



Wiley Rein & Fielding LLP

MEMORANDUM

**TO:** Geoffrey C. Ziebart  
**FROM:** Jan Witold Baran  
D. Mark Renaud  
**DATE:** February 28, 2006  
**RE:** ESOPs and the Restricted Class

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Below is a brief summary of the campaign finance rules under which a corporation may be able to solicit contributions for their connected federal PAC from non-executive or administrative personnel who hold company shares in stock plans like Employee Stock Ownership Plans or ESOPs.

**ANALYSIS**

Under the Federal Election Campaign Act and the Federal Election Commission's ("FEC") regulations, a corporation and its corporate-sponsored PAC are permitted to solicit voluntary contributions from the corporation's stockholders (in addition to the corporation's "executive and administrative personnel"). 2 U.S.C. § 441b(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 plan may qualify as "stockholders" as 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.

The FEC has generally found vested stock and the right to vote stock easy to determine. These two criteria have not been the subject of legal controversy in FEC analysis of employee benefit

plans, but sometimes a new employee is not vested in company stock for some time after he or she has begun her job.

The third criterion—the right to receive dividends—has received the most analysis and has engendered significant legal debate within the FEC over many years. The controversy has arisen in the context of retirement plans that automatically reinvest dividends in each employee’s account and restrict each employee’s right to withdraw stock in order to actually receive a dividend. The debate has yielded a fact-specific test for determining whether an employee holds an actual “right to receive dividends” under 11 C.F.R. § 114.1(h). This test is “whether participants are able to withdraw at least one share of stock purchased . . . without incurring a suspension period.” FEC Advisory Opinion 1998-12. See also FEC Advisory Opinion 1996-10. An employee’s ability to withdraw and receive dividends in cash also satisfies this third criteria.

As a result of the law described above, if a corporation wishes to expand the scope of the class of persons it may solicit for its federal PAC, the corporation may want to analyze its stock retirement or savings plans. Because of changes in the Internal Revenue Code over the past five or so years, many corporations have changed their ESOPs and other plans so that employees may withdraw company stock without penalty. This, of course, helps bring the stock plan within the third criterion discussed above. Nonetheless, there also are some practical problems encountered in analyzing a stock plan and determining what employees may be solicited for the federal PAC. These are listed below.

- The corporation must have some way of determining who actually holds stock in the company, which can be made more difficult by stock being held in the name of a broker, etc.
- If a corporation allows employees to sell their shares at any time, then the corporation needs to regularly check to make sure a potential solicitee still holds the stock at the time of the solicitation.
- It may take a year or more after stock distribution to new employees for their stock to become vested. If vesting takes place over the course of several years (e.g., the employee is 25% vested after the first year of employment, etc.), the employee must be vested in at least one share of stock before he or she can be solicited.
- Some stockholder-employees also may be union members, and, although the corporation may still solicit such persons, such a solicitation may interfere in the corporation’s relationship with the union.
- Foreign nationals still may not be solicited and must be deleted from the list of any eligible stockholders.
- At some employee level, the cost of solicitation may exceed the expected returns to the PAC, although a broader “restricted class” makes distribution of PAC newsletters, intranet sites, etc. less complicated from a legal compliance point of view (i.e., the number of persons who can receive the publications is increased).