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Jeff S. Jordan
Assistant General Counsel
Office of General Counsel
Federal Election Commission
Washington, D.C. 20463

Subject: RR 18L-15, American Federation of Teachers, AFL-CIO, Committee on Political Education (“AFT COPE”) FEC ID C00028860, and Lorretta Johnson, Treasurer; FEC letter dated March 26, 2018

Dear Mr. Jordan:

Our firm represents AFT COPE and its treasurer, Lorretta Johnson, with respect to the subject matter, and I am primary counsel. The American Federation of Teachers, AFL-CIO (“AFT”), is the connected organization of AFT COPE, its separate segregated fund.

The March 26 letter states that AFT COPE and its Treasurer (in her official capacity) have been referred to the Commission’s Office of General Counsel for “possible enforcement action under 52 U.S.C. §30109.” The referral was made by the Commission’s Reports Analysis Division “for amending its [AFT COPE’s] 2017 30 Day Post-Special Report to disclose additional receipts of \$114,750.68.”

The documents submitted to your office in support of the referral from the Reports Analysis Division (“RAD”) indicate that AFT COPE disclosed the cited amount in an amendment filed on June 10, 2017, which amended its original report filed on May 11, 2017.¹ The original May 11 filing had disclosed \$1,247,608 of un-itemized contribution receipts by

¹ To simplify and enhance readability, all amounts are hereafter stated in whole dollars, with no rounding up or down. All dates are 2017.

AFT COPE, while the June 10 amendment disclosed \$1,362,359 of such receipts.² Sixty days after receiving the June 10 amendment, RAD sent a notice to AFT COPE requesting “clarification regarding the substantial increase in receipts” as compared to the May 11 filing. AFT COPE accounting staff, without contacting legal counsel, offered a very brief response to the RAD query simply stating the \$114,750 was “not recorded in our accounting system.” And thus was “not reported in our initial filing” on May 11.

In hindsight, and given the staff member’s diligent efforts to prepare and file the June 10 amendment within 30 days after the original FEC report, there was an inadvertent oversight in failing to seek review by legal counsel before filing the June 10 amendment. Counsel’s advance review would have explained the applicability of an FEC regulation that permitted \$54,138 (of \$114,750) to be disclosed in a later FEC report: namely, the report that was due (and filed) on June 8, with coverage dates May 2 to May 31. For the reasons discussed below, we respectfully request that the Office of General Counsel and the Commission give AFT COPE the opportunity to rely on the regulation at this time.

The applicable FEC regulation is 11 CFR 103.3(a) that allows a 10 day period before contribution receipts must be deposited (or returned to source) in a committee’s campaign depository. This 10 day grace period allows a committee to ascertain and review pertinent underlying facts about its receipts to assure that the funds comply with FEC regulations and otherwise accord with committee policy regarding contributions that it chooses to accept. The receipts have to be included in the relevant FEC report once they are deposited within the 10 day period. Any receipts that are rejected and returned to the funding source, before expiration of the 10 day period, do not have to be included in the committee’s FEC report. As explained over 25 years ago in Advisory Opinion 1992-29, one key purpose of this longstanding regulation is to assure that there is only a brief time lapse between the actual receipt date of a contribution and when it has to be deposited and recorded for inclusion in the next due FEC report.

AFT COPE received \$54,138 in three transactions on April 26 and 28. It could have used the 10 days to review these receipt transactions and then, in compliance with the rule, deposit them between May 2--6. These un-itemized contribution receipts would then have been disclosed in the June 8 report. (We note that they were, in fact, disclosed two days later in an amendment filed with the FEC on June 10.)

In the 40+ years since 1977 when the cited regulation was promulgated, the FEC has considered its application and interpretation in only a few advisory opinions. Most notably in Advisory Opinions 1992-29, 1999-33, and 2000-11. These opinions considered facts where contributions were made and received, but never deposited or returned within the 10 day grace period. Two of them, like this matter, involved voluntary contributions made via employer-

² AFT COPE relies almost entirely on low amounts of individual voluntary contributions by AFT members in local affiliates scattered throughout the United States. These voluntary contributions are received and forwarded to AFT COPE pursuant to the FEC’s collecting agent regulations and the procedures permitted therein. 11 CFR 102.6(b)[local unit of labor union qualifies as collecting agent for separate segregated fund of its parent national union], 102.6(c) [collected contributions of \$50 or less must be transmitted to SSF within 30 days after agent’s receipt.] The primary method of collection is through employer-administered, voluntary payroll deduction at typical levels of \$2-\$7 from each contributor per pay period (26 periods in CY). For 2017, AFT COPE reported receipt of \$4,741,078 in un-itemized contributions and \$105,488 of itemized contributions.

administered payroll deduction programs, and pursuant to the FEC's collecting agent rules and procedures. (See summary and citations in footnote 2.) In both of these opinions there were significant lapses and failures to comply with FEC-mandated accounting procedures in that substantial amounts of contribution receipts were collected over many months (even years), but never (in one case) transmitted to the committee treasurer, never deposited into committee bank accounts, and never included in FEC reports. In one opinion, the cited reason for the failures was that a regional office, the collection point for the contributions, did not follow the centralized payroll system prescribed by the headquarters office where all committee contributions were supposed to be forwarded, deposited, and then reported to the FEC. Advisory Opinion 1999-33.

In the other opinion, Advisory Opinion 2000-11, the committee treasurer "lost" 14 transmittal checks payable to the committee, most of which were found years later after a search of her office. Over a three year period, contributions of \$125,809 were lost by the treasurer, never deposited into the committee's bank account and never reported to the FEC.³ The FEC explained that the treasurer's failure to comply with FEC rules, including the 10 day deposit rule, "does not appear to have been intentional." It further noted that the treasurer's failure to deposit the checks "does not appear to have been for the purpose of self-enrichment or any other improper disposition."

In both opinions, the FEC permitted the committees to replace the amounts represented by the original contributions: contributions that were not deposited or reported in compliance with Commission regulations. The Commission did require extensive amendments to past FEC reports that would disclose the contributions in the same manner that they should have been reported originally. Significantly, both opinions concluded by warning that the committees might expect future enforcement action by the Commission given the facts they had presented in their requests for advisory opinions. Our research of closed FEC enforcement cases (using corporation and PAC names) in the Commission's data base indicated that no enforcement action was initiated in either instance.

The two opinions describe egregious failures over many years to deposit and report contributions of significant amounts, yet without FEC enforcement action where multiple FEC violations were obvious. The Commission also recognized that the conduct of committee personnel was inadvertent or unintentional, and generously spelled out a remedial plan for amendments to past FEC reports spanning several years. In this matter, AFT COPE's disclosure of \$54,138 in un-itemized contribution receipts was not required to be disclosed in the May 11 FEC report, and could have been lawfully disclosed in the next required report. And, but for the inadvertent failure of AFT COPE accounting staff to contact counsel regarding application of the 10-day deposit rule, the sum most certainly would have been included in the June 8 report, instead of the June 10 amendment. We note also that this amount represents only 4% of the contributions received in period covered by the May 11 report. ($\$54,138/\$1,247,608=.043$)

With regard to the delayed reporting of \$60,612 in un-itemized contributions, AFT COPE concedes that this amount was required to be disclosed in its May 11 report to the FEC.

³ This amount represented almost 35% of the total contributions (\$365,569) made to the committee over the 3 year period.

However, we offer several comments for consideration by the Office of General Counsel and the Commission with respect to this delayed disclosure.

First, the sum was reported in the amendment filed by AFT COPE June 10, just 30 days after its filing of the May 11 report. The May 11 report was not considered an "election sensitive" report in that it was a post-special election report in an odd-numbered year. 11 CFR 111.43(d)(1). The \$60,612 amount represents less than 5% of the contribution receipts included in the original May 11 report. ($\$60,612/\$1,247,608=.0485$) Accordingly, the 30-day reporting delay of a relatively low amount of un-itemized contribution receipts is hardly such a substantial or significant departure from the FEC reporting calendar so as to warrant enforcement action.

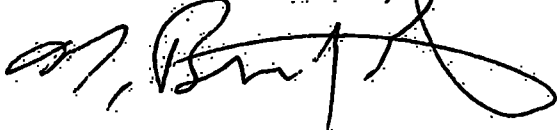
In addition, we contend that this 30 day delay in disclosing lump sum contribution receipts had no material, adverse impact on the public interest. The cash position of AFT COPE on February 1 (beginning coverage date of May 11 report), was at such a high level that the delayed disclosure of lump sum receipts of \$60,612 would not have thwarted or impeded the FEC mission to serve the public interest by assuring the timely and full public disclosure of campaign money received and spent in elections for federal office.

On February 1, AFT COPE had cash on hand of \$4,263,929 and made disbursements of \$1,721,612 between February 1 and May 1. Funds available on February 1 were reported to the FEC in prior filings and were substantially in excess of amounts needed to cover all AFT COPE disbursements through May 1. Thus, there was obviously no need for AFT COPE to draw down from the \$60,612 to make any of its disbursements between February 1 and May 1. Those disbursements were, in effect, made from the cash available on February 1 and not from the \$60,612. Although cash funds are generally considered as fungible, FEC rules adopt the accounting convention or principle that first funds received are first funds expended. 11 CFR 104.12. While this rule addresses the specific context of identifying sources of cash on hand balances for newly registering committees, we believe its application to the above cash flow analysis is analogous and reasonable. See 11 CFR 110.3(c)(4), 110.3(c)(5) [first funds received, first funds expended principle applies to same candidate fund transfers].

In conclusion, AFT COPE and its treasurer, Lorretta Johnson, confidently expect that the Office of General Counsel and the Commission will carefully and thoroughly consider this letter. Thereafter, we are hopeful that the Commission will concur with our position that no further action should be taken in this matter, and provide this office with written notice to that effect.

Respectfully submitted,

OLDAKER & WILLISON, LLP



N. Bradley Litchfield
Counsel to AFT COPE and Treasurer Johnson