



FEDERAL ELECTION COMMISSION
Washington, DC 20463

November 7, 2003

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2003-23

Joseph E. Sandler, Esq.
Neil P. Reiff, Esq.
Sandler, Reiff & Young, P.C.
50 E Street, S.E.
Suite 300
Washington, DC 20003

Dear Messrs. Sandler and Reiff:

This responds to your letter of July 25, 2003, requesting an advisory opinion on behalf of WE LEAD Women Engaged in Leadership, Education, and Action in Democracy ("WE LEAD"), concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations, to the earmarking, collection, and forwarding of contributions from individual donors to the presumptive Democratic Presidential nominee.

Background

You state that WE LEAD is a non-connected, Federal political committee that has not been established, financed, maintained, or controlled by any political party committee, other political committee, or any candidate for any Federal office. WE LEAD registered with the Commission on July 17, 2003.

You indicate that WE LEAD plans to solicit and accept contributions up to \$2,000 from individuals who would earmark such contributions to the "presumptive nominee" of the Democratic Party ("Party") for the office of President of the United States. You define the "presumptive nominee" as the candidate who, no later than 5:00 P.M. Eastern Daylight Time ("EDT") on the seventh day prior to the start of the 2004 Democratic National Convention, has received enough pledged delegates to win nomination on the first ballot at the 2004 Democratic National Convention. The pledged delegates must be

registered with and certified by the Secretary of the Democratic National Committee (“DNC”).

You state that WE LEAD plans to forward all earmarked contributions to the primary committee of such presumptive nominee as soon as the nominee is identified, but not later than July 20, 2004, which is the sixth day prior to the scheduled start of the 2004 Democratic National Convention. You indicate that if no presumptive nominee has been identified by 5:00 P.M. EDT on July 19, 2004, WE LEAD plans to forward the earmarked contributions to the DNC. You indicate that if the contributions are forwarded to the DNC, they will not be forwarded to any candidate for President or other Federal office.

You state that, in soliciting the earmarked contributions, WE LEAD plans to inform prospective contributors that their contributions are being earmarked, pursuant to 11 CFR 110.6(b), and that the presumptive nominee who receives the contribution will be publicly identified on WE LEAD’s disclosure reports. You also state that prospective contributors will be informed that any earmarked contributions must be limited to a total of \$2,000. In addition, you indicate that each prospective contributor will be informed that if he or she has made other contributions to the committee that receives his or her earmarked contribution (*e.g.*, the presumptive nominee’s authorized committee or the DNC), those contributions will be aggregated with his or her earmarked contribution and any amount exceeding the relevant contribution limit will be refunded by the recipient committee.

You also indicate that all disclaimers required by Commission regulations with respect to WE LEAD’s solicitation of contributions will be included in all solicitations. You further indicate that WE LEAD understands, and will communicate to the presumptive nominee’s primary committee, that the earmarked contributions would not qualify for matching funds under the Presidential Primary Matching Payment Account Act pursuant to 11 CFR 9034.3(f).

You state that WE LEAD plans to identify each contribution as earmarked for the presumptive nominee on its disclosure report for the reporting period in which each such earmarked contribution was received, in accordance with 11 CFR 110.6(c)(1)(ii). You also state that, at the time the earmarked contributions are forwarded to the presumptive nominee’s campaign committee, WE LEAD plans to send the recipient committee a check from WE LEAD for the total amount of all earmarked contributions along with a report containing all required information with respect to each earmarked contribution in accordance with 11 CFR 110.6(c)(1)(i), (iii) and (iv). Finally, you indicate that WE LEAD plans to report the disbursement of the earmarked contributions to the recipient committee on its disclosure report for the reporting period during which the disbursement was made.

Question Presented

May WE LEAD accept earmarked contributions from individuals to be forwarded to the Party's presumptive nominee for the office of President of the United States or to the Democratic National Committee?

Legal Analysis and Conclusions

Yes, as long as WE LEAD complies with the requirements set forth below.

1. Earmarking contributions to the presumptive nominee's authorized committee

The Act provides for the earmarking of contributions "made by a person, either directly or indirectly, on behalf of a particular candidate." 2 U.S.C. 441a(a)(8). All contributions by a person that are made on behalf of, or to, a candidate, including contributions that are in any way earmarked or otherwise directed to the candidate through an intermediary or conduit, are contributions from the person to the candidate. 2 U.S.C. 441a(a)(8); 11 CFR 110.6(a). If the intermediary or conduit exercises any direction or control over the choice of the recipient candidate, however, the contributions are treated as contributions from both the original contributors and from the intermediary or conduit to the recipient candidate. 11 CFR 110.6(d). The Commission's regulations define "earmarked" as "a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee." 11 CFR 110.6(b)(1). Earmarked contributions must be forwarded to the candidate or the candidate's authorized committee in accordance with 11 CFR 102.8. 11 CFR 110.6(b)(2)(iii).

Section 432(b) of the Act and Commission regulations at 11 CFR 102.8(a) require that persons who receive contributions on behalf of an authorized committee must forward the contributions to the treasurer no later than 10 days after receiving them. If the contribution exceeds \$50, the name and address of the contributor and the date of receipt must be forwarded with the contribution, and, if the contribution exceeds \$200, the contributor's employer and occupation must also be forwarded. The date of receipt of the contribution is the date that the person receiving the contribution obtains possession. 11 CFR 102.8(a). The Act and Commission regulations also require the intermediary or conduit to report the original source and the intended recipient of an earmarked contribution to the Commission and to the intended recipient. 2 U.S.C. 441a(a)(8); 11 CFR 110.6.

A. Unidentified Candidate

As noted above, the Commission's regulations define an earmarked contribution, in part, as one that is made to a "clearly identified candidate or a candidate's authorized committee." 11 CFR 110.6(b)(1). The Commission has interpreted this regulation to allow contributions to be earmarked for an undetermined Federal candidate in certain circumstances. In Advisory Opinion 1982-23, the Commission concluded that it was permissible for a local committee to earmark \$1,000 through a local party committee to the as-yet unknown Republican nominee for New York's 24th Congressional District. In Advisory Opinion 1977-16, the Commission concluded that it was permissible for a local

committee to accept contributions and make expenditures on behalf of an undetermined Federal candidate. In both instances, the Commission concluded that it was permissible to earmark contributions to undetermined Federal candidates because the candidates were identifiable as to specific office, party affiliation, and election cycle, although the names of the eventual nominees were not known.

Under WE LEAD's proposal, because the presumptive nominee is identifiable as to specific office (President of the United States), party affiliation (Democratic Party), and election cycle (2004), the Commission concludes that contributors may earmark contributions to the primary committee of the presumptive nominee through WE LEAD, as long as the earmarked contributions are forwarded to the treasurer of the presumptive nominee's authorized committee once the presumptive nominee is identified, consistent with the 10 day forwarding and other requirements of 2 U.S.C. 432(b)(2) and 11 CFR 102.8(a).

B. Direction and control

Based on the facts presented in your request, WE LEAD will not exercise any direction or control over the choice of the recipient candidate, which will be the presumptive Democratic Presidential nominee no matter who that person is.¹ 11 CFR 110.6(d). Accordingly, WE LEAD will exercise no discretion over which candidate receives the earmarked contributions. Your request describes a clear method to identify the presumptive nominee based on a sufficient number of pledged delegates as certified by the state Democratic Chairs. WE LEAD will not have any role in, or control over, the selection of the delegates or their certification. Your request also clearly identifies the entity – the DNC – that will receive the earmarked contributions if no Presidential candidate receives sufficient delegates to secure the nomination seven days before the start of the Democratic National Convention. Thus, WE LEAD must forward the earmarked contributions to the presumptive nominee or the DNC, depending on the circumstances, within the time periods discussed below.

C. Timing

Generally, contributions earmarked for a candidate must be forwarded to the authorized committee's treasurer within 10 days of receipt. 2 U.S.C. 432(b)(2) and 11 CFR 102.8(a). The 10 day forwarding rule is designed to prevent individuals and entities from being able to influence or manipulate cash-on-hand figures by holding onto contributions for designated candidates. In Advisory Opinion 1982-23, however, the Commission concluded that the 10 day forwarding requirement of 11 CFR 102.8(a) did not apply until such time that the Republican congressional candidate for the 24th congressional district of New York was determined. Like the requestor in that advisory opinion, WE LEAD will not know, and has no way of knowing, the identity of the Democratic Party's nominee when it solicits and receives earmarked contributions until the DNC certifications show that a candidate has become the party's presumptive

¹ At least one Democratic candidate, General Wesley Clark, was not even in the Presidential race when WE LEAD submitted its advisory opinion request to the Commission in July. Nevertheless, if General Clark wins the Democratic nomination for President, WE LEAD will forward the earmarked contributions it has collected to General Clark's campaign.

nominee. Thus, the timing requirements of 2 U.S.C. 432(b)(2) and 11 CFR 102.8(a) are not triggered until the presumptive nominee is chosen by the method described in your request. Once the presumptive nominee is known, WE LEAD must forward the earmarked contributions to the presumptive nominee's authorized committee within ten days. *See* Advisory Opinion 1982-23 (applying the same rule in the context of congressional elections).

WE LEAD must report the original source of each earmarked contribution on its reports for the reporting period in which the earmarked contributions were received. 11 CFR 110.6(c)(1). The reports must identify each earmarked contribution as earmarked for the presumptive Presidential nominee of the Democratic Party. For the reporting period in which the earmarked contributions are forwarded to the presumptive nominee, WE LEAD must report the disbursement in accordance with 11 CFR 110.6(c)(1). In addition, at the time WE LEAD forwards the earmarked contributions to the presumptive nominee's primary committee, it must also send the committee a report containing all required information with respect to each earmarked contribution pursuant to 11 CFR 110.6(c)(1)(i), (iii), and (iv). WE LEAD's plan to address excessive contributions is acceptable.

Two additional issues arising from the proposed activity are whether WE LEAD's direct costs of solicitation should be treated as in-kind contributions or independent expenditures and the contents of any required disclaimer. If WE LEAD's solicitations in this earmarking program were made independent of any candidate, candidate's authorized political committee, or its agents, by virtue of this independence the direct costs of solicitation incurred by WE LEAD would constitute independent expenditures. 2 U.S.C. 431(17); 11 CFR 100.16. Thus, to the extent that Advisory Opinion 1980-46 concludes that the direct costs of the solicitation incurred would constitute an in-kind contribution to the candidate's campaign merely on account of a candidate's subsequent acceptance of earmarked contributions, it is overruled. Furthermore, if the solicitations are independent expenditures triggering the disclaimer requirements, the disclaimer shall clearly state WE LEAD's full name and permanent street address, telephone number, or World Wide Web address and that the communication is not authorized by any candidate or candidate's committee. 2 U.S.C. 441d(a)(3); 11 CFR 110.11(b)(3) and (c). Alternatively, if the solicitations are coordinated with a candidate, an authorized committee of a candidate, or an agent of either (11 CFR 109.20), the direct costs of solicitations would constitute an in-kind contribution to the campaign and the disclaimer shall state that the communication has been paid for by WE LEAD and that the communication is authorized by such candidate, authorized committee, or agent. 2 U.S.C. 441d(a)(2); 11 CFR 110.11(b)(2) and (c).

2. *Earmarking contributions to the DNC*

In the event that the presumptive nominee cannot be determined within seven days of the Democratic National Convention, WE LEAD intends to forward the contributions to the DNC. Neither the Act nor Commission regulations specifically address contributions earmarked to political committees that are not authorized committees of candidates. *See* 2 U.S.C. 441a(a)(8) and 432(b); 11 CFR 110.6. The

Commission has held that this omission does not bar such earmarking, but that it would be subject to other regulations concerning the receipt of contributions by any person on behalf of a political committee. Advisory Opinions 1983-18 and 1981-57. Section 432(b) of the Act and Commission regulations at 11 CFR 102.8(b) require persons who receive a contribution in excess of \$50 on behalf of an unauthorized committee to forward the contribution, as well as the contributor's name, address, and receipt date, to the treasurer no later than 10 days after receipt. 2 U.S.C. 432(b)(2)(B); 11 CFR 102.8(b)(2). If the contribution exceeds \$200, the contributor's employer and occupation must also be forwarded. 11 CFR 102.8(b)(2). Contributions of \$50 or under to unauthorized committees must be forwarded within thirty days (with no information forwarding requirement). 2 U.S.C. 432(b)(2)(A); 11 CFR 102.8(b)(1).

Because the DNC is not an authorized committee of any candidate, if WE LEAD forwards the contributions to the DNC, then the time period in which WE LEAD must forward each earmarked contribution would depend on the amount of the contribution: (1) contributions of \$50 or less must be forwarded to the treasurer of the DNC within 30 days of receipt; and (2) contributions over \$50 must be forwarded to the treasurer of the DNC within 10 days of receipt. For purposes of WE LEAD's program, the date of receipt is the date on which the presumptive nominee is determined.

The requirements set forth above regarding solicitation and reporting of earmarked contributions and handling of excessive contributions also apply to contributions forwarded to the DNC. The only difference is that the contribution limit for individuals is \$25,000 per calendar year rather than \$2,000 per election because the contribution is made to a national political party rather than a Federal candidate. 2 U.S.C. 441a(a)(1).

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 opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

Bradley A. Smith
Vice Chairman

Enclosures (AOs 1983-18, 1982-23, 1981-60, 1981-57, 1980-109, 1980-46 and 1977-16)