



FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 18, 1994

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1994-3

M. Joel Bolstein
Dechert Price & Rhoads
4000 Bell Atlantic Tower
Philadelphia, PA 19103-2793

Dear Mr. Bolstein:

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

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

You note that other plans of this nature have been considered by the Commission in the past. You state, however, that prior plans have been limited in application to the corporation's restricted classes: its executive or administrative personnel and their families, and its shareholders and their families. Enviro's proposed plan differs from prior plans in that it would be open to all of Enviro's employees, including the non-executive and non-administrative employees of its subsidiaries, divisions or branches. You refer to these individuals as the "Expanded Class." You state that because of the participation of the "Expanded Class," the PAC will, in administering the plan, abide by all Commission rules and regulations concerning the solicitation of the Expanded Class, including those relating to twice yearly solicitations and those

regarding the appointment and maintenance of a separate custodial arrangement to receive contributions.¹

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

The Act prohibits a corporation from making contributions or expenditures in connection with any Federal election. However, the Act excludes from the definition of "contribution or expenditure," those costs which are paid by the corporation for "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes" by the corporation. 2 U.S.C. 441b(b)(2)(C). Although Commission regulations explain that a corporation may use its general treasury monies to pay the expenses of establishing and administering such a fund and of soliciting contributions to the fund, the regulations also provide that a corporation may not use this process "as a means of exchanging treasury monies for voluntary contributions." 11 CFR 114.5(b). In this respect, the regulations further explain that a contributor may not be paid for his or her contributions through a bonus, expense account, or other form of direct or indirect compensation. 11 CFR 114.5(b)(1).

The Act and Commission regulations allow a corporation, or a separate segregated fund established by a corporation, to solicit voluntary 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). Any solicitation of these persons for contributions to the fund must meet certain requirements. See 11 CFR 114.5(a).

The Act and regulations also permit two written contribution 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 written contribution solicitations by mailing them to an employee's residence and must use 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). See also Advisory Opinions 1991-28 and 1990-25.

As your request notes, the proposed PAC plan is similar to those approved by the Commission in the past. See Advisory Opinions 1990-6, 1989-9, and 1989-7. These past opinions have allowed corporations to match contributions made to their separate segregated funds with donations to charities. The Commission has viewed the corporation's matching of voluntary political contributions with charitable donations as solicitation expenses related to fundraising for its separate segregated fund. 2 U.S.C. 441b(a) and 441b(b)(2)(C). Central to this conclusion is that the individual contributor to the PAC would not receive a financial, tax, or other tangible benefit from either the corporation or the recipient charities, thus avoiding an exchange of corporate treasury monies for voluntary contributions.^{1/}

According to the terms of the plan which were included in your request, the PAC contributors will not receive any financial benefit from either the corporation or the charity as a result of his or her participation. The plan description also states that contributions to the PAC must be voluntary. Therefore, the plan, as it applies to members of the restricted classes, is lawful under the Act and Commission regulations.

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

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

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

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

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.

For the Commission,

(signed)

Trevor Potter
Chairman

Enclosures (AOs 1991-28, 1990-25, 1990-6, 1989-9, 1989-7 and 1977-56)

PS: Commissioners McDonald and Thomas voted against approval of this opinion and may file dissenting opinions at a later date.

ENDNOTES

1/ The Commission's conclusion regarding matching charitable contributions by SSF's is consistent with the Internal Revenue Code's treatment of the tax consequences of such programs. The Internal Revenue Service has concluded that "a Charity/PAC matching program grant to an IRC 501(c)(3) organization should not be recharacterized as payment of compensation to the employee, and a subsequent payment by the employee to the IRC 501(c)(3) organization." Judith E. Kindell and John F. Reilly, 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.

2/ As required by section 114.6(e), the description of the proposed plan does not allow the use of a payroll deduction format for contributions by the "Expanded Class Members." Other requirements of section 114.6, as noted above, include the requirement that all twice yearly solicitations be by mail. Further, such mailings must inform the employee (1) that all contributions are voluntary, (2) of the custodial arrangement prepared for the solicitation, (3) of the anonymity granted to all who refuse to contribute, and (4) that the anonymity of the contributor making a contribution of \$50 or less, or multiple contributions aggregating \$200 or less in a calendar year, will be maintained by submitting the contributions directly to the custodian. 11 CFR 114.6(c); see 11 CFR 114.5(a)(5).

The custodian chosen for your plan cannot be a stockholder, officer, executive or administrative personnel or employee of the corporation or its separate segregated fund. The custodian is limited in the degree that he or she may make records of employee contributions available. 11 CFR 114.6(d). As permitted by section 114.6(d)(5), the treasurer of the SSF may serve as custodian if that person does not hold any position with the corporation, as listed above, and 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.