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March 9, 2000

**MEMORANDUM**

**AGENDA ITEM**  
For Meeting of: 3-16-00

TO: The Commission

THROUGH: James A. Pehrkon *JAP*  
Staff Director

FROM: Lawrence M. Noble *L.M.N.*  
General Counsel

N. Bradley Litchfield *NBL/RS*  
Associate General Counsel

Jonathan M. Levin *JL*  
Senior Attorney

Subject: Draft AO 2000-04

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for March 16, 2000.

Attachment

1 ADVISORY OPINION 2000-04

2  
3 Thomas J. Cooper  
4 John F. Cooney  
5 Venable, Baetjer, Howard & Civiletti, LLP  
6 1201 New York Avenue, N.W.  
7 Suite 1000  
8 Washington, D.C. 20005-3917

**DRAFT**

9  
10 Dear Mr. Cooper:

11 This responds to your letter dated January 21, 2000, on behalf of the National  
12 Association of Credit Unions ("NAFCU"), requesting an advisory opinion concerning the  
13 application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and  
14 Commission regulations to contributions to NAFCU/PAC ("the PAC") by share account  
15 holders in NAFCU's member credit unions and the role of the credit unions in the  
16 contribution process.

17 ***Background and Proposal***

18 NAFCU is a trade association organized as a non-profit corporation in the State of  
19 California and is tax exempt under 26 U.S.C. §501(c)(6). You state that it was organized  
20 to extend the utility of Federal credit unions to consumers and to improve business  
21 conditions for its members. NAFCU has approximately 1,100 members, almost all of  
22 which are Federally-chartered credit unions organized under the auspices of the Federal  
23 Credit Union Act, 12 U.S.C. §1751, *et seq.* Moreover, State chartered credit unions that  
24 are Federally insured and that were members of NAFCU at the time of conversion to a  
25 State charter may remain as members of NAFCU. As part of your request, you have  
26 enclosed NAFCU's bylaws and the standard bylaws issued by the National Credit Union  
27 Administration ("NCUA") for Federal credit unions, which is representative of the  
28 bylaws of NAFCU's credit union members.

29 NAFCU has a separate segregated fund ("SSF"), NAFCU/PAC, which is a  
30 registered multicandidate political committee.<sup>1</sup> The PAC proposes to raise contributions  
31 through the "Invest in Democracy Fundraising Program." NAFCU would solicit the  
32 share account holders (i.e., members) of the incorporated credit unions that are members

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<sup>1</sup> NAFCU/PAC filed its statement of organization with the Commission in 1976.

1 of NAFCU.<sup>2</sup> You state that a procedure would be developed so that any account holders  
2 that are foreign nationals, corporations, or individual sole proprietors who are Federal  
3 contractors would not be solicited. Participating credit unions would sign prior approval,  
4 solicitation authorization forms before any solicitation by the PAC, and member credit  
5 unions would not be allowed to give solicitation approval if they have already given it to  
6 another trade association. Subsequently, individual account holders desiring to contribute  
7 would sign automatic account transfer forms instructing their respective credit unions to  
8 transfer a designated amount from their share account to the PAC. The credit union  
9 would establish debits from a member's individual share account and transmit the funds  
10 directly to the PAC; procedures would be established for timely transmittal to the PAC  
11 under 11 CFR 102.8. Prior to making an automatic deduction, the credit unions will  
12 devise procedures to review the account to determine that: the account balance is  
13 sufficient to support the deduction; the account belongs to an individual; and that the  
14 account holder is not in any one of the three prohibited contributor categories listed  
15 above.

16 You ask: (i) whether the PAC may solicit voluntary contributions from individual  
17 share account holders of NAFCU's incorporated member credit unions; (ii) whether  
18 NAFCU's member credit unions may defray the expenses of deducting PAC  
19 contributions from the credit union accounts of the individual share account holders; and  
20 (iii) whether automatic deductions may be made from the share account holder's account.

21 ***Act and Commission regulations***

22 In order to respond to the questions, the Commission must analyze the nature of  
23 NAFCU as a trade association of the member credit unions, the ability of NAFCU to  
24 solicit contributions for the PAC from the share account holders of the credit unions, and  
25 the ability of the member credit unions to participate in the collection of contributions to  
26 the PAC. The provisions discussed below are applicable.

27 In an exception to the general prohibition on corporate contributions, the Act and  
28 Commission regulations provide that a corporation, including an incorporated trade

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<sup>2</sup> The standard bylaws for a Federal credit union indicate that they are corporations chartered under the laws of the United States. The Commission assumes that those few members of NAFCU that are State chartered are also incorporated.

1 association, may use general treasury funds for the establishment, administration, and  
2 solicitation of contributions to its SSF. 2 U.S.C. §441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii)  
3 and 114.5(b). An organization such as an incorporated trade association, which is not  
4 itself a political committee, but which directly or indirectly establishes, administers, or  
5 financially supports a political committee is a "connected organization" of that  
6 committee. 2 U.S.C. §431(7); 11 CFR 100.6(a). A connected organization or its  
7 subsidiary, branch, division, department or local unit is permitted to act as a "collecting  
8 agent" for the SSF and thus may collect and transmit contributions to the SSF without  
9 thereby becoming a political committee. 11 CFR 102.6(b)(1)(ii) and (iii), and  
10 102.6(b)(2).<sup>3</sup> The collecting agent may pay any and all costs incurred in soliciting and  
11 transmitting contributions to the SSF. 11 CFR 102.6(c)(2)(i).

12 The connected organization and its SSF are subject to restrictions as to the  
13 personnel who may be solicited for contributions to the SSF. 2 U.S.C. §441b(b)(4)(A),  
14 (C), and (D); 11 CFR 114.5(g)(1), 114.7(a), and 114.8(c). Specifically, an incorporated  
15 trade association and its SSF may solicit the association's executive and administrative  
16 personnel, and the families of such personnel. They may also solicit the stockholders and  
17 executive and administrative personnel, and the families of such stockholders and  
18 personnel, of the member corporations that separately and specifically approve the  
19 solicitations and that have not approved a solicitation by any other trade association for  
20 the same calendar year. Moreover, they may solicit members of the association that are  
21 not incorporated, without any need to seek a prior approval. 11 CFR 114.7(a), 114.7(c),  
22 and 114.8(c). The requirements for separate and specific approval are described in 11  
23 CFR 114.8(d) and (e).

24 Under Commission regulations, a trade association is:

25 generally a membership organization of persons engaging in a similar or  
26 related line of commerce, organized to promote and improve business  
27 conditions in that line of commerce and not to engage in a regular business  
28 of a kind ordinarily carried on for profit, and no part of the net earnings of  
29 which inures to the benefit of any member.

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<sup>3</sup> The two other permissible categories of collecting agents are a committee affiliated with the recipient SSF and a local, national, or international union collecting contributions for the SSF of a labor federation with which the union is affiliated. 11 CFR 102.6(b)(1)(i) and (iv).

1  
2 11CFR 114.8(a). Commission regulations define a "membership organization" as a trade  
3 association, cooperative, or corporation without capital stock that:

- 4 (i) Is composed of members, some or all of whom are vested with the  
5 power and authority to operate or administer the organization, pursuant to  
6 the organization's articles, bylaws, constitution or other formal  
7 organizational documents;  
8 (ii) Expressly states the qualifications and requirements for membership in  
9 its articles, bylaws, constitution or other formal organizational documents;  
10 (iii) Makes its articles, bylaws, constitution, or other formal organizational  
11 documents available to its members upon request;  
12 (iv) Expressly solicits persons to become members;  
13 (v) Expressly acknowledges the acceptance of membership, such as by  
14 sending a membership card or including the member's name on a  
15 membership newsletter list; and  
16 (vi) Is not organized primarily for the purpose of influencing the  
17 nomination for election, or election, of any individual to Federal office.  
18

19 11 CFR 114.1(e)(1)(i)-(vi); see also 11 CFR 100.8(b)(4)(iv)(A)(1)-(6).

20 The term "members" includes all person who are currently satisfying the  
21 requirements for membership in a membership organization, affirmatively accept the  
22 membership organization's invitation to become a member, and either:

- 23 (i) Have some significant financial attachment to the membership  
24 organization, such as a significant investment or ownership stake; or  
25 (ii) Pay membership dues at least annually, of a specific amount  
26 predetermined by the organization; or  
27 (iii) Have a significant organizational attachment to the membership  
28 organization which includes: affirmation of membership on at least an  
29 annual basis; and direct participatory rights in the governance of the  
30 organization. For example, such rights could include the right to vote  
31 directly or indirectly for at least one individual on the membership  
32 organization's highest governing board; the right to vote directly for  
33 organization officers; the right to vote on policy questions where the  
34 highest governing body of the membership organization is obligated to  
35 abide by the results; the right to approve the organization's annual budget;  
36 or the right to participate directly in similar aspects of the organization's  
37 governance.  
38

39 11 CFR 114.1(e)(2)(i)-(iii); see also 11 CFR 100.8(b)(4)(iv)(B)(1)-(3).

1 ***NAFCU as a membership organization and membership rights***

2 Membership in NAFCU is voluntary and open to any Federally-chartered credit  
3 union, as well as the previously described grandfathered State chartered credit unions.  
4 NAFCU Bylaws, Article I, §1. Any credit union eligible for membership in NAFCU  
5 becomes a member upon making a written application and upon payment of the  
6 prescribed dues amount. Bylaws, Article I, §2. Thereafter, the members pay annual dues.  
7 See Bylaws, Article XI. You state that NAFCU expressly solicits persons to become  
8 members. NAFCU expressly acknowledges the acceptance of membership by sending  
9 each new member a "new member packet" explaining the benefits of membership, as  
10 well as a plaque, a decal, and a member logo that can be included in credit union  
11 publications. You also state that NAFCU makes its articles of incorporation and bylaws  
12 available to its members upon request. See 11 CFR 114.1(e)(1)(ii), (iii), (iv), and (v), and  
13 114.1(e)(2)(ii).

14 The management of NAFCU is vested in its board of directors, which consists of  
15 six at-large members and one member from each of six geographic regions. Bylaws,  
16 Article VI, §§1 and 3. To be eligible for the board, a person must be a board member or  
17 CEO of a Federal credit union that is a NAFCU member. Bylaws, Article VI, §2.  
18 Directors at-large are elected by a mail ballot of the full membership of NAFCU.  
19 Regional directors are elected by a mail ballot of the members in their respective regions.  
20 Delegates of the members attend an annual meeting, as well as any special meetings  
21 called by the board for the consideration of a specific subject; some matters requiring a  
22 membership vote may be voted on by mail. Bylaws, Article IV and V. See 11 CFR  
23 114.1(e)(1)(i) and 114.1(e)(2)(iii).

24 The foregoing information and explanations, as well as the above-stated purpose  
25 of NAFCU, indicate that NAFCU qualifies as a membership organization under  
26 Commission regulations. It satisfies the six defining criteria at 11 CFR 114.1(e)(1).  
27 Moreover, the credit unions in NAFCU satisfy the definition of "member" at 11 CFR  
28 114.1(e)(2) in that they affirmatively respond to NAFCU's solicitations for membership  
29 and pay dues annually. In view of NAFCU's principal purpose of improving business

1 conditions for Federal credit unions, it also qualifies as a trade association under 11 CFR  
2 114.8(c).

3 *Rights of members within credit unions*

4 You state that a credit union is a member-owned, member-controlled, not for  
5 profit cooperative financial institution formed to permit groups of persons to save,  
6 borrow, and obtain related financial services. The member Federal credit unions are  
7 corporations chartered under the laws of the United States. The standard bylaws provide  
8 for a membership application process and for approval by a specific authority. Standard  
9 Bylaws, Article II. The members are invited to an annual meeting of the credit union.  
10 Bylaws, Article IV. The bylaws also provide for a board of directors, consisting entirely  
11 of members of the credit union, that "has the general direction and control of the affairs of  
12 [the] credit union and is responsible for performing all the duties customarily performed  
13 by boards of directors." Bylaws, Article VI, §§1 and 6. This board is elected by the  
14 members of the credit union who each have one vote. Bylaws, Article V, §5.

15 You describe the financial interest of the members. The members are "share  
16 account holders." To be accepted into membership, a person must subscribe to at least  
17 one share of the credit union, pay for the initial installment on that share, and, if the board  
18 requires, pay a uniform entrance fee. Bylaws, Article II, §2. There are provisions  
19 requiring the continued maintenance of one share at par value in the account. Article III,  
20 §§1 and 3. Share account holders may also receive dividends. Article XII. The bylaws  
21 also include provisions for borrowing by the member and the related need to maintain a  
22 certain balance if delinquent, the holding of shares in trust, and fees on excessive share  
23 withdrawals. Article III. You note that the NCUA's Accounting Manual instructs  
24 Federally-insured credit unions that "shares function as equity and represent ownership"  
25 and that, as such, should be "classified as equity in the credit union's Statement of  
26 Financial Condition."

27 The Act and Commission regulations expressly permit the solicitation of the  
28 shareholders of a member corporation of a trade association for contributions to the trade  
29 association's SSF but do not specifically address the solicitation of "members" of non-  
30 stock corporate members of trade associations. 2 U.S.C. §441b(b)(4)(D); 11 CFR

1 114.8(c). As illustrated above, the members of the credit unions, however, have rights  
2 and interests that correspond closely to those of shareholders. They have the governance  
3 rights described above coupled with equity ownership of the credit union in the form of  
4 shares (and certain contingent financial obligations, such as in a borrowing situation).<sup>4</sup>  
5 The Commission concludes, therefore, that the members of NAFCU's member credit  
6 unions should be treated as stockholders for purposes of solicitation for contributions to  
7 the PAC, and not merely as members or depositors.

8 *Responses to questions*

9 As indicated above, the PAC may solicit contributions from the individual  
10 members of the incorporated member credit unions. A response as to the role of the  
11 credit unions in the deduction of PAC contributions from the share accounts and the  
12 expenses to screen the contributions is, in part, affected by whether the credit union may  
13 act as a collecting agent for the PAC. As a collecting agent, a credit union would be able  
14 to perform all of the proposed collecting functions without making a corporate  
15 contribution to the PAC. In order to be a collecting agent, a credit union would have to  
16 be a local unit or other type of affiliate of NAFCU. As such, it would have to fit within  
17 the class of related organizations described in 11 CFR 100.5(g)(2) and by application of  
18 the categories in 11 CFR 100.5(g)(3) or the factors at 11 CFR 100.5(g)(4). In the absence  
19 of further information as to all aspects of the relationship of member credit unions to  
20 NAFCU, the Commission cannot presently conclude that the credit unions would be more

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<sup>4</sup> You note that, in an opinion issued to the Credit Union National Association ("CUNA"), the Commission addressed the rights of members in two of its member credit unions, and concluded that the rights of the members were sufficiently analogous to stockholders in stock corporations to permit solicitation, under 11 CFR 114.8(c), by CUNA's SSF. You point out that those two credit unions are also members of NAFCU. Advisory Opinion 1998-19. That opinion also discussed Commission opinions analogizing a member's equity interest in a nonstock corporation and the interest of a shareholder in an incorporated savings and loan association to stockholders' rights in a stock corporation. See Advisory Opinions 1984-63 and 1982-12.



1 than just members, but would also qualify as affiliates.<sup>5</sup> Therefore, the individual credit  
2 unions cannot act as collecting agents.<sup>6</sup>

3 Although the credit unions may not act as collecting agents, they may perform the  
4 proposed functions for other reasons and under certain conditions. The credit union  
5 functions as a depository institution (or bank) for its members. Any cost of the actual  
6 deduction and transfer of a pre-authorized amount from the member's account would be  
7 no different, in effect, from the functions that a contributor's bank would perform in  
8 deducting the amount of a contribution check from the bank account and transmitting the  
9 funds to the bank of the recipient political committee.

10 In addition to these typical depository, collection, and fund transmittal functions,  
11 however, the credit union will assign some of its employees to perform the screening  
12 functions described above. These include assuring that contributions are not deducted  
13 from accounts that would fall below the balances required to be maintained under the  
14 credit union's rules, and that the accounts are owned only by those persons who may  
15 lawfully make contributions under the Act and regulations. These activities may be  
16 treated, in the manner described below, as either legal and accounting services provided  
17 by the employees of the credit union or as exempt administrative costs that may be paid  
18 by NAFCU.

19 Under the Act and Commission regulations, legal and accounting services  
20 rendered to a political committee are not contributions if the person paying for such  
21 services is the regular employer of the individual rendering the services and if such  
22 services are solely to ensure compliance with the Act or the presidential funding

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<sup>5</sup> See, e.g., Advisory Opinion 1985-37, where the Commission concluded that a local chamber of commerce was merely an organizational member of the State chamber, did not qualify as a local unit, and could not therefore act as a collecting agent. See also Advisory Opinions 1997-9 and 1989-3 where the Commission concluded that member firms of a member organization and corporate members of a trade association did not qualify as collecting agents.

<sup>6</sup> Your situation is also distinguishable from that presented in Advisory Opinion 1998-19 where the Commission considered a program in which member credit unions of a federated national credit union association would participate in debiting the accounts of their share account holders for contributions to the SSFs of the national association or the association's State leagues. The Commission concluded that the credit unions would qualify as local units, reasoning that "the situation of a federation of trade associations is distinguishable from the customary trade association structure since, by definition, the federation presents a highly integrated structure with multiple tiers of organizational membership and related governance powers linking the tiers." Under the facts you have presented, NAFCU is not a federation of trade associations.

1 provisions of title 26. 2 U.S.C. §431(8)(B)(ix)(II); 11 CFR 100.7(b)(14). The political  
2 committee must report, as a memo entry on Schedule A, the amounts paid for these  
3 services by the employer, the date(s) such services were performed, and the name of each  
4 person performing such services. 11 CFR 104.3(h). The amounts expended by the credit  
5 unions for setting up and operating the screening functions, including the payments of  
6 salary and other compensation to the employees, would be exempt from the definition of  
7 contribution, but would have to be reported by the PAC. NAFCU or the PAC will  
8 therefore have to contact each credit union whose employees are providing such services  
9 to ascertain the costs of such services and the other information required by 11 CFR  
10 104.3(h). The Commission is mindful, however, of the quantity of information that might  
11 be required if a large number of credit unions (out of the 1100 members) participated in  
12 these contribution screening activities. Due to the circumstances presented, where a very  
13 extensive amount of detailed information would need to be reported in the described  
14 memo entries, the Commission will allow a modification with respect to NAFCU's  
15 situation. Instead of reporting these costs with each report, the PAC will only be required  
16 to report them on its year end report. On that report, NAFCU shall disclose the total  
17 yearly amount spent by the credit unions whose employees provided such services, and  
18 the name of each such credit union. For each of the credit unions, the PAC should also  
19 disclose the time period in which such services were provided (which may be phrased as  
20 "entire year" if applicable to the particular credit union), and the name(s) of each credit  
21 union employee who provided the services.

22 As an alternative, NAFCU may treat these expenses as exempt administrative  
23 costs under 2 U.S.C. §441b(b)(2)(C) if it pays the credit unions for them. NAFCU may  
24 pay the credit union on a periodic basis (e.g., twice yearly) for the actual costs incurred by  
25 the credit union. Using another payment approach, NAFCU may instead contract with  
26 the credit union for an amount based on a reasonable estimate of the anticipated cost of  
27 such services over a specific time period (e.g., a year) and pay that amount.<sup>7</sup>

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<sup>7</sup> See Advisory Opinion 1997-9 for a somewhat similar treatment of expenses by a member firm of a membership organization for screening the accounts of individuals who authorize deductions for contributions.

1           As indicated in the above responses, the Commission also concludes that an  
2 automatic deduction system performed by the credit union may be used. Although 11  
3 CFR 114.8(e)(3) prohibits the use of a payroll deduction or checkoff system for  
4 contributions by the executive or administrative personnel of a member corporation to the  
5 SSF of a trade association, this provision is inapplicable since the funds in question  
6 would not be deducted by means of a payroll deduction system administered by the  
7 employer of the share account holders. Even if a deduction is authorized by a person who  
8 is both a share account holder and an employee of the same credit union, such a deduction  
9 would be permissible because the deductions will be made from the share account and not  
10 from an employee payroll account. The Commission notes that pre-authorized automatic  
11 deductions by member credit unions from share accounts for contributions to the SSF of a  
12 national credit union association were determined to be permissible under the regulations  
13 in Advisory Opinion 1998-19.

14           The Commission also conditions its approval of this automatic deduction system  
15 on compliance by NAFCU with the voluntariness requirements set out at 11 CFR  
16 114.5(a)(1)-(5) when it solicits written and signed authorization from a share account  
17 holder for the periodic deduction of contributions. These requirements include  
18 informing the solicitee of the political purposes of the PAC, that the solicitee is free to  
19 contribute more or less than any suggested guideline, that the solicitee will not be favored  
20 or disadvantaged by reason of the amount of the contribution or the decision not to  
21 contribute, and that the solicitee is free to contribute or refuse to contribute without  
22 reprisal.<sup>8</sup> 11 CFR 114.5(a)(2), (3), and (4).<sup>9</sup>

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<sup>8</sup> The right to refuse to contribute includes the right to revoke, or modify the amount of, an authorization at any time. See, e.g., Advisory Opinion 1999-3.

<sup>9</sup> The PAC must ensure that the members' authorizations for deductions are preserved in accordance with 11 CFR 104.14(b) and 102.9(c). See, e.g., Advisory Opinion 1999-3.

