

## ADVISORY OPINION 1975-31

### Contributions by Spouses and Individuals Connected with Government Contractors

This advisory opinion is rendered under 2 U.S.C. SS 437f in response to a request for an advisory opinion which was submitted by Norval D. Reece, Campaign Manager of the Shapp for President Committee, which was published as AOR 1975-31 in the August 20, 1975, Federal Register (40 FR 36532). Interested parties were given an opportunity to submit written comments relating to the request. One comment was received.

The request generally asks whether in certain cases a person is barred from making a personal contribution because of the prior acts of a related person or business, under the Federal Election Campaign Act of 1971, as amended, and sections 608 and 611 of Title 18, United States Code (hereinafter together referred to as "the Act"). Specifically, it was asked:

- (A) Can a wife in a single income family make a contribution to a candidate if the husband already has contributed \$1,000 to the same candidate?
- (B) Can a partner, officer, or member of a corporation or business holding a Federal contract make a personal contribution? In addition, can the wives of those mentioned make a contribution?

#### A. Contributions by a Husband and Wife

It is provided in 18 U.S.C. 608(b)(1) that in general "no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed \$1,000." It further is provided in 18 U.S.C. § 591(g) that "person" means "an individual, partnership, committee, association, corporation, or any other organization or group of persons." (Emphasis added.) Accordingly, except as otherwise provided in 18 U.S.C. § 608(a) and (b)(3), an individual is allowed to contribute up to \$1,000 per election to any candidate for Federal office.

The Commission concludes that under the Act a wife is an individual who is entitled to make contributions in her own name in the same manner and under the same limitations as her husband. Thus, even though one spouse in a single income family already has made contributions to a candidate for Federal office of up to \$1,000 per election, the other spouse may similarly contribute in the aggregate up to \$1,000 per election to the same candidate. It is also clear under the Act that each spouse is subject to the overall limitations in 18 U.S.C. § 608(b)(3).

B. Contributions by Persons Associated With a Government Contractor

The question is then asked as to whether a contribution by a partner, office, or member of a corporation or business holding a Federal contract, or the spouses of these persons, would constitute a violation of 18 U.S.C. § 611. It is generally provided in 18 U.S.C. § 611 that:

"Whoever—

- (a) entering into any contract with the United States or any department or agency thereof \*\*\*directly or indirectly makes any contribution of money or other thing of value, or promises expressly or impliedly to make any such contribution, to any political party, committee, or candidate for public office or to any person for any political purpose or use; or
- (b) knowingly solicits any such contribution from any such person for any such purpose during any such period;

shall be fined not more than \$25,000 or imprisoned not more than 5 years, or both. \*\*\*"

In order to determine whether an officer or employee of a firm holding a Federal contract is barred from making a contribution, it must be determined first which forms of business organizations are affected by 18 U.S.C. § 611, and secondly, whether the contributions of an officer or employee of such an affected organization are to be deemed to have been made in a representative or personal capacity.

As a result of amendments made by the Federal Election Campaign Act of 1971 to 18 U.S.C. § 591 and 611, any individual, sole proprietorship, partnership, corporation, or any other organization or group of persons, that is negotiating, or has not completed performance of any contract with the United States (or any department or agency thereof) is prohibited by 18 U.S.C. § 611 from making a contribution. Whether an officer or employee of a covered business organization shall be deemed to have made a contribution in a representative capacity depends largely upon the legal relationship of that individual to the business which employs him.

### Sole Proprietorship

It has long been accepted that the business roles and personal roles of any individual who is the sole proprietor of an unincorporated business, are virtually indistinguishable.<sup>1/</sup> Accordingly, the Commission shall presume, in the absence of significant evidence to the contrary, that for purposes of the Act each Federal contract entered into by an unincorporated sole proprietor of a business, or an unassociated accountant, attorney, doctor or like professional, was entered into personally. Therefore, such individuals shall be barred from personally making a contribution to any political party, committee, candidate for public office or to any person for any political purpose which will influence a Federal election.<sup>2/</sup>

### Corporation

Just as it has long been established that a sole proprietor is indistinguishable from his business, it is equally established that an officer, stockholder, or employee of a corporation is clearly distinct from the corporate entity. The very nature of a corporation dictates that its property is vested in the corporation itself and not in its stockholders, officers, or employees. In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers <sup>3/</sup> and it shall be treated as a distinct entity even though a majority of its stock is owned by a single individual, <sup>4/</sup> or corporation and even if the corporation is closely held.<sup>5/</sup> In light of the independent identity of a corporation, it has traditionally been held that its stockholders, officers and employees do not generally have the power to represent the corporation or act for it in relation to its ordinary business unless expressly or impliedly authorized to do so; nor

<sup>1/</sup> H. Henn, Law of Corporations 43 (2d ed. 1970).

<sup>2/</sup> Generally, the third party beneficiary of a Federal contract will not be held to be barred from making a contribution to influence a Federal election. For example, the receipt of payments under the Medicare and Medicaid programs would not by itself make a doctor a Federal contractor. Committee on Conference Report, *supra*, at 68.

<sup>3/</sup> Omaha National Bank v. Commissioner, 183 F. 2d 899, 901 (8th Cir., 1950).

<sup>4/</sup> Green v. Victor Talking Machine Co., 24 F. 2d 378, 380 (2d Cir., 1928), cert. den. 278 U.S. 602.

<sup>5/</sup> W. D. Miller Lumber, Corp. v. Miller, 225 Or. 427, 357 P. 2d 503 (1960).

are they ordinarily personally liable for the acts and obligations of the corporation. Accordingly, the Commission shall presume in the absence of contrary evidence, that for purposes of the Act a stockholder, officer, or employee of any type of corporation has acted solely in a representative capacity for the corporation with respect to any Federal contract. Thus, he would not be prohibited by 18 U.S.C. §611 from making a personal contribution to influence a Federal election.<sup>6/</sup>

### Partnerships

It next must be determined whether a partner can make a contribution even though the partnership to which he belongs is a Federal contractor. In making this determination, it is not necessary for the Commission to distinguish between a full or limited partnership; nor is it necessary for the Commission to determine whether a partnership will be treated generally under the Act as an entity or an aggregate of individuals. The Commission only need determine whether 18 U.S.C. §611 permits a partner to make a political contribution in the partner's personal capacity, or whether it precludes such a personal act on the theory that every act of a partner (who together with his other partners, is under contract with the Federal Government) must be regarded as made in a representative capacity for the partnership.

Clearly a partner may undertake independent actions since "it is well settled that a partner may traffic outside of the scope of the firm's business, for his own benefit and advantage."<sup>7/</sup> Moreover, there is little doubt that an individual partner can engage in a broad range of activities without affecting the legal relations between or among the partners or between the partners and other persons (including the Federal Government) with whom contractual obligations have been established. Thus, the Commission concludes that a political contribution made by a partner

(1) out of personal funds on a personal check (or other written instrument), as distinguished from partnership funds drawn from a partnership account, and (2) in his or her own name, will not be regarded as a violation of 18 U.S.C. § 611.

<sup>6/</sup> Whether a professional corporation composed of doctors, lawyers, architects, engineers and the like is to be treated as a corporation is a matter determined by State law. Committee on Conference Report. Supra., at 68-69.

<sup>7/</sup> Uniform Partnership Act, SS 9(2); Latta v. Kilburn, 150 U.S. 524, (1893).

Personal Contribution by Employees

Earlier in this opinion, it was pointed out that the employees of a corporation with a Federal contract are not barred from making contributions. Similarly, the employees of any sole proprietorship or partnership will be presumed by the Commission for purposes of the Act, to have acted solely in a representative capacity with respect to a Federal contract. Thus an employee of any type of business with a Federal contract, generally is not prohibited by 18 U.S.C. § 611 from making a personal contribution to influence a Federal election. Further, as it was stated in Part A of this opinion "that a wife is an individual who is entitled to make contributions in her own name", it is the conclusion of the Commission that the spouse of a sole proprietor, stockholder, officer, partner, or employee of a business with a Federal contract is not prohibited by 18 U.S.C. § 611 from making a personal contribution in his or her own name.

It should be emphasized that in general, any sole proprietor or partnership with a Federal contract would not be permitted to indirectly make a contribution through the establishment of a separate, segregated fund by that type of business. The 1974 amendments to 18 U.S.C. §611 specifically apply only to corporations or labor organizations with Federal contracts and permit them to establish such a fund.<sup>8/</sup>

Finally, it should be noted that contributions by a stockholder, officer, partner, or employee of any business with a Federal contract, or the spouse of any of these individuals, must be made: by each individual in his or her own name pursuant to 18 U.S.C. §614 and §105.5(d) of the Proposed Disclosure Regulations, 40 FR 44705 (September 29, 1975); solely from personal and not business funds; by each individual freely and independently, and not as a conduit for a business or person with a Federal contract, in violation of 18 U.S.C. §§ 608(b)(6) and 611.

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

<sup>8/</sup> See committee on Conference Report, supra, at 67-69