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AGENDA ITEM
For Meeting of: 01-16-03 |

SUBMITTED LATE

MEMORANDUM

TO: The Commission
FROM: Chair Ellen L. Weintraub *ELW*
DATE: 01/16/2003
SUBJECT: AO 2002-14

Attached for consideration at today's meeting is an alternative draft for AO 2002-14.

AGENDA ITEM

For Meeting of: 1-16-03

SUBMITTED LATE

1 ADVISORY OPINION 2002-14

2
3 William W. Hall

4 Warner, Norcross & Judd

5 900 Fifth Third Center

6 111 Lyon Street, N.W.

7 Grand Rapids, Michigan 49503-2487

8
9 Dear Mr. Hall:

10 This responds to your letters dated September 20, October 24, and November 15, 2002,
11 on behalf of the Libertarian National Committee, Inc. ("LNC"), concerning the application of the
12 Federal Election Campaign Act of 1971, as amended ("the Act"), the Bipartisan Campaign
13 Reform Act of 2002 ("BCRA"), and Commission regulations to activities of the LNC that entail
14 the sale or lease of committee assets to others.

15 ***Background***

16 The LNC is the national committee maintained by the Libertarian Party of the United
17 States. The Commission recognized the LNC as a national committee of a political party in
18 Advisory Opinion 1975-129.¹ As a national committee, the LNC may accept contributions in
19 amounts greater than those made to other political party committees; as of January 1, 2003, the
20 calendar year limits are \$15,000 from multicandidate committees and \$25,000 from other
21 persons (other than prohibited entities). 2 U.S.C. 441a(a)(2)(B) and (1)(B); 11 CFR 110.2(c)(1)
22 and 110.1(c)(1).

23 You state that currently, and for many years, the LNC has engaged in a number of
24 "business" activities, in addition to its "political" activities. These business activities have

25 _____
¹ The Commission assumes for purposes of this Advisory Opinion that the LNC still engages in support of a sufficient range of Federal candidates and other activities to retain its status as a national committee of a political party under 2 U.S.C. 431(14) and 11 CFR 100.13; see Advisory Opinion 2001-13 and opinions cited therein.

1 included the sale or lease of items to others, made at arms-length and at fair market rates, and
2 you distinguish these transactions from the ordinary contributions and donations the LNC
3 receives from individuals and other persons. In the past, the LNC has deposited receipts from
4 these transactions in its non-Federal (or "soft money") account and reported those receipts in
5 accordance with Commission regulations regarding non-Federal accounts of national party
6 committees. You are concerned that under recently enacted 11 CFR 300.10 the LNC will no
7 longer be able to maintain a non-Federal account for the receipt of proceeds from transactions
8 where the sources are prohibited from making contributions under the Act or in amounts that
9 exceed the Act's limitations.

10 You describe three types of transactions by which the LNC receives funds: (1) rental of
11 the LNC's mailing list; (2) sale of advertising space in the *Libertarian Party News* ("LP News"),
12 a monthly newspaper; and (3) licensing Libertarian Party trademarks to t-shirt vendors and other
13 manufacturers of campaign items. You describe the transactions as follows.

14 *Mailing List*

15 The LNC rents its mailing list of members, contributors, and prospects on a commercial,
16 arms-length basis, either directly or using an incorporated commercial list broker. Typically, the
17 broker locates organizations desiring to rent the list and enters into contracts with them, some of
18 which may be corporations, political committees, or organizations qualified under 26 U.S.C.
19 501(c) or 527. Those organizations pay a market rate fee per name and address rented.²

20 The mailing list was developed in the course of LNC's political activities, primarily from:
21 (1) the names and addresses of Libertarian Party members and contributors to the party; (2) direct

1 mail prospecting; (3) inquiries from persons interested in the party; (4) exchanges of lists with
2 other organizations; and (5) names and addresses of interested persons provided by the party
3 members. Typically, in the prospecting activities, the LNC rents lists from others at a fair market
4 rate, and, when it receives a positive response to a direct mail solicitation using a name from a
5 list, it adds that name to the LNC mailing list. Similarly, the LNC may also exchange its list
6 with other organizations on a limited or one-time basis, and then use that organization's list for
7 direct prospecting for new party members. Those who respond positively are added to the LNC
8 list. Generally, the purchases or exchanges by LNC do not involve more than a limited or one
9 time use of another's mailing list, and that use is for the purpose of generating more names for
10 the LNC list, in the manner described above. Occasionally, the LNC purchases the perpetual use
11 of a voter registration list.

12 You state that the mailing list was developed primarily for use by the LNC for its own
13 campaign purposes and "is primarily and substantially used for those purposes." Approximately
14 once a month, the LNC rents or exchanges a portion of the mailing list with another organization
15 for non-campaign purposes. Approximately once every two months in non-election years and
16 more often in election years, the LNC rents or provides free or at a reduced rate a portion of the
17 list to a Libertarian Party candidate or ballot initiative committee for political or campaign
18 purposes. Approximately three times a month, the LNC or one of its affiliates will use the list
19 for Libertarian Party political or campaign purposes. For example, the LNC uses the mailing list
20 to send the *LP News* to party members and a relatively small number of subscribers who are not
21 members.

² You state by phone that the broker sends you a check for the LNC's share of the fee, and the LNC deposits the check in its non-Federal account regardless of whether the purchaser is

1 *Advertising Space*

2 The *LP News*, which is published by the party, has a substantial circulation and, as a
3 consequence, Libertarian Party candidates and organizations that are and are not affiliated with
4 the party purchase advertising space in the newspaper. These organizations include for-profit
5 corporations, political committees, and organizations qualified under 26 U.S.C. 501(c) or 527.
6 The advertising is sold on an arms-length basis at a fair market rate. You enclose a sample issue
7 (September 2001) that includes advertisements for the sale of goods and services, political
8 candidates, ballot initiatives, and other causes.

9 *Trademarks*

10 The LNC owns the trademarks Libertarian Party® and Party of Principle®. From time to
11 time, the LNC has granted limited licenses to use the trademarks to t-shirt vendors and other
12 manufacturers of campaign items, for consideration. The LNC desires to continue and expand
13 this practice, offering licenses on an arms-length, fair market rate basis as a business transaction.
14 You state that your description of the development and uses of your mailing list applies also to
15 the trademarks. You assert that the trademarks were developed for the LNC's political campaign
16 activities and "are used primarily and substantially" for those activities, and that the licensing
17 activities "are merely incidental to the uses for political purposes."

18 The LNC asserts that its temporary cessation of renting its mailing list and selling
19 advertising space in the *LP News* to corporate advertisers, pending the issuance of this opinion,
20 "has already resulted in a material loss of revenues to the LNC, and hampered its abilities to
21 engage in political activities."

incorporated.

1 ***Question Presented***

2 The LNC asks the Commission to conclude that the receipts from these transactions are
3 not “contributions” or “donations,” and may be deposited in the LNC’s federal account and may
4 be spent for federal election purposes, because they are received in return for goods and services
5 provided at customary market rates. It wishes to continue these activities after BCRA and
6 proposes to report the receipts as “other federal receipts” on its reports filed with the
7 Commission.

8 ***Analysis***

9 ***Statutory Provisions and Commission Regulations***

10 Before BCRA, national party committees were able to raise and spend non-Federal funds
11 (i.e., funds not subject to the limitations, prohibitions, and reporting requirements of the Act)
12 from separate, non-Federal accounts. Under BCRA, however, “a national committee of a
13 political party may not solicit, receive, or direct to another person a contribution, donation, or
14 transfer of funds or any other thing of value, or spend any funds, that are not subject to the
15 limitations, prohibitions, and reporting requirements of this Act.” 2 U.S.C. 441i(a); 11 CFR
16 300.10(a). Under BCRA’s transition rules, the national party committee may not receive non-
17 Federal funds after November 5, 2002, and any such funds received on or before that date -
18 which, of course, would have been deposited in a non-Federal account - must have been used
19 before January 1, 2003. 11 CFR 300.12(a).

20 When adopting regulations to implement BCRA, the Commission broadly interpreted the
21 ban on the receipt by a national party committee of non-Federal funds and the spending of such
22 funds, and emphasized that such committees must not have non-Federal accounts. The
23 Commission states:

1 [T]he plain language of the ban on national party non-Federal fundraising at 2
2 U.S.C. 441i(a) cannot be plausibly construed to allow party committees to
3 continue to raise non-Federal funds for any purpose. The language is broad in
4 prohibiting a national party committee from soliciting, receiving, or directing to
5 another person "a contribution, donation or transfer of funds or any other thing of
6 value" or spending funds that are not subject to the Act's limitation, prohibition,
7 and reporting requirements. A separate "non-Federal" account even if it contained
8 funds that complied with the prohibitions of the Act would not contain funds
9 complying with the amount limitations of the Act, if for example, individuals
10 gave \$20,000 per year to a national party's account and also gave another \$20,000
11 to the party's "non-Federal" account as suggested by the party committee
12 commenters.

13
14 Explanation and Justification, *Prohibited and Excessive Contributions: Non-Federal Funds or*
15 *Soft Money; Final Rule*, 67 Fed. Reg. 49064, 49088 (July 29, 2002) ("Soft Money Final Rules").

16 *Application to the Transactions Presented*

17
18 A. Mailing List Exchanges

19
20 The Commission concludes that the LNC is allowed to exchange lists of equal value with
21 other organizations, regardless of whether the organizations involved are political committees
22 under the Act, organizations qualified under 26 U.S.C. 501(c) or 527, labor organizations, for-
23 profit corporations, or any other organizational structure. Payments for the LNC's lists,
24 trademark licenses or advertising space pursuant to arms-length transactions at the usual and
25 normal charge, which may be reported by the LNC as "Other federal receipts," are discussed
26 below.

27 B. Mailing List Rentals, Newspaper Advertising, and Trademark Licensing Agreements

1 *1. Entities that are not Federal Political Committees*

2 Some of the entities leasing the LNC's mailing list or purchasing advertising space in the
3 *LP News* or entering into trademark agreements are entities that are not political committees
4 under the Act, such as organizations qualified under 26 U.S.C. 501(c) or 527. The funds of such
5 entities or committees will likely be composed, in part, of donations in amounts exceeding the
6 Act's limitations or from sources prohibited by the Act from contributing. Consistent with 2
7 U.S.C. 441i(a), these entities are allowed to lease the LNC's list, lease the LNC's trademarks or
8 purchase advertising space in *LP News* at a usual and normal charge using funds subject to the
9 limitations and prohibitions of the Act and subject to the requirements of 11 CFR 102.5(b)(1).¹⁰
10 Under 11 CFR 102.5(b)(1), any such organization making a payment must keep records of
11 receipts and disbursements and, upon request, must make such records available for examination
12 by the Commission. The organization must demonstrate through a reasonable accounting
13 method that, whenever such an organization makes such a payment, it has received sufficient
14 funds in amounts that in any calendar year do not exceed \$25,000 and that are not from
15 prohibited sources¹¹ to make the payment. The amount of the payment to the LNC for leasing
16 the list, for advertising space, or for the limited trademark license would not be subject to the
17 Act's contribution limits, nor would it count toward the political committee registration threshold

¹⁰ You indicated that you use a broker to solicit renters of the list, and the broker sends you a check for the LNC's share of the fee. Assuming that this arrangement is conducted in the ordinary course of business and at the usual and normal charge for such list transactions, the receipt by the LNC of a check from an incorporated broker does not by itself result in the broker making a corporate contribution to the LNC.

¹¹ See 2 U.S.C. §§ 441a(a)(1)(B) (limit for national committees), 441b (prohibition against general treasury funds of corporations, labor organizations or national banks), 441c (prohibition against funds from federal government contractors), and 441e (prohibition against funds from foreign nationals).

1 of contributions aggregating in excess of \$1,000 in a calendar year. *See* 2 U.S.C. 431(4)(A); 11
2 CFR 100.5(a).

3 *2. Principal Campaign Committees of Federal Candidates*

4 Purchases or rentals from the LNC by a principal campaign committee of a Federal
5 candidate would not result in a contribution or prohibited transfer to the LNC. Under 2 U.S.C.
6 439a(a)(4) and 11 CFR 113.2(c), funds of a principal campaign committee may be transferred
7 without limit to a national, State, or local committee of a political party. In view of the ability of
8 a principal campaign committee to make unlimited transfers to the LNC, the Commission views
9 a payment by a principal campaign committee in the context of one of the transactions covered
10 by this opinion to be a transfer permitted under 2 U.S.C. 439a, rather than a contribution by the
11 principal campaign committee. Hence, a payment by a principal campaign committee for list
12 rental, advertising in the *LP News*, or licensed use of the trademarks would not be a contribution
13 by the principal campaign committee to the LNC. If the principal campaign committee pays less
14 than the usual and normal charge, however, for such an item, the difference between the amount
15 paid and the usual and normal charge would be a contribution by the LNC to the principal
16 campaign committee and subject to the per election limit at 2 U.S.C. 441a(a)(2)(A), or to the
17 limit at 2 U.S.C. 441a(h) with respect to a Senate candidate. *See* 11 CFR 100.52(d).

18 *3. State and Subordinate Party Committees*

19 Subject to certain restrictions, transfers of Federal funds unlimited in amount are
20 permitted between a national party committee and a State party committee, and/or any
21 subordinate party committee. 11 CFR 102.6(a)(1)(ii). A purchase or lease of the LNC items by
22 a State, or subordinate Libertarian Party committee may be categorized as a transfer rather than

1 as a contribution, and the amount of the payments themselves would not be subject to the Act's
2 limits. However, the funds making up the transfer would still be subject to the limitations,
3 prohibitions, and reporting requirements of the Act. 2 U.S.C. 441i(a); 11 CFR 300.10(a). If the
4 State or subordinate committee were a political committee under the Act, it would need to make
5 the transfer using funds from its Federal account. If the State or subordinate committee were not
6 a political committee, it would follow the procedures described above under B.1 for "Entities that
7 are not Federal Political Committees." In either case, a State or subordinate Libertarian Party
8 committee would not be permitted to transfer funds from prohibited sources to the LNC.¹³

9 *4. Other Political Committees*

10 If the purchasing or leasing committee is a political committee under the Act, such
11 payments must be made from its Federal accounts.

12 This response constitutes an advisory opinion concerning the application of the Act and
13 Commission regulations to the specific transaction or activity set forth in your request. *See* 2
14 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or
15 assumptions presented and such facts or assumptions are material to a conclusion presented in
16 this opinion, then the requester may not rely on that conclusion as support for its proposed
17 activity. Some individual Commissioners have explained their reasons for voting to approve this
18 opinion in separate concurring statements that accompany this opinion.

19 Sincerely,
20

¹³ *See* 2 U.S.C. §§ 441b (prohibition against general treasury funds of corporations, labor organizations or national banks), 441c (prohibition against funds from federal government contractors), and 441e (prohibition against funds from foreign nationals).

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Ellen L. Weintraub
Chair

Enclosures (AOs 2001-13 and 1975-129)