

APR 14 4 31 PM '99



FEDERAL ELECTION COMMISSION

Washington, DC 20463

April 14, 1999

**AGENDA ITEM**  
For Meeting of: 4-21-99

**MEMORANDUM**

TO: The Commission

THROUGH: James A. Pehrkon  
Staff Director

FROM: Lawrence M. Noble  
General Counsel

N. Bradley Litchfield  
Associate General Counsel

Michael G. Marinelli  
Staff Attorney

SUBJECT: Draft AO 1999-6

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for April 21, 1999.

Attachment

**DRAFT**

1 **ADVISORY OPINION 1999-6**

2  
3 **Ken Parmelee, Vice President**  
4 **National Rural Letter Carriers' Association**  
5 **1630 Duke Street, 4<sup>th</sup> Floor**  
6 **Alexandria, Virginia 22314-3465**

7  
8 **Dear Mr. Parmelee:**  
9

10 **This responds to your letters dated April 6, March 23, and February 26, 1999, on**  
11 **behalf of the National Rural Letter Carriers' Association ("NRLCA"), which request an**  
12 **advisory opinion concerning the application of the Federal Election Campaign Act of**  
13 **1971, as amended ("the Act"), and Commission regulations to the use of authorized**  
14 **deductions from members' retirement (annuity) payments as a method of making**  
15 **contributions to NRLCA's separate segregated fund, the National Rural Letter Carriers**  
16 **Association PAC ("the PAC").**

17 **FACTUAL BACKGROUND**

18 ***NRLCA proposal***

19 **You state that NRLCA has approximately 97,000 members which includes**  
20 **approximately 26,000 retirees. Its postal retiree members receive their monthly annuity**  
21 **payments from the United States Office of Personnel Management ("OPM"). For many**  
22 **years, OPM has allowed retirees to designate or allot voluntary amounts for deduction**  
23 **from their annuity payments. These voluntary allotments have been limited to three in**  
24 **number, but OPM has recently expanded the capacity of its allotment system to allow a**  
25 **larger number. You state that OPM has informed you that it will forward voluntary**  
26 **contributions to a PAC, or separate segregated fund, if a retiree so elects and if such a**

1 process complies with the rules of the Commission. Your request includes OPM  
2 documents that describe the annuitant allotment process in some detail.

3 OPM has established a toll free number that retirees may call to begin, modify or  
4 discontinue their allotment of a voluntary PAC contribution. Each Federal retiree is  
5 given their personal, civil service seven digit annuity number, known as a CSA number.  
6 This number is required to access each individual retiree's account. In addition, if the  
7 retiree uses OPM's interactive voice response system to authorize a PAC contribution,  
8 the retiree must also use a personal identification number. Therefore, the retiree retains  
9 total control of his account, and OPM will not accept changes to a retiree's allotment  
10 instructions from anyone other than the retiree herself. OPM documents further explain  
11 that the allottee organization (i.e. the PAC) will receive payments as a lump sum amount  
12 with individual detail provided in addenda records. OPM does not provide a breakdown  
13 of the allotment payment into sub-categories such as dues or contributions. The  
14 organization must have separate bank accounts for each type of allotment in order to  
15 obtain a breakdown of this type.<sup>1</sup> Furthermore, OPM documents indicate that it has no  
16 way of screening to ensure that retirees who request an allotment to the PAC are current  
17 members of NRLCA. You characterize the role of NRLCA as very limited in that it  
18 would publicize the option of making a PAC contribution in this manner to its retiree  
19 members. NRLCA proposes to do this by publishing an article in its membership  
20 magazine that would provide basic information as to how a retiree could call OPM's toll

---

<sup>1</sup> By letter dated April 6, 1999, you explain that NRLCA has established separate bank accounts at separate banks that will be used for the receipt and deposit of allotment payments from OPM. One bank account will be used for the deposit of PAC contributions collected from retiree members through the OPM allotment process, and the other will be used for the deposit of dues payments collected from retiree members through such process.

1 free phone number to authorize the retiree's PAC contributions via the allotment system.

2 You have included the text of a proposed or sample article that NRLCA may use.<sup>2</sup>

3 *Membership rights within NRLCA*

4 You have also submitted the NRLCA constitution and bylaws which delineate the  
5 classes of members within the organization. These classes are active members, who may  
6 also be retired members, associate members, and honorary members. NRLCA  
7 Constitution, Article III sections 1 and 2. Although there are other classes of members,  
8 you have limited NRLCA's request to those active retired members who receive an  
9 annuity from OPM.<sup>3</sup> Active retired members pay dues to the organization and receive  
10 voting rights through membership in the various State associations. *Id.*, sections 2 and 3.  
11 The bylaws indicate that the NRLCA magazine is sent to both active and associate  
12 members. *Id.*, section 6.<sup>4</sup>

13 Voting rights in the organization consist of the power to select the delegates sent  
14 by a voting member's State association to the NRLCA's national convention. NRLCA  
15 Constitution, Article III, section 3; and Bylaws, Article XV, section 1 and 2. These

---

<sup>2</sup> In summary, the article states that a new alternative is available from OPM to NRLCA's retired members which permits them to make their PAC contributions through automatic deductions from their retirement payments. The OPM phone number is provided along with a brief description of the OPM security measures that apply when using the allotment process. The article also explains that the retirees retain total control over their accounts and can discontinue the PAC contribution or change the amount at any time by making a toll free phone call to OPM. The article notes that cash contributions to the PAC will be handled through State PAC chairs.

<sup>3</sup> Active and active retired members form the overwhelming portion of NRLCA's membership. The other membership classes (honorary and associate members), according to your request, number approximately 450 of the 97,000 total membership. Since you have limited your solicitation proposal to active retired members who receive annuity payments from OPM, this opinion will address the membership status of that group of NRLCA's active members, although as indicated elsewhere in this opinion, their membership attachments to NRLCA are indistinguishable from those of the active NRLCA members who are currently employed by the United States Postal Service as rural letter carriers. The membership status of the other membership classes is not considered in this advisory opinion.

<sup>4</sup> Your letter dated March 23 indicates that honorary members, which includes some Members of Congress and officials of the USPS, receive complimentary copies of the NRLCA magazine.

1 delegates elect the NRLCA officers who consist of a president, vice-president, secretary-  
2 treasurer, director of labor relations, and an executive committee made up of four other  
3 individuals. NRLCA Constitution, Article V, section 1. These eight individuals also  
4 form the national board of the NRLCA. *Id.*, section 2.

5 The powers granted to the NRLCA national board indicate that it has general  
6 management of the organization. It is responsible for maintenance of the organization's  
7 magazine and the maintenance of the national headquarters. The Board also sets the  
8 annual salaries of organization personnel and may make interim amendments to the  
9 bylaws of the NRLCA in order to preserve conformity to Federal law. NRLCA Bylaws,  
10 Article VI, sections 1, 2, 3, and 5.

#### 11 **ACT AND COMMISSION REGULATIONS**

12 Under Commission regulations, the term "labor organization" means any  
13 organization of any kind, or any agency or employee representative committee or plan, in  
14 which employees participate and which exists for the purpose, in whole or in part, of  
15 dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours  
16 of employment, or conditions of work. See 11 CFR 114.1(d). As one type of  
17 membership association, a labor organization must also possess certain attributes. It must  
18 (i) expressly provide for "members" in its articles and bylaws; (ii) expressly solicit  
19 members; and (iii) expressly acknowledge the acceptance of membership, such as by  
20 sending a membership card or inclusion on a membership newsletter list. 11 CFR  
21 100.8(b)(4)(iv)(A), 114.1(e)(1).

22 On the question of what constitutes membership for purposes of the Act, the  
23 Supreme Court has suggested that members are to be defined, at least in part, by analogy

1 to stockholders of business corporations and members of labor unions. See *FEC v.*  
2 *National Right to Work Committee*, 459 U.S. 197, 202 (1982), see also *Chamber of*  
3 *Commerce v. FEC*, 69 F.3d 600 (D.C.Cir.1995); *petition for rehearing denied*, 76 F.3d  
4 1234 (1996).<sup>5</sup>

5 Under the Act and Commission regulations a labor organization may not use  
6 general treasury funds to make political contributions or expenditures in connection with  
7 any Federal election. 2 U.S.C. §441b(a), 11 CFR 114.2(b). An exception to this  
8 prohibition provides that a labor organization may solicit contributions to its separate  
9 segregated fund ("SSF") from its membership. 2 U.S.C. §441b(b)(4)(A)(ii); 11 CFR  
10 114.5(g)(1), 114.1(c)(1), and 114.1 (j). The permissibility of a solicitation is dependent  
11 upon compliance by the labor organization and the SSF with the requirements of  
12 voluntariness set out in 2 U.S.C. §441b(b)(3) and 11 CFR 114.5(a)(1)–(a)(5). These  
13 include, but are not limited to, requiring that when a labor organization solicits  
14 contributions to its SSF, it must inform the members of the political purposes of the SSF,  
15 and of the member's right to refuse to contribute without any reprisal.<sup>6</sup> The regulations

---

<sup>5</sup> In 1993, the Commission revised its membership regulations to further define the term "members." However, the court in *Chamber* determined that portions of those regulations were invalid, concluding that they defined the term "member" in an unduly restrictive fashion. See *Chamber* at 604. (There were not four votes at the Commission to seek further judicial review of this decision.) The regulation at 11 CFR 114.1(c)(2), now invalid in the District of Columbia Circuit, had defined members to mean: all persons who are currently satisfying the requirements for membership in a membership association, who affirmatively accept the membership association's invitation to become a member, and who:

(i) Have some significant financial attachment to the membership association, such as a significant investment or ownership stake (but not merely the payment of dues);

(ii) Are required to pay on a regular basis a specific amount of dues that is predetermined by the association and are entitled to vote directly either for at least one member who has full participatory and voting rights on the highest governing body of the membership association, or for those who select at least one member of those on the highest governing body of the membership association; or

(iii) Are entitled to vote directly for all of those on the highest governing body of the membership association.

<sup>6</sup> Furthermore, when the solicitation suggests a guideline for contributions, it must make clear that the guidelines are merely suggestions, that the individual may contribute more or less than the guidelines

1 further indicate that a labor organization may use any method, if permitted by law to a  
2 corporation for its SSF fundraising, to facilitate the making of voluntary contributions to  
3 the labor organization's SSF. 11 CFR 114.5(f). Such a method may include checkoff  
4 systems or other periodic payment plans. 11 CFR 114.1(f).

5 Under 2 U.S.C. §432(c), the treasurer of a political committee that receives  
6 contributions made by individuals shall keep an account of: (1) all contributions received  
7 by or on behalf of the political committee; (2) the name and address of any person who  
8 makes any contribution in excess of \$50, together with the date and amount of such  
9 contribution by any person; and (3) the identification of any person who makes a  
10 contribution or contributions aggregating more than \$200 during a calendar year, together  
11 with the date and amount of any such contribution. See also 11 CFR 102.9(a)(1) and (2).  
12 In addition, a political committee must disclose in its periodic financial reports the  
13 amounts of all contributions received and must itemize contributor information for each  
14 donor whose contributions aggregate over \$200 in a calendar year. 2 U.S.C. §434(b)(2)  
15 and (b)(3).

## 16 APPLICATION TO NRLCA PROPOSAL

### 17 *Membership status in NRLCA*

18 The facts of your request indicate that NRLCA is a labor organization and qualifies as  
19 a membership association for purposes of the Act.<sup>7</sup> The Commission further concludes

---

suggest, and that the labor organization will not favor or disfavor anyone for amount of their contribution or the decision not to contribute. 11 CFR 114.5(a)(2).

<sup>7</sup> For example, Article III of NRLCA's constitution meets the requirements of the regulations at 11 CFR 100.8(b)(4)(iv)(A)(1) and 114.1(e)(1) by expressly providing for membership. Your request includes materials which indicate that NRLCA solicits members. See 11 CFR 100.8(b)(4)(iv)(A)(2) and 114.1(e)(1). The request materials also indicate compliance with the requirement that membership be expressly acknowledged.

1 that, based on the powers granted to it under the NRLCA bylaws, the national board is  
2 the highest governing body of NRLCA for purposes of the Commission regulations.  
3 Lastly, the Commission concludes that the retired active members that NRLCA wishes to  
4 solicit would be considered "members" for purposes of the Act and Commission  
5 regulations. The Commission notes that these members pay dues and all have the right to  
6 vote for the highest governing body, or for those who choose the members of that body.  
7 Thus, the membership criteria of NRLCA with respect to the retired active members  
8 would have satisfied even the more restrictive standard struck down in *Chamber*.<sup>8</sup>

9 *Permissibility of NRLCA proposal*

10 Since the membership class that would use the OPM annuity allotment process to  
11 make PAC contributions is restricted to those who qualify as members of NRLCA and  
12 are thus within its solicitable class, the Commission concludes that NRLCA may urge  
13 that the annuity allotment process to be used by those individuals for that purpose. Some  
14 modifications will, however, be necessary regarding the proposed article in the NRLCA  
15 magazine and in some other respects, in order to assure that your proposal complies with  
16 the Act and Commission regulations. These changes are discussed below.

17 The OPM allotment has safeguards to assure that the contributing NLRCA  
18 member has exclusive and complete control over all the steps necessary for use of the  
19 process to make a contribution which, in turn, is made from an account that represents the

---

<sup>8</sup> In its continuing review of membership issues following the *Chamber* decision, the Commission published a second notice of proposed rulemaking which may lead to regulation changes concerning the definition of membership. See FEC Notice of Proposed Rulemaking, published in the *Federal Register* on December 16, 1998, at pages 69224 through 69227. The conclusion of this opinion regarding membership could be modified or superseded by the adoption of any new regulations on membership criteria, but the opinion may be relied upon until any change is made. If a change is made, it will become effective on a

1 personal annuity entitlement of that member. Access to the member's annuity account  
2 requires entry of his unique account number, along with a personal identification number  
3 if the voice or phone keypad automated features of the OPM system are used. The  
4 system provides detailed instructions by which the retiree alone must take some  
5 deliberate and affirmative action to authorize the start of her monthly PAC contribution  
6 of virtually any amount (\$1 or higher dollar increments), to change the amount at a later  
7 time, and to terminate the contribution altogether. The fact that the contributing member  
8 does not make a handwritten signature on a paper document to authorize the allotment  
9 deduction is not significant in the circumstances presented.

10 In Advisory Opinion 1999-3, the Commission allowed the use of an electronic  
11 signature process, with unique identifier safeguards, to authorize payroll deductions for  
12 voluntary contributions to an SSF by the corporation's executive and administrative  
13 personnel. The opinion concluded that an electronic signature, like a traditional  
14 signature, is designed and functions as a unique identifier of the authorizing employee:  
15 This recent opinion also summarized relevant past opinions stating:

16 The Commission has previously interpreted its regulations to be consistent with  
17 contemporary technological innovations, including the maintenance of records in  
18 non-paper form and the performance of committee transactions, where the use of  
19 the technology would not compromise the intent of the Act or regulations. For  
20 example, in Advisory Opinion 1995-9, the Commission permitted a committee  
21 that used its web site to solicit contributions to accept these contributions using  
22 electronic means. This arrangement was permissible so long as complete and  
23 reliable records for recordkeeping, disclosure, and audit purposes were maintained  
24 and contributor data in a computer file were backed up in a way that permitted the  
25 committee to maintain either machine readable or paper copies for three years  
26 after the date on which it reported the contributions. In Advisory Opinion 1994-  
27 40, the Commission permitted a political committee to maintain its records on

---

specific date announced in the *Federal Register*. In addition, the Commission's written explanation and justification for any new rules will identify each past advisory opinion that is modified or superseded.

1 microfilm, rather than paper, so long as the necessary documentation of  
2 committee transactions was preserved and the microfilm records were legible and  
3 retrievable. In Advisory Opinion 1993-4, the Commission permitted a committee  
4 to pay its bills electronically through a computer driven billpayer service so long  
5 as adequate documentation, including receipts and invoices, were preserved.

6  
7 The OPM allotment process has both electronic and related telephone-based  
8 features that restrict annuity account access only to the contributor and authorized OPM  
9 personnel. Such features are materially indistinguishable from those considered and  
10 relied upon in Advisory Opinion 1999-3. Accordingly, the Commission reaches a similar  
11 conclusion in this opinion. This is predicated on assurances that OPM and PAC records  
12 will be maintained in a readable electronic record format to verify that annuity allotment  
13 authorizations were, in fact, submitted by those NRLCA members whose contributions  
14 are forwarded to the PAC; that such records will be retained for at least three years from  
15 the filing date of each PAC report on which a contribution via annuity allotment is  
16 disclosed; and that they would be made available to the Commission upon request. See  
17 11 CFR 102.9(c), 104.14(b)(1) & (b)(3), and Advisory Opinion 1999-3.<sup>9</sup>

18 *Magazine notice as solicitation*

19 The Commission notes the content of the proposed article in the NRLCA  
20 magazine. It provides information describing a "new" and "automatic deduction" process  
21 for making monthly contributions to the PAC and gives the reader OPM contact  
22 telephone numbers for the reader to call in order to start using the allotment system. The  
23 article also promotes use of the allotment process by stating that OPM "has designed [it]

---

<sup>9</sup> The Commission notes that OPM does not qualify as a "collecting agent" under Commission regulations at 11 CFR 102.6(b)(1). However, as an agency of the Federal government, OPM is not a "person" under the Act and thus its administration of the annuity allotment program would not represent a "contribution." See 2 U.S.C. §§431(11), 441a(a).

1 to be user friendly and provides maximum control to the retiree.” Given this content the  
2 article would be a solicitation for contributions to the PAC under past Commission  
3 opinions. See Advisory Opinions 1991-3, and 1988-2 and opinions cited therein. It  
4 provides vital information on what action a NRLCA member needs to take to use the  
5 annuity allotment system for PAC contributions and gives a telephone number to call for  
6 more information; the article also includes several positive references to the convenience  
7 and advantages of using the allotment system. Accordingly, as a solicitation for PAC  
8 contributions, the article must follow the requirements of 11 CFR 114.5(a)(1)--(5) and  
9 inform the persons solicited that the PAC has political purposes and that they have the  
10 right to refuse to contribute without any reprisal. (If other articles in the NRLCA  
11 magazine contain guidelines as to an amount that retirees should contribute, they must  
12 also make clear that “the guidelines are merely suggestions” and that other amounts may  
13 be contributed instead. See the regulations at 11 CFR 114.5(a)(2) for all the disclosures  
14 that need to be provided when contribution guidelines are suggested in a solicitation.)

15 The fact that the article represents a contribution solicitation for the PAC also  
16 means that it may only be distributed to those who are qualified members of NRLCA or  
17 who are otherwise within its restricted class for contribution solicitation purposes.

18 As noted above, the magazine apparently is distributed to approximately 450  
19 persons who are either not members under any membership category set forth in the  
20 NRLCA governing documents, or whose membership status is not reached in this opinion  
21 because those within it are not receiving a retirement annuity from OPM. Such persons  
22 should not be solicited for contributions to the PAC. Notwithstanding this general rule,  
23 the Commission has, under limited circumstances, permitted the distribution of

1 contribution solicitation messages in journals or magazines that reach those who are  
2 outside the solicitable class of the organization that produces the publication. See, for  
3 example, Advisory Opinions 1994-21, 1981-7, 1980-139, 1979-50, and 1978-97. In  
4 summary, these opinions indicate that some circulation of the publication (containing the  
5 contribution solicitation message) outside the solicitable class may be permitted under  
6 several conditions:

- 7 (a) the article must include an explicit caveat stating that contributions will be  
8 screened and those from persons who are not solicitable will be returned;  
9 (b) this declared return or refund policy must be implemented by the PAC; and  
10 (c) both the actual number and the percentage of unsolicitable persons who  
11 receive the publication must be incidental or *de minimus*, as compared to the  
12 entire circulation of the journal.

13 In this situation it appears that approximately 450 persons (of a total 97,000) are  
14 potential recipients of the NRLCA magazine who are outside the solicitable class of the  
15 PAC. Under the cited opinions this number would be incidental and *de minimus*, both in  
16 absolute terms and as a percentage of the total circulation (less than 1% of 97,000).  
17 Accordingly, the article with the necessary content modifications described above, may  
18 be included in the NRLCA magazine. One required modification would be to include an  
19 explicit statement that the PAC will return contributions made in response to the article  
20 by individuals who are not active retiree members of NRLCA ( for example, PAC  
21 contributions received from other individuals who receive annuities from OPM will be  
22 returned or refunded to them).

**1 Recordkeeping requirements**

**2 The procedure for the receipt of annuity allotment contributions by the PAC is**  
**3 described in an OPM letter and related documents included in your request. The letter**  
**4 states “[s]ince all payments will be recurring, electronic payments, there will no longer be**  
**5 a need to periodically bill your member/contributor or process their payments by check.**  
**6 Each month, your bank will automatically receive the remittance and pass on the**  
**7 supporting data to you.” OPM documents also explain that “Each payment will be**  
**8 forwarded to you as a lump sum amount. The individual detail is provided in the addenda**  
**9 records.”**

**10 The Commission concludes that your proposal will satisfy the recordkeeping**  
**11 requirements of the Act and Commission regulations provided that the PAC obtains:**  
**12 (through the addenda as described by OPM) the pertinent information that identifies each**  
**13 of the active member retirees who choose to contribute through the annuity allotment**  
**14 process. This information must be presented in a manner that permits the PAC and**  
**15 NRLCA to distinguish between amounts that represent a retired member’s dues and sums**  
**16 that represent contributions to the PAC. Since you have indicated that NRLCA and the**  
**17 PAC already maintain separate bank accounts, it appears that allotment proceeds for each**  
**18 purpose can be readily segregated and deposited timely in the proper account. The**  
**19 information must also include sufficient details so that the PAC can fulfill the**  
**20 recordkeeping and reporting provisions at 2 U.S.C. §§432(c) and 434(b). See 11 CFR**  
**21 102.9(a) and 104.3. In order to report these contributions correctly, the PAC should note**  
**22 when it must itemize the contributions. If a contribution from an active retiree member,**  
**23 either via the annuity deduction or other means, when added to his or her previous**

1 contributions, exceeds \$200 for the calendar year, the PAC must disclose the name,  
2 address, occupation, and employer (if any) of the contributor, along with the date of  
3 receipt of the contribution, on the next report covering the period in which the  
4 contribution was received. Each additional contribution from that same contributor in the  
5 same calendar year shall also be so itemized. 11 CFR 104.8(b). See Advisory Opinion  
6 1989-26.

7 This response constitutes an advisory opinion concerning application of the Act  
8 and Commission regulations to the specific transaction or activity set forth in your  
9 request. 2 U.S.C. §437f.

10 Sincerely,

11  
12 Scott E. Thomas  
13 Chairman

14  
15 Enclosures (AOs 1999-3, 1995-9, 1994-40, 1994-21, 1993-4, 1991-3, 1989-26, 1988-2,  
16 1981-7, 1980-139, 1979-50, and 1978-97)  
17