



FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 22, 1984

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1984-23

Mr. Charles E. Hawkins III
Associated Builders and Contractors, Inc.
729 15th Street, N.W.
Washington, D.C. 20005

Dear Mr. Hawkins:

This responds to your letter of April 26, 1984, as supplemented by your letter of May 11, 1984, requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to a trade association's endorsement of a presidential candidate and the publication of information about that endorsement in the association's newsletter and magazine.

You state that Associated Builders and Contractors ("ABC") is a nonprofit incorporated trade association. Its Board of Directors plans to make an endorsement of a presidential candidate. ABC will issue press releases announcing this endorsement. It will also publish articles relating to its endorsement in its bi-weekly newsletter, Merit Shop Scoop, and in its monthly magazine, Builder and Contractor. Scoop is financed entirely from dues payments and is sent regularly to 17,000 members and 125 nonmembers, primarily members of the press and those who request it. ABC plans to publish news of its endorsement in the August issue of the newsletter. Builder and Contractor is financed primarily through dues payments, though it has some paid subscriptions. It is sent regularly to 17,000 members and 2,698 nonmembers, 1,100 of whom receive it without charge. The nonmembers who receive the magazine include advertisers, schools, government officials, and construction users. You state that the magazine does not circulate to the general public through newsstands or subscriptions. ABC will publish a news story and an editorial about its endorsement in the magazine's October issue. You state that ABC intends to send the issue containing the endorsement information "only to those on our normal monthly circulation list." You further state that all expenses relating to this endorsement will be paid through the general operating fund of the association.

You ask whether the Act and Commission regulations permit the expenditures you plan to make regarding this endorsement.

The Act makes it unlawful for a corporation to make a contribution or expenditure in connection with a Federal election. 2 U.S.C. 441b. It defines "contribution" or "expenditure" to 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 Federal election. 2 U.S.C. 441b(b)(2).¹ The Act excludes from this definition "communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject." 2 U.S.C. 441b(b)(2)(A). This exclusion also applies regarding internal communications by trade associations. The regulations permit a trade association to "make communications, other than solicitations, to its members and their families under the provisions of 114.3."² 11 CFR 114.8(h). The referenced section permits an incorporated trade association to make partisan communications to its members and executive or administrative personnel, and their families, but the trade association may not direct such Communications to the general public. See 11 CFR 114.3(a).

In the Commission's view, a corporation or labor organization may endorse a candidate and may publicly announce its endorsement and state the reason or reasons for it.³ Both United States v. United Auto Workers, 352 U.S. 567 (1957), and United States v. Congress of Industrial Organizations, 335 U.S. 106 (1948), support that conclusion, at least inferentially. On the other hand, corporate or labor organization resources (PAC activities apart) may not be used for "partisan communications to the general public." 11 CFR 114.3(a); compare 11 CFR 114.5(i). The conflict between these principles may, we think, be minimized by permitting corporate or union endorsements, and the announcement thereof through press releases, so long as the expenditures related thereto are de minimis and the announcement is not made a pretext for general electioneering. In this situation the Commission will presume that ABC expenditures for the press releases are de minimis if the press releases are distributed only to those press entities that ABC customarily contacts. Commission regulations at 11 CFR 114.3(c)(2) permit partisan candidate and party appearances at corporate or labor organization conventions which may be attended by representatives of the news media. The issuance of press releases, if circumscribed as indicated above, would not appreciably enlarge this existing permission.

As noted above, the regulations permit a trade association to make partisan communications, other than solicitations, to its members and their families. In the case of

¹ The Act excludes from its definition of expenditure "any news story, commentary, or editorial distributed through the facilities of any...magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. 431(9)(B)(i); see Advisory Opinion 1980-109. This exception, however, applies only to periodicals of general circulation. See 11 CFR 100.7(b)(2) and 100.8(b)(2); see also Advisory Opinion 1982-58. Because you state that neither Scoop nor Builder and Contractor is a general circulation periodical, this exclusion is not applicable to your request.

² The solicitations referred to here are those for the trade association's own separate segregated fund, which are governed by special rules. See 11 CFR 114.8. The communication permitted by 11 CFR 114.8(h) may, however, contain a suggestion that a contribution be made to a particular candidate so long as the trade association does not facilitate the making of the contribution. See Advisory Opinion 1982-2. Of course, such a contribution must be otherwise lawful. The Commission does not view your request as presenting any question concerning communications that solicit contributions to ABC's separate segregated fund.

³ The Commission previously had reserved its opinion on this question. See Advisory Opinion 1978-77.

corporate members, a trade association may make its communications to the "representatives of the corporation with whom the trade association normally conducts the association's activities." 11 CFR 114.8(h). ABC's bi-weekly newsletter, Scoop, is sent regularly to 17,000 members and 125 nonmembers, i.e. persons outside the restricted class for partisan communications. In the Commission's view, this distribution of Scoop outside the restricted class is either incidental to its distribution to the class or a de minimis distribution outside the class. See Advisory Opinions 1978-97 and 1978-18. Thus, ABC may publish information about its presidential endorsement in Scoop. Its disbursement of funds for this communication would not constitute a violation of 2 U.S.C. 441b.⁴ On the other hand, the Commission has concluded that organizations subject to 2 U.S.C. 441b may not include solicitations for their separate segregated funds in their periodicals if the percentage of persons outside the solicitable class is more than de minimis. See Advisory Opinions 1980-139 and 1979-50. ABC's monthly magazine circulates to 17,000 members and 2,698 nonmembers. The percentage of total circulation to nonmembers is 13.7% and is more than de minimis. Therefore, the Commission concludes that ABC's disbursement of general treasury funds to print and distribute an issue of Builder and Contractor that contains information about ABC's endorsement would violate 2 U.S.C. 441b.

Although the request does not explicitly raise a question concerning the reporting of disbursements regarding the publication of the association's endorsement in Scoop, such a question is necessarily raised by implication. The regulations provide that disbursements for partisan communications such as those in this request shall be reported "to the extent required by 11 CFR 100.8(b)(4) and 104.6." 11 CFR 114.3(b). These regulations require the reporting of such disbursements if: (1) the costs of the communication exceed \$2,009 for any election; and (2) the partisan communication is not part of a communication primarily devoted to subjects other than the express advocacy of the election or defeat of a clearly identified candidate. See 2 U.S.C. 431(9)(B)(iii); 11 CFR 100.8(b)(4) and 104.6. If such disbursements are reportable, they shall be reported to the Commission on FEC Form 7. See 11 CFR 104.6. The Commission notes that if the issue of Scoop that contains the communications about ABC's endorsement is primarily devoted to subjects other than candidate advocacy, no reporting requirement may arise. See H.R. Rpt. 94-1057, 94th Cong., 2d Sess. 41-42 (1976); see also Advisory Opinion 1978-97.

This opinion does not reach any issues concerning the membership status of those ABC claims as members for purposes of the Act and Commission regulations. See 11 CFR 114.1(e) and Advisory Opinion 1982-2.

⁴ This request does not present the question whether solicitations for contributions to ABC/PAC may be made in the newsletter, so this opinion does not purport to answer that question. Also, the Commission's understanding of the request is that ABC will not print or distribute extra copies of the newsletter and will not suggest to its members that they reprint or copy it and distribute it to their employees and others. See ABC's agreement in MUR 274.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely yours,

(signed)

Lee Ann Elliott
Chairman for the
Federal Election Commission