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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**AGENDA ITEM**  
For Meeting of: JUL 18 1996

July 11, 1996

**MEMORANDUM**

TO: The Commission

THROUGH: John C. Surina  
Staff Director

FROM: Lawrence M. Noble  
General Counsel

N. Bradley Litchfield  
Associate General Counsel

Michael Marinelli  
Staff Attorney

SUBJECT: Draft AO 1996-26

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for July 18, 1996.

**Attachment**

# DRAFT

1 ADVISORY OPINION 1996-26

2  
3 Elaine Acevedo,  
4 Director of Government Affairs  
5 FTD Association  
6 666 Pennsylvania Avenue, S.E.  
7 Suite 403  
8 Washington, D.C. 20003

9  
10 Dear Ms. Acevedo:

11  
12 This responds to your letter dated May 28, 1996, requesting an advisory opinion on  
13 behalf of FTD Association ("the Association ") concerning the application of the Federal  
14 Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to  
15 its proposal to have FTD Inc. ("the Corporation") act as a collecting agent for FlowerPAC,  
16 the Association's separate segregated fund.

### 17 ***FACTUAL BACKGROUND***

#### 18 **Creation of Corporation and Association**

19 To explain the proposal, you illustrate the interrelationship and history of the  
20 parties involved. Both the Corporation and the Association are successor organizations  
21 created out of the original FTD (Florists Transworld Delivery incorporated or "FTD").  
22 The FTD was created nearly a hundred years ago to serve as a cooperative wire service for  
23 retail florists. You further explain that, as a non-profit corporation created under the laws  
24 of Michigan, FTD acted as a clearinghouse house for flower orders processed for its  
25 member/owners, who were primarily U.S. retail florists. FTD also provided many trade  
26 association services such as marketing, government affairs programs, business education,  
27 and social and networking opportunities for retail florists. It, however, never created a  
28 separate segregated fund.

1        You explain that in 1995, through a contractual merger agreement, the FTD was  
2 divided into the present Association and Corporation with different aspects of the FTD  
3 assumed by each new entity. The Corporation is a for-profit corporation which assumed  
4 the clearinghouse house functions of FTD. It also received ownership of the FTD  
5 trademark, the FTD Mercury Man logo. The Association was organized as a nonprofit  
6 501(c)(6) organization and incorporated in the state of Ohio. It took over the functions of  
7 FTD that related to trade association activity, such as, for example, sustaining programs of  
8 quality adherence in the industry. You state that the Association also received the exclusive  
9 license from the Corporation to control the use of the logo in the floral industry for 99  
10 years. You state that the Corporation is not a member of the Association, although all of  
11 the subscribers to the Corporation's services are members.<sup>1</sup>

#### 12        Continued Links between Corporation and Association

13        While the Corporation and Association are legally separate incorporated entities,  
14 your request describes the continued ties that connect them. Under the terms of the merger  
15 agreement, both the Corporation and the Association may appoint directors to serve on the  
16 other's governing board. Each is authorized to designate a minimum of two directors on  
17 the other's board, such that the representatives appointed by each constitute at least 20% of  
18 the other's board.<sup>2</sup>

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<sup>1</sup> You state that the former member/owners of FTD received monetary compensation for their former rights. Rather than being the owners of the Corporation (though some did purchase stock in the new corporation), they are subscribers to the Corporation for its services. The former member/owners of the FTD also became members of the Association.

<sup>2</sup> You state that the Corporation has three directors of its choosing serving on the Association's board, and the Association has appointed two of the directors serving on the Corporation's board. The mutual cooperation agreement between the Corporation and the Association does place a limit on the degree of institutional integration at the highest level. The agreement bars the officer of one organization from serving as an officer of the other.

1           There are substantial financial ties between the two organizations. As noted above,  
2 while the Corporation owns the Mercury Man logo for 99 years, the Association has the  
3 exclusive right to license the logo. The Association and Corporation have signed a mutual  
4 support agreement under which the Corporation, in exchange for services (such as the  
5 Association's quality control programs) pays the Association .125% of all floral orders  
6 cleared through the Corporation's clearinghouse resources.<sup>3</sup> The Association is also  
7 pledged not to support financially any enterprise that is in competition with the  
8 Corporation in any of its markets.

9           Among the other ties are an overlap of the membership of the Association with the  
10 subscribers of the Corporation, an overlap of employees, and the use of the same electronic  
11 data base and building facilities.<sup>4</sup>

#### 12           Association's Proposal

13           You state that the Corporation sends monthly clearinghouse house statements to its  
14 subscribers which include a line item for the collection of \$15 per month for the  
15 Association dues. The Corporation also collects and processes other voluntary payments  
16 for the programs supported by the Association.<sup>5</sup> The Association now wishes to use this

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<sup>3</sup> The agreement also gives the Corporation and the Association authority to enforce their own standards as they apply to their separate spheres of operation. However, a member/subscriber can appeal to one organization, in certain instances, the sanctions imposed by the other. If the Association and the Corporation cannot reach agreement, the matter is submitted to a neutral arbiter.

<sup>4</sup> You state in your request that all of the members of the Association are subscribers to the Corporation and that "[t]here are no subscribers to the Corporation that are not also members of the Association." Regarding employees, you also state that "the employees who work for both organizations are, in large measure, the same employees who worked for the original FTD." Your request does not, however, quantify the actual numbers of overlapping employees, as compared with other employees who may work for either entity alone.

<sup>5</sup> Association members consolidate all their industry business on one monthly Corporation clearinghouse statement. You further explain that a sophisticated electronic data base keeps track of all transactions, as well as member information, such as whether or not a business is incorporated. You state that more than 60% of the Association's membership is unincorporated.

1 combined billing arrangement to allow Association members make their contributions to  
2 FlowerPAC.<sup>6</sup>

3 The Association would first send a solicitation card (a copy of which was included  
4 in your request) to its solicitable class of incorporated members and to its unincorporated  
5 members.<sup>7</sup> The card has several options for making the contribution to FlowerPAC. One  
6 option would be a line added to the card which would read "I am unincorporated. Please  
7 deduct my FlowerPAC contribution of \$\_\_per month from my FTD Inc. Clearinghouse  
8 Statement."<sup>8</sup>

9 After checking its data base to make certain no incorporated member inadvertently  
10 requests the deduction from its clearinghouse statement, the Association proposes to send  
11 to the Corporation, a list of contributors who have authorized monthly deductions for  
12 FlowerPAC. When the Corporation receives the list, each unincorporated member of the  
13 Association who has signed the pledge card and checked the "clearinghouse block" will  
14 have a new line item added to his or her monthly clearinghouse statement which tells how

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<sup>6</sup> The Association in the Spring of 1996 created FlowerPAC. You affirm that the Association solicits contributions for FlowerPAC following all of the procedures for trade associations prescribed by Commission regulations. You explain that the Corporation, on the other hand, has not formed a separate segregated fund, does not lobby, and currently shows no interest in engaging in this type of activity. The facts of your request indicate that the Corporation is significantly engaged in the Association's political activity on various levels. You state that Corporation employees rely on the expertise of the Association's government office for information. You point out that the President-elect of the Association, who also sits on the Corporation's Board of Directors, presides over the Association's committee overseeing FlowerPAC. Furthermore, the directors appointed to the Association's board by the Corporation joined in the vote establishing FlowerPAC and participate fully in all board discussion regarding the PAC.

<sup>7</sup> Your request does not seek clarification of which members of the Association would qualify as "members" for purposes of the Act. Therefore, issues relating to the application of 11 CFR 114.1(e)(2) and 100.8(b)(4) are not discussed in this opinion. For a recent treatment of these issues see Advisory Opinion 1996-21.

<sup>8</sup> You estimate that the vast majority of these donations will range between \$12 and \$60 per year.

1 much is being deducted for FlowerPAC.<sup>9</sup> The statement will also inform the member that  
2 FlowerPAC deductions are voluntary and not deductible as charitable contributions.

3 The Corporation will then deposit the FlowerPAC contributions into the same  
4 segregated account where the Corporation currently deposits (within three days) the  
5 Association dues collected by it. The Association will write a check or transfer the funds  
6 electronically to FlowerPAC within seven days of receipt of the funds from the  
7 Corporation.<sup>10</sup>

8 ***THE ACT AND COMMISSION REGULATIONS***

9 A collecting agent is defined in 11 CFR 102.6(b) as an organization or committee  
10 that collects and transmits contributions to one or more separate segregated funds to which  
11 the collecting agent is related. A collecting agent may be either: (i) a committee, whether  
12 or not it is a political committee as defined in 11 CFR 100.5, affiliated with the separate  
13 segregated fund under 11 CFR 110.3; or (ii) the connected organization of the separate  
14 segregated fund as defined in 11 CFR 100.6; or (iii) a parent, subsidiary, branch, division,  
15 department, or local unit of the connected organization of the separate segregated fund; or  
16 (iv) a local, national or international union collecting contributions on behalf of the

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<sup>9</sup> The Corporation will not collect contributions to FlowerPAC from the solicitable class of Association members who are incorporated because, you explain, the collection process the Association has in mind does not lend itself well to that situation. You emphasize that you propose only that the Corporation serve as a collecting agent for FlowerPAC with regard to unincorporated U.S. members of the Association who have signed a pledge card authorizing a contribution made through the Clearinghouse deduction.

<sup>10</sup> You state that the Corporation keeps electronic records of all transactions and will add the FlowerPAC transaction to the electronic database so that it can keep track of the aggregate amount each Association member donates to FlowerPAC through the clearinghouse each year. You emphasize that the Association will continue to maintain FlowerPAC records and be responsible for Federal Election Commission reports.

1 separate segregated fund or any federation with which the local, national, or international  
2 union is affiliated. See 11 CFR 102.6(b)(1)(i) to (iv).

3 A collecting agent, if it is an unregistered organization that follows the procedures  
4 set out in 11 CFR 102.6(c), is not required to register and report as a political committee  
5 under 11 CFR parts 102 and 104, provided that the organization does not engage in other  
6 activities such as making contributions or expenditures for the purpose of influencing  
7 Federal elections. 11 CFR 102.6(b)(2).

8 The collecting agent may pay any or all of the costs incurred in soliciting and  
9 transmitting contributions to the separate segregated fund. 11 CFR 102.6(c)(2)(i).  
10 Furthermore, a contributor may write a check that represents both a contribution and  
11 payment of dues or other fees. The check must be drawn on the contributor's personal  
12 checking account or on a non-repayable corporate drawing account of the individual  
13 contributor. 11 CFR 102.6(c)(3). The full amount of each contribution collected by the  
14 collecting agent on behalf of a separate segregated fund shall be transmitted to that fund  
15 within 10 or 30 days as required by 11 CFR 102.3. 11 CFR 102.6(c)(4).

16 The Act and Commission regulations provide that committees, including separate  
17 segregated funds, that are established, financed, maintained or controlled by the same  
18 corporation, person, or group of persons, including any parent, subsidiary, branch, division,  
19 department, or local unit thereof, are affiliated. Contributions made to or by such  
20 committees shall be considered to have been made to or by a single committee. 2 U.S.C.  
21 §441a(a)(5); 11 CFR 100.5(g)(2), 110.3(a)(1), and 110.3(a)(1)(ii).

1           Where one entity is not a subsidiary of another entity, as in 11 CFR 110.3(a)(2)(i),  
2 Commission regulations provide for an examination of various factors in the context of an  
3 overall relationship to determine whether one entity (such as a corporation) is an affiliate of  
4 another and, hence, whether their respective SSFs are affiliated with each other. 11 CFR  
5 100.5(g)(4)(i) and (ii)(A)-(J), and 110.3(a)(3)(i) and (ii)(A)-(J). These factors include: (A)  
6 the ownership by one sponsoring organization of a controlling interest in the voting stock  
7 or securities of another sponsoring organization; (B) the authority or ability of one  
8 sponsoring organization to participate in the governance of another sponsoring  
9 organization through provisions of constitutions, by-laws, contracts or other rules, or  
10 through formal or informal practices or procedures; (C) the authority or ability to hire,  
11 demote or otherwise control the decision makers of another sponsoring organization; (D)  
12 whether a sponsoring organization or committee has a common or overlapping  
13 membership with another sponsoring organization or committee which indicates a formal  
14 or ongoing relationship between the sponsoring organizations or committees, (E) common  
15 or overlapping officers or employees, indicating a formal or ongoing relationship between  
16 the sponsoring organizations; (F) members, officers, or employees of one sponsoring  
17 organization who were members, officers, or employees of another organization which  
18 indicates a formal or ongoing relationship or the creation of a successor entity; (G) whether  
19 a sponsoring organization or committee provides funds or goods in a significant amount or  
20 on an ongoing basis to another sponsoring organization or committee such as through  
21 direct or indirect payments for administrative, fundraising or other costs, (H) whether a  
22 sponsoring organization or committee causes or arranges for funds in a significant amount



1 or on an ongoing basis to be provided to another sponsoring organization or committee, (I)  
2 an active or significant role by one sponsoring organization in the formation of another. 11  
3 CFR 110.3(a)(3)(ii) and 100.5(g)(4)(ii)(A), (B), (C), (D),(E), (F),(G),(H), and (I).

#### 4 ***APPLICATION OF ACT AND COMMISSION REGULATIONS***

##### 5 **Affiliation between Association and Corporation**

6 The relationship between the Corporation and Association does not fall within the  
7 usual classification of corporate parent/subsidiary relationships. However, the continued  
8 relationship between the two successor entities of FTD, when examined through the  
9 affiliation factors at sections 100.5 and 110.3, would support an conclusion that the two  
10 entities are affiliated with each other. For example, each entity has the right to participate  
11 in the governance of the other organization through the naming of directors to each other's  
12 board. 11 CFR 100.5(g)(4)(ii)(B) and 110.3(a)(3)(ii)(B). Through the control of 20% of  
13 the directors on each other's board, the Corporation and Association each play a role in the  
14 hiring, appointing and demoting of officers and other decision making employees. 11 CFR  
15 100.5(g)(4)(ii)(C) and 110.3(a)(3)(ii)(C). There is an overlap in membership and  
16 subscribers between the two, as well as a degree of overlap in employees. 11 CFR  
17 100.5(g)(4)(ii)(D),(E),(F) and 110.3(a)(3)(ii)(D),(E),(F). Payments by the Corporation to  
18 the Association (which you indicate make up 10% of the Association's revenue) for  
19 services and the agreements regarding the former logo of the FTD show continued  
20 transfers of funds between the two. 11 CFR 100.5(g)(4)(ii)(G),(H) and  
21 110.3(a)(3)(ii)(G),(H). Finally, since the directors appointed to the Association's board by  
22 the Corporation joined in the vote establishing FlowerPAC, the Corporation can be said to

1 have played a role in the establishment of FlowerPAC. See 11 CFR 100.5(g)(4)(ii)(I) and  
2 110.3(a)(3)(ii)(I). The conclusion that the Association and Corporation are affiliated with  
3 each other also means that if any committee were established by the Corporation, it would  
4 be affiliated with FlowerPAC.<sup>11</sup> Furthermore, because of its affiliated status with the  
5 Association, the Corporation could also pay the costs to administer and establish  
6 FlowerPAC. See Advisory Opinions 1992-17, 1988-14, and 1983-19.<sup>12</sup>

7 Corporation as Collecting Agent

8 None of the four categories of collecting agent under 11 CFR 102.6 precisely fit the  
9 factual pattern in your request. However, there is a reasonable approximation in the  
10 relationship between the Association and the Corporation to the definition in section  
11 102.6(b)(iii) of a collecting agent as a "branch" of the connected organization of the  
12 separate segregated fund.<sup>13</sup> The Commission bases this on the common origin of the  
13 Corporation and the Association as part of FTD, the different but complementing roles  
14 each has adopted since their creation, and their continued business affairs in the florist  
15 industry. It can be said that both operate as dependent branches of a common enterprise.

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<sup>11</sup> The Commission notes that a prior opinion issued before the current versions of 11 CFR 100.5 and 110.3 dealt with requesters whose relationship was not unlike that presented in your request. In Advisory Opinion 1978-39, the Commission concluded that the separate segregated funds maintained by Holiday Inn Inc. and an association which consisted of licensees of Holiday Inn were affiliated with each other. The Commission cited, among other factors, the close relationship between Holiday Inn Inc. and the association as shown by the trademark relationship between the corporation and the association, and the right of the corporation to name directors to the association's board.

<sup>12</sup> Advisory Opinion 1988-14 is relevant to your situation. The Commission found two corporations were affiliated, not through stock ownership of one by the other, but by the presence of common shareholders, officers, personnel, and overlapping boards. The Commission found that both could establish and administer a joint separate segregated fund.

<sup>13</sup> The Commission notes that neither entity could be considered a subsidiary of the other since neither owns a majority of shares in the other. The Commission has observed in the past that the subsidiary corporation is generally defined as one in which another (the parent) corporation owns at least a majority of the shares of another corporation and thus has control. See Advisory Opinion 1985-27.

1 The Commission concludes that this analogy and relationship is close enough to allow the  
2 Corporation to act as a collecting agent pursuant to the proposal outlined in your request.  
3 Therefore, as permitted by 11 CFR 102.6(c)(3), the billing procedure used by the  
4 Corporation and the Association (with the safeguard you describe) may be utilized to  
5 handle the payment of contributions to FlowerPAC.<sup>14</sup>

6 This response constitutes an advisory opinion concerning application of the Act, or  
7 regulations prescribed by the Commission, to the specific transaction or activity set forth in  
8 your request. See 2 U.S.C. §437f.

9

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Sincerely,

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14

Lee Ann Elliott

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Chairman

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Enclosures (AOs 1996-21, 1992-17, 1988-14, 1985-27, 1983-19 and 1978-39)

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<sup>14</sup> You state that FlowerPAC follows all of the procedures for trade associations prescribed by Commission regulations. The Commission notes that as regards the solicitable class of its incorporated membership, the Association must receive specific prior approval of that corporate member, given through the corporate representative to the Association, before the Association may solicit these individuals for contributions to FlowerPAC. See 11 CFR 114.8(d)(3) and Advisory Opinion 1984-61. Therefore, the solicitation materials you include in the request should be sent first to the corporate representative to the Association, and such approval obtained, before the solicitations may be sent to other personnel within the solicitable class of the corporate member.