



FEDERAL ELECTION COMMISSION
WASHINGTON DC 20463

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November 23, 1993

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Hitchfield
Associate General Counsel

Jonathan M. Levin
Senior Attorney

AGENDA ITEM
For Meeting of: DEC 2 1993

SUBJECT: Draft AO 1993-18

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for December 2, 1993.

Attachment

210-351-3467

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ADVISORY OPINION 1993-18

DRAFT

93 NOV 23 AM 9:47

Alan E. Siegel, Senior Attorney
Southwestern Bell Corporation
175 E. Houston
12th Floor
San Antonio, TX 78205

Dear Mr. Siegel:

This responds to your letter dated September 3, 1993, as supplemented by your letter dated October 22, 1993, on behalf of the Southwestern Bell Corporation ("SBC") concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the provision of information to corporate employees about how to volunteer for specific political campaigns.

SBC is an international telecommunications holding company with almost one million shareholders. Its subsidiaries employ over 59,000 employees.^{1/} You state that SBC subsidiaries actively encourage all their employees to be involved in their communities, including political and legislative activities, "i.e., to be politically informed, to vote, to stay abreast of legislative issues and to express their opinions to elected officials."

As part of this effort, SBC and its subsidiaries propose to initiate a program to encourage employees and retirees to volunteer to serve as campaign workers for candidates of their choice in both Federal and non-Federal elections and to

^{1/} The largest of SBC's subsidiaries is Southwestern Bell Telephone Company, which provides local exchange service in Arkansas, Kansas, Missouri, Oklahoma, and Texas.

"facilitate the involvement of volunteers in campaigns."

This is considered to be in the company's best interest by increasing the personnel's community involvement and political awareness and by "open[ing] channels of communication for the expression of company views to lawmakers."

SBC companies propose to facilitate the volunteer involvement in three ways. They are:

- 0
1 (1) Early in the campaign season, an SBC company would
2 send questionnaires to all candidates campaigning for a
3 particular elected position to determine how employees
4 and retirees wishing to volunteer can best help out,
5 whom they should contact to work in the campaign, when
6 they are needed, and the telephone number and address of
7 the candidate's campaign office. The SBC company would
8 publish this information about all candidates for a
9 particular elected position either in company prepared
0 bulletins, which is the normal means for communicating
1 local or regional information to SBC company employees,
2 or in another written form of communication such as a
3 poster, flier, memorandum, or electronic mail. SBC
4 companies maintain close ties to retirees. They often
5 attend company functions and receive a monthly
6 publication designed especially for them. This
7 publication would contain the above-described
8 information for them.
- 0
1 (2) An SBC company would set up a candidate information
2 booth in company locations where information on all
3 candidates' campaign offices will be available. For
4 each candidate, the booth would contain some or all of
5 the following data - the candidate's name, party
6 affiliation, office sought, telephone number and address
7 of headquarters, name of a contact person at
8 headquarters, the type of volunteer help needed, and
9 when the help is needed. Company prepared posters and
0 other written communications would encourage employees
1 to work for their choice of candidates, with no bias or
2 preference shown to any candidate. The booth would not
3 contain campaign literature prepared by any candidate or
4 candidate's campaign committee.
- 0
1 (3) When a candidate speaks to employees on a
2 non-partisan basis at company locations, a company
3 representative will announce whom to contact if
4 employees wish to volunteer for the candidate speaking.

All candidates for a particular elected position would be given the same opportunity to appear before employees.

Any one of these three options may be used by itself or in combination with one or both of the other options. All expenses related to these activities would be paid for by SBC companies. Planning and coordination of these activities would be performed entirely by SBC company employees on company time and would involve the use of company supplies and materials.

You note that names of employees who might be willing to volunteer in a campaign will not be provided to candidates by SBC personnel and that it will be up to the individual to volunteer his or her services. In addition, SBC companies will not permit employees to take time off the job with pay to work in a campaign. Employees may, however, use their accrued vacation days or designated holidays (which is paid time off and which the employee may use as he or she chooses) to work in a campaign.

Finally, you state that, when encouraging employees to volunteer for the candidates of their choice, the SBC companies will not take any action which would have the effect of promoting one candidate or campaign over another; there will be no express or implied advocacy. Furthermore, you explain that the companies "have no immediate plans to communicate on a partisan basis with members of the restricted class," although a future decision to make such communications is possible.

3 You request an advisory opinion as to whether the
4 above-described program, entailing communications with
5 employees and retirees, is permissible with respect to
6 Federal candidacies under the Act.

7 The Act prohibits contributions and expenditures by a
8 corporation in connection with a Federal election. 2 U.S.C.
9 §441b(a); 11 CFR 114.2(b). The term "contribution" (or
10 "expenditure") is defined to include "any direct or indirect
11 payment, distribution, loan, advance, deposit, or gift of
12 money, or any services, or anything of value ... to any
13 candidate, campaign committee, or political party, or
14 organization," in connection with any Federal election. 2
15 U.S.C. §441b(b)(2); 11 CFR 114.1(a)(1). See 2 U.S.C.
16 §431(8)(A)(i) and (9)(A)(1); 11 CFR 100.7(a)(1) and
17 100.8(a)(1). The phrase "anything of value" includes goods
18 or services provided without charge, or at less than the
19 usual and normal charge. 11 CFR 100.7(a)((1)(iii)(A) and
20 100.8(a)(1)(iv)(A).

21 Commission regulations specifically address
22 disbursements by corporations for partisan communications and
23 for nonpartisan communications. The regulations provide that
24 certain communications by a corporation may not be made to
25 the general public, but may be made to stockholders and
26 specific classes of employees, and their families.
27 Communications that comply with these regulations will avoid
28 treatment as a corporate contribution or expenditure. 2
29 U.S.C. §441b(b)(2)(A) and (B); 11 CFR 114.1(a)(2)(x), 114.3,
30

and 114.4.

Partisan Communications

A corporation may make partisan communications to its stockholders and executive or administrative personnel and their families, i.e., its restricted class. 2 U.S.C. §441b(b)(2)(A); 11 CFR 114.3(a)(1) and 114.1(c). As long as the corporation complies with certain parameters set out in the regulations, such communications will avoid treatment as prohibited contributions. A permitted communication includes the distribution of printed material of a partisan nature as long as it is produced at the corporation's expense and constitutes a communication of the corporation's views rather than a partial or complete reproduction of any broadcast, transcript or tape of any materials produced by the candidate or his campaign. 11 CFR 114.3(c)(1). See Advisory Opinions 1987-29 and 1982-2.^{2/}

The printed materials, which are produced by the corporation and not by any campaign, do no more than inform as to the candidates' names, party affiliations, the campaign committees' locations, phone numbers, and contact persons, and information on what type of help is needed and when it is needed. These types of information and the materials used

^{2/} Also included as permitted communications are partisan candidate and political party appearances whereby a corporation may allow a candidate or party representative to address the restricted class at a corporate gathering, as long as no more than a small number of persons outside the class, i.e., those necessary to administer the meeting, limited invited guests, and news media, are in attendance. 11 CFR 114.3(c)(2).

fall well within the information that may be conveyed to the restricted class. See, for example, Advisory Opinion 1987-29 (corporation permitted to distribute candidate advocacy messages, including contribution solicitations, in support of those candidates to its restricted class).

Based on the foregoing, the proposed communications are permissible when conveyed to the restricted class, i.e., executive and administrative personnel of SBC companies, their stockholders, and the families of such persons.^{3/} A retiree or non-executive or non-administrative employee is included in the restricted class only if he or she qualifies as a stockholder under Commission regulations. 11 CFR 114.1(c)(2)(iii). See also 11 CFR 114.6(a) (excluding non-stockholder retirees from the group of non-executive and non-administrative employees eligible to receive twice-yearly written solicitations for contributions to an SSF). A stockholder means "a person who has a vested beneficial interest in stock, has the power to direct how that stock should be voted, if it is voting stock, and has the right to receive dividends." 11 CFR 114.1(h). See Advisory Opinions 1988-36, 1988-19, and opinions cited therein.

Nonpartisan Communications to Other Employees and Their

^{3/} The restricted class of a corporation also includes the restricted class of its subsidiaries, branches, divisions, and affiliates. See 11 CFR 114.5(g)(1); see also Advisory Opinion 1991-3, n. 1, and Federal Election Commission Regulations, Explanation and Justification, House Document No. 95-44, at 108 (1977) (i.e., that the corporation's restricted class for partisan communications is the same as that for solicitation to an SSF).

Families

Rather than providing this information for only one candidate or for certain preferred candidates running for a particular Federal office, the SBC companies will be providing the information with respect to all candidates for a particular office.

Commission regulations provide that a corporation may make nonpartisan communications to its restricted class as well as its other employees and their families. 11 CFR 114.4(a)(1)(i). Included in such communications are nonpartisan candidate and political party appearances on corporate premises or at a meeting, convention, or other function of the corporation. These communications must meet a number of conditions: (a) If a House or Senate candidate, or a candidate's representative, is permitted to address or meet employees, then all candidates for the seat who request to appear must be given the same opportunity. (b) A corporation, its stockholders, its employees, or its SSF may make no effort, either oral or written, to solicit or direct or control contributions by members of the audience to any candidate or political party in conjunction with any candidate or party representative appearance under this section. (c) A corporation, its stockholders, its employees, or its SSF may not, in conjunction with any candidate or political party representative appearance under this section, endorse, support or oppose any candidate, group of candidates, or political party. 11 CFR 114.4(a)(2)(i), (iv),

3 and (v).^{4/}

4 Your proposal contains elements that resemble the
5 safeguards set out in nonpartisan candidate appearance
6 communications. The SBC companies will gather information
7 from all candidates and make it available to corporate
8 employees.^{5/} Although conveying information as to how and
9 when a volunteer can best help out in a campaign may provide
10 some assistance to the campaign, such information, along with
11 the other elementary information to be conveyed, may also be
12 provided as part of the above-described non-partisan
13 communications. Based on the foregoing, the proposed
14 communications may also be made to employees of the SBC
15 companies and their families, as well as the restricted
16 class. In approving your proposal for employees outside the
17 restricted class and their families, the Commission

18
19 4/ Other conditions for such nonpartisan appearances are as
20 follows: (1) If a Presidential or Vice Presidential
21 candidate, or a candidate's representative, appears, all
22 candidates seeking a major party nomination or who are on the
23 general election ballot in enough states to win a majority of
24 electoral votes must be given the same opportunity. (2) If a
25 political party representative appears, representatives of
all parties which had a candidate on the last general
election ballot or which are actively engaged in placing or
will have a candidate on the next general election ballot
must be given the same opportunity. 11 CFR 114.4(a)(2)(ii)
and (iii).

26 5/ With respect to House and Senate candidates, the
27 Commission construes the phrase "all candidates" to mean all
28 candidates appearing on the ballot for a particular office.
See Explanation and Justification, Nonpartisan Communications
29 by Corporations and Labor Organizations, 48 Fed. Reg. 50502,
30 at 50504 (November 2, 1983) (discussion of 11 CFR
114.4(b)(2)). See also, by analogy, 11 CFR 114.4(a)(2)(iii).
With respect to Presidential or Vice Presidential candidates,
see 11 CFR 114.4(a)(2)(ii).

3 conditions its opinion on the assumption that, when
4 implementing the program, no SBC companies and no SBC
5 separate segregated fund will make partisan communications
6 that endorse or support any candidate who is identified in
7 program materials, or solicit or make contributions with
8 respect to any such candidate. 11 CFR 114.4(a)(2)(iv) and
9 (v). The Commission construes this to mean that such
10 activities of candidate support may not occur at the time
11 that the written communications, which include references to
12 those candidates, are distributed or made available to
13 company employees, or at the time the information booths and
14 posters which contain references to these candidates are in
15 place or on display. These candidate support activities by
16 corporate personnel must also be barred during appearances by
17 candidates for the particular seat. See Federal Election
18 Commission Regulations, Explanation and Justification, House
19 Document No. 95-44, at 105-106 (1977) (explaining the two
20 subsections).^{6/}

21
22 6/ The cited Explanation and Justification states:

23 The Commission recognizes that, for example,
24 the separate segregated fund of a corporation may
25 have contributed to one of the candidates or the
26 corporation may have sent a partisan communication
27 to its executive or administrative personnel
28 endorsing one of the candidates prior to the
29 appearances of all the candidates for that seat.
30 However, since the group addressed by the
candidates consists of employees outside the
partisan communication exemption, the corporation
may not make any endorsement of any of the
candidates in conjunction with the appearances
under this section If the audience consists of
both executive and administrative personnel and

TP proposal
In particular, the inclusion of [unclear] about
candidate req. for campaign assistance
do not fall w/i the requirements

Nonpartisan Communications to the General Public

Commission regulations also provide for nonpartisan communications to the general public. These are specific types of information, including nonpartisan voter registration and get-out-the-vote information, distribution of registration or voting materials produced by official election administrators, voting records not prepared for the purpose of influencing an election, voter guides, and nonpartisan candidate debates. 11 CFR 114.4(b), (c), and (e). None of these specialized activities are analogous to the kinds of information that the SBC companies propose to convey. Retirees who are not shareholders or in the families of employees or shareholders in the SBC companies are indistinguishable from members of the general public. The Commission concludes, therefore, that your proposed program may not be made available to such retirees and steps should be taken to assure that the information is not distributed to them. Otherwise, your proposed activity will result in a prohibited, in-kind corporate contribution to the candidates

off for a
voter
guide.

not [unclear]
retirees
class
GENERAL
114.4(a)
(a)

(Footnote 6 continued from previous page)
other employees who are not stockholders or employees who are not members, the nonpartisan requirements of this section override the right to make partisan communications to the more limited group. Clearly, the separate segregated fund of a corporation or labor organization may not make a contribution to any of the candidates at the time of the appearances; the corporation or labor organization or its separate segregated fund may not endorse one of the candidates at the time of such appearances.

involved. See Advisory Opinion 1986-37.^{7/}

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,

Scott E. Thomas
Chairman

Enclosures (AOs 1991-3, 1988-36, 1988-19, 1987-29, 1986-37,
and 1982-2)

^{7/} The Commission also notes that your activity involves contact and consultation with campaign personnel of the candidates who are included in the program, and the receipt by the SBC companies of information as to the volunteer needs of each campaign. The Commission cautions that the prior consultation and receipt of such information will compromise the ability of an SSF of the SBC companies to make independent expenditures on behalf of these campaigns. See 11 CFR 109.1(a) and (b)(4)(1)(A). Similarly, because of the contact and consultation with respect to volunteer needs, the conclusions of this opinion are not affected by the Supreme Court opinion in Federal Election Commission v. Massachusetts Citizens for Life ("MCFL"), 479 U.S. 238 (1986).