NOTICE AO DRAFT COMMENT PROCEDURES

The Commission has approved a revision in its advisory opinion procedures that permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2003-29 is available for public comments under this procedure. It was requested by Bridget Vigue, Legislative Liaison on behalf of the National Fraternal Order of Police Political Action Committee. The draft may be obtained from the Public Disclosure Division of the Commission.


Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (EST) on November 19, 2003.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case by case basis in special circumstances.

4) All comments timely received will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Disclosure Division.
**CONTACTS**

Press inquiries: Ron Harris  (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copy of draft AO 2003-29 contact Public Records Office-
Public Disclosure Division (202) 694-1120, or 800-424-9530.

For questions about comment submission procedure contact
Rosemary C. Smith, Acting Associate General Counsel, (202) 694-1650.

**ADDRESSES**

Submit single copy of written comments to:

Commission Secretary
Federal Election Commission
999 E Street NW
Washington, DC 20463
November 13, 2003

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

James Kahl
Deputy General Counsel

Rosemary C. Smith
Acting Associate General Counsel

Mai T. Dinh
Acting Assistant General Counsel

Robert M. Knop
Attorney

SUBJECT: Draft AO 2003-29

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for November 20, 2003.

Attachment
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. 441(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
1 or served as law enforcement officers or were recognized as honorary members for their
2 exceptional service by the NFOP or by a State or subordinate lodge. See 11 CFR
3 114.1(e)(1)(v). Each of these “distribution members” qualifies as an NFOP member
4 under the Commission regulations by affirmatively deciding to become a member and by
5 paying annual pre-determined dues. See Advisory Opinion 1999-40.

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

Transfers that exceed $1,000 in a calendar year when aggregated with other expenditures trigger political committee status. See 11 CFR 100.5. 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.\textsuperscript{2} See 11 CFR 104.12 and Advisory Opinions 1990-16, 1985-2, 1984-46, and 1982-52. 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 Opinion 1982-52.

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 also 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. 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

\textsuperscript{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).
recently) was contributed by persons not in its restricted class, then only $5,000 may be
going to 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

3 Although you have stated that Ohio FOP PAC does not accept contributions from labor organizations or
corporations, the Commission nevertheless emphasizes 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.
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 contributors were also not informed, as required by 11 CFR 102.5(a)(2), that their contributions: (1) should be designated for the NFOP PAC; (2) would be used in connection with a Federal election; or (3) were subject to the prohibitions and limitations of the Act.

Accordingly, prior to transferring funds to the NFOP PAC, the Ohio FOP PAC must send written requests seeking written redesignations from the original donors, informing them that, if they agree to redesignate their contributions to the NFOP PAC, the funds so transferred will be used in connection with Federal elections and will be subject to the prohibitions and limitations of the Act. See Advisory Opinions 2000-25, 1997-20, 1984-31, and 1981-34. The written requests must also inform the original donors of the political purposes of NFOP PAC and of their right to refuse to redesignate without reprisal. This communication, along with the receipt of donor redesignations, would ensure 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). Any contributors who do not provide written redesignations must either be given a refund or their contributions must remain with the Ohio FOP PAC. 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
A conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

Ellen L. Weintraub
Chair