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FEDERAL ELECTION COMMISSION
WASHINGTON DC 20463

DISSENTING OPINION

OF

**COMMISSIONER DANNY LEE MCDONALD
COMMISSIONER SCOTT E. THOMAS**

ADVISORY OPINION 1991-3

In Advisory Opinion 1991-3, the Commission considered whether a sample "newsletter," submitted by TEX/CON Oil and Gas Company ("TEX/CON") and TEX/CON Political Action Committee ("TEX/CON PAC"), would constitute a solicitation of contributions by TEX/CON beyond its solicitable class in violation of 2 U.S.C. §441b. The majority concluded that distribution of the TEX/CON newsletter would not "constitute a solicitation to TEX/CON PAC" and that TEX/CON may spend its corporate monies to send the PAC's newsletter to an "audience outside of the restricted class." Advisory Opinion 1991-3 at 4. Because the legislative history and prior Commission advisory opinions indicate that this corporate communication is in fact a solicitation, we dissent.

I.

The Federal Election Campaign Act of 1971, as amended ("the Act"), makes it "unlawful for...any corporation...to make a contribution or expenditure in connection with any election" for

federal office. 2 U.S.C. §441b. This general prohibition, however, is subject to a limited number of exceptions. One such exception allows a corporation to pay for the costs of "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation...." 2 U.S.C. §441b(b)(2)(C) (emphasis added).

A separate segregated fund and its parent organization are restricted, however, as to whom they may solicit for fund contributions. The Act makes it unlawful for a corporation to solicit contributions to the fund from persons other than "its stockholders and their families and its executive or administrative personnel and their families." 2 U.S.C. §441b(b)(4)(A);¹ see FEC v. National Right to Work Committee, 459 U.S. 197, 201-202 (1982). Thus, Congress has authorized the use of corporate funds to solicit only those with a direct and immediate relationship with the corporation. A corporation may not solicit contributions to its separate segregated fund from the general public. Such a corporate solicitation beyond the restricted class would not qualify as an exception to 2 U.S.C. §441b. Rather, such a corporate solicitation if circulated

1. Under 11 C.F.R. §114.5(g), corporations are allowed unlimited solicitation of their stockholders and their families and their administrative or executive personnel and their families. There is no restriction on the number of times a corporation may solicit contributions to its separate segregated fund from those in direct relationship to it.

Section 441b(b)(4)(B) also gives a limited permission for a corporation to solicit contributions twice yearly from its non-management employees.

beyond those persons who were permissible solicitees would violate §441b.

In determining what constitutes a "solicitation," the Commission has long held that simply "informing persons of a fundraising activity is considered a solicitation." Advisory Opinion 1976-27, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5213. See also Advisory Opinion 1976-96, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5227; Advisory Opinion 1978-17, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5307; and Advisory Opinion 1979-13, 1 Fed. Elec. Camp. Guide (CCH) ¶5403. The Commission's construction of the term "solicitation" is based on the legislative history of the Act. See, e.g., Advisory Opinion 1976-96 ("the legislative history of the Act illustrates that informing persons of a fundraising activity is considered a solicitation."). As Senator Allen indicated during the Senate floor debates on what constituted a solicitation under 2 U.S.C. §441b(b)(4)(B), the term should be broadly construed: "When they [the corporation or labor organization] announce setting up the fund, obviously, that is a solicitation right there." 122 Cong. Rec. S4155 (daily ed. March 24, 1976). As a result of the legislative history, "[p]ast advisory opinions of the Commission have concluded that a contributions solicitation may occur in many types of communications which do not explicitly request the making of a contribution but nevertheless give notice to the communication recipient that a specific PAC exists to accept and make contributions." Advisory Opinion 1978-97, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5385.

Following Commission precedent and the legislative history, we believe that the TEX/CON newsletter should be considered a solicitation for contributions to TEX/CON PAC. Displayed in bold letters and underlined, near the top of the newsletter's first page, is the following "disclaimer:"

Contributions to the TEX/CON Oil and Gas Company Political Action Committee are restricted to employees of TEX/CON Oil and Gas Company only. Any other contributions received will be returned to the donor.

It seems clear to us that the disclaimer at issue here informs the recipients of the newsletter that they may contribute to TEX/CON PAC if they are employees of TEX/CON. Indeed, TEX/CON itself characterizes the disclaimer as a notice to TEX/CON Oil and Gas Company employees that they may contribute to TEX/CON PAC: "Each newsletter carries prominently a disclaimer that only employees of TEX/CON Oil and Gas Company may contribute." TEX/CON February 15, 1991 Advisory Opinion Request at 1 (emphasis added).² The message is not hard to understand. The suggestion is clear. Money is welcome. If a contribution is made by an employee, it will be accepted. Because of the disclaimer, we believe that the newsletter is a solicitation.

2. Thus, this opinion is distinguishable from two advisory opinions principally relied upon by the majority, Advisory Opinion 1979-66, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5455, and Advisory Opinion 1988-2, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶5910. See Advisory Opinion 1991-3 at 3. There is no indication in either of those advisory opinions that the organization informed persons that they "may contribute" to the organization's separate segregated fund.

The majority does acknowledge, as it must, that "although Commission regulations permit a separate segregated fund to accept an unsolicited contribution from a nonsolicitable person (assuming it is otherwise lawful), informing any person of that right is a solicitation. 11 C.F.R. §114.5(j)." Advisory Opinion 1991-3 at 2 (emphasis added) (other citations omitted). Here, the disclaimer plainly informs recipient employees that they have a right to contribute to TEX/CON PAC. Yet the majority is not willing to find that this is a solicitation.

The inconsistency of the majority's logic is made apparent by their assertion that the disclaimer must be revised to state that contributions are restricted to stockholders, executive and administrative personnel, and their families, and that any other contributions will be returned. Advisory Opinion 1991-3 at 4-5. The only conceivable reasoning for insisting on such a change is that the disclaimer would otherwise be informing non-restricted class employees of the right to contribute--which would be an impermissible solicitation. It is a strange approach which finds that the act of informing nonsolicitable persons that a corporate PAC may accept their contribution is a solicitation, but apparently the act of informing solicitable persons that a corporate PAC may accept their contribution is not a solicitation.

The majority concedes that "the disclaimer makes reference to the ability of 'employees' and inability of others to contribute." Advisory Opinion 1991-3 at 4. The majority argues, however, that this language is "negated" by language in the

disclaimer which (as revised by the majority) forbids participation from outside the solicitable class. Id. In finding that the disclaimer was not a solicitation, the majority relies on what it considers to be the similar matter of Advisory Opinion 1982-65, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5701. In that opinion, the Commission found that a corporate communication was not a solicitation because of the language and certain assurances contained in a disclaimer issued by the corporation. The disclaimer read:

The information being provided herein with respect to the Union Carbide Corporation Political Action Committee is being provided for informational purposes only and is not a solicitation by, or an invitation to contribute funds to, the Union Carbide Corporation Political Action Committee. The Union Carbide Corporation Political Action Committee will not accept contributions from shareholders, employees or others in response to this information.

Advisory Opinion 1982-65 (emphasis added).

Significantly, the disclaimer in Advisory Opinion 1982-65 stated that the communication was not a solicitation and, to that end, promised that any contribution received as a result of the communication would be returned. With its use of the word "any," the corporation underscored that the communication was not a solicitation by proposing to return even those contributions which might otherwise be received from its solicitable class. Given these assurances, the Commission was able to conclude that the corporate communication in Advisory Opinion 1982-65 was not a solicitation.

In the present advisory opinion, by contrast, neither of these assurances are present. Unlike the disclaimer in Advisory Opinion 1982-65, the TEX/CON disclaimer does not contain a disavowal of solicitation. To the contrary, the TEX/CON disclaimer carries the clear message that "employees of TEX/CON Oil and Gas Company may contribute; any other contribution received will be returned to the donor." TEX/CON February 15, 1991 Advisory Opinion Request at 1 (emphasis added). Moreover, unlike the disclaimer in Advisory Opinion 1982-65, it is equally clear that contributions received pursuant to the corporate communication will be accepted and kept. TEX/CON intends to return only those contributions received from those donors who are not employees of TEX/CON. The failure of this disclaimer to meet the standards carefully laid out by the Commission in Advisory Opinion 1982-65 provides further evidence that this disclaimer is a solicitation.

II.

In our opinion, the disclaimer contained in the TEX/CON PAC newsletter is a solicitation. That conclusion, however, does not end our analysis. On several occasions the Commission has allowed a solicitation to go beyond the solicitable class but only so long as (1) the percentage of people beyond the permissible class is relatively small; (2) the solicitation contained a disclaimer indicating that contributions from individuals outside the solicitable class would not be accepted;

and (3) there is a procedure for screening and returning contributions received outside of the permissible class.

In Advisory Opinion 1978-97, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5385, the Commission allowed a labor organization to publish solicitations in a publication for its membership where three percent of the circulation went to persons outside the permissible class of persons that the labor organization could solicit. The Commission also based its approval on the precautionary steps proposed by the labor organization to avoid soliciting other than those it was permitted to solicit under the Act. The Commission expressly noted that the labor organization planned to include in the solicitation a disclaimer stating that contributions from individuals outside of the solicitable class would not be accepted and, further, that the labor organization would implement a procedure for screening and returning nonmember contributions. Given the incidental percentage, the use of the disclaimer, and the labor organization's use of certain precautionary measures to return nonmember contributions, the Commission concluded that the solicitations would not be "viewed as solicitations directed to persons other than those whom [the labor organization] is permitted by the Act to solicit." Advisory Opinion 1978-97.

Similarly, in Advisory Opinion 1981-71, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5595, the Commission allowed a labor organization to publish a solicitation in a publication for its membership where only .16% of the circulation went to individuals who were not members and therefore could not be solicited for

contributions under the Act. In reaching its decision, the Commission again required that the labor organization include within the solicitation a disclaimer and implement a screening process for returning nonmember contributions.

In Advisory Opinion 1979-50, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5434, however, the Commission concluded that a proposed solicitation reaching persons beyond the solicitable class would be prohibited by the statute. In that opinion a labor organization proposed to publish a solicitation in a publication where 15 percent of the circulation went to persons beyond the solicitable class. "Despite the fact that the solicitation would include a caveat, and that the PAC would return all contributions received from non-members,"³ the Commission found it dispositive that "[u]nlike the solicitation proposed in Advisory Opinion 1978-97, the percentage and number of persons receiving the

3. In defense of the majority's approach, the argument was made that it doesn't really matter whether this was a solicitation because TEX/CON intended to return contributions received from outside the restricted class anyway. As the above-cited language indicates, the Commission flatly rejected this argument in Advisory Opinion 1979-50. A promise to return some of the contributions received in response to a communication does not cure the communication of its status as a solicitation. Indeed, the entire line of cases of which Advisory Opinion 1979-50 is a part illustrate that the Commission first decides whether a communication is a solicitation. Only after a communication is considered to be a solicitation will the Commission look at such factors as whether measures were taken to ensure that contributions from outside the solicitable class would be returned.

newspaper solicitation would not be de minimus." Advisory Opinion 1979-50 (emphasis added). See also Advisory Opinion 1979-15, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5415 (50.6 percent of the circulation was outside the solicitable class); Advisory Opinion 1980-139, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5586 (slightly more than ten percent of the circulation was outside the solicitable class).

We believe that the Commission should have applied the line of analysis used in these prior opinions to TEX/CON. Unfortunately, we do not know from the record whether TEX/CON has established a screening process for contributions and the extent to which the solicitation would be sent beyond the solicitable class. We only know that TEX/CON hopes to distribute the newsletter "to selected key opinion and thought leaders, including members of regulatory and legislative bodies, at the local or state or national levels." TEX/CON February 15, 1991 Advisory Opinion Request at 2. Without a full knowledge of these facts, we are not prepared to ignore our traditional line of analysis and sanction what appears to be a corporate solicitation beyond the solicitable class.

III.

Congress enacted the corporate solicitation provisions as a narrow exception to the broad, general prohibition of §441b. By finding that the corporate communication in this advisory opinion is not a solicitation, the majority has taken a step towards broadening the exception at the expense of the general rule. Accordingly, we dissent.

13 May 1991
Date

Danny Lee McDonald
Danny Lee McDonald
Commissioner

13 May 1991
Date

Scott E. Thomas
Scott E. Thomas
Commissioner