



FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 15, 1988

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1988-49

Rodney D. Joslin, Treasurer
The Lawyers for Better Government—Federal
Jenner & Block
One IBM Plaza
Chicago, Illinois 60611

Dear Mr. Joslin:

This responds to your letter of November 4, 1988, on behalf of The Lawyers for Better Government Fund--Federal ("the PAC") concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the employment status of two of the PAC's potential contributors.

You state that the Lawyers for Better Government Fund--Federal is a nonconnected political action committee that contributes to candidates for Federal office. Although the PAC is sponsored by the law firm, Jenner & Block, it is not a separate segregated fund. According to your request, partners and the employees of incorporated partners contribute to the PAC on a voluntary basis. Non-partner employees do not contribute to the PAC.

A partner and an associate (a non-partner employee) of Jenner & Block have been appointed to the panel of private trustees maintained by the Office of the United States Trustee for the Northern District of Illinois. You state that the partner and associate did not negotiate a contract (written or otherwise) regulating the terms of their employment, but instead are subject to the terms of their appointment which is governed by federal statute. The United States Trustee program is operated by the U.S. Department of Justice. A private trustee performs the duties of a trustee in Chapter 7 bankruptcy cases and is appointed pursuant to 28 U.S.C. 586(a).¹ He or she is compensated pursuant to 11 U.S.C. 326 and 330. Section 326(a) provides that, in a case under chapter 7 or 11, the court may allow "reasonable compensation" under 11 U.S.C. 330 of the trustee for his or her services, payable after the services are rendered, from a percentage of the

moneys disbursed or turned over to parties in interest other than the debtor.² Section 330(a) provides for “reasonable compensation for actual necessary services rendered” by the trustee and “reimbursement” to the trustee for “actual, necessary expenses,” subject to section 326. Section 330(b) provides that a trustee in a chapter 7 case shall be paid \$45 from the filing fee in a case filed under that chapter after the services are rendered. You state that, in accordance with the policy of Jenner & Block, the amounts payable to the partner and associate for their services in the trustee program are paid directly to the firm.

Part 58 of Title 28 of the Code of Federal Regulations applies to the appointment of members of the private panel. The United States Trustee is authorized to establish such a panel and, with the approval of the Director in the Executive Office for United States Trustees, to increase or decrease the size of the panel and to institute a system of rotation of membership to achieve diversity of experience, geographic distribution, or other characteristics. 28 CFR 58.1. Part 58 also sets out the standards for eligibility for the private panel, including personal characteristics, profession, education, and a requirement that the potential panel member “submi[t] an application under oath, in the form prescribed by the Director, to the United States Trustee for the District in which appointment is sought.” (This last provision may be waived by the U.S. Trustee with the approval of the Director.) 28 CFR 58.3.

You ask whether the individuals acting as trustees would be considered government contractors for the purposes of 2 U.S.C. 441c. You also ask whether the partnership would be considered a government contractor if the partner or associate is considered to be a government contractor.

The Act and regulations prohibit a Federal contractor from making, directly or indirectly, any contribution or expenditure of money or other thing of value, or to promise expressly or impliedly to make any such contribution or expenditure to any political committee or other person for any political purpose or use. 2 U.S.C. 441c(a)(1), 11 CFR 115.2.³ Any person who enters into any contract with the United States or any department or agency thereof for personal services and whose compensation is paid from funds appropriated by Congress is a Federal contractor. 2 U.S.C. 441c(a)(1), 11 CFR 115.1(a)(1)(i) and (a)(2). A contract includes “[a] written (except as otherwise authorized) contract, between any person and the United States or any of its departments or agencies, for the furnishing of . . . personal services.” 11 CFR 115.1(c)(2).

The Commission concludes that, in the circumstances presented, the partner and associate do not fall within the criteria for a Federal contractor as set out in 11 CFR 115.1. It appears that a member of the panel does not contract for a position but is appointed by the United States Trustee. The terms of the member's tenure and compensation is not regulated by a contract, but, instead, by Federal statutes and regulations. In addition, the compensation to a panel member does not come from funds wholly or partially appropriated by Congress. Instead, it comes from the filing fee in the particular Chapter 7 proceeding for which the individual is serving as a trustee and from a portion of the funds in the bankruptcy estate disbursed or turned over to the parties in interest; this portion is to be determined by the court within statutory limits. Accordingly, a partner and associate at Jenner & Block who are appointed as members of a private panel by the United States Trustee are not precluded by 2 U.S.C. 441c or related

regulations from making contributions to the PAC or from engaging in other activities within the purview of the Act and Commission regulations.⁴

In view of the Commission's conclusion with respect to the noncontractor status of the partner and employee, it follows that the partnership would not be viewed as a Federal contractor solely on the basis of the appointments to the private trustees' panel. Compare Advisory Opinion 1984-10 wherein the Commission concluded that the government contract held by the partnership barred individual partners from making contributions to influence Federal elections through the use of any partnership account.

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,

(signed)

Danny L. McDonald
Vice Chairman for the Federal Election Commission

Enclosures (AOs 1984-10 and 1987-33)

1. (a) Each United States trustee, within the region for which such trustee is appointed, shall—
(1) establish, maintain, and supervise a panel of private trustees that are eligible and available to serve as trustees in cases under chapter 7 of title 11. 28 U.S.C. 586(a)(1).

2. (a) In a case under chapter 7 or 11, the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services, payable after the trustee renders such services, not to exceed fifteen percent on the first \$1,000 or less, six percent on any amount in excess of \$1,000 but not in excess of \$3,000, and three percent on any amount in excess of \$3,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims. 11 U.S.C. 326(a).

3. The regulations also provide that the prohibition does not apply to contributions or expenditures in connection with state and local elections. 11 CFR 115.2(a).

4. In Advisory Opinion 1987-33, the Commission considered a request from you with respect to whether a partner who received an appointment to the Council on Employee Welfare and Pension Benefit Plans was a government contractor. In that opinion, the Commission made its determination that the partner was not a government contractor with reference in part to the Federal employee status of the partner. As stated above, among the standards for consideration as a government contractor under the Act and regulations is the receipt of payment in whole or in part from funds appropriated by Congress. In the situation presented in Advisory Opinion 1987-

33, the partner was to be paid from such funds. Despite the fact that the partner was to be paid from Congressionally appropriated funds, the Commission indicated that the partner could be characterized as a Federal employee, rather than as a government contractor. In the situation presented here, the Commission does not address the Federal employee status of the partner and the associate because, in any event, these individuals are not compensated from Congressionally appropriated funds.