FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

CONCURRING OPINION

OF

COMMISSIONER SCOTT E. THOMAS
COMMISSIONER DANNY LEE MCDONALD
COMMISSIONER JOHN WARREN MCGARRY

ADVISORY OPINION 1993-24

We support the result reached by the Commission in Advisory Opinion 1993-24 and agree that this Opinion is controlled by the Commission's recently passed membership rules. Since this is the first occasion which the Commission has had to apply those rules, we write separately to discuss those rules. In our view, the Commission's new membership rules not only liberalize the Commission's policy on who qualifies as a "member" but also are consistent with both congressional intent and judicial precedent.

I.

We agree with Commissioner Aikens that the Federal Election Commission should encourage political activity and "build public confidence in the political process." Advisory Opinion 1993-24, Concurring Opinion of Commissioner Aikens at 4. She writes that "we should do everything possible, under the statute and Court decisions, to encourage broad segments of our society in the process of selecting, electing and petitioning our political leaders without infringing on the protected rights of free speech and association under the Constitution." Id. (emphasis added). We believe that the Commission amended its membership rules with these concerns specifically in mind. Indeed, the Commission's new membership rules broaden and liberalize Commission policy on who qualifies as a member in several important ways.

Since the Supreme Court's 1982 decision in Federal Election Commission v. National Right to Work Committee (NRWC), 459 U.S. 197 (1982), the Commission has consistently held that both the regular payment of dues and specified voting rights in an organization are required to confer membership status. The Commission required both attachments even where the financial attachment was a large one, such as the purchase of seats on a stock or commodity exchange (Advisory Opinions 1987-31 and 1988-39, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶¶ 5909 and 5941,

respectively), or where a person could vote directly for the entire membership of an association's highest body (Advisory Opinion 1992-41, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶6078).

Under its new membership rules, however, the Commission is recognizing in its regulations for the first time that either a significant financial attachment or the right to vote for all members of an association's governing body, standing alone, is sufficient to confer this status. As a result of these new rules, for example, a number of persons with only significant financial ties to their organizations will now be within the Commission's definition of member for the first time.

These changes are not illusory or merely cosmetic. Indeed, the immediate effects of these change were both real and tangible for The Insurance Coalition of America. In Advisory Opinion 1992-41, the Commission concluded that certain individuals were not "members" of The Insurance Coalition of America even though these individuals had the right to vote for all the members of the corporation's Board of Directors. The Commission found that the "payment of a one-time, lifetime membership fee of $25 [was] not an obligation to help sustain the organization through a regular financial contribution." Advisory Opinion 1992-41, supra, at 11,858-11,859. Under the new membership rules, however, these individuals are considered "members" for their voting rights alone--irrespective of any significant or continuing financial obligation. As a result, in the Explanation and Justification for the new membership rules, the Commission specifically "overruled" Advisory Opinion 1992-41 "to the extent it requires the payment of dues in addition to the right to vote for the entire governing body to be considered a member for purposes of these rules." 58 Fed. Reg. 45772 (August 30, 1993).

In the event that there is neither a significant financial interest nor the right to vote for all the members of an association's highest governing body, the Commission's new regulations provide that membership status also includes those individuals who have a dues obligation and have the right to vote for only one member of the organization's highest body. This rule is likewise the result of significant change. As originally proposed by the Commission, the rule would have required that members pay dues and be able to vote directly for a majority of the members of an association's highest governing body. After considering the testimony and comments submitted in connection with the rulemaking, the Commission significantly changed this proposal so that rather than a majority of the members of the association's highest governing body, the right to vote for only one member of that body is sufficient. Thus, while in some instances voting rights may be required, this requirement is far less onerous than the one originally contemplated.

The new rules also liberalize previous Commission policy and specifically allow for solicitation throughout "federative structure" associations, where the lower-tier members, such as from a local association, vote for a representative who then votes for certain members of the higher-tier governing body. The rules would treat as a "member" someone with dues paying obligations plus the right to vote "for those who select at least one member of those on the highest governing body of the membership association." 11 C.F.R. § 114.1(e)(2)(ii). This would permit members of a lower tier to meet the standard of membership in a higher tier.

In addition, the new rules for the first time allow farm cooperatives and entities eligible for assistance under the Rural Electrification Act to solicit members of the cooperative's regional, State or local affiliates. This is a significant and important expansion of solicitation rights long unavailable to cooperatives. Previously, the Commission had held that absent financial and organizational attachments, multi-tiered organizations cannot solicit across all tiers. See, e.g., Advisory Opinion 1981-23, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5613 and Advisory Opinions 1991-24 and 1992-9, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶¶ 6028 and 6052 respectively.

Finally, the new membership regulations specifically provide that the Commission will consider, on a case by case basis, whether persons who do not meet the precise requirements of the member definition, but who nevertheless have a significant organizational and financial attachment, can be considered members for purposes of these rules. This provision lends additional flexibility to the membership regulations as it allows the Commission to consider unique membership structures that do not fit neatly into a particular category.

II.

Even though the Commission has substantially broadened the definition of members, there are some who argue that the Commission should go even further. We believe that the Commission has adopted, after an exhaustive hearing process, a regulation that properly interprets both congressional intent and judicial precedent. Careful review of the congressional intent and judicial precedent indicate that there are definite limits to how liberally the Commission may construe the term "member."

2 U.S.C. §441b of the Federal Election Campaign Act ("FECA" or "the Act") broadly prohibits corporations and labor organizations from making contributions and expenditures in connection with federal elections. Under this general ban, all federal campaign activity and solicitations by any corporation or labor organization will be prohibited. Congress has enacted, however, serveral exceptions to this general prohibition. These

exceptions allow corporations and unions to make their political views heard by permitting them to engage in political activities financed by voluntary contributions from those individuals who comprise the organization. Thus, the Act makes it lawful for a labor organization or a corporation to establish and pay the administrative expenses of a "separate segregated fund," which may be "utilized for political purposes," 2 U.S.C. §441b(b)(2)(C), and to finance the solicitation of voluntary contributions to such a fund from the individuals who make up the corporation or union. The corporation or union can utilize the money it accumulates in its separate segregated fund to make contributions or expenditures to influence federal elections. See Pipefitters v. United States, 407 U.S. 385, 414-417 (1972). See also Buckley v. Valeo, 424 U.S. at 28 n.31 (1976).

These exceptions allowing for corporate and labor organization federal campaign activity are not open-ended. The statute limits the operations of these separate segregated funds for example, by making it illegal for a corporation to solicit funds from any persons other than its "stockholders and their families and its executive or administrative personnel and their families." 2 U.S.C. §441b(b)(2)(A)(i). Similarly, it is unlawful for a labor organization to solicit funds from any persons other than "its members and their families." 2 U.S.C. §441(b)(b)(4)(A)(ii).

The exceptions which allow corporations to solicit their stockholders and labor organizations to solicit their members were enacted in 1971. Five years later, in 1976, Congress added a similar exception for membership organizations by enacting §441b(b)(4)(C). It provides that:

> This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

2 U.S.C. §441b(b)(4)(C) (emphasis added).

Senator Allen introduced the amendment which became section 441b(b)(4)(C) on the floor of the Senate, with the express purpose of putting nonstock membership corporations on equal footing with stock corporations and unions by permitting them to solicit political contributions to their separate segregated funds from their own roughly comparable constituency--their members. Senator Allen carefully explained the limited purpose of his amendment:

> What it does is to allow a membership corporation or a corporation without capital stock but with membership, . . . to set up a separate segregated fund.
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> Mr. President, all this amendment does is to cure an omission in the bill. It would allow corporations that do not have stock but have a membership organization, such as a cooperative or other corporation without capital stock and, hence, without stockholders to set up separate segregated funds as to which it can solicit contributions from its membership; since it does not have any stockholders to solicit, it should be allowed to solicit its members. That is all that amendment provides. It does cover an omission in the bill that I believe all agree should be filled.

122 Cong. Rec. S3811, S3812 (daily ed. March 18, 1976).

Senator Allen was concerned that without such an amendment, it was "entirely likely that membership corporations, corporations that have members but do not have stockholders, could not set up segregated funds as are permitted to corporations with stockholders and stock." 122 Cong. Rec. S3810 (daily ed. March 18, 1976). Without further discussion, the amendment was adopted by the Senate. 122 Cong. Rec. S3812 (daily ed. March 18, 1976). As the district court in FEC v. National Right to Work (NRWC), 501 F. Supp. 422, 432 (D.D.C. 1980), rev'd., 665 F.2d 371 (1981), rev'd., 459 U.S. 197 (1982), concluded:

> These remarks confirm what the face of the statute itself indicates; that in enacting the membership exception Congress intended to allow corporations without stock and membership organizations to solicit persons analagous to stockholders. There was no intent to create a loophole for mass solicitation based on purely philosophical affinity; only a desire to treat equitably organizations which do not fall neatly into the pre-existing union or stock corporation categories.

(emphasis added).

Finally, the Supreme Court decision in FEC v. NRWC, supra, recognized that there are limits to how broadly the term "member" may be defined. Commenting on Senator Allen's floor statement, supra, the Court reiterated congressional intent that "'members' of nonstock corporations [are] to be defined, at least in part, by analogy to stockholders of business corporations and members of labor unions." 459 U.S. at 294.

The Court held that "[t]he analogy to stockholders and union members suggests that some relatively enduring and independently significant financial or organizational attachment is required to be a 'member' under §441b(b)(4)(C)." Id. In finding that NRWC's alleged "members" did not meet this test, the Court stated that "members play no part in the operation or administration of the corporation; they elect no corporate officials. . . . There is no indication that NRWC's asserted members exercise any control over the expenditure of their contributions." 459 U.S. at 206.

Congressional intent and Supreme Court precedent clearly recognize that the relationship which exists between a corporation and the individuals it claims as members must be comparable to the relationship which exists between a corporation and its shareholders or a union and its members. According to the Court in FEC v. NRWC, supra, such limits on what constitutes a member are necessary if the general prohibition of 2 U.S.C. §441b is to survive. The Court found that to adopt a broad definition of member, such as that suggested by NRWC, would "open the door to all but unlimited corporate solicitation and thereby render meaningless the statutory limitation to members." 459 U.S. at 204.

III.

Under 11 C.F.R. 114.1(e)(2), "member" means all persons who are currently satisfying the requirements for membership in a membership association, who affirmatively accept the membership association's invitation to become a member, and who meet one of the following requirements:

> (i) Have some significant financial attachment to the membership association, such as a significant investment or ownership stake (but not merely the payment of dues);
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> (ii) Are required to pay on a regular basis a specific amount of dues that is predetermined by the association and are entitled to vote directly either for at least one member who has full participatory and voting rights on the highest governing body of the membership association, or for those who select at least one member of those on the highest governing body of the membership association; or

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

We agree with the Commission's conclusion in Advisory Opinion 1993-24 that "the NRA ["National Rifle Association"] may not solicit contributions for the NRA/PVF ["the NRA Political Victory Fund"] from any category of 'members' who have no voting rights." Advisory Opinion 1993-24 at 8.

As discussed earlier, supra at p. 2, membership status under section 114.1(e)(2)(ii) of the new rules includes those individuals who have a dues obligation and have the right to vote for only one member of the organization's highest body. As noted earlier, this is a significant broadening of the original proposed rule which would have required that members be able to vote directly for a majority of the members of the highest governing body. Yet, the non-voting individuals whom the NRA claims as "members" cannot even meet this much broader and more liberal standard. The record indicates that the NRA "Board of Directors shall consist of 75 Directors." NRA Bylaws, Article IV, section 1. If the non-voting individuals at issue in this Advisory Opinion could vote for just one member of the 75 member NRA Board of Directors, they would satisfy the minimal requirements for voting set out in section 114.1(e)(2)(ii) and be considered "members." Because the NRA has not provided these individuals with even this minimum level of participation, however, they do not qualify as members under that provision.

Arguing that these individuals should be considered "members" under the Act, Commissioner Elliott states that "The Commission cannot, in my opinion, democratize private membership associations. . . just to allow solicitation under §441b(b)(4)(C)." Dissenting Opinion of Commissioner Elliott, Advisory Opinion 1993-24 ("Dissent") at 18.[1] To our way of

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1. We are not sure what to make of Commissioner Elliott's dissent. Repeatedly, Commissioner Elliott's strongly worded dissent criticizes Commission determinations that Commissioner Elliott herself supported and voted for. For example, the dissent pointedly disapproves of the new membership regulations, dissent at 14-15; but the record shows that Commissioner Elliott joined a unanimous Commission and voted to approve the text of the final rules defining who is a "member" of a membership association. See FEC Minutes of an Open Meeting at 3 (June 24, 1993). Likewise, Commissioner Elliott expresses strong disagreement with the Explanation and Justification for those rules, dissent at 15-17; yet, the record shows that Commissioner Elliott joined a unanimous Commission and voted not only to approve the membership regulations' Explanation and Justification for publication in the Federal Register, but to transmit the text of the regulations and the Explanation and

thinking, that statement should be turned around. The Commission should not write its rules at section 114.1(e)(2) to accommodate those private membership associations who have not "democratized." The NRA cannot have it both ways. They cannot, on the one hand, claim that there exists a special closeness or affinity to these individuals which warrants membership status; and then, on the other hand, not even entrust these individuals with what seems to be an extremely low level of participatory rights in the organization--the right to vote for just one member out of a 75-member Board of Directors!

We also agree with the Advisory Opinion's conclusion that the non-voting members do not satisfy the requirements of section 114.1(e)(2)(i). According to the record, these individuals pay dues of between $15 and $25 per year. In our view, the payment of such a minimal amount of dues on a yearly basis falls far short of the "significant financial attachment" contemplated by the regulation. Indeed, the plain language of the regulation states that a "significant financial attachment" consists of an interest "such as a significant investment or ownership stake (but not merely the payment of dues)." 11 C.F.R. § 114.1(e)(2) (emphasis added).

We think that the result reached in Advisory Opinion 1993-24 reflects not only a correct application of the new membership regulations to the facts presented by the requestor, but also demonstrates how the new regulations faithfully follow congressional intent and judicial precedent. In our opinion, the relationship between the NRA and the non-voting individuals it claims as members is in no way "analo[gous] to stockholders of business corporations and members of labor unions." FEC v. NRWC, supra, 459 U.S. at 204. In commenting on this area in an en banc decision, the United States Court of Appeals for the D.C. Circuit stated:

> Technically, shareholders own the corporation. While union members do not "own" their union in the same technical sense, there is more than a kernel of truth in describing its members as "owners." The union membership resembles a corporation's stockholders in that each group is the source of legitimacy and power for the organization's management and leadership. Thus, it follows that

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(Footnote 1 continued from previous page)
Justification to Congress pursuant to 2 U.S.C. § 438(d). See FEC Minutes of an Open Meeting at 5 (August 24, 1993). Similarly, the dissent criticizes several Advisory Opinions for allegedly misinterpreting the Supreme Court's decision in FEC v. NRWC, see Advisory Opinions 1984-63 and 1985-11 at 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶¶ 5804 and 5815, respectively, discussed in dissent at 11-12; but, again, the record shows that Commissioner Elliott voted to approve those opinions.

> Congress would consider sound the analogy: union members are to their union as shareholders are to their corporation.

International Association of Machinists v. FEC, 678 F.2d 1092, 1108 (D.C. Cir. 1982) (en banc), aff'd mem., 459 U.S. 983 (1982) (emphasis added). An individual who pays between $15 and $25 in annual dues and has no voting rights for even one member of a 75-person Board of Directors is not, in our view, a "source of legitimacy and power for the organization's management and leadership."

4/14/94
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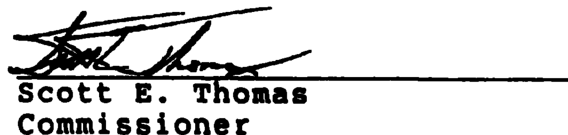
Scott E. Thomas
Commissioner

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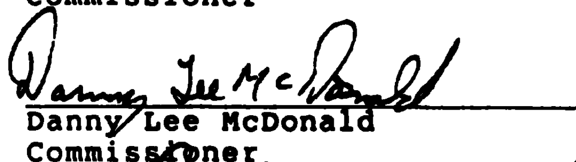
Danny Lee McDonald
Commissioner

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John Warren McGarry
Commissioner