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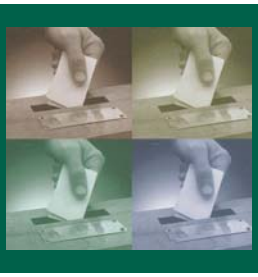

Corporate PACs and Employee-Stockholders: Changed Your Company's ESOP Lately?

A fundamental challenge all corporate-sponsored PACs face is how to increase employee participation in their federal PACs' activities, especially employee contributions. Federal election laws make this challenge all the more difficult by limiting the employees who may be solicited for contributions. Hourly employees, secretaries, laborers, persons without professional or administrative responsibilities, and even some mid-level supervisors are all off limits for solicitations, regular contributions and participation in PAC activities—even if they want to participate and even if they support the PAC's cause. Therefore, many corporate PACs often are stymied in their efforts to expand broad and democratic participation throughout the company ranks.

Corporate PACs, however, have another option open to them—soliciting their company stockholders—and recent tax changes may well allow the company to solicit more employees who are also stockholders. Many of those hourly employees, secretaries, laborers and supervisors who are otherwise off-limits on the basis of the positions they hold nonetheless own stock in the company through their retirement plans. Depending on the company's retirement plan details, holding such company stock may make the employees solicitable by the PAC under FEC rulings.

For decades federal election law has been wary of recognizing employees as *bona fide* stockholders, because of significant withdrawal and dividend restrictions inherent in many companies' Employee Stock Ownership Plans (ESOPs) and 401(k)-type plans. Federal election law and the Federal Election Commission (FEC) have demanded that an employee have the right to receive direct payment of dividends earned on his or her company stock or the right to withdraw shares without any restriction in order to qualify as a *bona fide* stockholder who can be solicited by the company's PAC. At the same time, such FEC-conforming features of ESOP and retirement plans were disadvantageous under federal tax laws

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FEC Approves Fundraising for State & Local Candidates

On April 24, 2003, the FEC issued an advisory opinion in response to a request by Jan Baran on behalf of U.S. Representative Eric Cantor and various Virginia state and local political candidates. The advisory opinion provides guidance as to how federal candidates and officeholders may participate in state and local campaigns under the new Bipartisan Campaign Reform Act (BCRA).

The BCRA prohibits federal candidates and officeholders from raising funds in connection with non-federal elections in amounts that exceed federal contribution limits and source restrictions. Virginia law allows state and local candidates to receive unlimited contributions, and permits contributions from sources that would otherwise be prohibited under federal law such as corporations.

The FEC's Advisory Opinion 2003-3 explains that federal candidates and officeholders may attend, participate, and speak at state and local fundraising events. However, if the federal candidates or officeholders publicly and orally ask for funds, either (1) a written disclaimer stating that they are only soliciting funds within federal amount and source restrictions must be clearly and conspicuously displayed, or (2) the federal candidate or officeholder must recite a disclaimer while making his or her remarks. The following disclaimer language was offered in the advisory opinion as a safe harbor:

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Also in This Issue

Protect Your PAC Name and Logo: Register a Service Mark

A PAC's name (and/or acronym) identifies and distinguishes it from other political action committees. Hence, a PAC's name is also a service mark, and, as a service mark, it is an important asset. For this reason, consideration should be given to protecting a PAC's name by registering it as a service mark at the U.S. Patent and Trademark Office (PTO). While there is no requirement that PACs register their names at the PTO, many do because of the added protection provided to registrants by the Federal Trademark Act of 1946 (Lanham Act).

Under the Lanham Act, a federal service mark registration protects the mark's holder against infringement. Among other things, registration constitutes constructive notice to the public of the registrant's ownership of the registered name, raises a legal presumption of the registrant's ownership of the mark nationwide and gives the registrant the exclusive right to use the mark in connection with the services identified in the registration. Moreover, in cases where a registrant has to sue to prevent an infringement, the Lanham Act confers federal court jurisdiction. The owner of a federal registration is also given the right to use the federal registration symbol (®) in connection with its name, which immediately alerts others to the registrant's statutory rights.

Ownership of a federal registration of a service mark makes it easier for a registrant to protect its rights in a name and prevent others from using not only the registrant's name but also a confusingly similar name. For example, the notice provision of the Lanham Act generally allows a registrant to object to use of a confusingly similar name even when the would-be user was unaware of the registrant's service mark rights. Thus, ownership of a federal registration deprives an infringer of the excuse that it is entitled to use a name because it did not have actual knowledge of the registrant's rights. Further, the presumption of ownership accorded by a federal registration places the onus on the would-be user, in the face of an objection by the registrant, to show that it is entitled to use a name at issue.

A service mark is extremely valuable because, in a crowded field of names and logos, it immediately identifies a particular service with a specific individual or organization in the minds of the public. Examples of registered PAC names are as follows: ABCPAC (Associated Builder & Contractors); NACSPAC (National Association of Convenience Stores); PRINPAC (Principal Financial Services, Inc.) and GENENPAC (Genentech, Inc.). Federal registration of a mark, and the bundle of rights that comes with registration, is recommended because it heightens protection in a name by deterring others from using a confusingly similar name and increases the remedies available should someone infringe the name. In other words, federal registration of a name helps to ensure that it continues to distinguish its owner's services from those of others and, hence, remains a valuable asset. ✦

For more information, contact Christopher Kelly (202.719.7115 or ckelly@wrf.com).

Changes in the States

New York

Although the changes do not affect corporations' $5,000/year aggregate limit for contributions to New York state and local candidates, the New York State Board of Elections (NYSBOE) has adjusted individual contribution limits for candidates in the state. (Corporations must also abide by these individual limits if the limits are less than $5,000.)

For many elections, New York uses formulas based upon enrolled voters in the district, and these formulas are not discussed here. Information about the application of these formulas to a particular election should be procured from the NYSBOE. The offices for which the non-formula limits have changed, and the corresponding higher limits, are as follows:

- ✦ Statewide candidates in a general election: $33,900
- ✦ State senate candidates in a primary election: $5,400
- ✦ State senate candidates in a general election: $8,500
- ✦ State assembly candidates in a primary election: $3,400
- ✦ State assembly candidates in a general election: $3,400

The NYSBOE also adjusted state limits applicable to New York City candidates, but these offices are also covered by City ordinances, which have not changed. The NYSBOE's contribution limit chart may be accessed at **http://www.elections.state.ny.us/finance/climit.htm**. ✦

For more information, contact Carol A. Laham (202.719.7301 or claham@wrf.com) or D. Mark Renaud (202.719.7405 or mrenaud@wrf.com).

House Ethics Committee Interprets New Rules

As previously reported in the March 2003 edition of *Election Law News*, the House of Representatives recently amended its gift rules by allowing perishable food provided to a Member's office to be counted against the $50 gift limit of each recipient of the food, and not just against the Member's own $50 limit. The House gift rules were further loosened in the area of charitable events, allowing Members and staff to accept free travel and lodging in order to attend a charitable fundraising event.

On April 11, 2003, the House Committee on Standards of Official Conduct issued an Advisory Memorandum known as a "Pink Sheet" (*available at* **http://www.house.gov/ethics/m_gift_rule_amendments.htm**) clarifying the application of these amendments to the gift rule. The Committee placed the following conditions upon acceptance of perishable food:

- Staff members who are offered a gift of perishable food must learn both the identity of the donor and the dollar value of the food provided in order to properly count it against their $50 gift limits.
- A staff member may not accept gifts of perishable food—even if valued at less than $10 and therefore not counted against the $50 limit—from any one source on a repetitive basis.
- A gift of food sent to a House office for staff, even if within the dollar limits of the gift rule, must be refused entirely if the person offering the food has a direct interest in the particular legislation or other official business on which staff is working at the time.
- A Member or a staff person may never request or suggest that anyone send a gift of food to a House office.

The Committee also provided the following advice with regard to charitable events:

- An event is a "charity event" for purposes of the rule only if the primary purpose of the event is to raise funds for charity (*e.g.*, attendees pay an admission fee, and more than half of the fee paid is tax deductible as a charitable donation); the mere fact that a donation to charity will result from an event does not necessarily mean that the exception will apply.
- Expenses may be accepted only from the beneficiary charity and may not be accepted if those expenses would be paid using charitable donations that were earmarked, either formally or informally, for payment of expenses of congressional participants.
- An invitation to the event may be accepted only from the beneficiary charity.
- A Member or staff person may only accept travel and lodging expenses that are reasonably necessary for the individual to attend the event (*e.g.*, only one night of lodging, or at most two, will be necessary to attend any charity event).
- Any meals—beyond those at the charity event that are taken in a group setting with the other attendees—as well as any other things of value may only be accepted if otherwise permitted under the House gift rules (*e.g.*, the $50 gift limit). ✦

For more information, contact Carol A. Laham (202.719.7301 or claham@wrf.com) or Caleb P. Burns (202.719.7451 or cburns@wrf.com).

FEC Reduces Administrative Fines

In final rules issued on March 17, 2003, the Federal Election Commission (FEC) lowered the administrative fines applicable to committees with less than $50,000 in financial activity on reports they either file late or fail to file at all.

First, the FEC divided late- and non-filed financial reports into four brackets for activity of less than $50,000, and then it reduced both the base and *per diem* fines. For late-filed, non-election sensitive reports, the FEC reduced the fines between 12% and 79%. For late-filed election sensitive reports, the FEC reduced the fines between 7% and 66%. For non-filed non-election sensitive reports, which covers reports filed more than 30 days late or not at all, the FEC reduced the fines between 50% and 72%, and it reduced the fines applicable to non-filed election sensitive reports between 10% and 50%.

Separately, the FEC eliminated receipts and disbursements attributable to the payment of allocable nonfederal activity from the calculation of financial activity on a late-filed or non-filed report.

Administrative Fines, Final Rules, 68 Fed. Reg. 12, 572 (March 17, 2003). ✦

For more information, contact D. Mark Renaud (202.719.7405 or mrenaud@wrf.com).

Upcoming Filing Dates to Remember

May 15, 2003 – IRS Form 990 due from Qualified State and Local Political Organizations with gross receipts of $100,000 or more and from nonfederal PACs not registered in a state

May 20, 2003 – FEC Monthly Report due from federal PACs filing monthly

May 20, 2003 – IRS Form 8872 due from nonfederal PACs filing monthly*

June 20, 2003 – FEC Monthly Report due from federal PACs filing monthly

June 20, 2003 – IRS Form 8872 due from nonfederal PACs filing monthly*

July 15, 2003 – FEC 2nd Quarter Report due from House and Senate candidates

July 20, 2003 – FEC Monthly Report due from federal PACs filing monthly

July 20, 2003 – IRS Form 8872 due from nonfederal PACs filing monthly*

July 31, 2003 – FEC Semiannual Report due from PACs filing semiannually

July 31, 2003 – IRS Form 8872 due from nonfederal PACs filling semiannually*

(*Note: Qualified State and Local Political Organizations are not required to file Form 8872 with the IRS.) ✦

If you have any questions or would like any additional information, please contact a member of Wiley Rein & Fielding's Election Law & Government Ethics Group at 202.719.7000 or visit the website at www.wrf.com. We welcome the opportunity to discuss any matter of specific concern to you or to tell you more about our practice and our capabilities.

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and, therefore, were rarely offered. Nevertheless, corporate PACs may find that their company's retirement plans have changed in response to 2001 federal tax law changes and may soon find they have a new crop of employee-stockholders ready and willing to support their cause.

EGTRRA Makes ESOPs More Attractive & Alters Dividend Policies

The Economic Growth And Tax Relief Reconciliation Act of 2001 (EGTRRA), President Bush's major tax relief measure which took effect in 2002, enacted several tax reforms that make ESOPs more attractive and less administratively cumbersome. Some corporations have begun to alter their ESOPs' dividend policies in response to the new tax law. These changes may qualify employees who participate in the ESOP as "stockholders" who may be solicited by the corporation's federal PAC. A corporate-sponsored PAC looking for ways to expand participation may wish to inquire into any changes in the company's ESOP.

EGTRRA makes company ESOPs more attractive by raising the tax-deductible limit on each employer's matching contributions. Furthermore, an employee's voluntary contributions to a 401(k) account no longer reduces the tax-deductible limit on the amount the employer can contribute on the employee's behalf to an ESOP.

EGTRRA also provides each company a relatively simple procedure under which both the employer and employee can avoid tax on dividends earned by stock held in an ESOP. Corporations now receive a business expense deduction for the value of dividends paid on company stock held in an ESOP if the dividends are reinvested in company stock voluntarily by ESOP participants and participants also have the choice to receive the dividends in cash.

Prior to EGTRRA, a corporation could deduct the value of ESOP dividends only if they were used to repay an ESOP loan or paid directly to participants. Many corporations did not offer direct payments of dividends in order to take

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a deduction because employees reacted negatively to forced distributions of ESOP dividends. When corporations tried to offer employees the ability to re-invest their ESOP dividends in their 401(k) accounts, they encountered administrative difficulties and strict limits on the amount of money that could be contributed under prior tax laws. Therefore, many companies simply did not offer to pay dividends directly to participants.

In EGTRRA, Congress attempted to eliminate these problems and to make the dividend deduction more widely available and attractive to most companies. As a result of the new tax law, it is anticipated that many companies will reform their ESOP plans to offer all participants a straightforward choice to receive direct payments of dividends or to reinvest their dividends.

Corporate PACs May Solicit Employee-Stockholders

As more corporations begin to offer their employees direct dividend payment options in connection with the stock they own through the company's ESOP, corporate-sponsored PACs may find that they can solicit ESOP participants as "stockholders" of the corporation.

Under the Federal Election Campaign Act (FECA) and FEC regulations, a corporation and its corporate-sponsored PAC are permitted to solicit voluntary contributions from the corporation's stockholders. 2 U.S.C. § 441(b); 11 C.F.R. § 114.5(g).

The FEC defines "stockholder" as:

> "A person who
>
> [i] has a vested beneficial interest in stock,
>
> [ii] has the power to direct how that stock shall be voted, if it is voting stock, and
>
> [iii] has the right to receive dividends."

11 C.F.R. § 114.1(h).

The FEC consistently has recognized that employees who own company stock as part of an ESOP or other retirement and savings plans may qualify as "stockholders" so long as their stock ownership rights satisfy the three criteria noted above, i.e., that their rights are vested, they can vote the stock and they have a right to receive dividends. *See e.g.*, FEC Advisory Opinion 1998-12, Fed. Election Camp. Fin. Guide (CCH) ¶ 6265 (1998); FEC Advisory Opinion 1996-10, Fed. Election Camp. Fin. Guide (CCH) ¶ 6192 (1996).

The first two criteria—vested stock and the right to vote stock—generally can be clearly determined and have not been the subject of legal controversy in FEC analysis of employee benefit plans. The third criterion—the right to receive dividends—has received the most analysis and has engendered significant legal debate within the FEC over several decades.

The controversy arose in the context of retirement plans that automatically reinvested dividends in each employee's ESOP account *and* restricted each employee's right to withdraw stock in order to actually receive a dividend. The debate yielded a fact-specific test for determining whether an employee holds an actual "right to receive dividends" under 11 C.F.R. § 114.1(g): "whether participants are able to withdraw at least one share of stock purchased…without incurring a suspension period." *See* FEC Advisory Opinion 1998-12, Fed. Election Camp. Guide (CCH) ¶ 6265 (1998) (collecting prior opinions). Other restrictions on withdrawal rights also had to be analyzed to determine if the employee actually had an unfettered right to obtain a dividend.

More ESOP Participants Will Qualify as "Stockholders" Under EGTRRA

Now, however, under EGTRRA, companies receive a tax deduction for the dividends paid on ESOP stock *if* they offer employees the choice to reinvest their dividends or to receive them directly, and many companies are changing their dividend policies accordingly to obtain the deduction. Once each participant is offered an unrestricted right to receive direct payments of dividends earned by his ESOP stock, there is no need to go through a complicated analysis of ESOP withdrawal restrictions.

Opportunity for Increasing PAC Participation

Corporate PACs would be wise to track changes in their company retirement and ESOP programs. As corporations change their ESOP dividend policies in response to EGTRRA, corporate-sponsored PACs may find that more and more ESOP participants now qualify as "stockholders" and can be solicited for PAC contributions and payroll deduction.

It is often said that legislative reforms have unintended consequences. PACs looking for ways to increase participation may find the tax reform of 2001 had some good consequences for them by opening new doors to an entirely new class of supporters. ✦

For more information, contact Lee E. Goodman (202.719.7378 or lgoodman@wrf.com).

Upcoming Speeches

American Conference Institute's "National Forum on Corporate Compliance with the Bipartisan Campaign Reform Act"

St. Regis Hotel, Washington, DC

Jan Witold Baran, Co-Chair

Carol Laham and **Lee Goodman**, Speakers

June 23 & 24, 2003

Practising Law Institute's "Corporate Political Activities 2003: Complying With Campaign Finance, Lobbying & Ethics Laws"

Washington, DC

Jan Witold Baran, Co-Chair

September 11-12, 2003

FEC Approves Fundraising for Candidates

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> I am asking for a donation of up to $2,000 per election from an individual's own funds [or up to $5,000 per election from a multi-candidate political committee or a political party committee]. I am not asking for funds from corporations, labor organizations or minors.

The FEC could not agree on what action must be taken if a federal candidate or officeholder's name appears in written materials of a state or local candidate soliciting contributions. The Commission did determine that a disclaimer is required where a federal candidate's or officeholder's name is used in direct conjunction with fundraising, *e.g.*, as a member of a fundraising event "host committee." The FEC could not reach a conclusion regarding other uses of a federal candidate's or officeholder's name in written materials, *e.g.*, a listing in the letterhead as "Honorary Co-Chair" of the campaign.

A copy of AO 2003-3 is available at the FEC's website, **www.fec.gov**. ✦

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