

COMMISSIONER THOMAS J. JOSEFIK

Advisory Opinion 1991-29

Concurring Opinion

I supported the result in Advisory Opinion 1991-29 because the requestor presented facts similar to those in the "Hallmark" opinion (Advisory Opinion 1981-21), and because that prior opinion's "deferred earmarking" approach appeared to be the only basis upon which a majority of the Commission could agree to advise the requestor. ¹ The Commission could not agree, however, on whether the Sundstrand Pledge Program, as described, would involve the conduit PAC exercising "direction or control over the choice of the recipient candidate" with respect to the earmarked contributions of participating employees. See 11 CFR 110.6(d).

It has long been the Commission's position that the recommending of a potential recipient by an entity acting as a conduit for earmarked contributions does not necessarily constitute "direction or control" under 110.6. See MUR 1028 (Council for a Livable World) and Advisory Opinion 1980-46. The mere suggesting of a candidate to

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1. The focus of Advisory Opinion 1991-29 would indicate the requestor, in order to stay within the provisions of the Federal Election Campaign Act and Commission regulations, may only modify its employee participation program to more clearly fit the Hallmark "deferred earmarking" plan. That may be true if the requestor wishes to emulate that program, but the Hallmark earmarking analogue is not entirely consistent with the requestor's proposed program and objectives. Nor should it be the exclusive model for efforts by separate segregated funds to involve their contributors in deciding which candidates the PAC should support (see concurring opinion of Commissioners Aikens and Elliott).

a contributor is not 'directing or controlling' the donor's choice, and should not automatically trigger the dual attribution consequence under 110.6(d)(2) for "direction or control," by which contributions count toward the contribution limits of both donor and conduit.

Requesting or encouraging contributions may have particular consequences under the Act, as does serving as a conduit for earmarked contributions. Such activity, however, should not be treated as highly suspect, nor discouraged through a vague and undefined 'direction or control' standard. Application of the 110.6 rules must reasonably assume that groups and committees actively engaged in the political sphere may act as conduits for earmarked contributions, and that they will solicit and advocate contributions for specific candidates. Directing or controlling the contributor's choice of recipient candidate must mean more than asking for contributions earmarked for specific candidates. \²

Therefore, in circumstances where a political action committee solicits contributions for specific candidates and acts as a conduit for earmarked contributions, the PAC's role should not inherently be viewed as "direction or control over the choice of the recipient

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2. The legal line under 11 CFR 110.6 cannot then hinge merely on the relative 'degree of influence' or persuasive nature of solicitations. Otherwise, we are left with a vague, sliding-scale standard based upon relative persuasiveness of the solicitation: "You can ask, but don't influence the decision-making of the contributor." The query should not be whether a solicitation for earmarked contributions "influenced" the contributor (of course it did), but whether the solicitation, or the manner of transmitting the contribution, effectively supplanted or interfered with the contributor's ability to make an independent decision. 'Dual attribution' only makes sense if the conduit has, to some significant degree, co-opted the contributor's discretion -- not just encouraged the result.

candidate" under 11 CFR 110.6(d). As contemplated by the regulation, such a finding depends on the circumstances and methods of solicitation and transmittal of the contributions.

The Commission has properly recognized, however, the particular opportunity for the exercise of "direction or control" in the context of solicitations for earmarked contributions by a separate segregated fund of a corporation or labor union -- in the setting of the workplace. Such circumstances, where persons may believe their jobs are affected, may require heightened scrutiny to watch for the potentially coercive effects of certain solicitation practices or the surrendering of decision-making by contributors. See 11 CFR 114.5(a). That recognition does not demand a conclusion that any solicitation by a separate segregated fund for earmarked contributions to candidates be treated as involving "direction or control" of the donor's choice under 110.6. The regulation suggests no 'per se' distinction or disqualification for SSFs. The workplace is, in fact, where economic and political interests of persons are most likely and naturally to coincide; there is nothing insidious about political discussion and fundraising among coworkers. The Act and our regulations strongly encourage such interaction. See, generally, 11 CFR Part 114.

A significant example of the fact-dependent determination of "direction or control" is Advisory Opinion 1986-4. The Commission determined that the requestor, a corporation, could not generally engage in a political fundraising program operated within and through

a corporate executive structure. \³ The Commission stated that only a separate segregated fund could act as a corporate-sponsored conduit for the contributions of its employees. The Commission concluded, if the corporation were to set up such a fund to act as a conduit, the solicitation and conduit activity described by the request would constitute "direction or control over the choice of the recipient candidate" under 11 CFR 110.6(d), and contributions raised under those methods would be subject to that provision's 'dual attribution' consequences.

Under the facts presented in Advisory Opinion 1986-4, specific contribution goals for the corporation were to be determined by a committee of corporate executives in response to solicitations from candidates and political action committees. A representative of the committee would then individually canvas those executives who had pledged to participate and encourage giving to the recommended candidate or committee until a particular and predetermined aggregate contribution amount was achieved. "Matching up" of contributors to recipients was to be conducted on a personal, one-to-one basis, and was undertaken as the primary (if not sole) means for employees to fulfill their previous promise to contribute a particular dollar amount. Employees would inevitably have to decide whether to decline a personal request from executive personnel to make a contribution and to renege in their commitment to help meet aggregate company goals for specific candidates.

3. The Commission concluded the program involved corporate activity "in connection with" Federal elections prohibited under §441b of the Act, and the activity did not qualify for any exception to that prohibition.

Given the potential pressure of the workplace environment, the predetermined aggregate amounts to be contributed by the employees as a group, the focused and personalized nature of the solicitations, and the lack of alternatives presented to potential contributors, the Commission concluded the circumstances described in Advisory Opinion 1986-4 would result in "direction or control" over the donor's choice of recipient candidate (and, consequently, earmarked contributions raised would also count against the corporate PAC's limits).⁴ In contrast, the solicitation approach described by the request and accompanying documentation in Advisory 1991-29 did not represent circumstances where decision-making by contributors would be surrendered to or co-opted by the conduit, or where solicitations would be tightly focused on particular employees.

Participants in the Sundstrand program were under no obligation to promise a contribution total in advance. Materials soliciting participation in the pledge program were to contain statements advising participants of their right not to contribute to recommended candidates, their right to contribute to other candidates instead and their right to seek refunds of their money rather than contribute at all (materials in the request included disclaimers advising employees

4. The result in Advisory Opinion 1986-4 has often been broadly and incorrectly cited for the proposition that any solicitation for earmarked contributions to specific candidates by a conduit, or by a separate segregated fund acting as a conduit, will constitute (or is presumptively) "direction or control." My vote for that opinion meant no such thing. While I continue to agree with its outcome, based on the fact pattern presented, I regret approving the overbroad language and inexact legal analysis of Advisory Opinion 1986-4. In particular, I reject any implication in the opinion that the issue of "direction or control" is always to be decided on the basis of an unspecified "totality of the circumstances test" (see footnote 6).

of their "right to refuse to contribute without reprisal," and actually told employees any funds contributed to the PAC remained their money). No aggregate contributions per candidate were to be determined by the program in advance and, of course, contributions to candidates were to be disbursed exactly pursuant to the designations of the participants.

Importantly, the part of the program involving solicitations for contributions to candidates would be conducted through periodic descriptions and recommendations of potential candidate recipients by letter to the entire group of participating employees. These suggestions of specific candidates were understood to be part of a continuing series of choices for participants.

It is hard to imagine a more benign setting for recommending candidates to employee-contributors than the proposal in Advisory Opinion 1991-29. Based on the requestor's representations of their solicitation methods, and absent any other reason to believe such donor choices would not be voluntary and deliberate, the Commission should have concluded that the program's solicitation and forwarding of earmarked contributions from participants would not appear to constitute "direction or control" under 110.6(d). With all the precautions and general sensibility built into the requestor's program, it is frustrating the General Counsel and my Democratic colleagues could not acknowledge -- at least here, under these facts -- the circumstances would not inherently constitute "direction or control" (or could not identify any problems with some particularity).

Unfortunately, the principle that a recommendation or suggestion of specific candidates does not automatically constitute "direction or

control" seems to be accepted in theory by the Commission, but never by a majority in application. Questions are always raised about how much "influence" the organization acting as a conduit may exert upon the contributor's decision. Endorsements of candidates from an advisory board of a separate segregated fund would supposedly be perceived as marching orders to the employees. Rather than assume contributors to political campaigns are acting willingly out of a healthy mixture of civic duty and self-interest -- the foundation of political life -- the almost irrefutable presumption seems to be that normal people do not voluntarily give to candidates, particularly to candidates they do not know much about, and that solicitations in these circumstances cannot be refused. \⁵

The law should not (and cannot reasonably) assume contributors tend to be victims of coercion or irresistible fundraising pitches. Generally, contributors to political campaigns willingly choose to give to candidates they like and believe will do a good job in office, and with whom they agree on issues affecting their lives. Toward that end, contributors may seek information and respond to suggestions.

Recommending or endorsing candidates to whom persons of similar livelihood and economic interest may wish to contribute, and serving as the means for transmitting earmarked contributions that may result,

5. The effort to broadly use "direction or control" as a consumer protection device is even less credible in the context of requests for earmarked contributions to candidates in mass mailings, such as the fundraising efforts of a national party committee. As I stated in my Statement of Reasons in MUR 2282: "... [D]irect mail solicitations to lists containing thousands of potential contributors fit at the end of the spectrum where the least opportunity for coercive effects or undue pressure may be reasonably imputed."

is an entirely legitimate role for separate segregated funds. \⁶
The Commission should generally assume (unless specific facts suggest otherwise) that employees want to support their PAC if they contribute to it, and want to contribute to candidates who, as officeholders, would work to the benefit of their company or industry or union. The PAC board's recommendations of candidates deserving support under such criteria is a sensible convenience (not everyone subscribes to National Journal or Congressional Quarterly). The whole process is not so remarkable or suspicious.

The process can, of course, be corrupted. Fundraising methods can go overboard. Discouraging the exceptional cases of coercion and pressure in the workplace is what the Commission's enforcement actions and line-drawing in advisory opinions are meant to accomplish. But we should not presume that employees are being forced to contribute to specific candidates under such a program unless particular facts or elements of the program seem to truly undermine the voluntary and discretionary act of the contributor -- unless the conduit genuinely seems to be exercising direction or control (as it appeared would result in Advisory Opinion 1986-4). And we should try to identify as clearly as possible those facts or elements that might lead to such a

6. The practical effect of 'dual attribution' under 110.6(d) may not be that onerous. In few situations will individual earmarked contributions of employees to candidates exceed the total permitted by their PAC's \$5000 limit (although such attribution immediately cuts in to the right of the PAC itself to give under the law). The issue is truly more of principle than practical effect: Is a separate segregated fund entitled to give advice to the makers of earmarked contributions for which it acts as a conduit? I think the answer is clearly yes, and I find no support in the Act or Commission regulations to penalize or discourage activity that goes no further.

conclusion of "direction or control," rather than cryptically refer to "totality of the circumstances." ⁷

The Commission has had the opportunity to outline the parameters of "direction or control" in a number of settings over the years, but it has remained impossible for a majority to agree on where the line should be drawn. See, e.g., MUR 2282 and Advisory Opinion 1987-29. It is long overdue for the FEC culture to shed its instinctive aversion to ordinary political fundraising. It is time to face up to describing a specific meaning for the "direction or control" standard under the earmarking regulations, instead of treating it as a chance

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7. Advisory Opinion 1986-4 has been sometimes cited to indicate the Commission's commitment to utilizing the so-called "totality of the circumstances" test in applying the "direction or control" standard of 11 CFR §110.6. From my perspective, however, the "totality of the circumstances test" should not be considered the Commission's preferred basis for evaluating the facts in "direction or control" cases (or any other particular category), and should probably be viewed as a measure of last resort.

The "totality of the circumstances test" looks to a combination of legally relevant facts to decide a legal conclusion. At its most persuasive, the test identifies facts that interact in some significant manner to cross the 'direction or control' line.

The approach should not, however, permit abandoning the need to find genuine legal significance in the facts. As I stated in my Statement of Reasons in MUR 2282, the "totality of the circumstances test" is capable of misapplication in specific cases in order "to justify an intuitive judgment and avoid a definable legal conclusion." Rather than explain, the test may serve to obfuscate the significance or weight to be given particular factual elements. Reliance upon it may permit legal results to hinge on extra-legal, subjective and even emotional factors. Often, the "test" provides a rather scientific name for an unscientific approach to legal analysis.

An evolving Commission definition of "direction or control" through case by case review should not be confused with the "totality of the circumstances test." Hopefully, the more actions or behavior that can be specifically recognized in cases as indicating "direction or control," the less likely our legal conclusions will need to fall back on a "totality" rationale.

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to circumscribe PAC activity. Rather than constantly renegeing on the principle that "recommendation is not necessarily direction" in every case, the Commission should set out some relatively specific limits and guides for soliciting earmarked contributions under the "direction or control" standard of 11 CFR 110.6(d). The Commission missed a good opportunity to begin in Advisory Opinion 1991-29.

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