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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. #14-30
AGENDA ITEM
For meeting of June 12, 2014
SUBMITTED LATE

June 11, 2014

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson
Deputy General Counsel

Adav Noti
Acting Associate General Counsel

Amy L. Rothstein
Assistant General Counsel

Esther D. Gyory
Attorney

Subject: AOR 2014-04 (Enterprise Holdings)

Attached are two proposed responses to the subject advisory opinion request.

Members of the public may submit written comments on the drafts. We are making these drafts available for comment until 9:00 am (Eastern Time) on June 12, 2014.

Members of the public may also attend the Commission meeting at which the drafts will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to http://www.fec.gov/law/draftaos.shtml.

Attachment

ADVISORY OPINION 2014-04

Jan Witold Baran, Esq. **DRAFT**
Eric Wang, Esq.
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006

Dear Messrs. Baran and Wang:

We are responding to your advisory opinion request on behalf of Enterprise Holdings, Inc. concerning whether federal law preempts New York law regarding the requestor's use of payroll deductions to process voluntary contributions to its separate segregated fund ("SSF"). The Commission concludes that the requestor's use of such deductions is permissible under the Federal Election Campaign Act, 2 U.S.C. §§ 431-57 ("FECA"), and Commission regulations, notwithstanding the provisions of a New York state statute and regulation that impose certain restrictions on payroll deductions.

Background

The facts presented in this advisory opinion are based on your letter received on April 24, 2014.

Enterprise Holdings is the corporate parent of Enterprise Rent-A-Car, Alamo Rent-A-Car, and National Car Rental. Enterprise PAC is the SSF of Enterprise Holdings and is registered with the Commission. Enterprise PAC makes contributions to federal candidates, federal political committees, and (where permissible) to candidates for nonfederal offices in states other than New York. Enterprise Holdings uses a payroll-deduction program to facilitate the making of voluntary contributions by its restricted-class employees, including employees in New York, to Enterprise PAC.

A New York state statute specifies the payroll deductions that employers may implement for their employees and prohibits all other deductions. N.Y. Lab. Law § 193. Paragraph (1)(a) of the statute provides that employers may implement payroll deductions "in accordance with the provisions of any law or any rule or regulation issued by any governmental agency." *Id.* § 193(1)(a). Paragraph (1)(b) provides that an employer also may make deductions that are "expressly authorized in writing by the employee" and "limited to payments for" certain statutorily enumerated purposes. *Id.* § 193(1)(b).[1] None of these enumerated purposes includes political contributions, *see id.*, and the New York State Department of Labor's regulations specify that payroll deductions for "[c]ontributions to political action committees, campaigns and similar payments" are not permissible under section 193(1)(b), even if authorized by the employee. N.Y. Comp. Codes R. & Regs. Tit. 12, § 195-4.5(f) (2013).

On May 27, 2014, the Commission received a comment from the New York State Department of Labor regarding the instant request. The comment notes that the reference in section 193(1)(a) to payroll deductions made "in accordance with any law or any rule or regulation" includes "federal election laws and regulations." N.Y. State Dep't of Labor, Comment at 1. The comment accordingly states that "New York does not prohibit the specific payroll deductions at issue." *Id.* More particularly, the comment states that the state law prohibitions in question "do not apply to payroll deductions made in accordance with 2 U.S.C. § 441b(b)(5) and 11 C.F.R. § 114.1(f), to facilitate the making of voluntary contributions from the restricted class employees of the requestor and its subsidiaries to its federal separate segregated fund, Enterprise Holdings, Inc. Political Action Committee." *Id.*

[1] The statute contains other limited exceptions, which are not relevant here. *See* N.Y. Lab. Law § 193(1)(c)-(d), (2).

Question Presented

Do FECA and Commission regulations preempt N.Y. Lab. Law § 193 and N.Y. Comp. Codes R. & Regs. Tit. 12, § 195-4.5(f) insofar as the state provisions purport to prohibit the use of payroll deductions for employees to make voluntary contributions to Enterprise PAC?

Legal Analysis and Conclusions

The requestor's use of payroll deductions to process voluntary contributions to Enterprise PAC is permissible under FECA and Commission regulations, notwithstanding the provisions of N.Y. Lab. Law § 193(1)(b) and its implementing regulations.

Commission regulations expressly permit a corporation to use payroll deductions to facilitate the making of voluntary contributions from the corporation's executive and administrative personnel to its SSF. 11 C.F.R. §§ 114.1(f), 114.2(f)(4)(i), 114.5(k)(1); *see also* Advisory Opinion 2010-12 (Procter & Gamble) at 3 (authorizing connected organization to deduct SSF contributions from quarterly retainer payments to its directors); Advisory Opinion 2001-04 (Morgan Stanley Dean Witter & Co. PAC) at 3 (authorizing connected organization to accept payroll-deduction authorizations made by electronic signature for contributions to its SSF); Advisory Opinion 1999-03 (Microsoft PAC) at 2 (same). Like the SSFs in these prior advisory opinions, Enterprise PAC is a federal political committee that makes contributions to federal candidates and political committees and uses a payroll-deduction system to process voluntary contributions to the SSF from members of the restricted class. Thus, the requestor may operate a payroll-deduction system, as described in the request, consistent with the Commission's regulations.

FECA and Commission regulations "supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. § 453(a); *see also* 11 C.F.R. § 108.7(a). In

amending FECA in 1976, Congress expressly "acknowledge[d] the use by corporations of various methods, such as check-off systems, to solicit voluntary contributions to separate segregated political funds" and passed an amendment "intended to authorize such methods *notwithstanding any other provision of law*." H.R. Rep. No. 95-1057, at 62 (emphasis added) (discussing amendment codified at 2 U.S.C. § 441b(b)(5)). Accordingly, the Commission has previously concluded that state laws prohibiting the use of payroll-deduction programs for voluntary contributions to an SSF are preempted. *See* Advisory Opinion 1982-29 (United Telecom PAC) at 2 ("[T]he Act would supersede or preempt any State law prohibiting the use of payroll deductions as a means of facilitating voluntary contributions . . . ."); Advisory Opinion 1976-23 (Conoco Employees Good Government Fund) at 2 ("State laws regarding payroll deduction plans would not be applicable to separate segregated funds established for the purpose of making contributions or expenditures in connection with Federal elections.").

The Commission acknowledges that the New York State Department of Labor, in its comment, interprets N.Y. Lab. Law § 193 and its implementing regulations not to prohibit the requestor's activity. Because the Commission's regulations permit the requestor to operate a payroll-deduction system (as discussed above), FECA's preemption provision would foreclose an interpretation of N.Y. Lab. Law § 193(1)(b) that prohibited such a system. *See* Advisory Opinion 1988-21 (Wieder) at 2 ("[T]he central aim of the [FECA's preemption] clause is to provide a comprehensive, uniform Federal scheme that is the sole source of regulation of campaign financing . . . for election to Federal office."); Advisory Opinion 1999-12 (Campaign for Working Families) at 7 ("Preemption . . . is compelled by the need for one set of requirements for Federal campaign finance activities, rather than subjecting Federal political committees . . . to a multiplicity of requirements depending upon the number of States in which

they solicit contributions.").

This response constitutes an advisory opinion concerning the application of FECA and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. § 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions cited herein are available on the Commission's website.

On behalf of the Commission,

Lee E. Goodman
Chairman

DRAFT

FEDERAL ELECTION COMMISSION
Washington, DC 20463

June , 2014

Jan Witold Baran, Esq.
Eric Wang, Esq.
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006

Dear Messrs. Baran and Wang:

The Commission has dismissed your request for an advisory opinion (AOR 2014-04) on behalf of Enterprise Holdings, Inc. because the request "pos[es] a hypothetical situation." 11 C.F.R. § 112.1(b). As such, it does not qualify as an advisory opinion request under the Federal Election Campaign Act, 2 U.S.C. §§ 431-57 ("FECA"), and Commission regulations.

The request asks whether FECA preempts the provisions of a New York state labor statute, N.Y. Labor Law § 193(1)(b), and its implementing regulation, 12 NYCRR § 195-4.5, "insofar as the state law purports to prohibit" the requestor's use of payroll deductions to process voluntary contributions from its executive and administrative personnel to its separate segregated fund. On May 27, 2014, the Commission received a comment on the pending request from the New York State Department of Labor, which is charged with enforcing the relevant provisions of state law. The comment notes that the statute in question authorizes payroll deductions made in accordance with "any law or any rule or regulation," including "federal election laws and regulations." The comment accordingly states that "New York does not prohibit the specific payroll deductions at issue." More particularly, the comment states that the state law prohibitions in question "do not apply to payroll deductions made in accordance with 2 U.S.C. § 441b(b)(5) and 11 C.F.R. § 114.1(f), to facilitate the making of voluntary contributions from the restricted class employees of the requestor and its subsidiaries to its federal separate segregated fund, Enterprise Holdings, Inc. Political Action Committee."

Because the New York State Department of Labor has informed the Commission that state law does not prohibit the requestor's proposed payroll deductions, the question presented in the request regarding federal preemption of such a prohibition is hypothetical. As noted above, hypothetical questions do not qualify as advisory opinion requests. 11 C.F.R. § 112.1(b). Therefore, the Commission has dismissed the request.

Sincerely,

Adav Noti
Acting Associate General Counsel