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BY HAND

Mr. John Warren McGarry
Chairman
Federal Election Commission
1325 K Street, N.W.
Fifth Floor
Washington, D.C. 20463

Dear Mr. Chairman:

This letter is submitted in response to the General Counsel's recommendation regarding our Advisory Opinion Request (1985-24) on behalf of the National Football League.

In our letter of August 2, 1985, we stated that the National Football League, a not-for-profit organisation of twenty-eight professional football teams, is considering the formation of a multicandidate political committee. We explained that, while the League's clubs are owned and operated by corporations, partnerships, or sole proprietorships, the League itself is not a corporation within the meaning of the FECA. We suggested that the NFL should be treated as a "trade association" for FECA purposes and that, accordingly, the League should be permitted to establish, administer and solicit contributions to a separate segregated fund, and defray the costs of such activities out of NFL treasury funds, pursuant to 2 U.S.C. § 441b(b)(2)(C).

The General Counsel recommends that the Commission reach the conclusion that the League "cannot avail itself of the exception of 2 U.S.C § 441b(b)(2)(C) with regard to establishing and administering NFLPAC as a separate segregated fund" (Draft letter, p. 6), because the League is an unincorporated association. In doing so, the General Counsel misreads the provisions of the FECA and the Commission's own regulations relating to "membership organizations" and "trade associations." Nothing in the FECA or in the Commission's regulations requires

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a "membership organization" or a "trade association" to be incorporated in order to qualify for the exception in § 441b(b)(2)(C). Indeed, the statute does not define either of these terms. The regulations also do not define "membership organization," and the definition of "trade association" contains no hint that only an incorporated trade association is contemplated.1/

On the contrary, the regulations strongly suggest that, so long as at least some of their members are corporations, "membership organizations" and "trade associations" need not be incorporated in order to come within the statutory exception of § 441b(b)(2)(C). Thus, 11 C.F.R. § 114.7(b) states in pertinent part: "Nothing in this section waives the prohibition on contributions to the separate segregated fund by corporations . . . which are members of a membership organization . . . ." The regulation governing trade associations contains a similar provision. See 11 C.F.R. § 114.8(b). In addition, § 114.7(c) provides:

> A trade association whose membership is made up in whole or in part of corporations is subject to the provisions of § 114.8 when soliciting any stockholders or executive or administrative personnel of member corporations. A trade association which is a membership organization may solicit its noncorporate members under the provisions of this section.

Thus, the consistent focus of these regulations is not on whether the membership organization or trade association is itself incorporated, but on whether the members of the membership organization or trade association are corporations. In

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1/ 11 C.F.R. § 114.8(a) defines "trade association" as follows:

> A trade association is generally a membership organization of persons engaging in a similar or related line of commerce, organized to promote and improve business conditions in that line of commerce and not to engage in a regular business of a kind ordinarily carried on for profit, and no part of the net earnings of which inures to the benefit of any member.

drawing an arbitrary distinction between incorporated and unincorporated associations, the General Counsel focuses on an entirely formalistic consideration without explaining how it may have any bearing on any purpose of the FECA.

The General Counsel's reliance on the Supreme Court's decision in California Medical Association v. FEC, 453 U.S. 182 (1981), ("CALPAC") is misplaced. That case involved the establishment of a political committee by "a not-for-profit unincorporated association of approximately 25,000 doctors residing in California." Id. at 185. In contrast to the organization in CALPAC, whose membership consisted entirely of individuals, most of the NFL's member clubs are organized as corporations. Because these member corporations are individually subject to the provisions of the FECA governing corporate contributions, it makes sense to conclude that a trade association comprised in part of these member corporations should also be subject to the corporate contribution provisions, including the exception in § 441b(b)(2)(C) permitting the establishment of a separate segregated fund.

As noted in our August 2, letter, the Commission, in A.O. 1979-8, responded to a request by an unincorporated trade association without in any way indicating that the association could not use its treasury funds to administer and and operate a PAC. The General Counsel contends that A.O. 1979-8 is contrary to, and has been superseded by, the CALPAC decision. Nevertheless, despite the fact that the Commission has twice amended its regulations concerning membership organizations and trade associations since CALPAC, the Commission has not seen fit to limit the scope of those regulations to membership organizations and trade associations that are incorporated. If the Commission agrees with the General Counsel's view, we submit that the proper course would be for the Commission to undertake a notice-and-comment rulemaking proceeding for the purpose of amending its regulations, instead of seeking to amend its regulations by interpretation in an advisory opinion. Absent formal amendment by rulemaking, we would submit that, if the Commission's regulations (and the underlying statute) mean what the General Counsel now says they mean, these provisions might well be void for vagueness under the due-process clause of the Fifth Amendment to the United States Constitution. See, e.g., Grayned v. City of Rockford, 408 U.S. 104 (1972).

Sincerely,

John L. Bolton by Eg

John R. Bolton