

April 13, 2006

**AO DRAFT COMMENT PROCEDURES**

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2006-09 is available for public comments under this procedure. It was requested by, Russell Smith., on behalf of The American Institute for Certified Public Accountants and The American Institute for Certified Public Accountants Political Action Committee.

Proposed Advisory Opinion 2006-09 is scheduled to be on the Commission's agenda for its public meeting of Thursday, April 20, 2006.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on April 19, 2006.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

## **CONTACTS**

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2006-09, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

## **MAILING ADDRESSES**

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April 13, 2006

MEMORANDUM

**AGENDA ITEM**

For Meeting of: 4-20-06

TO: The Commission

THROUGH: Robert J. Costa *RJC*  
Acting Staff Director

FROM: Lawrence H. Norton *LHN (by SAC)*  
General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Mai T. Dinh *MTD by J.E.*  
Assistant General Counsel

Anthony T. Buckley *ATB*  
Attorney

Subject: Draft AO 2006-09

Attached are two proposed drafts of Advisory Opinion 2006-09, which responds to the request from the American Institute of Certified Public Accountants ("AICPA") and its separate segregated fund, the American Institute of Certified Public Accountants Political Action Committee ("AICPA PAC"). The requestors seek the Commission's determination as to whether AICPA PAC must attribute checks from partnerships that represent contributions from individual partners as contributions from individual partners and as contributions from the partnerships.

Draft A concludes that AICPA PAC must attribute such contributions to both the individual partners and to the partnerships. Draft B concludes that AICPA PAC may be able to attribute the contribution to individual partners only.

We request that these drafts be placed on the agenda for April 20, 2006.

Attachment  
Drafts A and B

1 ADVISORY OPINION 2006-9

2  
3 Mr. Russell L. Smith  
4 Willkie Farr & Gallagher, LLP  
5 1875 K Street, NW  
6 Washington, DC 20006-1238  
7  
8

**DRAFT A**

9 Dear Mr. Smith:

10 We are responding to your advisory opinion request on behalf of the American  
11 Institute of Certified Public Accountants ("AICPA") and its separate segregated fund, the  
12 American Institute of Certified Public Accountants Political Action Committee ("AICPA  
13 PAC"), concerning the application of the Federal Election Campaign Act of 1971, as  
14 amended (the "Act"), and Commission regulations to AICPA PAC's treatment of checks  
15 received from partnerships. The Commission concludes that AICPA PAC must attribute  
16 and report any check received from a partnership as a contribution by the partnership, as  
17 well as contributions by individual partners.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on  
20 February 16, 2006.

21 AICPA, a District of Columbia nonprofit corporation, is the national professional  
22 organization composed of Certified Public Accountants, many of whom practice their  
23 profession as partners in professional partnerships. The partnerships themselves do not  
24 belong to AICPA. AICPA PAC is AICPA's separate segregated fund ("SSF"), and is  
25 registered with the Commission.

26 Some partnerships deduct partners' dues to AICPA from their partnership  
27 compensation and aggregate all of the dues payments into a single check transmitted to

1 AICPA. AICPA PAC would like to accept contributions from partners in a similar  
2 manner. Under the proposal, partners would have their partnerships deduct their  
3 individual contributions from their respective compensation. A partnership would then  
4 aggregate these individual contributions into one check drawn on the partnership's  
5 operating account, which the partnership would then send to AICPA PAC.

6 ***Question Presented***

7 *May AICPA PAC accept a check representing contributions by individual*  
8 *partners of a partnership and attribute the contributions to the individual partners only*  
9 *and not also attribute the contribution to the partnership, and report the contributions as*  
10 *such?*

11 ***Legal Analysis and Conclusions***

12 The Commission concludes that AICPA PAC may accept a check from a  
13 partnership representing contributions by individual partners and that it must attribute the  
14 contributions to both the individual partners and the partnership. AICPA PAC must  
15 report the contributions accordingly.

16 Under the Act and Commission regulations, a partnership is a "person." 2 U.S.C.  
17 431(11); 11 CFR 100.10. As a result, a contribution from a partnership is attributable not  
18 only to individual partners but also to the partnership itself. See 11 CFR 110.1(e). The  
19 Commission considered and rejected attributing partnership contributions only to  
20 individual partners, concluding that this would be in conflict with the Act. See  
21 Explanation and Justification, Contribution and Expenditure Limitations and  
22 Prohibitions; Contributions by Persons and Multicandidate Committees; 52 FR 760, 764  
23 (Jan. 9, 1987).

1           You offer three rationales for why you believe the Commission should allow  
2   AICPA PAC to attribute the contributions to the individual partners only and not also to  
3   the partnership, which are addressed in turn.

4   1. Contributions Drawn on a Partnership's Operating Account

5           In one instance, the Commission allowed a partnership to forward contributions  
6   from partners to the partnership's nonconnected political committee without the amounts  
7   of the partners' contributions being considered partnership contributions. *See Advisory*  
8   *Opinion 2005-20 (Pillsbury Winthrop)*. However, the special circumstances that existed  
9   in that advisory opinion do not exist in the proposed scenario you present on behalf of  
10   AICPA and AICPA PAC for two reasons.

11           In *Advisory Opinion 2005-20 (Pillsbury Winthrop)*, a partnership that was a  
12   Federal contractor sought to use its automated electronic payroll system to disburse funds  
13   from the partnership's payroll account to the partnership-sponsored nonconnected  
14   political committee. The payroll account held only undistributed income of the partners  
15   and was segregated from the partnership's operating account. Partners determined how  
16   their net compensation contained in the payroll account was to be disbursed. Based on a  
17   number of factors concerning the control individual partners had over funds in the payroll  
18   account, and the lack of any control the partnership had over an individual partner's  
19   choice of recipients of those funds, the Commission determined that at the moment the  
20   funds were disbursed from the payroll account, they were the personal assets of the  
21   individual partners.<sup>1</sup>

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<sup>1</sup> However, the Commission also determined that the nonconnected political committee had to pay the partnership for costs related to the use of the automated electronic payroll system in advance so as to avoid accepting an illegal contribution from a Federal contractor, *i.e.* the partnership itself.

1           The first distinction between Advisory Opinion 2005-20 (Pillsbury Winthrop) and  
2   your proposed activity concerns the accounts from which the contributions would be  
3   drawn. Unlike the situation in the Advisory Opinion, the contribution checks to AICPA  
4   PAC would be drawn on the partnerships' operating accounts rather than accounts  
5   containing undistributed income of the partners. The funds in the partnership operating  
6   accounts would be under the control of the partnerships themselves, and not subject to the  
7   control of the individual contributing partners. The funds in operating accounts have not  
8   been designated as partner compensation. In effect, the partnership would contribute to  
9   AICPA PAC an advance of a partner's compensation that would be reimbursed later in a  
10   separate transaction when the partner's compensation is reduced. *See* Advisory Opinion  
11   2005-20 (Pillsbury Winthrop), n. 3. As a result, any contribution checks drawn on a  
12   partnership's operating account would constitute a contribution by both the partnership  
13   and the individual partners and must be reported as such. *See also* Advisory Opinion  
14   1984-10 (Arnold & Porter) (where a plan to enable partners to make individual  
15   contributions that would be made by checks drawn on the partnership's operating account  
16   was found unlawful because the contributions would also be attributable to the  
17   partnership, that was a Federal contractor).

18           The second distinction between Advisory Opinion 2005-20 (Pillsbury Winthrop)  
19   and your proposed activity concerns the relationship between the partnership disbursing  
20   the funds and the recipient committee. In Advisory Opinion 2005-20 (Pillsbury  
21   Winthrop), the partnership sponsored the nonconnected committee receiving the  
22   contributions. Here, in contrast, the partnerships are not even members of AICPA, and  
23   do not have similar ties to AICPA PAC.

**2. Collecting Agents and Conduits**

You assert that if the partnerships were to collect and transmit contributions to AICPA PAC, "the partnerships would be involved in . . . relationship[s] with . . . AICPA that [are] analogous to those described" in the collecting agent rules at 11 CFR 102.6(b)(1). A collecting agent is "an organization or committee that collects and transmits contributions to one or more separate segregated funds to which the collecting agent is related." *Id.* Thus, the regulations regarding collecting agents are based on a relationship existing between the collecting agent and the SSF. *See* 11 CFR 102.6(b)(1)(i)-(iv). Here, the partnerships are not members of AICPA, and have no relationship with AICPA PAC. Accordingly, the partnerships would not be collecting agents for AICPA PAC. Indeed, even if the partnerships were members of AICPA, the partnerships could not be collecting agents for AICPA PAC. *See* Advisory Opinion 1997-9 (Chicago Board of Trade) (the member firms of a membership organization did not qualify as collecting agents for the membership organization's SSF).

The Commission also disagrees with your assertion that the partnership's activities here would be analogous to the actions of conduits or intermediaries. Conduits and intermediaries collect and forward contributions to candidates and their authorized committees, not to SSFs. *See* 2 U.S.C. 441a(a)(8); 11 CFR 110.6(b)(2). Because your proposal involves a separate segregated fund receiving the contributions, the provisions of the Act and Commission regulations regarding conduits and intermediaries do not provide a basis for forwarding partners' contributions without also attributing them to the partnerships.



1    **3. Payroll Deduction**

2            You assert that recently adopted Commission regulations at 11 CFR 114.8(e)(3)  
3    regarding the use of payroll deductions by corporations support your proposed activity.  
4    Section 114.8(e)(3) permits a corporation to use payroll deductions to forward  
5    contributions by its employees who are in the solicitable class to the SSF of a trade  
6    association of which the corporation is a member. The policy rationale supporting these  
7    regulations is to recognize "the special relationship that exists between a trade association  
8    and its members corporations . . . [which] is firmly rooted in the Act." Explanation and  
9    Justification, Final Rules on Payroll Deductions by Member Corporations for  
10   Contributions to a Trade Association's Separate Segregated Fund, 70 FR 41939, 41941  
11   (July 21, 2005).

12           Section 114.8(e) does not support your proposed activity for three reasons. First,  
13   the plain language of section 114.8(e)(3) does not apply to the partnerships under your  
14   proposal because they are not corporations and not members of AICPA. Moreover, the  
15   partnerships do not have the "special relationship" with AICPA that underlies section  
16   114.8(e)(3). Second, you suggest that revised section 114.8(e) would allow a corporation  
17   to collect and forward contributions to a membership organization's SSF from employees  
18   who are members of the membership organization, and that, by implication, your  
19   proposed activity should also be allowed. However, when the Commission adopted these  
20   new rules, it declined to revise its regulations "to allow a corporation to provide  
21   incidental services to collect and forward contributions to a membership organization's  
22   SSF from employees who are members of the membership organization." *Id.*, 70 FR at  
23   41943. Finally, the funds of corporate employees made available via payroll deduction

1 under section 114.8(e) differ in character from funds contained in partnership operating  
2 accounts under your proposal. Payroll funds being disbursed according to employee  
3 instructions are personal funds of the employee. The partnership operating accounts that  
4 would be the source of the contributions under your proposal belong to the partnerships,  
5 not the individual partners.

6 Based on the foregoing analysis, AICPA PAC must attribute and report any  
7 contribution received from a partnership as a contribution from the partnership, as well as  
8 from individual partners.

9 This response constitutes an advisory opinion concerning the application of the  
10 Act and Commission regulations to the specific transaction or activity set forth in your  
11 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
12 of the facts or assumptions presented, and such facts or assumptions are material to a  
13 conclusion presented in this advisory opinion, then the requestor may not rely on that  
14 conclusion as support for its proposed activity.

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16  
17 Sincerely,

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20  
21 Michael E. Toner  
22 Chairman  
23  
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25 Enclosures (Advisory Opinions 2005-20, 1997-9, and 1984-10)

1 ADVISORY OPINION 2006-9

2  
3 Mr. Russell L. Smith  
4 Willkie Farr & Gallagher, LLP  
5 1875 K Street, NW  
6 Washington, DC 20006-1238

**DRAFT B**

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8  
9 Dear Mr. Smith:

10 We are responding to your advisory opinion request on behalf of the American  
11 Institute of Certified Public Accountants ("AICPA") and its separate segregated fund, the  
12 American Institute of Certified Public Accountants Political Action Committee ("AICPA  
13 PAC"), concerning the application of the Federal Election Campaign Act of 1971, as  
14 amended (the "Act"), and Commission regulations to AICPA PAC's treatment of checks  
15 received from partnerships. The Commission concludes that AICPA PAC may attribute  
16 and report certain checks received from partnerships as contributions only by individual  
17 partners.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on  
20 February 16, 2006.

21 AICPA, a District of Columbia nonprofit corporation, is the national professional  
22 organization composed of Certified Public Accountants, many of whom practice their  
23 profession as partners in professional partnerships. The partnerships themselves do not  
24 belong to AICPA. AICPA PAC is AICPA's separate segregated fund ("SSF"), and is  
25 registered with the Commission.

26 Some partnerships deduct partners' dues to AICPA from their partnership  
27 compensation and aggregate all of the dues payments into a single check transmitted to

AICPA. AICPA PAC would like to accept contributions from partners in a similar manner. Under the proposal, partners would have their partnerships deduct their individual contributions from their respective compensation. A partnership would then aggregate these individual contributions into one check drawn on the partnership's operating account, which the partnership would then send to AICPA PAC.

***Question Presented***

*May AICPA PAC accept a check representing contributions by individual partners of a partnership and attribute the contributions to the individual partners only and not also attribute the contribution to the partnership, and report the contributions as such?*

***Legal Analysis and Conclusions***

The Commission concludes that AICPA PAC may accept a check from a partnership representing contributions by individual partners and that it may attribute the contributions to the individual partners only, as long as the check is comprised only of the personal funds of partners. AICPA PAC should report the contributions accordingly.

Under the Act and Commission regulations, a partnership is a "person." 2 U.S.C. 431(11); 11 CFR 100.10. As a result, a contribution from a partnership is attributable not only to individual partners but also to the partnership itself, see 11 CFR 110.1(e). However, not all actions undertaken by a partnership to facilitate contributions from partners result in a partnership contribution.

For example, in Advisory Opinion 2005-20 (Pillsbury Winthrop), a partnership that was a Federal contractor sought to use its automated electronic payroll system to disburse funds from the partnership's payroll account to the partnership-sponsored

1 nonconnected political committee. The payroll account held undistributed income of the  
2 partners transferred to it from the partnership's operating account. All funds in the  
3 payroll account were designated for partnership compensation. Each partner determined  
4 to whom the payroll account disbursed the partner's compensation. The Commission  
5 determined that at the moment the funds were disbursed from the payroll account, they  
6 were the personal assets of the individual partners. Thus, when these funds were  
7 disbursed from the payroll account to the partnership-sponsored nonconnected political  
8 committee, the funds were not contributions by the partnership to the political committee.

9 To the extent partnerships forward contributions comprised solely of the personal  
10 funds of partners to AICPA PAC, those funds would not be partnership contributions,  
11 and would not have to be attributed to the partnerships or reported as such. The  
12 partnerships' use of an account similar in all material respects to Pillsbury Winthrop's  
13 payroll account would be one method of doing this. In order to attribute the contributions  
14 properly, AICPA PAC would need to confirm that the funds it has received represent  
15 only personal funds of individual partners that were disbursed to AICPA PAC at the  
16 direction of the individual partners. AICPA PAC would also need to know which  
17 partners contributed and the amount of each partner's contribution.

18 Your request raises the issue of partnership contributions resulting from the costs  
19 associated with the forwarding of funds. In Advisory Opinion 2005-20 (Pillsbury  
20 Winthrop), the costs incurred in using of the partnership's automated electronic payroll  
21 system would have resulted in a contribution. Because that partnership was a Federal  
22 contractor, such a contribution would have been prohibited by 2 U.S.C. 441c.  
23 Accordingly, the Commission required the political committee to pay the partnership in

1 advance for these costs to avoid the making and accepting of an illegal contribution.  
2 Similarly, if any of the partnerships forwarding contributions to AICPA PAC are  
3 prohibited from making contributions, AICPA PAC must pay these partnerships in  
4 advance for their costs associated with forwarding contributions to AICPA PAC. Where  
5 a partnership may lawfully make contributions, AICPA PAC may accept the  
6 contributions or reimburse the partnership for its costs within a commercially reasonable  
7 time.<sup>1</sup>

8 Accordingly, under the Act and Commission regulations, when AICPA PAC  
9 receives checks from partnerships that are composed only of the partners' personal funds,  
10 it may attribute the contributions to individual partners only and not to the partnerships.

11 This response constitutes an advisory opinion concerning the application of the  
12 Act and Commission regulations to the specific transaction or activity set forth in your  
13 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
14 of the facts or assumptions presented, and such facts or assumptions are material to a  
15 conclusion presented in this advisory opinion, then the requestor may not rely on that  
16 conclusion as support for its proposed activity.

17  
18 Sincerely,  
19  
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21  
22 Michael E. Toner  
23 Chairman  
24  
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26 Enclosures (Advisory Opinion 2005-20)

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<sup>1</sup> As the partnerships themselves are not members of AICPA, AICPA PAC may not solicit them for contributions. Nevertheless, AICPA PAC may accept any contribution it receives from a partnership that is permitted by law to make contributions. *See* 11 CFR 114.5(j).