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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

SEP 26 3 55 PM '94

**AGENDA ITEM**

September 26, 1994 For Meeting of: SEP 29 1994

**MEMORANDUM**

**TO:** The Commission

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

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

N. Bradley Litchfield  
Associate General Counsel

Michael Marinelli  
Staff Attorney

**SUBJECT:** Alternative Draft of Advisory Opinion 1994-27

Attached for Commission discussion on September 29, 1994, is an alternative draft of the subject advisory opinion.

This alternative draft is submitted pursuant to the Commission discussion at the September 22 meeting. The differences from Agenda Document #94-107 are shown in bolded type and begin on page 5, line 28, extending to page 7, line 7.

We request that this alternative draft, along with Agenda Document #94-107, be placed on the agenda for September 29.

Attachment

1  
2 CERTIFIED MAIL  
3 RETURN RECEIPT REQUESTED

4 ADVISORY OPINION 1994-27

5 Karen A. McCarthy  
6 Consumers Power Company Employees  
7 For Better Government  
8 212 W. Michigan  
9 Jackson, Michigan 49201

**DRAFT**

10 Dear Ms. McCarthy:

11 This refers to your letter of July 28, 1994, on behalf  
12 of Consumers Power Company Employees For Better Government  
13 ("the Committee") concerning the application of the Federal  
14 Election Campaign Act of 1971, as amended ("the Act"), to  
15 the Committee's proposed solicitation for political  
16 contributions.

17 The Committee is the separate segregated fund of  
18 Consumers Power Company ("the Company"), a subsidiary of CMS  
19 Energy Corporation ("CMS"). You state that the Committee  
20 wishes to solicit shareholders of CMS. Among the  
21 shareholders to be solicited would be employees of the  
22 Company and other CMS subsidiaries whose employees are  
23 enrolled in what is described in your request as the  
24 Employees' Savings and Incentive Plan, ("the Plan"), and who,  
25 pursuant to the Plan, are shareholders in CMS. A copy of the  
26 Plan is provided with your request.

27 According to your request, all regular Company employees  
28 are eligible to join the Plan. As with most such programs,  
the funding of the plan is divided into Plan contributions  
made by the employee and Plan contributions made by the

1  
2 Company. There are three different types of contributions  
3 that employees can make into the Plan: "elective employer  
4 contributions," "participant contributions," and "voluntary  
5 contributions." See Plan, Sections 5.1, 5.2 and 5.3.  
6 Elective employer contributions are deducted from the  
7 employee's compensation before taxes, pursuant to a 401(k)  
8 pension program. These are limited to a maximum of 12% of  
9 salary. Participant contributions and voluntary  
10 contributions are after-tax employee contributions, the  
11 amounts of which are limited by the level of an employee's  
12 elective contributions.<sup>1/</sup> The Company will make matching  
13 contributions of one half an employee's contributions up to a  
14 maximum of 3%. Additional Company matching contributions can  
15 be made pursuant to an incentive program in which more funds  
16 are contributed should certain Company-wide performance goals  
17 be met. See Plan, Sections 5.10 and 5.10. Each dollar of a  
18 contribution is valued as a Plan unit, and all units are  
19 recorded according to the type of employee or Company  
20 contribution that is made.

21 Employees may designate the contributions to three  
22 different investment Funds. Fund A consists of investment  
23 contracts by insurance companies, financial institutions,  
24 U.S. Government obligations and other debt instruments.

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<sup>1/</sup> The Plan is designed so that the more an employee utilizes  
27 the elective option, the less the other two options may be  
28 used. If no elective contributions are made, employees may  
contribute up to 6% of their salaries for participant  
contributions and up to 10% for voluntary contributions.

1  
2 Fund B consists of common stock of non-CMS companies. Fund C  
3 consists of CMS Energy Corporation common stock and temporary  
4 investments. See Plan, Sections 2.1 and 5.4. All Company  
5 contributions, as well as dividends earned from CMS stock,  
6 are placed in Fund C. An employee's right to the matching  
7 Company contributions vests at the rate of 10% per year for  
8 the first four years of employment and 20% for each of the  
9 next three years of service. The employee is 100% vested  
10 after seven years of Plan participation and Company  
11 employment. See Plan, Section 8.4.

12 Prior to an employee reaching retirement age (59 1/2),  
13 the ability to withdraw funds from the plan varies according  
14 to the type of contribution made. See Plan, Section 8.4.  
15 Funds that consist of elective employee units may only be  
16 withdrawn in case of emergency situations or heavy financial  
17 need for medical reasons, purchase of a residence, college  
18 tuition or to prevent eviction. Participant units may be  
19 withdrawn partially, but only one withdrawal a year may be  
20 made. Voluntary units may be withdrawn, in part or fully, at  
21 any valuation date which is the last day of each month.

22 The withdrawal of units made up of Company matching  
23 contributions is subject to a different set of limitations.  
24 See Plan, Section 8.4. An employee can only withdraw those  
25 units which form the vested portion of that employee's  
26 matching contributions from the Company. Even vested units  
27 cannot be withdrawn until they have been in the account for  
28 two years. Should any unit be withdrawn before an employee

1  
2 is fully vested, all the non-vested portions are forfeited  
3 until the amount the employee withdrew is repaid into the  
4 account. Finally, if units consisting of Company matching  
5 contributions are withdrawn, the employee is suspended from  
6 participating in the Plan for a period from three months to  
7 one year, depending on the amount (or value) that was  
8 withdrawn.

9 Given these facts, your request asks whether employees  
10 participating in the Plan would be considered stockholders  
11 under 11 CFR 114.1(h) and thus solicitable for voluntary  
12 contributions to the Committee on the basis of that status,  
13 even though they are not executive or administrative  
14 personnel as defined in the Act. 2 U.S.C. §§441b(b)(4),  
15 441b(b)(7).

16 The Act permits a corporation or its separate segregated  
17 fund to solicit its individual stockholders and their  
18 families. 2 U.S.C. §441b(b)(4)(A)(i). A corporation may  
19 also solicit the stockholders or their families of its  
20 subsidiaries and its parent corporation. 11 CFR 114.5(g)(1).  
21 Under Commission regulations, a stockholder is defined as a  
22 person who (i) has a vested beneficial interest in stock;  
23 (ii) has the power to direct how that stock shall be voted  
24 (if it is voting stock); and (iii) has the right to receive  
25 dividends. 11 CFR 114.1(h); See also Advisory Opinions  
26 1988-36, 1988-19, 1984-5, 1983-35 and 1983-17.

27 Any employee with any funds invested in Fund C, either  
28 by that employee's own contributions or the Company's

1  
2 matching contributions, would meet the first requirement if  
3 their contribution purchased one share of stock. If the  
4 share of stock was purchased by the Company's matching  
5 contribution, the unit of value produced by the contributions  
6 would have to be a fully vested unit. The information  
7 contained in your request states that each employee that  
8 acquires stock through the Plan has the right to give voting  
9 instructions and that the trustee must comply with those  
10 instructions. See Plan, Section 6. Therefore, the second  
11 requirement of the regulations is met.

12 In past treatments of employee stock purchase plans, the  
13 third requirement--the right to receive dividends--is the  
14 element that has received the most analysis. Most of the  
15 Plans discussed in the past have contained some limitations  
16 regarding the withdrawal of either the accumulated dividends  
17 or the underlying stock. See Advisory Opinion 1988-36 and  
18 the opinions cited therein. The test that the Commission has  
19 used is whether "participants are able to withdraw at least  
20 one share of stock purchased with employer matching  
21 contributions without incurring a suspension period..." to  
22 conclude that those participants had the right to receive  
23 dividends and were stockholders under 11 CFR 114.1(h). The  
24 Commission also considered it significant whether the right  
25 to withdraw stock or dividends was limited to only once per  
26 year.

27 The Commission concludes, however, that this past  
28 analysis is not entirely relevant to the regulation since it

1  
2 concerned a detailed discussion of what amounted to a delayed  
3 enjoyment of the possession of the dividends, rather than the  
4 ownership of the dividends or the right to receive the  
5 dividends themselves.<sup>2/</sup> A more pertinent consideration would  
6 be whether the employee had ownership of any dividends that  
7 accumulated. Your request indicates that the dividends are  
8 accumulated and reinvested in an employee's individual stock  
9 account. The Commission concludes this is sufficient to  
10 indicate that employees under the Plan do own and have a  
11 right to receive dividends. Therefore, in this situation the  
12 Commission finds that any Company or CMS employee who has a  
13 vested right to a share of CMS stock meets the third  
14 requirement since that employee likewise has ownership of any  
15 dividends and a right to receive dividends, even though the  
16 enjoyment of that right might be deferred to some point in  
17 the future.<sup>3/</sup>

18 Accordingly, with respect to stockholder solicitations  
19 for the Committee, the Commission concludes that any employee  
20

21  
22 2/ The Explanation and Justification of Section 114.1(h)  
23 states only that an employee should have "the right to  
24 receive dividends directly." See Explanation and  
25 Justification for 1977 Amendments to the Federal Election  
26 Campaign Act of 1971, House Document No. 95-44, p. 103  
27 (January 12, 1977). The use of the word "directly" is  
28 somewhat ambiguous, but could be construed as requiring that  
the dividends accrue to the benefit of the employee and no  
one else, which would be the case in this situation.

29  
30 3/ To the extent that past opinions have required that the  
31 enjoyment of the right of possession of the dividends be  
32 immediate, these opinions are partially superseded. See  
33 Advisory Opinions 1983-17, 1983-35, 1984-5, 1988-19 and  
34 1988-36.

1  
2 participants in the Plan who have at least one fully vested  
3 share of CMS stock credited to their account may be solicited  
4 by the Committee (or the Company) for political contributions  
5 to the Committee. This is because participants in the Plan  
6 are considered stockholders under 11 CFR 114.1(h). Of  
7 course, the solicitation by the Committee or the Company must  
8 otherwise meet the requirements for a proper solicitation  
9 under the Act and regulations. 2 U.S.C. §441b(b)(3)(A), (B)  
10 and (C); see 11 CFR 114.5(a).<sup>4/</sup>

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

15  
16 For the Commission,

17  
18 Trevor Potter  
19 Chairman

20 Enclosures (AOs 1988-36, 1988-19, 1984-5, 1983-35 and  
21 1983-17.)

22  
23  
24 <sup>4/</sup> For example, a corporation or separate segregated fund  
25 that solicited contributions of a particular amount must  
26 inform the person solicited that such amount is only a  
27 suggestion and that the person is free to contribute more or  
28 less than the suggested amount. 11 CFR 114.5(a)(2).  
Moreover, any solicitation for a separate segregated fund  
must describe the political purpose of the fund and specify  
that persons have the right to refuse to contribute to the  
fund without reprisal. 11 CFR 114.5(a)(3), (a)(4), and  
(a)(5).