FEDERAL ELECTION COMMISSION
Washington, DC 20463

September 23, 1985

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1985-24

Mr. John R. Bolton
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044

Dear Mr. Bolton:

This responds to your letter of August 2, 1983, requesting an advisory opinion on behalf of the National Football League, concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the creation of a multicandidate political committee.

You state that the National Football League ("NFL") is an unincorporated, not-for-profit organization of 28 professional football teams. It is exempt from income taxation under 26 U.S.C. 501(c)(6).[1] You state that the NFL itself is not a corporation within the meaning of the Act. The NFL's member teams are owned and operated by corporations, partnerships, or sole proprietorships. You add that the NFL has been recognized as a unique or novel business organization operating basically as a joint venture.[2] You further state that the NFL is "considering the formation of a multi-candidate political committee, tentatively named NFLPAC."

In your first question, you ask whether the NFL could establish, administer, and solicit contributions to NFLPAC as a separate segregated fund of the NFL and defray such costs out of NFL treasury funds. In your second question, you ask whether NFLPAC could solicit contributions from (1) the NFL's executive and administrative personnel pursuant to 11 CFR 114.5(g) and its other employees pursuant to 11 CFR 114.6; (2) the stockholders and executive and administrative personnel, and their families, of the NFL's incorporated clubs pursuant to 11 CFR 114.8(c) and (d); and (3) the partners and sole proprietors, and their families, of the NFL's unincorporated clubs in the same manner as its incorporated clubs.

As your request indicates, it raises a threshold question whether the NFL, an unincorporated association, may come within the "membership organization" language of 2 U.S.C. 441b(b)(2)(C), based on certain similarities it shares with membership organizations such as trade associations.[3] This referenced provision must, however, be viewed in its statutory context.

The title for Section 441b reads: "Contributions or expenditures by national banks, corporations, or labor organizations." 2 U.S.C. 441b. This section first prohibits a corporation, labor organization, or national bank from making a contribution or expenditure in connection with a Federal election. 2 U.S.C. 441b(a) and 11 CFR 114.2(b). It then broadly defines "contribution or expenditure" to include "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value...to any candidate, campaign committee, or political party or organization." 2 U.S.C. 441b(b)(2) and 11 CFR 114.1(a)(1). It then excludes from this definition of contribution or expenditure "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock." 2 U.S.C. 441b(b)(2)(C) and 11 CFR 114.1(a)(2)(iii); see also 2 U.S.C. 431(8)(B)(vi) and 431(B)(9)(v); 11 CFR 100.7(b)(10) and 100.8(b)(11).[4] Commission regulations further define "establishment, administration, and solicitation costs" to mean the cost of office space, phones, salaries, utilities, supplies, legal and accounting fees, fundraising and other expenses incurred in setting up and running a separate segregated fund. 11 CFR 114.1(b).

This exception permits an incorporated membership organization, such as a trade association, to pay the operating and solicitation expenses of a political committee without such payments being considered contributions or expenditures in connection with a Federal election. See FEC v. National Right to Work Committee, 459 U.S. 197 (1982). Its statutory framework demonstrates that it applies to only those membership organizations that are subject to the broad prohibition on making political contributions or expenditures, that is, incorporated membership organizations and incorporated trade associations. "The legislative history indicates that the `membership organizations' language was only intended to rescue organizations that would otherwise fall within section 441b's blanket prohibition of any election activity." California Medical Association v. FEC, 641 F.2d 619, 630 (9th Cir. 1980), aff'd, 453 U.S. 182 (1981).[5]

In affirming this case, the U.S. Supreme Court described the Act's different treatment of unincorporated associations, such as the NFL, and corporations and found such treatment to be constitutionally permissible:

> Appellants' claim of unfair treatment ignores the plain fact that the statute as a whole imposes far fewer restrictions on individuals and unincorporated associations than it does on corporations and unions. Persons subject to the restrictions of 441a(a)(1)(C) may make unlimited expenditures on political speech; corporations and unions, however, may make only the limited contributions authorized by 441b(b)(2). Furthermore, individuals and unincorporated associations may contribute to candidates, to candidates' committees, to national party committees, and to all other political committees while corporations and unions are absolutely barred from making any such

> contributions. In addition, multicandidate political committees are generally unrestricted in the manner and scope of their solicitations; the segregated funds that unions and corporations may establish pursuant to 441b(b)(2)(C) are carefully limited in this regard. 441b(b)(3), 441b(b)(4). The differing restrictions placed on individuals and unincorporated associations, on the one hand, and on unions and corporations, on the other, reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process. Appellants do not challenge any of the restrictions on the corporate and union political activity, yet these restrictions entirely undermine appellants' claim that because of 441a(a)(1)(C), the Act discriminates against individuals and unincorporated associations in the exercise of their First Amendment rights.

California Medical Association v. FEC, 453 U.S. 182, 200-201 (1981) (emphasis in original). See also Advisory Opinions 1982-63 and 1981-56.

Accordingly, the Commission concludes that the NFL, as an unincorporated association, cannot avail itself of the exception of 2 U.S.C. 441b(b)(2)(C) with regard to establishing and administering NFLPAC as a separate segregated fund. Because the other specific questions you asked are predicated on solicitations by NFLPAC as a separate segregated fund under 2 U.S.C. 441b, the Commission does not reach them in this opinion since it has concluded that NFLPAC may not be established as a separate segregated fund. See 11 CFR 112.1(b).

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely yours,

(signed)

John Warren McGarry
Chairman for the Federal Election Commission

Enclosures (AOs 1982-63 and 1981-56)

1. Section 501(c)(6) exempts from taxation "business leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension fund for football players), not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual."

2. You cite two cases to support this description: Smith v. Pro-Football, Inc., 593 F.2d 1173, 1179 (D.C. Cir. 1978) and Mackey v. NFL, 543 F.2d 606, 619 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977). More recently, another Federal appellate court has noted that the NFL is

composed of 28 separate legal entities and that "NFL policies are not set by one individual or parent corporation, but by the separate teams acting jointly. Los Angeles Memorial Coliseum Commission v. NFL, 726 F.2d 1381, 1387-89 (9th Cir. 1984), cert. denied, 105 S.Ct. 397 (1984).

3. The Act and Commission regulations treat trade associations as a special type of membership organization. See 2 U.S.C. 441b(b)(4)(D) and 11 CFR 114.8(a); see also, 122 Cong. Rec. 12181 (1976) (remarks of Sen. Cannon), reprinted in Legislative History of Federal Election Campaign Act Amendments of 1976 at 1091 (GPO 1977).

4. With respect to corporations, labor organizations, and national banks, the Act also excludes from its definition of "contribution or expenditure" communications on any subject to the corporation's or union's restricted class and certain nonpartisan campaigns. 2 U.S.C. 441b(b)(2)(A) and (B). Commission regulations specifically extend these exemptions to "[a]n incorporated membership organization, incorporated trade association, incorporated cooperative or corporation without capital stock." 11 CFR 114.3(a)(2) and 114.4(a)(1)(ii).

5. You submit that in Advisory Opinion 1979-8 the Commission recognized that a trade association need not be incorporated in order to establish a separate segregated fund. Advisory Opinion 1979-8 involved an unincorporated trade association consisting solely of corporate members and was issued on April 9, 1979. To the extent that it stands for the proposition you advance, it is contrary to and has been superseded by the later decisions in the California Medical Association case. You also note that the NFL is grouped with trade associations for tax exemption purposes and implicitly suggest that it should be similarly treated for purposes of supporting a separate segregated fund. This comparison is inapt. The tax exempt status of either a football league or a trade association does not depend on whether it is incorporated or unincorporated. See 26 U.S.C. 501(c)(6). Furthermore, the Internal Revenue Code of 1954, as amended, includes a specific provision that defines a "corporation" to include an association in order for both to receive similar tax treatment. See 26 U.S.C. 7701(a)(3). The absence of a comparable provision in the Federal Election Campaign Act underscores the Supreme Court's assessment that Congress intended unincorporated associations to be treated differently than corporations with regard to political activities. Because the development of the common law has historically accorded different treatment to corporations than to unincorporated associations, specific statutory provisions are generally viewed as necessary to treat unincorporated associations in a manner similar to corporations. 6 Am.Jur.2d Associations and Clubs §1 et seg. (1963). See also Footnote 4.