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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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August 22, 2012

MEMORANDUM

AGENDA ITEM

TO: The Commission

FROM: Anthony Herman *AH*
General Counsel

Kevin Deeley *KD*
Acting Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Anthony T. Buckley *ATB*
Attorney

Subject: AO 2012-29 (Hawaiian Airlines, Inc.) (Draft B)

For Meeting of 8/23/12

SUBMITTED LATE

Attached is a proposed draft of the subject advisory opinion (Draft B). We have been asked to have this draft placed on the Open Session agenda for August 23, 2012.

Attachment

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Ronald M. Jacobs, Esq.
Lawrence H. Norton, Esq.
Jeffrey J. Hunter, Esq.
Venable LLP
575 Seventh Street, NW
Washington, DC 20004

DRAFT B

10 Dear Messrs. Jacobs, Norton and Hunter:

11 We are responding to your advisory opinion request concerning the application of
12 the Federal Election Campaign Act of 1971, as amended (the “Act”) and Commission
13 regulations to the plan by Hawaiian Airlines, Inc. (“Hawaiian”) to sponsor appearances
14 by candidates for the U.S. Senate at Hawaiian-sponsored events that will include
15 attendance by leaders in the Hawaii travel and tourism industry. The Commission
16 concludes that Hawaiian may sponsor the proposed candidate appearances.

17 ***Background***

18 The facts presented in this advisory opinion are based on your letter received on
19 July 20, 2012 and your email received August 17, 2012.

20 Hawaiian is a business corporation. Hawaiian Airlines Inc. Political Action
21 Committee is Hawaiian’s separate segregated fund. Hawaiian provides inter-island
22 flights and nonstop service between Hawaii and the U.S. mainland, Australia, and Asia.
23 Its business operations are closely linked to other members of the travel and tourism
24 industry in Hawaii, such as hotels, restaurants, tour operators, and their vendors.

25 Hawaiian intends to organize morning events each of which will feature a general
26 election candidate for the 2012 election to the U.S. Senate from Hawaii.¹ These events

¹ Hawaiian also asked about similar events that it had planned to organize in advance of the primary elections. Those elections have already occurred, however, so that part of their request is moot.

1 will include breakfast, followed by a discussion. Hawaiian plans to invite members of its
2 restricted class and leaders in the Hawaii travel and tourism industry to the events.
3 Slightly less than half of the invitees will be Hawaiian employees, all of whom are
4 executive or administrative employees within Hawaiian's restricted class, and slightly
5 more than half of the invitees will be leaders of the tourist industry who are neither
6 employees nor stockholders of Hawaiian.² Invitees may participate in as many of the
7 events as they desire.

8 Hawaiian will pay the costs of organizing the events, inviting attendees, and
9 providing breakfast. The event will take place either in Hawaiian's offices or an offsite
10 location, possibly the candidate's office. Discussions prior to the event between
11 Hawaiian and the candidate will be limited to the event's structure, format, and timing.
12 There will be no discussion of the candidate's plans, projects, or needs, relating to the
13 campaign.

14 Hawaiian will refrain from expressly advocating the nomination, election, or
15 defeat of any candidate before, during, and after each event and will not promote or
16 encourage express advocacy by its employees. Hawaiian does not anticipate endorsing
17 any federal candidate in connection with this election. Hawaiian will not solicit or direct
18 contributions to any political committee, nor will it collect contribution checks or
19 otherwise facilitate contributions. The candidates will not accept contributions before or
20 during the event, but may leave materials or envelopes for attendees.

² There may be several Hawaiian employees assisting with the event, such as a secretary handing out name tags and a waiter or other company catering personnel.

1 ***Question Presented***

2 *May Hawaiian use general treasury funds to pay for appearances by candidates*
3 *for the U.S. Senate that will include attendance by leaders in the Hawaii travel and*
4 *tourism industry?*

5 Yes, Hawaiian may use general treasury funds to pay for appearances by
6 candidates for the U.S. Senate that will include attendance by leaders in the Hawaii travel
7 and tourism industry.

8 The Act does not impede the ability of a corporation to communicate with its
9 restricted class (*i.e.*, the corporation’s executive and administrative employees,
10 stockholders, and their families) on any subject, including Federal elections. *See*
11 2 U.S.C. 441b(b)(2)(A). Such communications may include express advocacy. *See*
12 11 CFR 114.3. Commission regulations set forth examples of these types of
13 communications, which include corporate-sponsored appearances by Federal candidates
14 at corporate meetings, conventions, or other functions. *See* 11 CFR 114.3(c)(2).
15 Attendance at such appearances need not be limited to the corporation’s restricted class,
16 however, and may also include corporate employees necessary to administer the meeting,
17 as well as “other guests of the corporation who are speaking or participating in the
18 event.” *Id.*; *see also* Explanation and Justification, Corporate and Labor Organization
19 Activity; Express Advocacy and Coordination with Candidates (“1995 E&J”), 60 FR
20 64259, 64266 (Dec. 14, 1995) (explaining this aspect of the regulation as extending to
21 “individuals who are part of the program”). During these appearances, candidates may
22 ask for – and accept – contributions. 11 CFR 114.3(c)(2)(i).

1 Hawaiian proposes to organize two separate events, each of which will involve an
2 appearance by one of the major candidates in Hawaii’s upcoming Senate election.
3 Hawaiian plans to invite to these events members of its restricted class as well as leaders
4 in the Hawaii travel and tourism industry who are not Hawaiian employees.³ Hawaiian
5 states that the purpose of these events is “to foster an open and robust exchange of ideas
6 about matters of importance to the state travel and tourism industry.” Advisory Opinion
7 Request at 2. Hawaiian further states that attendees will “have the opportunity to engage
8 directly” in the discussion and that “[t]he very structure of the events – intimate breakfast
9 meetings – permits each guest to participate actively, as distinguished from passive
10 attendance at a speech.” Advisory Opinion Request, at 5-6.

11 Hawaiian’s proposed events are thus the type of corporate-sponsored candidate
12 appearance expressly contemplated by Commission regulations as a protected form of
13 communication between a corporation and its restricted class.⁴ *See* 11 CFR 114.3(c)(2).
14 That the events will be open to leaders in the Hawaii travel and tourism industry who are
15 not part of Hawaiian’s restricted class does not alter this conclusion since, consistent with
16 Commission regulations, the proposed events are structured so that all attendees will be
17 “speakers” who are “part of the program.” *See* 11 CFR 114.3(c)(i).

³ The Commission is analyzing the request under section 114.3 of its regulations given Hawaiian’s representation that the only employee-invitees will be members of the restricted class, save those non-restricted class employees, such as a secretary handing out name tags and a waiter or other company catering personnel, whose presence would be considered “necessary to administer the meeting.” 11 CFR 114.3(c)(2)(i).

⁴ The Commission assumes that Hawaiian will comply with each of the other requirements of the applicable candidate appearance exception. *See* 11 CFR 114.3(c).

1 While the Commission concludes that Hawaiian Airlines' sponsorship of the
2 proposed events falls within the scope of 11 C.F.R. § 114.3, even if it did not, it would
3 not be prohibited by the Act. In a number of advisory opinions, the Commission has
4 concluded that the cost of activities involving candidate appearances would not constitute
5 a prohibited in-kind corporate "contribution" if the event was held for a purpose
6 unrelated to the nomination or election of a candidate for Federal office. *See, e.g.,*
7 *Advisory Opinions 1992-05 (Moran)* (concluding that a candidate's participation in two
8 "public affairs forums" paid for by local cable stations was not prohibited by the Act);
9 *1992-06 (Duke)* (concluding that a University's sponsorship of a speech by and payment
10 of travel expenses and an honorarium to a presidential candidate were not contributions
11 or expenditures under the Act); *1981-37 (Gephardt)* (concluding that a candidate's
12 participation in "public affairs forums" hosted by a corporate production company was
13 not for the purpose of influencing a federal election).

14 In *Advisory Opinion 1980-22 (American Iron and Steel Institute)*, for example,
15 the Commission permitted a corporation to sponsor "town meetings" about the future of
16 the steel industry that included federal candidates and officeholders. All costs associated
17 with the town meetings, including pre-meeting publicity, room rental, and refreshments,
18 would be paid by the trade association or its member companies. Similar to this request,
19 no express advocacy and no solicitations were to occur at, or in publicity for, the event at
20 issue. The Commission concluded that payment by the trade association and/or member
21 companies to sponsor the town meetings would not result in a contribution to the
22 participating Federal candidates because "the purpose of the 'town meetings' [was]

1 primarily to serve as a forum for discussion of problems of the steel industry and that the
2 overall context of these meetings will be limited to effecting that primary purpose.”

3 The events proposed by Hawaiian are materially indistinguishable from those
4 which the Commission has previously concluded were beyond the scope of the Act.
5 Hawaiian proposes to organize and pay for a series of events which are intended to
6 “foster an open and robust exchange of ideas about matters of importance to the state
7 travel and tourism industry.” Indeed, Hawaiian has structured its events so as to ensure
8 that their primary purpose is to serve as a forum for discussion about the state’s tourism
9 industry and not relate to the upcoming election.

10 For the foregoing reasons, therefore, the Commission determines that Hawaiian
11 may use general treasury funds to pay for the candidate appearances.

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 that 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 website, www.fec.gov, or
2 directly from the Commission's Advisory Opinion searchable database at
3 <http://www.fec.gov/searchao>.

4 On behalf of the Commission,

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Caroline C. Hunter
Chair