



FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 11, 1989

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1989-13

Roger M. Witten and Kristina L. Ament
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420

Dear Mr. Witten and Ms. Ament:

This responds to your letter dated July 6, 1989, requesting an advisory opinion on behalf of International Business Machines Corporation ("IBM") concerning application of the Federal Election Campaign Act of 1971, as amended, (the "Act" or "FECA") and Commission regulations to IBM's furnishing computers, software, and technical training to selected candidates for Federal office.

You state that IBM plans to provide to "candidates of its choice" a personal computer, software "designed to facilitate the completion of the accounting work necessary for full FECA compliance," and, "for a limited period of time," the services of a "regular" IBM employee to train each candidates' personnel in the use of the computer and the FECA accounting software. IBM will not hire new employees to perform these FECA-related services. No will it hire additional employees in order to free its regular employees for these tasks.

IBM's aim, you explain, is "to enhance the ability of candidates for federal office to comply with the FECA." Only candidates who certify in writing that they will use the computer and software solely for FECA compliance will receive the equipment and assistance. IBM, which will retain title to the computer and software, will repossess its equipment if a candidate breaks this promise.

You ask whether IBM's provision of a personal computer, FECA accounting software, and training to selected candidates for Federal office would be a contribution under the Act and Commission regulations.

Under 2 U.S.C. 441b(a), a corporation may make no "contribution or expenditure in connection with any [Federal] election" See also 11 CFR 114.2(b). The term "contribution or expenditure" includes "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value" 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a)(1). The Commission has broadly construed "anything of value" to include things that "can be consumed or utilized to influence a Federal election unless specifically exempted by the Act or regulations." Advisory Opinion 1985-19. See also the definition of "contribution" at 2 U.S.C. 431(8)(A) and 11 CFR 100.7(a)(1), and the definition of "expenditure" at 2 U.S.C.

431(9)(A) and 100.8(a)(1). Unless IBM's proposed donation falls within an exemption from these definitions, therefore, IBM would be making a prohibited corporate contribution if it provided the computer, software, and training sessions--that is, "services" or "anything of value"--to selected candidates for Federal office.

You suggest that IBM's plan falls within the exemptions or exclusions set out at 2 U.S.C. 431(8)(B)(ix)(II) and 431(9)(B)(vii)(II) and 11 CFR 100.7(b)(14), 100.8(b)(15), and 114.1(a)(2)(vii). Each of these provisions excludes from the definition of "contribution," "expenditure," or "contribution or expenditure" payment for "legal or accounting services" under certain conditions. One condition is that the person paying for the services must be "the regular employer of the individual rendering such services."

The focus of these statutory and regulatory exemptions is narrow. The provisions speak only of payments for "the individual rendering" legal or accounting services. The purpose of the exemptions is to permit persons to donate an individual's specialized services without the donors' making contributions or expenditures as a consequence. A corporation, for example, may donate to a political committee the services of the corporation's employee-accountants or employee-lawyers, that is, individuals who will undertake the committee's legal or accounting work and who will be compensated by the corporation, their "regular employer." See, e.g., Advisory Opinions 1981-54 and 1979-77. Cf. Advisory Opinions 1982-31 and 1979-22.

As your letter acknowledges, "IBM does not itself propose to provide legal or accounting services" IBM instead wishes to lend computers and software to candidates, its donation of the services of its employees is subordinate to the primary gift, the loan of the equipment. The function of IBM's employees is to train candidates (their staffs) how to use the equipment that IBM furnishes. When that short-term assignment ends, the employees' responsibilities end. The computers and the software remain, and the candidates' staffs or volunteers do the actual legal or accounting work necessary for compliance with the FECA or Title 26.

You maintain, however, that Advisory Opinions 1980-137 and 1979-22 construe the FECA and the regulations in a way "not inconsistent with" IBM's plan. In Advisory Opinion 1980-137 a candidate proposed that, as an aid in his preparing the reports required by the Act, he modify and use computer programs that he had designed for the corporation of which he was the founder and president. He also planned to use the services of other corporate personnel to help enter the relevant data and to use the corporation's computer equipment to produce contribution and

expenditure schedules. Concluding that the candidate's proposal came within the exemption set out at 11 CFR 114.1(a)(2)(vii), the Commission explained:

If the services rendered to your campaign through your use of Company personnel who will be paid by the Company to do this work, including your own time and effort, and the coincidental use of computer equipment relate only to compliance with the Act, then the use of personnel and equipment . . . would not constitute a corporate contribution from the Company. . .

[T]he use of firm resources, such as computer equipment, necessary to enable a corporate employee to provide compliance accounting services under the exemption . . . would be encompassed within that exemption. (Emphasis added.)

Unlike IBM's employees, the Company's employees, including the candidate himself, would "provide [the] accounting services." Thus, the Company would provide the personnel as well as the equipment. The proposal at issue in Advisory Opinion 1980-137, therefore, unlike IBM's proposal, met the exemption's "individual services" condition.

In Advisory Opinion 1979-22, a law firm associate also served as counsel to the principal campaign committee of a presidential candidate. The lawyer received part of his compensation from the firm and part from the political committee, for whom he primarily worked on FECA compliance and public financing matters. When the lawyer used his office at the firm instead of his office at the committee to do "occasional, isolated, or incidental work" for the committee, the committee did not pay the firm a portion of its overhead costs so long as use of the firm's office did "not involve any increase" in the firm's costs. However, when the lawyer occasionally used certain of the firm's resources (e.g., long-distance telephone, photocopying, secretarial assistance) while performing his legal duties for the committee, the committee reimbursed the firm according to a fixed schedule of charges.

The Commission concluded that the Act permitted these arrangements. If use of the firm's resources "was incidental to [the lawyer's] services rendered solely for the purpose of ensuring compliance with the Act or public financing provisions, the amounts paid would not be subject to limit under 441a(b) but would still be reportable pursuant to 434(b) and Part of 104 of the Commission's regulations." IBM's proposal, in contrast, does not involve the "occasional, isolated, or incidental" use of IBM resources by an IBM employee who is providing legal or accounting services to a candidate. Advisory Opinion 1979-22 is thus inapposite.

You urge the Commission to "extend the logic and policy" of these two advisory opinions to IBM's plan. The Commission finds no basis for such an extension. First, the pertinent language of the Act and of the regulations is specific and does not support the broad interpretation you advocate. Second, nothing in the legislative history of the Act suggests that Congress intended the legal and accounting exemptions to cover the type of proposal your letter describes. The Commission's prior advisory opinions reflect the restrictions that Congress has placed on the exemptions. In addition to the opinions already cited, see Advisory Opinion 1977-5 ("The exemption from contribution limits does not apply where any person . . . contributes funds to a candidate . . . for the purpose of defraying costs of legal and accounting services, such a

contribution is subject to applicable prohibitions in 2 U.S.C. 441b . . .") (emphasis in original). Cf. Advisory Opinion 1985-19 (the proposed joint purchase of a computer by a political committee and a corporation would result in the committee's unlawfully receiving "a tangible benefit or gift of a thing of value from the Firm . . .").

IBM's plan to provide computers, software, and technical training fails to meet the key condition for the legal or accounting exemptions. Because no other exemption appears to be applicable, the Commission concluded that the plan, if implemented, would result in IBM's making prohibited corporate contributions.

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,

(signed)

Danny L. McDonald
Chairman for the Federal Election Commission

Enclosures (AOs 1985-19, 1982-31, 1981-54, 1980-137, 1979-77, 1979-22, and 1977-5)