

AGENDA DOCUMENT NO. 11-31



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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June 8, 2011

AGENDA ITEM

MEMORANDUM

For Meeting of 6-15-11

TO: The Commission

FROM: Christopher Hughey *pch*
Acting General Counsel

Rosemary C. Smith *ACS*
Associate General Counsel

Amy L. Rothstein *AR*
Assistant General Counsel

Joshua S. Blume *JSB*
Attorney

Subject: Draft AO 2011-10 (POET, LLC, POET PAC, and Sioux River
Ethanol, LLC, d/b/a POET Biorefining – Hudson)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for June 15, 2011.

Attachment

1 ADVISORY OPINION 2011-10

2

3 Michael E. Toner, Esquire

4

Wiley Rein LLP

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1776 K Street, N.W.

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Washington, D.C. 20006

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DRAFT

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Dear Mr. Toner:

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We are responding to your advisory opinion request on behalf of POET, LLC,

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POET PAC, and Sioux River Ethanol, LLC, d/b/a POET Biorefining-Hudson, concerning

11

the application of the Federal Election Campaign Act of 1971, as amended (the “Act”),

12

and Commission regulations to the requestors’ proposed fundraising program for POET

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PAC.

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The Commission concludes that the requestors may engage in the proposed

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fundraising program for POET PAC, as described below.

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Background

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The facts presented in this advisory opinion are based on your letter received on

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April 20, 2011.

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POET, LLC is a single-member, limited liability company organized under the

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laws of South Dakota that has elected not to be treated as a corporation for income tax

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purposes. It is wholly owned by the JT Broin Trust, a revocable South Dakota trust

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established by Mr. Jeff Broin and his wife.

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The POET family of companies includes twenty-seven POET plants that produce

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and refine ethanol. Each POET plant is partly owned, either directly or indirectly, by Mr.

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Broin or the JT Broin Trust, and partly owned by corn farmers and other investors. The

1 POET plants are organized as partnerships under the laws of the several States where
2 they are based.

3 To produce ethanol, the POET plants purchase corn from corn farmers, the vast
4 majority of which are individuals, partnerships, or limited liability companies electing
5 partnership treatment for tax purposes. Approximately one-third of the thirty thousand
6 corn farmers who sell corn to the POET plants are also investors in the POET plants. The
7 sales are conducted pursuant to sales contracts between the corn farmers and the POET
8 plants. Each POET plant typically mails an average of three hundred such contracts to
9 corn farmers per month, although some POET plants generate more than five hundred
10 contracts in a month.

11 POET PAC is registered with the Commission as a nonconnected, multicandidate
12 committee. The requestors propose to establish a program, the POET PAC Cultivator
13 Club, to make it easier for corn farmers to contribute to POET PAC.¹ Under the
14 program, the POET plants would solicit contributions to POET PAC from the corn
15 farmers with which they do business, and the corn farmers could opt to have the POET
16 plants deduct a portion of the money that the POET plants owe to them for their corn.
17 Each farmer could choose to have the POET plants deduct a certain amount per bushel of
18 corn from the amount due and owing to the farmer, such as one-fourth of a cent, one-half

¹ Under the proposal, only corn farmers that are individuals, partnerships, or limited liability companies electing to be treated as partnerships for tax purposes could make contributions to POET PAC using the POET PAC Cultivator Club. Corn farmers that are limited liability companies electing corporate treatment for tax purposes would not be able to participate, because they would be considered corporations under Commission regulations. See 2 U.S.C. 441b(a), 11 CFR 114.2(b) (ban on corporate contributions); 11 CFR 110.1(g)(3) (treatment of limited liability company electing tax treatment as a corporation is treated as a corporation under Commission regulations). None of the corn farmers are foreign nationals or Federal contractors.

1 of a cent, or one full cent per bushel of corn sold, and then contribute that amount to
2 POET PAC.² The POET plants would transfer the deducted amounts to POET PAC each
3 week.

4 A corn farmer wishing to participate in the POET PAC Cultivator Club would
5 check a box on the farmer's corn sales contract, thereby authorizing the POET plant to
6 which it sells corn to make deductions for contribution purposes. A farmer could modify
7 or revoke an authorization to deduct payments for contributions at any time by notifying
8 the POET plant in writing and via the POET companies' website. The authorization to
9 deduct contributions would not carry over from contract to contract. Instead, a corn
10 farmer wishing to continue to participate in the POET PAC Cultivator Club after his or
11 her contract expires would have to affirmatively elect to do so on the new sales contract.
12 The terms of the contracts would not exceed one year.

13 Under the proposal, the POET PAC solicitation and check-off box would be pre-
14 printed on each corn sales contract, while the disclaimer required by 2 U.S.C. 441d(a)
15 and 11 CFR 110.11, the statement of political purpose required by 11 CFR 102.5(a)(2),
16 and the best efforts statement required by 11 CFR 104.7 would appear with the Terms
17 and Conditions. The Terms and Conditions would also state that contributions from
18 foreign nationals, Federal government contractors, and corporations are prohibited. The
19 contract and Terms and Conditions would be printed together in a double-sided format,
20 with the contract on the front and the Terms and Conditions on the back of the same sheet

² For example, using the average sale of 35,000 bushels of corn per farmer, a one-fourth of a cent deduction per bushel would generate a contribution of \$87.50, a one-half cent deduction per bushel would result in a \$175.00 contribution, and a full cent deduction would result in a total contribution of \$350.00.

1 of paper. The materials would be distributed as a single document, and after being signed
2 by a corn farmer, they would be returned to the POET plant as a single document.

3 In administering the POET PAC Cultivator Club, the requestors would implement
4 compliance safeguards to ensure that POET PAC did not accept any contributions from
5 prohibited sources or in excessive amounts. POET PAC would report all contributions
6 received on its reports filed with the Commission, as required by 2 U.S.C. 434(b) and
7 11 CFR 104.3(a), and would retain copies of the corn farmers' authorization as required
8 by 2 U.S.C. 432(d) and 11 CFR 102.9(c) and 104.14(b). With respect to contributions
9 from corn farmers that are partnerships or are LLCs treated as partnerships for tax
10 purposes, the POET plant solicitations would request information as to the amount of the
11 contributions attributed to each partner, and POET PAC would report this information to
12 the Commission. Finally, the POET entities would ensure that the POET plants would
13 not transfer funds to POET PAC before the POET plants make payments to the corn
14 farmers.

15 POET PAC proposes to compensate the POET Plants for the services that they
16 provide in soliciting, deducting, and transmitting contributions by paying the usual and
17 normal charge for these services to the POET Plants in advance every two weeks.³ The
18 payments would be based on estimates of staff compensation and the time involved in
19 administering the fundraising program. POET PAC proposes to reconcile the actual time
20 to amounts paid each calendar quarter.

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³ POET PAC would also similarly compensate POET, LLC to cover the cost of any POET, LLC staff time spent ensuring that the solicitation program complies with the Act and Commission regulations.

1 **Questions Presented**

2 1. *Is the POET PAC Cultivator Club permissible under the Act and Commission*
3 *regulations?*

4 2. *May POET PAC include required disclaimers on a separate “terms and*
5 *conditions” page rather than on the page with the actual checkoff box for the POET PAC*
6 *Cultivator Club?*

7 3. *Is a quarterly reconciliation of the actual staff time spent administering the POET*
8 *PAC Cultivator Club by POET plant and POET, LLC employees to the amounts paid in*
9 *advance by POET PAC permissible?*

10 **Legal Analysis and Conclusions**

11 1. *Is the POET PAC Cultivator Club permissible under the Act and Commission*
12 *regulations?*

13 Yes, the POET PAC Cultivator Club is permissible under the Act and
14 Commission regulations, as described below.

15 Under the Act and Commission regulations, a “contribution” includes “any gift,
16 subscription, loan, advance, or deposit of money or anything of value made by any
17 person for the purpose of influencing any election for Federal office.” 2 U.S.C.
18 431(8)(A)(i) and 11 CFR 100.52(a). “Anything of value” includes all in-kind
19 contributions, including the provision of goods or services without charge or at a charge
20 that is less than the usual and normal charge. *See* 11 CFR 100.52(d)(1). “Usual and
21 normal charge” is defined as the price of goods in the market from which they ordinarily
22 would have been purchased at the time of the contribution, or the commercially

1 reasonable rate prevailing at the time the services were rendered. *See* 11 CFR
2 100.52(d)(2).

3 Here, the POET plants are limited liability companies that are organized as
4 partnerships in the States in which they are located. Limited liability companies that
5 have elected treatment as partnerships for taxation purposes are treated as partnerships
6 under the Act and Commission regulations. *See* 11 CFR 110.1(g)(2). As such, they may
7 make contributions of up to \$5,000 per calendar year to nonconnected multicandidate
8 political committees.⁴ 2 U.S.C. 441a(a)(1)(C); 11 CFR 110.1(d); *see also* Advisory
9 Opinions 2008-05 (Holland & Knight) and 2005-20 (Pillsbury Winthrop Shaw Pittman
10 LLP Political Action Committee), n.4.

11 The proposed solicitation by the POET plants of contributions from the corn
12 farmers and the subsequent deduction and transmittal of those contributions to POET
13 PAC would constitute the provision of services and, therefore, potential in-kind
14 contributions, by the POET plants to POET PAC. The Commission has approved similar
15 types of proposals before. In Advisory Opinion 1982-63 (Manatt, Phelps, Rothenberg &
16 Tunney), for example, the Commission determined that a partnership could institute a
17 “check-off” system, under which the noncorporate partners could authorize the
18 partnership to withhold a specified amount of their share of the partnership’s profits and
19 to transfer that amount as contributions to a nonconnected political committee. More
20 recently, in Advisory Opinion 2005-20 (Pillsbury Winthrop Shaw Pittman LLP), the

⁴ Corporations, in contrast, may not make contributions to nonconnected political committees. 2 U.S.C. 441b(a); 11 CFR 114.2(a). They may, however, establish separate segregated funds and pay for their establishment, administration, and solicitation costs without the payments constituting contributions under the Act and Commission regulations. 2 U.S.C. 441b(b)(2)(C); 11 CFR 114.1(b).

1 Commission approved a plan to use a partnership's automatic electronic payroll system to
2 make pre-authorized deductions from the partners' income distributions for contributions
3 to a nonconnected political committee.⁵

4 Consistent with these advisory opinions, the POET plants may provide the
5 proposed solicitation and contribution processing services to POET PAC.⁶ Given that
6 these services would be in-kind contributions to POET PAC, they would ordinarily be
7 subject to the contribution limitation of \$5,000 per calendar year. In this case, however,
8 POET PAC indicates it will pay in advance for the services furnished by the POET
9 plants. The Commission concludes that no contribution will result if POET PAC pays in
10 advance the usual and normal charge for the POET plants' services in soliciting and
11 processing contributions made by corn farmers.⁷ See Advisory Opinion 2005-20
12 (Pillsbury Winthrop Shaw Pittman LLP Political Action Committee).

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⁵ Although not involving a partnership, in Advisory Opinion 1986-07 (American Crystal Sugar Company), the Commission also approved an incorporated agricultural cooperative's proposal to make periodic pre-authorized deductions from amounts due to sugar beet farmers for contributions to its separate segregated fund.

⁶ By transmitting contributions received from the corn farmers to POET PAC within seven days of their receipt in all cases, as the requestors indicate the POET plants will do, the solicitation plan also meets the requirements of 2 U.S.C. 432(b) and 11 CFR 102.8(b), which require such transmittal within ten or thirty days of receipt, depending upon the amount of the contribution involved. The POET plants indicate they will also transmit the required information regarding the contributors' identification, as required by 2 U.S.C. 434 and 11 CFR 104.3 and 104.8.

⁷ The Commission notes that, pursuant to POET PAC's Bylaws, POET PAC is administered almost exclusively by personnel employed in executive positions by POET, LLC. Thus, because POET PAC is not the separate segregated fund of POET, LLC, to the extent that individuals employed by POET, LLC are compensated by POET, LLC for the time that they spend administering the POET PAC Cultivator Club, that compensation would be an in-kind contribution by POET, LLC to POET PAC, subject to the \$5,000 contribution limit. See, e.g. In Re: AOR 1976-102 (Spears Leeds Kellogg Good Government Committee).

1 2. *May POET PAC include required disclaimers on a separate Terms and*
2 *Conditions page rather than on the page with the actual check-off box for the POET PAC*
3 *Cultivator Club?*

4 Yes, POET PAC may include required disclaimers on a separate Terms and
5 Conditions page rather than on the page with the actual check-off box for the POET PAC
6 Cultivator Club.

7 Public communications that solicit contributions must include disclaimers. *See*
8 2 U.S.C. 441d(a); 11 CFR 110.11(a)(3). A “public communication” includes a mass
9 mailing. 2 U.S.C. 431(22); 11 CFR 100.26. A “mass mailing” is defined as “a mailing
10 by United States mail or facsimile of more than 500 pieces of mail matter of an identical
11 or substantially similar nature within any 30-day period.” 2 U.S.C. 431(23); 11 CFR
12 100.27.

13 If the public communication is not authorized by a candidate, an authorized
14 committee of a candidate, or an agent of either, the disclaimer must “clearly state the full
15 name and permanent street address, telephone number, or World Wide Web address of
16 the person who paid for the communication, and that the communication is not authorized
17 by any candidate or candidate’s committee.” 11 CFR 110.11(b)(3); *see also* 2 U.S.C.
18 441d(a)(3). Every disclaimer “must be presented in a clear and conspicuous manner, to
19 give the reader, observer, or listener adequate notice of the identity” of the
20 advertisement’s sponsor. 11 CFR 110.11(c)(1). Disclaimers on printed communications
21 must be of sufficient type size to be clearly readable, must have a reasonable degree of
22 color contrast between text and background, and must be contained in a box set apart

1 from the rest of the communication. 2 U.S.C. 441d(c); 11 CFR 110.11(c)(2)(i)-(iii).

2 In addition to these requirements, political committees are required to make their
3 “best efforts” to gather information about contributors, and to include in solicitations “a
4 clear request for the contributor’s full name, mailing address and name of employer, and
5 . . . an accurate statement of Federal law regarding the collection and reporting of
6 individual contributor identifications.” 11 CFR 104.7(b)(1)(i).

7 In this case, the requestors intend to include disclaimers that comply with
8 2 U.S.C. 441d(a) and (c) and 11 CFR 110.11 for each contract that also solicits
9 contributions to POET PAC, even though fewer than five hundred contracts will be
10 mailed in certain months. The requestors also intend to make their “best efforts” to
11 obtain contribution information and to include in the solicitations a statement saying
12 contributions to POET PAC will be used in connection with Federal elections and are
13 subject to the limitations and prohibitions of Federal law. 11 CFR 102.5(a)(2)(ii). The
14 requestors propose to include the disclaimer and statement on the Terms and Conditions
15 side of the document, rather than on the side of the document containing the solicitation.

16 Commission regulations provide that “[a] communication that would require a
17 disclaimer if distributed separately, that is included in a package of materials, must
18 contain the required disclaimer.” 11 CFR 110.11(c)(2)(v). The Commission has
19 explained that “[a]ll items intended for separate distribution (*e.g.*, a campaign poster
20 included in a mailing of campaign literature) are covered by this requirement.” *See*
21 Explanation and Justification of Final Rule Regarding Communications Disclaimer
22 Requirements, 60 Fed. Reg. 52069, 52071 (Oct. 5, 1995). Nevertheless, a disclaimer

1 “need not appear on the front or cover page of the communication as long as it appears
2 within the communication, except on communications, such as billboards, that contain
3 only a front face.” 11 CFR 110.11(c)(2)(iv).

4 Here, POET PAC proposes to place all required disclaimers and “best efforts”
5 information on a single double-sided document that includes the contract on one side and
6 the Terms and Conditions on the other side. The disclaimer will be set apart in a box and
7 it will be printed in the same font size as other material on the rest of the page. The
8 contract and Terms and Conditions will be transmitted to the corn farmers as a single
9 document, and will be returned to the POET plants in the same fashion after being signed
10 by the corn farmers.

11 The Commission concludes that this proposal would satisfy the disclaimer
12 requirement in 11 CFR 110.11(c)(2)(iv). As noted above, a disclaimer need not appear
13 on the front or cover page of a communication so long as it appears within the
14 communication. Given that the disclaimers and the solicitation and check-off will be
15 distributed as a single document, the Commission concludes that they are not separable
16 communications under 11 CFR 110.11(c)(2)(v). Hence, a disclaimer appearing on the
17 Terms and Conditions side of the document will suffice.

18 POET PAC asks if the phrase “[a]dministration costs and solicitations made on
19 behalf of POET PAC are paid for by POET PAC” may be used as the “paid for by”
20 disclaimer instead of simply “paid for by POET PAC.” It proposes this modification in
21 language because the Terms and Conditions contain information predominantly related to
22 the corn sales contracts, rather than to the solicitation program, and POET PAC intends to

1 pay only the incremental “usual and normal” cost of adding the specific solicitation
2 information and accompanying disclaimers to the pre-existing forms.

3 The Commission has allowed for some flexibility in the manner of phrasing
4 disclaimers in situations where the Act does not prescribe the exact wording. *See* 2
5 U.S.C. 441d(d)(2) (precise language prescribed for specific type of “stand by your ad”
6 disclaimer). In Advisory Opinion 1998-17 (Daniels Cablevision), for example, the
7 Commission provided three examples of acceptable disclaimer statements, two of which
8 provided additional elaborating language specifying that free airtime was being provided
9 by Daniels Cablevision.

10 Given that the proposed modification to the language would provide more
11 accurate and precise information than the standard “paid for by” language, it would fulfill
12 a function similar to that served by the Commission’s suggested alternative language in
13 Advisory Opinion 1998-17 (Daniels Cablevision). *See also* Advisory Opinions 1994-13
14 (Voter Education Project) and 2004-37 (Waters). Accordingly, the Commission
15 concludes that the requestors may modify the language as proposed.

16 3. *Is a quarterly reconciliation of the actual staff time spent administering the POET*
17 *PAC Cultivator Club by POET plant and POET, LLC employees to the amounts paid in*
18 *advance by POET PAC permissible?*

19 Yes, a quarterly reconciliation of the actual staff time spent administering the
20 POET PAC Cultivator Club by POET plant and POET, LLC employees to the amounts
21 paid in advance by POET PAC is permissible.

22 Neither the Act, nor the Commission’s regulations, nor the Commission’s prior

1 advisory opinions have addressed the question of when a nonconnected political
2 committee must determine the amount of money that it owes, if any, to a partnership for
3 services rendered. The Commission's prior advisory opinions on similar questions in
4 different contexts are materially distinguishable. For example, in Advisory Opinion
5 1984-37 (AMA), the Commission determined that an SSF must determine and pay in
6 advance the full value of consulting services to be provided by its corporate connected
7 organization, in order to avoid receiving a prohibited corporate contribution. Unlike
8 here, however, that advisory opinion involved a prohibited source.

9 Here, POET PAC plans to provide advance payment to the POET plants based on
10 an initial estimate of plant employee time to be spent soliciting and processing
11 contributions in connection with the POET PAC Cultivator Club, and then to adjust these
12 payments each calendar quarter to reflect the actual time spent. The Commission
13 concludes that this proposal is permissible.

14 Because the POET plants do not normally provide solicitation and contributions
15 processing services in their ordinary course of business, they are not "commercial
16 vendors." 11 CFR 116.1(c); Advisory Opinion 2007-04 (Atlatl). Thus, if POET PAC's
17 initial advance payment to the POET plant underestimates the amount due to the POET
18 plant for the staff time actually expended, the resulting difference would be considered an
19 advance or an extension of credit by the POET plant to POET PAC, and therefore a
20 contribution, until it is repaid. 2 U.S.C. 431(8)(A)(i), 11 CFR 100.52(a). As such, it
21 would be subject to contribution limits. *See* 11 CFR 110.1(e).

22 In its reports filed with the Commission, POET PAC must report each advance

1 payment to a POET plant on Schedule B, Line 21(b), as an operating expense, with a
2 memo text explaining that the expense is an advance payment for solicitation and
3 contribution processing services to be provided by the POET plant. If POET PAC later
4 determines that its advance payment to a POET plant was less than the amount actually
5 due for services rendered, then POET PAC must report the difference between the two
6 amounts as a debt owed to the POET plant on Schedule D of its reports to the
7 Commission until the difference is paid in full. *See* 11 CFR 104.11. When POET PAC
8 pays the amount owed to a POET plant for services rendered, it must report the payment
9 on Schedule B, Line 21(b), as an operating expense, with a memo text explaining that the
10 amount is additional payment for services rendered and the date(s) that the services were
11 rendered, and identifying the report in which the advance payment was reported.

12 This response constitutes an advisory opinion concerning the application of the
13 Act and Commission regulations to the specific transaction or activity set forth in your
14 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
15 of the facts or assumptions presented, and such facts or assumptions are material to a
16 conclusion presented in this advisory opinion, then the requestor may not rely on that
17 conclusion as support for its proposed activity. Any person involved in any specific
18 transaction or activity which is indistinguishable in all its material aspects from the
19 transaction or activity with respect to which this advisory opinion is rendered may rely on
20 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
21 conclusions in this advisory opinion may be affected by subsequent developments in the
22 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

1 The cited advisory opinions are available on the Commission's Web site, www.fec.gov,
2 or directly from the Commission's Advisory Opinion searchable database at
3 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

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Cynthia L. Bauerly
Chair

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