AGENDA DOCUMENT NO. 03-74

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

OCT 08 2003

Memorandum

AGENDA ITEM
For Meeting of: 10-16-03

To: The Commission

Through: James A. Pehrkon

From: Lawrence H. Norton
General Counsel

James A. Kahl
Deputy General Counsel

Rosemary C. Smith
Acting Associate General Counsel

John C. Vergeli
Acting Assistant General Counsel

Esa L. Sferra
Law Clerk

Subject: Petition for Rulemaking on Payroll Deductions by Trade Associations: Notice of Availability

On September 2, 2003, America's Community Bankers and its separate segregated fund, COMPAC, submitted a Petition for Rulemaking asking the Commission to revise 11 CFR 114.8(e)(3). *See* Attachment 1. Petitioners urge the Commission to permit specifically, rather than prohibit, the use of payroll deductions for contributions to a trade association's separate segregated fund by a member corporation's executive and administrative personnel.

The Office of General Counsel has examined the Petition and determined that it meets the requirements of 11 CFR 200.2(b). Therefore, we have drafted a Notice of Availability for publication in the *Federal Register*, pursuant to 11 CFR 200.3(a)(1). *See* Attachment 2.

The draft Notice of Availability states that the Petition is available for inspection in the Commission's Public Records Office and that comments on the Petition may be submitted until 30 days after publication. In keeping with the Commission's usual procedure, the draft Notice does not address the merits of the Petition. Instead, it states that consideration of the merits will be deferred until the close of the comment period.

Recommendation

The Office of General Counsel recommends that the Commission approve the draft Notice of Availability for publication in the *Federal Register*.

Attachments

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 114**

3 **[NOTICE 2003 - >>]**

4 **Rulemaking Petition: Payroll Deduction Contributions to a Trade Association's**

5 **Separate Segregated Fund**

6 **AGENCY:** Federal Election Commission.

7 **ACTION:** Rulemaking petition: notice of availability

8 **SUMMARY:** On September 3, 2003, the Commission received a Petition for

9 Rulemaking from America's Community Bankers ("ACB"), a

10 trade association, and its separate segregated fund ("SSF"),

11 COMPAC. The Petition urges the Commission to revise the

12 rule prohibiting the use by member corporations of payroll

13 deductions for contributions to a trade association's separate

14 segregated fund. The Petition is available for inspection in the

15 Commission's Public Records Office, through its Faxline

16 service, and on its website, www.fec.gov.

17 **DATES:** Statements in support of or in opposition to the Petition must be

18 submitted on or before [insert date 30 days after the date of

19 publication in the Federal Register].

20 **ADDRESSES:** All comments should be addressed to Mr. John C. Vergelli,

21 Acting Assistant General Counsel, and must be submitted in

22 either electronic or written form. Electronic mail comments

23 should be send to payrollded03@fec.gov and must include the

full name, electronic mail address, and postal service address of the commenter. Electronic mail 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 mail 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 to ensure legibility. 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. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. The Commission will make every effort to have public comments posted on its web site within ten business days of the close of the comment period.

FOR FURTHER INFORMATION CONTACT: Mr. John C. Vergelli, Acting Assistant General Counsel, or Ms. Esa L. Sferra, Law Clerk, 999 E Street, N.W., Washington, D.C. 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION:

The Federal Election Commission ("Commission") has received a Petition for Rulemaking from America's Community Bankers and its SSF. Petitioners ask that the Commission revise 11 CFR 114.8(e)(3) to permit, rather than prohibit, the use of payroll

deductions for contributions to a trade association's separate segregated fund by a member corporation's executive and administrative personnel.

The Commission seeks comments on this issue. In particular, the Commission asks: Do the proposals by the petitioners represent permissible interpretations of the Federal Election Campaign Act, as amended, specifically 2 U.S.C. 441b? If so, which policy and factual considerations support, and which oppose, petitioners' proposal?

Copies of the Petition for Rulemaking are available for public inspection at the Commission's Public Records Office, 999 E Street, N.W., Washington, D.C. 20463, Monday though Friday between the hours of 9 a.m. and 5 p.m., and on the Commission's website, www.fec.gov. Interested persons may also obtain a copy of the Petition by dialing the Commission's Faxline service at (202) 501-3413 and following its instructions, at any time of the day and week. Request document #>>>.

Consideration of the merits of the Petition will be deferred until the close of the comment period. If the Commission decides that the Petition has merit, it may begin a rulemaking proceeding. Any subsequent action taken by the Commission will be announced in the Federal Register.

Ellen Weintraub
Chair
Federal Election Commission

DATED: _____

BILLING CODE: 6715-01-U

FEDERAL ELECTION COMMISSION
Washington, DC 20463

Michael W. Briggs
Chief Legal Officer
America's Community Bankers
Suite 400
900 Nineteenth Street, NW
Washington DC, 20006

Re: Notice of Availability

Dear Mr. Briggs,

This letter is in response to your Petition for Rulemaking dated August 29, 2003. The Commission has examined the Petition and determined that is meets the requirements of 11 CFR 200.2(b). Therefore, the Commission will publish a Notice of Availability in *Federal Register*, pursuant to 11 CFR 200.3(a)(1). The Commission will defer consideration of the merits of your Petition until the close of the comment period, as stated in the Notice of Availability.

Sincerely,

John C. Vergelli
Acting Assistant General Counsel

America's Community Bankers
Shaping Our Future

2003 SEP -2 A 10: 22

August 29, 2003

2003 SEP -2 P 12: 19

Lawrence H. Norton
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Petition for Rulemaking

Dear Mr. Norton:

America's Community Bankers ("ACB"), which represents the nation's community banks[1] and ACB's separate segregated fund, COMPAC, hereby petition the Federal Election Commission ("the Commission") to undertake a rulemaking proceeding to modify the regulations implementing the Federal Election Campaign Act ("FECA" or the "Act"). 2 U.S.C. §§431 *et seq.* (as amended). ACB makes this request pursuant to 5 U.S.C. § 553(e) and part 200 of the Commission's regulations.

Specifically, ACB asks the Commission to undertake a rulemaking proceeding to amend Section 114.8(e)(3) of the regulations to allow trade associations to use a payroll deduction mechanism to facilitate voluntary contributions to the trade association's separate segregated fund ("SSF") from its corporate members' restricted classes. Such a change would more accurately reflect the FECA's intent for permissible corporate activities, make it easier and more efficient for trade associations to raise fully-regulated federal funds, and address the transformation of the American workforce and payments system that have occurred since 1976. Corporations that are members of a trade association are permitted to facilitate contributions from their restricted classes to the trade association's SSF. Given the widespread acceptance of automatic payment processes in the work place (and otherwise), such as direct depositing of paychecks and automatic payroll deductions, there is no conceivable reason to distinguish between "manual" facilitation and the automatic facilitation possible with payroll deduction.

[1] ACB's member have aggregate assets totaling more than $1 trillion and pursue progressive, entrepreneurial, and service-oriented strategies in providing financial services to benefit their customers and communities.

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DISCUSSION

I. INTRODUCTION – EVOLUTION OF THE PAYMENT PROCESS

The United States payments system has evolved exponentially since 1976. What just a few years ago was viewed as a limited service for sophisticated consumers today reflects the common practice of how more and more Americans receive and transmit funds. Direct depositing and debiting have become a primary medium for receiving payroll and making payments or regularly scheduled deductions. Direct transfers have grown in popularity due in part to two key advantages over traditional payment methods: convenience and security. Today, more than 60% of Americans receive one or more payments via direct deposit, including payroll deposits. At the same time, most workers have at least one payroll deduction, whether such payments are for parking, charitable contributions to the local United Way, a gym membership fee, or contributions to other organizations. In addition, many other payments, such as utilities, student loans, and installment credit are directly debited from a consumer's designated account. In many instances, this form of payment has replaced the practice of writing a single check in all but a few instances.

This trend is confirmed by the fact that the use of checks continues to decline. For example, in 1979, checks represented more than 85% of retail non-cash payments. By 2000, that figure had dropped to less than 60%.[2] According to a 2002 study prepared by the staff of the Board of Governors of the Federal Reserve System (the "Board"), "evidence suggests that consumers and businesses are increasingly using electronic payments."[3] The study concludes that the number of checks paid in the United States has declined over the past five years from an estimated 49.5 billion in 1995 to 42.5 billion in 2000. To further underscore these statistics, the Board is hosting a conference this fall entitled, "The Payments System in Transition," noting that "the most striking long-term development in the U.S. payments system is the national shift from paper to electronic payments."

The trend toward electronic payments will continue unabated, in part, because electronic payments are a convenient and efficient way of decreasing the costs associated with the current payments system for consumers. Electronic transactions save time and provide greater consumer protections than provided by traditional check transactions. Other benefits are important, as well. For example, consumers can better manage their finances with regularly scheduled transactions. This also allows an individual to avoid the hassle of writing and mailing physical checks.

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[2] "The Use of Checks and other Noncash Payment Instruments in the United States," 88 Fed. Res. Bull 360 (Aug. 2002).
[3] *Id.*

Reflecting this evolution of payments, the Congress currently has before it check truncation legislation that would allow financial institutions to replace actual checks with electronic images, thus truncating the check clearing process. This will further encourage electronic transactions as a preferred means for making payments, denotations, contributions, and other financial transactions.

In summary, consumers both want and are benefited by the choice to make payments on a variety of financial transactions through direct debiting from their payroll and/or transaction accounts.

II. NATURE OF ACB'S PROPOSAL

ACB proposes that the Commission allow trade associations to use a payroll deduction mechanism to facilitate voluntary contributions from the executive and administrative personnel as well as employee shareholders of the trade association's member corporations (the corporation's "restricted class").[4] Simply put, if a member corporation approves the solicitation of its restricted class by a trade association pursuant to 11 C.F.R. § 114.8(d), it would also be permitted to use a payroll deduction mechanism to collect voluntary contributions from those members of the restricted class who are employees of the corporation. All solicitations would, of course, have to comply with the Commission's regulations governing solicitations for contributions to a trade association's SSF.

In order to facilitate this change, as discussed below, section 114.8(e)(3) could simply be modified by striking one word as shown:

> 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.

III. THE BACKGROUND OF THE PROHIBITION

The FECA broadly prohibits corporate contributions and expenditures in connection with federal elections. 2 U.S.C. § 441b. The FECA, however, carves out of this prohibition a number of permissible activities including "the establishment,

[4] Although the restricted class includes all stockholders and the families of stockholders as well as executive and administrative employees and their families, 2 U.S.C. § 441b(b)(4)(A)(i), the only portion of the restricted class that would be eligible for the payroll deduction would be those individuals who are employees of the member corporation.

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." *Id.* § 441b(b)(2)(C).[5] Additionally, a trade association is not prohibited

> [F]rom soliciting contributions from stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

Id. § 441b(b)(4)(D).

In order to implement these two paragraphs, the Commission's Notice of Proposed Rulemaking included proposed section 114.8(c) that would have provided:

> There is no restriction on the method of facilitating the making of contributions which a trade association can use. The member corporation *may use* a payroll deduction or check-off system for executive and administrative personnel contributing to the separate segregated fund of the trade association.

41 Fed. Reg. 21472, 21595 (May 26, 1976) (emphasis added). This provision was changed during the course of a Commission meeting on June 29, 1976 and the revised language, in the same form as it currently exists, was published in the Federal Register on August 25:

> There is no limitation on the method of soliciting voluntary contributions or the methods of facilitating the making of voluntary contributions which a trade association can 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.

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[5] *See also*, 2 U.S.C. §§ 431(8)(B)(vi) & (9)(B)(v) (excluding from the Act's overall definitions of contributions and expenditures a corporation's establishment of a SSF).

41 Fed. Reg. 35932, 35961 (Aug. 25, 1976) (codified at 11 C.F.R. § 114.8(e)(3)) (emphasis added). The Explanation and Justification for the regulation cryptically explains that:

> Once approval has been obtained, there is no limitation on the number of times a trade association may solicit the persons approved by the member corporation and *there is no restriction* on the method of soliciting voluntary contributions or *the method of facilitating the making of voluntary contributions used by a trade association.* §(c)(1)(3). The Commission specifically rejected a proposal which would have allowed a member corporation to use a payroll deduction or checkoff system for executive or administrative personnel contributing to the separate segregated fund of a trade association.

Explanation and Justification of Regulations, H.R. Doc. No. 95-44 (1977), *reprinted in* 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 930 at 3153 (emphasis added). There is no discussion in the Explanation and Justification as to why the use of a payroll deduction mechanism was rejected.

IV. THERE IS NO STATUTORY IMPERATIVE TO LIMIT THE USE OF A PAYROLL DEDUCTION

A. The FECA Does Not Require Excluding Payroll Deductions From Permissible Methods of Obtaining Contributions

Nothing in the Act discusses whether a trade association should be allowed to use a payroll deduction mechanism. Rather, the Act categorically excludes from the definition of "contribution or expenditure", which corporations are prohibited from making, any expenses by a corporation, trade association, or labor union for "the establishment, administration, and solicitation of contributions to a separate segregated fund." 2 U.S.C. § 441b(b)(2)(C). The Act also specifically allows a trade association to solicit contributions from the shareholders and executive personnel, and their families, of member corporations. *Id.* § 441b(b)(4)(D). The Act does not limit the method of facilitating contributions to the trade association's separate segregated fund.

The general thrust of the regulations reflect such an understanding: "[t]here is *no limitation on* the method of soliciting voluntary contributions or *the methods of facilitating the making of voluntary contributions* which a trade association can use." As the Commission recently made clear, member corporations are permitted to facilitate contributions to a trade association's SSF. Advisory Opinion 2003-22. The specific and explicit limitation on the use of payroll deduction that follows this permissive regulation is incongruous; if the regulation places "no limitation" on the method of facilitating

contributions, it is contradictory to single out one specific method of facilitation. In fact, the Commission has narrowly interpreted this provision to apply only to a payroll deduction mechanism. *See, e.g.*, Advisory Opinion 1999-35 (allowing the use of a deduction from an employee's bank account to make a contribution to the trade association's SSF); Advisory Opinion 1998-19 (allowing a credit union to deduct a contribution from a member's account to a trade association SSF).

There is also no reason why the use of a payroll deduction would violate any provision of the FECA. The Explanation and Justification for § 114.8(e)(3) provides that:

> There was no legislative history on the extent of corporate participation in the trade association's solicitation of the stockholders and executive or administrative personnel of the corporation. An argument can be made from the statutory language that the exemption for solicitation costs applies only to solicitation by a corporation to its separate segregated fund.

Explanation and Justification of Regulations, H.R. Doc. No. 95-44 (1977), *reprinted in* 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 930 at 3153. ACB believes that the suggestion that the FECA places a limit on the ability of a corporation to assist the trade association with solicitation and collection is tenuous at best. The Act excludes "the establishment, administration, and solicitation of contributions to *a* separate segregated fund." It does not exclude the establishment, administration, and solicitation of contributions to *the* separate segregated fund *of the corporation*. The Commission explicitly endorsed this broader reading of the statute in Advisory Opinion 1980-59:

> The Act specifically exempts from the definition of "contribution or expenditure" contained in 2 U.S.C. § 441b, those costs incurred by a corporation, labor organization, membership organization, cooperative or corporation without capital stock, to establish, administer and solicit contributions to such separate segregated funds. 2 U.S.C. § 441b(b)(2)(C), 11 CFR § 114.1(a)(2)(iii); *see also* 2 U.S.C. § 431(8)(B)(vi) and (9)(B)(v). Therefore, in the situation presented...a corporate member of [the trade association], may donate funds to [the association] designated to defray administrative costs of [the association's SSF] without violating the prohibition against corporate contributions embodied in 2 U.S.C. § 441b. Once [the association] accepts the designated funds into its general treasury, [it] is permitted under Commission regulations to use the funds for the establishment and administration of, and for solicitation of contributions to, its separate segregated fund.... *See* 11 CFR § 114.5(b).

Advisory Opinion 1980-59.

There is another reason why 2 U.S.C. § 441b(b)(2)(C) cannot be read to prohibit the participation of a member corporation in the trade association's solicitation. As the Explanation and Justification explains:

> Under [the narrow interpretation of the Act discussed above], a trade association would be required to reimburse the corporation for any expenditure or assistance by the corporation. To require a trade association to reimburse the corporation for incidental services, such as the distribution of the association's material via the corporation's internal mailing system, seemed tenuous since the trade association will be paying for the substantial costs of the solicitation with the membership fees from corporations. Consequently, the Commission has not required the trade association to reimburse the corporation for such incidental expenditures.

Explanation and Justification of Regulations, H.R. Doc. No. 95-44 (1977), *reprinted in* 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 930 at 3153. The minimal cost and intrusion of using a payroll deduction system (see Section IV(B), *infra*) is much like the use of interoffice mail to send solicitations. *Compare* Advisory Opinion 1997-9 (noting the high cost of – and need for the trade association to pay for – the complex accounting associated with facilitating contributions through a commodities trader's individual account to the Chicago Board of Trade's SSF).

Furthermore, the Commission has allowed donations from member corporations to administrative accounts of trade associations to fund solicitations. For example, Advisory Opinion 1986-13 permitted a corporate member to donate money and also merchandise to the trade association's administrative account. These items were for the purpose of conducting a raffle for the association's SSF. Just as it is permissible for a member corporation to donate money and other items to a trade association's administrative account, so too should a corporation be permitted to make the modest donation of the value of a payroll deduction mechanism to the trade association's administrative account.

Thus, there is simply no basis in the Act that requires the regulations to prohibit a trade association from using a payroll deduction mechanism.

B. The Current Regulation is Inconsistent with the FECA and other FEC Regulations

The 180-degree switch between the proposed and final rules occurred during the Commission's meeting on June 29, 1976. At that session, the Commissioners discussed a

number of different provisions of section 114.[6] Although ACB was unable to locate the transcript of the entire proceeding in the Commission's files, we were able to locate an excerpt that deals with the payroll deduction issue that is less than 10 and one-half pages long. In this abbreviated discussion, the Commissioners considered three reasons to prohibit the use of a payroll deduction. First, two Commissioners seemed to espouse the view that the Act does not allow a corporate member of a trade association to facilitate contributions. Second, there was concern that the a corporation could evade the requirement that unions must be given access to the same fundraising mechanisms that a corporation uses by using a trade association. Third, there was concern about balancing union and corporate interests generally. None of these concerns provide a reason to limit the ability of a corporation to facilitate contributions to a trade association.

Commissioner Aikens and Vice Chairman Harris argued that facilitating a contribution to a trade association is not permitted. Tr. at 3-4 (Aikens) and 5 (Harris).[7] As we discussed above in Section III(A), this concern was apparently rejected as shown by the text of section 114.8(e)(3) ("There is *no* limitation on the method of soliciting voluntary contributions or the methods of facilitating the making of voluntary contributions which a trade association can use."), and certainly by the Explanation and Justification. As discussed above, Advisory Opinions 1986-13 and 1980-59 are clearly inconsistent with this basis of concern.

The second concern was based on the need for equal access. The FECA establishes a balance between executive employees and employees who are members of a labor union. If a corporation uses a specific method of obtaining voluntary contributions, such as a payroll deduction mechanism, the corporation must make this method available to the labor union. 2 U.S.C. § 441b(b)(5) & (6). Commissioner Staebler was afraid that if a corporation chose only to ask its employees to contribute to a trade association SSF, the corporation could avoid the equal access provisions. Tr. at 2-3. The proposal for Section 114.8(e)(3) that the Commission was considering rectified this concern by specifying that if a corporation used a payroll deduction to facilitate contributions to a trade association SSF it would have to make the payroll deduction available to the labor unions. Tr. at 2-3. The transcript from the meeting demonstrates that the Commissioners did not adopt this simple remedy, at least in part, because of some confusion. The staff explained to the Commissioners that:

> If the corporation provides a payroll deduction for its executive or administrative personnel to the trade association, they would have to provide payroll deduction for the labor organization for its members. If

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[6] *See* FEC Binder 3, tab "1976 Amendments -- 5/26/1976" [*hereinafter* "Tr."]. The excerpt from the meeting transcript is found at Attachment 1.

[7] Apparently this point was discussed in greater detail earlier in the meeting, but ACB was unable to locate the entire transcript.

> they merely give the trade association a list of persons for whom they have approved solicitation, and that's the extent of the corporate involvement, we construe that as no method and they would have to make no method available to a labor organization for soliciting its members.

Tr. at 2. Commissioner Steabler began questioning why the list should not be made available to the labor union. He did not understand that there really was no comparable list for the corporation to provide to a union under this scenario – the union would already posses a list of its own members. Tr. at 2-3. Out of that confusion, the Commission proceeded to eliminate the payroll deduction option. The better option, and the one more consistent with the Act, would have been to retain the option described by the staff and require a corporation to make a payroll deduction available for union members if it facilitated contributions to the trade association through the use of a payroll deduction mechanism.

The third concern was a general balancing issue: namely, that some executives might have two methods of making political contributions available to them whereas a union member might only have one. Tr. at 8. The Commissioner's solution was to limit the trade association's mechanism for collecting funds as a way to balance the two groups; "[b]ut the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[8] The fact remains that the FECA specifically permits the restricted class to be solicited by both a corporation's SSF and one trade association SSF; the balancing of interests was done by Congress. *See* H.R. Conf. Rep. No. 94-1057, at 64 (1976) *reprinted in* 1976 U.S.C.C.A.N. 929, 979. The mechanism that ACB is requesting is merely a facilitation of the statutory right of the trade association to solicit its members' restricted class.

The concerns raised by the Commissioners at the meeting on June 29, 1976, could have been dealt with by providing more opportunities for contributions by both executives and union members rather than less. The Commissioner's decision to prohibit the use of a payroll deduction mechanism is not compelled by the Act and should be changed for purely legal reasons. In addition to the legal reasons, there are also a number of policy reasons why the Commission should revisit its decision from 27 years ago.

V. FACTUAL AND LEGAL CHANGES SINCE 1976

There have been significant factual changes since the Commission established the rules for trade association solicitations pursuant to the FECA. Payroll deduction is less

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[8] *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). The Court rejected the argument that Congress can "abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments in our society." *Id.* at 49 & n.55.

expensive and more commonplace, and the workplace has undergone significant changes. Additionally, the legal framework has been altered considerably by the Bipartisan Campaign Reform Act of 2002 ("BCRA").[9]

A. Payroll Deductions

Although a payroll deduction mechanism may have been a complicated and costly system in 1976, the cost has fallen dramatically. As discussed, in Section I, *supra*, the use of payroll deductions is widespread and cost-efficient. Employees of all types are paid through the use of direct deposit and therefore expect that they will be able to participate in various programs through the use of a payroll deduction mechanism. There is virtually no difference between the cost or effort involved in providing an employee an interoffice envelope to return a contribution or providing her or him with a pre-addressed stamped envelope to send to the trade association. *See* Advisory Opinion 2003-22 (permitting a corporation to provide interoffice envelopes or stamped envelopes in order to facilitate contributions to trade associations). Thus, a payroll deduction is virtually identical to other forms of "facilitation" that the Act and Regulations permit.

B. Workplace Changes

In addition to the changes to the legal framework governing the political system, there have been tremendous changes in the workplace that support a change in the way trade associations can solicit funds to their SSFs. When the 1976 amendments to the FECA were enacted, nearly one-quarter of American workers belonged to labor unions. The 1976 amendments therefore sought to balance the interests of labor and management and to provide access to the political process by more employees by allowing labor unions to have access to whatever fundraising mechanisms the corporation utilized. *See*, 2 U.S.C. § 441b(b)(5) & (6).

Since 1980, the percentage of workers in unions has dropped from over 20 percent to just 13.2 percent in 2002.[10] Thus, there are fewer opportunities for employees to participate in the political process because fewer employees are eligible to give to labor union SSFs. 30 percent of employees, however, own stock in the companies for which they work.[11] These employees are in their company's restricted class and eligible to participate in the political process by contributing to a SSF. For those companies with a SSF, their employees have the easy method of participating through the use of a payroll

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[9] Pub. L. No. 107-155, 116 Stat. 81 (2002).
[10] *Union Members Summary*, Bureau of Labor Statistics (Feb. 25, 2003) *available at* http://www.bls.gov/news.release/union2.nr0.htm (last visited April 21, 2003).
[11] Charles Duhigg, *Workers' Paradise: How Oddball Guru Lois Kelso Brought Capitalism to the Masses*, BOSTON GLOBE, March 16, 2003, at D1.

deduction mechanism. Not all companies have their own SSFs; employees in the restricted classes of such corporations have no way of using a payroll deduction mechanism to participate in the political process. Thus, the Commission should remove the restriction in order to provide more employees with the opportunity to participate in the political process by using a payroll deduction to make contributions to their trade association SSFs.

C. BCRA's Changes to the Political Process

Since BCRA became effective on November 6, 2002, the political system has been radically altered. In the 2001-2002 election cycle, individuals and corporations donated $495.9 million in unregulated "nonfederal funds" to the national parties. BCRA has eliminated the use of these unlimited funds from individuals and corporations. During the same time period, there was a considerable amount of advertisements broadcast that referred to a clearly identified candidate for federal office (but that did not expressly advocate the election or defeat of the candidate) and that had been paid for with unregulated donations from corporations and individuals. Many of these were broadcast within the 90 day blackout window imposed by BCRA's limitations on "electioneering communications."

Most individuals will now only be able to participate by making contributions. Others, with sufficient resources, may choose to make "independent expenditures," and "electioneering communications." One easy way for individuals to remain active in the political process is to make contributions to their company and trade association SSFs. The Commission can simplify the method by which individuals can contribute to these SSFs by allowing the use of a payroll deduction mechanism.

Similarly, with the ban on "nonfederal funds," corporations and trade associations that seek to participate in the political process will be able to do so only through the use of their SSFs. Yet, SSFs are still subject to the same limitations on giving and receiving contributions as they were in 1976; unlike the increases to individual contribution limits to candidates and parties, BCRA made no changes to the limits to or from SSFs. Furthermore, individual limits are now indexed to inflation while SSF limits are not. SSFs perform an important aggregating function in the political process.[12] To the extent that there is less and less of a difference between individual and SSF limits, corporations will be less able to make contributions and be involved in the political process.[13] The

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[12] *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 35 (1976) ("[The multicandidate political committee] provision enhances the opportunity of *bona fide* groups to participate in the election process.").

[13] *Cf.* 2003 Legislative Recommendations adopted at April 9, 2003 Commission Meeting, Agenda Document Nos. 03-22-A and 03-22-B (suggesting indexing the contribution limits for multicandidate committees to inflation).

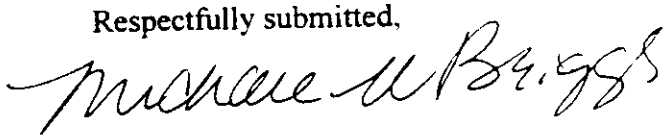
Commission can help to preserve the vitality of SSFs by making it easier for them to raise federal funds.

BCRA also directly limits the ability of a trade association to air "electioneering communications." As the Commission is well aware, any communication broadcast over television or radio that mentions a candidate for federal office, is broadcast to a target electorate, and is aired within 60 days of a general election or 30 days of a primary election cannot be paid for with corporate money. Although there are certain exceptions for nonprofit entities, a trade association typically would not be able to avow itself of the exemption. Therefore, it would have to treat any "electioneering communication" within the window as an independent expenditure paid for entirely from the funds in its SSF.[14] For example, if a major banking bill, such as the Gramm-Leach-Bliley Act, were to be considered within 60 days of a general election (or 30 days of a relevant primary), ACB would have to pay for any advertisement mentioning a candidate for federal office (including in this example, the name of the legislation if aired in Texas, parts of Iowa, or parts of Virginia) from its SSF. Because trade associations will have to fund more activity from their SSFs, allowing the use of the payroll deduction mechanism will provide trade associations with a greater ability to participate in the political process.

CONCLUSION

For the foregoing reasons, America's Community Bankers and COMPAC request the Commission to initiate a rulemaking proceeding pursuant to part 200 of the Commission's regulations to amend 11 C.F.R. § 114.8(e)(3) to allow trade associations to use payroll deductions to obtain voluntary contributions to their SSFs. Please contact the undersigned at (202) 857-3122 or via email at mbriggs@acbankers.org.

Respectfully submitted,



Michael W. Briggs
Chief Legal Officer

Attachment

[14] The SSF as an I.R.C. § 527 committee may be able to create a separate account to receive individual donations to fund electioneering communications.

Attachment I

FEDERAL ELECTION COMMISSION
1325 K STREET N.W.
WASHINGTON, D.C. 20463

NOVEMBER 15, 1976

MEMORANDUM

TO: ORLANDO POTTER

FROM: MARJORIE EMMONS

RE: PARTIAL TRANSCRIPT OF COMMISSION MEETING OF JUNE 29, 1976.

Pursuant to a request received by Kent Cooper's office from John E. Ahearn, General Counsel for the Insurance Association of Connecticut, the attached eleven page transcript has been prepared covering a part of a Commission meeting held on June 29, 1976.

It starts at that point of the discussion of proposed Commission regulations pertaining to Part 114.8(e), and concludes with the vote on that matter.

Our previous procedure has been to submit this to the Commissioners asking them to review and initial the transcript by a deadline, returning the initialed copies to the Commission Secretary by that deadline. Following this action, I will certify the document and forward it to the FEC Public Records.

It is my understanding that since this is a verbatim transcript that no changes are permitted in the record.

Attachment
CC: Kent Cooper (w.o/a)

1 CHAIRMAN THOMSON. Section "e". Solicitation.

2 DEPUTY ASSISTANT GENERAL COUNSEL REED: This means that the trade

3 association has obtained the solicitation, the approval. In section

4 "e" "1" there is no limit on the number of times they may be solicited.

5 However, the member corporation, again, may want to limit the number of

6 times they may be made. "e" "2" is purely some questions and confusion

7 had arisen if the member corporation grants approval to the trade

8 association, does that in any way affect their rights to solicit their

9 own stockholders. And this says no. It's purely for clarification.

10 Section "3" we return to the question that Mr. Harris had brought up.

11 We indicate there's no restriction on the method of facilitating the

12 making of contributions. There's an addition, excuse me. There's no

13 restriction on the method of soliciting voluntary contributions or

14 the method of facilitating the making of voluntary contributions with

15 the trade association.

16 CHAIRMAN THOMSON: Where did we add?

17 DEPUTY ASSISTANT GENERAL COUNSEL REED: On line 23, after the word "the"

18 add "method of soliciting voluntary contributions or the method of..."

19 VICE CHAIRMAN HARRIS: Where are we?

20 COMMISSIONER AIKENS: I'm lost.

21 CHAIRMAN THOMSON: Line 23, after the word "the" insert "method of

22 soliciting voluntary contributions or the"

23 DEPUTY ASSISTANT GENERAL COUNSEL REED: And then you continue on. And

24 the second sentence specifically says that the member corporation may

25 use the payroll deduction or checkoff for contributions to the trade

1 association. The section "4" deals with the availability of methods and
2 what happens if the corporation exercises a method. The way it is set up,
3 if a corporation uses a method to do the soliciting for the trade
4 association, they would have to make that method available to the labor
5 organizations to solicit its members. The availability of methods section
6 was written broadly enough that I think you can construe it that way.
7 There are two examples then set forth, little "i" and two little "i",
8 there are examples of how that would apply. If the corporation provides
9 a payroll deduction for its executive or administrative personnel to the
10 trade association, they would have to provide payroll deduction for the
11 labor organization for its members. If they merely give the trade
12 association a list of persons for whom they have approved solicitation,
13 and that's the extent of the corporate involvement, we construe that
14 as no method and they would have to make no method available to a labor
15 organization for soliciting its members.
16 COMMISSIONER STAEBLER: Mr. Chairman, in the interest of trying to keep
17 the balance between the corporate possibilities and the labor possibilities,
18 I think that we ought not to encourage this type of discrimination. If
19 "4" were adopted as it stands, my understanding is that if the corporation
20 uses a payroll deduction plan on its own initiative, it would have to make
21 such a plan available to a union for use of the corporation. If, on the
22 other hand, it provides just the names of its employees and the trade
23 association did the addressing, it would not be required to make that
24 method, would not even be required to provide the names to the union.
25 What I was trying to accomplish is to get the same methods open to unions

1 as to either the rporation on its own initiativ or the corporation through
2 the trade association.
3 DEPUTY ASSISTANT GENERAL COUNSEL REED: If the corporation turns over a list
4 of its executive or administrative personnel, they have not used a method
5 that can be made available to the labor organization, because here your
6 method is whatever the corporation uses has to be available to the labor
7 organization for its own members, and they are not soliciting, they are not
8 turning over a list of the labor organization's members, they are soliciting
9 their group up here, and under this they are not using a method.
10 COMMISSIONER STAEBLER: You are justifying this on the ground that anything
11 it does within its limited personnel, it does not need to share with unions?
12 DEPUTY ASSISTANT GENERAL COUNSEL REED: The most that could be said is that
13 the corporation would have to turn over a list of the union members. When
14 they use any method, i.e., a payroll deduction or something discernible
15 that can be given to the labor organization for use for its own members,
16 that has to be turned over. But here there is nothing to turn over.
17 COMMISSIONER STAEBLER: Well, why not?
18 DEPUTY ASSISTANT GENERAL COUNSEL REED: Because the labor organization
19 doesn't have...the labor organization's entitlement to that list comes
20 about when the corporation does a twice yearly solicitation of employees
21 and union employees, not when they solicit their executive or administrative
22 personnel.
23 COMMISSIONER AIKENS: I have just one argument on the section itself, and
24 that is that the statute says, "the making of voluntary contributions to
25 a separate segregated fund established by a corporation." And this is

1 not established a corporation. The corporati has no control over
2 where the money is going to go, what political candidate the money is
3 going to be contributed to...
4 DEPUTY ASSISTANT GENERAL COUNSEL REED: I agree with you.
5 COMMISSIONER AIKENS: I find great difficulty with it.
6 DEPUTY ASSISTANT GENERAL COUNSEL REED: I think the section you are
7 referring to is...
8 COMMISSIONER AIKENS: That deals with payroll deductions.
9 DEPUTY ASSISTANT GENERAL COUNSEL REED: The one that deals with payroll
10 deductions does not say to a separate segregated fund. Your argument backs
11 up Mr. Harris' argument that it's not allowed.
12 VICE CHAIRMAN HARRIS: What is an affiliate of a corporation?
13 COMMISSIONER STAEBLER: We've defined it somewhere.
14 VICE CHAIRMAN HARRIS: See this thing..utilize any method of soliciting or
15 facilitating making. It says if the corporation does it, it has to make
16 it available. It doesn't say...But I was just wondering whether, say, if
17 you have an incorporated trade association like the Iron and Steel Institute,
18 if it allows a checkoff, say for its own executives, it it would have to
19 make it available for all of the steel companies. Could they be considered
20 affiliates of the Iron and Steel Institute?
21 GENERAL COUNSEL MURPHY: I would think not.
22 VICE CHAIRMAN HARRIS: It's a nice idea.
23 DEPUTY ASSISTANT GENERAL COUNSEL REED: Going back to this method section,
24 it's not at all, as I said earlier, clear to me according to the statute,
25 that the corporation could even do it. We've essentially come down to the

position, and I'm not sure whether Congress would accept it, that you can do it, but in doing it we're going to make it subject to all of the provisions that were set up in the statute for when a corporation does something. It is a problem as to what exactly the corporation can do. We've attempted to take a middle course in saying they could do certain things, but when they do them, the statutory language just says voluntary contributions, it would include this type of activity. And there is also the very real possibility, and it has come up at seminars that corporations have discussed the fact that they have at least thought of using the trade association PACs as a way of getting around the requirement to make everything available to the labor organizations. So this is what we came up with.

GENERAL COUNSEL MURPHY: I think the separate contribution limits enjoyed by the National Association of Manufacturers PAC, where the PACs are members of the National Association of Manufacturers, confirms my view that the Iron and Steel Institute (background noise interferes)...affiliate of all of the iron and steel giants of this country and produced by the institute of a method (background noise intereferes)...all those companies to require that they have to make the method available. (Laughter)

COMMISSIONER AIKENS: Why don't we just say the whole world and its affiliates?

VICE CHAIRMAN HARRIS: You think that's the most extravagant proposal put forward this afternoon?

GENERAL COUNSEL MURPHY: Yes.

VICE CHAIRMAN HARRIS: As I indicated, I don't think corporations can solicit trade associations and I don't think its proper to make checkoffs. If they do, the statute seems plainly to require that they be made

1 available to unions.

2 GENERAL COUNSEL MURPHY: That's what we're saying.

3 DEPUTY ASSISTANT GENERAL COUNSEL REED: Technically, I think the proper

4 statutory interpretive argument would not be used. We put it forth

5 here in...

6 COMMISSIONER STAEBLER: I think there's a very serious policy implication

7 in allowing checkoffs for associations. You get awfully close to

8 syndicalism by such a means. You remember what syndicalism is?

9 GENERAL COUNSEL MURPHY: I've never understood.

10 COMMISSIONER STAEBLER: Syndicalism was the organization of the state by

11 industry. The industry emcompassed everybody who worked for or participated

12 in it. You usually get to that position via trade associations who have

13 the checkoff.

14 DEPUTY ASSISTANT GENERAL COUNSEL REED: There is a distinction that can be

15 made. When we were talking earlier about the corporations doing soliciting,

16 we were talking mainly about speech. I think we could possibly distinquish

17 checkoffs from that type of activity and prohibit the use of the checkoff

18 based on it is not a speech or communication but the payroll is the (unintelligible)

19 item and that be, we must be able, I could get the rational, divisible, means.

20 COMMISSIONER STAEBLER: We really aren't required to go that far by anything

21 in the Act, are we?

22 COMMISSIONER AIKENS: No.

23 COMMISSIONER STAEBLER: Well, then, I think we would do well to stop...

24 DEPUTY ASSISTANT GENERAL COUNSEL REED: I think we could, along with what

25 you're suggesting, delete sections "3" and "4" and I think we should stay

1 in that, delete those two, and then say in there the corporations may not
2 use a checkoff as a method of facilitating the making of voluntary
3 contributions to a trade association PAC. I think that that would be
4 the alternative that you have suggested. And that we read the other as an
5 is that the Commission voted on, the distinguishing factor being that that
6 is speech and that seems to be communication that we thought was exempted
7 because in the communication exemption and this you can't really bring in
8 under the communication exemption. It's something beyond communication.
9 But speech was an idea that we recognized earlier.
10 GENERAL COUNSEL MURPHY: Commissioner Harris is of the view, now, that what's
11 happening to this meeting is something beyond communication.
12 VICE CHAIRMAN HARRIS: It's an endurance contest.
13 COMMISSIONER AIKENS: Which I just lost.
14 CHAIRMAN THOMSON: You're suggesting that you strike "3" on page 38 and
15 "4" on page 39?
16 VICE CHAIRMAN HARRIS: Say that corporations can't checkoff for trade
17 association PACs?
18 DEPUTY ASSISTANT GENERAL COUNSEL REED: Yes.
19 CHAIRMAN THOMSON: Well, we say here in "3" that they may. But that would
20 be deleted?
21 DEPUTY ASSISTANT GENERAL COUNSEL REED: Yes. If I'm stating what Mr.
22 Staebler suggested, "3" and "4" would be deleted and in place of that
23 we would add a section "3" saying that a corporation may not set up a
24 payroll deduction plan as a method of facilitating the making of
25 contributions to a trade association separate segregated fund.

1 CHAIRMAN THOMSON. What's the pleasure of the Com. ssion?

2 DEPUTY ASSISTANT GENERAL COUNSEL REED: (In answer to an unintelligible

3 question), Yes. The corporation would have the checkoff for its own

4 corporate PAC. That's clear in the statute. The labor organization

5 may have it for its own labor organization PAC. T t was established

6 earlier. So this is, in essence, providing another checkoff for corporate

7 executives.

8 COMMISSIONER TIERNAN: To the trade association?

9 DEPUTY ASSISTANT GENERAL COUNSEL REED: To the trade association PAC. It

10 would in no way limit them.

11 COMMISSIONER STAEBLER: The big significance is that the Congress, when it

12 argued this thing out, came to kind of balance that some kind of equation

13 between corporations and unions. But if we put the association thing in

14 you get an agglomerative effect on the corporate side which would permit

15 people to gather in much larger groups.

16 CHAIRMAN THOMSON: It's been suggested by staff that we strike paragraph

17 "3" on page 38 and paragraph "4" on page 39, which takes us over to paragraph

18 "5" on page 40.

19 COMMISSIONER STAEBLER: Well, I'll so move, Mr. Chairman.

20 GENERAL COUNSEL MURPHY: (In answer to an unintelligible question). This

21 is obviously confined to the persons who, under this statute, may be

22 solicited by a corporation as distingui from a larger group of employees

23 covered by EPA who may not be solicited i nt of the revision except

24 twice yearly. So that I don't think the two are related. This is solicitation

25 by a trade association of the same class of upper level employees who are

1 solicitable by th corporation itself as frequent as the corporation
2 wishes in the calendar year. Now EPA went to the other larger class.
3 COMMISSIONER AIKENS: What are we doing?
4 GENERAL COUNSEL MURPHY: You're saying that, and this encompasses some of
5 the earlier material, that a corporation can assist a trade association in
6 soliciting appropriate classes of employees for contributions to the trade
7 association PAC, but beyond that aide association process, the corporation
8 may not install a payroll deduction or checkoff or other method that
9 facilitates the transmission of the individual employee's salary portion
10 to a trade association PAC. And that the constitutional distinction is that
11 assisting in the solicitation is part and parcel of the corporate right to
12 speak to its employees, internal communications exception, whereas the
13 installation of a mechanical process is not speech, speech plus at the very
14 best, and is regulatable.
15 CHAIRMAN THOMSON: Well, you'd have your new section "3" if you just struck
16 the first sentence in section "3" and the next sentence to the last would say
17 "The member corporation may not use a payroll deduction or checkoff system
18 for executive or administrative personnel contributing to a trade
19 association."
20 GENERAL COUNSEL MURPHY: Yes.
21 COMMISSIONER STAEBLER: So, the motion is to strike the first sentence in
22 "3" and strike all of "4"?
23 CHAIRMAN THOMSON: And add the word "not" after "may". So it would read,
24 "The member corporation may not use a payroll deduction or check off system..."
25 GENERAL COUNSEL MURPHY: I was just making a point that the first sentence of

1 "3" speaks to what the trade association may use by the way of methods and states,
2 and I think it's a different kind of rule, there is no restriction on what they
3 can do. We should probably leave that in.
4 COMMISSIONER STAEBLER: All we need is the word "not" in the intrigue.
5 CHAIRMAN THOMSON: We wouldn't strike "3", we would leave it with the language
6 it's at and the method of soliciting voluntary contributions or method of
7 facilitating the making of contributions.
8 DEPUTY ASSISTANT GENERAL COUNSEL REED: Yes. And then we strike "4".
9 CHAIRMAN THOMSON: We'll just strike "4" then.
10 COMMISSIONER STAEBLER: But you insert the word "not" at line 24 1/2.
11 CHAIRMAN THOMSON: Right.
12 COMMISSIONER STAEBLER: So the motion is, insert the word "not" between the
13 words "may" and "use" in line 24 1/2, and strike "4".
14 VICE CHAIRMAN HARRIS: How can the trade association, what can it do to
15 facilitate the...
16 DEPUTY ASSISTANT GENERAL COUNSEL REED: Well, it could send a mailing to
17 the executive personnel, it could put in the mailing a return addressed
18 envelope, and that would be a method of facilitating the making. We're
19 getting very precise in defining method.
20 CHAIRMAN THOMSON: The question is on the motion. Those in favor will say
21 "aye". (Ayes heard) Opposed will say "no". (No responses). The ayes have
22 it. Agreed to.
23 COMMISSIONER STAEBLER: That shortens the thing a bit.
24 CHAIRMAN THOMSON: Paragraph "5". Subject to the provision of 114.5(a).
25 Leave it the way it is? We don't have any 5(a) do we?

1 COMMISSIONER AIKENS: Are we leaving that last sentence in? Then we should

2 spell separate right.

3 GENERAL COUNSEL MURPHY: Yes, I've got that.

4 DEPUTY ASSISTANT GENERAL COUNSEL REED: Section "f".

5 CHAIRMAN THOMSON: Well, what about "4"? Do you want that the way it is?

6 DEPUTY ASSISTANT GENERAL COUNSEL REED: It should be separate spelled correctly.

7 CHAIRMAN THOMSON: Outside of that? Alright.

8 DEPUTY ASSISTANT GENERAL COUNSEL REED: Section "f". (The tape continues on).

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