AGENDA DOCUMENT #95-64-A

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

JUN 29 7 01 AM '95

SUBMITTED LATE
AGENDA ITEM
For Meeting of: JUN 29 1995

June 29, 1995

MEMORANDUM

TO: The Commission

FROM: Scott E. Thomas
Commissioner

SUBJECT: Alternative draft for AOR 1995-15 (Allison PAC)

I attach for your consideration an alternative for a portion of the OGC draft set forth in Ag. Doc. 95-64. As to that portion of the draft concerning the employee earmarking program, we should clarify that the company's funds may be used to administer this program because the funds raised and disbursed under the program are being treated as if they were contributions to and by the PAC. The exception at 2 U.S.C. §441b(b)(2)(C) should not be read to extend to a PAC's program to raise earmarked contributions to candidates unless the funds are considered contributions "to [and by] a separate segregated fund."

Further, because the funds raised and disbursed under the program are being treated as contributions to and by the PAC, we need not include any "direction or control" analysis. It does not matter under the facts before us.

The attached version shows the changes I would make. The changes on pages 11, 13, and 14 are in the nature of friendly corrections.

Because I cannot join in the first part of the opinion draft concerning foreign national involvement, I suggest we have a separate vote on that part.

Attachment

CFR 110.4(a)(2).[4/] The Commission, therefore, considers your proposed safeguards to be sufficient to ensure the PAC's compliance with the prohibition on foreign national participation.

Employee Earmarking Program

Each year, the employees of the company voluntarily fill out a contribution election form issued by Allison PAC. The form gives a choice of making a contribution in the form of a payroll deduction or a personal check in an amount to be chosen by the individual; no amount is suggested. The payroll deduction option provides for a monthly deduction from the employee's salary in the amount designated, with the funds to be forwarded to the PAC. Such deduction would continue until the amount is amended or revoked by the employee. The form also provides for a certification by the contributor that he or she has been informed that no favor or disadvantage from the company will result by reason of the amount given or the decision not to contribute.

In the lower portion of the form, the employee may designate a percentage of his yearly deduction total to go to as many as three candidates of the employee's choice. No candidates are suggested by the PAC. The form states that the disbursements so designated will be made in October of

4/ The Commission notes that, while the PAC by-laws appear in some instances to use U.S. citizenship as the criterion for participation or making contributions, the Act permits such activity by legal "permanent residents" as well. 11 CFR 110.4(a)(2)(ii).

each year and that, after October, a re-designation would be needed. It is also stated that if no designee is named, the PAC "will distribute the contributions."

You provide the following example of how the program works: An employee contributing $30 per month, for a total of $360 per year, may choose to designate that one-third goes to candidate A, one-third to candidate B, and that the remaining third is spent pursuant to the PAC's determination. Each month, the $30 is deposited into the PAC. In October of each year, PAC checks with accompanying letters from the PAC are sent to candidate A in the amount of $120 and to candidate B in the same amount, and the PAC will determine what disbursements, if any, will be made with the remaining $120. The PAC reports the $360 as a contribution to the PAC and the disbursements of $120 as PAC contributions to candidates A and B, to be counted against the Act's limits. Another possible variation is that an employee may notify the PAC that he or she wishes to make a designation later in the year. In those cases, the individual may make a designation in October or shortly before. You state that the same treatment as described above is applied to these contributions for reporting and limitation purposes.

The letter from the PAC to the recipient candidate that accompanies the checks states that the check is from Allison PAC and that the amount "was determined through the specific request of one or more Allison Engine employee(s) who designated all or a portion of their voluntary contribution."

The letter also states that the check does not represent a decision by the PAC but solely reflects the contributor's designation.

[~~For corporations wishing to encourage employees to make contributions to committees supporting Federal candidates,~~] the Act and Commission regulations permit "the establishment, administration and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation." 2 U.S.C. §441b(b)(2)(C).

Because you choose to treat the contributions raised and made under the Program as contributions to and by the PAC, the company's funds may be used to administer the program and solicit the contributions.

Commission regulations permit corporations to use a payroll deduction plan for contributions to its separate segregated fund from the personnel in its restricted class, i.e., executive and administrative personnel. 11 CFR 114.5(k) and 114.1(c)(1).5/ Advisory Opinions 1994-23, 1991-29, and 1991-19. Your proposal raises a number of questions, however, as to the timing and attribution of contributions.

The Act provides that contributions made by a person which are earmarked or otherwise directed through an intermediary or conduit to a candidate shall be treated as contributions from that person to the candidate. 2 U.S.C. §441a(a)(8). Commission regulations define "earmarking" as:

> a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or

---

5/ The restricted class, i.e., the class that may be solicited by a corporation or its SSF for contributions to the SSF at any time, consists of the corporation's stockholders, its executive and administrative personnel, and the families of such persons. 2 U.S.C. §441b(b)(4)(A); 11 CFR 114.5(g)(1).

> expended on behalf of, a clearly identified candidate or a candidate's authorized committee.

11 CFR 110.6(b)(1). Contributions that are earmarked shall be forwarded by the conduit to the ultimate recipient candidate in accordance with the requirements of 11 CFR 102.8. 11 CFR 110.6(b)(2)(iii). This means that contributions designated for a candidate's authorized committee shall be forwarded no later than 10 days after the conduit's receipt of such contributions. See 11 CFR 102.8(a). [~~Generally, a conduit's contribution limits are not affected by passing on earmarked contributions, except where the conduit exercises "any direction or control over the choice of the recipient candidate." 11 CFR 110.6(d)(1). If "direction or control" is exercised by the conduit, the earmarked contribution will be considered a contribution by both the original contributor and the conduit. 11 CFR 110.6(d)(2). See Advisory Opinion 1981-57.~~]

Under your proposal, the employee would designate a portion of his or her contribution to be sent to a specific candidate or committee during the next October. The PAC would forward the contribution long after its receipt of the funds and long after its receipt of the designation. By forwarding the funds in this belated manner, the PAC would not be in compliance with the 10 day time limit applicable to committees acting as conduits for donor designated contributions to candidates. Accordingly, Allison PAC will have to implement its earmarking program in another manner.

In Advisory Opinion 1991-29, the Commission addressed a proposal by which employees would make contributions to the separate segregated fund in anticipation, and with the stated intention, of subsequently making earmarked contributions to candidates from the funds. A corporation provided a payroll deduction plan to permit eligible employees to contribute funds to "individual accounts" maintained by the SSF in its general bank account through administrative recordkeeping. Contributions to candidates from employees' "accounts" required approval by means of employees' signatures on a form requesting that a check for a specific amount be contributed to a candidate.

The Commission concluded that the funds received by the SSF's bank account were contributions to the SSF at the time it received the funds. In addition, the Commission treated this process as a deferred earmarking program whereby contributions resulting from employee designations under the program later became earmarked contributions from the employees through the conduit SSF. Because the designations of candidate donees were made by the employee after the funds were received by the SSF in accordance with a specific program which contemplated designations in that manner, the contributions were treated as subject to a "designation, instruction, or encumbrance" within the meaning of 11 CFR 110.6. See Advisory Opinion 1981-21. The Commission, however, did not address a situation where the forwarding of the designated contribution by the conduit would occur many weeks or months after the designation.

Assuming Allison PAC wishes to send the funds to designated committees in October of each year, it may still operate its plan subject to modification as to when the employee actually makes the designation. The PAC may send a solicitation requesting the approval by the employee of a monthly payroll deduction in a certain amount or the pledge of a check in a certain amount. That solicitation would also inform the employee that the opportunity for designating candidate recipients, and the amounts they each should receive, would occur during a certain ten day window of time, specified in the solicitation, in the following October, and that the PAC would disburse the funds according to the designation instructions at the end of that period. Since the PAC also wishes to provide an opportunity for non-designation, and the disbursement by the PAC of non-designated funds for political uses it determines, the solicitation would permit the employee to denote a percentage of funds that he or she wished to have subject solely to the PAC's discretion for distribution at any time.

As in Advisory Opinion 1991-29, the funds that the employee wished to be subject to a future candidate designation would be accounted for in individual book accounts. See Advisory Opinion 1981-21. This would constitute a reasonable accounting method for assuring that funds to be designated for a candidate would not be used until the time of designation. During the ten day [~~forwarding~~]

period, the PAC would accept a designation form completed by the employee which lists the candidates, if any, that he or she wishes to receive contributions and in what amounts or percentages. The PAC may also take the opportunity to allow the employee to denote that funds in the book account may be used in a manner solely to be determined by the PAC.

[~~As noted above, the passing on of earmarked contributions by a conduit does not generally affect the contribution limits of the conduit. 11 CFR 110.6(d)(1). If, however, the conduit "exercises any direction or control over the choice of recipient candidate," the earmarked contribution is considered a contribution by both the original contributor and the conduit, and must be so reported. 11 CFR 110.6(d)(1) and (2). The Commission notes that, under your proposed program, contributions made to candidates under the program are treated as contributions by Allison PAC and subject to the PAC's contribution limits under the Act. See Advisory Opinion 1991-29.~~]

There are a number of reporting considerations with respect to your program based upon the above analysis. Consistent with Advisory Opinion 1991-29, Allison PAC should report receipts from participating employees as contributions to the PAC at the time the PAC receives the monthly deduction proceeds from the employee's salary or receives the employee's check. These contributions are received into the PAC's bank account at that time and are held for a period of months, as opposed to situations in which the conduit passes on the funds shortly after of receipt of the funds. Such contributions are itemizable when the employee's total for the calendar year exceeds $200. 2 U.S.C. §434(b)(3)(A); 11 CFR 104.3(a)(4)(i). They are subject to the limits of individual contributions to PACs under 2 U.S.C. §441a(a)(1)(C).

As a conduit of earmarked contributions, Allison PAC should identify the original donor and disclose the conduit transaction in its reports, pursuant to 11 CFR 110.6(c)(1). The contributions to Federal candidates through your program are viewed as being made by the original participant and, since you are counting the disbursements as PAC contributions to the candidate, as contributions made by the PAC. The limits of 2 U.S.C. §441a(a)(1)(A) apply to the employees and the limits of 2 U.S.C. §441a(a)(2)(C) apply to the PAC.

The Commission notes that the PAC's letter to the designated committee accompanying the contribution check describes the check as "a check in the amount of $__ from Allison [PAC]." It proceeds to state that the check does not represent the PAC's decision but solely "the designated request of the voluntary contribution(s)." The letter does not state that this check is a contribution from the PAC. The fact that an earmarked contribution is forwarded by a conduit's check does not mean, by itself, that it is a contribution from the conduit. See 11 CFR 110.6(d) and 110.6(c)(1)(v). In order to clarify that Allison PAC considers the amounts sent to the designee as contributions from the PAC, it should state that this check is a contribution from the PAC.

The letter also does not identify the individuals who earmarked the contributed amounts. The letter should state the pertinent identifying information for each employee and, if the check includes designations by more than one employee, the amount earmarked by each employee. Otherwise, the recipient will not be able to properly report the receipt of the contribution. See 11 CFR 110.6(c)(1) and (2).

Use of Payroll Deduction for Non-Restricted Employees

You ask whether a written authorization solicited through twice yearly mailings directly to the home address of non-restricted class employees provide an acceptable basis for the company to establish a payroll deduction for PAC contributions by such employees.

As stated above, ~~solicitations of~~ contributions by restricted class personnel for contributions may be ~~done~~ facilitated through a payroll deduction. 11 CFR 114.5(k). Employees who are not executive or administrative employees under 11 CFR 114.1(c)(1) and (2) will not be able to participate in a payroll deduction plan under 11 CFR 114.5 (i.e., for solicitations at any time) unless they qualify for the restricted class in another way, e.g., as a stockholder. See Advisory Opinion 1983-17.

The Act and Commission regulations also provide that a corporation or its SSF may solicit contributions to its SSF from corporate employees who are not in the restricted class. These solicitations may be sent only twice a year, must be in written form, and must be mailed to the employee's residence. The solicitation program must be designed so that neither the corporation nor its SSF may determine who makes a contribution of $50 or less, or who does not contribute. 2 U.S.C. §441b(b)(4)(B). Commission regulations require the establishment of a custodial arrangement, whose requirements are described in detail, in order to protect the anonymity of employees who do not wish to contribute or who wish to respond with a single contribution of $50 or less or contributions aggregating $200 or less in a calendar year. 11 CFR 114.6(d). In addition, Commission regulations specifically forbid the establishment of a payroll deduction plan to facilitate contributions in response to these twice-yearly solicitations. 11 CFR 114.6(e)(1). Advisory Opinions 1994-23, 1991-19, and 1981-14. This prohibition exists along with, not in place of, the other above-described conditions. The Commission concludes, therefore, that the employees you describe in your final question may not participate in a payroll deduction plan.

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

Sincerely,

Danny L. McDonald
Chairman

Enclosures (AOs 1994-23, 1992-16, 1991-29, 1991-19, 1990-8, 1983-17, 1981-57, 1981-21, and 1981-14)