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STOEL RIVES BOLEY JONES & GREY

1990-4 F. 3.15

ATTORNEYS AT LAW
SUITE 2300
STANDARD INSURANCE CENTER
900 SW FIFTH AVENUE
PORTLAND OREGON 97204 1268
Telephone (503) 224 3380
Telecopier (503) 220 2480
Cable Language
Telex 703455
Writer's Direct Dial Number
(503) 294-9339

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March 30, 1990

Federal Election Commission
Office of General Counsel
999 E Street, N.W.
Washington, D.C. 20463

AOR 1990-06

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FEDERAL ELECTION COMMISSION

Re: Advisory Opinion Request

Dear Commissioners:

This office represents Pacific Power and Light ("PP&L"), an electric utility based in Oregon. On PP&L's behalf, we request an Advisory Opinion on the following question: Does the Federal Election Campaign Finance Act (the "Act") preempt Oregon state law with respect to the legality of a proposed plan for soliciting contributions to PP&L's separate segregated fund, for use in federal elections?

FACTS.

PP&L has established a separate segregated fund for its employees, to raise money for use in federal elections (the "Federal PAC"). The company has a separate political committee that is active in state elections. PP&L seeks to implement a solicitation plan for the Federal PAC only, to be known as the Pacific Power Community Charitable Contribution Plan (the "Plan"). Under the Plan, PP&L will match all voluntary contributions to the Federal PAC with equal contributions to charity. The Plan will allow each contributor to the Federal PAC to choose a 501(c)(3) charity as the recipient of a donation from PP&L equal to that person's contributions to the Federal PAC. PP&L's Plan is similar to several plans approved by the FEC in recent advisory opinions.¹ The plans will be

¹ Advisory Opinion 1986-44, 2 Fed Election Camp Fin Guide ¶ 5879 (1987); Advisory Opinion 1987-18, 2 Fed Election Camp Fin Guide (CCH) ¶ 5897 (1987); Advisory Opinion 1988-48, 2 Fed Election Camp Fin Guide (CCH) ¶ 5949 (1988); Advisory Opinion 1989-7, 2 Fed Election Camp Fin Guide (CCH) ¶ 5958 (1989); Advisory Opinion 1989-9, 2 Fed Election Camp Fin Guide (CCH) ¶ 5960 (1989).

Federal Election Commission
March 30, 1990
Page 2

referred to hereafter, collectively, as "matching donation plans."

STATE LAW.

ORS 260.665(2)(e) provides in pertinent part:

"(2) No person *** shall directly or indirectly subject any person to undue influence with the intent to induce any person to:

* * * * *

"(e) Contribute or refrain from contributing to any candidate, political party or political committee; ***."

"Undue influence" includes "giving or promising to give money, employment or other thing of value." ORS 260.665(1).

The Oregon Elections Division has determined that the Plan would violate the state statute because, in the Elections Division's view, PP&L's contribution to a charity of the employee's choice would be a "thing of value" to the employee, which could induce the employee to contribute to the PAC. A copy of the Elections Division's letter is attached.

ORS 260.665 is not limited by its terms to state elections and the Elections Division did not limit its determination to state elections. The question, then, is whether the state statute applies to a political committee that is active only with respect to federal elections.

DISCUSSION.

We believe that federal law preempts state law in this case because Congress intended to occupy the field as to: (1) the legality of contributions to federal political committees; and (2) the methods that corporations use to solicit contributions to separate segregated funds. This view is based on the Act's language and legislative history and several FEC Advisory Opinions.

The Act broadly preempts state law concerning federal elections by stating: "The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any

Federal Election Commission
March 30, 1990
Page 3

provision of State law with respect to election to Federal office." 2 USC § 453 (emphasis added). The legislative history for this provision demonstrates that Congress intended, as a general rule, "*** to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated." Advisory Opinion 1978-54, 1 Fed Election Camp Fin Guide (CCH) ¶ 5345 (1978) (quoting HR Rep No. 1239, 93d Cong, 2d Sess 10 (Committee on House Administration) (1974)).

With specific reference to the legality of contributions, the FEC has stated that "*** Federal law clearly occupies the field with respect to permissible and prohibited contributions to Federal candidates and committees ***." Informational Letter, 1 Fed Election Camp Fin Guide (CCH) ¶ 6953 (1976).

With reference to methods used to solicit contributions to separate segregated funds, the FEC has also stated that federal law preempts state law. Advisory Opinion 1982-29, 1 Fed Election Camp Fin Guide (CCH) ¶ 5667 (1982). In that case, United Telecom Political Action Committee ("UnIPAC") proposed to use a payroll deduction plan to collect contributions from corporate executive and administrative personnel. The FEC did not address whether any particular state statute prohibited UnIPAC's plan. The FEC concluded, however, that if any state statute did prohibit the plan, federal law would preempt the state statute. In order to reach this conclusion, the FEC relied on 2 USC § 453 and the Conference Committee Report for the Act ("Report"). The Report states:

"The provisions of the conference substitute make it clear that the Federal law occupies the field with respect to criminal sanctions relating to limitations on campaign expenditures, the sources of campaign funds used in Federal races, the conduct of Federal campaigns, and similar offenses...."² Id. (quoting HR Conf Rep No. 1438, 93d Cong, 2d Sess. at 69

² Though the language of the Report might be read to restrict preemption to criminal sanctions, § 453 and Advisory Opinion 1982-29 suggest that preemption applies to both criminal and civil sanctions.

Federal Election Commission
March 30, 1990
Page 4

(1974)) (S Conf Rep No 1237, which has the same language as HR Conf Rep No. 1438, is reprinted at 1974 US Code Cong & Admin News 5587, 5618, 5638) (emphasis added by Advisory Opinion).

A Conference Committee Report on an amendment to the Act, now codified at 2 USC § 441b, further states:

"The House amendment was intended to acknowledge the use by corporations of various methods, such as check-off systems, to solicit voluntary contributions [or to facilitate the making of such contributions] to separate segregated political funds. *** The House amendment also intended to authorize such methods notwithstanding any other provision of law." Id. (quoting HR Conf Rep No. 1057, 95th Cong, 2d Sess 62 (1976), reprinted in 1976 US Code Cong & Admin News 929, 946, 977)) (emphasis added by Advisory Opinion) (bracketed material in original Report but omitted from reported Advisory Opinion).

Accordingly, the FEC concluded that "*** the Act would supersede or preempt any State law prohibiting the proposed use of payroll deduction as a means of facilitating voluntary contributions to UniPAC." Id.; see also Informational Letter, 2 Fed Election Camp Fin Guide (CCH) ¶ 6927 (1976) (Federal law preempts state law as to a payroll deduction plan).

Based on the authorities described above, it appears that federal law preempts state law with respect to the legality of PP&L's Plan. The legality of the contributions to the Federal PAC under the Plan will depend on the legality of the method the Plan uses to solicit contributions. The FEC has stated that federal law occupies the field "*** with respect to permissible and prohibited contributions to Federal *** committees ***." 2 Fed Election Camp Fin Guide (CCH) ¶ 6953 (1976). Because federal law controls with respect to the legality of contributions, it also controls, and preempts contrary state law, concerning the solicitation of contributions. This conclusion is buttressed by the FEC's

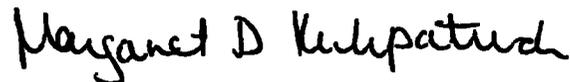
Federal Election Commission
March 30, 1990
Page 5

holding in Advisory Opinion 1982-29 that federal law preempts state law with respect to permissible solicitation methods.³

We therefore believe that, as to federal elections, the legality of the Plan depends on federal law, not state law. Because previous FEC Advisory Opinions have approved of matching donation plans for federal elections,⁴ the Plan should be lawful.

Please notify me as quickly as possible if this request is incomplete or not qualified for any reason. Once accepted, please notify me of all scheduled hearings and actions taken with respect to this request. I look forward to hearing from you. If you have any questions, please feel free to call.

Very truly yours,



Margaret D. Kirkpatrick

MDK:BLM:krc
Enclosure
cc: Ed Grosswiler
John Robinson

³ A matching donation plan is a "method" of soliciting voluntary contributions, as it concerns the manner of soliciting contributions for federal campaigns. See 11 CFR 114.1(g).

⁴ See footnote 1. In approving the matching donation plans, the Advisory Opinions cited in Footnote 1 interpreted 11 CFR 114.5(b)(1), which prohibits "indirect compensation" of contributors and appears to have the same purpose as the state statute discussed above, ORS 665(2)(e).

OFFICE OF THE SECRETARY OF STATE

BARBARA ROBERTS
SECRETARY OF STATE



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DEC 28 1989

GOVERNMENT AFFAIRS
SALEM, OREGON

ELECTIONS DIVISION
JACK GRAHAM
DIRECTOR
141 STATE CAPITOL
SALEM, OREGON 97310 0722
ELECTIONS — (503) 378 4144

December 26, 1989

Jim Anderson,
Senior Government Affairs Representative
Pacific Power
1241 State Street, N.E., Suite 201
Salem, Oregon 97301

This is to provide written confirmation of our telephone conversation regarding the contribution plan for Pacific Power & Light Employee Political Committees.

I asked Assistant Attorney General Lynn Rosik to review the plan proposed in your letter of November 21, 1989. After careful consideration Ms. Rosik has advised me that the plan would violate ORS 260.665(2)(e). I share her view that the contribution to a charity of the employee's designation is a "thing of value" as defined in ORS 260.665(1)

Courts and this office have historically interpreted that phrase very broadly to include items of such trivial value as balloons and pencils. This theory need not be extended to encompass the value one might receive from a significant monetary contribution to his or her favorite charity.

Please let me know if you have any further questions about our rationale.

Sincerely,

Jack Graham
Director

cc: Lynn Rosik