



FEDERAL ELECTION COMMISSION
Washington, DC 20463

May 25, 2017

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2017-02

Charles R. Spies, Esq.
James E. Tyrrell III, Esq.
Clark Hill PLC
1001 Pennsylvania Avenue, N.W.
Suite 1300 South
Washington, D.C. 20004

Dear Messrs. Spies and Tyrrell:

We are responding to your advisory opinion request on behalf of War Chest, LLC, concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-30146 (the “Act”), and Commission regulations to your proposal to offer political committees a web-based, bank-deposit program that would invest political committee funds into FDIC-insured money market accounts. The Commission concludes that the requestor may provide the investment services described in the request, but that the political committees participating in the program may not use their investment accounts with the requestor as campaign depositories. The Commission also concludes that, because participating committees would not have accounts at the banks at which their funds would ultimately be invested, political committees would not be required to list the sub-custodian banks as depositories on their Statements of Organization; political committees would, however, be required to list the intermediary depository at which each political committee would have its own account.

Background

The facts presented in this advisory opinion are based on your letter received on March 31, 2017, and publicly available information.

War Chest, LLC, is an Ohio limited liability company that plans to offer political committees a web-based bank deposit program (“Program”) for investment purposes. According to the request, many political committees maintain balances at single banks well above the \$250,000 amount insured by the Federal Deposit Insurance Corporation (“FDIC”). The Program

would provide a political committee participant with 100% FDIC insurance on deposits up to \$50 million by investing the political committee's funds from a single "War Chest Account" into money market deposit accounts at "hundreds of FDIC-insured sub-custodian banks." Advisory Opinion Request at AOR001.

The requestor's proposal would involve a number of financial entities in providing its service to political committees: a trust established under state law that would hold War Chest Accounts, a Program advisor, a national bank serving as an intermediary, and the "sub-custodian" banks.

A political committee would initially place its funds into a War Chest Account held at a Colorado-chartered "non-depository Trust Company" ("Trust"). AOR002. According to the requestor, under Colorado law the Trust may maintain savings deposits, time deposits, and certificates of deposit, but it "cannot receive and maintain transaction deposit accounts (i.e., checking accounts)." AOR002. Each committee's War Chest Account would be segregated and have a unique account number. *Id.* The Trust is not FDIC-insured. *Id.*

Once funds are deposited into a War Chest Account at the Trust, an investment advisor registered with the Securities and Exchange Commission ("Program Advisor"¹), would administer the Program. AOR002-003. The Program Advisor would use "sophisticated algorithms" to determine how to distribute political committee funds among the sub-custodian banks; a political committee would not be able to direct the Program Advisor to deposit funds with any particular sub-custodian bank.² *Id.*

Having used its algorithms, the Program Advisor would direct the Trust to "immediately transfer" funds to a depository chartered, regulated, and supervised by the Comptroller of the Currency ("Intermediary"³). Each political committee would have a separate account at the Intermediary. *Id.*

The Intermediary would then "immediately transfer[]" the funds to money market deposit accounts at the sub-custodian banks. *Id.* The political committee's money would be commingled with the funds of other Program participants in a single money market account at each sub-custodian bank. *Id.* The Intermediary, though, would keep daily records of each political committee's funds held in the money market account at each sub-custodian bank. Interest earned by the political committees would be automatically reinvested on their behalf in the Program.

¹ The Program Advisor is a cash management firm, StoneCastle Cash Management, LLC, which "currently administers over \$6 billion of funds for over 1,200 customers." AOR003.

² The only exception is that a political committee may exclude a bank where the political committee already has funds to ensure that there is "no overlap of FDIC coverage." AOR003.

³ The name of the institution serving as the Intermediary is the U.S. Bank Trust National Association. AOR002.

To withdraw funds in its War Chest Account, a political committee would submit an application through a secure web portal or by telephone. A political committee would be able to request funds on any business day for availability on the morning of the next business day.⁴

The political committees would receive two monthly statements: (1) one from the Program Advisor reflecting the aggregate amount of accrued interest, and (2) another from the Intermediary showing the amount of the political committee's funds in the money market account at each sub-custodian bank. Moreover, each political committee participant would receive a Program statement identifying the total amount of funds it has in the Program, the amount of its funds at each sub-custodian bank, and the total amount of interest earned by the participant during a certain period. None of these statements would show the amount of interest earned at each respective sub-custodian bank.

The Program would only allow a political committee to deposit money into the sub-custodian banks from the War Chest Account through the Intermediary, and a political committee would only be able to spend its Program funds after they are returned to the War Chest Account from the sub-custodian banks through the Intermediary.

Questions Presented

1. *Does the War Chest Program comply with Act and Commission regulations?*
2. *May War Chest allow a participating political committee to deposit contributions directly into, and draw expenditures directly on, the political committee's War Chest Account?*
3. *Would War Chest's sub-custodian banks be considered "depositories" that need to be listed on a participating committee's amended Form 1 Statement of Organization?*

Legal Analysis and Conclusions

1. *Does the War Chest Program comply with Act and Commission regulations?*

Yes, the Program complies with Act and Commission regulations.⁵

The Act requires that each political committee "designate one or more State banks, federally chartered depository institutions, or depository institutions the deposits or accounts of which are insured by the [FDIC] . . . or the National Credit Union Administration, as its

⁴ The request states that the Program plans to implement same-day (Automated Clearing House) withdrawals soon. AOR002.

⁵ The request does not present facts bearing on whether the requestor's services to a political committee would result in a contribution. Therefore, the Commission does not address this issue and assumes, for the purposes of the advisory opinion, that all services will be offered in the ordinary course of business and for the usual and normal charge. See 52 U.S.C. § 30101(8)(A)(i) (defining contribution to include "anything of value made by any person for the purpose of influencing any election for Federal office"); 11 C.F.R. §§ 100.52(a) (same), 100.52(d)(1) (stating that "anything of value" includes the provision of services without charge or for less than the usual and normal charge); see also 11 C.F.R. § 100.52(d)(2).

campaign depository or depositories.” 52 U.S.C. § 30102(h)(1); *see also* 11 C.F.R. § 103.2. All funds received by a political committee must be deposited in a checking or transaction account maintained in a campaign depository. *See* 52 U.S.C. § 30102(h)(1); 11 C.F.R. §§ 103.2, 103.3(a). No disbursements, other than petty cash, may be made by such committee except by check or similar draft drawn on those accounts. 52 U.S.C. § 30102(h)(1); 11 C.F.R. §§ 102.10, 103.2, 103.3(a).

Nevertheless, “[f]unds may be transferred from the depository for investment purposes.” 11 C.F.R. § 103.3(a). The Commission has approved a variety of investment vehicles for committee funds, including Vanguard Group’s family of mutual and bond funds, *see* Advisory Opinion 1999-08 (Citizens for Arlen Specter) (“Specter”), government securities and money market funds, *see* Advisory Opinion 1997-06 (Kay Bailey Hutchison for Senate) (“Hutchison”), a cash management account managed by an outside firm, *see* Advisory Opinion 1986-18 (Friends of Tom Bevill), and a professionally managed money market fund, *see* Advisory Opinion 1980-39 (Fluor Public Affairs Committee) (“Fluor”). The Commission has determined that, though funds generally must be returned to a campaign depository before being used to make expenditures, interest earned from committee investments need not be returned to a campaign depository before being automatically reinvested in the investment account. *See* 52 U.S.C. § 30101(h)(1); 11 C.F.R. § 103.3(a); Advisory Opinion 1999-08 (Specter) at 2-3 (determining that reinvestment of interest is “conversion of one form of cash on hand to another” and not expenditure); Advisory Opinion 1997-06 (Hutchison) at 2-3 (same).⁶

Here, the funds would be transferred into interest-bearing money market accounts similar to those the Commission has approved as proper investment vehicles. *See, e.g.*, Advisory Opinion 1999-08 (Specter) at 2-3 (concluding that committee could invest in Vanguard’s Prime Money Market Fund); Advisory Opinion 1997-06 (Hutchison) at 2 (concluding that committee could invest in “money-market funds maintained in investment account”); Advisory Opinion 1986-18 (Friends of Tom Bevill) at 1-2 (approving investment of funds into cash management account that included “money market funds”). Indeed, the entire design of the Program would serve an investment purpose, which is to protect the committee funds from an economic loss. Thus, the Commission concludes that War Chest may provide the investment services described in its proposal.

2. *May War Chest allow a participating committee to deposit contributions directly into, and draw expenditures directly on, the committee’s War Chest Account?*

No, War Chest may not allow a participating committee to deposit contributions directly into, and draw expenditures directly on, the War Chest Account because the Trust holding the War Chest Account is not a campaign depository under the Act and Commission regulations.

As explained above, a political committee must designate one or more state banks, federally chartered depository institutions, or depository institutions insured by the FDIC or the National Credit Union Administration as the political committee’s campaign depository or

⁶ For the same reason, neither the transfer of funds to an investment account nor the transfer back to a depository needs to be reported. *See* Advisory Opinion 1999-08 (Specter) at 2-3; Advisory Opinion 1997-06 (Hutchison) at 2-3.

depositories. A political committee must maintain at least one checking account or transaction account at a designated campaign depository, although a political committee may maintain other accounts at the same depository. 11 C.F.R. §§ 103.2, 103.3(a); *see also* 52 U.S.C. § 30102(h)(1). Political committees may transfer funds from a transaction account at a campaign depository for investment purposes, but funds must be returned to the campaign depository before the political committee uses the funds for expenditures.

Here, because the Trust holding the War Chest Account is not federally chartered or insured, it may only serve as a campaign depository if it is a state bank. The Commission looks to state law to determine whether a given entity is a state bank for the purposes of the Act and Commission regulations. *See* Advisory Opinion 1984-06 (Cooperative Central Bank) at 1-2 (determining that cooperative bank was state bank where state law “define[d] ‘bank’ to include a cooperative bank” and “accord[ed] cooperative banks powers comparable to other types of banking institutions in that state, including the establishment of checking accounts”).

The Trust is a Colorado-chartered trust company and is not recognized under state law as a state bank. AOR002. Under Colorado law, the definition of “state bank,” *see* Colo. Rev. Stat. § 11-101-401(58), does not include a “trust company,” which is separately defined and discussed in the statute, *see* Colo. Rev. Stat. § 11-109-101(11) (defining “trust company” as “corporation organized pursuant to and subject to regulation by the provisions of [Article 109 of the Colorado Banking Code]”). Colorado trust companies “shall not have the power to conduct a banking business, receive and maintain transaction deposit accounts, nor use the word ‘bank’ in its name.” *Id.* § 11-109-201(2). Because the Trust is not a state bank and is not one of the other types of entities eligible to serve as a campaign depository, it is not a campaign depository under the Act and Commission regulations. Accordingly, a political committee may not deposit funds directly into or make expenditures directly from a War Chest Account.⁷

3. *Would the sub-custodian banks need to be listed as depositories on a participating political committee’s amended Form 1 Statement of Organization?*

No, the sub-custodian banks would not need to be listed as depositories on a participating political committee’s Statement of Organization.

Under the Act and Commission regulations, a political committee’s Statement of Organization must include a “listing of all banks, safety deposit boxes, or other depositories used by the committee,” 52 U.S.C. § 30103(b)(6); 11 C.F.R. § 102.2(a)(1)(vi), and “[a]ny change or correction in the information previously filed in the Statement of Organization shall be reported . . . by filing an amended Statement of Organization or, if the political committee is not required to file electronically . . . , by filing a letter noting the change(s),” 11 C.F.R.

⁷ Furthermore, political committees must make all disbursements “by check or similar drafts” drawn on an account at a designated campaign depository. 11 C.F.R. § 103.3(a); *see also* 52 U.S.C. § 30102(h)(1). Political committees, however, would be unable to withdraw funds from their War Chest Accounts by checks or similar drafts. *See* AOR002 (explaining that “the [Trust] cannot receive and maintain transaction deposit accounts (i.e., checking accounts”); *see also* Colo. Rev. Stat. § 11-109-101(9) (defining “transaction account” as a “deposit or account that the depositor or account holder may withdraw *by check or by similar means for payment to third parties*”) (emphasis added).

§ 102.2(a)(2). The Commission has concluded that, “if any depository institution of the type referred to in [52 U.S.C. § 30102(h)] and 11 CFR 103.2 is used in making the investment, that institution would have to be listed on [the committee’s] statement of organization.” Advisory Opinion 1981-19 (Louisiana State Medical Society PAC) (“LAMPAC”) at 2 (addressing proposal to invest funds in money market fund); *see also* Advisory Opinion 1980-39 (Fluor) at 2 (“If a political committee invests its funds in a savings account in one of the categories of institutions listed in 103.2 of the regulations [as qualified campaign depositories], then the committee must amend its Statement of Organization to designate that institution, if different than those already listed, as an additional campaign depository.”); *c.f.*, Advisory Opinion 1990-02 (Committee to Re-Elect Congressman Chris Smith) at 2 n.3 (noting that, where committee purchased certificate of deposit, “committee will also have to amend its Statement of Organization to include the bank as a depository of committee funds”).

Here, although the sub-custodian banks may appear to qualify as “campaign depositories,” they would not actually be used by the political committee participants. Rather, the requestor would hold the bank accounts in its own name and would use them to manage political committee funds for investment purposes, similar to a mutual fund managing its client funds by investing them in various financial accounts. Moreover, a political committee participant, like a mutual fund client, would have no control over how its funds in the War Chest Account are managed. Unlike the Trust⁸ (or the money market fund or the bank issuing a certificate of deposit in prior advisory opinions LAMPAC and Fluor, respectively), the sub-custodian banks would not be used by a political committee participant. Therefore, the Commission concludes that a political committee participant would not be required to amend its Statement of Organization to list each sub-custodian bank.⁹

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* 52 U.S.C. § 30108. 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. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be

⁸ Though a political committee would use the Trust, through the War Chest Account, to make investments, the Trust is not a type of institution listed in the Act and Commission regulations as qualifying as a campaign depository, as explained above. Therefore, a political committee is not required to list the Trust on its Statement of Organization. *See* Advisory Opinion 1980-39 (Fluor) (concluding that political committee not required to list investment trust on Statement of Organization because trust “does not fall within any of the categories of institutions listed in 103.2”). The Commission notes that, as a federally chartered institution used by participating political committees that have accounts under their individual names, the Intermediary would need to be listed as a depository on the participating political committees’ Statements of Organization.

⁹ The Commission also recognizes that interpreting this requirement to mean that a political committee must file an amended Statement of Organization within 10 days each time the Program Advisor reinvests any of the political committee’s funds would result in a substantial burden to political committees. As the request describes, the War Chest Program includes “hundreds” of sub-custodian banks. AOR001.

affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions cited herein are available on the Commission's website.

On behalf of the Commission,

A handwritten signature in black ink, appearing to read "Steven T. Walther". The signature is written in a cursive style with a large initial "S".

Steven T. Walther
Chairman