



## FEDERAL ELECTION COMMISSION

1325 K STREET N.W.  
WASHINGTON, D.C. 20463

### DISSENTING OPINION OF COMMISSIONERS THOMAS E. HARRIS AND NEIL STAEBLER TO ADVISORY OPINION 1977-67

A majority of the Commission today has issued an opinion which virtually eliminates the solicitation restrictions imposed on corporations without capital stock by Section 441b of the Act. In so doing, they have ignored the intent of Congress in enacting the restrictive language of this section and have consequently created a loophole in the Act through which large amounts of corporate interest money will find its way into the political system.

The crux of the question raised by the advisory opinion request is what is the definition of the word "member" as used in the Act and the Commission's regulations? While neither the Act nor the regulations explicitly define that term, its definition may be discerned from a careful reading of the legislative history of Section 441b of the Act.

Section 441b prohibits the use of corporate or labor treasury funds in connection with federal elections. It does, however, permit corporations and unions to set up separate segregated funds for which voluntary contributions may be solicited and which, in turn, can be used to make contributions to federal candidates. The class of persons who may be solicited to make contributions into such funds is strictly limited by the language of 441b(b)(4). Labor organizations are permitted to solicit members and their families. 2 U.S.C. 441b(b)(4)(A)(ii). Corporations with capital stock may solicit shareholders and executive and administrative personnel but not employees. 2 U.S.C. 441b(b)(4)(A)(i). Corporations without capital stock which have no shareholders but which have members may solicit those members. 2 U.S.C. 441b(b)(4)(C).

The legislative history of 441b(b)(4)(A)(i) reflects a carefully drawn balance between the right of a corporation and its shareholders to participate in the political system and the danger which Congress foresaw might result in the form of corruption from unlimited corporate spending in connection with federal elections. Congress provided this narrow exception to the broad prohibitions of Section 441b because it

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recognized the existence of a fiduciary relationship<sup>1/</sup> between the corporation and its shareholders. (See remarks of Representative Hansen 117 Cong. Rec. 43381; 117 Cong. Rec. H 11478). It further recognized that this relationship creates an obligation in the corporation to communicate with its shareholders and mandates that the corporation's political activities reflect the shareholders' interests.<sup>2/</sup>

Section 441b(b)(4)(C) was introduced during the Senate debates on the Act's 1976 amendments. Its purpose was to cure an omission in the Senate bill which until then excluded cooperatives and like corporations from the 441b solicitation provisions because they did not have shareholders. Thus it provided corporations which did not have shareholders but did have members with solicitation rights comparable to those of corporations with capital stock.<sup>3/</sup>

Since it was the intent of Congress that the solicitation rights in 441b(b)(4)(C) parallel those in (b)(4)(A), it is clear that the term "member" must be defined as embodying a substantive relationship between a corporation and an individual similar to that of a corporation and its shareholders.

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<sup>1/</sup> Congress similarly recognized the community of interest shared by a labor organization and its members, hence the solicitation rights in 441b(b)(4)(A)(ii).

<sup>2/</sup> "...it must be remembered and emphasized that stockholders who are being solicited, can vote out the corporate management who is doing the solicitation if they do not agree with it or if they do not agree with the contributions made from the political committees.

By the same token, the union members are in a position to vote out the union management with which it disagrees." 122 Cong. Rec. S. 3860 (daily ed., March 22, 1976) (remarks of Senator Cannon).

<sup>3/</sup> "...all this amendment does is 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 corporations without capital stock and, hence, without stockholders, to set up separate segregated political 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 the amendment provides. It does cover an omission in the bill that I believe all agree should be filled." 122 Cong. Rec. S 3812 (daily ed., March 18, 1976) (remarks of Senator All

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Accordingly, the "membership" relationship must be evidenced by the existence of member rights and obligations vis-a-vis the corporation. For this reason, we agree with the majority that where, as here, persons described by a corporation as "members" do not enjoy any direct and enforceable participatory rights as a matter of law or constitution, the Commission must require some further evidence of the "membership relationship" between the corporation and the "member" before the solicitation rights in 44lb(b)(4)(C) attach.

What are the rights and obligations of those persons whom PSRC proposes to solicit as "members?" The Commission majority has ruled that such persons must affirmatively indicate their intent to join the organization before being solicited by its political action committee and we agree. The majority has also required that the corporation's articles or by-laws provide that it shall have members. With this requirement, we also agree. And finally, we agree with the majority that persons described as "members" must make a financial commitment to the corporation in the form of a pre-determined dues payment and further that membership must be renewed at fixed intervals.

We have no quarrel with the majority's requirements for the indicia of "membership" as far as they go, but they do not go far enough. Those facts which the majority has viewed as sufficient to establish a membership relationship between PSRC and certain individuals describe a one-sided relationship of obligations by a so-called "member" to the corporation. We think that the Act demands more. In our opinion, a bona fide membership relationship cannot exist unless members have certain fundamental rights guaranteed vis-a-vis the corporation.

Paramount among these is the right of members to direct the policies and activities of the corporation, for this is what characterizes the corporation as a "membership" organization. Membership control can only be derived from a concomitant right in the membership to elect corporate directors or officers. It is the existence of this right, guaranteed by law to corporate shareholders<sup>4/</sup> and labor union members<sup>5/</sup>

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<sup>4/</sup> Reifsnnyder v. Pittsburgh Outdoor Advertising Co.; 405 Penn. 172; 173 A. 2d. 319, citing Fletcher Cyc. Corp. (Perm. Ed.) §5717.

<sup>5/</sup> 29 U.S.C. §411

which creates the fiduciary relationship between such organizations and their shareholders or members. And it is the existence of the fiduciary relationship that the statutory scheme in Section 441b seeks to protect by providing that a corporation without capital stock may solicit its members. PSRC's "Articles of Incorporation" not only fail to provide this fundamental right they specifically deny it.<sup>6/</sup> In our view, the absence of this right and the resultant lack of control by the alleged "members" over the corporation's policies and actions is fatal to the corporation's contention that it is a "membership" organization. A bona fide membership organization is one which represents its members; that is not the case here.

Finally, what is particularly egregious about the majority's opinion is not just that they have strayed so far from the legislatively intended purpose of 441b(b)(4)(C) but that in doing so they have created a mechanism by which ideological organizations, funded by corporate monies, may enlarge their solicitable class to include the public at large. This is particularly troublesome in view of the recent proliferation of incorporated special interest organizations which are engaging in widespread direct mail solicitations. If, as the majority has found, all that such organizations must do is drop a membership card in the mail, and request a contribution and the return of a portion of the card, with the result

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<sup>6/</sup> "EIGHTH: The Corporation shall have members who shall be persons who voluntarily support the purposes of the organization and are accepted as members by the Board of Directors of the Corporation under procedures established by the Board.

No members shall have any voting or property rights or have, or acquire any vested right, title, or interest in or to the property of this Corporation or any vested right in the exercise of any of the privileges of membership in this Corporation or any vested right in the continuation of any of its purposes, policies or activities.

Every member in good standing shall have the right to receive such privileges as may be prescribed under rules and regulations adopted from time to time by the Board of Directors.

The Board of Directors shall have the sole authority to establish the purposes and goals and direct the activities of the Corporation." Public Service Research Council, Articles of Incorporation.

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that it is then free to solicit such persons for a contribution to its political action committee, such organization's solicitation rights are practically without limit. This was not the intent of Congress in enacting 44lb(b)(4)(C). Instead, it is clear that Congress intended just the opposite, that is, that the solicitation rights of corporations be narrowly limited in order to protect the political system from corruption by special interest money.

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