



FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 9, 1981

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1981-34

Phillip J. Harter
Kator, Scott & Harter, Chartered
Suite 900
1029 Vermont Avenue
Washington, D.C. 20005

Dear Mr. Harter:

This responds to your letter of August 4, 1981, as supplemented by your letters of August 18 and October 13, 1981, requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to a transfer of funds by the National Association of Retired Federal Employees ("NARFE").

Your request asks whether NARFE may transfer to its separate segregated political fund, certain monies donated by its individual members in response to a special fundraising solicitation effort. The funds in question were deposited and maintained in, and disbursed from, a segregated bank account that was completely separate from and did not contain general purpose treasury funds of NARFE. The circumstances under which these funds were received, handled, and spent are explained in your letters of August 4 and 18 and October 13, 1981.

NARFE's National Executive Board approved a program at its October, 1978, meeting to raise at least \$100,000 for "legislative purposes". A solicitation letter dated November 15, 1978 was mailed to the members asking for contributions "to defend our position in the issues facing us." The letter pointed out that the Federal Retirement System was under "attack" and that several studies were considering the merger of the Federal Retirement System with the Social Security System. It stressed a great financial need to "repel this attack." The Federal Government was mentioned as one source of the "attack," and members were reminded that the House Ways and Means Committee had, in the last year, almost "pushed through" legislation to merge the two retirement systems. The letter further noted that another "try" for such legislation would probably be made. The letter concluded:

Three consecutive NARFE National Conventions have unanimously opposed any Civil Service-Social Security merger. To defend our position of "unalterable opposition," we must secure the best talent available to provide actuarial and statistical enforcement to our point of view. The expertise we need will cost money; money we do not have, but are now seeking through your voluntary contributions. And every contribution of even \$1.00 will help.

We urgently need your support. A card to record and remit your contribution is enclosed. PLEASE, GIVE YOUR FAIR SHARE.

In addition to this solicitation mailing, NARFE alerted its membership to developments in the Congress and elsewhere concerning the issue. These communications were made in its membership journal, Retirement Life. Articles and editorial views in issues for January, February, and March 1978 called attention generally to Congressional politics that were and would be involved in merger of the retirement systems. Reference was made in a January 1978 editorial by NARFE's president to the relationship between representing a larger number of voters and moving Congress with "politics". Future plans to influence Congress with studies and seminars on retirement system merger were described. Advice was also given on the best techniques for affecting legislative attitudes on the issue.

In the December 1978 issue, an article described the effect of the 1978 Congressional elections on friends who would no longer be in Congress to assist NARFE in its legislative goals. In the same issue a "Comment" piece pointed out:

NARFE's national office is working very hard on establishing a good working relationship with all the members of Congress. But our Washington representatives can't even get a foot in the door if the local organization has not done its homework first.

At your next chapter meeting, talk about how your chapter is going to establish an ongoing relationship with your congressman and senators. Make sure you have a good legislative chairman, and even a legislative committee, to work with your members of Congress. Let your representatives know the facts about federal retirement.

Excerpts submitted from the February 1979 issue of Retirement Life include an article which lists and describes several specific ways to accomplish an "organized, well planned and coordinated legislative effort." The article mentioned the financial support in donations made by NARFE members and then stressed the need to make personal and group contacts with Members of Congress and Senators. In the March 1979 issue, the fundraising results were reported. The fund was referred to as NARFE's:

special legislative fund to finance our battle against the social security Federal retirement merger.... The purpose of the money is to acquire necessary professional and actuarial assistance that will surely be needed to support our position, and to further our legislative efforts on this issue.

Your request further explains that the proceeds far exceeded the goal and a substantial amount remains in the fund. NARFE now believes that an essential element of protecting its interests in maintaining the Federal Retirement System separate and apart from the Social Security System is by electing individuals whose views are sympathetic to NARFE. Accordingly, NARFE wishes to use the funds to make political contributions.

At the time of the initial solicitation for the Anti-Merger Fund, the solicitation emphasized that a paramount issue was the possible merger of the Federal Retirement and the Social Security Systems. While the letter indicated that the immediate need was to retain actuarial and statistical experts, you assert that the clearly understood long-run purpose of the fundraising was to counter a merger by whatever means appropriate, and therefore the solicited members were apprised of the "political purposes" for which the money would be used. You add that the solicitation went only to NARFE members, as authorized by 441b(b)(4)(C), and that it made clear that donations would be entirely voluntary and that there would be no reprisals or other adverse actions taken for failure to contribute, nor was contributing a condition for continued membership in the organization.

Although the donations were made directly to NARFE, a not for profit corporation¹, NARFE has maintained the proceeds in a separate fund. The proceeds have not been treated as corporate funds, nor commingled with corporate funds generated from membership dues or any other means. Deposits of contributions to this fund are made to an account in the name of the Fund at the American Security Bank, whereas NARFE's regular fund accounts are all with Riggs National Bank. The bulk of the Anti-Merger Fund, however, is invested in U.S. Treasury Bills in the name of the fund. These bills are purchased for the fund by Riggs National Bank. A book entry receipt is provided to Riggs National Bank by the Bureau of Public Debt, and Riggs National Bank sends the Association its receipt and confirmation of the purchase for the several Treasury Bill investments. Those accounts are held by NARFE and not by any other entity. The fund is not used to defray NARFE general expenses, and NARFE does not charge the general and administrative expenses of maintaining the fund against the fund itself.

You have asked whether the money in the Anti-Merger Fund may be transferred to NARFE's separate segregated political fund and then used to make contributions to candidates for Federal office. The Commission concludes that the solicitation for the described funds did not comply with its regulations governing contribution solicitations for separate segregated funds and that such funds may not be transferred to NARFE's separate segregated political fund unless the original deficient solicitation is remedied in the manner specified below.

Under the Act, a corporation without capital stock that has individual members may establish and administer a separate segregated fund for "political purposes" and may solicit

¹ According to your supplemental letter of August 18, NARFE is exempt from Federal income tax under 26 U.S.C. 501(c)(5).

voluntary contributions to such a fund from its individual members. 2 U.S.C. 441b(b)(2), (b)(4)(C). The cited 441b(b) also provides that any person who solicits a contribution to such a political fund from an employee (who is otherwise within the solicitable class) must inform the employee of the political purposes of the fund at the time of the solicitation. 2 U.S.C. 441b(b) (3) (B). The employee must also be informed, when solicited, of his or her "right to refuse to so contribute without any reprisal." 2 U.S.C. 441b(b)(3)(C). By regulation the Commission has made these conditions applicable to contribution solicitations of labor organization members and to solicitations of members of incorporated membership organizations. 11 CFR 114.5(a). In its explanation and justification for this regulation the Commission explained:

Language in the Conference Report indicates that the disclosures are to be made by a labor organization when soliciting members who are also employees of a corporation or labor organization. H. Conf. Report, supra, p.64. The regulation accordingly, adds the word "member" to the statutory language. These disclosure requirements also apply to the solicitation of members of a membership organization, cooperative, or corporation without capital stock.... These solicitations must also inform the member of his or her right to refuse without reprisal. This was done to make clear that the membership organization, cooperative, or corporation without capital stock may not cancel membership, policies, or take other similar actions against members who do not contribute. H.R. Doc. No. 95-44, 95th Cong., 1st Sess. 107 (1977)

Accordingly, NARFE's solicitations for its separate segregated fund must provide members with notice of both the political purposes of the fund and that the member may refuse to contribute without any reprisal. Since the original solicitation was not explicitly for the separate segregated fund the requisite notices were not included. However, given both the substance of the 1978 letter and NARFE's status as a voluntary membership organization,² it is apparent that the described funds were solicited as voluntary donations and not by means of any form of coercion. Nor were the funds solicited as a condition of maintaining membership, nor as general treasury or dues funds. Compare Advisory Opinions 1980-27 and 1979-63. The solicitation letter repeatedly refers to the funds being solicited as "contributions" and concludes with an appeal for "your voluntary contributions. And every contribution of even \$1.00 will help." The use of a return card to transmit and record the contribution also indicates that the fundraising was separate and distinct from general NARFE finances.

The issue thus remaining is the proper method, if any, by which NARFE could remedy the inadequacy of the original solicitation letter which failed to give explicit notice that the funds

² In a recent decision involving contribution solicitation for the separate segregated fund of a nonstock corporation, the U.S. Court of Appeals for the District of Columbia concluded that the secondary interest served by 441b restrictions on solicitations -- protecting minority dissenting interests from coerced support of political causes they disagreed with -- was not an issue when the solicitee was not solicited as an employee of a corporation or as a member of a labor organization. FEC v. National Right to Work Committee, 501 F.Supp. 422 (D.D.C. 1980), rev'd, Nos. 80-1487, 80-1488, slip op. at 7 and 8 (D.D.Cir., Sept. 4, 1981) FEC petition for rehearing denied November 13, 1981.

were being solicited for "political purposes" as contemplated by the Act, i.e., to make contributions or expenditure's to influence the nomination or election of any person to Federal office.

The Commission concludes that in order to remedy the inadequate notice given with the original solicitation for the Anti-Merger Fund, a mailing must be made to each donor to the fund. The mailing must include a postage prepaid, return addressed envelope and a form whereby the donor has a convenient and easily utilized means for disapproving, in writing, the transfer of the unspent portion of his or her donation to NARFE's separate segregated fund. Transfers may not be made to such fund until a reasonable time has passed after the described mailing is made, and in no event may the transfer be made within the 90 day period after the mailing is sent out. (In this situation the Commission would presume reasonableness if the allotted time for submitting disapprovals was equal to the time period during which the funds were originally donated to the Anti-Merger Fund.) Transfers to the NARFE separate segregated fund may be made thereafter, provided that the balance remaining in the Anti-Merger Fund is at least equal to the total amount of donations whose transfer has been objected to.

A similar procedure was followed where a labor organization and its separate segregated fund had collected political contributions in violation of 2 U.S.C. 441b. FEC v. National Education Association, 457 F.Supp. 1102 (D.D.C. 1978); see also Abood v. Detroit Board of Education, 431 U.S. 209 (1977). In the NEA case a special mailing was permitted in lieu of mass refunds even though there had been a per se violation of the Act. Thus, it may be used here, where there has not been any such violation of the Act or Commission regulations, as a means of enabling dissenting members of NARFE to object to the transfer of the unspent portion of those funds they originally donated for legislative influencing activity. All funds transferred to the separate segregated fund in accordance with this procedure must originally have been both donated by a solicitable member of NARFE and within the applicable contribution limits of 441a(a). Such funds are also subject to reporting under the Act and regulations, including contributor itemization if aggregate amounts contributed in a calendar year exceeded \$200. 2 U.S.C. 434(b)(3)(A); also see 2 U.S.C 431(13) and 11 CFR 104.3, 104.8.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437.

Sincerely,

(signed)

John Warren McGarry
Chairman for the
Federal Election Commission