



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

November 22, 1985

CERTIFIED MAIL,  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1985-35

William K. Cox  
Corporate Attorney  
Weirton Steel Corporation  
400 Three Spring Drive  
Weirton, WV 26062

Dear Mr. Cox:

This responds to your letter of October 11, 1985, requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the solicitation of the nonemployee, nonshareholder members of the board of directors of Weirton Steel Corporation.

You state that Weirton Steel Corporation ("Weirton") is a Delaware corporation that is an entirely employee-owned corporation through a qualified employee stock ownership plan (ESOP). You note that all of the corporation's issued shares have been issued to a trustee who has all voting rights with regard to these shares. Weirton, the connected organization, has established a separate segregated fund, Weirton Steel Corporation Political Action Committee ("Weirton PAC"), to solicit voluntary political contributions from its management personnel.<sup>1</sup>

You state that Weirton's board of directors consists of one director who is an officer and employee of Weirton, three union- selected directors, and seven independent directors. The union- selected directors are neither officers nor shareholders of Weirton. The seven independent directors are neither employees nor shareholders of Weirton. Furthermore, you note that the seven independent directors could not become shareholders of Weirton, since shares may not be issued to nonemployees. You further state that the seven independent directors receive an annual director's fee plus reimbursement of their expenses incurred in attending board meetings. You add that the union- selected directors receive the same remuneration, if such is permitted by law.

You ask two questions:

(1) May nonemployee, nonshareholder members of Weirton's board of directors be solicited for contributions to Weirton PAC as executive or administrative personnel?

(2) If such directors are solicitable as executive or administrative personnel, does the fact that Weirton is entirely employee-owned alter the directors' status?

The Act permits a corporation or its separate segregated fund to solicit contributions to such fund from "its stockholders and their families and its executive or administrative personnel and their families." 2 U.S.C. 441b(b)(4)(A)(i). The Act further defines executive or administrative personnel to mean "individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities." 2 U.S.C. 441b(b)(7). Commission regulations explain that the definition of executive or administrative personnel includes "individuals who run the corporation's business, such as officers, other executives, and plant, division, and section managers." 11 CFR 114.1(c)(1)(i).

The regulations also provide, however, that this definition does not include "[i]ndividuals who may be paid by the corporation...such as consultants, but who are not employees, within the meaning of 26 CFR 31.3401(c)-1, of the corporation...for the purpose of income withholding tax on employee wages under Internal Revenue Code of 1954, section 3402." 11 CFR 114.1(c)(2)(iv). The cited definition of employees for withholding tax purposes provides that an officer of a corporation is "generally" an employee of the corporation but that a "director of a corporation in his capacity as such is not an employee of the corporation." 26 CFR 31.3401(c)-1(f) (emphasis added). Nevertheless, the Commission does not view its regulations as requiring that compensation paid to directors of a corporation be subject to the income withholding tax in order for the directors to qualify as executive or administrative personnel.

In two relevant advisory opinions, the Commission focused on whether the individual directors of a corporation were paid on a salary basis, rather than their employee status for purposes of the income withholding tax. In Advisory Opinion 1977-18, the Commission concluded that directors of an incorporated trade association were not solicitable as executive or administrative personnel of the trade association since they did not receive any salary or other compensation.<sup>2</sup> In Advisory Opinion 1984-55, the Commission noted that an individual who was chairman of the board of directors of a for-profit corporation could be solicited for contributions to the corporation's separate segregated fund, if the payments to him were on a salary, rather than hourly, basis.<sup>3</sup>

Thus, the Commission has required that directors of a corporation must be compensated on a salary, rather than hourly, basis in order for them to be solicitable as executive or administrative personnel. With respect to such directors, the Commission has not required that they be employees within the meaning of 26 CFR 31.3401(c)-1. Instead, compensation on a salary basis, whether or not it is subject to the income withholding tax, has sufficed to make these directors "individuals employed by the corporation" for purposes of the Act and Commission regulations.

Accordingly, the Commission concludes that those Weirton directors who receive an annual director's fee are included within the meaning of "executive or administrative personnel" under the Act.<sup>4</sup> Thus, they may be solicited for voluntary contributions to Weirton PAC. Such solicitations, however, must comply with the provisions of the Act and regulations regarding proper solicitations. See 11 CFR 114.5(a); Advisory Opinion 1984-31.

With respect to your second question, the Commission's conclusion is not altered by reason of the fact that all of Weirton's issued shares are owned by its ESOP. The Commission expresses no views with respect to the status of Weirton's directors for purposes of any other statute or regulation since its advisory opinion authority is limited to the Act and related campaign financing statutes. 2 U.S.C. 437f(a).

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

Sincerely yours,

(signed)

John Warren McGarry  
Chairman for the Federal Election Commission

Enclosures (AO 1984-55, 1984-31, 1980-1, and 1977-18)

1. You have indicated that Weirton does not regard its stockholders as solicitable since they have no voting rights in the stock held by the Weirton ESOP.
2. Recognizing that the solicitability of a trade association director as director could undermine the Act's restrictions on trade association solicitations, the Commission also indicated that these directors could be solicited as stockholders or as executive or administrative personnel of the member corporations of the trade association provided the member corporation had authorized such solicitation pursuant to 2 U.S.C. 441b(b)(4)(D).
3. In Advisory Opinion 1980-1, the Commission did conclude that insurance company agents, who were not corporate directors and who were paid on a commission basis, would not be solicitable as executive or administrative personnel since they were not employees within the meaning of 26 CFR 31.3401(c)-1. This opinion applied a Commission regulation specifically addressing personnel paid on a commission basis and is thus distinguishable from this situation. See 11 CFR 114.1(c)(3).
4. The Commission assumes that payment of an annual fee constitutes compensation on a salary basis, and not on the basis of a prescribed number of hours that a director must spend on Weirton business.