



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

March 11, 2009

MEMORANDUM

TO: Wanda J. Thomas
Acting Assistant Staff Director
Audit Division

THROUGH: Joseph F. Stoltz *JFS*
Acting Staff Director

FROM: Christopher Hughey *pch*
Deputy General Counsel

Lawrence L. Calvert, Jr. *LLC*
Associate General Counsel
General Law and Advice

Lorenzo Holloway *LH*
Assistant General Counsel
Public Finance and Audit Advice

Albert Veldhuyzen *AV*
Attorney

SUBJECT: Interim Audit Report on CWA COPE PCC (LRA # 760) and AFL-CIO COPE PCC (LRA # 761).

I. INTRODUCTION

The Office of General Counsel has reviewed the Interim Audit Report ("Proposed Report") on CWA COPE PCC ("CWA PCC") and the Interim Audit Report on AFL-CIO COPE PCC ("AFL PCC"). This memorandum reflects our comments on both audit reports. In these comments, we address: 1) Whether CWA PCC can legally serve as a collecting agent for AFL-PCC; 2) Whether CWA PCC complied with the collecting agent requirements; 3) How should CWA PCC and AFL PCC report past and future contributions that were and will be transmitted

to AFL PCC. If you have any questions, please contact Albert R. Veldhuyzen, the attorney assigned to this audit.¹

II. BACKGROUND

CWA PCC, the separate segregated fund ("SSF") of an international union ("CWA"), receives and reports contributions from individuals who sign payroll authorization cards. The authorization cards contain a statement that the contributions will be used in a "joint fundraising" effort and that CWA PCC and AFL PCC are authorized to use the contributions "on behalf of candidates for federal, state, and local offices and [for] addressing political issues of public importance." Thus, contributors do not designate specific and separate amounts for CWA PCC and AFL PCC; rather, their undifferentiated contributions are received by CWA PCC and deposited into its account.

At various intervals, CWA PCC transmits an agreed portion of the collections in a lump sum to AFL PCC, the SSF of an organization of national and international unions ("AFL") of which CWA is a member.² AFL PCC reports this lump sum transmittal as a transfer from an affiliated committee. The audit confirmed that: 1) CWA PCC does not maintain a separate transmittal account solely for AFL PCC or keep separate records of all such receipts and deposits; 2) CWA PCC does not forward the individual (payroll contributor) contribution amounts and contributor information (about the payroll contributor) to AFL PCC or maintain those records of deposits and transmittals for three years; 3) AFL PCC does not report the full amount of each contribution received from the original contributor when required. See 11 C.F.R. §§ 102.6(c)(4), 102.6(c)(5), 102.6(c)(6), 102.6(c)(7), 102.8.

Prior to examining the mechanics of the transfers from CWA PCC to AFL PCC, it is important to discuss the legal status of each of the parties and their concomitant rights and responsibilities. Specifically, we seek to establish whether CWA PCC is a collecting agent of AFL PCC governed by the Commission's regulations. If CWA PCC is a collecting agent, it must abide by the regulations governing collecting agents. Alternatively, if the SSFs are affiliated, they may transfer unlimited funds to each other. If CWA PCC cannot be a collecting agent and the SSFs are unaffiliated, CWA PCC made excessive contributions to AFL PCC. The answer to these questions will help determine the transfer, reporting, and recordkeeping responsibilities of the parties.

¹ The Office of General Counsel recommends that the Commission consider this document in Executive Session because the Commission may eventually decide to pursue an investigation of matters contained in the proposed Report. 11 C.F.R. §§ 2.4(a) and (b)(6).

² During the audit period, AFL PCC received four transfers from CWA PCC: 1) \$100,000 (July 29, 2005); 2) \$100,000 (July 26, 2006); 3) \$50,000 (June 27, 2006); 4) \$50,000 (July 20, 2006). This Office is unaware of the rationale for the timing and amounts of the transfers, and we understand that Audit is unaware as well.

III. AS A COLLECTING AGENT FOR AFL PCC, CWA PCC MUST MEET THE REGULATORY REQUIREMENTS FOR COLLECTING AGENT AND AFL PCC MUST ENSURE REQUIREMENTS ARE MET.

The Federal Election Campaign Act ("the Act") limits the amount of funds that one committee may contribute to another non-affiliated committee. *See* 2 U.S.C. § 441a(a)(2)(C). A committee may not make a contribution greater than \$5,000 to another non-affiliated committee. 2 U.S.C. § 441a(a)(2)(C). By contrast, affiliated committees share a single limit on contributions made and a single limit on contributions received, but can transfer unlimited funds to each other. 11 C.F.R. §§ 100.5(g)(3), 110.3(c)(1), 104.3(a)(2)(v). The affiliation regulation specifies that all committees controlled by a single national or international union are affiliated and share a single contribution limit. 11 C.F.R. § 100.5(g)(3)(ii).

CWA PCC is a committee of a single international union. By contrast, AFL PCC is a committee of an organization of national and international unions. 11 C.F.R. § 100.5(g)(3)(iii). Although all of the committees established by an international union and its locals and other subordinate organizations are affiliated, 11 C.F.R. § 100.5(g)(3)(ii), and all of the committees established by an organization of national or international unions and that organization's state or local central bodies are affiliated, 11 C.F.R. § 100.5(g)(3)(iii), committees established by a single union are not affiliated with the committees established by an organization of unions. Even though the single union is a part of an organization of unions, its committees are not affiliated with the organization of unions (nor with its subordinate bodies) if they are not controlled by the latter. 11 C.F.R. § 100.5(g)(2). As applied here, this means that CWA PCC and AFL PCC are not affiliated, and they do not claim to be.³ Consequently, they may not contribute more than \$5,000 to each other. Moreover, each SSF must report its own contributions received.

Another possibility is the collecting agent relationship. The transactions between CWA PCC and AFL PCC suggest there is a collecting agent relationship between the committees. In a collecting agent relationship, the collecting agent can transfer contributions collected for the benefit of the other SSF. This raises the question of whether CWA PCC can legally serve as a collecting agent for another unaffiliated SSF.

A collecting agent relationship allows an organization to collect and transmit contributions to one or more separate segregated funds to which it is related. 11 C.F.R. § 102.6(b)(1). If it were a collecting agent, CWA PCC could transfer to AFL PCC unlimited sums of contributions that were in fact made to AFL PCC. The regulations outline four circumstances when an entity may serve as a collecting agent for another organization. 11 C.F.R. § 102.6(b)(1). One of those circumstances is when an international union collects contributions on behalf of a separate segregated fund of a federation of which the international union is a member. 11 C.F.R. § 102.6(b)(1)(iv). Although the international union (in this case, CWA), the connected organization, is clearly permitted to collect on behalf of AFL PCC, the

³ The current practice of having CWA PCC report all contributions, regardless of whether it keeps them or transmits them to AFL PCC, would be permissible 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).

regulations do not specify that its separate segregated fund (CWA PCC) may collect on behalf of a separate segregated fund of the federation (AFL PCC). However, the Commission, in Advisory Opinion 2000-03, has allowed an SSF to step into the shoes of its connected organization, albeit in the context of funding a candidate appearance before the restricted class. There is nothing in AO 2000-03 that suggests that this principle must be limited to funding a candidate's appearance before a restricted class. Therefore, as a legal matter, we conclude that CWA PCC can function as a collecting agent for AFL PCC. However, it would need to abide by the rules governing collecting agents at 11 C.F.R. § 102.6(c).⁴

Under that section, the collecting agent must transmit to the recipient committee the full amount of each contribution collected within 10 days after receipt for contributions more than \$50 or 30 days for contributions of \$50 or less. As relevant to these facts, the collecting agent must do one of the following three things:

- 1) Establish a transmittal account to be used solely for the deposit and transmittal of funds collected on behalf of the SSF. 11 C.F.R. § 107.6(c)(4)(i).
- 2) Deposit the contributions collected into its own treasury account, keeping separate records of all receipts and deposits that represent contributions to the committee for which the agent is acting. 11 C.F.R. § 102.6(c)(4)(ii).
- 3) Deposit the contributions collected for the SSF into an account otherwise established as a non-Federal account, keeping separate records of all receipts and deposits that represent contributions to the committee for which the agent is acting. 11 C.F.R. § 102.6(c)(4)(iii).

As relevant here, the collecting agent must also transmit, along with the contributions, the name and address of the contributor and the date of receipt for each contribution between \$51 and \$200, and the name, address, occupation and name of employer of the contributor for each contribution in excess of \$200. 11 C.F.R. §§ 102.6(c)(5), 102.8. In addition, the collecting agent must retain all records of contribution deposits and transmittals for three years for Commission inspection. 11 C.F.R. § 102.6(c)(6). However, it is the receiving SSF that must report the full amount of each contribution received as a contribution from the original contributor. 11 C.F.R. § 102.6(c)(7).

The audit revealed that CWA PCC does not have a separate transmittal account or keep separate records of all receipts and deposits that represent contributions to AFL PCC. CWA PCC does not have separate records of individual contributions because it did not consider itself bound by the collecting agent regulations. Consequently, such records were not retained for three years for Commission inspection. 11 C.F.R. §§ 102.6(c)(4), 102.6(c)(5), 102.6(c)(6), 102.6(c)(7), 102.8. Fundamentally, CWA PCC did not keep separate records of receipts and deposits, segregate those portions intended for AFL PCC, or distinguish contributions at the individual level. 11 C.F.R. § 102.6(c)(4)(ii)(B). Having failed to distinguish between

⁴ It is also essential that checks provided to unions representing a combined payment of union dues, other employee deductions, and voluntary contributions to an SSF be properly disaggregated. 11 C.F.R. § 102.6(c)(3). In our situation, it is assumed that the funds have already been disaggregated so that funds received by CWA PCC are permissible federal contributions and intended to be so by the original contributors.

contributions intended for CWA PCC and AFL PCC, they could not comply with the requirement to keep separate records of contributions. Given that these separate records were not kept, the arrangement violated the Commission's collecting agent regulations.

CWA PCC and AFL PCC assert that their relationship has aspects of joint fundraising, and aspects of a collecting agent relationship, but acknowledge that the transactions here do not fit precisely into either regulatory category. The result, they assert, is that neither the joint fundraising regulations of 11 C.F.R. § 102.17 nor the collecting agent regulations of 11 C.F.R. § 102.6 apply here, because "the Commission has never addressed the relative obligations of two SSFs undertaking such an arrangement." Letter from Lawrence Gold to Tom Hintermister, at 7 (July 8, 2008). The committees' assertions, however, ignore this key point: the Act and regulations create a system in which the \$5,000 limit on contributions between committees is a default rule, and the various statutory and regulatory provisions about transfers between committees provide, in essence, very specific and limited exceptions to that default rule. There are a number of these exceptions. First, as noted, affiliated committees may transfer unlimited amounts to each other. 2 U.S.C. § 441a(a)(5); 11 C.F.R. § 110.3(c)(1). Second, the authorized committee of a candidate may transfer excess campaign funds to political party organizations—including Federal party committees—without limit. 2 U.S.C. § 439a. Third, national, district, state, and local committees of the same political party may transfer unlimited amounts between each other. 2 U.S.C. § 441a(a)(4). Fourth, under certain circumstances, an authorized committee of a candidate for a Federal office may transfer an unlimited amount to a general election (of unused primary funds); to a future election cycle; or to the authorized committee of the same candidate for a different Federal office. 2 U.S.C. § 441a(a)(5)(C); 11 C.F.R. § 110.3(c). Fifth, joint fundraising representatives of committees other than SSFs engaged in joint fundraising under 11 C.F.R. § 102.17 may, without limit, transfer to each participating committee its proper share of the joint fundraising proceeds. 11 C.F.R. § 102.17. Finally, a committee acting as a "collecting agent" for another committee pursuant to 11 C.F.R. § 102.6 may transfer the full amount of contributions received *on the other committee's behalf* to the other committee.

Thus, the fact that the committees use the label of "joint fundraising" and term their arrangement "unique" does not mean that they get to create their own exception and make their own rules.⁵ Either they fit into one of the specifically described exceptions, or their transactions

⁵ The SSFs contend that the unlimited transfers are permissible because the committees are engaging in joint fundraising. However, if this rationale is accepted, any two committees who share contributors would be able to claim that they too are doing joint fundraising. Allowing this would tend to undermine the transfer rules, which permit transfers from one committee to another only in limited circumstances. See 11 C.F.R. § 110.3(c). Those limited circumstances include the transfer of funds between affiliated committees and between collecting agents and SSFs. 11 C.F.R. § 110.3(c)(1). Another circumstance where unlimited transfers are allowed concerns the transfer of joint fundraising proceeds, "provided that no participating committee or organization governed by 11 C.F.R. § 102.17 received more than its allocated share of the funds raised." 11 C.F.R. § 110.3(c)(2). However, since section 102.17 is specifically limited to committees other than SSFs, this provision allowing unlimited transfers specifically does not apply to CWA PCC or AFL PCC. Both committees specifically acknowledge that they are not conducting joint fundraising as described in 11 C.F.R. § 102.17, and have not followed the procedures in that regulation.

with each other are subject to contribution limits. The facts show that CWA PCC was, if not using these words, purporting to act as AFL PCC's collecting agent. Accordingly, they were required to structure that arrangement in conformity with the collecting agent regulations.

The major flaw in CWA PCC and AFL PCC's arrangement occurred when, having determined to deposit all contributions into its own account, CWA PCC failed to keep separate records of all receipts and deposits that represented contributions to AFL PCC. In the absence of such records, it is simply impossible to determine which contributions were made to CWA PCC and which to AFL PCC. As a result, it is also impossible to tell which contributions to AFL PCC were in amounts less than \$50, and which more; which were transferred within ten days of receipt, which within thirty days, and which longer; and for which ones CWA PCC was required to forward contributor information to AFL PCC, and for which ones it was not. The practical effect appears to have been that AFL PCC could simply have as much money as it wanted out of CWA PCC's account (or at least as much as CWA PCC was willing to send it), whenever it needed it, without regard to any facts pertaining to the actual contributors. In effect, CWA PCC and AFL PCC operated, for purposes of these funds transfers, as if they were affiliated committees. This they could not do.

In conclusion, CWA PCC and AFL PCC are not affiliated entities sharing one contribution limit. As such, they cannot transfer unlimited funds to each other. 11 C.F.R. § 110.3(c). CWA PCC qualifies as a collecting agent, which allows it to transmit to AFL PCC all contributions received on behalf of AFL PCC. As a collecting agent, however, CWA PCC must comply with certain collecting agent rules. These include the transmittal of contributions exceeding \$50 within 10 days and of all other contributions within 30 days, and the transmission of contributor information for contributions exceeding \$50. CWA PCC is also required to keep separate records of the contributions collected and transmitted and AFL PCC must report contributions received to the Commission. CWA PCC did not comply with these rules. This Office, therefore, recommends that the interim audit report on CWA PCC include a finding that CWA PCC did not comply with the collecting agent rules. Since AFL PCC was responsible for ensuring that CWA PCC would comply with the collecting agent rules, *see* 11 C.F.R. § 102.6(c)(1), we also recommend that the interim audit report on AFL PCC include a finding that AFL PCC failed to do so.

The SSFs have specific transfer, recordkeeping, and reporting responsibilities, the mechanics of which are discussed below.

IV. CWA PCC AND AFL PCC FAILED TO PROPERLY REPORT THEIR ACTIVITIES AND NEED TO CORRECT THEIR PROCEDURES & PAST REPORTS.

CWA PCC reported the questionable transfers to AFL PCC as "transfers to Affiliated/Other Party Committees." FEC Form 3X, Line 22. In turn, AFL PCC reported the transfers as "Transfers From Affiliated/Other Party Committees." FEC Form 3X, Line 12. As previously discussed, CWA PCC and AFL PCC are not affiliated committees and therefore, the transfers should not have been reported as transfers to/from affiliated committees. Rather, the SSFs should follow these procedures in the future, for contributions transmitted to AFL PCC.

At the outset, the Act requires that CWA PCC and AFL PCC retain all records of deposits and transmittals for three years and make the records available to the Commission upon request. 11 C.F.R. § 102.6(c)(6). AFL PCC is responsible for ensuring that the record-keeping, disclosure, and transmittal requirements set forth in the Commission's regulations for collecting agent accounts are met by CWA PCC. 11 C.F.R. § 102.6(c)(1).

Assuming the two committees wish all contributions initially to be deposited in CWA PCC's account, the reporting would have to proceed in the following manner. CWA PCC would need to report the aggregate amount of contributions received for itself on line 11(a), reporting the aggregate amount of unitemized contributions on line 11(a)(ii), itemizing itemizable contributions on Schedule A, and reporting the aggregate amount of itemized contributions on line 11(a)(i). It would also need to report the aggregate amount of contributions received for AFL PCC on line 17 as "other Federal receipts" and it would need to report its transfers of those contributions to AFL PCC on line 29 as other disbursements, itemizing the transfer on Schedule B as a transfer of funds received on behalf of AFL PCC in its role as a collecting agent. CWA PCC, of course, would need to transmit to AFL PCC any contributor and date of receipt information required by 11 C.F.R. §§ 102.6(c)(5) and 102.8.

AFL PCC would need to include the aggregate amount of contributions received from CWA PCC in the aggregate amount of its contributions received as reported on line 11(a), include the aggregate amount of unitemized contributions received in a transfer in the total amount of its unitemized contributions reported on line 11(a)(ii), and itemizing itemizable contributions as necessary on Schedule A and including those contributions in its aggregate amount of itemized contributions.

For past CWA PCC and AFL PCC reports, it may be impossible for the SSFs to fully correct their reports because of the long-standing failure to keep separate records for AFL PCC contributions. Accordingly, it may be impossible to recreate past reports correctly. However, the SSFs should correct their past reports covered by the audit to the following extent: 1) CWA PCC should list all amounts previously forwarded to AFL PCC on line 29 (other disbursements) rather than on line 22 (transfers to affiliated committees); and 2) AFL PCC should list all amounts previously received from CWA PCC as contributions and itemize those contributions to the extent possible, rather than reporting the transmitted amount on line 12 (transfers from affiliated committees). The itemized contributions should be reflected on Schedule A, and not as memo entries. 11 C.F.R. § 102.6(c)(7). Given that these contributions are from individuals through a collecting agent, they should be reflected as individual contributions on Schedule A. 11 C.F.R. § 102.6(c)(7). The report also proposes that AFL PCC may continue to report the contributions collected from CWA PCC as lump sum transfers-in on Line 12 (Transfers From Affiliated/Other Party Committees). Because Line 12 is for transfers from affiliated committees and the SSFs are not affiliated, it is not appropriate to list the contributions forwarded by CWA PCC as transfers-in on Line 12. This Office recommends revision to the proposed reports' recommendations to the extent that they differ from the analysis in this subsection.