FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 2, 2005

MEMORANDUM

TO: The Commission
General Counsel
Staff Director
Public Information
Press Office
Public Records
Audit Division

FROM: Brad C. Deutsch
Assistant General Counsel

SUBJECT: Response of the AFL-CIO to the supplemental comments submitted by America's Community Bankers

The AFL-CIO has submitted the attached comments in response to the supplement filed by America's Community Bankers on May 20, 2005 regarding the May 17, 2005 hearing on Payroll Deductions by Member Corporations for Contributions to a Trade Association's Separate Segregated Fund.

Attachment

cc: Public Financing, Ethics & Special Projects
Associate General Counsel for Policy
Congressional Affairs Officer
Executive Assistants

American Federation of Labor and Congress of Industrial Organizations

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June 1, 2005

The Honorable Scott E. Thomas
The Honorable Michael E. Toner
Federal Election Commission
999 E St., NW
Washington, DC 20463

Re: Notice of Proposed Rulemaking, "Payroll Deductions by Member Corporations for Contributions to a Trade Association's Separate Segregated Fund." 69 Fed. Reg. 76628 (Dec. 22, 2004)

Dear Chairman Thomas and Vice Chairman Toner:

I write on behalf of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), in response to the supplemental comments filed on May 20 by America's Community Bankers (ACB) pursuant to its request at the May 17 hearing. The AFL-CIO appreciates the opportunity to address ACB's singular position that the plain text of 2 U.S.C. § 441b(b)(6) does not apply if a corporation affords a payroll deduction contribution system to its executive and administrative personnel so they may contribute to the political committee of a trade association to which the corporation belongs.

The proposed legislation would end a longstanding prohibition on the use by corporations of payroll deduction and check-off systems to facilitate contributions by their restricted class members to the separate segregated fund of a trade association. See 11 C.F.R. § 114.8(e)(3). This proposal incorporates the statutory limitation of a single annual corporate approval of a particular trade association as a solicitor of the corporation's restricted class. See 2 U.S.C. § 441b(b)(4)(D).

As we advised in our comments, the AFL-CIO does not oppose this proposal because we agree that FECA does not preclude such payroll deduction and check-off arrangements and because employee access to such methods of contribution further the purposes of the Act. However, we believe that, as drafted, the rule –

specifically, proposed § 114.8(e)(4) – does not conform with the statutory requirement that a corporation that so utilizes its payroll system make the same services available to any labor organization that represents any members working for the corporation, "including its subsidiaries, branches, divisions and affiliates," see 2 U.S.C. § 441b(b)(6), because the proposed rule omits this quoted phrase. The proposed regulatory formulation conflicts in this regard with current 11 C.F.R. § 114.5(k)(1), the regulation that implements that statutory provision for all current purposes.

In its post-hearing submission, ACB concedes that the "right of equal access for labor organizations [under § 441b(b)(6)] is broad" and that it applies to the circumstance where a corporation authorizes a trade association to utilize the corporation's payroll deduction system for its restricted class employees to contribute to the trade association's separate segregated fund. But ACB contends that this right must be restricted so that it precisely mirrors the corporate entity that has so authorized the trade association, as delimited in 11 C.F.R. § 114.8(f). That reading conflicts with the plain meaning of the statute.

Thus, § 441b(b)(4)(D) sets forth the right of a trade association's "member corporations" to authorize one trade association a year to solicit the corporation's restricted class. ACB acknowledges that the statutory term "members" operates to limit the trade association to the corporate affiliates that actually are its "members," a reading confirmed by the legislative history. See Explanation and Justification for 1977 Amendments to Federal Election Campaign Act of 1971 at 114, House Document No. 95-44 (1977), citing 122 Cong. Rec. S6367 (daily ed. May 3, 1976).

In contrast, § 441b(b)(6), which imposes the equal-access requirement, applies to "[a]ny corporation, including its subsidiaries, branches, divisions and affiliates," and it does not condition the equal-treatment obligation on a corporation's use of a method of soliciting or facilitating voluntary contributions to its *own* SSF; neither does § 114.5(k)(1). Neither the applicable legislative nor regulatory histories of these provisions suggests that the § 441b(b)(6) requirement can be applied in any circumstance in a manner that reads out its "including its subsidiaries..." language. Indeed, since that provision comprises the sole basis for an equal-treatment requirement when a corporation enables a trade association to access contributions from its restricted class via payroll deduction or any other means, as ACB concedes that it does, it can only be applied in full accordance with its explicit terms. That is, once it is conceded that the statute applies, it must apply by its terms, and not in a manner that effectively amends it. If ACB considers that its doing so is unwise public policy, it should address that concern to the Congress rather than the Commission.

ACB also contends that this reading upsets the balance Congress struck 30 years ago, and that the equal-treatment requirement must be commensurate with the corporate location of the solicitor's restricted class. While that may be true as a matter of fact when a corporation solicits for its own separate segregated fund, by virtue of §§ 441a(a)(5) and 441b(b)(6), applying the same equal-access requirement when a trade association is able to solicit less than an entire corporate network both carries out the plain meaning of the statute and vindicates the same statutory purposes.

As expressed in the NPRM, requiring corporations that make incidental payroll services available for trade associations to provide the same services to incumbent labor organizations is "necessary to prevent circumvention of provisions of the Act and Commission regulations that seek to prevent corporate SSFs from gaining an unfair fundraising advantage over labor organization SSFs," particularly where the corporation has

no SSF of its own and utilizes the trade association SSF as a "proxy SSF." See 69 Fed. Reg. at 76631. Just as a corporation isn't allowed to engage in manipulation of its structure in order to finance its own SSF while isolating and freezing out from access to the same payroll services unions that represent employees elsewhere within its structure, so also a corporation cannot manipulate its structure in conjunction with its membership in a trade association in order to finance its proxy PAC while isolating and freezing out incumbent unions within its structure. If ACB's position were accepted, one could easily imagine a corporation and a trade association collaborating to satisfy their respective interests in affiliating and building the trade association's SSF while ensuring that no incumbent union within the corporation's structure gained the opportunity for access to payroll deduction for its own SSF.

It is also pertinent to point out that the proposed rule would not require a trade association to reimburse a corporation for the incidental costs of access to the payroll system, just as there has been no reimbursement requirement in other contexts; in contrast, a labor organization would have to continue to reimburse the corporation for such access. While the AFL-CIO does not oppose the proposed rule's extension of this longstanding distinction, it underscores that there is no real unfairness in extending the statutory equal-treatment requirement as we advocate.

Accordingly, we continue to urge the Commission to revise the proposed rule so that its language is faithful to § 441b(b)(6) and tracks that of § 114.5(k)(1).

The AFL-CIO appreciates the opportunity to submit this responsive comment. Thank you for your consideration of our views.

Sincerely,

Laurence E. Gold
Associate General Counsel

cc: The Hon. David M. Mason
The Hon. Danny L. McDonald
The Hon. Bradley A. Smith
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