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THE WHITE HOUSE

WASHINGTON

October 14, 1975

MEMORANDUM FOR: JIM CONNOR

FROM: DICK CHENEY

D

The attached came out of the out-box.

It's very important that we take a look at this to see what, if anything, we want to do or can do.

It could have a major impact, so take a look at it and touch base with our lawyers and see what, if anything, we might want to do.

Attachment

Received in Jerry's December 1976 — OBE.

Digitized from Box C29 of The Presidential Handwriting File at the Gerald R. Ford Presidential Library

Don R J

This is serious. It will undercut any responsible corporate "fund raising". A staff recommendation but could be devastating if FEC approves.

Commissioner Memo #112

FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

October 9, 1975

AO 1975-23

MEMORANDUM TO: The Commissioners

THROUGH: Lan Potter

FROM: Jack Murphy JM.

Attached find the preliminary draft in AO 1975-23, regarding a request submitted by the Sun Oil Company. This is for the Tuesday, October 14th meeting of the Commission.

Attachment

REDRAFT 10/9/75
Janey:bjm

ADVISORY OPINION 1975-23

Establishment of Political Action Committee and Employee Political Giving Program by Corporation.

In this advisory opinion, rendered pursuant to 2 U.S.C. §437f, the Commission responds to a request for an advisory opinion submitted by the Sun Oil Company and published as AOR 1975-23 in the Federal Register on July 29, 1975 (40 FR 31879). Interested persons were invited to submit written comments with respect to this request. A number of such comments were received and considered by the Commission before this opinion was issued.

A. Introduction

Sun Oil proposed to sponsor a bifurcated responsible citizenship program for political activities. One part of this program will involve the expenditure of general corporate treasury funds to establish, administer, and solicit voluntary contributions to a political action committee. This committee (hereinafter SUN PAC) will be maintained as a separate segregated fund and used by Sun Oil for political purposes under the provisions of 18 U.S.C. §610. The other part of this program will involve the expenditure of treasury funds to establish and administer a so-called "trustee" plan. Under this plan (hereinafter SUN EPA) Sun Oil will open separate bank accounts for participating employees in order to channel

their contributions to candidates for political office. The activities of SUN EPA will be separate and apart from those of SUN PAC.

The Commission has been asked to evaluate SUN PAC and SUN EPA with respect to the requirements of the Federal Election Campaign Act of 1971, as amended (hereinafter the "FECA" or the "Act") and the proscriptions of 18 U.S.C. §610. In the following opinion, the Commission will discuss various legal aspects of corporate segregated funds and trustee plans.

B. Applicable Law

Section 610 of Title 18 of the United States Code provides, in pertinent part, as follows:

> Contributions or expenditures by national banks, corporations or labor organizations.
>
> It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or [officials] to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any . . . political committee . . . to accept or receive any contribution prohibited by this section.

> As used in this section, the phrase "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization in connection with any election to any of the offices referred to in this section; but shall not include . . . the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization . . .: Provided, That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction.

The history of section 610, prior to its amendment by section 205 of the Federal Election Campaign Act of 1971, was set forth in United States v. UAW, 352 U.S. 567 at 570-90 (1957). Moreover, the history of the 1971 amendment, which permits corporations to establish, administer and solicit contributions to separate segregated funds, was discussed in some detail in Pipefitters Local 562 v. United States, 407 U.S. 385 at 409-13, 421-27, 429-32 (1972). See also, United States v. CIO, 335 U.S. 106 (1948). There is no need, therefore, to trace that history here in any detail. However, some general conclusions can be made in light of legislative history about the application of section 610 to the corporate political activities proposed by Sun Oil.

C. Conclusions

(1) First, it is lawful for Sun Oil to expend general treasury funds to defray expenses incurred in establishing, administering, and soliciting contributions to SUN PAC so long as it is maintained as a separate segregated fund. The language of the section 610 and the supporting legislative history of the 1971 Amendment to the statute plainly permits such expenditures. See, Pipefitters, supra, at 429-32. SUN PAC must register and file reports just as any other political committee is required to do under the FECA.

(2) Secondly, it is lawful for Sun Oil to make any political contributions and expenditures it sees fit in connection with any Federal election so long as the monies used for such purposes are expended from SUN PAC and the fund consists of voluntary contributions. Contributions are presumed to be voluntary only when they have been strictly segregated from treasury funds and when it appears that they have not been secured through coercion. See, United States v. Boyle, 482 F.2d 755, 761 (D.C. Cir.), cert. denied 94 S. Ct. 593 (1973). Such contributions may not be secured by actual or apparent physical force, job discrimination, financial reprisals, or the threat thereof; or by the actual or effective assessment or collection of dues, fees, or other monies required as a condition of employment. The solicitation of contributions to SUN PAC

"must be conducted under circumstances plainly indicating that donations are for a political purpose and that those solicited may decline to contribute without loss of job, . . ., or any other reprisal within the . . . institutional power" of Sun Oil. See, Pipefitters, supra, at 441. SUN PAC may not accept from any donor any contributions which have been unlawfully secured, as described above.

In situations where SUN PAC makes contributions or expenditures in connection with Federal and non-Federal elections, it must establish and maintain a separate account for use in Federal elections. Monies to be expended in non-Federal elections should not be commingled with monies to be expended in Federal elections. SUN PAC must designate the bank in which it maintains its account for Federal elections as the campaign depository of the fund. 2 U.S.C. §437b. All contributions received or expenditures made in connection with Federal elections must be deposited in or drawn from this account. If SUN PAC maintains a separate account for use in Federal elections, it will be required to file reports pertaining only to the separate Federal account. However, if SUN PAC fails to segregate the accounts and monies to be used in connection with both Federal and non-Federal elections, then SUN PAC will be required to report all contributions and expenditures regardless of whether they are made for non-Federal purposes.

Any political contributions or expenditures made by SUN PAC are subject to the applicable reporting requirements of the FECA and the limitations of 18 U.S.C. §608. Moreover, since individual contributions made to SUN PAC are also contributions within the meaning of 18 U.S.C. §591(e), such contributions are also subject to the limitations of 18 U.S.C. §608.

Whether SUN PAC can lawfully make contributions or expenditures in connection with non-Federal elections is a matter to be determined under the appropriate State laws.

(3) Thirdly, it is lawful for Sun Oil to control and direct the disbursement of contributions and expenditures from SUN PAC. When the issue of the control of segregated funds was presented to the Supreme Court in the Pipefitters case, (which involved a section 610 criminal prosecution against a labor union) the Court held that "such a fund must be separate from the sponsoring union only in the sense that there must be a strict segregation of its monies from union dues and assessments." Id. at 414. After an exhaustive review of legislative history, the Court concluded that (Id. at 415-417):

> Nowhere, however, has Congress required that the political organization [i.e., the fund] be formally or functionally independent of union control or that union officials be . . . precluded from determining how the monies raised will be spent. * * * Senator Taft adamantly maintained that labor organizations were not prohibited from expending those monies [from the fund] in connection with Federal elections. * * * Neither the absence

> of even a formally separate organization, . . ., nor the method for choosing the candidate to be supported was mentioned as being material. Similarly, the only requirements for permissible political organizations were that they be funded through separate contributions [which were voluntary]. (emphasis added).

The Court also concluded from the legislative history that (Id. at 426):

> [T]he term "separate" . . . is synonymous with "segregated." Nothing in the legislative history indicates that the word is to be understood in any other way. * * * It is difficult to conceive how a valid political fund can be meaningfully "separate" from the sponsoring union in any way other than "segregated."

Since corporations and labor unions are subject to the same restrictions under section 610, it is clear that under the language of the Pipefitters case, Sun Oil can exercise control over the operations and activities of SUN PAC.

There is much concern in the corporate business community about the permissible scope of soliciting contributions to a corporate political fund. Sun Oil indicated in its request that it proposes to "solicit and accept contributions from individuals and from other political committees." This unqualified language suggests that Sun Oil contemplates spending general treasury funds for solicitation efforts aimed at persons connected with the corporate organization, such as stockholders, directors, officers, and employees, as well as the general public.

(4) It is the opinion of the Commission that Sun Oil may spend general treasury funds for the solicitation of contributions to SUN PAC only from the stockholders of the corporation. Of course, the stockholders of Sun Oil could include, and probably does include, employees and members of the general public who own shares of stock in or have stockholder type interests in the corporation. It would be unlawful for Sun Oil to spend general treasury funds to subsidize solicitation efforts aimed at non-stockholders, whether they are employees or not. Such expenditures certainly may not reach members of the general public unless they are also stockholders.

This interpretation of section 610 obviously does not prohibit Sun Oil from eventually reaching the general public through its solicitation campaign. Under the express language of the statute, SUN PAC may make expenditures from its fund of voluntary contributions to subsidize such a campaign since the fund may be used "for political purposes" by Sun Oil. Sun Oil may conduct a solicitation drive simultaneously aimed at stockholders and the general public so long as it assures that expenses incurred soliciting stockholders are the only solicitation expenses charged to or reimbursed from the general treasury, while the remaining expenses are charged to SUN PAC's fund of voluntary contributions. Appropriate books and records should be maintained for this purpose and are subject to audit at the discretion of the Commission.

The Commission's conclusions concerning the scope of solicitation activities which may be subsidized by treasury funds is supported by a reasonable interpretation of the segregated fund exception to section 610 in context with the whole statute and in light of legislative history. Section 610 plainly permits a corporation to spend treasury funds to solicit contributions to a segregated fund. However, the statute wholly fails to specify who may be solicited with treasury funds. This ambiguity is apparent when the segregated fund exception is read in context with the other two exceptions of section 610. Those exceptions permit the expenditure of treasury funds for activities aimed only at stockholders. In order to resolve this ambiguity the Commission will resort to the legislative history of the 1971 amendment to the statute.

During the House debates on the 1971 amendment to section 610, permitting corporations to spend treasury funds for certain political purposes, Rep. Orval Hansen, the sponsor of the amendment, remarked that:

> At the present time there is broad agreement as to the essence of the proper balance in regulating corporate and union political activity required by sound policy and the Constitution. It consists of a strong prohibition on the use of corporate and union treasury funds to reach the general public in support of, or opposition to, Federal candidates and a limited permission to corporations and unions, allowing them to

> communicate freely with members and stockholders on any subject, to attempt to convince members and stockholders to register and vote, and to make political contributions, and expenditures financed by voluntary donations which have been kept in a separate segregated fund. This amendment writes that balance into clear and unequivocal statutory language. (emphasis added) 117 Cong. Rec. 43381

Obviously, the intent of Congress in amending section 610, as expressed by Rep. Hansen, was to permit corporations to spend treasury funds for three categories of political activities. The activities contemplated included the solicitation of contributions, but only from stockholders. This intent is consistent with the general purpose of section 610 which, when applied to corporations, was to protect the interests of stockholders.

As Mr. Justice Reed observed, speaking for the Supreme Court in the first case where the Court construed the application of section 610:

> This legislation seems to have been motivated by two considerations. First, the necessity for destroying the influence over elections which corporations exercised through financial contribution. Second, the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders. (Emphasis added, footnotes omitted.)

United States v. CIO, supra, at 113. Even Mr. Justice Rutledge, concurring in CIO, agreed that the protection of stockholder

interests, which he described as the "minority protection objective," was one of the principal purposes of section 610. Id. at 135.

The protection of stockholder interests is not an objective prescribed by Supreme Court decisions alone. It is an objective rooted in the general principles of corporation law which protect such interests.

Generally, stockholders have a legally protected interest in the earnings, assets, and control of the corporation in which they have invested. See, H. Henn, Law of Corporations §155 at 279 (2nd ed. 1970) (hereinafter "Henn"). This interest is protected, to some extent, by the fiduciary duty which management owes its stockholders to exercise good business judgment in the use of corporate assets, including, of course, the expenditure of treasury funds. See, Henn, supra §§231-42, at 450-82. Thus, since management has the primary responsibility to use corporate assets to maximize profits, from which dividends may be paid to stockholders, its use of such assets has been strictly regulated by law. Id. See also, Henn, supra §§318, 327, 328, and 359 at 630-48, 665-70, 749-55. Indeed, the law has even declared that management lacks power to make certain uses of corporate assets. In particular, the law has traditionally prohibited corporations from making charitable and political contributions,

although modern statutes now permit charitable contributions. See, Henn, supra §183 at 350-51 and 350 n. 36. The interests of stockholders in the proper use of corporate assets is so highly regarded that stockholders have been granted the right to sue and collect damages in situations where management either exceeds its legal authority or exercises poor business judgment in making certain uses of corporate assets. See, Henn, supra §§358, 359 at 749-55. See also, Cort v. Ash, ___ U.S. ___ ___, 95 S. Ct. 2080, 2091 (1975) (stockholders may sue under State law doctrines of ultra vires and breach of fiduciary duty where management spends treasury funds in violation of section 610).

During the House debates, Rep. Hansen stated that it was proper to allow expenditure of treasury funds under the three exemptions proposed to section 610. In this connection he said:

> Recognizing that group interests must be given some play and that the interest of the minority is weakest when corporations and unions confine their activities to their own stockholders and members, the beneficial owners of these organizations, the second subdivision of the amendment sets out three precisely defined and limited permissions for corporate and union activity related to the political process. (emphasis added) 117 Cong. Rec. 43380.

Certainly, it would be consistent with legislative intent and with the general principles of corporation law previously discussed to suggest that minority stockholders have a minimal

interest in preventing treasury funds from being used in a solicitation campaign aimed at them to determine whether they wished to make political contributions to a partisan political fund sponsored by their corporation. However, it is quite another thing to say that minority stockholders have no interest in preventing treasury funds from being used to solicit political contributions from non-stockholders, whether they are employees or not. Such an interpretation of section 610 would allow unlimited solicitation subsidized by treasury funds, and would be tantamount to officially sanctioning the very abuse the law was intended to prevent -- unchecked political use of treasury funds by corporations.

It is clear that treasury funds cannot be expended for the solicitation of contributions to a corporate political fund from members of the general public.

Under the substantive law, as interpreted by the Supreme Court in United States v. UAW, supra, it was an indictable offense under section 610 for a union to spend treasury funds for the purpose of influencing the general public to vote for union supported candidates in Federal elections through political broadcasts. In the same respect, it would be unlawful for corporations to spend treasury funds for the purpose of influencing the general public to contribute to a corporate political committee which will be utilized to support

candidates for Federal office. As Representative Hansen remarked in House debates on the 1971 amendment to section 610:

> The dividing line established by section 610 is between political activity directed at the general public in connection with Federal elections which must be financed out of political donations and activities directed at members or stockholders which may be financed by general funds. As a matter of principle this line of demarcation supports the proposed limitation and there is no consideration of which I am aware that requires an exception to the basic guiding theory of this provision.
>
> * * *
>
> At the present time there is broad agreement as to the essence of the proper balance in regulating corporate and union political activity required by sound policy and the Constitution. It consists of a strong prohibition on the use of corporate and union treasury funds to reach the general public in support of, or opposition to, Federal candidates . . . . (emphasis added) 117 Cong. Rec. 43380-81

(5) An issue related to that of soliciting contributions is that of SUN PAC accepting contributions from any donor willing to make them. It is the opinion of the Commission that SUN PAC generally can accept any contribution from any donor, whether or not it is lawful for Sun Oil to solicit a contribution from that donor. However, section 610 would prohibit SUN PAC from accepting any political contribution which would be an unlawful contribution by the donor under that statute.

Although Sun Oil cannot spend treasury funds to solicit contributions from political committees, SUN PAC could solicit such contributions with expenditures from its fund of voluntary contributions. Accordingly, SUN PAC may accept contributions from political committees which it solicited and contributions which were not so solicited but freely donated by political committees.

(6) Finally, Sun Oil has proposed a detailed organizational scheme for SUN PAC. Essentially, SUN PAC will be a voluntary, non-profit, unincorporated, political membership association open to certain employees of Sun Oil and its subsidiaries. Several employees will be appointed by Sun Oil to create SUN PAC. In addition, Sun Oil will appoint the administrative officers of SUN PAC. A contribution committee will manage the overall financial operations of SUN

PAC and will designate the donees of contributions. The committee may delegate all of its powers to the Chairman of SUN PAC who is a Sun Oil appointee.

Section 610 does not mandate any formal organizational structure for corporate political committees. However, under 2 U.S.C. §432, SUN PAC, just as any other political committee, would be required to have a chairman and treasurer in order to accept or make any political contributions. Beyond these requirements, there are no other formal organizational requirements applicable to SUN PAC under Federal law.

Whether Sun Oil legally can delegate certain responsibilities to SUN PAC in the manner proposed, and whether SUN PAC may be established as a membership organization are matters to be determined under applicable State law.

Sun Oil also proposed to spend general treasury funds to establish a political giving program for its employees called SUN EPA. SUN EPA is what is commonly called a "trustee" plan. This plan was described in some detail in Sun Oil's request for an advisory opinion and briefly in the introductory paragraphs to this opinion. One commentator has described the concept of SUN EPA as follows:

> * * * SUN EPA conceptually serves a purpose not unlike a Christmas Club -- i.e., systematic "saving" toward a set goal (in this case, in order to provide a source for individual contributions at campaign time, rather than a fund for Christmas gifts).

Although Sun Oil concedes that SUN EPA is not a segregated fund under the only applicable exception of section 610, and that it is not a political committee subject to the registration and reporting requirements of the Act, Sun Oil nevertheless suggests that the expenditure of treasury funds to subsidize the program are authorized by the statute. Sun Oil offered no legal arguments to support this proposition, but it did stress the fact that it will not exercise any control over the affairs of SUN EPA and that employees who participate in the plan will exercise complete control and discretion over the disbursement of their political contributions.

(7) It is the opinion of the Commission that the expenditure of general treasury funds for the establishment, administration, or solicitation of contributions to SUN EPA, or the assumption of such costs by Sun Oil, either directly or indirectly, is plainly unlawful under the express terms of section 610. The statute prohibits not only contributions but also direct or indirect expenditures in connection with Federal elections.

The meaning of the term "expenditures" in section 610 is indeed quite broad and embraces any transaction or activity which inures somehow to the benefit of candidates, political parties or committees, or conventions connected with Federal

elections. As noted by the D. C. Circuit United States Court of Appeals, in Buckley v. Valeo, No. 75-1061 (D.C. Cir., Aug. 15, 1975), slip. op. at 1530:

> An expenditure may obviously inure to the benefit of a candidate even though the expenditure was not directed by the candidate and the candidate was not in control of the expenditures or of the goods or services purchased.

Similarly, Mr. Justice Rutledge, concurring in United States v. CIO, supra, characterized the broad reach of the term "expenditure" as used in section 610. (Id. at 133):

> The crucial words are "expenditure" and "in connection with." Literally they cover any expenditure whatever relating at any rate to a pending election, and possibly to prospective elections or elections already held. The broad dictionary meaning of "expenditure" takes added color from its context with "contribution." The legislative history is clear that it was added by the 1947 amendment expressly to cover situations not previously included within the legislative interpretation of "contribution." The coloration added is therefore not restrictive, it is expansive. * * *

Mr. Justice Frankfurter applied these same principles, regarding the breadth of the term "expenditures," in upholding an indictment prosecuted under section 610. See, United States v. UAW, supra, at 585.

Applying these general principles to SUN EPA as proposed, it is clear that the expenditure of general treasury funds to support that program is an unlawful direct or indirect expenditure in connection with Federal elections. It matters

not that Sun Oil will exercise no control over the operations of SUN EPA or the activities of employees participating in the program. The law prohibits expenditures in connection with Federal elections -- it does not go behind those expenditures to determine whether they will be made with a benevolent or patriotic intent. Furthermore, such an expenditure quite clearly can be presumed to be in connection with Federal elections. As noted by one commentator, "SUN EPA [is] a program which establishes separate bank accounts for individual employees in order to facilitate their individual contributions to candidates for political office." (emphasis added) Since the contributions passing through SUN EPA could be made to any political candidate for any political office, then it must be conclusively presumed that some of the contributions will reach Federal candidates or political parties or committees participating in Federal elections, either directly or indirectly. In facilitating such contributions, through its subsidization of SUN EPA, Sun Oil would necessarily be using treasury funds in connection with Federal elections.

Of course, SUN PAC could make expenditures from its fund of voluntary contributions to support the SUN EPA program, since, as noted previously, the fund may be used "for political purposes" by Sun Oil. Appropriate records should be maintained plainly showing that the expenses of SUN EPA

are being charged to the fund and not the general treasury of Sun Oil. These records may be audited at the discretion of the Commission.

This advisory opinion is issued on an interim basis only, pending the promulgation by the Commission of rules and regulations of general applicability.