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**AGENDA ITEM**  
For Meeting of: 11-20-03

November 13, 2003

**MEMORANDUM**

TO: The Commission

THROUGH: James A. Pehrkon *JAP*  
Staff Director

FROM: Lawrence H. Norton *LHN*  
General Counsel

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Deputy General Counsel

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Subject: Draft AO 2003-28

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for November 20, 2003.

Attachment

1 CERTIFIED MAIL  
2 RETURN RECEIPT REQUESTED

3 ADVISORY OPINION 2003-28

4 Mr. Thomas F. Walls  
5 McGuire Woods LLP  
6 1050 Connecticut Avenue, NW  
7 Suite 1200  
8 Washington, DC 20036-5171

9 Dear Mr. Walls:

10 This responds to your letters dated June 20, July 28, August 15, and  
11 September 23, 2003, requesting an advisory opinion on behalf of Horizon Lines, LLC  
12 (“Horizon Lines”), concerning application of the Federal Election Campaign Act of 1971,  
13 as amended (the “Act”), and Commission regulations, to the establishment of a separate  
14 segregated fund (“SSF”) for which Horizon Lines would pay the administrative and  
15 solicitation expenses and which would solicit members of the restricted class of Horizon  
16 Lines and its affiliates.

17 *Background*

18 Horizon Lines is a limited liability company formed under Delaware law that has  
19 elected to be treated as a partnership for federal tax purposes. The ownership of Horizon  
20 Lines is divided into three classes of Membership Units -- 60,000 Senior Preferred Units,  
21 1000 Senior Common Units and 1000 Common Units -- all of which are held by three  
22 entities. Delian Holdings, L.L.C. (“Delian”), owns 100% of the Senior Common Units

1 and 90% of the Common Units, which, given the different number of votes assigned to  
2 the three types of Membership Units, together represent 84.5% of the voting interests of  
3 Horizon Lines. SL Services, Inc. ("SL") owns 90% of the Senior Preferred Units, which  
4 represents 13.5% of Horizon Lines' voting interest. CSX Domestic Shipping Corporation  
5 ("CSX Domestic") owns 10% of the Senior Preferred Units and 10% of the Common  
6 Units of Horizon Lines, which together represent 2% of the voting interests of Horizon  
7 Lines. Both SL and CSX Domestic are wholly owned subsidiaries of CSX Corporation.

8 Delian is a limited liability company and holding company organized under  
9 Delaware law that has not elected tax treatment for federal tax purpose. Under  
10 11 CFR 110.1(g)(2), Delian is therefore treated as a partnership. The sole member of  
11 Delian is Carlyle-Horizon Holdings Corporation ("Carlyle-Horizon"), a Delaware  
12 corporation; thus, Delian is wholly owned by Carlyle-Horizon. You state that Carlyle-  
13 Horizon also wholly owns a subsidiary known as Horizon Lines of Puerto Rico, Inc.  
14 ("HLPR"). Given that Carlyle-Horizon controls 84.5% of Horizon Lines through Delian,  
15 and given that CSX Corporation controls the remaining 15.5% through its wholly owned  
16 subsidiaries, SL and CSX Domestic, therefore, Horizon Lines is owned entirely by  
17 corporations.

18 You describe Horizon Lines as the "sponsoring organization" for a non-connected  
19 Federal political committee known as Horizon Lines Associates Good Government Fund  
20 ("HLAGGF"). You also state that neither Delian nor Carlyle-Horizon now has a political  
21 action committee of any kind. Horizon Lines wishes to establish an SSF for which it may  
22 pay the administrative and solicitation expenses, and for which it may solicit members of  
23 its restricted class and its affiliates, including Carlyle-Horizon and HLPR.

1 *Questions Presented*

2 1. May the existing non-connected committee HLAGGF name Carlyle-Horizon as  
3 its connected organization and become an SSF?

4 2. If HLAGGF may name Carlyle-Horizon as its connected organization and become  
5 an SSF, may Horizon Lines pay the administrative expenses of the SSF, on grounds that it  
6 is an affiliate of Carlyle-Horizon or on any other grounds?

7 3. As an alternative course to that posited in Question 1, if the non-connected  
8 committee HLAGGF is terminated, and Carlyle-Horizon establishes an SSF, may  
9 Horizon Lines pay the administrative and solicitation expenses of that new SSF, on  
10 grounds that it is an affiliate of Carlyle-Horizon, or on any other grounds?

11 4. If the answer to Question 3 is yes, could the new SSF take the name "Horizon  
12 Lines Associates Good Government Fund" as its official name or as its "pacronym?"

13 *Legal Analysis and Conclusions*

14 The answers to all four of your questions are yes.

15 Response to Question 1

16 The Act and Commission regulations provide for amendments to a Statement of  
17 Organization. *See* 2 U.S.C. 433(c); 11 CFR 102.2(a)(2). The Commission has permitted  
18 a nonconnected committee to amend its Statement of Organization to change its status to  
19 an SSF and to indicate its connected organizations. *See generally* Advisory Opinion  
20 1997-13 (noting the requestor had previously done so). Therefore, HLAGGF may amend  
21 its Statement of Organization, naming Carlyle-Horizon as its connected organization and

1 declaring its status as an SSF.<sup>1</sup> The consequences of this amendment are discussed in  
2 answering your other questions below.

3 Response to Question 2

4 Affiliation is a central concept to answering your questions. The Act and  
5 Commission regulations provide that political committees, including SSFs, that are  
6 established, financed, maintained or controlled by the same corporation, person, or group  
7 of persons, including any parent, subsidiary, branch, division, department, or local unit  
8 thereof, are affiliated. 2 U.S.C. 441a(a)(5); 11 CFR 100.5(g)(2), 110.3(a)(1)(ii). A  
9 corporation may solicit contributions to its SSF from the restricted class (*i.e.*, executive  
10 and administrative personnel and stockholders, and the families thereof) of its  
11 subsidiaries, branches, divisions, and other affiliates. 2 U.S.C. 441b(b)(2)(A) and  
12 (4)(A)(i); 11 CFR 114.3(a)(1) and 114.5(g)(1). The Commission has long held that  
13 affiliates may include entities other than corporations, such as partnerships and, more  
14 recently, limited liability companies. *See* Advisory Opinion 2001-18 (*citing* Advisory  
15 Opinions 2001-07, 2000-36, 1997-13, 1996-38, 1994-11, and 1992-17).

16 According to Commission regulations, committees established by a corporation  
17 and its subsidiaries, branches, divisions, or departments are affiliated *per se*. *See*  
18 11 CFR 100.5(g)(2); 100.5(g)(3)(i); 110.3(a)(1)(ii); and 110.3(a)(2)(i). The Commission  
19 considers organizations with a majority of ownership held by a corporation to be  
20 affiliated *per se* with the corporation. *See* Advisory Opinion 2001-18 (noting “majority  
21 ownership ... normally indicate[s] that the owned company is a subsidiary and affiliated

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<sup>1</sup> Horizon Lines is not listed as a connected organization on HLAGGF's Statement of Organization.  
*See* 11 CFR 100.6(a)(defining connected organization).

1 *per se* with the owner”); *see also* Advisory Opinion 1985-27 (stating that for purposes of  
2 the Act, a parent-subsidiary relationship is created by majority ownership). Thus, a  
3 corporation’s *per se* affiliates under Commission regulations may include organizations  
4 that are not corporate subsidiaries for Federal tax or security laws purposes. *See* Advisory  
5 Opinion 2003-21 (distinguishing a parent/subsidiary relationship for purposes of the Act  
6 from such a relationship under Federal tax or securities laws).

7 Carlyle-Horizon wholly owns Delian, which owns an 84.5% controlling interest in  
8 Horizon Lines. Therefore, Carlyle-Horizon, Delian, and Horizon Lines are *per se*  
9 affiliated under the Act and Commission regulations. On this basis, the Commission  
10 agrees with the premise of your second question that Horizon Lines is an affiliate of  
11 Carlyle-Horizon. Similarly, the Commission agrees that Delian’s intermediate level of  
12 ownership between Horizon Lines and Carlyle-Horizon does not alter this conclusion.  
13 *See* Advisory Opinion 1997-13 (concluding that an SSF established by a joint venture  
14 limited liability company is affiliated with an SSF established by the corporate parent of  
15 one of the joint venture partners).

16 The Commission has interpreted the Act and regulations to permit a partnership or  
17 limited liability company that is owned entirely by corporations and affiliated with one of  
18 the corporations to pay the administrative and solicitation costs of the partnership’s SSF.  
19 *See* Advisory Opinion 2001-18 (*citing* Advisory Opinions 1997-13, 1996-49, 1994-11,  
20 and 1992-17). In such circumstances, the Commission has required the SSF to list the  
21 affiliated corporate owners as the connected organizations. *See id.* Applying this  
22 interpretation to HLAGGF’s situation, HLAGGF may amend its Statement of  
23 Organization to identify Carlyle-Horizon as a connected organization, which will permit

1 Horizon Lines to pay HLAGGF's administrative and solicitation expenses. Horizon  
2 Lines may do so because it is a limited liability company treated as a partnership that is  
3 owned entirely by corporations and affiliated with one of them.

4 Response to Question 3

5         If the existing HLAGGF is terminated, and Carlyle-Horizon establishes a new  
6 SSF, Carlyle-Horizon must be listed as the connected organization on the SSF's  
7 Statement of Organization. Such an SSF would be indistinguishable from the SSF  
8 considered in response to question 3. Whether established by Carlyle-Horizon or by  
9 Horizon Lines, both SSFs would be required to identify Carlyle-Horizon as the connected  
10 organization because it either established the SSF or because it is the parent company of  
11 the partnership or limited liability company that pays for the administrative and  
12 solicitation costs of the SSF. As stated in Advisory Opinion 1997-13, if the  
13 administrative and solicitation costs are paid by the subsidiary partnership or limited  
14 liability company, this support is deemed to be from the parent corporation by virtue of its  
15 ownership of and affiliation with the partnership or limited liability company. *See also*  
16 *Advisory Opinion 1994-11* (permitting subsidiary partnership to pay administrative and  
17 solicitation costs of an SSF connected to its corporate parent). Consequently, Horizon  
18 Lines may pay the administrative and solicitation costs of an SSF established by Carlyle-  
19 Horizon.

20 Response to Question 4

21         The Commission has interpreted the Act and regulations to permit an SSF to  
22 include only the name of a joint venture limited liability company and to permit the  
23 omission of the affiliated corporate owners of the joint venture. *See Advisory Opinion*

1 1997-13 (superseding Advisory Opinion 1996-49 in this respect); *see also* Advisory  
2 Opinion 2001-18 (describing a similar arrangement). The basis for this interpretation is  
3 that the limited liability company is in virtually the same position as a subsidiary of each  
4 of the two corporations, and Commission regulations expressly permit a subsidiary's SSF  
5 to omit the corporate parent's name from the name of the SSF. *See* 11 CFR 102.14(c).  
6 Furthermore, the Commission noted that the SSF's Statement of Organization would  
7 identify the affiliated corporate owners as the connected organizations of the SSF, so  
8 including the corporations' names in the SSF's name was unnecessary. *See* Advisory  
9 Opinion 1997-13. Therefore, if the existing HLAGGF amends its Statement of  
10 Organization to become an SSF with Carlyle-Horizon as its connected organization as  
11 contemplated in questions 1 and 2, it would not be required to change its name.

12 Your proposal to have the new SSF take the name of HLAGGF is not materially  
13 different from situations determined to be permissible in previous advisory opinions. Nor  
14 is it materially different than having the current HLAGGF continue in existence with a  
15 new connected organization. The Statement of Organization for the SSF must disclose  
16 Carlyle-Horizon as the connected organization in both instances, and in neither instance  
17 would the SSF be permitted to identify Horizon Lines as a connected organization.  
18 Under either alternative, the name of the SSF would include the name of the functional  
19 equivalent of Carlyle-Horizon's subsidiary, Horizon Lines. Also, Horizon Lines will pay  
20 the administrative and solicitation expenses under either alternative. The only difference  
21 is that in the scenario suggested in questions 3 and 4, Horizon Lines would not have  
22 served as a "sponsoring organization" of the SSF in its previous, non-connected status.

1 Because this difference is immaterial, Carlyle-Horizon may establish a new SSF and  
2 name it Horizon Lines Good Government Fund, once the current HLAGGF terminates.  
3 Soliciting the Restricted Class of Horizon Lines of Puerto Rico, Inc.

4 Your request identifies the ability to solicit the restricted class of HLPR as one of  
5 its objectives. Commission regulations provide that a corporation may solicit the  
6 restricted class of its subsidiaries for contributions to the parent corporation's SSF. *See*  
7 11 CFR 114.5(g)(1). Thus, the regulation would expressly authorize Carlyle-Horizon to  
8 solicit the restricted class of HLPR if Carlyle-Horizon establishes a new HLAGGF under  
9 the alternative considered in questions 3 and 4.

10 In its previous consideration of arrangements like the alternative considered in  
11 questions 1 and 2 (where a limited liability company establishes an SSF with a  
12 corporation that holds an ownership interest in the company and is affiliated with the  
13 company), the Commission has interpreted the Act and regulations to permit the SSF to  
14 solicit the restricted class of the corporation's subsidiaries. *See* Advisory Opinion 1996-  
15 49 (permitting solicitation of Bell Atlantic's subsidiaries, such as NYNEX). On this  
16 basis, once current HLAGGF amends its Statement of Organization to become an SSF  
17 with Carlyle-Horizon as its connected organization, HLAGGF may solicit the restricted  
18 class of Carlyle-Horizon's subsidiary, HLPR.

19 This response constitutes an advisory opinion concerning the application of the  
20 Act and Commission regulations to the specific transaction or activity set forth in your  
21 request. *See* 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in  
22 any of the facts or assumptions presented, and such facts or assumptions are material to a

1 conclusion presented in this advisory opinion, then the requestor may not rely on that  
2 conclusion as support for its proposed activity.

3 Sincerely,

4 Ellen L. Weintraub  
5 Chair

6 Enclosures (AOs 2003-21, 2001-18, 2001-7, 2000-36, 1997-13, 1996-49, 1996-38, 1994-  
7 11, 1992-17, and 1985-27)