



FEDERAL ELECTION COMMISSION  
WASHINGTON, DC 20463

91 APR -6 AM 11:15

April 6, 1994

**MEMORANDUM**

**TO:** The Commission

**THROUGH:** John C. Sutina  
Staff Director

**FROM:** Lawrence M. Noble  
General Counsel

N. Bradley Litchfield  
Associate General Counsel

Michael E. Marinelli  
Staff Attorney

**SUBJECT:** Draft AO 1994-3

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for April 14, 1994.

Attachment

**AGENDA ITEM**  
For Meeting of: APR 14 1994

2  
3 **CERTIFIED MAIL**  
4 **RETURN RECEIPT REQUESTED**

5 **ADVISORY OPINION 1994-3**

6 **M. Joel Bolstein**  
7 **Dechert Price & Rhoads**  
8 **4000 Bell Atlantic Tower**  
9 **Philadelphia, PA 19103-2793**

**DRAFT**

10 **Dear Mr. Bolstein:**

11 This refers to your letter of February 25, 1994, on  
12 behalf of EnviroSource, Inc. ("Enviro"), concerning the  
13 application of the Federal Election Campaign Act of 1971  
14 ("the Act") to a matching charitable contribution plan that  
15 Enviro wishes to use for its separate segregated fund,  
16 EnviroSource Political Action Committee ("the PAC").

17 You state that the PAC would like to begin a matching  
18 charitable contributions plan to encourage a higher level of  
19 voluntary participation in the PAC and to increase the scope  
20 and level of corporate donations to charities. Under the  
21 proposed plan, each person making a voluntary contribution to  
22 the PAC may direct Enviro to donate an equal amount to a  
23 qualifying I.R.C. 501(c)(3) charitable organization. You  
24 assert that persons participating in the plan will not  
25 receive a financial, tax, or other tangible benefit from  
26 either Enviro or the possible recipient charities as a result  
27 of the matching charitable contribution.

28 You note that other plans of this nature have been  
29 considered by the Commission in the past. You state,  
30 however, that prior plans have been limited in application to  
the corporation's restricted classes: its executive or

2  
3 administrative personnel and their families, and its  
4 shareholders and their families. Enviro's proposed plan  
5 differs from prior plans in that it would be open to all of  
6 Enviro's employees, including the non-executive and  
7 non-administrative employees of its subsidiaries, divisions  
8 or branches. You refer to these individuals as the "Expanded  
9 Class." You state that because of the participation of the  
10 "Expanded Class," the PAC will, in administering the plan,  
11 abide by all Commission rules and regulations concerning the  
12 solicitation of the Expanded Class, including those relating  
13 to twice yearly solicitations and those regarding the  
14 appointment and maintenance of a separate custodial  
15 arrangement to receive contributions.

16 Included with your request are various background  
17 materials such as the By-laws of the PAC and a detailed  
18 description of the proposed plan.

19 The Act prohibits a corporation from making  
20 contributions or expenditures in connection with any Federal  
21 election. However, the Act excludes from the definition of  
22 "contribution or expenditure," those costs which are paid by  
23 the corporation for "the establishment, administration, and  
24 solicitation of contributions to a separate segregate fund to  
25 be utilized for political purposes" by the corporation. 2  
26 U.S.C. §441b(b)(2)(C). Although Commission regulations  
27 explain that a corporation may use its general treasury  
28 monies to pay the expenses of establishing and administering  
29 such a fund and of soliciting contributions to the fund, the  
30

1  
2  
3 regulations also provide that a corporation may not use this  
4 process "as a means of exchanging treasury monies for  
5 voluntary contributions." 11 CFR 114.5(b). In this respect,  
6 the regulations further explain that a contributor may not be  
7 paid for his or her contributions through a bonus, expense  
8 account, or other form of direct or indirect compensation.  
9 11 CFR 114.5(b)(1).

10 The Act and Commission regulations allow a corporation,  
11 or a separate segregated fund established by a corporation,  
12 to solicit voluntary contributions to the fund from the  
13 corporation's stockholders, its executive and administrative  
14 personnel, and the families of such persons. 2 U.S.C.  
15 §441b(b)(4)(A)(i); 11 CFR 114.5(g)(1). Any solicitation of  
16 these persons for contribution to the fund must meet certain  
17 requirements. See 11 CFR 114.5(a).

18 The Act and regulations also permit two written  
19 contribution solicitations in a calendar year to other  
20 employees. 2 U.S.C. §441b(b)(4)(B); 11 CFR 114.6(a). The  
21 corporation, however, must make such written contribution  
22 solicitations by mailing them to an employee's residence and  
23 must use a custodial arrangement that ensures the anonymity  
24 of those wishing to contribute less than \$50 in any single  
25 contribution, or those not wishing to contribute at all. 11  
26 CFR 114.6(c) and (d). See also Advisory Opinions 1991-28 and  
27 1990-25.

28 As your request notes, the proposed PAC plan is similar  
29 to those approved by the Commission in the past. See  
30

3 Advisory Opinions 1990-6, 1989-9, and 1989-7. These past  
4 opinions have allowed corporations to match contributions  
5 made to their separate segregated funds with donations to  
6 charities. The Commission has viewed the corporation's  
7 matching of voluntary political contributions with charitable  
8 donations as solicitation expenses related to fundraising for  
9 its separate segregated fund. 2 U.S.C §§441b(a) and  
10 441b(b)(2)(C). Central to this conclusion is that the  
11 individual contributor to the PAC would not receive a  
12 financial, tax, or other tangible benefit from either the  
13 corporation or the recipient charities, thus avoiding an  
14 exchange of corporate treasury monies for voluntary  
15 contributions.<sup>1/</sup>

16 According to the terms of the plan which were included  
17 in your request, the PAC contributors will not receive any  
18 financial benefit from either the corporation or the charity  
19 as a result of his or her participation. The plan

20  
21 <sup>1/</sup> The Commission's conclusions regarding matching  
22 charitable contributions by SSP's is consistent with the  
23 Internal Revenue Code's treatment of the tax consequences of  
24 such programs. The Internal Revenue Service has concluded  
25 that "a Charity/PAC matching program grant to an I.R.C.  
26 501(c)(3) organization should not be recharacterized as  
27 payment of compensation to the employee, and a subsequent  
28 payment by the employee to the I.R.C. 501(c)(3)  
29 organization." Judith E. Kindell and John F. Reilly,  
30 Election Year Issues, IRS publication, 441 (1992); see also  
Rev. Rul. 67-137, 1967-1 C.B. 63. The Internal Revenue  
Service has also concluded that the corporation may not  
receive a tax deduction for the matching charitable donation  
it makes. Because the corporation receives a substantial  
benefit or quid pro quo in return for its donation to the  
employee designated charity, the donation cannot be viewed as  
a true "gift" from the corporation. Kindell and Reilly, at  
444.

3 description also states that contributions to the PAC must be  
4 voluntary. Therefore, the plan, as it applies to members of  
5 the restricted classes, is lawful under the Act and  
6 Commission regulations.

7 There is nothing in the nature of matching charitable  
8 contribution plans that would prevent their implementation  
9 for employees who are only solicitable under the twice yearly  
10 procedures, as long as all other Commission regulations  
11 applicable to the solicitation of these personnel are  
12 followed. The description of Enviro's plan states "Expanded  
13 Class Members shall be given the opportunity to make  
14 contributions to the Matching Plan through a custodial  
15 arrangement established by EnviroSource." The description  
16 does not give any further details. However, you explicitly  
17 state in the request that Enviro will follow all Commission  
18 rules relating to the twice yearly solicitation, including 11  
19 CFR 114.6(a), "and those requiring the appointment of a  
20 custodian to receive contributions and the maintenance of a  
21 separate custodial arrangement."<sup>2/</sup>

22  
23 <sup>2/</sup> As required by section 114.6(e), the description of the  
24 proposed plan does not allow the use of a payroll deduction  
25 format for contributions by the "Expanded Class Members."  
26 Other requirements of section 114.6, as noted above, include  
27 the requirement that all twice yearly solicitations be by  
28 mail. Further, such mailings must inform the employee (1)  
29 that all contributions are voluntary, (2) of the custodial  
30 arrangement prepared for the solicitation, (3) of the  
anonymity granted to all who refuse to contribute, and (4) of  
the preservation of the contributor's anonymity by making a  
contribution of \$50 or less or multiple contributions  
aggregating \$200 or less in a calendar year, and submitting  
the contributions directly to the custodian. 11 CFR  
114.6(c).

3 In this regard, the Commission notes that Enviro's  
4 proposal may require modification in order to comply with  
5 the custodial arrangement required by section 114.6(d) and to  
6 ensure the anonymity of contributors making contributions of  
7 \$50 or less or multiple contributions aggregating \$200 or  
8 less in a calendar year. For example, the plan description  
9 indicates that the PAC administrative committee shall review  
10 the list of qualified charities selected by the participants.  
11 This review should be conducted in a manner that preserves  
12 the confidentiality of those contributing the smaller amounts  
13 listed above. The plan description also states that, if a  
14 plan participant wishes, Enviro will mail to the charity a  
15 letter identifying the contributor at whose behest Enviro is  
16 making the donation. For participants making the smaller  
17 contributions, such letters should be prepared and sent only  
18 by the custodian and should not give the actual name of the  
19 participant. Letters of appreciation from the charity could

20  
21 

---

  
(Footnote 2 continued from previous page)

22 The custodian chosen for your plan cannot be a  
23 stockholder, officer, executive or administrative personnel  
24 or employee of the corporation or its separate segregated  
25 fund. The custodian is limited in the degree that he or she  
26 may make records of employee contributions available. 11 CFR  
27 114.6(d). As permitted by section 114.6(d)(5), the treasurer  
28 of the SSF may serve as custodian if that person does not  
29 hold any position with the corporation, as listed above, and  
30 does not participate in the decision making process whereby  
the separate segregated fund makes contributions and  
expenditures. See Advisory Opinion 1977-56. The Commission  
notes that under the By-laws of the PAC, the treasurer is  
part of the PAC's administrative council which is responsible  
for choosing the recipients of the PAC's contributions. In  
these circumstances, the PAC treasurer may not serve as the  
custodian, or must be removed from the council.

3 be conveyed to these participants through the custodian.

4 The Commission therefore concludes that, if the  
5 conditions described in this opinion are satisfied and if all  
6 the provisions of section 114.6 are followed, the  
7 implementation of Enviro's proposal with respect to "Expanded  
8 Class Members" would be permissible under the Act and  
9 regulations.

10 The Commission expresses no opinion regarding any tax  
11 ramifications of the proposed matching charitable  
12 contribution plan because those issues are outside the  
13 Commission's jurisdiction.

14 This response constitutes an advisory opinion concerning  
15 application of the Act, or regulations prescribed by the Com-  
16 mission, to the specific transaction or activity set forth in  
17 your request. See 2 U.S.C. §437f.

18  
19 For the Commission,

20  
21 Trevor Potter  
22 Chairman

23 Enclosures (AOs 1991-28, 1990-25, 1990-6, 1989-9, 1989-7  
24 and 1977-56)  
25  
26  
27  
28  
29  
30