



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

April 15, 1991

CERTIFIED MAIL,  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1991-3

Richard N. Wheatley  
Secretary-Treasurer  
TEX/CON Oil & Gas Political Action Committee  
9401 Southwest Freeway  
Suite 1200  
Houston, Texas 77074

Dear Mr. Wheatley:

This responds to your letter dated February 15, 1991, requesting an advisory opinion on behalf of TEX/CON Oil & Gas Company ("TEX/CON") and TEX/CON Political Action Committee ("TEX/CON PAC") concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the distribution of the PAC's newsletter.

TEX/CON PAC issues a newsletter, TEX/CON PAC Legislative Report, that is mailed to employees' homes four times annually. The newsletter is paid for by TEX/CON as an administrative expense. You state that the newsletter informs "participating employees" about pertinent public policy issues, PAC contributions and specific oil and gas industry issues, and may include political commentary, positions advocated by TEX/CON PAC, and, occasionally, a listing of candidates who have received support.

You state that, through distribution of the newsletter, TEX/CON PAC has no intention of seeking contributions outside its restricted class. If the Act permits, however, the PAC seeks to inform a wider audience as to its positions.

Each newsletter displays prominently a disclaimer that only employees of the company may contribute and that any other contribution will be returned to the donor.

You have submitted a copy of your February 1991 newsletter. The disclaimer is displayed in bold letters near the top of the first page and states: "Contributions to the TEX/CON Oil & Gas Company Political Action Committee are restricted to employees of TEX/CON Oil & Gas Company only. Any other contribution received will be returned to the donor." The rest of the newsletter contains discussion of state governmental action and legislation in Texas and Oklahoma and Federal legislation pertaining to the oil and gas industry, including references to the principal endorsers and sponsors of such action or legislation, and the company's position on such legislation.

You ask whether the newsletter may be distributed to "selected key opinion and thought leaders, including members of regulatory and legislative bodies at the local or state or national levels." You premise your question on the assumption that there is no language in the newsletter "discussing fundraising, employee monetary involvement or encouraging future monetary involvement or support." You also state that each issue will contain the disclaimer.

The Act and Commission regulations allow a corporation, or a separate segregated fund established by a corporation, to solicit contributions to the fund from the corporation's stockholders, its executive and administrative personnel, and the families of such persons. 2 U.S.C. 441b(b)(4)(A)(i); 11 CFR 114.5(g)(1). The Act and regulations also permit two written solicitations in a calendar year to other employees. 2 U.S.C. 441b(b)(4)(B); 11 CFR 114.6(a). The corporation, however, must make such solicitations in writing to an employee's residence and pursuant to a custodial arrangement that ensures the anonymity of those wishing to contribute less than \$50 in any single contribution or those not wishing to contribute at all. 11 CFR 114.6(c) and (d). Since the PAC newsletter will be distributed beyond the solicitable class, the Commission must determine whether the newsletter, or any part of it, is a solicitation.

The Commission has previously concluded that a communication regarding a separate segregated fund's activity is not a solicitation under section 441b where the information provided would neither encourage readers to support a separate segregated fund's activities nor facilitate making contributions to it. Advisory Opinions 1988-2, 1983-38, 1982-65, 1980-65, and 1979-66. See also Advisory Opinion 1979-13. In addition, 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 CFR 114.5(j); Federal Election Commission Regulations, Explanation and Justification, House Document 95-44, 109; Advisory Opinion 1984-55 and 1983-38.

In Advisory Opinion 1979-66, the Commission considered a notice in a trade association newsletter regarding the separate segregated fund's financial activity. The notice gave information as to contribution totals received by the separate segregated fund at a major association event, the yearly total of contributions received by the fund, the number of contributors, the number of authorizations to solicit received by the fund, the amounts of contributions made by the fund, and the number of recipient candidates. The Commission concluded that this notice did not encourage support for the PAC nor provide information on how to contribute. This conclusion was contrasted with the situation presented in Advisory Opinion 1979-13 where the Commission concluded that a proposed article in a corporate newsletter would be a solicitation because it described the fundraising activities of the separate

segregated fund and contained a quotation from the fund's chairman commending the enthusiasm of employees who had participated in fund activities in the past year. Advisory Opinion 1979-66.

The Commission has also specifically considered situations in which a PAC has informed its restricted class and others of specific candidates it has supported. In Advisory Opinion 1988-2, the Chicago Board of Options Exchange ("CBOE") proposed the posting of FEC Form 3X reports disclosing receipts and disbursements of its PAC and other exchange PACs, "without comment or embellishment," on a bulletin board in an access-restricted area used by CBOE to post miscellaneous notices to its members. The Commission concluded that, in displaying these reports, CBOE would be "a passive conduit of information," and that the reports would not encourage support of its PAC or facilitate contributions to the PAC. In Advisory Opinion 1982-65, the Commission considered a request from a corporation that made only brief reference to its PAC in its annual report and advised the reader to write the corporate secretary if he or she desired further information. In response to a request for information, a shareholder requestor would be provided a report on the contributions by the PAC during the most recent calendar year, showing the recipient, the contribution amount, and the reasons for the contribution. The Commission concluded that such a response merely informed the shareholder without suggesting that a contribution be made.

In determining whether the newsletter would constitute a solicitation, the Commission confines its conclusion to your representations in the request letter and the sample newsletter submitted by you. Your request letter and the sample newsletter indicate that the PAC will present its views on specific issues, often with identification of the officeholder or legislator proposing a specific course of action or legislation, and will, from time to time, list candidates who have received support from the PAC. You state, however, that the newsletter will refrain from discussing fundraising, employee monetary involvement (which the Commission assumes to mean contributions to the PAC), or encouraging such employee support. The sample newsletter submitted by you, which does not mention or list candidates supported by TEX/CON PAC, may engender some inquiry about the PAC but avoids encouraging contributions or imparting information as to how to contribute. See Advisory Opinion 1983-38. The same may be said for a newsletter that mentions or lists candidates supported by the PAC, as long as the political and issue commentary in the newsletter does not include discussion of those candidates or their opponents in such a way as to indicate that support for the PAC would be helpful in order to elect or defeat those candidates.<sup>1</sup>

The Commission acknowledges that the disclaimer makes reference to the ability of "employees" and inability of others to contribute. Nevertheless, the Commission has considered phrases forbidding participation from outside the solicitable class to be language that can serve to negate the characterization of a communication as a solicitation or the effect of a solicitation outside that class. See Advisory Opinions 1982-65 and 1978-97. See also Advisory Opinion 1979-50. The inclusion of such a disclaimer, therefore, does not change the informational, non-solicitative, nature of the newsletter and its contents.

The Commission concludes, therefore, that, subject to the conditions set out above, neither the newsletter nor any part of it, will constitute a solicitation to TEX/CON PAC and may be sent to the proposed audience outside the restricted class. The Commission also conditions this approval

on a change in your disclaimer. Although you intend to seek contributions from the restricted class only, your proposed disclaimer erroneously characterizes the extent of the restricted class. In addition to stockholders (and their families), the restricted class of a corporation under 11 CFR 114.5 includes only those employees who are executive or administrative personnel (along with their families). As stated above, other employees may only be solicited under specific conditions set out in 11 CFR 114.6. If you intend to retain the disclaimer, it must be amended accordingly so as not to be interpreted as an invitation for contributions from non-executive or non-administrative employees.

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.

Although your request does not refer specifically to this issue, the Commission notes that partisan communications in connection with a Federal election may not be paid for by a corporation to the extent those communications are made outside the restricted class. 11 CFR 114.3(a)(1). See also 11 CFR 114.5(i). You have informed the Commission that TEX/CON, not TEX/CON PAC, pays the costs of the newsletter. The newsletter, therefore, must avoid making its communications as to issues and officeholders in any manner that would constitute partisan communications.

Sincerely,

(signed)

John Warren McGarry  
Chairman for the Federal Election Commission

Enclosures (AOs 1988-2, 1984-55, 1983-38, 1982-65, 1980-65, 1979-66, 1979-50, 1979-13, and 1978-97)

1/ The Commission expresses its caution on this aspect because, although information as to the reason for specific PAC contributions was not deemed to be encouragement of support for the PAC in Advisory Opinion 1982-65, that information would be given in response to a shareholder request for information about the PAC, as opposed to inclusion in a regularly circulated newsletter or report.