MICHIGAN
DEPARTMENT
OF STATE

RICHARD H. AUSTIN
SECRETARY OF STATE

LANSING, MICHIGAN 48918

January 23, 1989

Mr. John F. Markes
Detroit Edison Political Action Committee
2000 Second Avenue
Detroit, Michigan 48226

Dear Mr. Markes:

This is in response to your request for a declaratory ruling concerning the applicability of the Campaign Finance Act (the Act), 1976 PA 388, as amended, to the solicitation of contributions to the Detroit Edison Political Action Committee (EdPAC) from employee-shareholders of the Detroit Edison Company (Detroit Edison).

EdPAC is a separate segregated fund established by Detroit Edison under the authority of section 55 of the Act (MCL 169.255). The solicitation of contributions to EdPAC is restricted to certain individuals by section 55(2). Section 55 states in its entirety:

> "Sec. 55. (1) A corporation or joint stock company formed under the laws of this or another state or foreign country may make an expenditure for the establishment and administration, and solicitation of contributions to a separate segregated fund to be used for political purposes. A fund established under this section shall be limited to making contributions to, and expenditures on behalf of, candidate committees, ballot question committees, political party committees, and independent committees.
>
> (2) Contributions for a fund established by a corporation or joint stock company under this section may be solicited from any of the following persons or their spouses:

(a) Stockholders of the corporation.
(b) Officers and directors of the corporation.
(c) Employees of the corporation who have policy making, managerial, professional, supervisory, or administrative nonclerical responsibilities.

(3) Contributions for a fund established under this section by a corporation which is nonprofit may be solicited from any of the following persons or their spouses:
(a) Members of the corporation who are individuals.
(b) Stockholders of members of the corporation.
(c) Officers or directors of members of the corporation.
(d) Employees of the members of the corporation who have policy making, managerial, professional, supervisory, or administrative nonclerical responsibilities.

(4) Contributions shall not be obtained for a fund established under this section by use of coercion, physical force, or as a condition of employment or membership or by using or threatening to use job discrimination or financial reprisals.

(5) A person who knowingly violates this section is guilty of a felony and shall be punished by a fine of not more than $5,000.00 or imprisoned for not more than 3 years, or both, and if the person is other than an individual, the person shall be fined not more than $10,000.00."

You indicate that EdPAC is considering plans to solicit shareholders who are employees enrolled in the company's Employee Savings Plan (ESP). The ESP is a payroll savings program which allows employees to voluntarily contribute up to six percent of their salary to one or more investment funds. Fund A is a diversified equity fund, Fund B is a government obligations fund, and Fund C consists of investments solely in Detroit Edison Common Stock. ESP contributions funded by salary deductions are fully vested at all times.

In addition, Detroit Edison invests 50 cents in the Detroit Edison Common Stock Fund for every dollar an employee saves. As you explain in your letter:

> "All the Company matching contributions are credited to the participating employees account each calendar year (called "class years"), and may produce earnings. The Company matching contributions and related earnings . . . belong to the employee (are vested) when each class year matures. Each class year matures on January 1 of the fourth calendar year after the year in which the contributions are made. That year in our plan is called a mature year. The Company matching contributions and related earnings represented by that mature year become vested and belong to the employee.
>
> Employee ESP members may withdraw part or all of the value of their Company matching contributions for any mature class years, once a calendar year in an amount of $500 or more in multiples of $100, or 100 percent of the value of their employee contributions, without penalty."

You ask whether employees whose company matching contributions and related earnings are vested are stockholders who may be solicited under the Act.

This question was first presented to the Federal Election Commission on July 25, 1988. Under federal law, a corporation may only solicit contributions to a separate segregated fund from the corporation's stockholders and their families and its executive or administrative personnel and their families. (2 USC 441b(4)(A)(i)). "Stockholder" is defined in 11 CFR 114.1(h) as follows:

> "(h) 'Stockholder' means 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."

The Commission concluded in Advisory Opinion 1988-36 that ESP participants who have at least one share of Detroit Edison Common Stock credited to their account for a plan year that has matured are stockholders within the meaning of 11 CFR 114.1(h). As such, they may be solicited by EdPAC under federal law. A copy of this Advisory Opinion is attached hereto.

The Michigan act and administrative rules do not include a definition of "stockholder." However, it appears that ESP members who have vested interests in Detroit Edison Common Stock are stockholders within the generally accepted meaning of that term.

According to the documents submitted with your ruling request, ESP participants who have Common Stock credited to their account for a plan year that has matured shall have a 100% vested interest in that stock (Article IX, section 9.2). The trustee of the fund is required to vote those shares of stock in accordance with the directions of each participant (Article VI, section 6.3(c)). Shares for which no voting instructions are received may not be voted. Finally, participants who have a vested interest share in the profits or losses of Detroit Edison. Under general principles of corporate law, these factors indicate that ESP participants who have Common Stock credited to their account for a mature plan year are stockholders of Detroit Edison.

Presumably, the employees who are the subject of your ruling request do not have policy making, managerial, professional, supervisory, or administrative nonclerical responsibilities and cannot be solicited under section 55(2)(c) of the Act. However, section 55(2)(a) permits the solicitation of stockholders of the corporation. Therefore, in answer to your question, EdPAC may solicit employees who are enrolled in the Employee Savings Plan if their company matching contributions and related earnings in Detroit Edison Common Stock are fully vested.

This response is a declaratory ruling pertaining to the specific facts and questions presented.

Sincerely,

Richard H. Austin

Richard H. Austin

Attachment

[¶5937] AO 1988-36: Solicitation of ESOP Participants

[Members of an employee savings plan under which matching contributions purchase the employer's stock may be solicited by the corporate political action committee as stockholders since the restrictions on withdrawing stock and so enjoying stock dividends are minimal. Answer to John F. Markes, Detroit Edison Political Action Committee, 2000 Second Avenue, Detroit, Michigan 48226.]

This responds to your letters of July 25 and August 9, 1988, requesting an advisory opinion on behalf of the Detroit Edison Political Action Committee ("EdPAC") concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the solicitation of voluntary contributions from employees of Detroit Edison Company ("Detroit Edison") who purchase or receive stock through Detroit Edison's Employees' Savings Plan ("ESP") 1/

You explain that after six months of employment, Detroit Edison employees are eligible to participate in the ESP by contributing from one to six percent of their salary on either an after-tax or before-tax basis. 2/ These employees may designate the contributions to three different investment Funds. Funds A and B are invested respectively in common stocks (selected from Standard and Poor's 500 Index) and in certain government obligations or bank deposits. ESP art. VI(a) and (b). Fund C, the Detroit Edison Common Stock Fund, invests solely in Detroit Edison Common Stock. ESP art. VI(c). In addition to ESP contributions funded by salary deductions, Detroit Edison will match 50 cents for every $1 that a participating employee designates to his or her ESP account. ESP art. V, §5.1. These matching employer contributions are deposited in the Detroit Edison Common Stock Fund and invested only in Detroit Edison Common Stock.

You explain that under the ESP, employee vesting and withdrawal rights affecting all types of ESP contributions are based on the "maturing of plan years." 3/ ESP art. IX, §9.1. A plan year matures on January 1 of the fourth calendar year following such plan year. An employee has a 100% vested interest in matching employer contributions made on behalf of that employee during a matured plan year. Therefore, if an employee participant receives a $100 matching contribution in 1983 (plan year one), that contribution vests on January 1, 1987 (plan year four). An employee's interest in any other contribution, however, vests on the date it was made.

You explain that an employee participant may withdraw from the plan once a year, without penalty, all or part of the value of the employee's and the matching employer's contribution with respect to any matured plan year. ESP art. X, §10.3(a). Each time an employee participant makes more than one withdrawal during any plan year, subsequent contributions are suspended for a three month period. ESP art. X, §10.5. An employee who has withdrawn all contributions for matured plan years may withdraw from the plan 100% of the value of employee contributions with respect to all plan years that have not matured. ESP art. X, §10.3(b). If an employee makes such a withdrawal, however, all contributions are suspended for six months. Any employee participant who elects to withdraw his or her interest in the ESP may receive a check for the value of the shares credited to his or her account or receive whole shares of Detroit Edison Common Stock. ESP art. X, §10.8.

As an example of this withdrawal procedure, an employee who earns $20,000 a year, who decides to invest 1% ($200) of that salary in Fund A, will receive .5% ($100) of that salary in matching employer contributions. This $100 is invested in Detroit Edison Common Stock through Fund C, and after one year, that employee will have $100 in Detroit Edison Common Stock attributed to his or her account. Accordingly, on January 1st four years after that plan year ends, that employee may withdraw his or her vested interest in the stock represented by the $100 matching employer contribution four years earlier.

You also indicate that participating employees are given the right to vote all stock allocated to their accounts as exercised through a trustee. ESP art. VI, §6.3(c). Before a meeting of shareholders, the trustee must send participating employees a copy of the solicitation material for such meeting, together with a form that requests that employees provide instructions to the trustee on how to vote the common stock allocated to the employees' account. Id. Finally, the ESP provides that Detroit Edison will reinvest dividends, interest, and other income of any Fund in that same Fund. Id.

Given these facts, you ask whether employees participating in the ESP would be considered stockholders under 11 CFR 114.1(h) and thus solicitable for voluntary contributions to EdPAC on the basis of that status, even though they are not executive or administrative personnel. 2 U.S.C. §441b(b)(2)(A).

The Act permits a corporation or its separate segregated fund to solicit individual stockholders. 2 U.S.C. §441b(b)(4)(A)(i). Under Commission regulations, a stockholder is defined as a person who (i) has a vested beneficial interest in stock; (ii) has the power to direct how that stock shall be voted; and (iii) has the right to receive dividends. 11 CFR 114.1(h); see also Advisory Opinions 1988-19 [¶5927], 1984-5 [¶5755], 1983-35 [¶5739], and 1983-17 [¶5723].

All employee participants in Fund C and all employee participants with matured matching employer contributions meet the first two requirements of this definition. The ESP provides that employee participants in Fund C, the Detroit Edison Common Stock Fund, are at all times fully vested in contributions credited to their account. ESP art. IX, §9.2. Similarly, those employee participants in Fund A and Fund B will acquire ownership in Detroit Edison Common Stock through matching employer contributions. These contributions will vest when the respective plan years mature which is a maximum of four years after the matching employer contribution is made. Additionally, all participants have an absolute right to vote Detroit Edison stock attributed to their account. ESP art. VI, §6.3(c).

Regarding the right to receive dividends, those employees who actually withdraw Detroit Edison stock credited to their accounts would then satisfy all of the criteria of 11 CFR 114.1(h) and would be considered stockholders under the Act so long as they continue to hold at least one share.4/ See Advisory Opinions 1988-19 and 1984-5. With respect to the stockholder status of employee participants who have not exercised their withdrawal rights, the Commission concludes that they are also stockholders under 11 CFR 114.1(h) provided they own a vested interest in at least one share and otherwise meet the ESP qualifications to withdraw that share, if desired.

In Advisory Opinion 1984-5 the Pacific Gas and Electric Company ("PGE") offered its employees a savings plan very similar to that offered by Detroit Edison. PGE's plan permitted employees to contribute to three different funds, one of which was an investment fund in PGE common stock. PGE's plan also required PGE to apply 75 cents in matching contributions in PGE stock for every employee contribution made to any of the three funds in the savings plan. All employee participants in the PGE Common Stock Investment Fund and all other participants who received matching employer contributions had at all times a 100% vested interest in any shares attributed to their account. Moreover, all employee participants had full voting rights on those shares. The PGE plan, however, placed "significant restrictions" on many participants' withdrawal rights, automatically suspending subsequent contributions for a specified period or limiting withdrawals to once a year or to a one time only basis. The Commission concluded that where the exercise of withdrawal rights were limited or resulted in an automatic suspension the plan significantly restricted participants' rights to receive dividends. Accordingly, such participants were not stockholders under 11 CFR 114.1(h). The Commission concluded, however, that where participants were able to withdraw at least one share of stock purchased with employer matching contributions without incurring a suspension period, those participants had the right to receive dividends and were stockholders under 11 CFR 114.1(h).

Although Detroit Edison's plan restricts employee participants' ability to withdraw stock, such restrictions do not include automatic suspension or limitation on withdrawals to a once a year or a one time basis. Rather, participants may withdraw employee and matching employer contributions in Detroit Edison stock once a year, after the contribution matures, without automatic suspension of future contributions. ESP art. X, §10.3(a). Moreover, participants are not limited in their withdrawal rights to a once a year or a one time basis. ESP art. X, §§10.4 and

10.5. Accordingly, the Commission concludes that employee participants who have at least one share of Detroit Edison Common Stock credited to their account for a plan year that has matured have the right to receive dividends and thus are stockholders under 11 CFR 114.1(h).

Solicitations by EdPAC and Detroit Edison of voluntary contributions from any employee who qualifies as a Detroit Edison stockholder must meet the requirements for a proper solicitation under the Act and regulations. 2 U.S.C. §441b(b)(3)(A),(B), and (C); see 11 CFR 114.5(a). For example, a corporation or separate segregated fund that solicits contributions of a particular amount must inform the person solicited that such amount is only a suggestion and that the person is free to contribute more or less than the suggested amount. 11 CFR 114.5(a)(2). Moreover, any solicitation for a separate segregated fund must describe the political purposes of the fund and specify that persons have the right to refuse to contribute to the fund without reprisal. 11 CFR 114.5(a)(3),(a)(4), and (a)(5).

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.

Dated: September 26, 1988.

1/ You indicate that there are three Detroit Edison Employees' Savings Plans: (1) Employees' Savings Plan; (2) ESP for employees represented by Local 223 of the Utility Workers Union of America; and (3) ESP for employees represented by Local 17 of the International Brotherhood of Electrical Workers. You explain in a letter dated August 24, 1988, that except for their effective dates the rules and regulations governing each plan are the same. Accordingly, this opinion refers to all three plans as one ESP.

2/ An employee may choose to save before-tax, rather than after-tax, dollars. Such before-tax contributions, called employer elective contributions, are not subject to Federal, State or, local tax until paid out to the employee. ESP art. X, §10.4. After reaching the age of 59 1/2, an employee may withdraw from the plan once a year, without penalty, all or part of the elective employer contributions. ESP art. X, §10.5. Because all employee participants receive matching employer contributions, this opinion does not address the restrictions on the withdrawal of elective employer contributions.

3/ A plan year shall mean the period beginning with the effective date of the plan and ending December 31st of the same year and each calendar year thereafter. ESP art. II, §2.32. The effective dates of all three ESP's are in 1983.

4/ Any employee participants who elect to receive a check for the value of their full interest in Detroit Edison Common Stock will not hold at least one share and would not be stockholders under 11 CFR 114.1(h).

Advisory Opinion 1988-36

CONCURRING OPINION

Commissioner Thomas J. Josefiak

A corporation is generally permitted to solicit contributions to its separate segregated fund from a 'restricted class' composed of stockholders, executive and administrative personnel and their families. 11 CFR 114.5(g)(1). 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... and has the right to receive dividends." 11 CFR 114.1(h). In the context of employee stock savings plans, employees that are otherwise not solicitable acquire stock through investment accounts subject to special disincentives to withdrawing the accumulated funds. In those circumstances, the Commission has faced the task of reconciling the broad definition of "stockholder" with the limitations upon access to the investment that are inherent in most employee stock ownership plans.

It may be reasonably argued that 'a stockholder is a stockholder' as long as that person has the essential, legally recognized rights of ownership, voting of shares and right to receive dividends. See the Dissenting Opinion of Commissioner Joan D. Aikens in Advisory Opinion 1983-17 [¶5723]. Most all corporate employee stock ownership plans preserve these fundamental rights at law. It may also be reasonably argued that any qualifications, compromises or limitations upon those essential rights, as are commonly imposed under employee savings plans, place such share owners in a class inferior to normal stockholders and outside the regulation's definition of a "stockholder." See Dissenting Opinion of Commissioner Thomas E. Harris in Advisory Opinion 1983-35 [¶5735]. Unfortunately, evidence can be found within Congressional legislative history to support either argument.

In a series of advisory opinions, the Commission has developed a compromise view of "stockholder" status within the context of employee savings plans by focusing upon that definitional criterion regarding the "right to receive dividends." By that view, employees participating in plans under which they receive their dividends in cash are clearly solicitable as "stockholders." Advisory Opinion 1988-19 [¶5927]. Employees who participate in stock ownership plans under which their dividends are automatically reinvested "qualify as solicitable stockholders only if they actually withdraw stock or have a generally unrestricted option to withdraw stock." FEC Campaign Guide for Corporations and Labor Organizations, p. 10 (relying upon Commission opinions cited below).

In Advisory Opinion 1984-5, the Commission determined that participating employees were not solicitable as "stockholders" under savings plans in which the penalty of "automatic suspension" from further participation in the plan was imposed for withdrawal of funds not held in the account for at least three years. The Commission stated that it viewed "the automatic suspension period as a significant restriction on a participant's right to withdraw stock and therefore on the right to receive dividends." The opinion favorably cited Advisory Opinion 1983-17, where a similar result was reached under circumstances that also included "a one-year suspension period on certain withdrawals." That earlier opinion, however, seemed to endorse a much more sweeping view that employees could not be said to 'receive' dividends under any employee stock ownership plans involving automatic reinvestment of dividends until they actually withdrew stock from the plan. In Advisory Opinion 1984-5, the Commission also distinguished Advisory Opinion 1983-35, which permitted solicitation of employee stockholders where "the savings plan had various disincentives to stock withdrawals, but did not impose any suspension period on the employee's right to make contributions to the plan."

The result reached by the Commission in Advisory Opinion 1988-36 is entirely consistent with this precedent. The present circumstances involve some limitations upon employees' rights to withdraw funds from their stock savings accounts, but the restrictions are not too severe. The opinion seems particularly persuaded by the providing of reasonable opportunities for withdrawals without automatic suspension from the program. This use of a 'significant' restriction test by the Commission appears to be a reasonable compromise position for defining "stockholder" in the setting of employee stock savings plans. It seems to satisfy the Commission's interest in having those solicited stand on a relatively 'equal footing' as stockholders.

Two serious problems with this approach are evident, however. First, legal interpretation under this approach turns on the arcane fine points of provisions in employee stock ownership plans for withdrawal of funds. It fairly demands case-by-case analysis, rather than easily identifiable guidelines. See Harris dissent, id. Distinctions between withdrawal provisions in different plans are certain to become increasingly minute and insignificant.

Second, 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.

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. Limitations or penalties upon withdrawal of funds generally apply to the entire account, and no more undermine the right to receive dividends than the right to ownership of the stock generally. Adverse consequences for premature withdrawals are found in IRA's and 401(k) retirement accounts, to which many of these employee stock plans are analogous. Imposition of fees for untimely withdrawal of funds are also common in certain types of mutual funds in which investors own 'stock.' Both the right of ownership of all shares and the right to receive dividends would be considered whole under conventional legal principles, despite the special penalties associated with 'early' withdrawal of stock held under these plans.

The heavy emphasis in the Commission's prior opinions upon the penalty of "suspension" for 'early' withdrawal is especially misplaced. Such a penalty, common in stock ownership plans, undeniably discourages withdrawal of funds. Imposing that penalty does not deprive an employee of any rights to receive dividends from stock already owned, however, but merely suspends the employee's right to acquire more stock pursuant to the corporation's savings plan.

The full value of dividends belongs to employees at the time of the distribution of dividends by the corporation, even if it is reinvested in more shares of stock under the terms of the plan. The full value of all dividends are eventually disbursed pursuant to the terms of the savings plan -- just not as conveniently or as often or as soon as the employee may perhaps wish. Tax laws encourage such employee stock ownership plans precisely because such plans encourage employees to save, not withdraw, their funds. That is the bargain that is struck between the employee, the corporation and the federal government for such forms of employee compensation and savings plans.

Restrictions upon an employees' rights of access to stock held in an account under a corporate stock savings plan may seem to make those employees less of a "stockholder," but not because of any genuine compromise upon the right to receive dividends. The Commission should address the issue of employee stock ownership plans and corporate solicitation of such stockholders directly through regulations, and retire the false and unworkable legal artifice upon which it now relies.

Dated: September 23, 1988.

[The next page is 17,001.]