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AGENDA ITEM
For Meeting of: 11-20-03

November 13, 2003

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

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Deputy General Counsel

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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

DRAFT

1 ADVISORY OPINION 2003-29

2
3 Bridget Vigue
4 Legislative Liaison
5 National Fraternal Order of Police
6 Political Action Committee
7 309 Massachusetts Avenue, N.E.
8 Washington, D.C. 20002
9

10 Dear Ms. Vigue:

11
12 This responds to your letters dated March 7, July 18, and September 24, 2003, on
13 behalf of the National Fraternal Order of Police Political Action Committee (“NFOP
14 PAC”), requesting an advisory opinion concerning the application of the Federal Election
15 Campaign Act of 1971, as amended (“the Act”), and Commission regulations to the
16 receipt of funds from the Fraternal Order of Police of Ohio Political Action Committee
17 (“Ohio FOP PAC”).

18 ***Background***

19 You state that the National Fraternal Order of Police (“NFOP”) is a section
20 501(c)(8) incorporated tax-exempt fraternal membership organization with State and
21 local lodges in 43 States. You assert that political committees registered with the
22 Commission by any of these lodges are automatically affiliated with NFOP PAC.¹ Many
23 of the State lodges, including the Ohio Fraternal Order of Police, Inc. (“Ohio FOP”),
24 however, have only non-Federal PACs that have not registered with the Commission,
25 such as Ohio FOP PAC.

26

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.

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

7 You state that Ohio FOP PAC collects donations solely through solicitations by
8 the Ohio FOP but that these solicitations are not limited to members. Corporate and labor
9 organization contributions are prohibited, and all individual contributions are recorded,
10 including membership information, the contribution amount, and the contributor's name
11 and address. The bottom of the solicitation form states that "a portion of each
12 contribution may go to support [the Ohio FOP PAC]." You state that, approximately
13 \$1.50 from every contribution made by a member of the Ohio FOP is set aside for the
14 Ohio FOP PAC. You indicate that all funds set aside for the Ohio FOP PAC come only
15 from members of the Ohio FOP and that such funds are kept in a separate account
16 containing only contributions from members. You explain that the solicitation does not
17 indicate that the funds will be used in connection with a Federal election.

18 ***Questions Presented***

19 *You ask the following questions:*

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

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

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

6 ***Legal Analysis and Conclusions***

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

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

12 The Act prohibits corporations from making any contribution or expenditure in
13 connection with a Federal election. 2 U.S.C. 441b. The Act states, however, that the
14 term “contribution or expenditure” does not include “the establishment, administration,
15 and solicitation of contributions to a separate segregated fund (“SSF”) to be utilized for
16 political purposes by a corporation, labor organization, membership organization,
17 cooperative, or corporation without capital stock.” 2 U.S.C. 441b(b)(2)(C); *see also* 2
18 U.S.C. 431(8)(B)(vi) and (9)(B)(v). An organization such as a corporation, or an
19 incorporated membership organization, which is not itself a political committee, but
20 which directly or indirectly establishes, administers, or financially supports a political
21 committee is a “connected organization” of that committee. 2 U.S.C. 431(7); 11 CFR
22 100.6(a).

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

17 The Act and Commission regulations provide that committees, including SSFs,
18 that are established, financed, maintained, or controlled by the same corporation, person,
19 or group of persons, including any parent, subsidiary, branch, division, department, or
20 local unit thereof, are affiliated. 2 U.S.C. 441a(a)(5); 11 CFR 100.5(g)(2); *see also*
21 Advisory Opinion 1999-16. Commission regulations recognize that two committees may
22 be deemed “affiliates” even when one of them is not a political committee under the Act.
23 *See* 11 CFR 102.6(a). Contributions made to or by such committees shall be considered

1 to have been made to or by a single committee. 2 U.S.C. 441a(a)(5); 11 CFR 100.5(g)(2),
2 110.3(a)(1), and 110.3(a)(1)(ii). In addressing committee affiliation, the regulations
3 examine the relationship of the entities maintaining political committees. Included
4 among the categories of entities that are *per se* affiliated are a membership organization
5 and related State and local entities of that organization. 11 CFR 100.5(g)(3)(iv) and
6 110.3(a)(2)(iv); *see also* 11 CFR 114.1(e)(1) (defining “membership organization”) and
7 11 CFR 114.1(e)(2) (defining “member”).

8 The Commission concludes that NFOP qualifies as a membership organization
9 under the Act. It is composed of members who have the power to operate and administer
10 the organization through delegates who have the right to select the board of trustees and
11 vote on other matters. Constitution of NFOP, Articles 17, 19 and 31; *see* 11 CFR
12 114.1(e)(1)(i). NFOP’s constitution expressly states the qualifications for membership,
13 including descriptions of the eligible organizations and the dues requirements.
14 Constitution of NFOP, Articles 4, 19-22, and 31; *see* 11 CFR 114.1(e)(1)(ii). The
15 Commission assumes that the formal organizational documents are available to members
16 upon request. *See* 11 CFR 114.1(e)(1)(iii). NFOP’s website promotes the benefits of
17 membership and includes information on becoming a member, instructing potential
18 members to contact the State lodge in the State in which they live. *See* 11 CFR
19 114.1(e)(1)(iv). NFOP’s constitution also explains the qualifications for membership and
20 states that each State and subordinate lodge shall establish requirements for membership
21 that are consistent with NFOP’s requirements. NFOP Constitution, Article 4. NFOP
22 expressly acknowledges membership in a number of ways, including the distribution of a
23 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

1 exceptional service by the Ohio FOP or by a subordinate lodge. *See* 11 CFR
2 114.1(e)(1)(v). Each of these distribution members qualifies as an Ohio FOP member
3 under Commission regulations by affirmatively deciding to become a member and by
4 paying annual pre-determined dues. *See* Advisory Opinion 1999-40.

5 Ohio FOP is a State chapter of NFOP. All members of the Ohio FOP are
6 automatically members of NFOP as well, and a portion of the dues paid by members of
7 subordinate lodges in Ohio is transmitted to the NFOP through the Ohio FOP. Thus, the
8 Commission concludes that the Ohio FOP is a “subsidiary, branch, division, department,
9 or local unit” of the NFOP, within the meaning of 2 U.S.C. 441a(a)(5) and 11 CFR
10 100.5(g)(2). The Commission further concludes that both the Ohio FOP PAC and the
11 NFOP PAC were “established, financed, maintained, or controlled by the same
12 corporation, person, or group of persons, including any parent, subsidiary, branch,
13 division, department, or local unit thereof.” Accordingly, the Ohio FOP PAC is affiliated
14 *per se* with the NFOP PAC pursuant to 11 CFR 100.5(g)(3)(iv) and 110.3(a)(2)(iv).

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

21 Commission regulations, however, provide an exception to this treatment of
22 transfers between affiliated committees. If one of the committees is acting as a
23 “collecting agent” as defined in 11 CFR 102.6(b)(1) and follows the procedures set forth

1 in 11 CFR 102.6(c), it may collect and transmit funds to the political committee with
2 which it is affiliated without triggering political committee status. *See* 11 CFR
3 102.6(b)(2). Section 102.6(c)(2) of the Commission's regulations requires that a
4 collecting agent's solicitations for contributions to a separate segregated fund must meet
5 all of the requirements for proper solicitations under 11 CFR 114.5. In addition, 11 CFR
6 102.6(c)(4) requires that the full amount of contributions collected by a collecting agent
7 on behalf of a separate segregated fund must be transmitted to that fund within 10 or 30
8 days of receipt, depending on the amount of the contribution, pursuant to 11 CFR 102.8.

9 Under 11 CFR 114.5, any solicitation for a separate segregated fund, such as
10 NFOP PAC, must describe the political purpose of the fund and specify that persons have
11 the right to refuse to contribute to the fund without reprisal. 2 U.S.C. 441b(b)(3)(B) and
12 (C); 11 CFR 114.5(a)(3) through (a)(5). This information must be provided at the time of
13 the solicitation. *See id.*; *see also* Advisory Opinions 1992-20, 1987-17, and 1987-6.

14 Although the solicitations mailed by the Ohio FOP did indicate that a portion of
15 contributors' contributions may go to support Ohio FOP PAC, they did not inform
16 contributors that their contributions may go to support NFOP PAC or inform contributors
17 of the political purposes of NFOP PAC. In addition, the solicitations did not inform those
18 being solicited of their right to refuse to contribute without reprisal. Moreover, it is
19 impossible at this point for the contributions to be forwarded to the NFOP PAC within 10
20 or 30 days as required by 11 CFR 102.6(c)(4). Thus, the exception in 11 CFR 102.6(b)
21 does not apply to the funds that the Ohio FOP PAC has already collected and now seeks
22 to transmit to the NFOP PAC because the Ohio FOP and the Ohio FOP PAC were not
23 acting as collecting agents when they solicited and collected these funds. However, the

1 Ohio FOP PAC may act as a collecting agent for NFOP PAC in the future if it meets the
2 requirements of 11 CFR 102.6(b) and (c) and if future solicitations for NFOP PAC meet
3 the requirements of 11 CFR 102.5(a)(2) and 11 CFR 114.5(a).

4 Transfers that exceed \$1,000 in a calendar year when aggregated with other
5 expenditures trigger political committee status. *See* 11 CFR 100.5. Accordingly, your
6 proposed \$5,000 transfer to NFOP PAC would require the Ohio FOP PAC to register and
7 report as a political committee, disclosing on its first report the sources of funds then in
8 its accounts.² *See* 11 CFR 104.12 and Advisory Opinions 1990-16, 1985-2, 1984-46, and
9 1982-52. This cash on hand balance would be assumed to be composed of those
10 contributions most recently received by Ohio FOP PAC, and Ohio FOP PAC would have
11 to itemize such prior contributions to the extent required by the Act and Commission
12 regulations. *See* 2 U.S.C. 434(b); 11 CFR 104.3(a) and Advisory Opinion 1982-52.

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

15 In response to your second question, Ohio FOP PAC must also exclude any
16 contributions not permissible under the Act from those funds most recently received that
17 comprise its cash on hand and that are proposed to be transferred to NFOP PAC. *See* 11
18 CFR 104.12 and Advisory Opinions 2000-25, 1990-16, 1985-2, 1984-46, and 1982-52.
19 This means, for example, that if Ohio FOP PAC has a \$10,000 cash balance available for
20 transfer to NFOP PAC, but \$5,000 (of the \$10,000 of contributions received most

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).

1 contributions may go to support NFOP PAC; (2) of the political purposes of NFOP PAC;
2 or (3) of their right to refuse to contribute without reprisal. The contributors were also
3 not informed, as required by 11 CFR 102.5(a)(2), that their contributions: (1) should be
4 designated for the NFOP PAC; (2) would be used in connection with a Federal election;
5 or (3) were subject to the prohibitions and limitations of the Act.

6 Accordingly, prior to transferring funds to the NFOP PAC, the Ohio FOP PAC
7 must send written requests seeking written redesignations from the original donors,
8 informing them that, if they agree to redesignate their contributions to the NFOP PAC,
9 the funds so transferred will be used in connection with Federal elections and will be
10 subject to the prohibitions and limitations of the Act. *See* Advisory Opinions 2000-25,
11 1997-20, 1984-31, and 1981-34. The written requests must also inform the original
12 donors of the political purposes of NFOP PAC and of their right to refuse to redesignate
13 without reprisal. This communication, along with the receipt of donor redesignations,
14 would ensure that the transferred funds could permissibly be deposited in a Federal
15 account under 11 CFR 102.5(a)(2) and that they were voluntarily obtained under 11 CFR
16 114.5(a). Any contributors who do not provide written redesignations must either be
17 given a refund or their contributions must remain with the Ohio FOP PAC. The
18 Commission notes that all future solicitations for contributions to NFOP PAC must
19 comply with 11 CFR 102.5(a)(2) and 114.5(a).

20 This response constitutes an advisory opinion concerning the application of the
21 Act and Commission regulations to the specific transaction or activity set forth in your
22 request. *See* 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in
23 any of the facts or assumptions presented, and such facts or assumptions are material to a

1 conclusion presented in this advisory opinion, then the requestor may not rely on that
2 conclusion as support for its proposed activity.

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Sincerely,

Ellen L. Weintraub
Chair

13 Enclosures (AOs 2003-13, 2000-25, 1999-40, 1999-16, 1997-20, 1992-20, 1990-16,
14 1987-17, 1987-6, 1985-2, 1984-46, 1984-31, 1982-52, and 1981-34)