American Federation of Labor and Congress of Industrial Organizations

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November 16, 2009

Joseph F. Stoltz
Assistant Staff Director
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Draft Final Audit Report for AFL-CIO COPE PCC (2005-06)

Dear Mr. Stoltz:

I am responding on behalf of the AFL-CIO and the AFL-CIO Committee on Political Education Political Contributions Committee ("AFL-CIO COPE PCC") to your October 28, 2009 letter to Elizabeth H. Shuler, AFL-CIO COPE PCC Treasurer; the Federal Election Commission's ("the Commission") draft final audit report for AFL-CIO COPE PCC in the 2005-06 election cycle ("Draft Report"); and the October 15, 2009 memorandum of the Office of General Counsel ("OGC Memorandum") commenting on the Draft Report. As explained below, AFL-CIO COPE PCC requests a hearing before the Commission on certain aspects of Finding 2 of the Draft Report.[1]

Overview and Request for Hearing

Draft Finding 2, "Transfers Received From Separate Segregated Funds," concerns what we have been advised triggered the audit itself: the longstanding collecting agent/joint fundraising arrangements between, first, the AFL-CIO and AFL-CIO COPE PCC and the Communications Workers of America ("CWA") and its separate segregated fund, CWA COPE PCC, and second, between the AFL-CIO and AFL-CIO COPE PCC and the American Federation of Teachers ("AFT") and its separate segregated fund, AFT COPE.[2] The Draft Report concludes that those separate segregated funds lawfully could and did act as collecting agents for AFL-CIO COPE PCC when they transferred, in total during 2005-06, $1.1 million to

[1] Draft Finding 1, "Misstatement of Financial Activity," addresses misstatements of cash on hand and disbursements during the audit period. As the Draft Report states, AFL-CIO COPE PCC has complied with the Audit Division's recommendations in its interim audit report dated July 21, 2009 ("Interim Report") to amend past reports and to correct the cash balance on a current report. Accordingly, we accept Finding 1 as drafted.

[2] The CWA and AFT separate segregated funds are occasionally referred to below as "the CWA and AFT SSFs."

AFL-CIO COPE PCC. But the Draft Report also concludes that AFL-CIO COPE PCC was responsible for ensuring that the CWA and AFT SSFs each acted as an ordinary collecting agent in full compliance with 11 C.F.R.§ 102.6. OGC concurs with both parts of that analysis.

As explained below, AFL-CIO COPE PCC disagrees with the Draft Report's characterization of the arrangements at issue as cabined by 11 C.F.R. § 102.6, and contends that, due to the simultaneous joint fundraising arrangements with the CWA and AFT SSFs, the collecting agent regulations do not dictate the implementation, recordkeeping and reporting of the funds that were transferred. We do agree with Finding 2 that, if those requirements strictly apply, AFL-CIO COPE PCC and the CWA and AFT SSFs complied with the transfer timeliness requirements at 11 C.F.R. § 102.6(c)(4) during the audit period.

As we also show below, for over 20 years before this audit commenced in December 2007 AFL-CIO COPE PCC and at least nine and as many as 14 different Commission-registered separate segregated funds ("SSFs") connected with labor organizations that were constitutionally affiliated with the AFL:-CIO routinely engaged in joint fundraising from their common restricted classes, and *since 1993 alone those committees routinely reported on their respective Forms 3X, at both ends of the transaction, 183 transfers to AFL-CIO COPE PCC that exceeded the $5,000/yr. committee-to-committee limit.* Yet as far as we know, until October 2004 no office at the Commission ever questioned these arrangements or any of the 366 over-$5,000 entries on Forms 3X that reported them, or the 198 under-$5,000 transfers, which were recorded 396 times on Forms 3X, between the same committees and that further increased the aggregate annual payments from a particular union SSF to AFL-CIO COPE PCC over the $5,000 mark.

AFL-CIO COPE PCC requests a hearing so we may present oral argument concerning these facets of Finding 2, pursuant to the Commission's Notice 2009-12, "Procedural Rules for Audit Hearings," 74 Fed. Reg. 33140 (July 10, 2009), as revised by Notice 2009-19, "Procedural Rules for Audit Hearings," 74 Fed. Reg. 39535 (August 7, 2009). We request that this hearing be held in a closed session if, at the time of the hearing, the ongoing separate audit of CWA COPE PCC, which focuses on the same matters that Finding 2 covers, has not yet concluded with a public release of a final report by the Commission. That is because the two audits have been linked throughout; we are advised that CWA COPE PCC has complied with the Audit Division's recommendations set forth in the draft final report concerning CWA COPE PCC; and the OGC Memorandum, which would be made public in advance of the hearing on the AFL-CIO COPE PCC audit, applies to both audits.

More Than 20 Years of Fully Reported Joint Fundraising Between AFL-CIO COPE PCC and at Least Nine Other Union-Connected Separate Segregated Funds Elapsed Before RAD First Questioned the Arrangement and Before the Current Audit Was Initiated

This audit commenced in December 2007 following a series of correspondence between AFL-CIO COPE PCC and the Reports Analysis Division ("RAD") that began on October 20, 2004; between RAD and CWA COPE PCC that began on December 22, 2004; and between RAD and AFT COPE that began on September 13, 2006. Again, RAD's inquiries and this audit have questioned for the first time ever arrangements between the AFL-CIO, AFL-CIO COPE PCC and numerous labor organizations and their separate segregated funds that have continued year-in, year-out for almost a quarter-century, and that have been fully reported to the Commission throughout that lengthy period by every participating committee.

An Audit Division summary, "Line 12 Transfers from Affiliated Committees"[3] (Attachment 1), shows that between 2001 and 2004 the CWA and AFT SSFs and the SSFs of four other labor organizations made 66 separate joint fundraising transfers to AFL-CIO COPE PCC. Of these, 49 exceeded the $5,000/yr. contribution limit from one political committee to another, see 2 U.S.C. § 441a(a)(2)(C), and the other 17, when aggregated with other transfers by the same SSF to AFL-CIO COPE PCC in the same year, totaled more than $5,000. Of the 49 over-$5,000 transfers:

- 2 were over $5,000 and up to $10,000
- 36 were over $10,000 and up to $25,000
- 1 was over $25,000 and up to $50,000
- 2 were over $50,000 and up to $100,000
- 8 were over $100,000 and up to $250,000

AFL-CIO COPE PCC, a monthly filer, reported these joint fundraising transfers on Form 3X, Line 12. Previously, and since at least 1993 (the earliest period covered by reports available on the Commission's website[4]), AFL-CIO COPE PCC reported similar receipts on Line 11(c), as the attached spreadsheet (Attachment 2) demonstrates. During the eight-year period from 1993 to 2000, AFL-CIO COPE PCC's Form 3X reports and those of the transferor SSFs similarly explicitly alerted the Commission to the nature of these arrangements, as follows:

1. AFL-CIO COPE PCC reported 315 separate receipts from labor organization SSFs that were parties to collecting agent/joint fundraising arrangements:

2. 236 of these transactions were reported by the transferor SSF as "joint fundraising transfers."

3. 78 of these transactions lacked a "purpose" designation.

4. One transfer was reported as a "contribution."

5. 134 of these transfers exceeded $5,000, as follows:

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[3] We understand the Audit Division's use of the term "affiliated" here to mean the constitutional relationship between the AFL-CIO and the transferor SSF, rather than to mean affiliated in the sense of 11 C.F.R. § 100.5(g). Except for the Transportation Trades Department AFL-CIO PAC and AFL-CIO MI COPE PCC, none of the listed committees was so "affiliated" with AFL-CIO COPE PCC.

[4] The Commission presumably can readily review its records prior to 1993. AFL-CIO internal records other than AFL-CIO COPE PCC Forms 3X indicate that these joint fundraising arrangements date back at least to 1985, and that between 1985 and 1992 they entailed transfers of similar orders of magnitude as occurred after 1992. Those records indicate that at least four union SSFs other than those listed in the text on page 4 participated in these arrangements prior to 1993: the International Longshoremen's Association AFL-CIO Committee on Political Education ILA-COPE; the former Transportation Communications International /Brotherhood of Railway and Airline Clerks SSF; the National UFW- Volunteer PAC (a/k/a United Farm Workers of America AFL-CIO Federal PAC); and the American Federation of Teachers Staff Union Committee on Political Education.

- 50 transfers of over $5,000 and up to $10,000
- 62 transfers of over $10,000 and up to $25,000
- 12 transfers of over $25,000 and up to $50,000
- 7 transfers, each over $50,000 and up to $100,000
- 3 transfers of over $100,000 and up to $240,000

All told, between 1993 and 2004, AFL-CIO COPE PCC received joint fundraising transfers in one or more years from the following nine SSFs of labor organizations that are constitutionally affiliated with the AFL-CIO, in each case in amounts that exceeded $5,000/yr.:

- American Federation of Teachers Committee on Political Education
- Campaign Fund of the Allied Industrial Workers of America, AFL-CIO
- Communications Workers of America Committee on Political Education Political Contributions Committee
- International Brotherhood of Electrical Workers Political Action Committee
- Office of Professional Employees International Union – Voice of the Electorate
- SEIU COPE (Service Employees International Union Committee on Political Education)
- UNITE HERE TIP Campaign Committee, and its predecessors ILGWU Campaign Fund and UNITE Campaign Committee
- United Auto Workers Voluntary Community Action Program
- United Food and Commercial Workers International Union Active Ballot Club

Again, apparently the Commission's first inquiry about these arrangements was a letter from RAD to AFL-CIO COPE PCC on October 20, 2004. In that letter RAD evinced what might be termed a surprising cluelessness about the structure of the AFL-CIO and its affiliated national labor organizations, despite the decades of their reporting to the Commission, the Commission's long familiarity with them, and the explicit regulatory recognition of that structure at 11 C.F.R. §§ 100.5(g)(3), 100.134(h) and (i), and 114.1(e)(5) and (6): RAD asked AFL-CIO COPE PCC whether it was "actually...affiliated" with CWA COPE PCC. And, that letter initiated a series of correspondence between RAD and, variously, AFL-CIO COPE PCC, CWA COPE PCC, AFT COPE and the UAW Voluntary Community Action Program that continued, fitfully and formalistically, for over three years until the Commission voted in December 2007 to undertake the current audit. Specifically regarding the CWA and AFT SSFs, correspondence between RAD and AFL-CIO COPE PCC or CWA COPE PCC was exchanged in October, November and December 2004; then in January, February and March 2005; then *nothing* for 15 months; then another RAD-initiated round in July, August, September and October 2006; and then nothing until the audit 14 months later. Meanwhile, RAD initiated similar correspondence with AFL-CIO COPE PCC and AFT COPE in July 2006, which continued in August, September and October 2006; then nothing for 11 months until RAD sent a letter to AFL-CIO COPE in September 2007, to which AFL-CIO COPE PCC responded in October; and then, two months later, the audit. And, despite the initiation of this audit, RAD and AFT COPE exchanged further such letters in March, April, July and August 2008, and January and February 2009.[5] (All of this correspondence is attached as Attachment 3.)

[5] A review of this correspondence back and forth should raise concerns about how RAD operates. Not only did it appear unaware of the basic structure of the labor movement, but it repeatedly sent form letters asking the same questions over and over despite detailed responses from the various committees, including requests that RAD seek

The Collecting Agent/Joint Fundraising Arrangements Among the SSFs

The pertinent facts are as follows concerning the structures of the arrangements at issue in draft Finding 2. For clarity, we address the status of the parties and the arrangements among the AFL-CIO, AFL-CIO COPE PCC, CWA and CWA COPE PCC; the same status and arrangements also pertain to the AFL-CIO, AFL-CIO COPE PCC, AFT and AFT COPE, as the Draft Report describes.

CWA is a "labor organization" within the meaning of 2 U.S.C. § 441b(b)(1), and it is "affiliated" with the AFL-CIO within the meaning of 11 C.F.R. §§ 100.134(h) and 114.1(e)(4). The AFL-CIO is also a "labor organization" under 2 U.S.C. § 441b(b)(1), and it is a "federation" under 11 C.F.R. §§ 100.134(h) and (i), and 114.1(e)(4) and (5). All members of CWA are also members of the AFL-CIO, so the two organizations' restricted classes overlap to the full extent of CWA's membership. *See id.* However, CWA is *not* "affiliated" with the AFL-CIO for purposes of aggregating contributions to and by their respective SSFs. *See* 11 C.F.R. § 100.5(g).

CWA/AFL-CIO members routinely authorize payroll-deducted *joint* contributions to both CWA COPE PCC and AFL-CIO COPE PCC pursuant to voluntary individual written authorizations that explicitly designate both of those SSFs. Those contributions are routinely collected by employers that are signatories to CWA collective bargaining agreements in accordance with 11 C.F.R. § 114.5, and those employers then remit these contributions directly to CWA COPE PCC. CWA itself directly receives a relatively small amount of contributions from restricted-class members whom CWA itself employs, pursuant to identical payroll deduction authorizations, and CWA remits those contributions directly to CWA COPE PCC.

CWA COPE PCC initially receives, processes and reports to the Commission all such payroll-deducted contributions, including by itemizing on Form 3X, Schedule A every member whose contributions aggregate more than $200 in a calendar year, in accordance with 11 C.F.R. § 104.8. CWA COPE PCC then makes periodic joint fundraising transfers of a small fraction of these contributions to AFL-CIO COPE PCC, and each SSF reports that transfer as described above – CWA COPE PCC on Schedule B, Line 22, and AFL-CIO COPE PCC on Schedule A, Line 12.[6] The timing and amounts of those transfers occur at the mutual discretion of the officials of the SSFs' connected organizations, the AFL-CIO and CWA.

ANALYSIS

AFL-CIO COPE PCC Has a Joint Fundraising Arrangement with Each SSF

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guidance from OGC and that the underlying legal issues be addressed in an orderly and efficient manner. Undersigned counsel did meet with RAD and OGC staff in 2006 without a conclusive result, and RAD's rote RFAIs then continued as before. Meanwhile, since RAD first initiated its inquiries over five years ago, as far as we have been made aware the October 15, 2009 OGC Memorandum marks the first time that OGC has prepared any legal analysis of RAD's and the Audit Division's cursory contentions over the years that these longstanding arrangements are in any way unlawful, despite AFL-CIO COPE PCC's repeated requests that OGC be engaged.

[6] In recent years AFL-CIO COPE PCC and the other SSFs, upon the informal advice of a RAD analyst some time ago – as to which, we acknowledge, no record was made – have so reported the joint fundraising transfers as "transfers." (In light of that informal advice, as well, RAD's later inquiries were unexpected and perplexing.)

Under the Federal Election Campaign Act ("the Act"), there is no limit on the amounts of joint-fundraising proceeds that may be transferred between committees that jointly fundraise. See 2 U.S.C. § 441a(a)(5)(A); 11 C.F.R. § 110.3(c)(2). The Draft Report asserts that AFL-CIO COPE PCC *cannot* have a joint fundraising relationship with another SSF because the Commission's joint fundraising regulation, 11 C.F.R. § 102.17, "Joint fundraising by committees other than separate segregated funds," does not apply to them. See Draft Report at 11. But no such restriction appears in the Act or the regulations. Nor does the Act or the regulations require that a joint fundraising transferee record and report to the Commission the individual contributors to the transferor committee whose contributions might be deemed to be among the funds transferred.

Thus, 11 C.F.R.§ 110.3(c)(2) provides that the usual contribution limitations do not apply to "[t]ransfers of joint fundraising proceeds between organizations and committees participating in the joint fundraising activities provided that no participating committee or organization governed by 11 C.F.R. § 102.17 receive[s] more than its allocated share of the funds raised." OGC contends that "since section 102.17 is specifically limited to committees other than SSFs, this provision allowing unlimited transfers specifically does not apply to CWA [COPE] PCC or AFL[-CIO COPE] PCC." OGC Mem. at 5 n. 4. But, that is *not* what 11 C.F.R. § 110.3(c)(2) says: rather it sets forth a general rule about entities that are parties to joint fundraising arrangements, and then imposes a special condition on the subset of those entities that are subject to 11 C.F.R. § 102.17, namely, they must conform to their respective allocated shares of jointly fundraised receipts.

OGC also misstates AFL-CIO COPE PCC's position as relying on a "joint fundraising 'rationale' that, 'if...accepted, [would mean that] any two committees who share contributors would be able to claim that they too are doing joint fundraising." OGC Mem. at 5. n 4. In fact, AFL-CIO COPE PCC and the CWA and ACT SSFs do not simply "share contributors"; they are parties to longstanding joint fundraising arrangements, and their incoming contributions derive from individually executed instruments that identify *both* of the recipient joint fundraising committees. Only where there is such a commonly raised corpus of funds can there be transfers between committees without regard to the $5,000/yr. limit. Moreover, because it appears that only SSFs with common restricted classes fit within our analysis, we believe that it could apply only to organizations with national federation structures, and only insofar as they are not actually affiliated for contribution-aggregation purposes anyway. See 11 C.F.R. §§ 100.134(h) and (i), 114.1(e)(4) and (5).

Draft Finding 2 also appears to dispute that AFL-CIO COPE PCC and the CWA and AFT SSFs had joint fundraising agreements because "no joint fundraising agreement was presented." Draft Report at 8. However, the absence of a specific written agreement is legally irrelevant. 11 C.F.R. § 102.17(c)(1) does not apply, and even the collecting-agent regulations do not require a written agreement between a collecting agent and a recipient committee. S*ee generally* 11 C.F.R. § 102.6. Therefore, there is no statutory or regulatory requirement that the two SSFs either enter into a written agreement to govern their arrangement (let alone that they agree on a formula to allocate contributions between them, which neither the Audit Division nor OGC suggests is required.) Moreover, the Draft Report concedes that the underlying payroll check-off authorization cards of CWA/AFL-CIO members and AFT/AFL-CIO members authorize contributions to *both* the CWA or AFT SSF *and* AFL-CIO COPE PCC. *Id.* And, as

the Draft Report also notes, see *id.*, the parties' practice has been that CWA and AFL-CIO officials confer and agree, on a periodic basis, as to the amount and timing of transfers, as do AFT and AFL-CIO officials.

As described above, the transferor SSF and transferee AFL-CIO COPE PCC each routinely reports the transfers between them as a lump sum payment that is not attributed to particular individual member-contributors to the transferor. That is legally sufficient. Member-contributors authorize the actual *remittance* of their contributions *only* to their union's SSF, and there is no basis *at the time of receipt* for the SSF to do otherwise. That is, the contributors themselves authorize that their contributions be remitted *solely* to their SSF, and their employers, of course, must comply with that instruction. And, the member-contributors delegate to their union's SSF and AFL-CIO COPE PCC the decision as to the ultimate distribution of their contributions between their own union's SSF and AFL-CIO COPE PCC. The timing and amounts of the transfers occur without regard to which particular *individual* contributions were received – the contributions are, in fact, fungible for purposes of making the joint fundraising transfers. Only when a transfer from the CWA or AFT SSF to AFL-CIO COPE PCC later occurs might a *prior* receipt be even theoretically considered to be part of the transferred sum – but that occurs *after* the CWA or AFT SSF has received the contribution, logged it into its recordkeeping and reporting system, and deposited it into its own account when it does not necessarily know when the next transfer to AFL-CIO COPE PCC will occur. Nothing in the Act or the Commission's regulations compels them to decide that in advance so as to attribute particular incoming contributions to the transfer.

Accordingly, transfers are most accurately viewed as comprised of funds that are not attributable to any particular individual contributor, but are comprised of an unitemized aggregate of a portion of all of them. It is perfectly accurate, then, for the SSF that directly receives the individual contributions to treat *all* of them as *its* contributions, and then if and when it decides to transfer sums to AFL-CIO COPE PCC, to treat that transfer as a conventional transfer from one joint fundraising partner to the other that does not require disaggregation into prior individual contributors for attribution to the transferee, but requires only the reporting of its date and amount, just as is the case with transfers in other circumstances. *See generally* 11 C.F.R. §§ 104.3(a)(2)(v), 104.3(a)(4)(iii), 104.3(b)(1)(ii), 104.3(b)(3)(ii).

OGC asserts that the practice of CWA COPE PCC reporting all contributions received by it, "regardless of whether it keeps them or transmits them to AFL[-CIO COPE] PCC, would be permissible [only] if both organizations were 'affiliated,' sharing a single contribution limitation. *See* 2 U.S.C. § 441a(a)(1)(C); 11 C.F.R. §§ 100.5(g)(3), 110.3(a)." OGC Mem. at 3 n.2. However, *none* of these cited provisions states that a transfer between affiliated committees must be reported in any particular manner; indeed, none pertain to reporting at all. Indeed, the collecting agent rules that the Draft Report and the OGC Memorandum contend apply in every respect to these arrangements themselves can be read to require only date and amount reporting by AFL-CIO COPE PCC of the transfers it receives. 11 C.F.R. § 102.6(c)(7) requires an SSF to itemize contributions received from a collecting agent only "to the extent required under 11 CFR 104.3(a)," and that section in turn requires the recipient committee of a "transfer" from another organization to report only its "date and amount," *not* information about the original contributors of the transferred funds. See 11 C.F.R. § 104.3(a)(4)(iii)(B). (OGC does not acknowledge the reference in 11 C.F.R. § 102.6(c)(7) to 11 C.F.R. § 104.3. See OGC Mem. at 4.) These regulations, then, do *not* require a shift to AFL-CIO COPE PCC of the responsibility either to

report a share of individual contribution receipts as itemized or unitemized contributions, or to keep records as to individual contributors so long as the CWA and AFT SSFs do so.

Each SSF Is Also a Collecting Agent for AFL-CIO PCC, But That Relationship Does Not Trigger the Full Application of 11 C.F.R. § 102.6

Under their arrangements, CWA and CWA COPE PCC, and AFT and AFT COPE, are, respectively, not only joint fundraising partners but also collecting agents for AFL-CIO COPE PCC. CWA and AFT each is an "international union collecting contributions on behalf of the separate segregated fund of [a] federation with which the international union is affiliated." 11 C.F.R. § 102.6(b)(1)(iv). As such, each union is an "unregistered organization" within the meaning of 11 C.F.R. § 102.6(b)(2). And, because the CWA and AFT SSFs are separate segregated funds, each may act as a collecting agent under 11 C.F.R. § 102.6(b). See 11 C.F.R. § 102.17(a)(3).[7]

As just described, however, unlike the ordinary collecting agent contemplated in 11 C.F.R. §102.6(c), the CWA and AFT SSFs do not transmit all of the contributions that they collect to AFL-CIO COPE PCC; rather, each SSF is, principally, also a committee that *receives* contributions *to itself*, pursuant to its joint fundraising arrangement with AFL-CIO COPE PCC. The collecting-agent regulations themselves explicitly acknowledge the possibility of such a dual capacity: "Nothing in [them] shall preclude a separate segregated fund from soliciting and collecting contributions *on its own behalf*." 11 C.F.R. § 102.6(b)(4) (emphasis added). OGC accuses AFL-CIO COPE PCC and the CWA and AFT SSFs of trying to "create their own exception and make their own rules. Either they fit into one of the specifically described exceptions [to the $5,000/yr. contribution limit], or their transactions with each other are subject to contribution limits." OGC Mem. at 5. But, again, nothing in 11 C.F.R. § 102.6 or the Commission's other regulations imposes any such specific requirements on a committee when it performs the dual role of raising contributions for itself in joint fundraising with another SSF with which it shares a restricted class. Generally, if an activity is not clearly addressed by the Act or a Commission regulation, then it is simply not regulated, let alone subject to some "default rule," in OGC's term, see *id.*, that, as far as our research shows, the Commission has never asserted as such.

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[7] OGC concurs that CWA COPE PCC may be a collecting agent, but cites instead Advisory Opinion 2000-03 as authority. See OGC Mem. at 3. It should be noted that the course of dealing here has revealed a failure of internal communication and consistency within the Commission. Following its audit fieldwork, the Audit Division's Exit Conference Outline given to AFL-CIO COPE PCC placed the burden on that committee to demonstrate why it did not have to refund $1.1 million to CWA COPE PCC and AFT COPE. And, Interim Report Finding 2 asserted that "[u]nless it is shown that AFT and CWA COPE can act as collecting agents for AFL-CIO COPE, these committees are limited to making contributions up to $5,000 annually to AFL-CIO COPE." However, *RAD itself had previously explicitly and repeatedly informed AFL-CIO COPE PCC and the CWA and AFT SSFs that those SSFs could act as collecting agents for AFL-CIO COPE PCC.* In an RFAI to CWA COPE PCC on July 12, 2006 – based on submissions by AFL-CIO COPE PCC and CWA COPE PCC that we have both echo and amplify – RAD stated that "CWA COPE PCC could legally function as a collecting agent" for AFL-CIO COPE PCC. RAD reiterated that conclusion in RFAIs to AFL-CIO COPE PCC on July 19, 2006, and in another RFAI to CWA COPE PCC on September 13, 2006. And, RAD stated the identical conclusion with respect to AFT COPE's collecting agent capacity for AFL-CIO COPE PCC in RFAIs to AFT COPE on September 13, 2006, March 12, 2008, and July 18, 2008, and an RFAI to AFL-CIO COPE PCC on September 28, 2007. AFL-CIO COPE PCC (and, we submit, the CWA and AFT SSFs) justifiably relied upon those conclusions, and it was surprising, inconsistent and unfair for the Audit Division in 2008 to impose a burden on any of them to prove that this was the case.

Finding 2, however, asserts that the Commission's various collecting-agent rules must be followed here without regard to the joint fundraising -- namely, that the CWA and AFT SSFs must operate a separate transmittal account solely for AFL-CIO COPE contributions; transfer funds within 10 or 30 days, depending on the amounts involved[8]; and "[f]orward all recordkeeping information relating to the transfers to AFL-CIO COPE...." Draft Report at 8. It is true that the CWA and AFT SSFs do not use a transmittal account solely for AFL-CIO COPE PCC contributions, keep separate records of contributors attributable to their respective transfers to AFL-CIO COPE PCC, or report that information to AFL-CIO COPE PCC. But, again, the key difference between this collecting-agent arrangement and that contemplated by 11 C.F.R. § 102.6 is that CWA COPE PCC and AFT COPE each is *both* a collecting agent for AFL-CIO COPE PCC *and* a separate segregated fund soliciting and receiving *for itself* contributions from the same members in its own right. From our research, it appears that the Commission has never addressed the relative reporting obligations of two SSFs undertaking such an arrangement, let alone one where all incoming contributions were fully and accurately reported by one of them. *Cf.* AO 1980-74 (approving local union's solicitation of members for two SSFs *without* specifically requiring such reporting).

Nor is the AFL-CIO COPE PCC's assumption of individual contributor recordkeeping and reporting "necessary... to monitor itemization and limitation requirement," as the Draft Report, at 9, contends. First, the CWA and AFT SSFs itemize *all* joint contributions under the $200.01/yr. threshold as is required. Second, of course, neither SSF accepts accept more than $5,000/yr from any member as a matter of legal compliance policy, and in any event, as is common among union-connected SSFs, no member ever comes close to contributing $5,000 per year anyway. And third, CWA/AFL-CIO and AFT/AFL-CIO members who contribute to their union's SSF *never* contribute separately to AFL-CIO COPE PCC. Accordingly, there is no need for distinct AFL-CIO COPE PCC itemization in order to monitor compliance with limitation requirements.

In any event, insofar as the Commission might have discretion to interpret and apply the Act and its regulations, no public purpose would be served by shifting this recordkeeping and reporting obligation to AFL-CIO COPE PCC. For, doing so would *not* add any information to the public domain; in fact, the most likely consequence would be, ironically, a *reduction* of public information, for surely some individual contributors who would reach the $200.01 annual aggregate reporting threshold if they were recorded and reported solely by the CWA or AFT SSF would *not* reach that threshold if a portion of their contributions instead were attributed solely to AFL-CIO COPE PCC. It is difficult to discern how the disclosure goals of the Act would be served by imposing such requirements.

The Commission's Lengthy History of Acceptance of the Openly Reported Joint Fundraising Arrangements and the Burdens That Would Result If Changes Were Compelled Counsel Heavily Against Adoption of the Draft Report's Recommendations

[8] The Draft Report concedes that the transfers during the audit period satisfied the timeliness requirements in light of their amounts and the routine frequency and volume of the member contributions received by the CWA and AFT SSFs. See Draft Report at 8-9. Even so, AFL-CIO COPE PCC asserted in its response to the Interim Audit Report that it "would commit that it will accept transfers only if the transferring SSF itself also received at least the transferred amount within the previous 30 days (as both SSFs at issue did during 2005 and 2006)." The Draft Report fails to acknowledge that commitment, which we reiterate here.

As described above, for over 20 years before RAD's inquiries began AFL-CIO COPE PCC and the SSFs of many of its constitutionally affiliated national labor organizations entered into and implemented the joint fundraising/collecting agent arrangements described above, and reported hundreds of times to the Commission transfers that exceeded the $5,000/yr committee-to-committee limit, without, as far as we are aware, eliciting a single objection or inquiry from the Commission, let alone from any member-contributor or anyone else. While we acknowledge that, as far as we are aware, the Commission did not explicitly approve these arrangements (with the exception of RAD's numerous RFAIs confirming that various union SSFs could act as collecting agents for AFL-CIO COPE PCC), it is clear that the Commission at least tacitly accepted and approved them, year in and year out. Otherwise, why would it never raise a question about openly reported transfers, repeatedly termed "joint fundraising transfers," that far exceeded $5,000 between committees whose Form 1 Statements of Organization reflected no affiliation between them, and that were part of a national labor federation structure with which the Commission has been well conversant at least since the post-*Buckley* amendments in 1976?

The AFL-CIO, AFL-CIO COPE PCC, the AFL-CIO's numerous affiliated national unions and their SSFs have justifiably relied upon the Commission's tacit acceptance for many years. The SSFs have devised increasingly complex computer and accounting systems and transmittal relationships with innumerable employers that administer employee payroll deduction systems for contributions to the SSFs (the means by which virtually all member contributions to union SSFs are made). Those systems treat all incoming contributions as contributions to the SSFs, and they receive, deposit, process, track and aggregate contributions from individual members so that they are fully and accurately recorded and reported by the SSFs in compliance with the Act. The Draft Report effectively demands the disruption and revamping of all of these systems in order to recharacterize these contributions, impose new recordkeeping and reporting requirements on AFL-CIO COPE PCC, and require the SSFs in advance to arbitrarily designate particular contributions as the corpus of their transfers to AFL-CIO COPE PCC.

This history and those burdens counsel heavily against a belated determination by the Commission that everyone has been doing this wrong for all these years and systems and relationships suddenly have to be changed. That is especially the case where there has been no intervening change of law; all of the participants, including the contributing members themselves, are evidently satisfied with it; everything is accurately recorded and reported; and the changes sought would result in *less* itemization of contributors. It is telling that neither the Draft Report nor the OGC Memorandum deigns to acknowledge or explain this history, which we spelled out during the audit process, and that only the Draft Report even acknowledges the fact of our showing that that its recommendations would impose severe burdens.

The Draft Report's Recommendation That AFL-CIO COPE PCC Amend Its 2005-06 Reports to Itemize Individual Contributors Is Unfair and Burdensome

The Draft Report appears to stand by the Interim Report's recommendations that AFL-CIO COPE PCC amend its reports during the audit period to list the transfers from the CWA and AFT SSFs on Line 11, rather than Line 12, and itemize individual contributors. See Draft Report at 10-11. AFL-CIO COPE PCC is agnostic as to the appropriate reporting line, and over the years it has variously reported them on Line 11(c) and more recently, Line 12 in response to informal RAD advice. But even if the Draft Report were correct about which SSF must itemize,

it would be unfair and overly burdensome at this point to require AFL-CIO COPE PCC to reconstruct the originating contributors to the funds transferred from the CWA and AFT SSFs during 2005 and 2006. OGC itself acknowledges that "it may be impossible for the SSFs to fully correct their reports because of the long-standing failure to keep separate records for AFL[-CIO COPE] PCC contributors. Accordingly, it may be impossible to recreate past reports correctly." OGC Mem. at 7.

Meanwhile, the draft final audit report to CWA COPE PCC does *not* require that it identify and transmit contributor information to AFL-CIO COPE PCC for the audit years, yet AFL-CIO COPE PCC would be completely reliant on CWA COPE PCC to do so in order to amend its 2005-06 reports as the Draft Report suggests. Plainly, it would be unfair in any final report regarding CWA COPE PCC to require it to reconstruct, or, more accurately, create records about the contributors that could be deemed to underlie its transfers to AFL-CIO COPE PCC. Meanwhile, there has been no audit or, as far as we are aware, other Commission action with respect to AFT COPE's participation in these arrangements other than the RAD inquiries described above. Surely, then, even if the Commission accepts the Draft Report's conclusions about recordkeeping and reporting obligations, those requirements should be enforced only prospectively.

Conclusion

There is no sound reason to disturb the longstanding respective recordkeeping and reporting arrangements among AFL-CIO COPE PCC and the SSFs of AFL-CIO-affiliated unions to which hundreds of thousands of individual member-contributors have acceded for more than a generation. Absent clear and compelling statutory or regulatory support for a legal theory that would disrupt these open and fully reported practices, the Commission should decline to adopt the Draft Report insofar as it recommends that the various committees discontinue them and instead adopt new and burdensome requirements that do not advance the disclosure goals of the Act.

Thank you for your consideration.

Yours truly,

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LEG:sjb
Attachments

cc: Elizabeth H. Shuler, AFL-CIO COPE PCC Treasurer
Karen Ackerman, AFL-CIO Political Director