



FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 13, 1984

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1984-24

Mr. H. Richard Mayberry, Jr., Esq.
Law Office of H. Richard Mayberry, Jr.
1667 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Mayberry:

This responds to your letter of May 4, 1984, as supplemented by your letters of June 1 and June 28, 1984, requesting an advisory opinion on behalf of the Sierra Club ("the Club") and its separate segregated fund, the Sierra Club Committee on Political Education ("SCCOPE") or ("the Committee"), concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to SCCOPE's payment procedures for in-kind contributions it proposes to make to candidates for Federal office through the use of Club employees and facilities.

You state that the Club is a nonprofit membership organization, incorporated in the State of New York, and granted tax exempt status pursuant to 26 U.S.C. 501(c)(4). It is a national conservation organization dedicated to promoting the preservation of the environment through educational and lobbying efforts. It has 53 chapters and more than 350,000 individual members. It employs approximately 200 people, including a field staff of 29 persons, and operates 12 national and regional offices.

The Club has established and administers a separate segregated fund, SCCOPE. SCCOPE is governed by the Club's committee on Political Education, which consists of Club members and has a chairman, vice chairman, treasurer, and assistant treasurer, who are also Club members. The Committee decides which candidates to endorse and to receive SCCOPE's financial support. The day-to-day operations of SCCOPE are performed by Club staff employees. You state that SCCOPE intends to make in-kind contributions to approximately 60 to 70 U.S. Senate and House candidates in the 1984 elections by purchasing from the Club and providing to the candidates the services of 15-20 Club employees and the use of Club facilities incident to these services. You define "services" as the labor of Club employees and "facilities" as Club office space, furniture, equipment and any goods incidental to the use of the facilities. You state that

these employees may spend complete days or part days at either a candidate's offices or at Club offices on campaign-related activities.

You offer two examples to illustrate your proposed activity: (a) an employee may spend two days in one week on candidate-related activities working out of a candidate's campaign headquarters and the remaining three days of the week on Sierra Club nonelection membership relations at a Club regional office; or (b) an employee, operating out of a Club office, may spend part of a working day assisting a Federal candidate and the remainder of the day on Club matters that are not campaign related. You state that the Club anticipates that its employees will, (1) research and prepare campaign materials on environmental issues and the environmental record of the candidates and their opponents; (2) assist in fundraising and volunteer recruitment, including telephone banks, among Club members and the environmental community; and (3) identify voters interested in environmental issue and develop plans to reach these voters.

You state that there are three methods by which SCCOPE may pay the Sierra Club for these services and facilities: (a) reimbursement by SCCOPE to the Club of the normal and usual charge for the services and facilities; (b) advance payment through an escrow account by SCCOPE to the Club of the normal and usual charge for Club services and facilities; or (c) establishment of SCCOPE as the second employer of Club employees who engage in campaign-related activities.

In this regard, you pose five questions in your request:

- (1) Whether SCCOPE may purchase from the Sierra Club the services of its employees for candidate-related activities and pay to the Sierra Club the normal and usual charge for the services within thirty days of rendering them.
- (2) Whether SCCOPE may purchase the use of Sierra Club facilities in connection with the provision of services purchased from the Sierra Club and pay the Sierra Club the normal and usual charge for their use within thirty days.
- (3) Whether SCCOPE may pay the Sierra Club in advance the normal and usual charge for services and for the use of facilities with the funds to be held in escrow by the Sierra Club and debited monthly for the services performed and facilities used.
- (4) With the advance payment procedure, whether the level of funding may be maintained only at a reasonable estimate of the normal and usual charge for the services to be purchased from the Sierra Club and for the Sierra Club facilities to be used and may excess funds be returned to SCCOPE.
- (5) With the advance payment procedure, what are the recordkeeping and reporting requirements in connection with the use of escrow account?

With respect to the reimbursement payment method, as referenced in questions (1) and (2) you have provided additional facts. You state that each Club employee who provides any

services to SCCOPE will maintain a log to determine the time involved in election versus nonelection activity, the extent of the use of any Club facilities, and the identification of any goods used. You state that the purpose of the log is to serve as a basis for computing the amount of any reimbursement. Since the Club pays its employees on a biweekly basis, you propose to aggregate every two weeks the value of the time expended by each Club employee on SCCOPE's in-kind contributions. You state that SCCOPE will reimburse the Club within two weeks after the Club issues it paycheck to such an employee. You add that two weeks is necessary to allow time for the forwarding of time records from the Club's field offices and their analysis at the Club's headquarters. You propose to have SCCOPE reimburse the Club for all its services and the use of all its facilities within 30 days of their provision.

You further state that the services of Club employees are unique and unavailable from other sources. In this regard, you state that the Club will charge SCCOPE the total compensation paid to its employees for their campaign-related activities plus a seven and one-half percent administrative surcharge. You note that the club's practice is to charge the actual costs of its goods and services and up to a maximum of a seven and one-half percent surcharge. The decision on the amount of the surcharge is discretionary and depends on the ability of the contracting party to pay it, the value of the services in promoting the Club's objectives, and the status of the contracting party as nonprofit or for-profit. You note that in the past the Club provided goods at actual cost to Citizens Against Waste, a California nonprofit corporation, and services at cost plus the maximum surcharge to Southern California Gas Company.

With respect to the advance payment method using an escrow account questions (3) and (4), you also provide additional facts. You state that SCCOPE would periodically forward to the Club an amount of money that is estimated to cover the normal and usual charge of any services and facilities provided by the Club. The Club would place these funds in an escrow account and withdraw funds monthly to pay for these services and facilities. The level of funding of the escrow account would be commensurate with SCCOPE's estimated use of Sierra Club employees and facilities.

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). The Act excludes from this definition, however, the "establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock." 2 U.S.C. 441b(b)(2)(C). Except for certain activities such as internal communications and nonpartisan activities, the Act requires that a corporation or labor organization direct and finance its political activities solely through the use of the voluntary contributions in its separate segregated fund and not through the use of general treasury funds. 117 Cong. Rec. 43381 (Remarks of Rep. Hansen). The Commission's regulations at 11 CFR Part 114 comport with this purpose and intent of the Act. The regulations specifically provide that a corporation or labor organization may not use the establishment, administration, and solicitation process as a means of exchanging treasury monies for voluntary contributions. 11 CFR 114.5(b).

The relationship between a separate segregated fund and its connected organization has been noted by the U.S. Supreme Court. It has held that a separate segregated fund must be separate from its connected organization "only in the sense that there must be a strict segregation of its monies from" general treasury funds. Pipefitters v. U.S., 407 U.S. 385, 414 (1972). Furthermore, a separate segregated fund need not be formally or functionally independent of its connected organization's control. Id. at 415. Accordingly, Commission regulations specifically give a connected organization the right to control its separate segregated fund. See 11 CFR 114.5(d).

Thus, the statutory and regulatory framework permits a corporation to use its general treasury monies to establish and administer a separate segregated fund and to solicit voluntary contributions to that fund from its solicitable class. Only the monies in the separate segregated fund may be disbursed for political purposes, and the corporation may not use its general treasury funds for such purposes.

In this regard, the Act and regulations prohibit a corporation from using its general treasury funds to provide goods and services at no charge to candidates in any Federal election. A corporation's donation of the services of its employees and the use of its facilities incident to its employees' services qualifies as a gift of something of value to the candidate. Thus, the expenditure of corporate treasury funds to provide such services and facilities falls squarely within the prohibition of 2 U.S.C. 441b. Nothing in the Act or regulations excludes such corporate disbursements from the Act's prohibition. On the contrary, Commission regulations specifically define a contribution as the payment of compensation to a person who renders services to a candidate or political committee or the provision of goods or services at less than the usual and normal charge for them. See 11 CFR 100.7(a)(1)(iii) and (a)(3). See also Advisory Opinions 1978-45, 1978-34, 1976-70, 1975-94, and 1975-14. The regulations also prohibit a corporation from continuing to pay the employer's share of the cost of fringe benefits for an employee who has taken an unpaid leave of absence to volunteer his or her services to a Federal candidate or campaign. Instead, the employer's share of such cost may be paid by the corporation's separate segregated fund. See 11 CFR 114.12(c)(1). The prohibition of 2 U.S.C. 441b also includes advances by a corporation of its general treasury funds and the extension of credit which is not made in the ordinary course of the corporation's business and on terms similar to those extended to nonpolitical debtors. See Advisory Opinions 1980-44 and 1979-36.

The Commission notes that both the reimbursement payment method and the advance payment method using an escrow account involve the initial disbursement of corporate treasury funds to compensate employees for the time in which they have rendered political services to Federal candidates and to pay for the use of any corporate facilities incident to the rendering of such services. After these corporate disbursements are made, the Club will determine what proportion of an employee's compensation and the use of any facilities is attributable to political work. The Club will then transfer this amount plus up to a seven and one-half percent surcharge from its separate segregated fund to its general treasury fund.

In the Commission's view, the initial disbursement of corporate treasury monies is a loan, advance, or something of value to both the candidate and the corporation's separate segregated fund. It, thus, falls within the prohibition of corporate contributions or expenditures of 2 U.S.C.

441b. None of the exceptions in the Act or regulations remove such a disbursement from the general prohibition of 441b. Therefore, once the Club disburses its treasury funds to pay an employee for political services rendered to a Federal candidate and for the use of any Club facilities in rendering those services, the Club makes a prohibited corporate contribution or expenditure and a violation of the Act occurs. The subsequent transfer of voluntary contributions from the Club's separate segregated fund under either a reimbursement payment method or an advance payment method using an escrow account does not cause the violation to abate.

The Commission notes your arguments that 11 CFR 114.9 and 114.10 support or authorize a reimbursement payment method. The Commission, however, does not view either regulation as supporting or authorizing a reimbursement payment method or an advance payment method using an escrow account in the circumstances you have described.

First, by its own terms, section 114.9 applies only to the use of corporate facilities and does not include the use of the paid services of corporate employees. Therefore, this section cannot be read as supporting or authorizing either the reimbursement or advance payment methods regarding the compensation paid to Club employees for the political services rendered to Federal candidates. Second, this section was not intended to apply to permissible corporate disbursements of treasury funds or to disbursements by a corporation's separate segregated fund because such activities are covered in other sections of Part 114. This section applies only to the use of corporate facilities by stockholders and employees engaged in individual volunteer activity and by persons, other than stockholders and employees such as candidates and their committees for activity in connection with a Federal election. It does not purport to apply to the use of corporate facilities in connection with a Federal election by corporate employees who are being compensated for rendering their services to a Federal candidate. Third, section 114.10 is intended to apply to commercial transactions made in the ordinary course of a corporation's business, where it extends credit as part of such a transaction to a political purchaser on terms comparable to those for similar nonpolitical purchasers. It was not intended to apply to the circumstances presented in this request. Thus, neither of these provisions support a reimbursement or advance payment method.

Therefore, the Commission concludes that neither the reimbursement payment method nor the advance payment method using an escrow account as described in your request is permissible under the act. For this reason it is not necessary to address your fourth and fifth questions.

You state that if neither the reimbursement nor the advance payment method is permissible, the Club's only choice is to make SCCOPE a dual employer of employees who perform political work. You have not raised this method as a specific question in your request. Accordingly, the Commission expresses no opinion with regard to this method. It does note, however, that this or any other method must not entail the disbursement of corporate treasury funds, but only disbursements, initially and directly, from its separate segregated fund.

The Commission expresses no opinion whether the described activities would have any effect on the tax exempt status of the Club since that issue is not within the Commission's jurisdiction.

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

Sincerely yours,

(signed)

Lee Ann Elliott
Chairman for the
Federal Election Commission

Enclosures (AOs 1980-44, 1979-36, 1978-45, 1978-34, 1976-70, 1975-94
and 1975-14)

P.S. Commissioners Elliot and Aikens voted against approval of this opinion. A dissenting opinion will be submitted at a later date.