



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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May 20 12 42 PM '94

May 20, 1994

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan M. Levin
Senior Attorney

SUBJECT: Draft AO 1994-11

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for May 26, 1994.

**SUBMITTED LATE
AGENDA ITEM**
For Meeting of: MAY 26 1994

Attachment

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ADVISORY OPINION 1994-11

Alan R. Kidston, Counsel
FMC Corporation
200 East Randolph Drive
Chicago, IL 60601

DRAFT

Dear Mr. Kidston:

This responds to your letter dated April 13, 1994, requesting an advisory opinion on behalf of FMC Corporation ("FMC") concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the activities of a partnership owned by a government contractor.

FMC, a Delaware corporation, has been a government defense contractor for many years. In January 1994, FMC and Harsco Corporation ("Harsco"), another government defense contractor organized a limited partnership, United Defense L.P. ("United"), to carry on all of FMC's and most of Harsco's defense contractor business. Under the terms of the partnership agreement, FMC is the general partner of United and has 60 percent of the equity interest in the partnership. A wholly owned subsidiary of Harsco holds the other 40 percent as a limited partner. The partnership agreement provides that FMC has "management control" of United.

For many years, FMC has sponsored a separate segregated fund named the FMC Corporation Good Government Program ("the Program").^{1/} You state that "... many of the eligible

^{1/} The Program filed a statement of organization with the Commission on January 29, 1976.

FMC executive and administrative employees that are part of the FMC defense business transferred to [United], [had] participated in the [Program]."

FMC seeks advice on the following points. FMC, as the managing, controlling, and general partner, plans to include United executive and administrative employees in the Program's operations. FMC would continue to pay most of the administrative and solicitation expenses of the Program. It would not reimburse United for the time United's employees may spend assisting in solicitations or the use of United's facilities for solicitations (including solicitation meetings). United's payroll services are provided by FMC, and United's executive and administrative personnel would participate in the Program's payroll plan. (Some former FMC employees who are now with United have continued to participate.)

You also state your view that the Program could change its name to include United but would not be required to do so, and that United would be an affiliate of FMC, but not a connected organization of United. In addition, you state that Harsco would not be an affiliate of FMC or United, and would not be a connected organization of the Program.

Federal contractors are prohibited from making, directly or indirectly, any contribution or expenditure of money or other thing of value, or to promise expressly or impliedly to make any such contribution or expenditure, to any political party, committee, or candidate for Federal office or to any

person for any political use. 2 U.S.C. §441c(a)(1); 11 CFR 115.2(a). This prohibition does not apply to state and local elections. 11 CFR 115.2(a). It is also unlawful to knowingly solicit a Federal contractor for a contribution. 2 U.S.C. §441c(a)(2); 11 CFR 115.2(c).

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The prohibition, however, does not prevent a Federal contractor corporation from establishing and administering a separate segregated fund, and soliciting contributions to that fund, in accordance with the provisions applied to corporations under 2 U.S.C. §441b(b) and 11 CFR Part 114. 2 U.S.C. §441c(b); 11 CFR 115.3(a). In addition, the Federal contractor prohibition does not prevent the stockholders, officers, or employees of a corporation or other group that is a Federal contractor from making contributions from their personal assets. 11 CFR 115.6.

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A corporation, or a separate segregated fund established by a corporation, may solicit contributions to such a fund from its executive and administrative personnel, its stockholders, and the families of such persons. 2 U.S.C. §441b(b)(4)(A)(i). Commission regulations provide that a corporation's solicitable class extends to the executive and administrative personnel of its subsidiaries, branches, divisions, and affiliates, and their families. 11 CFR 114.5(g)(1). The Commission has long held that affiliated entities can include business structures other than corporations, including partnerships. Advisory Opinions 1992-17, 1989-8, 1987-34, and 1983-48. As a partnership that

is sixty percent owned, as well as managed and controlled by FMC, United is an affiliate of FMC. The Program may therefore solicit United's executive and administrative employees for contributions. Payroll deduction plans are permissible methods of solicitation of contributions from the restricted class, and corporations may conduct payroll deductions for the restricted class of their affiliates. See 11 CFR 114.5(k) and Advisory Opinion 1991-19 and 1987-34. These conclusions are not altered by the Federal contractor status of the companies involved.

The actual spending of funds directly or in-kind by United, e.g., assistance provided by United's employees in the activities of the Program and use of United's facilities for solicitation, raises other questions with respect to the abilities of partnerships. The Commission has permitted a corporation that has an affiliated relationship with another corporation to pay the administration and solicitation costs for the latter's SSF. Advisory Opinion 1983-19. The Act, however, does not extend to a partnership the ability granted to a corporation at 2 U.S.C. §441b(b)(2)(C) to conduct itself as a connected organization and benefit from the exemption for establishment, administration, and solicitation costs. Advisory Opinions 1990-20 and 1982-63. See California Medical Association v. Federal Election Commission, 453 U.S. 182 (1981). Nevertheless, the Commission has treated joint venture partnerships of corporations differently as a result of the partnerships' relationship with corporations,

including affiliated relationships. Advisory Opinions 1992-17 and 1987-34.

In Advisory Opinion 1987-34, a partnership consisting of two corporate partners was permitted to share, with a corporation owned by the partnership, the expenses of establishing and financing a payroll deduction plan of the latter corporation's SSF, without a contribution by the partnership resulting. The Commission stated that the joint venture partnership status should not preclude such involvement in view of the fact that the partnership is owned 50-50 by corporations.^{2/}

Drawing from the conclusion in Advisory Opinion 1987-34, the Commission concluded, in Advisory Opinion 1992-17, that a partnership owned in its entirety by two corporations and affiliated with those corporations could provide administrative and solicitation support to the partnership's PAC, because such support could be construed as coming from the affiliated corporations. The rule, as stated by the Commission in this opinion, was that partnerships owned entirely by corporations and affiliated with at least one of those corporations could pay establishment, administration, and solicitation costs without a contribution resulting. Advisory Opinion 1992-17.

^{2/} In describing the relationship among the business entities, the Commission referred to the long-held principle that contribution solicitation rights moved both downstream (parent to subsidiary) and upstream (subsidiary to parent). See Advisory Opinion 1982-18.

Based upon the above analysis, the Commission concludes that United, a partnership owned entirely by corporations and affiliated with one of them, could pay the described costs for the administration of and solicitation of contributions to the Program, the separate segregated fund of United's affiliate, FMC. Based on the provisions of 2 U.S.C. §441c(b) and 11 CFR 115.3(b), the Federal contractor status of the companies involved does not affect these conclusions.

Your assertions as to the name of the Program and the connected organization of the Program are correct based upon past advisory opinions. The Program could include the name of United Defense L.P. in its name, but would not be required to do so. Advisory Opinion 1989-8. United would be an affiliate of FMC, but not a connected organization of the Program. Advisory Opinions 1992-17 and 1989-8. Under the Act and regulations, the name of any separate segregated fund established by a corporation must include the full name of the connected organization. 2 U.S.C. §432(e)(5); 11 CFR 102.14(c). A corporation which has subsidiaries need not include the name of the subsidiaries in the PAC name. 11 CFR 102.14(c). Even though the Commission has concluded that a partnership can perform the functions of a connected organization under the above-described circumstances, Commission regulations defining "connected organization" do not include partnerships. 11 CFR 100.6(a). FMC is the connected organization of the Program and may provide exempt services to the Program through United. See Advisory Opinion

1992-17.

The Commission also agrees with your assertion that Harsco would not be an affiliate of FMC or United, or a connected organization of the Program. The Commission has considered a number of opinions involving joint venture entities. Advisory Opinions 1992-17, 1987-34, 1984-36, 1983-19, and 1979-56; compare Advisory Opinion 1981-54. In each of these opinions, the Commission has not determined that the joint venturers were affiliated with each other. Their relationships were as partners, not as shareholders, owners, or managers of each other. Hence, Harsco would not be an affiliate of FMC by virtue of their joint venture partnership. In addition, Harsco is the holder of a minority interest that is also a limited partnership interest while FMC holds the majority of shares and the management and control of the joint venture. See Advisory Opinion 1984-36. See also Advisory Opinions 1992-17, 1987-34, and 1983-19.^{3/} Therefore, Harsco is not an affiliate of United and, as such cannot assist in funding administrative or solicitation costs of the Program.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the

^{3/} With respect to circumstantial factors enumerated in the regulations that may be used to further analyze the question of Harsco's affiliation, the characterization you have provided would tend to indicate the lack of a controlling interest, governance rights, and the ability to affect decisionmakers on the part of Harsco. See 11 CFR 110.3(a)(3)(ii)(A), (B), and (C).

Commission, to the specific transaction or activity set forth
in your request. See 2 U.S.C. §437f.

For the Commission,

Trevor Potter
Chairman

Enclosures (AOs 1992-17, 1991-19, 1990-20, 1989-8, 1987-34,
1984-36, 1983-48, 1983-19, 1982-63, 1982-18,
1981-54, and 1979-56)

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