FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Concurring Opinion of Commissioner Joan D. Aikens to Advisory Opinion 1994-27

On October 4, 1994, the Commission unanimously approved Advisory Opinion 1994-27. During the discussion I and some of my colleagues expressed varying degrees of concern over who would be deemed to be "shareholders" of Consumers Power Company ("CPS") through their participation in the Employees' Savings and Incentive Plan ("the Plan"). Once again the key issue in determining whether individuals in the Plan qualified as shareholders and were thus solicitable by the CPS' separate segregated fund hinged on what constituted the "right to receive dividends."

The Federal Election Campaign Act ("FECA") permits a corporation or its separate segregated fund to solicit individual stockholders. 2 U.S.C. § 441b(b)(4)(A)(i). The Commission's regulations define "stockholder" to mean "a person who has a vested beneficial interest in stock, has the power to direct how that stock shall be voted, if it is voting stock, and has the right to receive dividends." 11 CFR § 114.1(h); see also Advisory Opinions 1988-36, 1988-19, 1984-5, 1983-35 and 1983-17.

The Commission, in drafting the language of 11 CFR § 114.1(h), relied on the legislative history of the 1976 amendments, and obviously crafted this regulation based on the colloquy between Senators Howard Cannon and Hugh Scott. In response to the question by Senator Scott as to who is a stockholder, Senator Cannon replied:

> Certainly, if an individual has a vested beneficial interest in the stock with the normal rights to vote and receive dividends, if any, and to share in the profits or losses of the company in proportion to his or her percentage of ownership, all of which would accrue to an individual under the general concepts of corporate law, then such an individual certainly would be considered to be a stockholder.

122 Cong. Rec. S6481 (daily ed. May 4, 1976); see also the Dissenting Opinion of Commissioner Joan D. Aikens in Advisory Opinion 1983-17 and the Separate Opinion of Commissioners Aikens, Thomson and Springer to AO 1977-49.

The Commission regulations, as cited above, closely follow the colloquy and list the three requirements for individuals to be considered stockholders under the FECA. The differences of opinion among my colleagues has never been on the first two criteria but has consistently involved the third: the right to receive dividends.

The Commission first confronted the issue in 1976 in a request from the Conoco Corp. as to whether ESOP participants were considered "stockholders" for purposes of solicitation. The Commission was in the process of writing the regulations of section 114 and so the response, AOR 1976-106,1/ was styled as an information letter, not an Advisory Opinion. This letter concluded that the Conoco ESOP participants were not stockholders because their dividends were reinvested in the participants' account and could not be physically received by the recipients until their employment terminated.

In 1977-49, a request on the same issue by the Kerr-Magee ESOP, the participants were able to withdraw their stock without terminating employment. The draft response therefore concluded that these ESOP participants were to be considered stockholders for purposes of the FECA. However, the argument at the table then became that the most significant requirement was not the termination of the participant, it was that the participant did not "have the right to receive dividends" unless and until a portion of the stock was actually withdrawn. This question in the request was left unanswered in the opinion when the Commission could not reach a consensus of at least four votes.2/

1/ Advisory Opinion Request 1976-106 was rescinded by the Commission in a vote of reconsideration on November 22, 1977. On a later vote the Commission failed to adopt the same conclusions by a 3-3 vote.

2/ Separate Opinion of Vice Chairman Joan D. Aikens, Commissioner Vernon W. Thomson, and Commission William L. Springer to Advisory Opinion 1977-49.

I have consistently argued against this novel legal interpretation of § 114.1(h) since the deliberation of the redraft of Advisory Opinion 1977-49. It has been my opinion that based on the legislative history and the actual language of the regulations, it is incontrovertibly clear that an employee/ participant in a corporate Savings/Thrift Plan would not be required to actually withdraw a portion of the stock from the Plan before the third requirement of § 114.1(h) would be satisfied. That the right to receive dividends is just that - a right, not actual receipt.

Fortunately, the Commission has slowly progressed from the rigid and, in my opinion, legally unjustifiable position espoused by my Democratic colleagues in Advisory Opinion 1977-49 that required the participant to actually receive the stock, to a more realistic approach in determining whether employees had met the "right to receive dividends" standards of § 114.1(h). In Advisory Opinion 1983-35, the Commission found that employees of Texas-New Mexico Power Company's Thrift Plan were considered to have 'received' dividends under the Plan even though certain restrictions applied to the withdrawal of stock and dividends credited to their accounts. The Commission decided that although certain withdrawal criteria were established by the Company to discourage employee withdrawals from their retirement accounts, it did not view such restrictions as significantly impairing the employee's right to receive dividends credited to their Thrift Plan account. This was a significant step forward from the strict interpretations advocated in Advisory Opinions 1977-49 and 1983-17.3/

Following its decision in Advisory Opinion 1983-35 to establish a "significant restrictions" test to determine a participant's withdrawal rights, the Commission constituted this standard as a principal criterion for determining an individual's "right to receive dividends" in Advisory Opinion 1984-5 to Pacific Gas and Electric ("PGE"). The Commission decided that where participants in the PGE Savings Plan were able to withdraw at

3/ Advisory Opinion 1983-17 permitted employees participating in the ESOP who had withdrawn their stock to be solicited, however, like 1977-49 it excluded those who did not actually withdraw stock from the plan.

least one share of stock without being subject to the type of sanctions or suspension periods imposed in 1983-17, those PGE participants would be considered to have met the requirements of § 114.1(h) regarding the "right to receive dividends." Advisory Opinion 1984-5 further validated this proposition by confirming that employees with stock ownership plans involving the automatic reinvestment of dividends were not required to actually withdraw stock from the plan to be considered as having "received dividends."

In Advisory Opinion 1988-36 to Detroit Edison Political Action Committee ("EdPAC"), the Commission continued to sanction the use of the "significant restrictions" test established in 1983-35 and 1984-5. The savings plan offered by Detroit Edison to its employees was very similar to that offered by PGE in Advisory Opinion 1984-5. However, the Commission considered that the limited withdrawal rights afforded to some PGE employees was not present in the Detroit Edison plan. While some minor restrictions did exist on an employee/participant's ability to withdraw stock, the Detroit Edison participants were able to withdraw at least one share of stock purchased with employer matching contributions without incurring a suspension period or other significant sanctions, and were thus considered to have the right to receive dividends and be considered stockholders under 11 CFR § 114.1(h).

After a six year hiatus on this issue, we now entertain CPC's request in this Advisory Opinion. CPC inquires as to which of its employees and the employees of its parent company, CMS Energy Corporation ("CMS") and its other subsidiaries, who are enrolled in the Plan, are considered shareholders of CMS.

While no controversy remains regarding the first two requirements of 11 CFR § 114.1(h), and the draft concedes that both the first and second criteria of the regulation has been met, this, once again, brings us to the third requirement - the right to receive dividends - which has been at the heart of the debate on this issue. As it did in 1983-35, 1984-5 and 1988-36, the focus of the debate was centered on whether the participants were able to withdraw at least one share of stock purchased with employer matching contributions without incurring significant sanctions or a suspension period. Secondly, was a vested Plan participant, absent the actual withdrawal of any stock, still qualified as a shareholder under § 114.1(h).

I agree with the draft's response that employees who used the voluntary contribution option to invest in Fund C qualified as shareholders despite minor restrictive withdrawal provisions. I also agree that any Plan participants who have actually withdrawn at least one share of company stock would also qualify as shareholders, under the Commission's interpretation. However, I must once again strongly disagree with denying shareholder status to those many employees who belong to the Plan and have a vested interest in the Company's stock. Some of this stock was accumulated as a result of reinvestment of dividends and credited to the individual accounts. The response in Advisory Opinion 1994-27 denies these individuals shareholder status based solely on our interpretation of what constitutes significant restrictions on the actual withdrawal of their vested stock.

I fully concur with Commissioner Josefiak's Statement on this issue when he said,

> ...the underlying argument that unrestricted withdrawal rights are a necessary element to "the right to receive dividends" is based on a fictitious legal notion that the right of receipt depends upon a right to unqualified or immediate physical possession. Those employees participating in stock ownership plans generally have an absolute legal right to all distributions of corporate profits through dividends to which any other stockholder is entitled. The right to receive dividends is not legally dependent upon an unfettered ability to withdraw shares of stock from the plan -- to physically possess the stock certificates or to "cash out." Limitations upon withdrawing stock which has not been held for a sufficient time period do not deny the employee the right to 'receive' dividends solely because reinvested dividends may routinely be among new additions to the account.
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> Employees 'own' the stock that represents reinvested dividends, normally a small component of their account, just as much as they 'own' the stock in their account that has been acquired by their own or the corporation's direct contributions.

See the Concurring Opinion of Commissioner Thomas J. Josefiak in Advisory Opinion 1988-36.

While we have "baby stepped" our way on this issue from the arcane legal positions espoused in 1977-49 requiring the "actual receipt" of dividends before meeting the "right to receive dividends" requirement of § 114.1(h), we still have failed to recognize the universally accepted view that dividends credited to employee accounts in which employees are vested, constitute the receipt of dividends and qualify them as shareholders of the Company, under normal concepts of corporate law.

I urge my colleagues to adopt this recognized principle of corporate law as it was discussed by Senator Howard Cannon and Senator Hugh Scott during consideration of the Conference Report on the 1976 amendments4/ and was clearly their intent to be the standard used in determining stockholder status for FECA purposes.

The actual language of the regulation, the legislative history of the Act, general principles of corporate law as well as pure common sense dictates nothing less.

11/16/94
Date

Joan D. Aikens
Joan D. Aikens
Commissioner

4/ 122 Cong. Rec. S6481 (daily ed. May 4, 1976).