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FEDERAL ELECTION COMMISSION

Washington, DC 20463

February 25, 1999

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Acting Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael G. Marinelli
Staff Attorney

SUBJECT: Draft AO 1999-02

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for March 4, 1999.

Attachment

1
2 **ADVISORY OPINION 1999-2**
3

4 **Barbara Mehlert**
5 **Public Affairs Administrator**
6 **Premera Blue Cross**
7 **PO Box 327**
8 **Seattle, WA 9811-0327**
9

DRAFT

10 **Dear Ms. Mehlert:**
11

12 **This refers to your letters dated January 21 and 27, 1999, requesting an advisory**
13 **opinion concerning the application of the Federal Election Campaign Act of 1971, as**
14 **amended ("the Act"), and Commission regulations to the holding of candidate lunch**
15 **forums by Premera Blue Cross, a corporation ("Premera").**

16 **You state that Premera wishes to hold candidate forums for its employees at its**
17 **corporate facilities which would include lunch for the attendees. The program would be**
18 **held both in 1999 and 2000 and would include appearances by candidates for the U.S.**
19 **House of Representatives and the U.S. Senate. All employees would be invited to attend**
20 **what you characterize as a "bipartisan forum." Employee attendance would be strictly**
21 **voluntary during the lunch hour. So as not to disrupt work schedules, you explain that no**
22 **forum would be held outside the usual lunch period.**

23 **You also state that employees would be asked for their input as to which candidates**
24 **they would like to hear. The candidate with the highest interest shown by employees**
25 **would be first selected. A letter would be sent to this candidate's opponents offering**
26 **him/her the same opportunity to appear at a later and separate forum. You further explain**

1 that you and a senior vice president would oversee the process.¹ Lunch would be
2 provided free of charge by Premera to the employees who attend the forums.

3 You state that candidates would speak about non-partisan issues and that no
4 election materials would be available to employees at these sessions. Flyers would be
5 posted throughout the corporate campus announcing the candidate forum and stating its
6 purpose as "non-partisan" with a view to "educating employees on relevant issues and not
7 a campaign-related forum." You state that the flyers would not include any campaign
8 language such as "Re-elect" or "Elect." If any campaign signs of a candidate are placed
9 around the corporate property to advertise the forum, you emphasize that any portion with
10 words such as "elect or retain or re-elect" would be "literally cut off the sign so there
11 would be no reference to a campaign." Further, you state that any candidate who agrees
12 to appear would be told, in writing, that no campaign literature would be accepted and
13 that no contributions could be solicited while on corporate premises.

14 You ask, given this format, whether the financing of this forum program, including
15 lunch for the participants, would be permitted by the Act and Commission regulations.

16 **Act and Commission Regulations**

17 The Act prohibits contributions and expenditures by a corporation in connection
18 with a Federal election. 2 U.S.C. §441b(a); 11 CFR 114.2(b). The term "contribution"
19 (or "expenditure") is defined to include "any direct or indirect payment, distribution, loan,
20 advance, deposit, or gift of money, or any services, or anything of value ... to any
21 candidate, campaign committee, or political party or organization," in connection with
22 any Federal election. 2 U.S.C. §441b(b)(2); 11 CFR 114.1(a)(1). See 2 U.S.C.

¹ In a phone conversation with Commission staff, you indicated that employees would use the corporate e-mail system to indicate their choices.

1 431(8)(A)(i) and (9)(A)(i); 11 CFR 100.7(a)(1) and 100.8(a)(1). The phrase "anything of
2 value" includes goods or services provided without charge, or at less than the usual and
3 normal charge. 11 CFR 100.7(a)(1)(iii)(A) and 100.8(a)(1)(iv)(A).

4 Commission regulations provide that a corporation may make certain
5 communications to its restricted class as well as to its other employees and their families.²
6 11 CFR 114.4(a). Included in such communications are candidate and political party
7 appearances on corporate premises or at a meeting, convention, or other function of the
8 corporation. 11 CFR 114.4(b)(1).

9 However, if these communications do extend beyond the restricted class then,
10 under 11 CFR 114.4(b)(1), they must meet a number of conditions:

- 11 (a) If a candidate for the House or Senate or a candidate's representative is
12 permitted to address or meet employees, all candidates for that seat who
13 request to appear must be given a similar opportunity to appear;
- 14 (b) The candidate's representative or party representative (other than an officer,
15 director or other representative of a corporation) or the candidate, may ask for
16 contributions to his or her campaign or party, or ask that contributions to the
17 separate segregated fund of the corporation be designated for his or her
18 campaign or party. The candidate, candidate's representative or party

² A corporation's restricted class is its stockholders and executive or administrative personnel, and their families, and the executive and administrative personnel of its subsidiaries, branches, divisions, and departments and their families. 11 CFR 114.1(j). Under Commission regulations, a corporation's executive and administrative personnel are defined as individuals employed by a corporation who are paid on a salary rather than hourly basis and who have policymaking, managerial, professional, or supervisory responsibilities. This definition consists of individuals who run the corporation's business such as officers, other executives, and plant, division, and section managers; and individuals following the recognized professions, such as lawyers and engineers. Other classes of employees are excluded. 11 CFR 114.1(c).

The rules for candidate appearances to the restricted class differ from those appearances that extend to all employees. See 11 CFR 114.3(c)(1)—(4). Among the differences, the representatives of the corporation may expressly advocate the support of the candidate and the candidate may accept contributions from

1 representative shall not, however, accept contributions before, during or after
2 the appearance while at the meeting, convention or other function of the
3 corporation, but may leave campaign materials or envelopes for members of
4 the audience. A corporation, its restricted class, or other employees of the
5 corporation or its separate segregated fund shall not, either orally or in writing,
6 solicit or direct or control contributions by members of the audience to any
7 candidate or party in conjunction with any appearance by any candidate or
8 party representative, and shall not facilitate the making of contributions to any
9 such candidate or party (see 11 CFR 114.2(f));

10 (c) A corporation or its separate segregated fund shall not, in conjunction with
11 any candidate, or candidate's representative appearance under this section,
12 expressly advocate the election or defeat of any clearly identified candidate(s)
13 or candidates of a clearly identified political party and shall not promote or
14 encourage express advocacy by employees;

15 (d) No candidate, candidate's representative or party representative shall be
16 provided with more time or a substantially better location than other
17 candidates, candidates' representatives or party representatives who appear,
18 unless the corporation is able to demonstrate that it is clearly impractical to
19 provide all candidates, candidates' representatives and party representatives
20 with similar times or locations;

21 A further condition is that coordination with each candidate, candidate's agent,
22 and candidate's authorized committee(s) may include discussions of the structure, format

1 and timing of the candidate appearance and the candidate's positions on issues, but shall
2 not include discussions of the candidate's plans, projects, or needs relating to the
3 campaign. Finally, representatives of the news media may be present during the
4 appearance of the candidate, candidate's representative or the party representative in
5 accordance with the procedures set forth at 11 CFR 114.3(c)(2)(iv).³ 11 CFR
6 114.4(b)(1)(i), (iv),(v),(vi),(vii) and (viii).

7 The 1995 Explanation and Justification of the related regulations at 11 CFR
8 114.3(c)(2) notes that these regulations "do not adversely affect the ability of corporations
9 . . . to invite their restricted class, other employees or the general public to attend a speech
10 given by an officeholder . . . who is also a Federal candidate, if the speech is not
11 campaign-related and the individual is not appearing in his or her capacity as a candidate
12 for Federal office." Explanation and Justification, 60 *Federal Register* 64266 (December
13 14, 1995).

14 The Commission "has frequently considered whether particular activities
15 involving the participation of a Federal candidate are campaign-related, and thus result in
16 a contribution to or expenditure on behalf of such candidate under the Act." Advisory
17 Opinion 1996-11. As stated in this 1996 opinion:

18 "The Commission has determined that financing such activities will result in a
19 contribution to or expenditure on behalf of a candidate if the activities involve (i)
20 the solicitation, making or acceptance of contributions to the candidate's

³ Section 114.3(c)(2)(iv) provides, in part, that if the corporation permits more than one candidate for the same office to address its restricted class, and permits the news media to cover or carry an appearance by one candidate, the corporation shall also permit the news media to cover or carry the appearances by the other candidate(s) for that office. In addition, if the corporation permits a representative of the news media to cover or carry a candidate appearance, the corporation shall provide all other representatives of the news media with equal access for covering or carrying that appearance, but equal access permits "the use of pooling arrangements if necessary." 11 CFR 114.3(c)(2)(iv)(B).

1 campaign, or (ii) communications expressly advocating the nomination, election
2 or defeat of any candidate. See Advisory Opinions 1994-15, 1992-37, 1992-6,
3 1988-27 and opinions cited therein. . . . The Commission has indicated that the
4 absence of solicitations for contributions or express advocacy regarding
5 candidates will not preclude a determination that an activity is 'campaign-
6 related'." Advisory Opinion 1996-11.

7 **Status of Premera Forums**

8 *Campaign related nature of event*

9 You state that the forums discussed in your request will be "non-partisan" in
10 nature, that there will not be any express advocacy or contribution solicitations for a
11 candidate, and that procedures would be followed to remove any campaign related
12 aspects. As noted above, however, the absence of any express advocacy or contribution
13 solicitations for any candidate, does not necessarily end the inquiry as to whether an
14 appearance is campaign related. Relevant to your request is the Commission's
15 conclusion in Advisory Opinion 1996-11. In that opinion, a nonprofit organization
16 wished to invite a number of Federal candidates to address a convention. While noting
17 several conditions to holding the event, the Commission permitted the corporation to
18 fund the event, in part, because "[t]he invitations to the speakers are not based on their
19 status as candidates, but rather are based on their roles as legislators who have had an
20 impact upon current statutes and future legislation of interest to those attending the
21 convention." See Advisory Opinion 1996-11.

22 The Commission notes that in your situation at least half the speakers in the
23 program will be invited to participate, not as a consequence of their expertise on an issue

1 or their legislative backgrounds, but because their opponents for election to office had
2 been given a similar opportunity. Therefore, the status as candidates would seem to be
3 the determining factor in extending the invitation to participate in the forums.⁴ The
4 Commission has stated in past opinions that invitations extended to multiple candidates
5 for the same office, or invitations extended to candidates qua candidates, signify that the
6 event planned is, in fact, campaign related. See Advisory Opinions 1984-13 and 1986-
7 37⁵ Therefore, the Commission concludes that the forums you describe would be related
8 to an election campaign.

9 *Permissibility of Forums*

10 Since the proposed lunch forums would be open to all employees, Premera must
11 follow the requirements established by 11 CFR 114.4(b)(1). See summary above. Your
12 proposal already contains elements that comply with some of these requirements. For
13 example, you intend to invite candidates who are seeking the same office in the same
14 election. Considering the structure of the forums, it appears that neither Premera nor its
15 employees will expressly advocate the election or defeat of any candidate that
16 participates. Further, because of the conditions set for candidate participation, no
17 candidate will be able to accept contributions either before or after or during the event.⁶

⁴ Extending an invitation to other candidates in a campaign would set the circumstances in your request apart from previous opinions where the Commission found a candidate's appearance was not campaign related. In these prior opinions, the opportunity to appear was usually given to one candidate and excluded all his/her opponents. See Advisory Opinions 1980-22 (Participation of Member of Congress in corporate funded town meeting,); 1988-27 (Member's speech at corporate reception); 1991-17 (Member's participation in video project); 1992-5, 1992-37 and 1994-15 (Candidate hosting radio show); 1992-6 (Candidate participating in college speakers program) and 1996-11 (noted above).

⁵ The circumstances of these two opinions are similar to your request. In Advisory Opinion 1984-13 Republican candidates from the 1984 national convention were invited to address a corporate public affairs conference. In Advisory Opinion 1986-37 candidates with opposing views from different political parties were invited to participate in a public policy forum.

⁶ Your proposal would seem more restrictive than the requirements of section 114.4(b)(1)(iv) in that a candidate participating in the Premera forum would not be allowed to discuss his or her candidacy or ask

1 The Premera forums would therefore be permissible as long as the other requirements of
2 section 114.4(b)(1) regarding the limited coordination and presence of news media, as
3 well as the need for similar or comparable treatment in location and timing, are also met.

4 Premera also proposes to provide a free lunch to forum attendees, apparently as an
5 inducement to attract a higher rate of attendance from employees. The Commission has
6 permitted, in other contexts, the payment of corporate funds to provide such inducements.
7 In Advisory Opinion 1980-50, a corporation was permitted to pay the meal and
8 transportation expenses of employees to attend a conference encouraging employee
9 involvement in PAC activities.⁷ The Commission, again in a different context, has also
10 permitted a labor union to pay the costs of attending a fundraising dinner where the event
11 was viewed as permissible since it came within an exempt activity permitted by the Act.
12 See Advisory Opinion 1979-33.⁸ The payment of these costs in the above situations was
13 treated as an administrative or fundraising cost of the PAC. Nonetheless, these opinions
14 are of some limited relevancy in that they addressed the payment of costs related to what
15 was otherwise viewed as an exempt event or activity under section 441b. Likewise, the
16 Commission views the expense of providing lunch to forum participants as a cost directly
17 and reasonably related to the sponsoring of the event itself and thus permissible under

for contributions. Under section 114.4(b)(1), a candidate could discuss his or her candidacy and (while not permitted to accept contributions either before, during or after the event) still ask for financial support.

⁷ The Commission has also permitted corporate funds to pay the costs of a corporate representative to attend the fundraising function of a party committee. See Advisory Opinion 1991-36.

⁸ In Advisory Opinion 1979-33, a local union was permitted to reimburse its PAC for the cost to attend a fundraising banquet after it was discovered that the funds were to be used for non-partisan get-out-the-vote activities which came within an exemption under section 441b.

1 Commission regulations to the extent that the event is otherwise conducted in accordance
2 with the relevant regulations summarized above.⁹

3 This response constitutes an advisory opinion concerning the application of the
4 Act, or regulations prescribed by the Commission, to the specific transaction or activity
5 set forth in your request. See 2 U.S.C. §437f.

6 Sincerely,

7 Scott E. Thomas
8 Chairman

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10 Enclosures (AOs 1996-11, 1994-15, 1992-37, 1992-6, 1992-5, 1991-17, 1988-27, 1986-
11 37, 1984-13, 1980-50, 1980-22 and 1979-33).

⁹ The Commission notes that the requirement, under 11 CFR 114.4(b)(1)(vi), to provide comparable and similar opportunities to each candidate participating would extend to the types of lunches offered by Premera at the different forums.