

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
UTILITY WORKERS UNION OF)	
AMERICA, LOCAL 369, AFL-CIO,)	
)	Case Number: 09-cv-01022-JDB
Plaintiff,)	
)	DEFENDANT FEDERAL ELECTION
v.)	COMMISSION’S SUPPLEMENTAL
)	MEMORANDUM OF LAW
FEDERAL ELECTION COMMISSION,)	
)	
Defendant.)	
_____)	

**DEFENDANT FEDERAL ELECTION COMMISSION’S
SUPPLEMENTAL MEMORANDUM OF LAW**

Pursuant to the Court’s January 14, 2010 Minute Order, Defendant Federal Election Commission (“Commission”) hereby submits this Supplemental Memorandum of Law addressing why the Commission’s Explanation and Justification for 11 C.F.R. § 114.5(j) has no bearing on the legal sufficiency of the complaint filed by Plaintiff Utility Workers Union of America, Local 369, AFL-CIO (“Local 369”), and accordingly, why such “interpretive guidance” has no effect on the resolution of the Commission’s motion to dismiss.

ARGUMENT

I. THE COMMISSION’S EXPLANATION AND JUSTIFICATION FOR SECTION 114.5(j) DOES NOT APPLY HERE.

The “interpretive guidance” referenced by the Court in its January 14 Minute Order is the Commission’s Explanation and Justification for Commission regulation 11 C.F.R. § 114.5(j), H.R. Doc. No. 95-44, 109 (Jan. 12, 1977). “Explanation and Justification” (“E&J”) is the term the Commission uses to describe the explanatory document it creates and submits to Congress whenever the Commission proposes a new regulation or an amendment to an existing regulation.

See Explanations and Justifications for FEC Regulations, *available at* http://www.fec.gov/law/cfr/ej_main.shtml (last visited Jan. 25, 2010). The Commission issued its E&J for what is now section 114.5(j) to Congress in 1977. That regulation explains that notwithstanding restrictions on a separate segregated fund's ("SSF") ability to solicit contributions from people outside its restricted class of shareholders and executive employees, "[a] separate segregated fund may accept contributions from persons otherwise permitted by law to make contributions." 11 C.F.R. § 114.5(j). *See also* 11 C.F. R. §§ 114.5(g), 114.7, 114.8 (solicitation restrictions). The corresponding E&J adds that "[i]nforming persons of the right to accept such contributions is, however, a solicitation." E&J, H.R. Doc. No. 95-44, 109 (Jan. 12, 1977).

The regulation and accompanying E&J together serve two clear purposes. First, they clarify that the restrictions limiting whom SSFs may *solicit* for contributions do not equally limit from whom SSFs may *accept* contributions. *Compare* 11 C.F.R. 114.5(g), with 11 C.F.R. 114.5(j); *see also* FEC Advisory Op. 1992-09, 1992 WL 105045, at *4 n.5 ("Commission regulations permit a separate segregated fund to accept an unsolicited contribution from a non-solicitable person (assuming it is otherwise lawful)") (citing 11 C.F.R. § 114.5(j)). Second, the E&J explains that an SSF may not circumvent solicitation restrictions through veiled communications that merely inform persons whom SSFs may not solicit of the SSF's right to accept such unsolicited contributions. *See, e.g.*, FEC Advisory Op. 1988-39, 1988 WL 170430, at *4 n.2 ("Although [an SSF] may accept such unsolicited contributions, the Commission has held that where a separate segregated fund informs an individual whom it may not solicit that the individual has the right to make unsolicited contributions to the fund, the act of informing that individual that the fund may accept his contribution is itself a solicitation.") (citing, *inter alia*, E&J for 11 C.F.R. § 114.5(j)); FEC Advisory Op. 1988-38, 1988 WL 170429, at *6 n.3 (same);

FEC Advisory Op. 1984-55, at 2 n.2, available at <http://saos.nictusa.com/aodocs/1984-55.pdf> (last visited Jan. 25, 2010) (same).

Local 369's federal complaint alleges that the Commission's dismissal of its administrative complaint was contrary to law because Local 369 disagrees with the Commission's determination that Covanta's Policy of Business Conduct ("Covanta Policy") does not contain a solicitation for contributions to Covanta's federal PAC. Because, as discussed below, the Covanta Policy — a 24-page "Policy of Business Conduct" distributed by Covanta to its employees that covers 35 different topics, one of which is Covanta's policies regarding "Political Contributions/Lobbying" (*see* Compl. Attach. A, Ex. 22) — does not inform anyone of the SSF's right to accept unsolicited contributions, the E&J invoked by Local 369 is inapposite and has no bearing on the Commission's motion to dismiss.

II. THE COVANTA POLICY DOES NOT INFORM ANYONE OF THE COVANTA SSF'S RIGHT TO ACCEPT UNSOLICITED CONTRIBUTIONS.

Local 369's reference to the E&J for section 114.5(j), like other allegations in the complaint, appears to have resulted from a misreading of the Covanta Policy language. (*See* Memorandum in Support of Commission's Motion to Dismiss ("Mem.") at 11.) While asserting that the Covanta Policy "informs all employees of the right of the Covanta PAC to accept contributions from undefined 'eligible employees'" (Compl. ¶ 56), Local 369 never identifies any portion of the Policy that supposedly provides this information. Local 369 mischaracterizes the Policy's "discuss[ion] [of] providing contributions to the federal PAC without explaining the scope of the term 'eligible employees,'" as "offering a fairly open 'invitation' for employee contributions." (*Id.* ¶ 48.) But the sentence referring to "eligible employees" does not say anything about accepting unsolicited contributions to the Covanta PAC, let alone "invite" such contributions. The paragraph containing the relevant sentence reads as follows:

Primarily, in order to make contributions to federal political candidates or committees, we have established a federal political action committee (or “PAC”). Contributions to the PAC by eligible employees are voluntary. Whether an employee contributes or not results in no favor, disfavor or reprisal from Covanta. The PAC will comply with all related federal and state laws.

(*Id.* Attach. A, Ex. 22, at 11.) At most, this sentence begs the question about who is “eligible” to make voluntary contributions; it certainly does not inform any particular employees that they are eligible to contribute. (*See* Mem. at 10, 13-14 (discussing Commission’s repeated conclusion that corporate communications “may engender some inquiries” about SSFs, including “from readers who are not solicitable,” without being deemed solicitations) (citing FEC Advisory Op. 2000-07, 2000 WL 725744, at *1, *3; FEC Advisory Op. 1982-65, *available at* <http://saos.nictusa.com/aodocs/1982-65.pdf>); Reply at 8 (same); *see also* Compl. Attach. B, at 4.) Rather, the sentence underscores Covanta’s efforts to comply with federal and state laws, *inter alia*, by highlighting the voluntary nature of any contributions to the PAC made by “eligible employees.” (Compl. Attach. A, Ex. 22, at 11.)

The Commission has previously found similar language in a company communication to employees that merely explained the voluntary nature of any employee contributions to an SSF not to be a solicitation. *See* Advisory Op. 1983-38, at 3, available at <http://saos.nictusa.com/aodocs/1983-38.pdf> (last visited Jan. 25, 2010). (*See* Mem. at 9, 10 (citing and discussing analogous advisory opinions — including 1983-38 — as a basis for the Commission’s dismissal of Local 369’s administrative complaint).) In Advisory Opinion 1983-38, the Commission approved a corporation’s announcement in a “company publication distributed to all employees” of the corporation’s establishment of an SSF. Advisory Op. 1983-38, at 1. In particular, the proposed communications “contain[ed] factual matters about the political fund and necessarily

impl[ied] that solicitations will occur” as well as “indicate[d] some of the legal requirements that apply to solicitations under 11 CFR 114.5(a), i.e. the voluntary nature and political purpose of the fund.” *Id.* at 3. In concluding that the communications were not solicitations, the Commission observed that the communications did not “praise employees for making contributions, encourage their participation, or facilitate the making of contributions. Moreover, they d[id] not inform the reader that unsolicited contributions from nonexecutive [company] employees or retirees w[ould] be accepted by [the SSF].” *Id.*

Unlike the communications at issue in Advisory Opinion 1983-38, the Covanta Policy does not even “imply that solicitations [to Covanta’s SSF] will occur.” *Compare id., with* Compl. Attach. A, Ex. 22, at 11-12. To the extent it discusses contributions to Covanta’s SSF, the Covanta Policy merely “indicate[s] some of the legal requirements that apply” to SSF contributions generally, as well as “the voluntary nature and purpose of the fund.” Advisory Op. 1983-38, at 3. Like the communications at issue in Advisory Opinion 1983-38, the Covanta Policy does not “praise employees for making contributions, encourage their participation, or facilitate the making of contributions.” *Id.* (*See also* Mem. at 10.) And, like the communications at issue in Advisory Opinion 1983-38, the Covanta Policy does not “inform the reader that unsolicited contributions from nonexecutive [company] employees or retirees will be accepted by [the SSF].” Advisory Op. 1983-38, at 3. The Commission’s E&J for section 114.5(j) therefore has no bearing on whether the Covanta Policy contains a solicitation.¹

¹ Local 369 also seems to suggest that Advisory Opinion 1991-03, 1991 WL 415550 — in which the Commission determined that a proposed communication was *not* a solicitation — supports its reliance on the E&J for 11 C.F.R. § 114.5(j), apparently because the Commission found a disclaimer included in the proposed communication there susceptible of “be[ing] interpreted as an invitation for contributions from non-executive or non-administrative employees.” (Compl. ¶ 48 (citing Advisory Op. 1991-03, at 4).) But that Advisory Opinion actually supports the Commission, not Local 369. (*See* Mem. at 9.)

III. INTERPRETING THE E&J AS LOCAL 369 SUGGESTS WOULD UNDERMINE PROVISIONS IN FECA AND COMMISSION REGULATIONS INTENDED TO ENSURE THAT CONTRIBUTIONS ARE MADE VOLUNTARILY.

To the extent Local 369 is advocating an interpretation of the E&J for section 114.5(j) that would construe the Covanta Policy as a solicitation, such an interpretation presents the same policy concerns raised by Local 369's proposed interpretations of 2 U.S.C. § 441b(b)(3) and 11 C.F.R. § 114.5. (*See* Mem. at 14-15; Reply at 9.) As the Commission has explained, section 114.5 of the Commission's regulations was promulgated to "ensur[e] the voluntary nature of contributions to separate segregated funds." FEC Advisory Op. 2003-06, 2003 WL 21210186, at *1; *see also* FEC Advisory Opinion 1996-18, 1996 WL 341161, at *3 n.3 (observing "the importance of ensuring that any contributions solicited for [an SSF] [are] voluntary and that no penalty attach[es] to any person who decides not to make a contribution"). (*See* Mem. at 14-15.) A determination that the Commission acted contrary to law in failing to classify as a solicitation a statement in a company policy of business conduct underscoring the voluntary nature of contributions to the company's SSF would undermine the fundamental purpose of these statutory

First, unlike the Covanta Policy, the communication at issue in Advisory Opinion 1991-03 "intended to seek contributions from the [company's] restricted class," but included a disclaimer purporting to identify who "may contribute" to the company's SSF that "erroneously characterize[d] the extent of the restricted class" by referring generally to all "employees of the company." 1991 WL 415550, at *1, *3. The Covanta Policy does not purport to seek contributions at all, but rather to inform employees of Covanta's policies of business conduct generally, including policies concerning "Political Contributions/Lobbying." (*See* Compl. Attach. A, Ex. 22, at 11-12.) Moreover, the Covanta Policy neither identifies who "may contribute" to the Covanta SSF nor informs "eligible employees" or anyone else of the SSF's right to accept unsolicited contributions. Rather, the Policy highlights the voluntary nature of contributions "by eligible employees" to the Covanta SSF. *See* Advisory Op. 1983-38, at 3.

Second, the Commission nowhere indicated that a communication needs a disclaimer to avoid being deemed a solicitation. On the contrary, the Commission required that the disclaimer at issue in Advisory Opinion 1991-03 be amended *only* "[i]f [the SSF] intend[ed] to retain the disclaimer." 1991 WL 415550, at *3. The Advisory Opinion clearly implied that an acceptable alternative was to omit the disclaimer altogether.

and regulatory provisions: protecting employees from unlawful pressure to contribute to their employers' SSFs.

CONCLUSION

For the foregoing reasons and those explained in the Commission's prior memoranda, the Commission respectfully requests that this Court dismiss the Complaint with prejudice for failure to state a claim upon which relief can be granted.

Respectfully submitted,

Thomasenia P. Duncan (D.C. Bar No. 424222)
General Counsel

David Kolker (D.C. Bar No. 394558)
Associate General Counsel

Kevin Deeley
Assistant General Counsel

/s/ Erin Chlopak

Erin Chlopak (D.C. Bar No. 496370)
Attorney

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

Dated: January 26, 2010