

ADVISORY OPINION 1975-23

Establishment of Political Action Committee and Employee Political Giving Program by Corporation

In this advisory opinion, rendered pursuant to 2 U.S.C. § 437f, the Commission responds to a request for an advisory opinion submitted by the Sun Oil Company and published as AOR 1975-23 in the Federal Register on July 29, 1975 (40 FR 31879). Interested persons were invited to submit written comments with respect to this request. A number of such comments were received and considered by the Commission before this opinion was issued.

A. Introduction

Sun Oil proposed to sponsor a bifurcated responsible citizenship program for political activities. One part of this program will involve the expenditure of general corporate treasury funds to establish, administer, and solicit voluntary contributions to a political action committee. This committee (hereinafter SUN PAC) will be maintained as a separate segregated fund and used by Sun Oil for political purposes under the provisions of 18 U.S.C. §610. The other part of this program will involve the expenditure of treasury funds to establish and administer a "trustee" plan. Under this plan (hereinafter SUN EPA) Sun Oil will open separate bank accounts for participating employees in order to channel their contributions to candidates for political office. The activities of SUN EPA will be separate and apart from those of SUN PAC.

The Commission has been asked to evaluate SUN PAC and SUN EPA with respect to the requirements of the Federal Election Campaign Act of 1971, as amended (hereinafter the "FECA" or the "Act") and the proscriptions of 18 U.S.C. § 610. In the following opinion, the Commission will discuss various legal aspects of corporate segregated funds and trustee plans.

B. Applicable Law

Section 610 of Title 18 of the United States Code provides, in pertinent part, as follows:

Contributions or expenditures by national banks,
corporations or labor organizations.

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to

make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or [officials] to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any . . . political committee . . . to accept or receive any contribution prohibited by this section.

As used in this section, the phrase "contribution or expenditure" shall 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; but shall not include . . . the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization . . . : Provided, That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction.

The history of section 610, prior to its amendment by section 205 of the Federal Election Campaign Act of 1971, was set forth in United States v. UAW, 352 U.S. 567 at 570-90 (1957). Moreover, the history of the 1971 amendment, which permits corporations to establish, administer and solicit contributions to separate segregated funds, was discussed in some detail in Pipefitters Local 562 v. United States, 407 U.S. 385 at 409-13, 421-27, 429-32 (1972). See also, United States v. CIO, 335 U.S. 106 (1948). There is no need, therefore, to trace that history here in any detail. However, some general conclusions can be made in light of legislative history about the application of section 610 to the corporate political activities proposed by Sun Oil.

C. Conclusions.

(1) First, it is lawful for Sun Oil to expend general treasury funds to defray expenses incurred in establishing, administering, and soliciting contributions to SUN PAC so long as it is maintained as a separate segregated fund. The language of section 610 and the supporting legislative history of the 1971 Amendment to the statute plainly permits such expenditures. See, Pipefitters, *supra*, at 429-33. SUN PAC must register and file reports just as any other political committee is required to do under the FECA.

(2) Secondly, it is lawful for Sun Oil to make any political contributions and expenditures it sees fit in connection with any Federal election so long as the monies

used for such purposes are expended from SUN PAC and the fund consists of voluntary contributions.

In situations where SUN PAC makes contributions or expenditures in connection with Federal and non-Federal elections, it may establish and maintain a separate account for use in Federal elections. Thereafter, monies to be expended in non-Federal elections should not be commingled with monies to be expended in Federal elections. SUN PAC should designate the bank in which it maintains any such account for Federal elections as the campaign depository of the fund. 2 U.S.C. § 437b. All contributions received or expenditures made in connection with Federal elections should be deposited in or drawn from this account. If SUN PAC so decides to maintain a separate account for use in Federal elections, it may file reports pertaining only to the separate Federal account. However, if SUN PAC fails to segregate the accounts and monies to be used in connection with both Federal and non-Federal elections, then SUN PAC will be required to report all contributions and expenditures regardless of whether they are made for non-Federal purposes.

Any political contributions or expenditures made by SUN PAC are subject to the applicable reporting requirements of the FECA and the limitations of 18 U.S.C. § 608. Moreover, since individual contributions made to SUN PAC are also contributions within the meaning of 18 U.S.C. 591(e), such contributions are also subject to the limitations of 18 U.S.C. § 608.

(3) Thirdly, it is lawful for Sun Oil to control and direct the disbursement of contributions and expenditures from SUN PAC. When the issue of the control of segregated funds was presented to the Supreme Court in the Pipefitters case, (which involved a section 610 criminal prosecution against a labor union) the Court held that "such a fund must be separate from the sponsoring union only in the sense that there must be a strict segregation of its monies from union dues and assessments." Id. at 414. After an exhaustive review of legislative history, the Court concluded that (Id. at 415-417):

Nowhere, however, has Congress required that the political organization [i.e., the fund] be formally or functionally independent of union control or that union officials be . . . precluded from determining how the monies raised will be spent. * * * Senator Taft adamantly maintained that labor organizations were not prohibited from expending those monies [from the fund] in connection with Federal elections. * * * Neither the absence of even a formally separate organization, . . . nor the method for choosing the candidate to be supported was mentioned as being material. Similarly, the only requirements for permissible political organizations were that they be funded through separate contributions [which were voluntary]. (Emphasis added.)

The Court also concluded from the legislative history that (Id. at 426):

[T]he term 'separate' . . . is synonymous with 'segregated.' Nothing in

the legislative history indicates that the word is to be understood in any other way. * * * It is difficult to conceive how a valid political fund can be meaningfully 'separate' from the sponsoring union in any way other than 'segregated.'

Since corporations and labor unions are subject to the same restrictions under section 610, it is clear that under the language of the Pipefitters case, Sun Oil can exercise control over the operations and activities of SUN PAC.

There is much concern in the business community about the proper class of persons who may be solicited by a corporation with its treasury money for contributions to a political fund. Sun Oil advised in its request for an opinion that "[t]o achieve its purpose, SUN PAC will solicit and accept contributions from individuals and from other political committees." Sun Oil now advises, through counsel, that its solicitation efforts will not be as broad as the language of its request suggested. The Commission is now advised that Sun Oil "will not solicit contributions from members of the general public who are neither Sun employees nor shareholders" but that "Sun does intend to use corporate funds to solicit contributions to SUN PAC from its employees."

(4) It is the opinion of the Commission that Sun Oil may spend general treasury funds for the solicitation of contributions to SUN PAC from stockholders and employees of the corporation. The Federal Election Campaign Act of 1971 amended section 610 by defining contribution and expenditure and setting forth exemptions to that definition. The first two exceptions permit the use of corporate treasury funds for activities aimed only at stockholders and their families. The third exception places no limitation on the categories of persons who may be solicited for voluntary contributions to a separate segregated fund. However, the legislative history of the 1971 Act clearly states that general treasury money may not be used to solicit the general public. 117 Cong. Rec. 43380-81. The absence of a limitation in the third exception similar to that contained in the first two exceptions, indicates that it was Congress' intent not to limit the use of corporate funds for solicitation of contributions to separate segregated funds only to stockholders. Furthermore, corporations have traditionally solicited their employees for both political and non-political purposes. Absent any express language in the statute or the legislative history prohibiting such solicitations, it would be illogical to conclude that corporations could solicit only their stockholders and not their employees. Finally, section 610 provides that contributions to a separate segregated fund may not be secured by "job discrimination" or "financial reprisals", actions which an employer may take against an employee.

The Commission recognizes, however, that there is in the best-intentioned plans a potential for coercion which is inherent in the employment relationship and which may be triggered by solicitation of employees by or on behalf of an employer. Section 610 forbids coercion or reprisal of any kind in the solicitation of contributions to separate segregated funds. To minimize the appearance or perception of coercion, the Commission recommends the following guidelines on solicitation of political

contributions by employees to such funds. First, no superior should solicit a subordinate. Second, the solicitor should inform the solicited employee of the political purpose of the fund for which the contribution is solicited. Third, the solicitor should inform the employee of the employee's right to refuse to contribute without reprisal of any kind.

(5) An issue related to that of soliciting contributions is that of SUN PAC accepting contributions from any donor willing to make them. It is the opinion of the Commission that SUN PAC generally can accept any contribution from any donor, whether or not it is lawful for Sun Oil to solicit a contribution from that donor. However, section 610 would prohibit SUN PAC from accepting any political contribution which would be an unlawful contribution by the donor under that statute.

Although Sun Oil cannot spend treasury funds to solicit contributions from political committees, SUN PAC could solicit such contributions with expenditures from its fund of voluntary contributions. Accordingly, SUN PAC may accept contributions from political committees which it solicited and contributions which were not so solicited but freely donated by political committees.

(6) Finally, Sun Oil has proposed a detailed organizational plan for SUN PAC. Essentially, SUN PAC will be a voluntary, non-profit, unincorporated, political membership association open to certain employees of Sun Oil and its subsidiaries. Several employees will be appointed by Sun Oil to create SUN PAC. In addition, Sun Oil will appoint the administrative officers of SUN PAC. A contribution committee will manage the overall financial operations of SUN PAC and will designate the donees of contributions. The committee may delegate all of its powers to the Chairman of SUN PAC who is a Sun Oil appointee.

Section 610 does not mandate any formal organizational structure for corporate political committees. However, under 2 U.S.C. § 432, SUN PAC, just as any other political committee, would be required to have a chairman and treasurer in order to accept or make any political contributions. Beyond these requirements, there are no other formal organizational requirements applicable to SUN PAC under Federal law.

Sun Oil also proposed to spend general treasury funds to establish a political giving program for its employees called SUN EPA. SUN EPA is what is commonly called a "trustee" plan. This plan was described in some detail in Sun Oil's request for an advisory opinion and briefly in the introductory paragraphs to this opinion. One commentator has described the concept of SUN EPA as follows:

* * * SUN EPA conceptually serves a purpose not unlike a Christmas Club -- i.e., systematic 'saving' toward a set goal (in this case, in order to provide a source for individual contributions at campaign time, rather than a fund for Christmas gifts).

Sun Oil conceded that SUN EPA would not be a segregated fund under the only applicable exception of section 610, and that it would not be a political committee subject to the registration and reporting requirements of the Act. Sun Oil stressed the fact that it will not exercise any control over the affairs of SUN EPA and that employees who participate in the plan will exercise complete control and discretion over the disbursement of their political contributions.

(6) It is the opinion of the Commission that the expenditure of general treasury funds by Sun Oil for the ordinary and necessary administrative costs of implementing SUN EPA is not prohibited by section 610. The assumption of these costs would not represent any direct or indirect payment by Sun Oil to any candidate, campaign committee, or political party or organization, within the meaning of section 610, so long as Sun Oil will exercise no control over the program nor will attempt to influence employee contributions.

The legislative history of the 1974 Amendments to the Federal Election Campaign Act clearly states that if a person exercises any direction and control over the making of a contribution then that contribution shall count as a contribution with respect to that person. Thus, in order to avoid making a contribution under section 610, Sun Oil and its management may not make any effort, either orally or in writing, to direct contributions by participants in SUN EPA to any candidate, group of candidates, political party or other person. Participants in SUN EPA must exercise independent judgment when making contributions.

The Commission notes that the Justice Department, which has criminal prosecution powers with respect to section 610, would not regard the use of corporate funds to administer such plans as being within the prohibitions of section 610:

provided that the corporation in no manner suggests to the contributing employee the identity of certain candidates or committees which should be the beneficiaries of such personal contributions, provided that absolutely no pressure of any kind is applied to induce participation in the program, and provided corporate funds are not indirectly contributed to the ultimate recipients through such means as artificially inflating employees' salaries (Letter to John G. Murphy, General Counsel, Federal Election Commission, November 3, 1975.)

Sun Oil states that:

the bank, on a quarterly basis, will inform SUN of the total amounts of contributions under SUN EPA for the quarter to specific candidates, committees, or political parties receiving them, so it may be published for those participating in the plan.

The receipt and publication of any report on the source or recipient of any contribution(s) or donation(s) into or out of any SUN EPA account(s) may constitute the exercise of direction and control over future contributions. The Commission would not object to Sun

Oil's receiving reports setting forth the total number of employees in the plan, the total amount of funds in all the accounts and the total amount of contributions made to all candidates and committees.

The Commission further notes that the possibility of exercising direction and control may be inherently present when an employee trustee plan and a political action committee are administered simultaneously by the same corporation. This, of course, will be a factual determination. However, under section 610, a violation need not be willful.

This advisory opinion is issued on an interim basis only, pending the promulgation by the Commission of rules and regulations or policy statements of general applicability.

NOTE: The foregoing opinion was adopted by the Commission by a 4 to 2 vote with Commissioners Harris and Tiernan voting against adoption. The dissenting opinion of Commissioner Harris is published as follows.

Date: Nov. 24, 1975

(signed) _____
Thomas B. Curtis
Chairman for the
Federal Election Commission