FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

ADVISORY OPINION 1998-19

DISSENTING OPINION

ACTING CHAIRMAN SCOTT E. THOMAS
COMMISSIONER DANNY LEE MCDONALD

In Advisory Opinion 1998-19, a majority of the Commission concluded that certain corporate members of a federation of trade associations, the Credit Union National Association, Inc. ("CUNA"), could act as "collecting agents" for CUNA. These corporate entities consisted of credit unions which were members of CUNA's state leagues. As such, these credit unions existed outside the structure and administrative workings of CUNA. Under the statute and the Commission's regulations, we believe it is inappropriate to allow the credit unions to somehow assist CUNA to raise funds for CUNA's—not the credit union's—separate segregated fund. Because we believe that the credit unions may not operate as a collecting agent for CUNA, we dissent.

By its plain terms, §441b would appear to prevent the credit unions from assisting CUNA in raising funds for CUNA's separate segregated fund. Section 441b broadly prohibits "any corporation whatever" from making a "contribution or expenditure in connection with any election" for federal office. "Contribution or expenditure" is defined in §441b to include "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or *any services, or anything of value . . . to any* candidate, *campaign committee,* or political party *or organization,* in connection with any election to any of the offices referred to in this section." 2 U.S.C. § 441b(b)(2)(emphasis added).

Clearly, the provision of services to assist CUNA to raise money for CUNA's political action committee is something of value and, on its face, an in-kind contribution covered by the §441b prohibitions. It is well established that payments to underwrite administrative expenses of a political committee are considered contributions under the Federal Election Campaign Act (the Act"). *See* 2 U.S.C. §431(8)(A). Indeed, the

Supreme Court in *California Medical Association v. Federal Election Commission*, 453 U.S. 182, 199, n.19 (1981) specifically found that payments for the administrative expenses of a political action committee pose a threat of corruption or the appearance of corruption to the political process. In rejecting CMA's argument that 2 U.S.C. §441a(a)(1)(C) should be declared unconstitutional to the extent that it restricted CMA's right to contribute administrative support to a political action committee, the Court found that:

> contributions for administrative support clearly fall within the sorts of donations limited by §441a(a)(1)(C). *Appellants contend, however, that because these contributions are earmarked for administrative support, they lack any potential for corrupting the political process. We disagree.* If unlimited contributions for administrative support are permissible, individuals and groups like CMA could completely dominate the operations and contribution policies of independent political committees such as CALPAC. Moreover, if an individual or association was permitted to fund the entire operation of a political committee, all moneys solicited by that committee could be converted into contributions, the use of which might well be dictated by the committee's main supporter. In this manner, political committees would be able to influence the electoral process to an extent disproportionate to their public support and far greater than the individual or group that finances the committee's operations would be able to do acting alone. *In so doing, they could corrupt the political process in a manner that Congress, through its contribution restrictions, has sought to prohibit.*

453 U.S. at 199 n.19 (emphasis added).

With respect to the prohibition on underwriting PAC administrative expenses by corporations, the law provides but one exception. Under 2 U.S.C. §441b(b)(2)(C) and 11 C.F.R. §114.5(b), a corporation is permitted to use its general treasury funds pay for the costs of establishing, administering, and soliciting contributions *to its own separate segregated fund.* As part of this narrow exception, the Commission's regulations allow a "collecting agent" to collect and transmit contributions to a separate segregated fund to which the collecting agent is related. 11 C.F.R. §102.6(b). This regulation is also narrowly drafted. A collecting agent must be either: (1) a committee affiliated with the separate segregated fund; (2) the connected organization of the separate segregated fund as defined in 11 C.F.R. 100.6; (3) a parent, subsidiary, branch, division, department, or local unit of the separate segregated fund's connected organization; or (4) a local, national, or international union collecting contributions on behalf of the separate segregated fund of an affiliated labor federation. 11 C.F.R. §102.6(b)(1)(i)-(iv).

Applying the above principles, we conclude that the statute and regulations cannot be read so broadly as to support the result reached by the majority. Clearly, the credit unions do not fit within the class of related organizations described at §102.6(b)(1). They are not affiliated with CUNA, they obviously are not the connected organization for CUNA's separate segregated fund, and they are not a union affiliate. As independent, business entities who happen to be members of a state league of CUNA, they also are not a "parent, subsidiary, branch, division, department, or local unit" of CUNA. Accordingly, we find that the corporate members of the state leagues of CUNA do not meet the §102.6(b)(1)(i)-(iv) criteria.

Advisory Opinion 1989-3, Fed. Elec. Camp. Fin. Guide (CCH)[Transfer Binder] ¶5953, confirms our conclusion. In that opinion, a unanimous Commission made clear that the corporate members of a trade association *could not act as collecting agents for the trade association.* The Commission specifically found that the individual corporate members of the trade association "do not meet any of the disjunctive criteria set out in 11 C.F.R. 102.6(b)(1)(i)-(iv) to qualify as 'collecting agents' for the Association." *Id.* This analysis and conclusion applies to the facts presented in Advisory Opinion 1998-19.

In reaching a contrary conclusion, the majority never questions the conclusion reached in Advisory Opinion 1989-3. Rather, they seek to distinguish it by pointing out that that opinion involved corporate members of a trade association whereas the instant opinion involves corporate members of a *federation* of trade associations. They assert "the situation of a federation of trade associations is distinguishable from the customary trade association structure since, by definition, the federation presents a highly integrated structure with multiple tiers of organizational membership and related governance powers linking the tiers." Opinion at 10. The opinion concludes that "the State leagues of CUNA and the credit union members of the State leagues may be considered as a 'branch, division. . .or local unit' of CUNA under 11 C.F.R. 102.6(b)(1)(iii) and may therefore act as collecting agents in receiving and transmitting contributions for [CUNA's separate segregated fund]." *Id.*

This analysis misses the mark by a wide margin. We fail to understand the majority's assertion that it is somehow significant that we are dealing with a *federation* of trade associations in Advisory Opinion 1998-19 rather than a single trade association as was the case in Advisory Opinion 1989-3. If anything, one would think the result reached in Advisory Opinion 1989-3 would be even more compelling—not less—when applied to a federation of trade associations. If the corporate member of a trade association lacks a sufficient connection to act as a collecting agent for the trade association, one would certainly expect that to be true when dealing with the higher (and more distant) level of a *federation* of trade associations (which is nothing more than the operating entity for a number of trade associations allied in the same line of commerce).

Yet, as we understand the majority's approach, a local credit union would lack a sufficient connection to act as a collecting agent for the state league, but could nevertheless be viewed as a "branch, division. . .or local unit" of the larger, and further removed, national federation known as CUNA and thus, could act as a collecting agent for CUNA. This makes little sense to us. Consistent with Advisory Opinion 1989-3, we would find that since a corporate member may not act as a collecting agent for a trade association, it may certainly not act as a collecting agent for a conglomeration of trade associations.[1]

Not too long ago, the Commission faced a similar issue in Advisory Opinion 1997-9, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶6238. In that opinion, the Commission found that a member of a commodity exchange did *not* qualify as a collecting agent under §102.6(b)(1). The Commission, however, indicated that the costs of setting up the check-off arrangement would, in that instance, be subject to the legal and accounting exemption from the definition of contribution found at 2 U.S.C. §431(8)(B)(ix)(II); 11 C.F.R. §100.7(b)(14). In the alternative, the Commission indicated that the commodity exchange could treat the expenses as exempt administrative costs under §441b(b)(2)(C) if it reimbursed the member firm for them. Whether the legal and accounting exemption would apply here is unclear. We have little doubt, however, that in accord with the second alternative, CUNA or its separate segregated fund would be allowed to reimburse the member credit unions for their costs in raising funds. Under this approach, the connected organization—not an outside corporate entity—would be paying for the administrative costs of its PAC as the statute and regulations contemplate. Additionally, both of the alternatives presented in Advisory Opinion 1997-9 would at least require reporting of the value of the services provided or the amount of the reimbursement—public disclosure not required under the majority's approach in Advisory Opinion 1998-19.

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[1] Interestingly, the majority's analysis raises the serious question of whether CUNA's separate segregated fund and the member credit unions' PACs should now be viewed as affiliated for purposes of the contribution limitations. Currently, members of the federation have their own contribution limits. If, however, member credit unions are considered to be a "branch, division, or local unit" of the federation, it would appear that they are now affiliated with the federation. *See* 11 C.F.R. §110.3(a)(ii) ("application of this paragraph means that all contributions made or received by the following committees shall be considered to be made or received by a single political committee--...(ii) Committees (including a separate segregated fund, *see* 11 CFR Part 114) established, financed, maintained or controlled by the same corporation, labor organization, person or group of persons, including any parent, subsidiary, *branch*, *division*, department *or local unit* thereof.") (emphasis added). As a result, contributions to and by CUNA's separate segregated fund and these "branches or local units" of CUNA seemingly would have to be aggregated.

Although the Commission has in the past allowed a corporate member of a trade association to provide occasional "incidental support" to the trade association,[2] Advisory Opinion 1998-19 goes much further. It would formally broaden a previously narrow exception to the prohibitions on corporate political activity and threaten an increased use of soft money in the raising of political contributions. Moreover, under the majority's approach, none of this activity would be reported and publicly disclosed. Because the rationale and result of Advisory Opinion 1998-19 are unsound, we dissent.

11/20/98
Date

Scott E. Thomas
Acting Chairman

11-24-98
Date

Danny Lee McDonald
Commissioner

[2] *See, e.g.*, Advisory Opinion 1982-61, Fed. Elec. Camp. Fin. Guide (CCH)[Transfer Binder] ¶5700; *see also* Advisory Opinion 1990-4, Fed. Elec. Camp. Fin. Guide (CCH)[Transfer Binder] ¶5983, Dissenting Opinion of Commissioner Thomas at 3-5.