

In the matter of

**Rob Bishop for Congress and
Christopher Larry Brown, as treasurer
Rob Bishop
Utah League of Credit Unions
America First Credit Union
Tooele Federal Credit Union
Deseret First Credit Union
Mountain America Credit Union
Horizon Credit Union
Goldenwest Credit Union
Box Elder County Credit Union
USU Community Credit Union**

MUR 5381

**STATEMENT OF REASONS
CHAIRMAN SCOTT E. THOMAS**

Introduction

On January 11, 2005, the Federal Election Commission (“the Commission”), by a 5-1 vote, adopted the recommendation of the Office of General Counsel to find no reason to believe that the Utah League of Credit Unions (ULCU) violated 2 U.S.C. § 441b(a) in connection with a newsletter that expressly advocated the election of Rob Bishop to Utah’s 1st congressional district seat.¹ ULCU, an incorporated trade association, paid the production costs for the newsletter, which was then disseminated by ULCU’s member credit unions to their individual share account holders. At issue was whether the ULCU was permitted to pay the production costs for a partisan communication created from the outset for distribution to as many as 1.2 million individual account holders.

Relying on 11 C.F.R. § 114.1(e)(5) and Advisory Opinion 1998-19, the Office of General Counsel contended that the ULCU could pay the costs associated with the

¹ Mine was the sole vote against the recommendation. The Commission also adopted the recommendations of the Office of General Counsel to find no reason to believe that: ULCU violated 2 U.S.C. § 431(9)(B)(iii); that ULCU’s eight member credit unions violated 2 U.S.C. §§ 431(9)(B)(iii) and 441b(a); that Rob Bishop for Congress and Christopher Larry Brown, as treasurer, violated 2 U.S.C. §§ 431(8)(B)(vii) or 432(e)(2); or that Rob Bishop violated 2 U.S.C. §§ 431(8)(B)(vii) or 432(e)(2).

newsletter because the individual share account holders were members of ULCU. First General Counsel's Report, p. 9.

I voted against the Office of General Counsel's recommendation because neither the Commission's regulations nor its prior rulings establish that account holders of credit unions can be treated as if they were "members" of the trade association in which their credit union participates. While there is an allowance for ULCU to send partisan communications to a few representatives of its member credit unions, 11 C.F.R. § 114.8(h), the law does not permit ULCU to pay for a newsletter designed to be distributed well beyond this restricted class.

I.

Determining whether certain individuals meet the Commission's definition of member is an important legal matter. The provisions that allow incorporated membership organizations to use otherwise prohibited funds to make partisan communications advocating the election or defeat of a candidate to their members are an exception to the general prohibitions regarding corporate contributions and expenditures. 2 U.S.C. §§ 431(9)(B)(iii), 441b(b)(2); *see also* 2 U.S.C. § 441b(b)(4)(C) allowing PAC solicitations to members. Thus, how broadly or how narrowly "member" is defined has a direct correlation to the amount of 'soft money' that is allowed into the federal election process. In *FEC v. National Right to Work Committee*, 459 U.S. 197, 206 (1982) ("*NRWC*"), the Supreme Court recognized that limits on what constitutes a member are necessary if the general prohibitions of 2 U.S.C. § 441b are to survive. The Supreme Court specifically found that to adopt a broad definition of member would "open the door to all but unlimited corporate solicitation and thereby *render meaningless* the statutory limitation to 'member.'" 459 U.S. at 204 (emphasis added).²

Contrary to the Office of General Counsel's contentions, there is no legal basis for broadening the definition of "member" as it pertains to ULCU to include the individual share account holders of member credit unions. Pursuant to 11 C.F.R. § 114.1(e)(5), a person who qualifies as a member of any "entity within the federation or of any affiliate" by meeting the requirements of 11 C.F.R. §§ 114.1(e)(2)(i), (ii), or (iii),³ shall also

² *NRWC* addressed solicitation restrictions, rather than communication restrictions. It is worth noting that in the trade association context, there are opportunities to solicit beyond the class of members, i.e. executives and stockholders of member corporations, as long as the 'prior approval' rules are followed. *See* 2 U.S.C. § 441b(b)(4)(D). No such 'prior approval' allowance is available regarding communications that do not constitute PAC solicitations. The Supreme Court's admonition is even more apt because of the direct electoral impact of partisan communications (compared to PAC solicitations) beyond the trade association's members. This activity goes to the heart of the longstanding prohibition at § 441b: "concern over the corrosive influence of concentrated corporate wealth" and the "prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986).

³ Under 11 C.F.R. § 114.1(e)(2), the term "members" includes all persons who are currently satisfying the requirements for membership in a membership organization, affirmatively accept the membership organization's invitation to become a member, and either:

qualify as a member of all affiliates. However, this provision does not make account holders at credit unions members of the trade association ULCU. It merely makes credit unions that are members of ULCU members of the national trade association federation, the Credit Union National Association, Inc. (“CUNA”). The regulation plainly is directed to the organizational bodies within a federation that would be deemed affiliated, not to any organizational bodies outside that federation.⁴ If the provision worked as the Office of General Counsel suggests, any trade association suddenly would be able to claim as members those persons who qualify as members of businesses that have joined the trade association (e.g., policyholders of mutual insurance companies that have joined an insurance trade association). Federal campaign finance law always has maintained a distinction between a trade association’s various components and the businesses that are members of the trade association; the latter are not considered “affiliates” of the former. Being a member of a corporation does not make one a member of the trade association the corporation joins.

Advisory Opinion 1998-19 concluded (erroneously in my view) that credit unions could act as collecting agents for PACs of CUNA or state trade associations because, in a federal structure, they were “branch, division . . . or local unit” of CUNA within the meaning of the collecting agent rules.⁵ It is not binding here for two reasons. First, its conclusion is confined to the collecting agent realm. Second, the opinion stopped short of treating credit unions as “affiliates” of CUNA or the state trade associations. Affiliation is a legal construct that would force the credit unions’ PACs to share a contribution limit with the PACs of the CUNA/state trade association federation.⁶ To the extent Advisory Opinion 1998-19 allowed CUNA or a state trade association to *solicit* PAC funds from the account holders of credit unions, it relied on the ‘prior approval’ rules applicable to trade associations with corporate members. *See* 2 U.S.C. § 441b(b)(4)(D). It did not treat the account holders as members of CUNA or the state trade associations.

The Commission has sanctioned partisan communications going from CUNA to its state level affiliates, with the understanding that the latter would then send their own

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- (i) Have some significant financial attachment to the membership organization, such as a significant investment or ownership stake; or
 - (ii) Pay membership dues at least annually, of a specific amount predetermined by the organization; or
 - (iii) Have a significant organizational attachment to the membership organization which includes: affirmation of membership on at least an annual basis; and direct participatory rights in the governance of the organization.

⁴ The first part of the regulation unambiguously limits its scope: “In the case of a membership organization which has a national federation structure or has several levels, including, for example, national, state, regional and/or local affiliates” 11 C.F.R. § 114.1(e)(5).

⁵ *See* Advisory Opinion 1998-19 Dissenting Opinion of Commissioners Thomas and McDonald, *Fed. Elec. Camp. Fin. Guide (CCH)* ¶ 6273, also available at www.fec.gov.

⁶ The opinion pointed out, “The affiliation of CULAC [CUNA’s PAC] with any PACs (or SSFs) of the credit union members of a State league would be determined by application of the factors in Commission regulations at 11 C.F.R. § 100.5(g)(4).” For purposes of collecting agent law only, the facts led the Commission to hold that credit unions could be a ‘local unit’ without being an ‘affiliate.’

communications to member credit unions. Advisory Opinion 1991-24, Fed. Elec. Camp. Fin. Guide (CCH), ¶ 6028, also available at www.fec.gov. All of the communications sanctioned were confined to the few representatives at the state level affiliates and member credit unions with whom normal trade association activities were conducted. See 11 C.F.R. § 114.8(h). While the candidate recommendations of CUNA were likely to serve as the candidate recommendations of the state level affiliates, there was no indication CUNA contemplated conduct like that involved in this MUR: publication of a newsletter designed to go to the multitude of individual account holders at various credit unions.⁷

II.

In the absence of a legal basis for concluding that the individual share account holders of ULCU's member credit unions were "members" of ULCU, ULCU was not permitted to pay the production costs associated with the partisan communication at issue. It was not simply a communication designed to go to a few representatives of ULCU's member credit unions pursuant to 11 C.F.R. § 114.8(h).

The particular facts of this matter tend to obscure the potential impact of the Office of General Counsel's position since the cost of producing the newsletter is likely to have been relatively small. Nonetheless, if the Office of General Counsel's position is accepted and account holders of the various credit unions in the trade association can be treated as members of the trade association itself, there would be nothing barring the ULCU from paying not only the costs of producing a similar newsletter containing express advocacy, but also the costs of printing and mailing the newsletter to all of the 1.2 million credit union account holders – potentially a much heftier infusion of soft money into the federal election process. Because the General Counsel's position would "open the door" and "thereby render meaningless the statutory limitation to 'member.'" 459 U.S. at 204 (emphasis added), I did not approve the recommendation.

2/23/05

Date

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Scott E. Thomas
Chairman

⁷ The newsletter's banner states it is "Published for the benefit of Utah's 1.2 million Credit Union members." It contains phrases like, "We encourage you as credit union members to vote on June 25 and support candidates that support your credit union." Credit Unions' September 25, 2003 Response, Attachment 6. ULCU produced the newsletter, and its member credit unions paid subsequent printing, mailing and handling charges. *Id.*, p. 13.