



Diane Casey-Landry
President & Chief Executive Officer

May 19, 2005

The Honorable Scott E. Thomas
Chairman
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

The Honorable Michael E. Toner
Vice Chairman
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Rulemaking on Payroll Deductions by Member Corporations for Contributions to a Trade Association's Separate Segregated Fund

Dear Chairman Thomas and Vice Chairman Toner:

Thank you for the opportunity to testify in support of the Federal Election Commission's proposed rule to permit payroll deductions by member companies to its trade association's separate segregated fund. ACB, as petitioner, strongly believes the Commission's proposal is the right approach. This straightforward rule change will benefit individuals, including small business employees that are involved with a trade association political action committee, by offering the convenience of making payments easily and spread out over a year.

During the hearing, Commissioner Mason asked for some additional information regarding the statutory support for the proposal. In response, ACB's outside counsel, Venable LLP, has prepared the attached memorandum, which addresses the questions raised.

ACB appreciates the time and effort the Commission has put into this rulemaking and looks forward to a final rule in the near future. If you have any questions or require additional information, please contact Ronald M. Jacobs, of Venable LLP, at (202) 344-8215 or Michael W. Briggs at (202) 857-3122.

Sincerely,

Diane Casey-Landry

Attachment

cc: Commissioners Mason, McDonald, Smith, Weintraub

Ronald M. Jacobs
*Associate***202-344-8215****rmjacobs@venable.com**

May 20, 2005

Via Email and Hand Delivery

The Honorable Scott E. Thomas
The Honorable Michael E. Toner
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Payroll Deductions by Member Corporations for Contributions to a Trade Association's Separate Segregated Fund

Dear Chairman Thomas and Vice Chairman Toner:

This letter responds to the Commission's request for additional information regarding the scope of equal access to payroll deductions that must be provided to labor organizations pursuant to 2 U.S.C. § 441b(b)(6) if the Commission amends its rules to allow a corporate member of a trade association to use payroll deduction to facilitate voluntary contributions from its restricted class to the separate segregated fund ("SSF") of its trade association. The AFL-CIO has suggested this provision requires all subsidiaries, branches, divisions, and affiliates of a member corporation to provide labor unions with equal access to payroll deduction and not just to the member corporation as proposed by the Commission. When 441b(b)(6) is read in the context of the Federal Election Campaign Act ("FECA" or "the Act"), it becomes clear that the right of equal access should apply only to the corporation that is a member of the trade association and not to all subsidiaries, branches, divisions, and affiliates of the member. The Commission's proposed rule, therefore, represents the proper synthesis of these statutes. This logical statutory reading is further supported by the policy considerations articulated by ACB in its testimony and cover letter submitted today.

In its comments and testimony, the AFL-CIO focused exclusively on 2 U.S.C. § 441b(b)(6). Although a reading of that provision providing for equal access across all subsidiaries, branches, divisions, and affiliates of a member corporation may not be "inconsistent with the language of that provision examined in isolation, statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). 441b(b)(6) must, therefore, be read in conjunction with 441b(b)(4)(D), which limits the scope of a trade association's solicitable class and the remainder of the FECA, which carefully balances the rights of unions and corporations to conduct political activity.

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Congress carefully struck this balance by permitting corporations to create SSFs and solicit voluntary contributions from their executive and administrative personnel and shareholders (and the families of each), 2 U.S.C. § 441b(b)(4)(A)(i), and labor organizations to create SSFs and solicit their members and families for voluntary contributions. *Id.* § 441b(b)(4)(A)(ii). In order to make certain that labor organizations are not disadvantaged by the methods that corporations use to raise voluntary contributions, the Act requires corporations to “make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby,” to a labor organization. *Id.* § 441b(b)(6).

This right of equal access for labor organizations is broad. It applies to a labor union if “[a]ny corporation, including its subsidiaries, branches, divisions, and affiliates” uses a method of solicitation or facilitation, and applies to “any labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.” *Id.* This broad right of access makes sense for two reasons. First, it prevents a corporation from circumventing the rules by placing all executive personnel in one corporate entity and all personnel represented by a union in another. Second, it mirrors the affiliation rules for corporate SSFs.

The affiliation rules require all SSFs within a corporate structure to share a single contribution limit and allow all executive and administrative personnel throughout a corporate structure to be solicited for contributions to one SSF. 2 U.S.C. § 441 a(A)(5) (“[A]ll contributions made by political committees established or financed or maintained or controlled by any corporation, . . . including any parent, subsidiary, branch, division, department, or local unit of such corporation . . . or by any group of such persons, shall be considered to have been made by a single political committee.”); 11 C.F.R. § 114.5(g)(1). 441 b(b)(6), therefore, allows labor unions to have equal access to a payroll deduction across a corporate structure in the same way that a corporation may solicit contributions from its executives and shareholders across the corporate structure.

This proposal involves another form of SSF permitted by the FECA: one created by a trade association. The solicitable class of a trade association is narrow and does not reach across a corporate structure:

[C]ontributions from the 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.

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Id. § 441b(b)(4)(D) (emphasis added). Thus, a trade association may only solicit the restricted classes of its member corporations and may not reach out to other corporate entities affiliated with the member corporation. The Commission has codified the narrow scope of 441b(b)(4)(D) in its regulations:

Solicitation of a subsidiary corporation. If a parent corporation is a member of the trade association but its subsidiary is not, the trade association or its separate segregated fund may only solicit the parent's executive or administrative personnel and their families and the parent's stockholders and their families; *it may not solicit the subsidiary's executive or administrative personnel or stockholders or their families.* If a subsidiary is a member of the trade association but the parent corporation is not, the trade association or its separate segregated fund may only solicit the subsidiary's executive or administrative personnel and their families and the subsidiary's stockholders and their families; *it may not solicit the parent's executive or administrative personnel or stockholders or their families.* If both parent and subsidiary are members of the trade association, the executive or administrative personnel and their families and the stockholders and their families of each may be solicited.

11 C.F.R. § 114.8(f) (emphasis added).

When 441b(b)(6) is read in conjunction with 441b(b)(4)(D), as it must be, the logical conclusion is that the equal access rules apply only to the member corporation and any organizational divisions or branches that are part of the same corporation.¹ For example, a bank could have a consumer banking division and a commercial banking division, both housed in the same corporate legal entity. 441b(b)(6) would therefore make clear that if the commercial division offers a payroll deduction mechanism to executive personnel for a trade association SSF, a union representing employees in the consumer division would also be allowed access to the payroll deduction mechanism.

That this is the correct reading is further demonstrated by the purpose of 441b(b)(6)'s broad application: to prevent a corporation from circumventing the right of equal access. 441b(b)(6)'s wide sweep prevents corporations from manipulating the rights of unionized employees by creating different corporate divisions or subsidiaries. It cannot place all of its executives in one corporation and its unionized employees in another to avoid providing equal access to payroll deduction. Under 441b(b)(6), if a corporation comprised entirely of executive personnel (or a holding company that has the only publicly-available stock) creates an SSF and

¹ Such an interpretation would not render 441b(b)(6) superfluous. It fully applies and prevents member corporations from manipulating the equal access rules by creating divisions or branches that are within the corporate member.

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provides a payroll deduction, unionized employees in other divisions or subsidiaries must have equal access to payroll deduction.

Expanding the right of equal access to all subsidiaries, branches, divisions, and affiliates of a member corporation would also damage the purpose of 441b(b)(4)(D). This section is designed to limit a trade association's access only to its actual members. Because there is a legal relationship between subsidiaries, branches, divisions, and affiliates themselves, the FECA subjects them to a single contribution limit and provides equal access to all unionized employees of any of these entities. There is, however, no legal relationship between the trade association and the subsidiaries, branches, divisions, and affiliates of the member. In fact, each of these entities may be a member of a different trade association – or none at all. 441b(b)(4)(D) focuses on the relationship between the member and the association and reading 441b(b)(6) to reach beyond the member would eviscerate the narrow scope of 441b(b)(4)(D) by requiring the member corporation to consider the subsidiaries, branches, divisions, and affiliates when determining how best to make contributions to its trade association.

To allow 441b(b)(6) to expand beyond a distinct corporate entity would upset the balance struck by Congress and allow a union to solicit its members in “subsidiaries, branches, divisions, and affiliates” of the member corporation while 441b(b)(4)(D) limits a trade association to soliciting the executive and administrative personnel of the member corporation. Such an interpretation that contradicts the careful balancing done by Congress throughout the FECA should be avoided in the regulations that the Commission promulgates. See *Cellco Partnership v. F.C.C.*, 357 F.3d 88, 90 (D.C. Cir. 2004) (upholding FCC rules because “this interpretation provides internal statutory consistency [and] avoids absurd results”); *City of Tacoma, Washington v. F.E.R.C.*, 331 F.3d 106, 115 (D.C. Cir. 2003) (“The Commission’s failure to interpret consistently two statutory provisions that are in *pari materia* manifests that it has not correctly read “the language and design of the statute as a whole.”). To focus exclusively on 441b(b)(6) at the expense of 441b(b)(4)(D) would be “a hypertechnical reading” of 441b(b)(6) that ignores its “place in the overall statutory scheme” governing solicitations of member corporations by trade associations. *Davis*, 489 U.S. at 809.

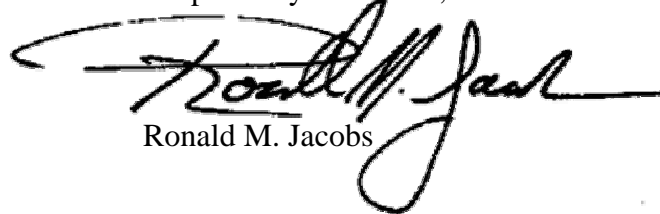
The Commission’s proposed rule represents the proper statutory understanding of the equal access rules. Allowing equal access within the member corporation comports with the limits of trade association access rules and the union equal access rules. The proposed rule respects the balancing done by Congress and ensures increased participation in the political process by both trade associations and unions.

America’s Community Bankers is grateful that the Commission has been willing to consider revising its rules to reflect the modern electronic payments system. It urges the Commission to maintain the Congressional balancing between labor organizations and trade associations and promulgate a final rule in the same form as the proposed rule. America’s

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Community Bankers appreciates the Commission's willingness to receive these final comments concerning the statutory framework that applies to the equal-access rules.

Respectfully submitted,



Ronald M. Jacobs

cc: The Honorable David M. Mason (*via email*)
The Honorable Danny L. McDonald (*via email*)
The Honorable Bradley A. Smith (*via email*)
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