AGENDA DOCUMENT #96-112-A

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

November 7, 1996

MEMORANDUM

AGENDA ITEM
For Meeting of: NOV 14 1996

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan M. Levin
Senior Attorney

SUBJECT: Revised Draft AO 1996-42

On November 4, 1996, a 72-hour tally vote circulation began for a revised draft of AO 1996-42, submitted by the Office of General Counsel (on November 1) upon the Commission's instructions. On November 4 and November 6, 1996, Michael Nemeroff, counsel for Lucent Technologies, sent letters to this office, both of which have been circulated as requester comments. (See attachments.)

The first letter, which Mr. Nemeroff sent before he knew of the circulation of the revised draft, proposes that Lucent must seek affirmative consent from each employee, but would not require any refund of the October deduction "unless and until no affirmative consent is received within a reasonable time after the letter [seeking such authorization] is sent." As in the OGC draft, the funds would be segregated and not expended prior to the employee's consent. However, this letter also allows the retention of all moneys received prior to the consent and further allows the continued deduction of contributions until consent is obtained.

This approach is confirmed by the second letter which Mr. Nemeroff sent after this office notified him that a revised draft was circulating and orally informed him of the nature of the changes. This letter states that Lucent accepts the principles of the revised draft, as well as the sixty-day deadline set out in the draft, but wishes to advise that implementation of the proposals would require extra staff work for Lucent and cause confusion. The letter explains that Lucent's proposal "would permit [Lucent] to continue payroll deductions for a short period of time while written authorization is requested and requires termination and refund of all accumulated deductions to the employees that do not execute an authorization form."

This office recommends that the Commission approve the language in the revised draft circulated on November 1. Lucent's proposed language would permit the continuation of payroll deduction on a reverse check-off basis for November and probably for December. Reverse check-off arrangements were specifically rejected in Advisory Opinion 1977-37 and in *Federal Election Commission v. National Education Association*, 457 F.Supp. 1102 (D.D.C. 1978). Although Lucent PAC would not use the funds deducted during these months until an affirmative payroll deduction was received from the employee, funds for contributions to the PAC are being taken from the employee without an affirmative authorization from that employee. The OGC draft allows the retention of one monthly deduction already made because of the timing of the advisory opinion request. To permit retention on a continuing basis for deductions made in the next two months, particularly after Lucent has been informed of the impermissibility of such a reverse check-off, would create a precedent that is difficult to explain in light of the legal principle. It would constitute an acceptance of the concept that Lucent is entitled to make payroll deductions because of administrative convenience, regardless of the long-standing rule that reverse check-off systems are prohibited by the Act.

Attachments

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Requester Comment
AOR 1996-42

November 4, 1996

Mr. Jonathan Levin
Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Comments on Commission's Public Meeting on Draft Advisory Opinion 1996-42

Dear Mr. Levin:

Pursuant to the meeting of October 31 referenced above, it is my understanding that the draft Advisory Opinion 1996-42 issued by your office will be modified to reflect the concerns raised by the Commission with regard to the draft Advisory Opinion's mandate for Lucent PAC to refund contributions received from Lucent employees by way of payroll deduction since the disaffiliation, within thirty (30) days of receipt of the Advisory Opinion.

Specifically, based upon that meeting, it is our recommendation that the Office of General Counsel consider modifying the text, from the sentence which begins on line 21 of page 10 through line 2 of page 11, to read as follows:

The Commission concludes, therefore, that Lucent PAC must obtain additional affirmative payroll deduction authorizations from its eligible employees in order to continue payroll deductions for their contributions to Lucent PAC. In soliciting these authorizations, Lucent and its PAC must follow the regulations on voluntariness set out at 11 C.F.R. 114.5(a)(1)-(5).

Accordingly, Lucent PAC shall request the affirmative consent of each Lucent employee currently making contributions to Lucent PAC via payroll deduction, to continue payroll deduction for said Lucent PAC contributions. Upon receipt of an affirmative consent from each employee, Lucent PAC may continue that

employee's payroll deduction thereafter and retain all monies received from that employee prior to the consent. Moreover, no refund to any employee will be required unless and until no affirmative consent is received within a reasonable time after the letter is sent. During the period in which Lucent PAC awaits responses, Lucent PAC shall be permitted to retain these funds in a separate bank account from which it will not make disbursements, or maintain sufficient funds to make any necessary refunds. Of course, Lucent PAC also may obtain the affirmative consent of any Lucent employee in the restricted class who does not currently make payroll deduction contributions to Lucent Technologies PAC.

I look forward to receiving the revised Advisory Opinion.

Sincerely,

Michael Nemeroff

Michael A. Nemeroff

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November 6, 1996

Mr. Jonathan Levin
Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Comments on Commission's Public Meeting on Draft Advisory Opinion 1996-42

Dear Mr. Levin:

We request that you circulate these comments to the Commission for its consideration in conjunction with the staff's revised draft advisory opinion and our letter on behalf of Lucent Technologies Inc. dated November 4, 1996, suggesting alternative language.

The revised draft advisory opinion requires Lucent Technologies Inc. to terminate all payroll deductions immediately and to reinstate such deductions only for employees who provide a written authorization. Furthermore, the draft requires the return of payroll deductions for the month of October if the employees do not agree to authorize payroll deduction within 60 days.

Lucent Technologies Inc. accepts the principles on which this draft is based, but respectfully wishes to point out the difficulties of implementing the staff's draft opinion. Furthermore, we wish to suggest an alternative that the Company can implement more successfully than the staff's draft and will still return promptly the funds of employees who do not authorize payroll deduction.

The staff draft requires Lucent Technologies' payroll department to make two changes in the payroll records of up to 2500 employees -- first, it must stop immediately payroll deduction for all of these employees and then it may reinstate deductions for the employees who agree to such deductions. This will require many changes to employee records that will result in errors, confusion, and a significant number of questions from employees regarding their paychecks as deductions are stopped and then reinstated. Moreover, these changes will require a significant amount of staff time and must be made while the payroll department is still dealing with the complex issues of implementing the separation from AT&T. For these reasons, it is the Company's judgment that the staff's proposal will create significant problems. This judgment is based in part on the experience of the payroll department over the last month in adjusting the records of employees who have terminated payroll deductions.

Our proposed revision to the advisory opinion would permit Lucent Technologies Inc. to continue payroll deductions for a short period of time while written authorization is requested and requires termination and refund of all accumulated deductions to the employees that do not execute an authorization form. This will require far fewer changes by the payroll department and will result in fewer mistakes, less confusion, and far fewer questions from Lucent employees regarding changes in their paychecks. Although our proposed draft does not set a final date within which authorizations must be received or funds returned, Lucent Technologies Inc. would agree to the same 60 day period in the staff's draft.

If the Commission follows the staff's recommendation, Lucent Technologies Inc. will do its best to comply. However, it seems to us that the staff's approach is unreasonable and likely to cause severe problems. It does not take into account the impact on the payroll department or the employees. Indeed, the staff never consulted with Lucent Technologies Inc. or its counsel before circulating its proposed revision. We hope that the Commission will take our concerns into account in preparing a final opinion so that the Commission's opinion can be implemented as efficiently as possible.

Sincerely,

Michael A. Nemeroff