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BY ELECTRONIC AND FIRST CLASS MAIL

Mr. John C. Veregelli
Acting Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: **Statement in Support of Petition for Rulemaking**
American Council of Engineering Companies
Notice 2003-18

Dear Mr. Veregelli:

The American Council of Engineering Companies ("ACEC") files this statement in support of the Petition for Rulemaking ("Petition") submitted by America's Community Bankers on August 29, 2003. ACEC agrees that the Federal Election Commission ("Commission") should initiate a rulemaking procedure to amend Section 114.8(e)(3) to allow trade associations to use payroll deductions to facilitate contributions.

The Federal Election Campaign Act (the "Act") contains no limitation on the methods a trade association can use to facilitate donations because there is no sound policy reason to restrict them. In addition, financial technology has advanced substantially since Section 114.8(e)(3) was promulgated in 1976, and payroll deductions are increasingly common. The Commission has approved debit-type contributions to trade association separate segregated funds, making the regulation's continued prohibition against payroll deduction somewhat isolated and arbitrary. Finally, the Commission should explain the policy or legal reasons why the prohibition on payroll deductions is necessary if it ultimately decides not to amend the rule.

1. The American Council of Engineering Companies

ACEC is the business association of America's engineering industry, representing 6,000 independent engineering companies throughout the United States engaged in the development of America's transportation, environmental, industrial, and other infrastructure. ACEC member firms represent the broad spectrum of the engineering industry, from very large firms to small, family-owned businesses. Overall, our members employ approximately 500,000 people throughout the 50 states. Founded in 1910 and headquartered in Washington, DC, ACEC is a national federation of 51 state and regional organizations.

The American Council of Engineering Companies Political Action Committee, or ACEC/PAC, relies upon donations from ACEC members through a variety of events and outreach programs. ACEC hosts PAC fundraising events at national conventions where members participate in golf outings, live and silent auctions, and raffles to raise funds for the PAC. ACEC/PAC also raises funds from ACEC members through a special donor club that invites members to make a donation once a year to support the Council's political activities. Finally, ACEC/PAC solicits prior-approved member firms through the use of direct mail twice a year.

2. The Commission Should Initiate a Rulemaking

In determining whether to grant a Petition for Rulemaking, the Commission considers several factors including the "Commission's statutory authority," "policy considerations," and the "desirability of proceeding on a case-by-case basis."[1] Each of these considerations favors the initiation of a rulemaking.

The Commission's Statutory Authority Permits Payroll Deductions to Facilitate Contributions to Trade Association SSFs

Section 441b(b)(4)(D) of the Act permits trade associations or their separate segregated funds ("SSF") to solicit contributions from stockholders and executive or administrative employees of member corporations. The statute is completely silent on, and does not limit, the method of payment or the facilitation of payments. This lack of statutory restriction is reflected in the implementing regulation, which states "[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."

The Commission's proposed regulation permitted payroll deductions.[2] As noted in the Petition, the Commission's reasons for reversing its position are unclear and may be partially based on a perception that payroll deduction for executives was somehow unfair to union members. Accordingly, the Commission did not reverse its position because of statutory authority or a prohibition in the Act. Because the Act contains no limitations on the use of payroll deductions to facilitate payments to a trade association SSF, the Commission clearly has the authority to permit (or lacks the authority to prohibit) payroll deductions to facilitate contributions.

As discussed further below, policy and legal considerations favor initiating a rulemaking and eliminating the prohibition on payroll deductions.

Policy Considerations Favor Initiating a Rulemaking and Amending the Rule

Three policy considerations favor a rulemaking and change to Section 114.8(e)(3). First, the payment process has changed substantially since the rule was promulgated in 1976. As the

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1 11 C.F.R. § 200.5 (2003).
2 41 Fed. Reg 21472, 21595 (May 26, 1976).

Petition notes, the use of checks has declined significantly, and approximately 60% of Americans receive at least one payment through direct deposit. Petition at 2. Americans increasingly use automatic payroll deductions to give to charity, pay loans or mortgages, or pay for services such as gym memberships or club dues. Electronic payroll deductions are used because they are easy, accurate, and simple to start, terminate or change. Electronic payroll deductions are also easy to track, both for the trade association and the Commission. Electronic payroll deductions are compatible with the Commission's requirement for electronic report preparation and filings. Given the current financial services market and the Commission's own rules, the prohibition on payroll deductions for trade associations is outdated.

Second, the Commission has approved many other means for corporations to facilitate payments to trade association SSFs. For example, the Commission has interpreted Section 114.8(e)(3) as permitting the use of an Automatic Clearing House ("ACH") system in which a restricted class employee's personal bank account is electronically debited each month so contributions can be deposited in a trade association's SSF. AO 1999-35.[3] In the solicitation, the employee is offered the option of using the electronic debit system. If the employee chooses this option, she executes a form authorizing the debit from her personal checking account and the money is automatically deducted on a regular basis.

There is no real distinction between the ACH system and a payroll deduction. In both cases, use of the system is voluntary, the employee is required to authorize the deduction and it is made from the employee's funds. With the ACH system, the deduction is made out of a checking account into which the employee's paycheck is deposited. With a payroll deduction, the money comes out of a paycheck before it is deposited.

The current regulation creates these distinctions-without-a-difference by providing "no limitation" on facilitation, which has resulted in automatic deductions like the ACH system, while prohibiting payroll deductions. From a policy standpoint, the limit on payroll deductions simply has no support. From a legal standpoint, treating payroll deductions differently than other automatic systems is arbitrary and capricious.

Finally, the justification for Section 114.8(e)(3) provides no basis for treating a trade association differently than a corporation or union. Corporations and unions are both permitted use payroll deductions or check off systems provided that certain conditions, including a lack of coercion, are met. No evidence has been presented that coercion occurs with payroll deductions. Similarly, there is no indication that contributions are higher or lower with payroll deductions than they are with traditional paper methods. The regulations and guidance documents are nevertheless

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[3] The Commission has also approved similar arrangements, such as a "Deduct-A-Buck" program where member credit unions set up debits from members' individual accounts and transfer the funds to an SSF (AO 1998-19), transfers from margin accounts (AO 1997-9), and transfers from an agricultural cooperative member's account (AO 1986-7).

silent as to why trade associations are treated differently. If the Commission does not open this rulemaking, it will be forced to explain why unions and corporations are treated more favorably than trade associations.

- ***A Change in the Regulation Will Prevent Case-by-Case Determinations***

The Commission has issued at least six Advisory Opinions answering whether electronic debit systems should be considered "payroll deductions or check off systems." As technology and financial systems advance, these questions are likely to continue and the line between automatic debit systems and payroll deductions will become increasingly blurred.

For example, corporations may offer employees the option of placing part of their paychecks in accounts that could be used for a variety of corporate purposes, such as corporate gym memberships, parking fees, personal postage, telephone and facsimile charges, or charitable contributions. Does an automatic deduction from this type of account to a trade association's SSF constitute a payroll deduction? The point is that as technology advances and corporations provide more innovative financial services to their employees, case-by-case determinations as to what constitutes a proper facilitation or an improper payroll deduction will become more difficult to answer.

The Commission Should Initiate Rulemaking to Clarify the Policy Reason for the Prohibition

The Commission should accept this opportunity to clarify its reasons for prohibiting payroll deductions. As stated in the Petition, the Commission's reasons for reversing its original position on payroll deductions is far from clear. The Commission's regulations treat trade associations differently from corporations and unions with regard to payroll deductions, and these differences appear to be arbitrary. Unless the Commission has some policy or legal reason for treating these entities differently, the regulation prohibiting corporations from establishing payroll deductions for contributions to a trade association's SSF may be invalid. As such, the Commission should, at a minimum, fully explain its reasons for prohibiting the use of payroll deductions to facilitate payments to trade association SSFs.

3. Conclusion

ACEC appreciates the opportunity to comment on this important proceeding. Based upon the rulemaking record, current banking technology, and the Commission's treatment of transactions similar to payroll deductions, ACEC concludes that the Commission should initiate a rulemaking and amend the current rule to permit payroll deductions pursuant to Section 114.8(e)(3).

Sincerely,

Craig Engle
Melissa A. Bailey

cc: Steve Hall
Harry Katrichis