AGENDA DOCUMENT NO. 10-04-B

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

February 25, 2010

MEMORANDUM

AGENDA ITEM

For Meeting of 03-04-10

To: The Commission

Through: Alec Palmer
Acting Staff Director

From: Joseph F. Stoltz
Assistant Staff Director
Audit Division

Tom Hintermister
Audit Manager

By: Bill Antosz
Lead Auditor

Subject: Audit Hearing for AFL-CIO Committee on Political Education/Political Contributions Committee (AFL PCC)

Attached is a memorandum from the Office of General Counsel commenting on AFL PCC's January 15, 2010 submission.

AFL PCC requested a hearing on November 16, 2009 and indicated that it wished to address Finding 2 (Transfers Received from Separate Segregated Funds) of the draft Final Audit Report. On December 16, 2009, the Commission granted AFL PCC's request for a hearing. The hearing was originally scheduled for January 20, 2010. On January 15, 2010, AFL PCC submitted a document that referenced conclusions in a 1979 audit report of AFL PCC. To allow time to consider this information the hearing was rescheduled for March 4, 2010.

Other documents related to the draft final audit report and audit hearing were previously circulated and are located in Ntsrv1\voting ballot matters\Audit\AFL-CIO\Audit Hearing. Should you have any questions, please contact Bill Antosz or Tom Hintermister.

Attachment as stated

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

February 24, 2010

MEMORANDUM

TO: Joseph F. Stoltz
Assistant Staff Director

FROM: Christopher Hughey
Deputy General Counsel

Lawrence L. Calvert, Jr.
Associate General Counsel

Lorenzo Holloway
Assistant General Counsel
For Public Finance and Audit Advice

Albert Veldhuyzen
Attorney

SUBJECT: Draft Final Audit Report on AFL-CIO Committee on Political Education/Political Contributions Committee (LRA # 761).

I. INTRODUCTION

The Office of General Counsel has reviewed the Draft Final Audit Report ("Report") on the AFL-CIO Committee on Political Education/Political Contributions Committee ("AFL PCC") and the responses provided by the AFL PCC. This memorandum reflects our analysis of the AFL PCC response of January 15, 2010 that it submitted in anticipation of the audit hearing. In this response, AFL PCC claims that an audit report that it received in 1979 settles the main issue of the audit hearing. The Commission, however, instituted a rulemaking in 1983 on collecting agents and joint fundraising that may have an impact on the Commission's decision from the 1979 audit. In the remainder of this memorandum, we address the impact of this rulemaking on the Commission's decision in the 1979 audit report. If you have any questions, please contact Albert R. Veldhuyzen, the attorney assigned to this audit.

The Commission will hold an audit hearing on March 4, 2010 on the Report for AFL PCC. The main issue at the hearing is the manner in which AFL PCC received and reported funds from other union separate segregated funds ("SSFs"). The draft Final Audit Report concludes that the other union SSFs acted as collecting agents for AFL PCC. Under 11 C.F.R.

§ 102.6, the collecting agent must transmit to the recipient committee the full amount of each contribution collected within 10 days after receipt of contributions of more than $50 or 30 days for contributions of $50 or less. The collecting agent must also transmit, along with the contributions, the name and address of the contributors and the date of receipt for each contribution between $51 and $200, and the name, address, occupation, and name of employer of the contributors for each contribution in excess of $200. 11 C.F.R. §§ 102.6(c)(5), 102.8. In addition, the collecting agent must retain all records of contribution deposits and transmittals for three years for Commission inspection. 11 C.F.R. § 102.6(c)(6). However, it is the receiving SSF that must report the full amount of each contribution received as a contribution from the original contributor. 11 C.F.R. § 102.6(c)(7). The receiving SSF is also responsible for ensuring that transferor SSFs meet the recordkeeping, reporting, and transmittal requirements of the collecting agent rules. 11 C.F.R. § 102.6(c)(1).

The facts show that the SSFs transmitted an agreed portion of the collections in a lump sum to AFL PCC. On the receiving end, AFL PCC reported this lump sum transmittal as a transfer from an affiliated committee. The audit found that: 1) The transmitting SSFs did not maintain separate transmittal accounts solely for AFL PCC or keep separate records of all such receipts and deposits; 2) The transmitting SSFs did not forward the individual (payroll contributor) contribution amounts and contributor information (about the payroll contributor) to AFL PCC or maintain those records of deposits and transmittals for three years; 3) AFL PCC did not report the full amount of each contribution received from the original contributor when required; and 4) AFL PCC failed to ensure that transferor SSFs met these recordkeeping, reporting, and transmittal requirements found in the collecting agent rules at 11 C.F.R. § 102.6(c).

AFL PCC Counsel asserted that, because the SSFs and AFL PCC had the dual capacity and ability to receive contributions for themselves and to transfer contributions to AFL PCC, the collecting agent rules of 11 C.F.R. § 102.6 should not apply to these transactions. *See* Letter from Lawrence Gold to Tom Hintermister, at 7 (July 8, 2008). However, in a letter dated January 15, 2010, AFL PCC Counsel supplemented its response to the Report. As a result of the 1979 audit report of the AFL PCC, Counsel now argues that the Commission specifically blessed the arrangement that the SSFs and AFL PCC have been using over the years.

In the 1979 AFL PCC Audit Report, the Commission outlined how funds could be transferred to AFL PCC in the context of "joint fundraising" with a member union. To constitute a joint fundraising effort: 1) the collecting organization would have to inform the contributor at the time of the solicitation that a portion of the funds will be sent to the AFL PCC; 2) the committee collecting the funds would report them as itemized or unitemized when received and would report the transfer out of the funds; and 3) AFL PCC as the receiving committee would report the transfers in on the next report and label them as "joint fundraising efforts." *See* Report of the Audit Division on the AFL-CIO COPE PCC, at 4 (June 8, 1979). AFL PCC Counsel states that this is exactly what AFL PCC and its sister union SSFs have been doing since that audit. AFL PCC further contends that "the Commission's adoption of its joint fundraising rules for persons other than SSFs and its collecting agent rules entailed no changes

that undermined the arrangements and relationships endorsed by the Commission in its 1979 audit of AFL-CIO PCC." Letter from Laurence E. Gold to Joseph F. Stoltz, at 7 (Jan. 15, 2010).

II. THE 1983 RULEMAKING MAY HAVE CHANGED THE PROCEDURES FOR AFL PCC

The impact of the 1983 collecting agent and joint fundraising rulemaking on the procedures approved in the 1979 AFL-CIO COPE audit is unclear. On the one hand, an examination of the comments submitted by the AFL-CIO during the 1981-83 rulemaking, and the Commission's apparent response to those comments, would seem to support the position taken by the Audit Division in the current report. On the other hand, the Commission's response to the AFL-CIO's comments was implicit, rather than explicit, and there is no evidence from the immediate aftermath of the rulemaking of any effort by the Commission specifically to inform the AFL-CIO that it needed to change its practices.

As noted, in the 1979 audit report the Commission characterized practices essentially identical to those at issue in this audit as "joint fundraising." In a Notice of Proposed Rulemaking published in the *Federal Register* on September 30, 1981, the Commission proposed new rules intended to make a clearer distinction between what the NPRM referred to as "true joint fundraising" and the activities of collecting agents.[1] The proposed new joint fundraising regulation provided that "[p]olitical committees may engage in joint fundraising with other political committees or with unregistered committees or organizations," proposed 11 C.F.R. § 102.7(a)(1), and that "[t]he procedures in [this regulation] will govern all joint fundraising activity conducted under this section," proposed 11 C.F.R. § 102.7(a)(3). The proposed rules distinguished between situations in which two political committees raised funds together, which would be joint fundraising, and situations in which unregistered organizations – such as a corporation or a union local – collected funds on behalf of political committees to which they were related, as in the relationship of a separate segregated fund to its connected organization. *See generally* 46 Fed. Reg. 48074. The implication was that the regulation would cover *all* forms of joint fundraising.

The AFL-CIO opposed the joint fundraising regulation in its proposed form, citing a number of reasons why in its view the proposed rule would be impractical for groups of two or more separate segregated funds engaged in joint fundraising. Among these were that a

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[1] According to the NPRM,

> The draft regulations provide separate procedures for these two forms of fundraising. To emphasize the distinction between true joint fundraising and the collecting agent situation, the proposed regulations would change the title of 11 C.F.R. 102.6 from "Transfers of Funds; Joint Fundraising" to "Transfers of Funds; Collecting Agents." In addition, a new section entitled "Joint Fundraising" would be added at 11 C.F.R. 102.7, thus necessitating a renumbering of subsequent sections of 11 CFR Part 102.

Notice of Proposed Rulemaking 1981-9, *Transfers of Funds; Collecting Agents, Joint Fundraising*, 46 Fed. Reg. 48074 (Sep. 30, 1981).

requirement to allocate fundraising expenses made no sense for SSFs, the fundraising expenses of which may be paid by their connected organizations, and that several of the procedural requirements would be onerous and burdensome for labor organizations. AFL-CIO Letter from J. Albert Woll, *et al.* to Susan Propper, Regarding Proposed Regulations 102.6 & 102.7 ("AFL-CIO Comments"), at 5-7 (Oct. 30, 1981). Consequently, the AFL-CIO suggested, proposed 11 C.F.R. § 102.7(a)(3) could be revised to read "The procedures in this section do not apply to instances in which all the parties engaged in joint fundraising are organizations whose activities are governed by 2 U.S.C. § 441b." *Id.* at 1-2.

However, the Commission did not adopt the AFL-CIO's suggestion in full. It did amend the title of the final joint fundraising regulation, which it determined to codify at 11 C.F.R. § 102.17, to read "Joint fundraising by committees other than separate segregated funds." But rather than adopt verbatim the AFL-CIO's proposed regulatory text, it adopted text that is still the law today: "If a separate segregated fund or an unregistered organization qualifies and acts as a collecting agent under 11 CFR 102.6(b), the provisions of 11 CFR 102.17 will not apply to that fundraising activity." 11 C.F.R. § 102.17(a)(3). Similarly, in the Explanation and Justification of the new rule, the Commission stated that "Subsection (a)(3) . . . clarifies that the provisions of this section are inapplicable to a separate segregated fund or an unregistered organization operating as a collecting agent under § 102.6(b)." Interestingly, and perhaps significantly, this is the only part of either Section 102.6 or Section 102.17 that refers specifically to a separate segregated fund acting as a collecting agent, rather than being the recipient of contributions collected by a collecting agent.

A similar sequence is apparent with respect to the provisions of 11 C.F.R. § 102.6 regarding the reporting of contributions received through a collecting agent. The proposed rule stated, "A separate segregated fund receiving contributions collected by a collecting agent shall report the total amount received as a transfer-in from the collecting agent. The recipient shall also file a memo Schedule A itemizing the total receipts as contributions from the original contributors to the extent required by 11 CFR 104.3(a)." Notice of Proposed Rulemaking 1981-9, *Transfers of Funds; Collecting Agents, Joint Fundraising*, 46 Fed. Reg. 48074 (Sep. 30, 1981). The AFL-CIO commented that "Proposed 102.6(c)(7) should be revised by deletion of the requirement for separate itemization of transfers-in from collecting agents. Itemization of transfers from an affiliated organization which is not a political committee is not contemplated by 2 U.S.C. § 434b and there is no justification in the purposes or policies of the Act for the imposition of this onerous requirement." AFL-CIO Comments at 4. The AFL-CIO may have been trying to say that itemization of individual contributions, once received from a collecting agent, should not be required. But the Commission appears to have read the comments as objecting to the reporting of the transfer-in; the final and current rule states, "A separate segregated fund receiving contributions collected by a collecting agent shall report the full amount of each contribution received as a contribution from the original contributor to the extent required by 11 C.F.R. § 104.3(a)." 11 C.F.R. § 102.6(c)(7).

From this history, one might infer that the Commission responded to the AFL-CIO's comments by clarifying that when one SSF collects contributions on behalf of another, as the AFL-CIO member unions' SSFs sometimes do on behalf of AFL PCC, the relationship is a

collecting agent relationship, not a joint fundraising relationship; and by deciding that contributions received through a collecting agent need only be reported as contributions received from the original contributor, with itemization of the contributions required or not depending on whether the contributor's contributions exceed the itemization threshold.

On the other hand, the Commission does not appear explicitly to have characterized these changes between the proposed and final rules as having been made in response to the AFL-CIO's comments. Nowhere in the Commission's Explanation and Justification of the final collecting agent and joint fundraising regulations is there any discussion of the AFL-CIO's comments, much less an acknowledgement that the Commission was addressing them in any particular fashion. While the Commission's Explanations and Justifications of final rules from that era generally did not address specific comments in the detail that "E&Js" of more recent vintage do, a third AFL-CIO comment – dealing with an issue regarding employee benefit plan administrators acting as collecting agents – *was* specifically addressed in the E&J. Moreover, inasmuch as the AFL PCC and the SSFs of AFL-CIO member unions have continued to the present day the practice described in the 1979 audit report, it appears that no one at the Commission informed the AFL-CIO in the wake of the 1983 rulemaking that it needed to change its practices. But we have been able to find no documents, and no institutional memory, that would explain whether this was a deliberate decision reflecting an understanding that the new regulations would have no impact on the AFL-CIO, or whether it was simply a matter of no one noticing at the time or for a long time afterwards.

Accordingly, we believe the Commission might find it helpful to hear argument from AFL PCC's counsel regarding whether the collecting agent and joint fundraising rules adopted in 1983 changed in any way the appropriate analysis of the practice approved in the 1979 audit report; if so, how; and if not, why not.