



FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 15, 1985

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1985-7

Robert O. Tiernan, Esquire
David E. Osterhout, Esquire
Law Offices of Robert O. Tiernan
Suite 299
1800 M Street, N.W.
Washington, D.C. 20036

Dear Messrs. Tiernan and Osterhout:

This responds to your letter of January 24, 1985, requesting an advisory opinion on behalf of Anheuser-Busch Companies, Inc. ("A-BC"), concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the solicitation of political contributions to A-BC's separate segregated fund from the executive and administrative personnel of wholesalers who are affiliated with Anheuser-Busch, Incorporated ("Anheuser-Busch"), the wholly-owned subsidiary of A-BC.

Your request states that Anheuser-Busch markets its malt beverage products for retail purchase through a system of wholesale distributorships. The relationship between Anheuser-Busch and each of its distributorships is controlled by a detailed Wholesaler Equity Agreement ("Equity Agreement"), which sets forth the basic rights and obligations of the parties. Under the Equity Agreement, the wholesaler is given responsibility for marketing Anheuser-Busch products in an exclusive territory. This means that, except where state law prohibits such exclusive territories, the wholesaler is not permitted to sell outside the territory, and no other wholesaler is permitted to sell within the territory. Furthermore, under the Equity Agreement Anheuser-Busch is granted a limited degree of influence over the management of the wholesaler, and also has the right to approve certain transfers and changes in the ownership of the wholesaler. According to your request, a wholesaler-owner who is thinking of selling the entire business must first discuss the prospective sale with Anheuser-Busch.

You also state that the Equity Agreement contains provisions spelling out various operating, sales and merchandising methods and standards that must be adhered to by the wholesaler. In the event such requirements are not met, Anheuser-Busch has a limited right to terminate the Equity Agreement. In certain extreme and serious situations, involving a material breach of the Equity Agreement, Anheuser-Busch has the right to terminate the brewer-wholesaler relationship immediately, without following any of the deficiency termination procedures.

Your request also explains that the Equity Agreement gives Anheuser-Busch a right of participation in the wholesaler's business and financial planning (unless prohibited by state law), and requires the wholesaler to provide certain financial information to Anheuser-Busch to facilitate market and financial planning. The Equity Agreement notes, however, that the financial information required by Anheuser-Busch shall not include matters pertaining to the products of other brewers.

You ask whether, in light of this factual situation, A-BC is permitted to solicit contributions to its separate segregated fund from the executive and administrative personnel of wholesalers that operate under the aforementioned Equity Agreements with Anheuser-Busch.

The Act and Commission regulations permit a corporation to solicit "the executive or administrative personnel of its subsidiaries, branches, divisions, and affiliates and their families." 11 CFR 114.5(g)(1), also compare 2 U.S.C. 441b(b)(6). Although the term "affiliate" is not defined in this context, the Commission has followed the indicia of affiliation that are applied in determining the affiliated status of political committees for purposes of the anti-proliferation rule in 2 U.S.C. 441a(a)(5). Among the indicia sufficient to establish affiliation are: 1) provisions of by-laws, constitutions, or other documents by which one "entity has the authority, power, or ability to direct another entity; and 2) the authority, power, or ability to hire, appoint, discipline, discharge, demote, or remove or otherwise influence the decision of the officers or members of an entity. 11 CFR 100.5(g)(2), 110.3(a)(1)(iii).

In a series of opinions involving corporate franchisees and licensees, the Commission has found affiliation to exist on the basis of the corporation's continuing control and direction over the business policies, practices and procedures of the franchisees or licensees as well as on the nature and extent of the licensees' or franchisees' contractual obligations to the corporation. See Advisory Opinions 1977-70, 1978-61, and 1979-38 (copies enclosed). See also Advisory Opinion 1983-48, copy enclosed. With respect to the situation presented in your request, however, the Commission concludes that the degree of influence exercised by Anheuser-Busch over the wholesalers is insufficient to meet the standard set forth in the Commission's previous opinions.

Under the Equity Agreement, the wholesaler maintains its status as an independent business, and its independence is not significantly impaired by its contractual relationship with Anheuser-Busch. For example, even though Anheuser-Busch has a limited right to approve the wholesaler's designation of a Successor-Manager, the Equity Agreement clearly states that the wholesaler retains responsibility for the management of its own business, and that Anheuser-Busch will not attempt to usurp the right of the wholesaler to choose its own manager. See Paragraph 3 of the Equity Agreement. Further evidence of the wholesalers' independence from Anheuser-Busch is

found in the ability of the wholesalers to market the products of other brewers along with those of Anheuser-Busch. See Paragraph 14(b). In general, the relationship created here reflects more the characteristics of a typical business contract between two independent and separate entities, as distinguished from the relationship created where one entity exercises pervasive supervision and direction over the daily operations and business policies of another entity such as a franchisee. See opinions cited above.

Thus, because the Equity Agreements merely set forth certain standards for the wholesalers' activities, the wholesalers would not be considered "affiliates" of Anheuser-Busch. Therefore, the executive and administrative personnel of the wholesalers may not be solicited by A-BC's separate segregated fund.

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)

John Warren McGarry
Chairman for the Federal Election Commission

Enclosures (AO 1977-70, 1978-61, 1979-38, and 1983-48).