



FEDERAL ELECTION COMMISSION
Washington, DC 20463

November 25, 2003

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2003-29

Bridget Vigue
Legislative Liaison
National Fraternal Order of Police
Political Action Committee
309 Massachusetts Avenue, N.E.
Washington, D.C. 20002

Dear Ms. Vigue:

This responds to your letters dated March 7, July 18, and September 24, 2003, on behalf of the National Fraternal Order of Police Political Action Committee ("NFOP PAC"), requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the receipt of funds from the Fraternal Order of Police of Ohio Political Action Committee ("Ohio FOP PAC").

Background

You state that the National Fraternal Order of Police ("NFOP") is a section 501(c)(8) incorporated tax-exempt fraternal membership organization with State and local lodges in 43 States. You assert that political committees registered with the Commission by any of these lodges are automatically affiliated with NFOP PAC.¹ Many of the State lodges, including the Ohio Fraternal Order of Police, Inc. ("Ohio FOP"), however, have only non-Federal PACs that have not registered with the Commission, such as Ohio FOP PAC.

¹ NFOP PAC filed a Statement of Organization with the Commission on October 8, 2002. On its Statement of Organization, NFOP PAC indicated that it was a separate segregated fund and it identified the NFOP as its connected organization.

In a telephone conversation, you stated that you plan to transfer \$5,000 initially from Ohio FOP PAC to NFOP PAC. You further stated that, in the event that the Commission determines that you may make this initial transfer, you plan to make additional transfers of unspecified amounts from Ohio FOP PAC to NFOP PAC. You note that, under Ohio State law, Ohio FOP PAC can receive donations that are permissible under State law but may be impermissible under the Act.

You state that Ohio FOP PAC collects donations solely through solicitations by the Ohio FOP but that these solicitations are not limited to members. Corporate and labor organization contributions are prohibited, and all individual contributions are recorded, including membership information, the contribution amount, and the contributor's name and address. The bottom of the solicitation form states that "a portion of each contribution may go to support [the Ohio FOP PAC]." You state that, approximately \$1.50 from every contribution made by a member of the Ohio FOP is set aside for the Ohio FOP PAC. You indicate that all funds set aside for the Ohio FOP PAC come only from members of the Ohio FOP and that such funds are kept in a separate account containing only contributions from members. You explain that the solicitation does not indicate that the funds will be used in connection with a Federal election.

Questions Presented

You ask the following questions:

- 1. Is the Ohio FOP PAC an affiliated committee of the NFOP PAC such that it can transfer funds to NFOP PAC in amounts that are not subject to the Act's limitation on contributions at 2 U.S.C. 441a(a)(1)(C) in accordance with 11 CFR 102.6(a)?*
- 2. If the answer to question 1 is yes, how should the Ohio FOP PAC determine which funds may be transferred to the NFOP PAC?*
- 3. Must the original donors to the Ohio FOP PAC be informed that their donations may be transferred to the NFOP PAC or may their consent be obtained after the initial donations were made?*

Legal Analysis and Conclusions

The Commission concludes that the Ohio FOP PAC is affiliated with NFOP PAC and may transfer funds to NFOP PAC consistent with the requirements explained below.

1. *Is the Ohio FOP PAC an affiliated committee of the NFOP PAC such that it can transfer funds to NFOP PAC in amounts that are not subject to the Act's limitation on contributions at 2 U.S.C. 441a(a)(1)(C) in accordance with 11 CFR 102.6(a)?*

The Act prohibits corporations from making any contribution or expenditure in connection with a Federal election. 2 U.S.C. 441b. The Act states, however, that the term “contribution or expenditure” does not include “the establishment, administration, and solicitation of contributions to a separate segregated fund (“SSF”) to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.” 2 U.S.C. 441b(b)(2)(C); *see also* 2 U.S.C. 431(8)(B)(vi) and (9)(B)(v). An organization such as a corporation, or an incorporated membership organization, 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).

The connected organization and its SSF are subject to restrictions as to the personnel who may be solicited for contributions to the SSF. Specifically, a membership organization and its SSF may solicit voluntary contributions to the fund from its executive and administrative personnel, its members, and the families thereof (the “restricted class”). 2 U.S.C. 441b(b)(4)(A) and (C); 11 CFR 114.1(j), 114.5(g), and 114.7(a). Further, any solicitation for a separate segregated fund must describe the political purpose of the fund and specify that persons have the right to refuse to contribute to the fund without reprisal. 2 U.S.C. 441b(b)(3)(B) and (C); 11 CFR 114.5(a)(3) through (a)(5). This information must be provided at the time of the solicitation. *See id.*; *see also* Advisory Opinions 1992-20, 1987-17, and 1987-6. In addition, under 11 CFR 102.5(a)(2), only contributions that have either been designated for a political committee’s Federal account, or that result from a solicitation which expressly states that the contribution will be used in connection with a Federal election, or that are from contributors who have been informed that all contributions are subject to the prohibitions and limitations of the Act, may be deposited in that political committee’s Federal account.

The Act and Commission regulations provide that committees, including SSFs, that are established, financed, maintained, or controlled by the same corporation, person, or group of persons, including any parent, subsidiary, branch, division, department, or local unit thereof, are affiliated. 2 U.S.C. 441a(a)(5); 11 CFR 100.5(g)(2); *see also* Advisory Opinion 1999-16. Commission regulations recognize that two committees may be deemed “affiliates” even when one of them is not a political committee under the Act. *See* 11 CFR 102.6(a). Contributions made to or by such committees shall be considered to have been made to or by a single committee. 2 U.S.C. 441a(a)(5); 11 CFR 100.5(g)(2), 110.3(a)(1), and 110.3(a)(1)(ii). In addressing committee affiliation, the regulations examine the relationship of the entities maintaining political committees. Included among the categories of entities that are *per se* affiliated are a membership

organization and related State and local entities of that organization. 11 CFR 100.5(g)(3)(iv) and 110.3(a)(2)(iv); *see also* 11 CFR 114.1(e)(1) (defining “membership organization”) and 11 CFR 114.1(e)(2) (defining “member”).

The Commission concludes that NFOP qualifies as a membership organization under the Act. It is composed of members who have the power to operate and administer the organization through delegates who have the right to select the board of trustees and vote on other matters. Constitution of NFOP, Articles 17, 19 and 31; *see* 11 CFR 114.1(e)(1)(i). NFOP’s constitution expressly states the qualifications for membership, including descriptions of the eligible organizations and the dues requirements. Constitution of NFOP, Articles 4, 19-22, and 31; *see* 11 CFR 114.1(e)(1)(ii). The Commission assumes that the formal organizational documents are available to members upon request. *See* 11 CFR 114.1(e)(1)(iii). NFOP’s website promotes the benefits of membership and includes information on becoming a member, instructing potential members to contact the State lodge in the State in which they live. *See* 11 CFR 114.1(e)(1)(iv). NFOP’s constitution also explains the qualifications for membership and states that each State and subordinate lodge shall establish requirements for membership that are consistent with NFOP’s requirements. NFOP Constitution, Article 4. NFOP expressly acknowledges membership in a number of ways, including the distribution of a quarterly magazine to its active, retired, and honorary members, all of whom either serve or served as law enforcement officers or were recognized as honorary members for their exceptional service by the NFOP or by a State or subordinate lodge. *See* 11 CFR 114.1(e)(1)(v). Each of these “distribution members” qualifies as an NFOP member under the Commission regulations by affirmatively deciding to become a member and by paying annual pre-determined dues. *See* Advisory Opinion 1999-40.

The Ohio FOP is also a membership organization under the Act. It is administered by its members, which consist of subordinate lodges granted charters by the Ohio FOP. Constitution of Ohio FOP, Article II. These subordinate lodges elect delegates who, in turn, elect the board of trustees of the Ohio FOP. Constitution of Ohio FOP, Article V and VI; *see* 11 CFR 114.1(e)(1)(i). The Ohio FOP’s constitution expressly states the qualifications for membership including descriptions of the eligible organizations and the dues requirements. Constitution of Ohio FOP, Articles II, III, and XI; *see* 11 CFR 114.1(e)(1)(ii). In a telephone conversation you described the manner in which members’ dues obligations are satisfied. Members give two checks to their local lodges, one for the local lodge and one for the NFOP. You explained that the State lodges act as clearinghouses for transmitting members’ dues payments to the NFOP. The Commission assumes that the formal organizational documents are made available to the members upon request. *See* 11 CFR 114.1(e)(1)(iii). The Ohio FOP’s website promotes the benefits of membership and includes a hyperlink to an application form for membership. *See* 11 CFR 114.1(e)(1)(iv). The Ohio FOP expressly acknowledges membership in a number of ways, including the distribution of a magazine and a monthly newsletter to its active, retired, and honorary members, all of whom either serve or served as law enforcement officers or were recognized as honorary members for their

exceptional service by the Ohio FOP or by a subordinate lodge. *See* 11 CFR 114.1(e)(1)(v). Each of these distribution members qualifies as an Ohio FOP member under Commission regulations by affirmatively deciding to become a member and by paying annual pre-determined dues. *See* Advisory Opinion 1999-40.

Ohio FOP is a State chapter of NFOP. All members of the Ohio FOP are automatically members of NFOP as well, and a portion of the dues paid by members of subordinate lodges in Ohio is transmitted to the NFOP through the Ohio FOP. Thus, the Commission concludes that the Ohio FOP is a “subsidiary, branch, division, department, or local unit” of the NFOP, within the meaning of 2 U.S.C. 441a(a)(5) and 11 CFR 100.5(g)(2). The Commission further concludes that both the Ohio FOP PAC and the NFOP PAC were “established, financed, maintained, or controlled by the same corporation, person, or group of persons, including any parent, subsidiary, branch, division, department, or local unit thereof.” Accordingly, the Ohio FOP PAC is affiliated *per se* with the NFOP PAC pursuant to 11 CFR 100.5(g)(3)(iv) and 110.3(a)(2)(iv).

Commission regulations provide that transfers of funds may be made without limit between affiliated committees. *See* 11 CFR 102.6(a). Accordingly, the Ohio FOP PAC may make transfers without limit to the NFOP PAC. While transfers of funds may be made without limit between these two committees, such transfers will generally apply in determining whether Ohio FOP PAC is a “political committee” as defined at 11 CFR 100.5. *See* 11 CFR 102.6(a)(2).

Commission regulations, however, provide an exception to this treatment of transfers between affiliated committees. If one of the committees is acting as a “collecting agent” as defined in 11 CFR 102.6(b)(1) and follows the procedures set forth in 11 CFR 102.6(c), it may collect and transmit funds to the political committee with which it is affiliated without triggering political committee status. *See* 11 CFR 102.6(b)(2). Section 102.6(c)(2) of the Commission’s regulations requires that a collecting agent’s solicitations for contributions to a separate segregated fund must meet all of the requirements for proper solicitations under 11 CFR 114.5. In addition, 11 CFR 102.6(c)(4) requires that the full amount of contributions collected by a collecting agent on behalf of a separate segregated fund must be transmitted to that fund within 10 or 30 days of receipt, depending on the amount of the contribution, pursuant to 11 CFR 102.8.

Under 11 CFR 114.5, any solicitation for a separate segregated fund, such as NFOP PAC, must describe the political purpose of the fund and specify that persons have the right to refuse to contribute to the fund without reprisal. 2 U.S.C. 441b(b)(3)(B) and (C); 11 CFR 114.5(a)(3) through (a)(5). This information must be provided at the time of the solicitation. *See id.*; *see also* Advisory Opinions 1992-20, 1987-17, and 1987-6. Although the solicitations mailed by the Ohio FOP did indicate that a portion of contributors’ contributions may go to support Ohio FOP PAC, they did not inform contributors that their contributions may go to support NFOP PAC or inform contributors of the political purposes of NFOP PAC. In addition, the solicitations did not inform those being solicited of their right to refuse to contribute without reprisal. Moreover, it is

impossible at this point for the contributions to be forwarded to the NFOP PAC within 10 or 30 days as required by 11 CFR 102.6(c)(4). Thus, the exception in 11 CFR 102.6(b) does not apply to the funds that the Ohio FOP PAC has already collected and now seeks to transmit to the NFOP PAC because the Ohio FOP and the Ohio FOP PAC were not acting as collecting agents when they solicited and collected these funds. However, the Ohio FOP PAC may act as a collecting agent for NFOP PAC in the future if it meets the requirements of 11 CFR 102.6(b) and (c) and if future solicitations for NFOP PAC meet the requirements of 11 CFR 102.5(a)(2) and 11 CFR 114.5(a).

The Commission notes that a consequence of transferring any funds from the Ohio FOP PAC to the NFOP PAC is that the Ohio FOP PAC would become a political committee under 2 U.S.C. 431(4)(B) and 11 CFR 100.5. *See* Advisory Opinions 1984-31, 1983-3 and 1982-46. Under 2 U.S.C. 431(4)(B), a separate segregated fund is a political committee regardless of the amount of contributions or expenditures it makes. *Cf.* 2 U.S.C. 431(4)(A) (committees, clubs, associations, or other groups of persons become political committees when they make contributions aggregating in excess of \$1,000 per calendar year or make expenditures aggregating in excess of \$1,000 per calendar year). *See* Advisory Opinions 1983-3, 1982-46, and 1981-6; *see also* Explanation and Justification for 11 CFR 102.6, 45 Fed. Reg. 15084 (Mar. 7, 1980). Thus, because there is no monetary threshold triggering political committee status for separate segregated funds, a transfer of any amount from the Ohio FOP PAC to the NFOP PAC would cause the Ohio FOP PAC to become a political committee. *See* Advisory Opinions 1983-3 and 1981-6. Accordingly, your proposed \$5,000 transfer to NFOP PAC would require the Ohio FOP PAC to register and report as a political committee, disclosing on its first report the sources of funds then in its accounts.² *See* 11 CFR 104.12 and Advisory Opinions 1990-16, 1985-2, 1984-46, 1983-3, 1982-52, and 1982-46. This cash on hand balance would be assumed to be composed of those contributions most recently received by Ohio FOP PAC, and Ohio FOP PAC would have to itemize such prior contributions to the extent required by the Act and Commission regulations. *See* 2 U.S.C. 434(b); 11 CFR 104.3(a) and Advisory Opinions 1983-3, 1982-52, and 1982-46.

2. *If the answer to question 1 is yes, how should the Ohio FOP PAC determine which funds may be transferred to the NFOP PAC?*

In response to your second question, Ohio FOP PAC must exclude any contributions not permissible under the Act from those funds most recently received that comprise its cash on hand and that are proposed to be transferred to NFOP PAC. *See* 11 CFR 104.12 and Advisory Opinions 2000-25, 1990-16, 1985-2, 1984-46, and 1982-52.

² At the time that the Ohio FOP PAC achieves political committee status, the NFOP PAC must also amend its Statement of Organization to indicate its affiliation with the Ohio FOP PAC. *See* 11 CFR 102.2(b)(1)(ii)(A). Similarly, the Ohio FOP PAC must indicate its affiliation with the NFOP PAC on its Statement of Organization. *See* 11 CFR 102.2(b)(1)(ii)(B).

This means, for example, that if Ohio FOP PAC has a \$10,000 cash balance available for transfer to NFOP PAC, but \$5,000 (of the \$10,000 of contributions received most recently) was contributed by persons not in its restricted class, then only \$5,000 may be included in the cash on hand of Ohio FOP PAC for transfer to NFOP PAC.³

Moreover, because the contribution limits apply to NFOP PAC and because Ohio FOP PAC is affiliated with NFOP PAC and shares the same contribution limit, the annual contribution limits of 2 U.S.C. 441a(a)(1)(C) and (2)(C) apply to the contributors of the \$5,000 that would be transferred to the NFOP PAC. *See* 2 U.S.C. 441a(a)(5). Accordingly, the contributions of any person that are included in the \$5,000 must be aggregated with any contribution previously made by such person to NFOP PAC in the same year. The aggregate total may not exceed the \$5,000 annual limit of 2 U.S.C. 441a(a)(1)(C) or (2)(C). Any amounts that exceed the section 441a(a) limits may not be transferred and would require the \$5,000 to be reduced by the excessive amounts. When Ohio FOP PAC ascertains the proper amount of funds that it may include in its cash on hand as a political committee, and files a report itemizing such funds as required by the Act and regulations, it must also report a transfer of that amount to its affiliated Federal committee, NFOP PAC.

3. *Must the original donors to the Ohio FOP PAC be informed that their donations may be transferred to the NFOP PAC or may their consent be obtained after the initial donations were made?*

As discussed above, the solicitations mailed by the Ohio FOP did not comply with the requirements of 11 CFR 114.5 because they did not inform contributors: (1) that their contributions may go to support NFOP PAC; (2) of the political purposes of NFOP PAC; or (3) of their right to refuse to contribute without reprisal. The contributions involved did not satisfy the requirements of 11 CFR 102.5(a)(2).

Accordingly, prior to transferring funds to the NFOP PAC, the Ohio FOP PAC must send written notification to the original donors informing them that the funds so transferred will be used in connection with Federal elections and will be subject to the prohibitions and limitations of the Act.⁴ 11 CFR 102.5(a)(2); *see* Advisory Opinions 2000-25, 1997-20, 1984-31, and 1981-34. The written notification must also inform the original donors of the political purposes of NFOP PAC, of their right to object to the transfer of their contributions without reprisal and of the proper method to submit their objections.

³ You have stated that Ohio FOP PAC does not accept contributions from labor organizations or corporations. In addition, the Commission notes that contributions from national banks, corporations, labor organizations, government contractors, and foreign nationals may not be included in the cash on hand because all of those entities are prohibited from making contributions in connection with a Federal election whether directly or indirectly, or through any other person. 2 U.S.C. 441b, 441c, and 441e.

⁴ The written notification may be sent by mail, facsimile or electronic mail.

After sending the written notification, the Ohio FOP PAC has two options. The first option is to provide a time period of at least 30 days to allow the original donors the opportunity to object. It must inform them of this time period in the written notification. After the time period has passed and the Ohio FOP PAC has honored any objections, the Ohio FOP PAC may make the transfer to the NFOP PAC and the NFOP PAC can be assured that the transferred funds could permissibly be deposited in a Federal account under 11 CFR 102.5(a)(2) and that they were voluntarily obtained under 11 CFR 114.5(a). The other option available to the Ohio FOP PAC is that it may make the transfer at any time after it sends the written notification. If the Ohio FOP PAC receives any objections after the transfer, however, the Ohio FOP PAC must inform the NFOP PAC of the objection and the NFOP PAC must refund to the Ohio FOP PAC the contribution attributable to the original donor who made the objection. The Ohio FOP PAC must also honor any objections it received before the transfer. The Commission notes that all future solicitations for contributions to NFOP PAC must comply with 11 CFR 102.5(a)(2) and 114.5(a).

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. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

David M. Mason
Commissioner

Enclosures (AOs 2003-13, 2000-25, 1999-40, 1999-16, 1997-20, 1992-20, 1990-16, 1987-17, 1987-6, 1985-2, 1984-46, 1984-31, 1983-3, 1982-52, 1982-46, 1981-34, and 1981-6)