NOTICE  AO DRAFT COMMENT PROCEDURES

The Commission has approved a revision in its advisory opinion procedures that permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2004-02 is available for public comments under this procedure. It was requested by Judith L. Corley, Esq. on behalf of National Committee for an Effective Congress (“NCEC”). The draft may be obtained from the Public Disclosure Division of the Commission.

Proposed Advisory Opinion 2004-02 will be on the Commission's agenda for its public meeting of Thursday February 26, 2004.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (EDT) on February 25, 2004.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case by case basis in special circumstances.

4) All comments timely received will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Disclosure Division.
CONTACTS

Press inquiries: Robert Biersack (202) 694-1220
Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copy of draft AO 2004-02 contact Public Records Office-
Public Disclosure Division (202) 694-1120, or 800-424-9530.

For questions about comment submission procedure contact
Rosemary C. Smith, Associate General Counsel, (202) 694-1650.

ADDRESSES

Submit single copy of written comments to:

Commission Secretary
Federal Election Commission
999 E Street NW
Washington, DC 20463
February 19, 2004

MEMORANDUM

To: The Commission

THROUGH: James A. Pehrkon

FROM: Lawrence H. Norton
General Counsel

James A. Kahle
Deputy General Counsel

Rosemary C. Smith
Associate General Counsel

John C. Vergelli
Acting Assistant General Counsel

Esa L. Sferra
Attorney

Subject: AO 2004-02

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for February 26, 2004.

Attachment
Dear Ms. Corley:

This responds to your letters dated November 10, 2003, and January 13, 2004, requesting an advisory opinion on behalf of the National Committee for an Effective Congress ("NCEC"), concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the receipt of contributions from testamentary trusts.

Background

You state that a number of NCEC contributors wish to provide funds to NCEC through bequests or other testamentary means. NCEC wants to accept contributions from testamentary trusts, and would like to advise these contributors, or other potential contributors, of an appropriate method to establish testamentary giving to NCEC.1 NCEC is registered as a non-connected committee.

You state that the trusts from which NCEC would accept contributions would be created and funded only through the estates of individuals who were legally qualified at the time of their deaths to make contributions under the Act. The terms of the trusts would limit the trusts to making the maximum annual contribution permitted under the Act. The aggregated contributions from a trust and all other trusts created by the testator would not be

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1 You note that NCEC has accepted bequests from contributors, which it processed according to Commission instructions by placing bequests in escrow and drawing no more that $5,000 per year, until Advisory Opinion 1999-14 made such practice unlawful under the Act.
exceed the aggregate bi-annual limit on contributions from individuals. The testator or executor of the estate will select the trustee, and the trustee would exercise no discretion regarding the amount of the contribution. A contributing testamentary trust will set as a condition of its contribution that NCEC may not pledge, assign, or otherwise obligate anticipated contributions in order to realize in whole or in part the present value of future contributions.

NCEC will expressly agree to abide by these conditions on such a trust’s contribution. In addition, NCEC will not knowingly accept contributions from any testamentary trust where the trustee exercises any discretion over whether a contribution is made or over the amount of a contribution. Further, NCEC will have no involvement in the administration of the testamentary trust.

You have not planned any campaign for the purpose of soliciting contributions through testamentary trusts. You have not planned a program of providing legal assistance to contributors wishing to set up such testamentary trusts. You would be willing to provide assistance when asked, including providing information and sample forms about how to set up such a testamentary trust with NCEC as a one of the beneficiaries, and referring a contributor to a lawyer or trustee familiar with legal requirements governing contributions from testamentary trusts.

Question Presented

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2 In a phone conversation on January 12, 2004, Counsel for NCEC specifically described what types of activities as part of providing “legal advice” NCEC might undertake.
Under the facts and circumstances described above, may NCEC accept contributions from testamentary trusts established by individuals for the purpose of making contributions to NCEC?

Legal Analysis and Conclusions

Yes, NCEC may accept contributions from testamentary trusts under the facts and circumstances described above, provided that NCEC satisfies the condition set forth below.

The Act sets a limit of $5,000 per calendar year on contributions by any "person" to a political committee other than an authorized committee of a candidate or a political committee established and maintained by a national or State political party. 2 U.S.C. 441a(a)(1)(C), 11 CFR 110.1(d). Under the Act, no political committee shall knowingly accept a contribution in violation of the Act's contribution limits. 2 U.S.C. 441a(f). The Act defines a "person" to include "an individual," but makes no specific reference to an individual's testamentary estate. See 2 U.S.C. 431(11) and 11 CFR 100.10.

Because the Act includes no express or implied prohibitions on contributions from a decedent's estate, the Commission has concluded that the testamentary estate of a decedent is the successor legal entity to the testator and qualifies as a "person" under the Act that is subject to the same limitations and prohibitions applicable to the decedent in the decedent's lifetime. Advisory Opinion 1999-14 and advisory opinions cited therein. A political committee may accept contributions from an individual's estate made through a testamentary trust, which in aggregate do not exceed $5,000 per calendar year. Advisory Opinion 1988-8; see also Advisory Opinion 1983-13.
1 In Advisory Opinion 1999-14, the Commission overturned its previous
determination that a political committee may receive a lump sum testamentary gift in
excess of $5,000 per calendar year. In that opinion, the Commission concluded that such
a testamentary gift would amount to a contribution for the entire bequest at the time the
funds were distributed from the estate and into the political committee's escrow account,
and therefore would be an excessive contribution. Under the Commission's regulations a
contribution is made "when the contributor relinquishes control over the contribution. A
contributor shall be considered to relinquish control over the contribution when it is
delivered by the contributor to the . . . political committee." 11 CFR 110.1(b)(6). The
Commission's determination that a testamentary gift in the form of a lump sum bequest is
unlawful under the Act hinged on the fact that the political committee would control the
entire amount of the testamentary gift, even when placed in escrow.

Advisory Opinion 1999-14 superseded Advisory Opinions 1988-8 and 1983-13 to
the extent that those advisory opinions permitted the acceptance of excessive contributions
into an escrow account, but left intact portions of those advisory opinions permitting a
testamentary trust to make, and a political committee to accept, a contribution not
exceeding the contribution limits in 2 U.S.C. 441a(a)(1).

NCEC may accept contributions under the facts and circumstances described above
because the testamentary trust, unlike the escrow account in Advisory Opinion 1999-14, is
beyond NCEC's control. However, NCEC may accept contributions only from trusts for

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3 The Commission had previously permitted a political committee to receive the total amount of a bequest
into escrow, provided that the political committee did not withdraw more than $5,000 (including principal
and interest) in any calendar year, and did not pledge, assign, or otherwise obligate the escrow account
which neither NCEC nor an officer, director, employee, member, agent, or affiliated
organization of NCEC serves as trustee. Under the facts and circumstances described
above, this condition will ensure that NCEC does not exercise any control over the
undistributed trust corpus or interest amounts.

NCEC must report contributions accepted from testamentary trusts at the time of
receipt, in accordance with 11 CFR 104.3, disclosing the name of the both the trust and the

This response constitutes an advisory opinion concerning the application of the Act
and Commission regulations to the specific transaction or activity set forth in your request.
See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the
facts or assumptions presented, and such facts or assumptions are material to a conclusion
presented in this advisory opinion, then the requestor may not rely on that conclusion as
support for its proposed activity.

Sincerely,

Bradley A. Smith
Chairman