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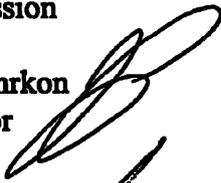
April 27, 1999

MEMORANDUM

AGENDA ITEM
For Meeting of: 4-29-99

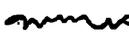
SUBMITTED LATE

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: Revised Draft Advisory Opinion 1999-6

Attached is a revised draft of the subject opinion for the Commission's further consideration on the April 29 agenda. This revised draft replaces Agenda Document No. 99-44 which was discussed on April 21.

The changes in this draft are made pursuant to the Commission's direction that OGC should contact OPM to obtain further information about the underlying records created and retained by OPM when an annuitant, who is a qualified member of a labor organization (NRLCA), uses the OPM telephone authorization process to begin, modify or terminate his/her allotment of a PAC contribution. OPM has provided pertinent information that is summarized in new footnote 1, page 2.

OGC has also added footnotes 3 (page 3), 11 (page 10), and 13 (page 13) to cover other points raised in the Commission's discussion. All four of the new footnotes are in underlined italics. In addition, there is a single word deletion edit at page 8, line 5.

Attachment

DRAFT

1 ADVISORY OPINION 1999-6
2
3 Ken Parmelee, Vice President
4 National Rural Letter Carriers' Association
5 1630 Duke Street, 4th 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.¹ 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.² 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

¹ OPM has informed the Commission that computer-based (and retrievable) records are created and retained for each call made by a retiree to authorize or modify or terminate a PAC contribution made under the allotment process. These OPM computer records are kept for a period of ??? years from the date of each call made by a retiree for this purpose. OPM has further indicated that these records would be available to the Commission if the need to review them arises in the context of a Commission investigation or audit involving the PAC or NRLCA.

² 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 members of NRLCA.³ You characterize the role of NRLCA as very limited in that it
2 would publicize the option of making a PAC contribution in this manner to its retiree
3 members. NRLCA proposes to do this by publishing an article in its membership
4 magazine that would provide basic information as to how a retiree could call OPM's toll
5 free phone number to authorize the retiree's PAC contributions via the allotment system.
6 You have included the text of a proposed or sample article that NRLCA may use.⁴

7 *Membership rights within NRLCA*

8 You have also submitted the NRLCA constitution and bylaws which delineate the
9 classes of members within the organization. These classes are active members, who may
10 also be retired members, associate members, and honorary members. NRLCA
11 Constitution, Article III sections 1 and 2. Although there are other classes of members,
12 you have limited NRLCA's request to those active retired members who receive an
13 annuity from OPM.⁵ Active retired members pay dues to the organization and receive

³ *As is discussed elsewhere in this opinion, the PAC and NRLCA must take appropriate steps to assure that only qualified members are solicited for contributions to the PAC through the OPM allotment process. This means that PAC contributions made through annuity allotments of Federal or USPS retirees who are not qualified NRLCA members should be rejected and returned to the contributor. In addition, the PAC should take the necessary action to assure that allotment authorizations for PAC contributions from such retirees are canceled by OPM. See 11 CFR 114.5(h) [requiring labor organizations and corporations to take immediate corrective action upon discovery of "accidental or inadvertent" contribution solicitations made beyond the class of individuals who are within the permissible category of PAC solicitees].*

⁴ 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.

⁵ 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

1 voting rights through membership in the various State associations. *Id.*, sections 2 and 3.
2 The bylaws indicate that the NRLCA magazine is sent to both active and associate
3 members. *Id.*, section 6.⁶

4 Voting rights in the organization consist of the power to select the delegates sent
5 by a voting member's State association to the NRLCA's national convention. NRLCA
6 Constitution, Article III, section 3; and Bylaws, Article XV, section 1 and 2. These
7 delegates elect the NRLCA officers who consist of a president, vice-president, secretary-
8 treasurer, director of labor relations, and an executive committee made up of four other
9 individuals. NRLCA Constitution, Article V, section 1. These eight individuals also
10 form the national board of the NRLCA. *Id.*, section 2.

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

17 **ACT AND COMMISSION REGULATIONS**

18 Under Commission regulations, the term "labor organization" means any
19 organization of any kind, or any agency or employee representative committee or plan, in
20 which employees participate and which exists for the purpose, in whole or in part, of

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.

⁶ 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 dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours
2 of employment, or conditions of work. See 11 CFR 114.1(d). As one type of
3 membership association, a labor organization must also possess certain attributes. It must
4 (i) expressly provide for "members" in its articles and bylaws; (ii) expressly solicit
5 members; and (iii) expressly acknowledge the acceptance of membership, such as by
6 sending a membership card or inclusion on a membership newsletter list. 11 CFR
7 100.8(b)(4)(iv)(A), 114.1(e)(1).

8 On the question of what constitutes membership for purposes of the Act, the
9 Supreme Court has suggested that members are to be defined, at least in part, by analogy
10 to stockholders of business corporations and members of labor unions. See *FEC v.*
11 *National Right to Work Committee*, 459 U.S. 197, 202 (1982), see also *Chamber of*
12 *Commerce v. FEC*, 69 F.3d 600 (D.C.Cir.1995); *petition for rehearing denied*, 76 F.3d
13 1234 (1996).⁷

14 Under the Act and Commission regulations a labor organization may not use
15 general treasury funds to make political contributions or expenditures in connection with
16 any Federal election. 2 U.S.C. §441b(a), 11 CFR 114.2(b). An exception to this

⁷ 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(e)(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

1 prohibition provides that a labor organization may solicit contributions to its separate
2 segregated fund ("SSF") from its membership. 2 U.S.C. §441b(b)(4)(A)(ii); 11 CFR
3 114.5(g)(1), 114.1(c)(1), and 114.1 (j). The permissibility of a solicitation is dependent
4 upon compliance by the labor organization and the SSF with the requirements of
5 voluntariness set out in 2 U.S.C. §441b(b)(3) and 11 CFR 114.5(a)(1)--(a)(5). These
6 include, but are not limited to, requiring that when a labor organization solicits
7 contributions to its SSF, it must inform the members of the political purposes of the SSF,
8 and of the member's right to refuse to contribute without any reprisal.⁸ The regulations
9 further indicate that a labor organization may use any method, if permitted by law to a
10 corporation for its SSF fundraising, to facilitate the making of voluntary contributions to
11 the labor organization's SSF. 11 CFR 114.5(l). Such a method may include checkoff
12 systems or other periodic payment plans. 11 CFR 114.1(f).

13 Under 2 U.S.C. §432(c), the treasurer of a political committee that receives
14 contributions made by individuals shall keep an account of: (1) all contributions received
15 by or on behalf of the political committee; (2) the name and address of any person who
16 makes any contribution in excess of \$50, together with the date and amount of such
17 contribution by any person; and (3) the identification of any person who makes a
18 contribution or contributions aggregating more than \$200 during a calendar year, together
19 with the date and amount of any such contribution. See also 11 CFR 102.9(a)(1) and (2).
20 In addition, a political committee must disclose in its periodic financial reports the

association.

⁸ 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 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).

1 amounts of all contributions received and must itemize contributor information for each
2 donor whose contributions aggregate over \$200 in a calendar year. 2 U.S.C. §434(b)(2)
3 and (b)(3).

4 **APPLICATION TO NRLCA PROPOSAL**

5 *Membership status in NRLCA*

6 The facts of your request indicate that NRLCA is a labor organization and qualifies as
7 a membership association for purposes of the Act.⁹ The Commission further concludes
8 that, based on the powers granted to it under the NRLCA bylaws, the national board is
9 the highest governing body of NRLCA for purposes of the Commission regulations.
10 Lastly, the Commission concludes that the retired active members that NRLCA wishes to
11 solicit would be considered "members" for purposes of the Act and Commission
12 regulations. The Commission notes that these members pay dues and all have the right to
13 vote for the highest governing body, or for those who choose the members of that body.
14 Thus, the membership criteria of NRLCA with respect to the retired active members
15 would have satisfied even the more restrictive standard struck down in *Chamber*.¹⁰

⁹ 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.

¹⁰ 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 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 *Permissibility of NRLCA proposal*

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

9 The OPM allotment has safeguards to assure that the contributing NLRCA
10 member has exclusive and complete control over all the steps necessary for use of the
11 process to make a contribution which, in turn, is made from an account that represents the
12 personal annuity entitlement of that member. Access to the member's annuity account
13 requires entry of his unique account number, along with a personal identification number
14 if the voice or phone keypad automated features of the OPM system are used. The
15 system provides detailed instructions by which the retiree alone must take some
16 deliberate and affirmative action to authorize the start of her monthly PAC contribution
17 of virtually any amount (\$1 or higher dollar increments), to change the amount at a later
18 time, and to terminate the contribution altogether. The fact that the contributing member
19 does not make a handwritten signature on a paper document to authorize the allotment
20 deduction is not significant in the circumstances presented.

21 In Advisory Opinion 1999-3, the Commission allowed the use of an electronic
22 signature process, with unique identifier safeguards, to authorize payroll deductions for
23 voluntary contributions to an SSF by the corporation's executive and administrative

1 personnel. The opinion concluded that an electronic signature, like a traditional
2 signature, is designed and functions as a unique identifier of the authorizing employee.

3 This recent opinion also summarized relevant past opinions stating:

4 The Commission has previously interpreted its regulations to be consistent with
5 contemporary technological innovations, including the maintenance of records in
6 non-paper form and the performance of committee transactions, where the use of
7 the technology would not compromise the intent of the Act or regulations. For
8 example, in Advisory Opinion 1995-9, the Commission permitted a committee
9 that used its web site to solicit contributions to accept these contributions using
10 electronic means. This arrangement was permissible so long as complete and
11 reliable records for recordkeeping, disclosure, and audit purposes were maintained
12 and contributor data in a computer file were backed up in a way that permitted the
13 committee to maintain either machine readable or paper copies for three years
14 after the date on which it reported the contributions. In Advisory Opinion 1994-
15 40, the Commission permitted a political committee to maintain its records on
16 microfilm, rather than paper, so long as the necessary documentation of
17 committee transactions was preserved and the microfilm records were legible and
18 retrievable. In Advisory Opinion 1993-4, the Commission permitted a committee
19 to pay its bills electronically through a computer driven billpayer service so long
20 as adequate documentation, including receipts and invoices, were preserved.

21
22 The OPM allotment process has both electronic and related telephone-based
23 features that restrict annuity account access only to the contributor and authorized OPM
24 personnel. Such features are materially indistinguishable from those considered and
25 relied upon in Advisory Opinion 1999-3. Accordingly, the Commission reaches a similar
26 conclusion in this opinion. This is predicated on assurances that OPM and PAC records
27 will be maintained in a readable electronic record format to verify that annuity allotment
28 authorizations were, in fact, submitted by those NRLCA members whose contributions
29 are forwarded to the PAC; that such records will be retained for at least three years from
30 the filing date of each PAC report on which a contribution via annuity allotment is

1 disclosed; and that they would be made available to the Commission upon request.¹¹ See
2 11 CFR 102.9(c), 104.14(b)(1) & (b)(3), and Advisory Opinion 1999-3.¹²

3 *Magazine notice as solicitation*

4 The Commission notes the content of the proposed article in the NRLCA
5 magazine. It provides information describing a “new” and “automatic deduction” process
6 for making monthly contributions to the PAC and gives the reader OPM contact
7 telephone numbers for the reader to call in order to start using the allotment system. The
8 article also promotes use of the allotment process by stating that OPM “has designed [it]
9 to be user friendly and provides maximum control to the retiree.” Given this content the
10 article would be a solicitation for contributions to the PAC under past Commission
11 opinions. See Advisory Opinions 1991-3, and 1988-2 and opinions cited therein. It
12 provides vital information on what action a NRLCA member needs to take to use the
13 annuity allotment system for PAC contributions and gives a telephone number to call for
14 more information; the article also includes several positive references to the convenience
15 and advantages of using the allotment system. Accordingly, as a solicitation for PAC
16 contributions, the article must follow the requirements of 11 CFR 114.5(a)(1)–(5) and
17 inform the persons solicited that the PAC has political purposes and that they have the
18 right to refuse to contribute without any reprisal. (If other articles in the NRLCA

¹¹ As it held in Advisory Opinion 1999-3, the Commission notes that OPM records of retiree allotments to the PAC by NRLCA members must be retained for at least three years from the filing date of each PAC report on which a contribution pursuant to that authorized allotment is disclosed. See 11 CFR 104.14(b)(3). Such records must be maintained in a retrievable manner so they are available for Commission review in the event of an audit or investigation. See 11 CFR 104.14(b) and Advisory Opinion 1999-3. See footnote 1.

¹² 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

1 magazine contain guidelines as to an amount that retirees should contribute, they must
2 also make clear that "the guidelines are merely suggestions" and that other amounts may
3 be contributed instead. See the regulations at 11 CFR 114.5(a)(2) for all the disclosures
4 that need to be provided when contribution guidelines are suggested in a solicitation.)

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

8 As noted above, the magazine apparently is distributed to approximately 450
9 persons who are either not members under any membership category set forth in the
10 NRLCA governing documents, or whose membership status is not reached in this opinion
11 because those within it are not receiving a retirement annuity from OPM. Such persons
12 should not be solicited for contributions to the PAC. Notwithstanding this general rule,
13 the Commission has, under limited circumstances, permitted the distribution of
14 contribution solicitation messages in journals or magazines that reach those who are
15 outside the solicitable class of the organization that produces the publication. See, for
16 example, Advisory Opinions 1994-21, 1981-7, 1980-139, 1979-50, and 1978-97. In
17 summary, these opinions indicate that some circulation of the publication (containing the
18 contribution solicitation message) outside the solicitable class may be permitted under
19 several conditions:

20 (a) the article must include an explicit caveat stating that contributions will be
21 screened and those from persons who are not solicitable will be returned;

1 (b) this declared return or refund policy must be implemented by the PAC; and

2 (c) both the actual number and the percentage of unsolicitable persons who

3 receive the publication must be incidental or *de minimus*, as compared to the

4 entire circulation of the journal.

5 In this situation it appears that approximately 450 persons (of a total 97,000) are
6 potential recipients of the NRLCA magazine who are outside the solicitable class of the
7 PAC. Under the cited opinions this number would be incidental and *de minimus*, both in
8 absolute terms and as a percentage of the total circulation (less than 1% of 97,000).

9 Accordingly, the article with the necessary content modifications described above, may
10 be included in the NRLCA magazine. One required modification would be to include an
11 explicit statement that the PAC will return contributions made in response to the article
12 by individuals who are not active retiree members of NRLCA (for example, PAC
13 contributions received from other individuals who receive annuities from OPM will be
14 returned or refunded to them).

15 *Recordkeeping requirements*

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

1 The Commission concludes that your proposal will satisfy the recordkeeping
2 requirements of the Act and Commission regulations provided that the PAC obtains
3 (through the addenda as described by OPM) the pertinent information that identifies each
4 of the active member retirees who choose to contribute through the annuity allotment
5 process. This information must be presented in a manner that permits the PAC and
6 NRLCA to distinguish between amounts that represent a retired member's dues and sums
7 that represent contributions to the PAC. Since you have indicated that NRLCA and the
8 PAC already maintain separate bank accounts, it appears that allotment proceeds for each
9 purpose can be readily segregated and deposited timely in the proper account. The
10 information must also include sufficient details so that the PAC can fulfill the
11 recordkeeping and reporting provisions at 2 U.S.C. §§432(c) and 434(b). See 11 CFR
12 102.9(a) and 104.3. In order to report these contributions correctly, the PAC should note
13 when it must itemize the contributions. If a contribution from an active retiree member,
14 either via the annuity deduction or other means, when added to his or her previous
15 contributions, exceeds \$200 for the calendar year, the PAC must disclose the name,
16 address, occupation, and employer (if any) of the contributor, along with the date of
17 receipt of the contribution, on the next report covering the period in which the
18 contribution was received.¹³ Each additional contribution from that same contributor in

¹³ The PAC cannot assume that contributions in excess of \$200 in a calendar year from retired members of NRLCA are made by individuals who have no current employer or occupation. As the Act makes clear, contributions made at that level by an individual to any political committee shall include the contributor's name, mailing address, occupation and name of employer. 2 U.S.C. §§431(13), 434(b)(3)(A). Furthermore, the Act requires that the treasurer of a political committee show that "best efforts have been used to obtain, maintain, and submit the information" which is required by the Act. 2 U.S.C. §432(i); see Commission regulations at 11 CFR 104.7(b).

1 the same calendar year shall also be so itemized. 11 CFR 104.8(b). See Advisory
2 Opinion 1989-26.

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

6 Sincerely,

7
8 Scott E. Thomas
9 Chairman

10
11 Enclosures (AOs 1999-3, 1995-9, 1994-40, 1994-21, 1993-4, 1991-3, 1989-26, 1988-2,
12 1984-55, 1981-7, 1980-139, 1979-50, and 1978-97)
13