

November 24, 1999

**NOTICE AO DRAFT COMMENT PROCEDURES**

The Commission has approved a revision in its advisory opinion procedures that permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 1999-31 is available for public comments under this procedure. It was requested by Theodore H. Bornstein, on behalf of Oshkosh Truck Corporation and OTCEPAC. The draft may be obtained from the Public Disclosure Division of the Commission.

Proposed Advisory Opinion 1999-31 will be on the Commission's agenda for its public meeting of Thursday December 2, 1999.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (EST) on December 1, 1999.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case by case basis in special circumstances.

4) All comments timely received will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Disclosure Division.

25.04.107.1410

**CONTACTS**

Press inquiries: Ron Harris (202) 694-1220

Acting Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copy of draft AO 1999-31 contact Public Records Office-  
Public Disclosure Division (202) 694-1120, or 800-424-9530.

For questions about comment submission procedure contact  
N. Bradley Litchfield, Associate General Counsel, (202) 694-1650.

**ADDRESSES**

Submit single copy of written comments to:

Commission Secretary  
Federal Election Commission  
999 E Street NW  
Washington, DC 20463

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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

November 24, 1999

**MEMORANDUM**

**AGENDA ITEM**

For Meeting of: 12-2-99

TO: The Commission

THROUGH: James A. Pehrkon  
Staff Director

FROM: Lawrence M. Noble  
General Counsel

N. Bradley Litchfield  
Associate General Counsel

Michael G. Marinelli  
Staff Attorney

SUBJECT: Draft AO 1999-31

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for December 2, 1999.

Attachment

1 ADVISORY OPINION 1999-31

2  
3 Theodore H. Bornstein, Esquire  
4 Foley & Lardner  
5 Washington Harbour  
6 3000 K Street, NW, Suite 500  
7 Washington, DC 20007-5109

**DRAFT**

8  
9 Dear Mr. Bornstein:

10  
11 This refers to your letters dated October 4 and 21, 1999, which request an advisory  
12 opinion on behalf of the Oshkosh Truck Corporation ("Oshkosh") and its separate  
13 segregated fund, the Oshkosh Truck Corporation Employees' Political Action Committee  
14 ("OTCEPAC"), concerning the application of the Federal Election Campaign Act of  
15 1971, as amended ("the Act") and Commission regulations to Oshkosh's proposed  
16 fundraising activities on behalf of OTCEPAC.<sup>1</sup>

17 **FACTS**

18 You state that OTCEPAC holds an annual luncheon for members of the restricted  
19 class who contribute to the PAC through its payroll deduction plan. In the past,  
20 OTCEPAC has given gifts of nominal value, such as coffee mugs and sweatshirts, to  
21 PAC contributors at the luncheon. In an effort to increase participation in the payroll  
22 deduction program, OTCEPAC is planning to expand its programs for encouraging  
23 eligible employees to contribute. These plans entail the use of Oshkosh corporate  
24 treasury funds to purchase a variety of prizes and premium gifts.

25 You state that in conjunction with its announcement of its annual luncheon later  
26 this year, OTCEPAC plans to announce that it will give door prizes to PAC contributors.

1 For its 1999 PAC luncheon, eligible employees who are participants in the payroll  
2 deduction plan during the period between the announcement of the event and the date of  
3 the event will be eligible for door prizes. Door prizes for the 1999 event will include a  
4 \$50 gift certificate at a local restaurant, a \$50 gift certificate for merchandise purchased  
5 from the Oshkosh Truck or Pierce Manufacturing novelty catalogues, and two tickets to  
6 an NFL football game (approximate value \$150). The aggregate value of the door prizes  
7 will be approximately \$400. You propose that the amount of contributions to OTCEPAC  
8 that would be linked to the door prizes awarded at the 1999 luncheon will be based upon  
9 the total of payroll deducted contributions received by OTCEPAC, from those within the  
10 restricted class, between the date the PAC event is announced and the date it is held.

11 You state that as a further inducement to contribute, OTCEPAC will announce at  
12 the 1999 luncheon that, in addition to the above door prizes, contributors to the PAC  
13 through payroll deductions during the 12 months between the 1999 luncheon and the  
14 2000 luncheon will be eligible for a grand door prize. This will be a weekend getaway  
15 package at a vacation resort valued at approximately \$2,500.<sup>2</sup> The aggregate value of  
16 door prizes for the 2000 luncheon will thus be approximately \$2,900. You explain that  
17 each person who contributes to the PAC has an equal chance to win a door prize  
18 regardless of the amount of his/her payroll deduction contributions to the PAC. Winners  
19 need not be present at the event.

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<sup>1</sup> OTCEPAC is a multicandidate political committee which filed its statement of organization with the Commission in 1995. Pierce Manufacturing Corporation, referred to later in this opinion, is a wholly-owned subsidiary of the Oshkosh Truck Corporation.

<sup>2</sup> The precise value of the package will depend upon seasonal air fares and the cost of the resort accommodations.

1           You further explain that the winner of the grand door prize will not be determined  
2 until the 2000 PAC event is held. An eligible PAC solicitee would qualify to win the  
3 grand door prize if such person maintained a payroll deduction for six months prior to the  
4 2000 PAC event. An eligible PAC solicitee would qualify to win one of the lesser valued  
5 door prizes, such as a \$50 gift certificate for dinner at a local restaurant, or a gift  
6 certificate for merchandise from the Oshkosh Truck or Pierce Manufacturing novelty  
7 catalog, if such person maintained a payroll deduction for one month prior to the 2000  
8 PAC event.

9           You state that, by taking this two-track approach, OTCEPAC will be able to  
10 effectively promote contributions to the PAC from eligible employees throughout the  
11 year. Employees who sign up for payroll deduction relatively early in the cycle (that is,  
12 at least six months before the event) will be eligible for both the grand prize and the  
13 lesser-valued prizes. Those who choose to sign up relatively late in the cycle (that is,  
14 more than one month and less than six months before the event), when interest in the  
15 upcoming event is likely to be greatest, will still be eligible to win something.  
16 Nevertheless, any perceived incentive to delay participation until just before the event  
17 will be obviated by the fact that those who sign up late will only be eligible for the lesser-  
18 valued prizes. The PAC receipts that will be the basis for determining the application of  
19 the one-third rule that could require PAC reimbursement to the corporation will be the  
20 total PAC contributions received via payroll deduction from qualified corporate  
21 employees during the period from the 1999 PAC event to the 2000 PAC event.

22           In addition, OTCEPAC plans to create a premium gift program to encourage  
23 employees to sign up their fellow eligible employees for the payroll PAC deduction plan.

1 The value of the gift premium will vary according to the number of eligible employees  
2 that the employee successfully encourages to enlist. An employee who signs up three  
3 new eligible colleagues during the 12 months between events would be entitled to a \$50  
4 gift certificate at a local restaurant; an employee who signs up six new eligible colleagues  
5 would be eligible for the restaurant gift certificate and a \$50 gift certificate for items in  
6 the Oshkosh Truck and/or Pierce Manufacturing novelty catalogue. An employee who  
7 signs up ten new payroll deduction PAC contributors would receive two NFL tickets  
8 valued at approximately \$150.

9 Under the premium gift program, the new payroll deduction contributor would not  
10 need to maintain his/her payroll deduction for any specified minimum time period in  
11 order for the recruiting employee to receive a gift. However, in order for the new payroll  
12 deduction contributor to be eligible for door prizes, he/she would need to maintain the  
13 payroll deduction for the period of time specified above, and no new payroll deduction  
14 contributor successfully recruited pursuant to the premium gift program may ever be  
15 credited to any other recruiter for purposes of qualifying for a gift under the premium gift  
16 program.

17 Oshkosh seeks an advisory opinion from the FEC regarding the applicability of  
18 the "one-third rule" to these Committee fundraising efforts, including the program for  
19 payroll deduction contributions collected over a 12-month period between fundraising  
20 events (as described above). As part of this guidance, Oshkosh would like specific advice  
21 concerning the rule's operation with respect to the Committee's reimbursements to  
22 Oshkosh for the cost of door prizes and premiums for employees who recruit new  
23 members to OTCEPAC as part of this program. Oshkosh Truck proposes to use its

1 corporate treasury funds to pay the full amount of the costs for the various door prizes  
2 and premium gift awards, provided that doing so would comply with FEC regulations,  
3 including the one-third rule.

#### 4 **ACT AND COMMISSION REGULATIONS**

5 Under 2 U.S.C. §441b, corporations are expressly prohibited from making any  
6 contributions or expenditures in connection any Federal election. However, 2 U.S.C.  
7 §441b(b)(2)(C) provides an exception to this broad prohibition by excluding from the  
8 definition of the terms "contribution or expenditure" a corporation's payment of the costs  
9 incurred in the establishment, administration and solicitation of contributions to a  
10 separate segregated fund to be utilized for political purposes by a corporation. See also  
11 11 CFR 114.1(a)(2)(iii).

12 The term "establishment, administration and solicitation costs" is, in turn, defined  
13 in the regulations as, "...the cost of office space, phones, salaries, utilities, supplies, legal  
14 and accounting fees, fund-raising and other expenses incurred in setting up and running a  
15 separate segregated fund established by a corporation... " 11 CFR 114.1(b). Section  
16 114.5(b)(2) of the Commission regulations permits a corporation to utilize a raffle or  
17 other fundraising device which involves a prize, so long as State law permits and the  
18 prize is not disproportionately valuable. Dances, parties, and other types of entertainment  
19 may also be used as fundraising devices. However, the regulation further provides that,  
20 when using raffles or entertainment to raise funds, a reasonable practice to follow is for  
21 the separate segregated fund to reimburse the corporation for costs which exceed one-  
22 third of the money contributed to the PAC. (This is referred to as the "one-third rule.")

**1 APPLICATION TO OSHKOSH PROPOSAL****2 Prizes awarded at 1999 luncheon****3****4 As noted above, Commission regulations specifically permit corporate fundraising****5 devices such as a raffle. The Commission noted in its explanation to the regulations that****6 prizes may not be so numerous or disproportionately valuable in relation to the cost of the****7 raffle tickets that the raffle is in effect a trading money situation. For this reason the one-****8 third rule was developed as a reasonable standard to avoid this difficulty. See Federal****9 Election Commission Regulations, Explanation and Justification, House Document No.****10 95-44, at 107 (1977). Door prizes at the luncheon are indistinguishable from a raffle and****11 the one-third rule could be utilized for the \$400 in prizes to the 1999 luncheon as a guide****12 to avoid the trading money situation.<sup>3</sup>****13 Prizes awarded at 2000 luncheon****14 The prizes offered at the 2000 luncheon, as contrasted with those offered for the****15 1999 luncheon, are greater and the period in which individuals may earn chances to gain****16 these prizes is longer. These circumstances, however, do not affect the analysis. Section****17 114.5(b)(2) does not delineate any maximum or minimum time period that must be used****18 to determine the total amount of contributions received and the resulting need, if any, for****19 reimbursement by the PAC in applying the one-third rule. Therefore, the Commission****20 concludes that in OTECPAC's specific circumstances, the one-third rule may be applied****21 to determine the amount of reimbursement for Oshkosh funds used to purchase**

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<sup>3</sup> Past opinions have indicated that the cost of the luncheon (food, drink and use of facilities) itself, as distinguished from the raffle prizes or entertainment costs, are considered solicitation expenses of the SSF which could be paid from corporate treasury funds without any need for reimbursement by the SSF. See Advisory Opinions 1980-50 and 1995-17.

1 fundraising prizes for the 2000 luncheon, even though the underlying contributions are  
2 collected over a 12 month period prior that event. OTCEPAC may aggregate together the  
3 cost of all the prizes to be awarded at the 2000 luncheon and compare that cost with all  
4 contributions received during the 12 month period from qualified contributors who  
5 participate in the OTCEPAC payroll deduction program.

6 *Premium gift program for employees*

7 For the same reasons as explained above, OTCEPAC may also use the one-third  
8 rule when determining the reimbursement for costs of the premium gift program designed  
9 to encourage eligible employees to promote Oshkosh's payroll deduction program to  
10 other eligible employees. This program is linked to Oshkosh's other efforts to boost  
11 participation in its payroll deduction program during the 12 month period between the  
12 1999 and 2000 events. OTCEPAC may therefore aggregate the costs and resulting  
13 contributions from the premium gift program with those of the 2000 luncheon when  
14 applying the one third rule.

15 The Commission emphasizes that the described PAC payroll deduction program  
16 may only be utilized by personnel who qualify as members of the "restricted class" of  
17 Oshkosh. 11 CFR 114.1(c), (h) and (j). In addition, all contributions made through the  
18 payroll deduction process must comply with Commission regulations that require them to  
19 be voluntary. See 11 CFR 114.1(i), 114.5(a).

