

FEDERAL ELECTION COMMISSION

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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

MEMORANDUM

**TO:** The Commissioners  
Staff Director  
General Counsel  
FEC Public Records  
FEC Press Office

**FROM:** Marjorie W. Emmons  
Secretary of the Commission *MWE*

**DATE:** February 2, 1994

**SUBJECT:** Comment: Proposed AD 1993-24

Transmitted herewith is a timely submitted comment from Mr. Richard E. Gardiner, Legislative Counsel for the National Rifle Association of America.

Advisory Opinion 1993-24 is before the Commission at tomorrow's open meeting.

Attachment:  
25 pages



**NATIONAL RIFLE ASSOCIATION OF AMERICA**  
**INSTITUTE FOR LEGISLATIVE ACTION**  
**11260 VALENTINE HILL ROAD**  
**FARMAN, VA 22020-7400**

February 2, 1994

**Marjorie Emons**  
**Secretary**  
**Federal Election Commission**  
**999 E Street, N.W.**  
**Washington, DC 20463**

Dear Ms. Emons:

Please find enclosed NRA's comments on proposed Advisory Opinion 1993-24.

Sincerely yours,

Richard E. Gardiner  
Legislative Counsel

REG/rer

Enclosure

cc: Office of General Counsel

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1 I. INTRODUCTION AND SUMMARY OF COMMENT

2 This submission is in response to Proposed Advisory Opinion  
3 1993-24, in which it is proposed that the Federal Election  
4 Commission ("Commission") interpret the Federal Election Campaign  
5 Act of 1974 ("FECA" or "Act") to prohibit the National Rifle  
6 Association ("NRA") from making partisan political communications  
7 to, and soliciting contributions to the NRA-Political Victory  
8 Fund ("PVF") from, any category of members who have no voting  
9 rights under the by-laws of the NRA. The position the General  
10 Counsel urges the Commission to take is based on a new regulation  
11 defining "members" of a "membership organization" for purposes of  
12 applying 2 U.S.C. § 441b(b) (4) (C).

13 This Proposed Advisory Opinion is not the first instance the  
14 Commission has closely scrutinized whether the NRA can  
15 communicate with or solicit non-voting members for campaign  
16 contributions to PVF. In 1984, the Commission, in MUR 1765,  
17 reached a different conclusion from Proposed Advisory Opinion  
18 1993-24 on the exact question presently under review.

19 As will be discussed below, the Commission is being asked by  
20 the General Counsel to render an Advisory Opinion based on an  
21 invalid regulation. The regulation has been promulgated by an  
22 illegally constituted FEC under *Federal Election Commission v.*  
23 *National Rifle Association Political Victory Fund*, 6 F.3d 821  
24 (D.C.Cir. 1993). Second, if the regulation upon which Proposed  
25 Advisory Opinion 1993-24 is based was validly promulgated, then  
26 Proposed AO 1993-24 is contrary to statute, as interpreted by the  
27 United States Supreme Court in *FEC v. National Right to Work*  
28 *Committee*, 103 S.Ct. 552 (1982), and the Commission's prior

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1 position in 1984. Finally, if challenged in litigation, the  
2 drastic shift in the position of the Commission with respect to  
3 the NRA's communications with, and solicitation for contributions  
4 to PVF of, its membership will be granted little deference by the  
5 courts.

## 7 II. COMMENT

### 8 A. Background

9 The organizational structure the NRA is certainly familiar  
10 to this Commission. The NRA was incorporated in the State of New  
11 York, chartered in 1871 and has, at present, over 3.2 million  
12 members. The PVF is a "separate segregated fund" established by  
13 the NRA.<sup>1</sup> The NRA has provided to the Commission the most recent  
14 by-laws of the Association upon the request of FEC staff.

#### 15 1. The Decision in *FEC v. NRA-PVF*

16 On October 22, 1993, the United States Court of Appeals for  
17 the District of Columbia Circuit held in *Federal Election*  
18 *Commission v. NRA-PVF et al.*, 6 F.3d 21 (D.C.Cir. 1993)  
19 (hereinafter "*NRA-PVF*"), that this body was unconstitutionally  
20 composed because its composition violated Article I of the United  
21 States Constitution by placing the Secretary of the Senate and  
22 Clerk of the House of Representative on the Commission as *ex*  
23 *officio* members. See 2 U.S.C. § 437(c)(a)(1) (1988).

24 As the Commission is well aware, that case was an  
25

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26 <sup>1</sup>Under 2 U.S.C. § 441b(b)(4)(C) and § 441(b)(2)(a), an  
27 incorporated membership organization, or separate segregated fund  
28 established by such entity, may solicit contributions to the  
separate segregated fund from, and make partisan communications  
to, its members.

1 enforcement proceeding against the very parties to be affected by  
2 Advisory Opinion 1993-24. The D.C. Circuit held in *NRA-PVF* that,  
3 because the NRA raised the doctrine of separate of powers as a  
4 defense to an enforcement action, "we are aware of no theory that  
5 would permit us to declare the Commission's structure  
6 unconstitutional without providing relief to the appellants in  
7 this case." *NRA-PVF*, 6 F.3d at \_\_\_\_\_. The Commission filed a  
8 petition of writ of certiorari to the United States Supreme Court  
9 on January 18, 1994; its motion for expedited consideration by  
10 the Supreme Court was recently denied.

## 11 2. NRA 1765

12 On August 22, 1985, an administrative complaint against the  
13 NRA, NRA-PVF, and its treasurer was filed with the Commission.  
14 The complaint alleged that the NRA and NRA-PVF had solicited  
15 individuals for contributions to NRA-PVF who were not members of  
16 the NRA within the meaning of FECA, in violation of 2 U.S.C. §  
17 441b(b)(4)(A). On October 23, 1984, the Commission determined  
18 that the NRA, under the principles delineated by the United  
19 States Supreme Court in *FEC v. National Right to Work Committee*,  
20 103 S.Ct. 552 (1982), had solicited members of the Association  
21 for campaign contributions to NRA-PVF in accordance with FECA.

22 Central to the Commission's reasoning that the NRA was in  
23 compliance with the Act (as interpreted by the Supreme Court in  
24 *NRWC*) was a combination of several factors, including that: all  
25 members pay dues; all members are eligible for membership on the  
26 committees of the NRA, which recommend policies and strategies to  
27 the NRA Board of Directors; all members of the NRA have the right  
28

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1 to attend all meetings of the Board, Executive Committee, and  
2 standing and special committees of the association; all members  
3 of the NRA have the privilege of attending and being heard at all  
4 official meetings of membership; and all members of the NRA have  
5 the right to circulate and submit petitions for nominating  
6 directors. MUR 1765 at 15.

7  
8 The Commission thus concluded that non-voting members of the  
9 NRA could be considered to exercise control over the expenditure  
10 of their contributions. MUR 1765 at 16. Additionally, this  
11 Commission determined that all members of the NRA are "members"  
12 of a membership organization under FECA and NRWC because, *inter*  
13 *alia*, the NRA By-laws provide for annual meetings of all members;  
14 all NRA members are issued appropriate membership materials and  
15 receive the official journal of the Association; and because all  
16 members of the NRA can request and receive advice and assistance  
17 from the NRA. MUR 1765 at 16.

18 Based on the above elements, the Commission, two years after  
19 the Supreme Court decided NRWC, declared that "the structure of  
20 the NRA organization appears to provide all member of the NRA  
21 with certain rights vis-a-vis the NRA." MUR 1765 at 17.

22 As for NRWC, the Commission concluded that the U.S. Supreme  
23 Court "did not dictate the requirements for membership in a  
24 corporation without capital stock, but rather commented upon the  
25 various indicia of membership that were lacking in the factual  
26 situation under its consideration. The right to vote is only one  
27 type of right vis-a-vis the corporation, in this office's view."  
28 MUR 1765 at 17. This Commission concluded that "the NRA

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1 organization provides all of its members with sufficient rights,  
2 obligations, and privileges to claim the membership exemption of  
3 2 U.S.C. § 441b(b)(4)(C)." MUR 1765 at 17.

4  
5 **3. The New Commission Regulations Defining "Member"  
of a "Membership Organization."**

6 As noted in the Proposed Advisory Opinion, the relevant  
7 regulations were published in the Federal Register on August 30,  
8 1993, 48 Fed. Reg. 45770, with an effective date of November 10,  
9 1993, 58 Fed. Reg. 59641. The new Commission regulations, 11  
10 C.F.R. Part 114, amended the Act's definition of "membership  
11 organization"<sup>2</sup> and "members."<sup>3</sup> 58 Fed. Reg. 45775.

12  
13 <sup>2</sup> The Commission now has defined a "membership  
association" as a:

14 [M]embership association, trade association,  
15 corporative, corporation without capital stock or a  
local, national, or international labor organization  
16 that

- 17 (i) Expressly provides for "members" in its  
articles and by-law;  
18 (ii) Expressly solicits members; and  
19 (iii) Expressly acknowledges the acceptance of  
membership such as by sending a membership card or an  
inclusion in a membership list.

20 11 C.F.R. § 114.1(e) (1993).

21 <sup>3</sup> "Members" under the Act now means

22 [A]ll persons who are currently satisfying the  
requirements for membership in a membership  
23 organization, affirmatively accept the membership  
association's invitation to become a member, and  
either:

24 (i) Have some significant financial attachment to  
the membership association, such as a significant  
25 investment or ownership stake (but not merely the  
payment of dues);

26 (ii) Are required to pay on a regular basis a  
specific amount of dues that is predetermined by the  
27 association and are entitled to vote directly either  
for at least one member who has fully participatory and

28 (continued...)

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1           As "Explanation and Justification" for the adoption of the  
2 regulations presently at issue, Notice 1993-20 declared that the  
3 amendments were necessitated to "reflect the Supreme Court's  
4 ruling" in *NRWC*. 58 Fed. Reg. 45770. The Commission's new-found  
5 interpretation of the *National Right to Work Committee* case in  
6 the newly-promulgated regulations, a decade after the Supreme  
7 Court's decision in *NRWC*, is a startling U-turn from its prior  
8 application of FECA in MUR 1765.

9           Stated differently, lacking any revisitation by the United  
10 States Supreme Court of the issue of who qualifies as a "member"  
11 for purposes of 2 U.S.C. § 441b(b)(4)(C), without any amendment  
12 to that specific provision by Congress, and without any  
13 substantial change in the by-laws or membership structure of the  
14 NRA since 1984, the General Counsel has recommended that the  
15 Commission reverse itself and determine that over two-thirds the  
16 NRA's membership should be excommunicated from the political  
17 process. As will be indicated below, in addition to being an  
18 arbitrary and capricious abuse of the administrative powers  
19 allotted to the Commission under the FECA, it is also contrary to  
20 the Supreme Court's decision in *National Right to Work Committee*  
21 and raises serious constitutional concerns.  
22

23           <sup>3</sup>(...continued)

24           voting rights on the highest governing body of the  
25           membership association, or for those who select at  
26           least one member of those on the highest governing body  
27           of the membership association; or

28           (iii) Are entitled to vote directly for all of  
            those on the highest governing body of the membership  
            association.

11 C.F.R. § 114.1(e)(2) (1993).

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**B. The New Commission Regulations at 11 C.F.R. 114.1(a)(2) are Void.**

An important component of the D.C. Circuit's decision in *NRA-PVF* was its rejection of the validity of the Commission's past actions, in contrast to the what the Supreme Court did in *Buckley v. Valeo*, 424 U.S. 1, 142 (1976).

On October 26, 1993, the Commission reconstituted itself in accord with the Court of Appeals' decision as a six member agency without the non-voting *ex officio* members. The Commission has conceded to the United States Supreme Court that "[t]here is ... some uncertainty in the regulated community ... that the many regulations and advisory opinions the Commission has issued since 1976 while the Commission included the *ex officio* members, continue to be legally enforceable," and that "until [*FEC v. NRA-PVF*] is finally resolved, these circumstances will continue to substantially impair the Commission's ability to effectually administer and enforce the campaign finance statutes." See Motion of Petitioner Federal Election Commission for Expedited Consideration filed January 18, 1994, at 3-4.

The identical constitutional debility found by the D.C. Circuit in *NRA-PVF* and by District Judge Thomas Hogan in *Federal Election Commission v. National Republican Senatorial Committee*, Civ. No. 93-1612, infects the regulatory process upon which this Proposed Advisory Opinion relies. The Commission's purported "ratification" of its previous actions cannot cure the unconstitutional taint that permeates its regulatory activity. There is simply no authority to support the empowerment of a governmental body to ratify an act that it lacked authority to

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1 perform initially.

2       Indeed, case law has held that there can be no ratification  
3 of a regulation such as the one here at issue. See e.g.,  
4 *Franklin Savings v. Director of Office of Thrift Supervision*, 740  
5 F.2d 1535, 1539 (D.Kan), rev'd, on other grounds, 934 F.2d 1127  
6 (10th Cir. 1990) ("for ratification to be effective, the ratifying  
7 person or entity must have had authority to do the underlying act  
8 both at the time of the original act and at the time of the  
9 ratification.")

10       Because the Commission did not constitutionally promulgate  
11 these regulations in the first instance, it cannot subsequently  
12 "ratify" such action. That the *NRA-PVF* holding is applicable to  
13 the regulatory process here is supported by the Supreme Court's  
14 recent ruling in *Harper v. Virginia Department of Taxation*, 113  
15 S.Ct. 2510 (1993), where the Court declared that:

16       When this Court applies a rule of federal law to the  
17 parties before it, that rule is the controlling  
18 interpretation of federal law and must be given full  
19 retroactive effect in all cases still open on direct  
20 review and as to all events, regardless of whether such  
21 events predate or postdate our announcement of the  
22 rule.

23 113 S.Ct. at 2517 (emphasis supplied).

24       In other words, every step taken by the Commission while  
25 instituting this regulation is fatally flawed by the fact that  
26 its composition violated the Constitution. The Commission may  
27 not proceed to enforce this regulation unless it repromulgates  
28 the regulation after complying with all proper administrative  
procedures.

Any previous administrative action, performed in

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1       contravention of the Constitution, cannot simply be "ratified."  
2       Rather, the procedures must be performed by a Commission whose  
3       composition passes constitutional muster. Because the relevant  
4       regulations relied upon by the General Counsel in Proposed  
5       Advisory Opinion 1993-24 were promulgated by an  
6       unconstitutionally composed Commission, they are void.

7               **G. The Non-Voting Members of the NRA are "Members" of the**  
8               **NRA under the United States Constitution and the**  
9               **Federal Election Campaign Act.**

10               1. The Member Communications at Issue in AO 1993-24  
11               are Protected by the First Amendment to the U.S  
12               Constitution.

13               The communications with members which will be affected by  
14       Advisory Opinion 1993-24 operates "in an area of the most  
15       fundamental First Amendment activities." *Buckley v. Valeso*, 424  
16       U.S. 1, 14, (1976). Additionally,

17               [t]he First Amendment protects political association as  
18               well as political expression. The constitutional right  
19               of association explicated in *NAACP v. Alabama*, 357 U.S.  
20               449, 460 (1958), stem from the Court's recognition that  
21               "[e]ffective advocacy of both public and private points  
22               of view, particularly controversial ones, is undeniably  
23               enhanced by group association." Subsequent decisions  
24               have made clear that the First and Fourteenth  
25               Amendments guarantee "freedom to associate with others  
26               for the common advancement of political beliefs and  
27               ideas, " a freedom that encompasses "[t]he right to  
28               associate with the political party of ones choice." *Kusper v. Pontikes*, 414 U.S. 51, 56 (1973), quoted in  
              *Cousins v. Wigoda*, 419 U.S. 447, 487 (1975).

*Buckley*, 424 U.S. at 15.

              Where, as in this case, the Commission has gone far beyond  
              that which was intended by Congress, the Commission must be  
              excruciatingly careful to ensure that the restrictions on  
              political speech impacted by this Advisory Opinion are  
              sufficiently narrowly tailored "to avoid undo restriction on the

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1 associational interests asserted" by the NRA. *NWNC*, 103 S.Ct. at  
2 560.

3 Moreover, because the NRA's membership communications<sup>4</sup> under  
4 review here implicate fundamental democratic participation in the  
5 political process, the obligation rests with the Commission to  
6 interpret the Act so as to "avoid even a danger of  
7 unconstitutionality." *U.S. v. Congress of Industrial*  
8 *Organizations*, 335 U.S. 106, 121 (1948) ("CIO"). In CIO, the  
9 Supreme Court passed on a federal statute which prohibited labor  
10 unions from making an "expenditure" to support a candidate. When  
11 the statute was applied by the government to the distribution of  
12 a newspaper intended only for internal distribution to union  
13 members, the Court became uneasy:

14  
15 If [the statute] were construed to prohibit the  
16 publication, by corporations and unions in the regular  
17 course of conducting their affairs, of periodicals  
18 advising their members, stockholders or customers of  
19 danger or advantage to their interests from the  
20 adoption of measures or the election to office of men,  
21 espousing such measures, the gravest doubt would arise  
22 in our minds as to its constitutionality. (emphasis  
23 added).

24 CIO, 335 U.S. at 121.<sup>5</sup> As with the statute before the Court in  
25 CIO, the specter of the First Amendment must loom large in the

26  
27 <sup>4</sup> "Membership communications" encompass not only partisan  
28 political communications but also solicitations for contributions  
since those solicitations, of necessity, carry a message of  
advocacy concerning the association's political beliefs. See  
e.g., *Village of Schaumburg v. Citizens for a Better Environment*,  
100 S.Ct. 826, 833-4 (1980); *Riley v. National Federation of the*  
*Blind of N.C.*, 487 U.S. 781, 787 (1988).

29  
30 <sup>5</sup> While the entire Court agreed in the result --  
affirming the dismissal of the indictment -- four of the justices  
believed the statute could not be construed to remove the  
constitutional infirmity and that it thus violated the First  
Amendment.

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1 Commission's promulgation of Advisory Opinion 1993-24.

2       The restrictions on corporate solicitations under § 441b  
3 were upheld by the Supreme Court in *NRWC* as a "legislative  
4 determination as to the need for prophylactic measures where  
5 corruption is the evil feared." *NRWC*, 103 S.Ct. at 560. In the  
6 Proposed Advisory Opinion, however, the General Counsel does not  
7 point to any evidence that the NRA's communications with, and  
8 solicitation of, members who have paid dues to join their  
9 membership organization is a corrupt activity. While it is  
10 understood that "neither the right to associate nor the right to  
11 participate in political activities is absolute," *Buckley*, 424  
12 U.S. at 25, quoting *CSC v. Letter Carriers*, 413 U.S. 548, 567  
13 (1973), it is also evident that the activity of the NRA to be  
14 proscribed by Proposed Advisory Opinion 1993-24 would not, under  
15 any set of circumstances, "open the door to all but unlimited  
16 corporate solicitation and thereby render meaningless the  
17 statutory limitation to 'members.'" *NRWC*, 103 S.Ct. at 557.  
18 That essential prophylactic purpose has not been offered by the  
19 General Counsel to justify the proposed restraint on membership  
20 communication in Proposed AO 1993-24, because, of course, it  
21 cannot be justified on that basis.

22               **3. The Commission Has Misconstrued the Supreme**  
23               **Court's Holding in *FEC v. National Right to Work***  
24               **Committee.**

25       The essential position taken in Proposed Advisory Opinion  
26 1993-24 is that somehow, between 1984 and 1993, there have been  
27  
28

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1 "developments" in a Supreme Court case decided in 1982.<sup>6</sup>  
2 However, "[i]t is not the role of the FEC to second-guess the  
3 wisdom of the [United States] Supreme Court," because "an  
4 interpretation given a statute by the Supreme Court becomes the  
5 law and must be given effect." *Faucher v. Federal Election*  
6 *Commission*, 928 F.2d 468, 471 (1st Cir. 1991). The Commission,  
7 in MUR 1765, two years after the Supreme Court decided *National*  
8 *Right to Work Committee*, had it right. Then, several important  
9 principles discussed by the Court in *NRWC* led the Commission to  
10 conclude properly that the NRA was entitled to solicit all of its  
11 members for campaign contributions to its separated segregated  
12 fund.

13 First, the Commission correctly noted that, under *NRWC*, the  
14 obligation of all NRA members to pay minimum dues on an annual  
15 basis indicated an "enduring and independently significant  
16 financial or organizational attachment" which qualified all NRA  
17 members as "members" under § 441b(b)(4)(C). See *NRWC*, 103 S.Ct.  
18 at 557; MUR 1765 at 14. This "significant financial attachment"  
19 factor under *NRWC* has not changed since the NRA's solicitation  
20 activities were scrutinized by the Commission in 1984.

21 Second, the Commission concluded in 1984 that all NRA  
22 members attained "enduring ... organizational attachment" under  
23 *NRWC*, 103 S.Ct. at 557, because all NRA members can participate  
24 in NRA policy, strategy, programs, rules and recommend such  
25

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26 <sup>6</sup> The Draft notes that "(t)he revisions to this rule were  
27 intended to take notice of developments in the definition of  
28 membership reflected both in the Supreme Court decision in *FEC v.*  
*National Right to Work Committee*, 459 U.S. 196 (1982) and in  
advisory opinions which followed." Draft AO 1993-24 at 7, n.9.

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1 activities to the NRA Board. See MUR 1765 at 15. The Commission  
2 also found "equally important" the fact that all NRA members can  
3 attend all meetings, have the privilege of attending and being  
4 heard at all official meetings of members, and have the right to  
5 circulate and submit petitions for nominating directors. See MUR  
6 1765 at 15. These factors, according the Commission in 1984, met  
7 the *NRWC* test of exercising "control over the expenditure of  
8 their contributions." *NRWC*, 103 S.Ct. at 558.

9 Now, well over a decade since the Supreme Court decided  
10 *NRWC*, and almost a decade since the Commission disposed of MUR  
11 1765, the Proposed AO urges the Commission to have a revelation  
12 and discount the above-enumerated membership indicia as  
13 triggering either a "significant financial attachment" or a  
14 "significant investment or ownership stake" in the NRA. See  
15 Proposed Advisory Opinion 1993-24 at 10:6-9.

16 The Proposed AO's myopic requirement of voting rights as the  
17 primary methodology for attaining "membership" under §  
18 441b(b)(4)(C) reads out of existence *NRWC*'s suggestion, that  
19 instead, there must be "some relatively enduring and independent  
20 significant financial or organizational attachment." *NRWC*, 103  
21 S.Ct. 557 (emphasis supplied). Further, the proposed position  
22 effectively neuters the "case-by-case" escape clause of the new  
23 regulation.<sup>7</sup> Now, the right to vote in organizational matters  
24

25 <sup>7</sup> New regulation § 114.1(e)(3) provides:

26 Notwithstanding the requirements of paragraph  
27 (e)(2)(ii) of this section, the Commission may  
28 determine, on a case by case basis, that persons  
seeking to be considered members of a membership  
association for purposes of this section have a

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1 has been elevated to a position of primacy to the exclusion of  
2 all other rights that are attendant to membership in a membership  
3 organization.

4 The Commission's own interpretation of *NRWC*, two years after  
5 the case was decided, was that *NRWC* did not dictate membership  
6 requirements, but only set forth various indicia that were  
7 lacking in that particular situation.<sup>5</sup> The Commission's view,  
8 well after the Supreme Court's pronouncement in *NRWC*, was that  
9 the right to vote was only one type of right to be considered.

10 Now, voting rights control, to the exclusion of all other  
11

12 -----  
13 significant organizational and financial attachment to  
14 the association under circumstances that do not  
15 *precisely meet the requirements of the general rule.*  
16 For example, student members who pay a lower amount of  
17 dues while in school or long term dues paying members  
18 who qualify for lifetime membership statutes with  
19 little or no dues obligation may be considered members  
20 if they retain voting rights in the association.

21 11 C.F.R. § 114.1(e)(3) (1993) (emphasis supplied).

22 <sup>5</sup> The facts and circumstances which led the Court to  
23 conclude that Congress did not intend to allow the 267,000  
24 individuals solicited by *NRWC* to come within the exclusion for  
25 "members" under 2 U.S.C. § 441b(b)(4)(C), were that

26 [T]he solicitation letters themselves make no reference  
27 to members. Members play no part in the operation or  
28 administration of the corporation; they elect no  
29 corporate officials, and indeed there are apparently no  
30 membership meetings. There is no indication that  
31 *NRWC*'s asserted members exercise any control over the  
32 expenditures of their contributions. Moreover, as  
33 previously noted, *NRWC*'s own articles of incorporation  
34 and other publicly filed documents explicitly  
35 disclaimed the existence of members. We think that  
36 under these circumstances, those solicited were  
37 insufficiently attached to the corporate structure of  
38 *NRWC* to qualify as "members" under the statutory  
39 provision.

40 *NRWC*, 103 S. Ct. at 558.

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1 | privileges and amenities granted by a membership organization to  
2 | its constituents. This was not what the Supreme Court held in  
3 | *National Right to Work Committee*. All that is required of the  
4 | Commission is a simple examination of circumstances indicating  
5 | some legitimate, reasonable, attachment between an organization  
6 | and its members. The Commission once properly applied *NRWC*. But  
7 | now, under the regulatory license of 11 C.F.R. § 114.1, it is in  
8 | danger of torturing a simple statute and the High Court's  
9 | interpretation of it in *NRWC*.'  
10 |

11 |           **2. Proposed Advisory Opinion 1993-24, if Adopted,**  
12 |           **Will Not be Given Deference by the Courts.**

13 |           The effect of the Commission's policy pronouncement should  
14 | it adopt Proposed Advisory Opinion 1993-24 cannot be  
15 | underestimated.

16 |           It is clear that the Commission's analysis of whether  
17 | present NRA members are "members" under FECA will be judicially  
18 | scrutinized under the two-part test formulated in *Chevron*,  
19 | *U.S.A. v. National Resources Defense Council Inc.*, 467 U.S. 837,  
20 | 842-43 (1984):

21 |           When a court reviews an agency's construction of  
22 | statute which it administers, it is confronted with two  
23 | questions. First, always, is the question whether  
24 | Congress has directly spoken to the precise question at  
25 | issue. If the intent of Congress is clear, that is the  
26 | end of the matter; for the court, as well as the  
27 | agency, must give effect to the unambiguously expressed  
28 | intent of Congress. If, however, the court determines  
29 | Congress has not directly addressed the precise  
30 | question at issue, the court does not simply impose its

31 |           ' Draft Advisory Opinion 1993-24 concedes that non-voting  
32 | members of the NRA clearly have significant membership  
33 | attachment. See Draft AO 1993-24 at 9 (payment of dues and  
34 | certain participatory rights); and 10 (NRA members receive  
35 | certain benefits from their membership.)

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1 own construction on the statute, as would be necessary  
2 in the absence of an administrative interpretation.  
3 Rather, if the statute is silent or ambiguous with  
4 respect to the specific issue, the question for the  
5 court is whether the agency's answer is based on a  
6 permissible construction of the statute. (Emphasis  
7 added.)

8 Under the first prong of the *Chevron* test, it is not  
9 conceded that Congress intended to include within the category of  
10 "members" under FECA only those who were entrusted with the *sine*  
11 *qua non* of so-called 'governance' voting. Although FECA does not  
12 define "members" or "membership organizations" specifically in  
13 the Act, it is unmistakable that, in recognizing "membership  
14 organizations" as distinct from "corporations" or "unions,"  
15 Congress did not intend to require that voting rights be bestowed  
16 upon all those with whom a membership organization may  
17 communicate to be fully enfranchised under the Act.

18 For example, 2 U.S.C. § 431(9)(A)(iii) states that an  
19 "expenditure" does not include "any communication by any  
20 membership organization or corporation to its members,  
21 stockholders, or executive or administrative personnel, if such  
22 membership organization or corporation is not organized primarily  
23 for the purpose for influencing the nomination of election, of  
24 any individual to federal office ... ." Under 2 U.S.C. § 441b,  
25 "capital stock corporations" and "labor organizations" are  
26 treated as separate and distinct entities from membership organizations.<sup>10</sup>

25 <sup>10</sup> See also, e.g., 2 U.S.C. § 441b(b)(4) wherein a  
26 "corporation" is prohibited from soliciting contributions to a  
27 separate segregated fund from "any person other than its stock  
28 holders and its families and its executive or administrative  
personnel and their families," and a "labor organization" is  
prohibited from soliciting "from any person other than its  
members and their families." Moreover, section 441b(b)(4)(C)

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The Supreme Court described the legislative history of § 441b as suggesting that "members" of non-stock corporations "were to be defined, at least in part, by analogy to stockholders of business corporations and members of labor unions." *NRWC*, 103 S.Ct. 557 (emphasis supplied). The Court, in attempting to glean the intent of Congress, purposefully failed to circumscribe completely the potential class of "members" under the Act:

There may be more than one way under the statute to go about determining who are "members" of a non-profit corporation, and the statute may leave room for uncertainty at the periphery of its exception for its solicitation of "members." However, on this record we are satisfied that *NRWC*'s activities extended in large part, *in toto*, to people who would not be members under any reasonable interpretation of the statute.

*NRWC*, 103 S.Ct. at 561. Thus, while the Court concluded that the statute was itself "uncertain[]" as to the outer reaches of the potential universe of "members" under FECA, it is also clear that *NRWC* did not circumscribe the class of members of a membership organization as Proposed AO 1993-24 would provide.

Is the teaching of *NRWC*, then, that the Commission must merely conjure some plausible description of "members" under the Act? Perhaps not. The principle of deference to administrative interpretation

has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved conflicting policies and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency

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distinguishes a "membership organization" from a "cooperative" or "corporation without capital stock" for purposes of prohibiting solicitation for a separate segregated fund from "members of such organization, cooperative or corporation without capital stock."

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1 regulations.

2 *Chevron*, 467 U.S. at 844 (emphasis supplied). In interpreting  
3 the term "membership organization," no "conflicting policies"  
4 need be resolved. Moreover, it is difficult to imagine that  
5 understanding the relationship between a "membership  
6 organization" and its "members" requires specialized knowledge of  
7 the electoral process. Thus, there is no reason for a court to  
8 defer to the Commission's interpretation of "membership  
9 organization" should it adopt the Proposed AO.

10 Even under the second prong of the *Chevron* test, where some  
11 deference might be accorded to the Commission's interpretation of  
12 FECA, see *FEC v. Democratic Senatorial Campaign Committee*, 454  
13 U.S. 27, 37 (1981), no deference is warranted if the  
14 interpretation is inconsistent with the legislative intent  
15 reflected in the language and structure of the statute or if  
16 there are other compelling indications that it is wrong. *Wabb v.*  
17 *Hodel*, 878 F.2d 1252, 1255 (10th Cir. 1989); *New Mexico*  
18 *Department of Human Services v. HCPA*, 4 F.3d. 882, 885 (10th Cir.  
19 1989). The important factors in determining if the Commission  
20 will be entitled to deference are: whether the public has relied  
21 upon the interpretation; *Udall v. Tallman*, 380 U.S. 1, 18 (1965);  
22 whether the interpretation involves a matter of public  
23 controversy, *United States v. Rutherford*, 442 U.S. 544, 545  
24 (1979); whether the interpretation is based upon agency expertise  
25 in a complex area; *Aluminum Co. of Am. v. Central Lincoln*  
26 *People's Util. Dist.*, 467 U.S. 380 (1984); whether the agency has  
27 rule-making authority, *FCC v. National Citizens Comm. for*  
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1 Broadcasting, 436 U.S. 775, 793 (1978); whether Congress knew of  
2 the agency interpretation and failed to repudiate it, *Zemel v.*  
3 *Rust*, 381 U.S. 1, 11 (1965); whether the agency has expressly  
4 addressed the application of the status to the proposed issue,  
5 *Investment Co. Inst. v. Camp*, 401 U.S. 671, 627-28 (1971); and  
6 the thoroughness, validity, and consistency of the agency's  
7 reasoning. *Democratic Senatorial Campaign Comm.*, 102 S.Ct. at 44-  
8 45. See also, *Good Samaritan Hospital v. Shalala*, 113 S.Ct.  
9 2151, 2161 (1993).

10 In addition to the fact that the public has relied upon MUR  
11 1765, that no agency expertise is necessary, that Congress had  
12 certainly known of the Commission's interpretation in MUR 1765,  
13 the chart below evidences clearly the inconsistency in the  
14 Commission's position should it adopt the Proposed AO. Each  
15 important factor under NRWC is set forth with the Commission  
16 position then, and as now proposed, relative to NRA's membership  
17 activity. The chart clearly indicates that the Proposed AO would  
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be a complete reversal of the Commission's regulatory posture from MUR 1765 in 1984. Importantly, each conclusion is based on the Supreme Court's interpretation of § 441b in *National Right to Work Committee*. As the following graphic indicates, the road map of NRNC has not changed, only the driver of the vehicle.

	MUR 1765 (1984)	Proposed AO 1993-24
<p>Significant Financial Attachment (NRNC, 103 S.Ct at 557)</p>	<p>"The apparent obligation of the NRA "members" to pay minimum dues on an annual basis should be considered to be the 'significant financial ... attachment required to be a 'member' under § 441b(b) (4) (C)." MUR 1765 at 14.</p>	<p>" [N]ominal or modest fees ... do not equal a 'significant financial attachment' or a 'significant investment or ownership stake' in the NRA." Draft AO 1993- 24 at 10:6-9</p>

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	MUR 1765 (1984)	Proposed AO 1993-24
<p>Significant Organizational Attachment (NRNC, 103 S.Ct at 557)</p>	<p>"The requisite 'enduring ... organizational attachment' also appears to exist, in view of this office." MUR 1765 at 14-15.</p> <p>1. Certain other rights vis-a-vis the NRA, namely:</p> <p>a. All members of the NRA are allowed to hold membership on any committee of the NRA which consider, debate, and recommend policies, strategies, programs, rules, and activities to the NRA Board of Directors;</p> <p>b. All members of the NRA have the right to attend all meetings of the Board of Directors, Executive Committee, and standing and special committees of the association;</p> <p>c. All members of the NRA have the privilege of attending and being heard at all official meeting of membership;</p> <p>d. All members of the NRA have the right to circulate and submit petitions for nominating directors. MUR 1765 at 15.</p>	<p>"It is clear that the nonvoting members of the NRA possess certain rights of participation in policy matters but this, in and of itself, is not sufficient ... [S]o-called 'governance' voting is required, as opposed to voting for the association's policies or positions." Draft AO 1993-24 at 9 n.10.</p>

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	<b>MUR 1765 (1984)</b>	<b>Draft AO 1993-24</b>
<p><b>Significant Organizational Attachment (cont.)</b></p>	<p>2. The NRA By-laws provide for an annual meeting of members; 3. All members of the NRA are issued an "appropriate card, certificate, or insignia" to each member under the by-laws; 4. All members receive a subscription to official journal of the NRA; 5. All members of the NRA have the opportunity to compete in matches and qualify for resulting awards; 6. All members of the NRA can request and receive advice and assistance from the NRA. MUR 1765 at 16.</p>	
<p><b>The Right to Vote (not required by NRNC)</b></p>	<p>"The right to vote is only one type of right vis-a-vis the corporation, in this office's view. ... [A] close scrutiny of the other existing rights and obligations is required." MUR 1765 at 17.</p>	<p>"Since ... associate members, junior members, senior members, and annual members of less than five years membership have no voting rights at all, the Commission concludes that they do not meet the definitional requirements for "members." Draft AO 1993-24 at 11:4-9.</p>

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	<b>MUR 1765 (1984)</b>	<b>Proposed AO 1993-24</b>
<b>Conclusion</b>	"The NRA organization provides all of its members with sufficient rights, obligations, and privileges to claim the membership exemption of 2 U.S.C. § 441b(b) (4) (C)." MUR 1765 at 17.	"The NRA may not solicit contributions for the NRA/PVF from any category of "members" who have no voting rights." Draft AO 1993-24 at 11:18-20.

The opposite conclusions reached in each instance, based on identical facts and identical case law, can only reinforce a strong presumption of arbitrary and capricious decision-making by the Commission, should the Proposed AO be adopted.

Because re-interpretation of § 441b conflicts with the Commission's earlier interpretation, it will be "entitled to considerably less deference than a consistently held agency view." *Natt v. Alaska*, 451 U.S. 259, 273 (1981).

**III. CONCLUSION**

Based on the above, the Proposed Advisory Opinion 1993-24 should be disapproved by the Commission in light of the invalidly approved rule making upon which it is based. Alternatively, the Proposed Advisory Opinion should be disapproved and be reevaluated in light of the factors described by the United States Supreme Court in *Federal Election Commission v. National Right to Work*

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Committee, 103 S.Ct. 552 (1982), and the conclusion of MDR 1765  
reaffirmed.

DATED: February 2, 1994

Respectfully submitted,

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