MEMORANDUM

TO:       The Commission

THROUGH:  James A. Pehrkon  
           Staff Director

FROM:     James A. Kahl  
           Deputy General Counsel
           Rosemary C. Smith  
           Associate General Counsel
           Brad C. Deutsch  
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SUBJECT:  Draft Notice of Proposed Rulemaking on Payroll Deductions by Member Corporations for Contributions to a Trade Association's Separate Segregated Fund

Attached is a draft Notice of Proposed Rulemaking ("NPRM") regarding contributions to the separate segregated fund of a trade association by employee-stockholders and executive and administrative personnel of corporations that are members of the trade association.

Recommendation:

The Office of the General Counsel recommends that the Commission approve the attached NPRM for publication in the Federal Register.
Payroll Deductions by Member Corporations for Contributions to a Trade Association’s Separate Segregated Fund

AGENCY: Federal Election Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Election Commission requests comments on proposed amendments to its rules regarding contributions to the separate segregated fund ("SSF") of a trade association by employee-stockholders and executive and administrative personnel (collectively, "restricted class employees") of corporations that are members of the trade association. Currently, the Commission’s regulations prohibit any corporate member of a trade association from using a payroll deduction or check-off system for employee contributions to the trade association’s SSF. The Commission proposes to amend its regulations to permit a corporate member of a trade association to provide incidental services to collect and forward contributions from its restricted class employees to the SSF of the trade association, including a payroll deduction or check-off system, upon written request of the trade association. In
addition, the proposed regulations would require any
corporate member of a trade association that provides
incidental services for contributions to the trade
association's SSF also to provide the same services for
contributions to the SSF of any labor organization that
represents employees of the corporation, upon written
request of the labor organization and at a cost not to exceed
actual expenses incurred. The Commission has not made
any final decisions on the amendments proposed in this
Notice and requests comments on them. Further
information appears below.

DATES:
Comments must be received on or before [INSERT DATE
30 DAYS AFTER DATE OF PUBLICATION IN THE
FEDERAL REGISTER]. If the Commission receives
sufficient requests to testify, it may hold a hearing on these
proposed rules. Commenters wishing to testify at the
hearing must so indicate in their written or electronic
comments.

ADDRESSES:
All comments should be addressed to Mr. Brad C. Deutsch,
Assistant General Counsel, and must be submitted in either
electronic or written form. Commenters are strongly
encouraged to submit comments electronically to ensure
timely receipt and consideration. Electronic mail comments
should be sent to paydeduct@fec.gov and may also be
submitted through the Federal eRegulations Portal at
www.regulations.gov. All electronic comments must
include the full name, electronic mail address, and postal
service address of the commenter. Electronic comments that
do not contain the full name, electronic mail address, and
postal service address of the commenter will not be
considered. If the electronic comments include an
attachment, the attachment must be in the Adobe Acrobat
(.pdf) or Microsoft Word (.doc) format. Faxed comments
should be sent to (202) 219-3923, with printed copy follow-
up. Written comments and printed copies of faxed
comments should be sent to the Federal Election
Commission, 999 E Street, N.W., Washington, D.C. 20463.
The Commission will post public comments on its Web site.
If the Commission decides that a hearing is necessary, the
hearing will be held in the Commission’s ninth floor
meeting room, 999 E Street N.W., Washington, D.C.

FOR FURTHER
INFORMATION
CONTACT:

Mr. Brad C. Deutsch, Assistant General Counsel, or Ms.
Amy L. Rothstein, Attorney, 999 E Street N.W.,
Washington, D.C. 20463, (202) 694-1650 or (800) 424-
9530.
SUPPLEMENTARY INFORMATION:

With this notice, the Commission is publishing and seeking comments on a proposed amendment to its regulations regarding corporate use of payroll deduction or check-off systems\(^1\) to collect and forward voluntary employee contributions to the SSF of a trade association of which the corporation is a member. The Commission's regulations currently prohibit member corporations from making payroll deduction or check-off systems available for employee contributions to a trade association's SSF. See 11 CFR 114.8(e)(3).

The Commission is publishing this proposed rule in response to a petition for rulemaking. See Notice of Availability, 68 Fed. Register 60,887 (October 24, 2003). The Commission emphasizes, however, that it has not made any final decision on whether to amend the existing rules on this subject, and invites comments on the proposed rulemaking.

The Commission proposes to amend 11 CFR 114.8(e)(3) to remove the current prohibition on corporate use of a payroll deduction or check-off system for employee contributions to the SSF of a trade association of which the corporation is a member. The proposed rule would add a new paragraph 114.8(e)(4), which would specifically authorize a member corporation to provide incidental services to collect and forward contributions from its restricted class employees to a trade association's SSF, including a payroll deduction or check-off system, upon written request of the trade association. Further, the proposed rule would require any

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\(^1\) The term "check-off system" as used here means a method by which an employee affirmatively designates a portion of his or her salary to be collected through payroll deductions and contributed to a trade association's SSF, by checking that designation on a pre-printed form or card.
corporation that provides these incidental services also to make the same services available to a labor organization representing members who work for the corporation, upon written request by the labor organization and at a cost not to exceed any actual expenses incurred. Finally, the proposed rule would make a conforming change to 11 CFR 114.2(f), to clarify that the provision of incidental services pursuant to proposed 11 CFR 114.8(e)(4) is not a prohibited corporate facilitation.

**LEGAL CONTEXT**

The Federal Election Campaign Act of 1971, as amended (the “Act”), and the Commission’s regulations permit any trade association to solicit contributions to the trade association’s SSF from the stockholders and executive and administrative personnel, and their families, of the trade association’s member corporations, if the member corporation involved has separately and specifically approved the solicitation and has not approved a solicitation by any other trade association for the same calendar year. See 2 U.S.C. 441b(b)(4)(D); 11 CFR 114.8(c). Once these conditions are met, “[T]here is no limitation on the method of soliciting voluntary contributions or the method of facilitating the making of voluntary contributions which a trade association may use.” 11 CFR 114.8(e)(3).

Although the regulations do not limit the methods that a trade association may use to solicit and facilitate the making of voluntary contributions to its SSF from the restricted class employees of consenting member corporations, the regulations do limit the methods that a consenting member corporation may use to collect and distribute those contributions. Specifically, a “member corporation
may not use a payroll deduction or check-off system for executive or
administrative personnel contributing to the separate segregated fund of the trade
association.” *Id.* The Commission has interpreted this prohibition to extend to all
employees of the corporation that may be solicited by the trade association (i.e.,
restricted class employees), including the member corporation’s employee-

In recent years, the Commission has given corporations some latitude in
collecting and transmitting contributions to a trade association’s SSF, so long as
the collection did not involve employee payroll deductions. For instance, in
Advisory Opinion 2003-22, the Commission interpreted the regulations to permit a
corporate member of a trade association to collect voluntary contributions in the
form of paper checks from its executive and administrative personnel, and to
transmit the contributions to the trade association’s SSF. In that opinion, the
Commission also interpreted the regulations to permit corporate executives who
were collecting employee contribution checks to use the member corporation’s
inter-office mail system to help collect the checks, and to provide envelopes and
postage in which contributors could send their contributions to the trade
association’s SSF.

Moreover, the Commission has permitted member corporations to deduct
contributions electronically to a trade association’s SSF, so long as the member
corporations did not deduct the contributions from employee payrolls. *See*
Advisory Opinions 2000-4 and 1998-19. In addition, the Commission has
permitted a trade association to pay for electronically deducting monthly
contributions to its SSF from the personal checking accounts of restricted class
employees of consenting member corporations. See Advisory Opinion 1999-35.
The Commission also has permitted State leagues of a federation of trade
associations and the leagues’ local corporate members to serve as collecting agents
for contributions to the federation’s SSF, and to pay expenses incurred in
connection with that activity. See Advisory Opinion 1998-19; compare to

THE PETITION FOR RULEMAKING

On September 3, 2003, the Commission received a Petition for Rulemaking
(the “Petition”) from America’s Community Bankers and its SSF, the America’s
Community Bankers Community Campaign Committee (collectively,
“Petitioners”). Petitioners asked the Commission to amend the regulations to
permit, rather than to prohibit, a member corporation to use a payroll deduction or
check-off system for contributions by its restricted class employees to a trade
association’s SSF.

Petitioners advanced four arguments in support of their request. First,
Petitioners asserted that the Act does not require the exclusion of payroll deduction
and check-off systems from permissible methods of collecting and forwarding
contributions to a trade association’s SSF. Second, Petitioners asserted that the
prohibition on payroll deduction and check-off systems is inconsistent with
Commission advisory opinions and other Commission regulations. Third,
Petitioners asserted that the concerns that prompted the prohibition in the first
place, as discussed at a June 29, 1976 Commission meeting, (1) resulted from a
misunderstanding on the part of some of the commissioners at the meeting, (2) are inconsistent with later Commission actions, and (3) could have been addressed by means other than the prohibition.\(^2\) Finally, Petitioners asserted that factual and legal changes that have occurred since the prohibition was promulgated in 1976 warrant a change in the regulations.

In accordance with its usual procedures, the Commission published a notice stating that the Petition was available for public review and comment. See Notice of Availability, 68 Fed. Register 60,887 (October 24, 2003). The comment period closed on November 24, 2003. The Commission received 30 comments in response to the Notice of Availability: 22 from trade associations, six from corporate members of one of the trade associations that submitted comments, one from a professional association, and one from a Member of Congress. The comments submitted by the six corporations were substantially identical both to each other and to comments submitted by the trade association to which the corporations belonged.

**SUMMARY OF COMMENTS ON THE PETITION FOR RULEMAKING**

All of the comments received by the Commission supported the Petition for Rulemaking. The commenters’ arguments in favor of the Petition fell into three categories: legal, policy and practical.

1. **Legal Arguments**

Almost all of the commenters addressed the question of whether the Act

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\(^2\) Petitioners identified several concerns as having prompted the prohibition, including a concern that labor unions be given equal access to fundraising methods used by corporations, and a concern that corporate facilitation of contributions to a trade association’s SSF would be prohibited by the Act. These issues are addressed further in the text of this Notice.
prohibits member corporations from using payroll deduction and check-off
systems to collect voluntary contributions to a trade association’s SSF from
restricted class employees. All of the commenters that addressed the question
concluded that the Act does not prohibit the use of payroll deduction and check-off
systems.

Moreover, several commenters asserted that eliminating the prohibition
would be consistent with the Act’s broad grant of authority to trade associations to
solicit contributions to their SSFs from the restricted class of consenting member
corporations, as set out in 2 U.S.C. 441b(b)(4)(D). Several commenters also
asserted that eliminating the regulatory prohibition would be consistent with the
Act’s exclusion of corporate, trade association and labor union payments for
establishing, administering and soliciting contributions to an SSF from the
definition of “contribution or expenditure,” as set out in 2 U.S.C. 441b(b)(2)(C).

With respect to the regulation itself, a few commenters perceived an
inconsistency between the first sentence of 11 CFR 114.8(e)(3), which permits a
trade association to use any method to solicit and facilitate the making of voluntary
contributions from restricted class employees of consenting member corporations,
and the second sentence of 11 CFR 114.8(e)(3), which contains the prohibition on
member corporations’ use of payroll deduction and check-off systems at issue
here. The commenters opined that only the first sentence is consistent with the
Act.

Several commenters indicated that the Commission’s own advisory
opinions support eliminating the prohibition. Specifically, the commenters argued
that the prohibition is inconsistent with (1) Advisory Opinion 2003-22, which
permits a member company to collect and forward employee contributions in the
form of checks to a trade association’s SSF; (2) Advisory Opinions 1995-28, 1995-
17, 1989-18 and 1980-89, which allow a member corporation to contribute to a
trade association to help defray the costs of establishing, administering and
soliciting for the trade association’s SSF; and (3) Advisory Opinions 1999-35,
1998-19, 1997-9 and 1986-7, which permit contributions to a trade association’s
SSF or a membership association’s SSF to be automatically debited from
contributors’ accounts.

2. **Policy Arguments**

Several commenters perceived a lack of a policy rationale for the
prohibition on corporate use of payroll deductions to collect voluntary employee
contributions to a trade association’s SSF. They argued that the lack of an
underlying policy purpose was demonstrated by the Commission’s issuance of
advisory opinions permitting other methods of collecting contributions to a trade
association’s SSF.

In addition, a number of commenters asserted that any underlying policy
rationale for the prohibition has been rendered obsolete by the growth in the use of
electronic methods for making and receiving payments since 1976, including by
federal government agencies such as the Internal Revenue Service and the Social
Security Administration. The commenters noted the decreasing role of paper
checks in American society. They cited to the growing prevalence of electronic
payroll deductions in the workplace, the large number of employees who currently
use payroll deductions and the variety of goods and services paid through payroll
deductions, such as health and life insurance premiums, flexible spending
accounts, retirement savings plans, charitable contributions, loan and mortgage
payments, gym memberships and club dues.

One commenter stated that questions regarding the permissibility of various
forms of electronic deductions are likely to increase, both in number and in
complexity, as technology advances and as corporations provide more innovative
financial services to their employees. This commenter suggested that amending
the regulations to permit payroll deductions would eliminate the need for the
Commission to answer these questions on a case-by-case basis through the
advisory opinion process.

Several commenters also indicated that removing the regulatory prohibition
could help to promote fairness. According to one commenter, the current
regulation disadvantages SSFs sponsored by smaller trade associations that try to
compete in the political arena against SSFs sponsored by larger trade associations,
presumably because larger trade associations and their SSFs have greater resources
to devote to SSF fundraising efforts. This commenter suggested that removing the
regulatory prohibition on payroll deductions could help smaller trade associations’
SSFs to raise funds and thus to compete with larger trade associations’ SSFs in
representing their members’ political interests.

In addition, several commenters complained that SSFs sponsored by trade
associations are at a disadvantage compared to SSFs sponsored by corporations
and labor organizations, not only because the regulations permit payroll deductions
of contributions to corporate and labor organization SSFs, but also because they require trade association SSFs to obtain prior approval before soliciting restricted class employees, without imposing any analogous prior approval requirement on corporate and labor organization SSFs. These commenters suggested that removing the prohibition on member corporations’ use of payroll deductions to collect employee contributions to a trade association’s SSF could help to rectify a perceived inequality in the fundraising abilities of trade association SSFs on the one hand, and corporate and labor organization SSFs on the other hand.

Finally, some commenters pointed out that not all corporate members of trade associations have their own SSFs, and that these companies may rely on their trade association’s SSF to serve as their political voice. According to these commenters, a trade association’s SSF is one of the most accessible mechanisms for political participation by restricted class employees of companies that do not have their own SSFs, and allowing payroll deduction and check-off systems would allow restricted class employees to spread out their contributions easily over time.

3. Practical Arguments

A number of commenters addressed the practical advantages of permitting member corporations to make payroll deductions available to their restricted class employees for contributions to a trade association’s SSF. The commenters described payroll deductions as, among other things, widely available, reliable, simple to administer, convenient and imposing minimal or no cost on the corporations that offer them.
According to these commenters, the benefits of permitting a member
corporation to collect voluntary employee contributions to a trade association’s
SSF through a payroll deduction or check-off system would extend to every party
to the transaction. Contributing employees would find it more convenient and
affordable to have smaller, regular contributions automatically deducted from their
paychecks than to write a single check for a larger sum. Member corporations
would find it more efficient and less costly to collect employee contributions
through automatic payroll deductions, and those that did not would be free to use
other methods of collecting contributions. Trade associations would be able to
reduce their SSF fundraising expenses, and their SSFs would find it easier to track
and document both contributing individuals and individual contributions. The end
result, according to these commenters, would be increased participation by
individuals in the political process and enhanced reporting of their contributions.

ANALYSIS

The Petition and comments raise a reasonable question as to whether the
regulatory prohibition against payroll deduction and check-off systems continues
to make sense. Accordingly, the Commission concludes that the goals of the Act
and the interests of the regulated community would be best served by further
examination of this issue and invites public comments on it.

1. Proposed changes to 11 CFR 114.8(e)

The Commission proposes amending 11 CFR 114.8(e) to remove the
prohibition on a corporation’s use of a payroll deduction or check-off system for
contributions by restricted class employees to the SSF of a trade association of
which the corporation is a member. The Commission proposes to effect this change by deleting the second sentence of 11 CFR 114.8(e)(3) in its entirety and by adding a new paragraph 114.8(e)(4). Existing paragraph 114.8(e)(4) would be redesignated as 114.8(e)(5).

As proposed, new paragraph 114.8(e)(4) would permit, but not require, a corporation to provide incidental services to collect and forward contributions from its restricted class employees to the SSF of a trade association of which the corporation is a member, upon written request of the trade association. Based on information in the Petition and in the comments regarding the wide availability and minimal cost of payroll deductions, the proposed regulation would expressly authorize the use of a payroll deduction or check-off system as an incidental service. The Commission invites public comments on this issue.

In addition to permitting a member corporation to provide incidental services to collect and forward employee contributions to a trade association’s SSF, proposed paragraph 114.8(e)(4) would require any corporation that provides these services to make the same services available to a labor organization representing employees of the corporation, upon written request of the labor organization and at a cost that does not exceed any actual expenses incurred. The Commission considers this requirement to be necessary to prevent circumvention of provisions in the Act and Commission regulations that seek to prevent corporate SSFs from gaining an unfair fundraising advantage over labor organization SSFs.

See 2 USC 441b(b)(6) and 11 CFR 114.5(k)(1).
The Petitioners and some of the commenters noted that a corporation without its own SSF might rely exclusively on its trade association's SSF to represent its corporate interests in the political arena. Absent the requirement in proposed paragraph 114.8(e)(4) that a member corporation make incidental services available to a labor organization representing employees of the corporation if the corporation makes those services available to a trade association, a corporation could allow restricted class employees to contribute through payroll deductions to the corporation's proxy SSF administered by a trade association, without permitting employees who are members of a labor organization to contribute to their labor organization's SSF through payroll deductions. This outcome would create an inequality that could subvert the careful balance struck in the Act and Commission regulations between corporate SSFs and labor organization SSFs. The Commission invites public comments on this issue.

The only distinction in the proposed rule between providing incidental services to collect and forward employee contributions to a trade association's SSF on the one hand, and providing incidental services to collect and forward employee contributions to a labor organization's SSF on the other hand, is in the area of reimbursement. The proposed rule would not require a trade association or its SSF to reimburse the corporation for any actual expenses that the corporation incurs in providing the incidental services. As the Commission has stated previously, "incidental services by corporate members would not require reimbursement by the trade association since, in any event, reimbursement if required would come from membership dues paid to the trade association by its corporate members."

A labor organization or its SSF that receives incidental services from a corporate employer of members of the labor organization, by contrast, would be required to reimburse the corporation for the cost of providing those services. The Commission has previously found that a prohibited corporate contribution would result from a failure by a labor organization to reimburse a corporation for actual expenses incurred by the corporation in providing a payroll deduction or check-off system for contributions to the labor organization’s SSF. See Advisory Opinions 1981-39 and 1979-21. The Commission invites public comments on this issue.

2. Proposed changes to 11 CFR 114.2(f)

The Commission proposes making a conforming change to the regulation that currently prohibits a corporation from facilitating the making of contributions to political committees, other than to the corporation’s own SSF. See 11 CFR 114.2(f)(1). The term “facilitation” means using corporate resources or facilities to engage in fundraising activities in connection with any federal election. Id. Facilitation does not include, however, enrollment by a corporation or labor organization of members of the corporation’s or labor organization’s restricted class in a payroll deduction plan or check-off system to make contributions to the corporation’s or labor organization’s SSF. See 11 CFR 114.2(f)(4)(i).

The Commission proposes adding a new paragraph (5) to 11 CFR 114.2(f), to specify that facilitation also would not include the provision of incidental
services by a corporation to collect and forward voluntary contributions from its
restricted class employees to the SSF of a trade association of which the
corporation is a member, pursuant to 11 CFR 114.8(e)(4), as revised. The new
paragraph would state that a corporation could collect the contributions through a
payroll deduction or check-off system. The Commission invites public comments
on this proposal.

Certification of No Effect Pursuant to 5 U.S.C. § 605(b) (Regulatory
Flexibility Act)

The attached proposed rules, if promulgated, would not have a significant
economic impact on a substantial number of small entities. The basis for this
certification is that the proposed rules permit, but do not require, a corporation to
provide incidental services to collect and forward contributions from its restricted
class employees to the separate segregated fund of a trade association of which the
corporation is a member, including the use of a payroll deduction or check-off
system. Under current law, a corporation is permitted to collect and transmit
contributions manually to the SSF of a trade association to which the corporation
belongs. If promulgated, the proposed rule should enable those corporations that
wish to transmit employee contributions to trade association SSFs to do so more
efficiently and using fewer resources.

List of Subjects

11 CFR Part 114

Business and industry, elections, labor.
For the reasons set out in the preamble, the Federal Election Commission proposes to amend subchapter A of chapter 1 of title 11 of the Code of Federal Regulations as follows:

PART 114 – Corporate and Labor Organization Activity

1. The authority citation for part 114 continues to read as follows:

Authority: 2 U.S.C. 431(8)(B), 431(9)(B), 432, 434, 437d(a)(8), 441b.

2. Revise §114.2 by adding new paragraph (f)(5), to read as follows:

§114.2 Prohibitions on contributions and expenditures.

(f) ***

(5) Facilitating the making of contributions also does not include the provision of incidental services by a corporation to collect and forward contributions from its employee stockholders and executive and administrative personnel to the separate segregated fund of a trade association of which the corporation is a member, including collection through a payroll deduction or check-off system, pursuant to 11 CFR 114.8(e)(4).

3. Amend §114.8 by revising paragraph (e)(3), by redesignating paragraph (e)(4) as new paragraph (e)(5), and by adding a new paragraph (e)(4) to read as follows:

§114.8 Trade associations.

(e) ***
(3) There is no limitation on the method of soliciting voluntary contributions or
the method of facilitating the making of voluntary contributions which a trade
association may use. The member corporation may not use a payroll deduction or
checkoff system for executive or administrative personnel contributing to the
separate segregated fund of the trade association.

(4) A corporation may provide incidental services to collect and forward
contributions from its employee stockholders and executive and administrative
personnel to the separate segregated fund of a trade association of which the
corporation is a member, including a payroll deduction or check-off system, upon
written request of the trade association. Any corporation that provides such
services shall make those services available to a labor organization representing
any members working for the corporation, upon written request of the labor
organization and at a cost sufficient only to reimburse the corporation for the
expenses incurred thereby.

(5) ***

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Bradley A. Smith
Chairman
Federal Election Commission

DATED __________
BILLING CODE: 6715-01-U