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FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 18, 1996

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael Marinelli
Attorney

AGENDA ITEM
For Meeting of: **JUL 25 1996**

SUBJECT: Revised Draft of Advisory Opinion 1996-25

Attached is the revised draft of the subject opinion. We request that this draft be placed on the agenda for July 25, 1996.

The changes made to the first draft (Agenda Document #96-73) reflect the analysis and consideration of the comments that have been received. These changes are found on pages 5 and 6 and incorporate the view that the safe harbor for best efforts found in section 104.7 applies to separate segregated funds like the requester. However, the draft also concludes that the requester is likewise obligated to follow all of the "best efforts" procedures set out in 11 CFR 104.7(b)(1)(2) and (3). This includes using any information in possession of the requester's connected organization.

Attachment

DRAFT

1
2 **ADVISORY OPINION 1996-25**

3
4 **David Frulla**
5 **Brand, Lowell & Ryan P.C.**
6 **923 Fifteenth Street, N.W.**
7 **Washington, D.C. 20005**

8
9 **Dear Mr. Frulla:**

10
11 **This refers to your letters dated May 24 and May 10, 1996, which request advice**
12 **concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"),**
13 **and Commission regulations to the voluntary check-off program maintained by Seafarers**
14 **Political Activity Donation ("SPAD"). You ask about the application of the Commission's**
15 **recently amended "best efforts" regulation to SPAD's check-off program and SPAD's obligation**
16 **to identify the employers of SPAD's union member contributors.**

17 **SPAD is the separate segregated fund of the Seafarers International Union ("SIU") which**
18 **represents merchant seamen and boatmen ("seamen") aboard U.S.-flag vessels on the high seas,**
19 **the Gulf of Mexico, and inland lakes and waterways. Almost all of these seamen are employed**
20 **through what is known as "rotary" crewing. This consists of SIU regional hiring halls referring**
21 **union members for periodic employment with SIU-contracted companies.¹ Once referred, an**
22 **individual merchant seaman will generally work for a shipping company employer only for the**
23 **duration of a trip at sea. A trip lasts only a few months and, often times, they are even shorter.**
24 **You state that, after the trip concludes, the SIU member returns to the "beach" and places his or**
25 **her name on the hiring hall's list of individuals waiting to ship. The union member then returns**

¹ You state that there are approximately one hundred companies that have contracted with SIU to obtain the referral of SIU members for employment.

1 to work some time later, most often for a different employer, once he or she has reached the top
2 of the hiring list.

3 You point out that the periodic and ever-changing nature of maritime employment
4 precludes SPAD from using a conventional, labor organization separate segregated fund check-
5 off program. To deal with the circumstances of the rotary crewing, SPAD's check-off
6 contributions are remitted from a participating member's share of the SIU's employer-funded
7 vacation plan, and not from individual SIU-contracted employers.² SPAD solicits a member to
8 voluntarily check off a portion (usually fifty cents) of each day of employment for which he or
9 she applies for vacation pay. You explain that this approach surmounts the logistical barriers
10 preventing SPAD from maintaining a check-off arrangement with individual SIU- contracted
11 employers.

12 You state that SPAD's solicitations ask each participating SIU member to provide his or
13 her name or address. You add that contributors willingly provide this information and SIU's
14 vacation plan has this information on file. SPAD also obviously knows the occupations of its
15 contributors who participate in the SIU's vacation plan check-off. They are all merchant
16 mariners. The above information is therefore easily disclosed in SPAD's reports filed with the
17 Commission. However, due to the nature of the rotary crewing system described above, you

² You state that pursuant to its collective bargaining agreement with SIU, an employer must make a payment to the SIU vacation plan on behalf of each SIU member that it has employed. An employers' vacation plan payment for an individual union member corresponds to the length of his or her employment with that company. Provided other eligibility criteria are met, an SIU member may request vacation pay at the conclusion of his or her trip at sea, whereupon the SIU vacation plan will issue the member one lump sum check comprising all the vacation pay to which the member is entitled. The administration of the plan is kept technically separate from SIU. However, it is administered by a board of trustees comprised in equal part of management and union representatives.

1 state that SPAD does not ask a participating SIU member to identify his or her employer on its
2 check-off authorization form. SPAD does not independently seek this information from a
3 member whose annual contributions exceeds \$200. You note that at the time a contribution is
4 obtained through the check-off program, the contributor is between assignments and is not
5 working for any employer. Because of the above circumstances, you ask that the Commission
6 conclude that SPAD's seeking the contributor's name, address and occupation but not seeking
7 the contributor's employer meets its "best efforts" requirement as set forth in Commission
8 regulations. In the event that SPAD must complete the employer box of its FECA disclosure
9 forms, you propose that SPAD be permitted to report that the contributor is employed by
10 "various U.S.-flag vessel operators."³

11 When the treasurer of a political committee shows that best efforts have been used to
12 obtain, maintain, and submit the information required by the Act for the political committee, any
13 report or any records of such committee are considered in compliance with the Act. 2 U.S.C.
14 §432(i) and 11 CFR 104.7(a). The identification of individual contributors required by the Act
15 for individuals whose contribution(s) aggregate in excess of \$200 in a calendar year requires
16 providing the individual's full name, mailing address, occupation and the name of the
17 contributor's employer. 2 U.S.C. §431(13) and 11 CFR 100.12.

18 The treasurer will be deemed to have exercised best efforts to obtain the information for
19 this identification if all written solicitations include a clear request for the contributor's full
20 name, mailing address, occupation and the name of employer. 11 CFR 104.7(b)(1) and (2). The

³ In the most recent report filed with the Commission, for each contributor SPAD indicated that the name of the contributor's employers is "not available."

1 treasurer of a political committee must report all contributor information not provided by the
2 contributor, but in the political committee's possession, regarding contributor identification.
3 This includes information in a committee's contributor records, fundraising records and
4 previously filed reports, in the same two-year election cycle in accordance with 11 CFR 104.3.
5 11 CFR 104.7(b)(3).

6 The Supreme Court has held that the disclosure of each large contributor's name and
7 address as well as the donor's occupation and principal place of business serves informational
8 functions, as well as the prevention of corruption and the enforcement of the contribution
9 limitations. *Buckley v. Valeo*, 424 U.S. 1 (1976). The Commission's "best efforts" regulation,
10 cited above, is designed to "promote the very gathering of information that *Buckley* found to be
11 in the public interest." *Republican National Committee v. Federal Election Commission*
12 (*"RNC"*), 76 F.3d 400, 408 (D.C. Cir. 1996), *petition for rehearing In Banc denied*, No. 94-5248
13 (D.C. Cir. June 11, 1996).⁴

14 The Commission notes that it has concluded that a vacation fund administered by a labor
15 organization is a permissible source of voluntary contributions to a separate segregated fund
16 using a deduction authorization plan. See Advisory Opinions 1980-74, 1980-69 and 1979-60.
17 However, your proposal to provide no information regarding your contributors' employers would
18 not meet the disclosure needs of the Act. Therefore, the Commission concludes that not
19 disclosing any employer name for contributors whose contributions exceed \$200 in a calendar

⁴ Congress noted the importance of a best efforts test: The 1979 report from the Committee on House Administration that accompanied the 1979 amendments to the Act noted that "[t]he best efforts test is crucial since contribution information is voluntarily supplied by persons who are not under the control of the committee." H.Rep. No. 96-422, 96th Cong., 1st Sess. 14 (1979).

1 year would not fulfill SPAD's "best efforts" obligations as set out in 11 CFR 104.7(b)(1) and
2 (2).⁵ However, with a modification, your alternative to report that a contributor is employed by
3 "various U.S.-flag vessel operators" would meet the requirements of the regulations. In addition
4 to this description, SPAD should request information from contributors (whose annual
5 contribution exceeds \$200) regarding their most recent employment. SPAD should include this
6 information in its reports.

7 This information, even if it does not indicate current employment status, would provide
8 relevant information for disclosure purposes regarding the recent employment situation of SPAD
9 contributors. Furthermore, the SPAD contributions (that cause the SIU member to exceed the
10 \$200 threshold) are derived from compensation in the form of vacation pay disbursed by the
11 member's most recent employer. It is the employment relationship with that employer which
12 directly enables the SIU member to make a contribution to SPAD. Therefore, the entry for a
13 contributor's employer should read: "various U.S.-flag vessel operators: most recently xx
14 company."

15 The Commission concludes that SPAD is required, the same as any other political
16 committee, to follow the procedures of 11 CFR 104.7(b)(1),(2) and (3). If a contributor fails to
17 provide SPAD with his/her current or most recent employer after the initial inquiry, made under
18 section 104.7(b)(1), SPAD must make a follow up inquiry under section 104.7(b)(2).⁶

⁵ You state in your request that, technically, members of SIU are unemployed at the time they make their contributions. However, because of the industry's employment practices that you have explained, to disclose their employment status as "unemployed" would be somewhat inaccurate.

⁶ The other requirements, as set out in section 104.7(b)(2) and in accord with *RNC*, are that the inquiry may be either written or oral (documented by a committee writing), that the inquiry be made no later than thirty (30) days after the receipt of the contribution, that the request not include any other material or solicitation, but it may thank

1 The Commission recognizes that a connected organization--whether a corporation,
2 membership organization, trade association, labor organization, or cooperative-- establishes,
3 administers or financially supports its separate segregated fund.⁷ See 2 U.S.C. §§431(7),
4 441b(b)(2)(C) and 11 CFR 100.6. It is presumed that, as a result of this relationship, certain
5 types of separate segregated funds (such as SPAD) will have access to information about their
6 contributors (for example, union members) who stand in a special relationship to the connected
7 organization.⁸ The Commission, therefore, concludes that its regulations, at section 104.7(b)(3),
8 require SPAD to obtain employment information from its connected organization if the required
9 "best efforts" inquiries fail to produce that information from the SPAD donor.⁹

the contributor for the previous contribution(s). A written request should be accompanied by a pre-addressed return post card or envelope. 11 CFR 104.7(b)(2).

⁷ Commission regulations assume that a labor organization has control of its separate segregated fund. 11 CFR 114.5(d) and Advisory Opinion 1996-1. See *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 426 (1972). (The Court concluded "it is difficult to conceive how a valid political fund can be meaningfully 'separate' from the sponsoring union in any way other than 'segregated.'").

⁸ The Commission acknowledges, however, that other types of separate segregated funds such as membership organizations, trade associations and cooperatives may not have the same access to contributor information as labor organizations and corporations with capital stock. Instead, their situation is more similar to that of party committees, authorized committees and nonconnected committees with regard to the contributor information they have available.

⁹ The regulation places importance upon a committee's obligation to provide information on contributors from internal sources when information from the contributor is not forthcoming. The Commission notes your statement that the SIU vacation plan already has the name and address of union member. You state that, regarding employment information, "[n]owhere ...does the record reveal that the SIU maintains this type of information in any centrally located, readily accessible manner. SIU members are referred for employment from regional hiring halls." This statement leaves open the possibility that employer information is, in fact, available, but only inconvenient to obtain. Again, the Commission notes that should the information be in the possession of SIU or an entity administered, in part, by the SIU (such as the SIU vacation plan), SPAD is required use the employer information in order to satisfy SPAD's "best efforts" obligation.

