



FEDERAL ELECTION COMMISSION
Washington, DC 20463

September 30, 1993

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1993-16

Nora Schwartz, Constituent Relations
Blue Cross of California
P.O. Box 70000
Van Nuys, California 91470

Dear Ms. Schwartz:

This refers to your letters of May 17, August 4, and August 19, 1993, concerning application of the Federal Election Campaign Act of 1971 ("the Act"), as amended, to a plan to solicit contributions from certain classes of employees of Blue Cross of California ("BCC").

You state that BCC wishes to solicit contributions for its Federal PAC from three classes of its employees. You believe these personnel meet the requirements for inclusion in BCC's restricted class, as outlined in materials published by the Federal Election Commission.^{1/} These classes of employees are:

- a) Telemarketing Representative
- b) Lead Telemarketing Representative
- c) Regional Sales Manager

You state that each of these three classes receives compensation that is apportioned between salary and commission with, on the average, nearly a third of the compensation being a straight salary and the rest consisting of commissions.^{2/} Your request asks whether these three classes of employees are considered executive or administrative personnel and thus, solicitable by BCC's separate segregated fund pursuant to 11 CFR 114.5.

The Act and Commission regulations prohibit a corporation from making contributions or expenditures in connection with a Federal election, but permit it to establish, administer, and solicit voluntary contributions to a separate segregated fund to be utilized for political purposes. 2 U.S.C. 441b(a) and 441b(b)(2)(C); 11 CFR 114.2 and 114.5. The corporation or its separate

segregated fund may solicit a restricted class consisting of executive or administrative personnel and their families, and stockholders and their families, at any time. However, the solicitation of other employees and their families is limited to twice yearly. See 2 U.S.C. 441b(b)(4)(A)(i), (b)(4); and 11 CFR 114.5(g)(1) and 114.6.

The Act and Commission regulations define "executive or administrative personnel" as individuals who (1) are employed by a corporation; (2) are paid on a salary basis; and (3) have policymaking, managerial, professional, or supervisory responsibilities. 2 U.S.C. 441b(b)(7); 11 CFR 114.1(c); see also Advisory Opinions 1984-55 and 1978-27. With regard to the third criterion, Commission regulations state that the Fair Labor Standards Act ("FLSA") and its regulations may serve as a guideline to determine whether an individual possesses policymaking, managerial, professional, or supervisory responsibilities. 11 CFR 114.1(c)(4); see, e.g. Advisory Opinions 1988-11.

Your request provides information that the first two elements of the above test are met. All three positions require that the individuals be employed by the corporation and involve the payment of a salary as compensation. The job descriptions included in your request must be examined to determine whether each position involves policymaking, managerial, professional, or supervisory responsibilities.

Telemarketing Representative

The materials you provided indicate that the position of telemarketing representative would be best characterized as a sales position.^{3/} According to the job summary description, an employee who holds this position "[p]rimarily through telephone and written communication, presents and sells individual plan insurance coverage." The job description details other duties that are related to this task such as preparation of enrollment forms and periodic sales reports. As a sales person, the telemarketing representative would seem to have no managerial, professional or supervisory responsibilities as commonly understood. Accordingly, the Commission concludes that a telemarketing representative does not qualify under the Act as part of the "executive or administrative personnel" who form BCC's restricted class.

Lead Telemarketing Representative

The job description for lead telemarketing representative indicates that this position is, in many respects, similar to that of the telemarketing representative. The summary description for lead telemarketing representative states that an employee holding this position in a "lead[ing] role, primarily through telephone and written communication, presents and sells individual Plan insurance coverage."

A distinction is that since an individual in this position "[m]ay oversee and develop lower level Telemarketing [Representatives]," this class of employees seems to exercise occasional managerial responsibilities.^{4/} Yet taken as a whole, the primary responsibility of this position would seem to be sales, rather than policymaking, managerial, professional, or supervisory work. See Advisory Opinion 1978-27.^{5/} It is significant, for example, that telemarketing representatives and lead telemarketing representatives are paid the same salary. Therefore, the

Commission likewise concludes that lead telemarketing representatives do not form part of BCC's restricted class.

Regional Sales Manager

A different conclusion holds for position of regional sales manager. According to the job description, those who hold this position, unlike the previous two, have a variety of supervisory, administrative and professional responsibilities. A regional sales manager is responsible for the quality of sales work by agents and "works to build, maintain and monitor a quality group of appointed agents and implements standards required of appointed agents." An employee in this position also plans sales strategy for an entire region and must maintain the sales records for that region. Finally, while the previous two positions required only the eligibility for a state life insurance and disability insurance license, this position requires the employee to qualify and maintain such a license. Therefore, the Commission concludes that a regional sales manager is part of BCC restricted class and may be solicited as provided by section 114.5.^{6/}

The Commission's conclusions, of course, do not alter BCC's right to solicit all three classes of employees, as well as its other employees, under the twice yearly solicitation procedures authorized by 2 U.S.C. 441b(b)(4)(B) and 11 CFR 114.6. This conclusion also does not affect BCC's ability to solicit those telemarketing representatives and lead telemarketing representatives who may qualify as BCC stockholders. See 11 CFR 114.5(g)(1).

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)

Scott E. Thomas
Chairman

Enclosures (AOs 1988-11, 1984-55 and 1978-27)

ENDNOTES

1/ Your initial May 13 letter included an additional fourth class, FEP Account Representative, which you wished to include in the proposed solicitation. Your August 4 letter subsequently withdrew these individuals from the request by stating that BCC will not solicit them.

2/ Your August 9, 1993 letter indicated that telemarketing representatives and lead telemarketing representatives were paid a straight weekly salary of \$323 exclusive of commissions, while regional sales managers were paid \$500 weekly exclusive of commissions. Your request states that both the straight salary portion and the commission portion of these individuals' compensation were subject to FICA withholding.

3/ Your August 19 letter confirms that telemarketing representatives, as well as lead telemarketing representatives, are inside sales persons. You explain that, under FLSA, these individuals are not exempt from the minimum wage provisions. However, you assert that they qualify for an exemption from FLSA overtime pay rules.

The Commission notes that according to the legislative history of the Act, FLSA is relevant to an analysis of a restricted class only to the limited extent it provides general guidance as to the definition of executive, administrative or professional employees. Even in these situations, the definition of solicitable class under the Act or Commission regulations is not determined as a matter of law by the definitions under FLSA. See Cong. Rec. S6368 (daily ed. May 3, 1976) (statement of Sen. Cannon) reprinted in Legislative History of Federal Election Campaign Act Amendments of 1976, at 1094, (GPO 1977).

4/ The job description states that this individual may disseminate information to other telemarketing representatives, may assist with performance reviews and provide guidance to staff. Further this employee may assume supervisory duties in the absence of the manager.

5/ On the basis of facts provided by the corporation and noted by the Commission, Advisory Opinion 1978-27 concluded that a corporation's unit managers were within its executive or administrative personnel class. These facts indicated: the salaries paid to the unit managers, the regular supervisory authority they exerted over employees, that less than 40% of their weekly work hours were spent on tasks unrelated to an executive function, their administrative responsibilities, their sole responsibility over a specific facility, the discretionary authority they wielded, and the promotion potential of the position.

6/ Your August 4, and August 19, letters explain that for purposes of FLSA, a regional sales representative is classified as an outside sales person under 29 CFR 541.5. That this individual is not classified under the provisions of FLSA covering employees working in an executive, administrative or professional capacity does not necessarily preclude the Commission concluding that an employee in this position is part of BCC's restricted class. See footnote 3. The information you have provided would make it possible to draw parallels between regional sales managers and section managers described in the legislative history of section 441b as part of a corporation's administrative or executive personnel. See H.R. Conf. Rep. No 94-1057, 94th Cong., 2d Sess. 62 (1976) reprinted in Legislative History of Federal Election Campaign Act Amendments of 1976, at 1056, (GPO 1977).