



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2000-04

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Dear Mr. Cooper:

This responds to your letter dated January 21, 2000, on behalf of the National Association of Federal Credit Unions (“NAFCU”), requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended (“the Act”), and Commission regulations to contributions to NAFCU/PAC (“the PAC”) by share account holders in NAFCU’s member credit unions and the role of the credit unions in the contribution process.

Background and Proposal

NAFCU is a trade association organized as a non-profit corporation in the State of California and is tax exempt under 26 U.S.C. §501(c)(6). You state that it was organized to extend the utility of Federal credit unions to consumers and to improve business conditions for its members. NAFCU has approximately 1,100 members, almost all of which are Federally-chartered credit unions organized under the auspices of the Federal Credit Union Act, 12 U.S.C. §1751, *et seq.* Moreover, State chartered credit unions that are Federally insured and that were members of NAFCU at the time of conversion to a State charter may remain as members of NAFCU. As part of your request, you have enclosed NAFCU’s bylaws and the standard bylaws issued by the National Credit Union

Administration (“NCUA”) for Federal credit unions, which is representative of the bylaws of NAFCU’s credit union members.

NAFCU has a separate segregated fund (“SSF”), NAFCU/PAC, which is a registered multicandidate political committee.¹ The PAC proposes to raise contributions through the “Invest in Democracy Fundraising Program.” NAFCU would solicit the share account holders (i.e., members) of the incorporated credit unions that are members of NAFCU.² You state that a procedure would be developed so that any account holders that are foreign nationals, corporations, or individual sole proprietors who are Federal contractors would not be solicited. Participating credit unions would sign prior approval, solicitation authorization forms before any solicitation by the PAC, and member credit unions would not be allowed to give solicitation approval if they have already given it to another trade association. Subsequently, individual account holders desiring to contribute would sign automatic account transfer forms instructing their respective credit unions to transfer a designated amount from their share account to the PAC. The credit union would establish debits from a member’s individual share account and transmit the funds directly to the PAC; procedures would be established for timely transmittal to the PAC under 11 CFR 102.8. Prior to making an automatic deduction, the credit unions will devise procedures to review the account to determine that: the account balance is sufficient to support the deduction; the account belongs to an individual; and that the account holder is not in any one of the three prohibited contributor categories listed above.

You ask: (i) whether the PAC may solicit voluntary contributions from individual share account holders of NAFCU’s incorporated member credit unions; (ii) whether NAFCU’s member credit unions may defray the expenses of deducting PAC contributions from the credit union accounts of the individual share account holders; and (iii) whether automatic deductions may be made from the share account holder’s account.

Act and Commission regulations

In order to respond to the questions, the Commission must analyze the nature of NAFCU as a trade association of the member credit unions, the ability of NAFCU to solicit contributions for the PAC from the share account holders of the credit unions, and the ability of the member credit unions to participate in the collection of contributions to the PAC. The provisions discussed below are applicable.

In an exception to the general prohibition on corporate contributions, the Act and Commission regulations provide that a corporation, including an incorporated trade association, may use general treasury funds for the establishment, administration, and

¹ NAFCU/PAC filed its statement of organization with the Commission in 1976.

² The standard bylaws for a Federal credit union indicate that they are corporations chartered under the laws of the United States. The Commission assumes that those few members of NAFCU that are State chartered are also incorporated.

solicitation of contributions to its SSF. 2 U.S.C. §441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii) and 114.5(b). An organization such as an incorporated trade association, which is not itself a political committee, but which directly or indirectly establishes, administers, or financially supports a political committee is a “connected organization” of that committee. 2 U.S.C. §431(7); 11 CFR 100.6(a). A connected organization or its subsidiary, branch, division, department or local unit is permitted to act as a “collecting agent” for the SSF and thus may collect and transmit contributions to the SSF without thereby becoming a political committee. 11 CFR 102.6(b)(1)(ii) and (iii), and 102.6(b)(2).³ The collecting agent may pay any and all costs incurred in soliciting and transmitting contributions to the SSF. 11 CFR 102.6(c)(2)(i).

The connected organization and its SSF are subject to restrictions as to the personnel who may be solicited for contributions to the SSF. 2 U.S.C. §441b(b)(4)(A), (C), and (D); 11 CFR 114.5(g)(1), 114.7(a), and 114.8(c). Specifically, an incorporated trade association and its SSF may solicit the association’s executive and administrative personnel, and the families of such personnel. They may also solicit the stockholders and executive and administrative personnel, and the families of such stockholders and personnel, of the member corporations that separately and specifically approve the solicitations and that have not approved a solicitation by any other trade association for the same calendar year. Moreover, they may solicit members of the association that are not incorporated, without any need to seek a prior approval. 11 CFR 114.7(a), 114.7(c), and 114.8(c). The requirements for separate and specific approval are described in 11 CFR 114.8(d) and (e).

Under Commission regulations, a trade association is:

generally a membership organization of persons engaging in a similar or related line of commerce, organized to promote and improve business conditions in that line of commerce and not to engage in a regular business of a kind ordinarily carried on for profit, and no part of the net earnings of which inures to the benefit of any member.

11CFR 114.8(a). Commission regulations define a “membership organization” as a trade association, cooperative, or corporation without capital stock that:

- (i) Is composed of members, some or all of whom are vested with the power and authority to operate or administer the organization, pursuant to the organization’s articles, bylaws, constitution or other formal organizational documents;
- (ii) Expressly states the qualifications and requirements for membership in its articles, bylaws, constitution or other formal organizational documents;

³ The two other permissible categories of collecting agents are a committee affiliated with the recipient SSF and a local, national, or international union collecting contributions for the SSF of a labor federation with which the union is affiliated. 11 CFR 102.6(b)(1)(i) and (iv).

- (iii) Makes its articles, bylaws, constitution, or other formal organizational documents available to its members upon request;
- (iv) Expressly solicits persons to become members;
- (v) Expressly acknowledges the acceptance of membership, such as by sending a membership card or including the member's name on a membership newsletter list; and
- (vi) Is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office.

11 CFR 114.1(e)(1)(i)-vi); see also 11 CFR 100.8(b)(4)(iv)(A)(1)-(6).

The term "members" includes all person who are currently satisfying the requirements for membership in a membership organization, affirmatively accept the membership organization's invitation to become a member, and either:

- (i) Have some significant financial attachment to the membership organization, such as a significant investment or ownership stake; or
- (ii) Pay membership dues at least annually, of a specific amount predetermined by the organization; or
- (iii) Have a significant organizational attachment to the membership organization which includes: affirmation of membership on at least an annual basis; and direct participatory rights in the governance of the organization. For example, such rights could include the right to vote directly or indirectly for at least one individual on the membership organization's highest governing board; the right to vote directly for organization officers; the right to vote on policy questions where the highest governing body of the membership organization is obligated to abide by the results; the right to approve the organization's annual budget; or the right to participate directly in similar aspects of the organization's governance.

11 CFR 114.1(e)(2)(i)-(iii); see also 11 CFR 100.8(b)(4)(iv)(B)(1)-(3).

NAFCU as a membership organization and membership rights

Membership in NAFCU is voluntary and open to any Federally-chartered credit union, as well as the previously described grandfathered State chartered credit unions. NAFCU Bylaws, Article I, §1. Any credit union eligible for membership in NAFCU becomes a member upon making a written application and upon payment of the prescribed dues amount. Bylaws, Article I, §2. Thereafter, the members pay annual dues. See Bylaws, Article XI. You state that NAFCU expressly solicits persons to become members. NAFCU expressly acknowledges the acceptance of membership by sending each new member a "new member packet" explaining the benefits of membership, as well as a plaque, a decal, and a member logo that can be included in credit union publications. You also state that NAFCU makes its articles of incorporation

and bylaws available to its members upon request. See 11 CFR 114.1(e)(1)(ii), (iii), (iv), and (v), and 114.1(e)(2)(ii).

The management of NAFCU is vested in its board of directors, which consists of six at-large members and one member from each of six geographic regions. Bylaws, Article VI, §§1 and 3. To be eligible for the board, a person must be a board member or CEO of a Federal credit union that is a NAFCU member. Bylaws, Article VI, §2. Directors at-large are elected by a mail ballot of the full membership of NAFCU. Regional directors are elected by a mail ballot of the members in their respective regions. Delegates of the members attend an annual meeting, as well as any special meetings called by the board for the consideration of a specific subject; some matters requiring a membership vote may be voted on by mail. Bylaws, Article IV and V. See 11 CFR 114.1(e)(1)(i) and 114.1(e)(2)(iii).

The foregoing information and explanations, as well as the above-stated purpose of NAFCU, indicate that NAFCU qualifies as a membership organization under Commission regulations. It satisfies the six defining criteria at 11 CFR 114.1(e)(1). Moreover, the credit unions in NAFCU satisfy the definition of “member” at 11 CFR 114.1(e)(2) in that they affirmatively respond to NAFCU’s solicitations for membership and pay dues annually. In view of NAFCU’s principal purpose of improving business conditions for Federal credit unions, it also qualifies as a trade association under 11 CFR 114.8(a).

Rights of members within credit unions

You state that a credit union is a member-owned, member-controlled, not for profit cooperative financial institution formed to permit groups of persons to save, borrow, and obtain related financial services. The member Federal credit unions are corporations chartered under the laws of the United States. The standard bylaws provide for a membership application process and for approval by a specific authority. Standard Bylaws, Article II. The members are invited to an annual meeting of the credit union. Bylaws, Article IV. The bylaws also provide for a board of directors, consisting entirely of members of the credit union, that “has the general direction and control of the affairs of [the] credit union and is responsible for performing all the duties customarily performed by boards of directors.” Bylaws, Article VI, §§1 and 6. This board is elected by the members of the credit union who each have one vote. Bylaws, Article V, §5.

You describe the financial interest of the members. The members are “share account holders.” To be accepted into membership, a person must subscribe to at least one share of the credit union, pay for the initial installment on that share, and, if the board requires, pay a uniform entrance fee. Bylaws, Article II, §2. There are provisions requiring the continued maintenance of one share at par value in the account. Article III, §§1 and 3. Share account holders may also receive dividends. Article XII. The bylaws also include provisions for borrowing by the member and the related need to maintain a certain balance if delinquent, the holding of shares in trust, and fees on excessive share

withdrawals. Article III. You note that the NCUA's Accounting Manual instructs Federally-insured credit unions that "shares function as equity and represent ownership" and that, as such, should be "classified as equity in the credit union's Statement of Financial Condition."

The Act and Commission regulations expressly permit the solicitation of the shareholders of a member corporation of a trade association for contributions to the trade association's SSF but do not specifically address the solicitation of "members" of non-stock corporate members of trade associations. 2 U.S.C. §441b(b)(4)(D); 11 CFR 114.8(c). As illustrated above, the members of the credit unions, however, have rights and interests that correspond closely to those of shareholders. They have the governance rights described above coupled with equity ownership of the credit union in the form of shares (and certain contingent financial obligations, such as in a borrowing situation).⁴ The Commission concludes, therefore, that the members of NAFCU's member credit unions should be treated as stockholders for purposes of solicitation for contributions to the PAC, and not merely as members or depositors.

Responses to questions

As indicated above, the PAC may solicit contributions from the individual members of the incorporated member credit unions. A response as to the role of the credit unions in the deduction of PAC contributions from the share accounts and the expenses to screen the contributions is, in part, affected by whether the credit union may act as a collecting agent for the PAC. As a collecting agent, a credit union would be able to perform all of the proposed collecting functions without making a corporate contribution to the PAC. In order to be a collecting agent, a credit union would have to be a local unit or other type of affiliate of NAFCU. As such, it would have to fit within the class of related organizations described in 11 CFR 100.5(g)(2) and by application of the categories in 11 CFR 100.5(g)(3) or the factors at 11 CFR 100.5(g)(4). In the absence of further information as to all aspects of the relationship of member credit unions to NAFCU, the Commission cannot presently conclude that the credit unions would be

⁴ You note that, in an opinion issued to the Credit Union National Association ("CUNA"), the Commission addressed the rights of members in two of its member credit unions, and concluded that the rights of the members were sufficiently analogous to stockholders in stock corporations to permit solicitation, under 11 CFR 114.8(c), by CUNA's SSF. You point out that those two credit unions are also members of NAFCU. Advisory Opinion 1998-19. That opinion also discussed Commission opinions analogizing a member's equity interest in a nonstock corporation and the interest of a shareholder in an incorporated savings and loan association to stockholders' rights in a stock corporation. See Advisory Opinions 1984-63 and 1982-12.

more than just members, but would also qualify as affiliates.⁵ Therefore, the individual credit unions cannot act as collecting agents.⁶

Although the credit unions may not act as collecting agents, they may perform the proposed functions for other reasons and under certain conditions. The credit union functions as a depository institution (or bank) for its members. Any cost of the actual deduction and transfer of a pre-authorized amount from the member's account would be no different, in effect, from the functions that a contributor's bank would perform in deducting the amount of a contribution check from the bank account and transmitting the funds to the bank of the recipient political committee.

In addition to these typical depository, collection, and fund transmittal functions, however, the credit union will assign some of its employees to perform the screening functions described above. These include assuring that contributions are not deducted from accounts that would fall below the balances required to be maintained under the credit union's rules, and that the accounts are owned only by those persons who may lawfully make contributions under the Act and regulations. These activities may be treated, in the manner described below, as either legal and accounting services provided by the employees of the credit union or as exempt administrative costs that may be paid by NAFCU.

Under the Act and Commission regulations, legal and accounting services rendered to a political committee are not contributions if the person paying for such services is the regular employer of the individual rendering the services and if such services are solely to ensure compliance with the Act or the presidential funding provisions of title 26. 2 U.S.C. §431(8)(B)(ix)(II); 11 CFR 100.7(b)(14). The political committee must report, as a memo entry on Schedule A, the amounts paid for these services by the employer, the date(s) such services were performed, and the name of each person performing such services. 11 CFR 104.3(h). The amounts expended by the credit unions for setting up and operating the screening functions, including the payments of salary and other compensation to the employees, would be exempt from the definition of contribution, but would have to be reported by the PAC. NAFCU or the PAC will therefore have to contact each credit union whose employees are providing such services to ascertain the costs of such services and the other information required by 11 CFR

⁵ See, e.g., Advisory Opinion 1985-37, where the Commission concluded that a local chamber of commerce was merely an organizational member of the State chamber, did not qualify as a local unit, and could not therefore act as a collecting agent. See also Advisory Opinions 1997-9 and 1989-3 where the Commission concluded that member firms of a member organization and corporate members of a trade association did not qualify as collecting agents.

⁶ Your situation is also distinguishable from that presented in Advisory Opinion 1998-19 where the Commission considered a program in which member credit unions of a federated national credit union association would participate in debiting the accounts of their share account holders for contributions to the SSFs of the national association or the association's State leagues. The Commission concluded that the credit unions would qualify as local units, reasoning that "the situation of a federation of trade associations is distinguishable from the customary trade association structure since, by definition, the federation presents a highly integrated structure with multiple tiers of organizational membership and related governance powers linking the tiers." Under the facts you have presented, NAFCU is not a federation of trade associations.

104.3(h). The Commission is mindful, however, of the quantity of information that might be required if a large number of credit unions (out of the 1100 members) participated in these contribution screening activities. Due to the circumstances presented, where a very extensive amount of detailed information would need to be reported in the described memo entries, the Commission will allow a modification with respect to NAFCU's situation. Instead of reporting these costs with each report, the PAC will only be required to report them on its year end report. On that report, NAFCU shall disclose the total yearly amount spent by the credit unions whose employees provided such services, and the name of each such credit union. For each of the credit unions, the PAC should also disclose the time period in which such services were provided (which may be phrased as "entire year" if applicable to the particular credit union), and the name(s) of each credit union employee who provided the services.

As an alternative, NAFCU may treat these expenses as exempt administrative costs under 2 U.S.C. §441b(b)(2)(C) if it pays the credit unions for them. NAFCU may pay the credit union on a periodic basis (e.g., twice yearly) for the actual costs incurred by the credit union. Using another payment approach, NAFCU may instead contract with the credit union for an amount based on a reasonable estimate of the anticipated cost of such services over a specific time period (e.g., a year) and pay that amount.⁷

As indicated in the above responses, the Commission also concludes that an automatic deduction system performed by the credit union may be used. Although 11 CFR 114.8(e)(3) prohibits the use of a payroll deduction or checkoff system for contributions by the executive or administrative personnel of a member corporation to the SSF of a trade association, this provision is inapplicable since the funds in question would not be deducted by means of a payroll deduction system administered by the employer of the share account holders. Even if a deduction is authorized by a person who is both a share account holder and an employee of the same credit union, such a deduction would be permissible because the deductions will be made from the share account and not from an employee payroll account. The Commission notes that pre-authorized automatic deductions by member credit unions from share accounts for contributions to the SSF of a national credit union association were determined to be permissible under the regulations in Advisory Opinion 1998-19.

The Commission also conditions its approval of this automatic deduction system on compliance by NAFCU with the voluntariness requirements set out at 11 CFR 114.5(a)(1)-(5) when it solicits written and signed authorization from a share account holder for the periodic deduction of contributions. These requirements include informing the solicitee of the political purposes of the PAC, that the solicitee is free to contribute more or less than any suggested guideline, that the solicitee will not be favored or disadvantaged by reason of the amount of the contribution or the decision not to

⁷ See Advisory Opinion 1997-9 for a somewhat similar treatment of expenses by a member firm of a membership organization for screening the accounts of individuals who authorize deductions for contributions.

contribute, and that the solicitee is free to contribute or refuse to contribute without reprisal.⁸ 11 CFR 114.5(a)(2), (3), and (4).⁹

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

Sincerely,

(signed)

Darryl R. Wold
Chairman

Enclosures (AOs 1999-3, 1998-19, 1997-9, 1989-3, 1985-37, 1984-63, and 1982-12)

⁸ The right to refuse to contribute includes the right to revoke, or modify the amount of, an authorization at any time. See, e.g., Advisory Opinion 1999-3.

⁹ The PAC must ensure that the members' authorizations for deductions are preserved in accordance with 11 CFR 104.14(b) and 102.9(c). See, e.g., Advisory Opinion 1999-3.