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FEDERAL ELECTION COMMISSION

Washington, DC 20463

AGENDA ITEM
For Meeting of: 1-16-97

January 9, 1997

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noh
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael G. Marinelli
Staff Attorney

SUBJECT: Draft AO 1996-50

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for January 16, 1997.

Attachment

97-006,076-0306

DRAFT

1
2 **ADVISORY OPINION 1996-50**

3
4 **Jan Witold Baran**
5 **Wiley, Rein & Fielding**
6 **1776 K Street, N.W.**
7 **Washington, D.C. 20006**

8
9 **Dear Mr. Baran:**

10
11 **This refers to your letter dated November 25, 1996, with enclosures, as supplemented by**
12 **letter dated December 23, on behalf of the Farm Credit Council ("FCC") that requests an**
13 **advisory opinion concerning application of the Federal Election Campaign Act of 1971, as**
14 **amended ("the Act"), and Commission regulations to the proposed termination of the former**
15 **affiliation relationship between FCC and the National Council of Farmer Cooperatives ("Co-**
16 **ops"), and the related ending of affiliated status for their respective separate segregated funds or**
17 **PACs.**

18 **Your request states that FCC is a not-for-profit membership organization incorporated in**
19 **the District of Columbia, while Co-ops is a not-for-profit association of cooperative businesses**
20 **owned and controlled by farmers which is incorporated in Illinois. Both entities are tax-exempt**
21 **organizations under 26 U.S.C. §501(c)(6), and both focus on agricultural issues. The PAC's**
22 **formed by each corporation have been registered with the Commission since 1985 as affiliated**
23 **committees, and are cited herein as FCC PAC and Co-op PAC. As a result of significant**
24 **changes in its structure and relationship with Co-ops, FCC proposes to amend the Statement of**
25 **Organization (FEC Form 1) of FCC PAC to indicate that it is no longer affiliated with Co-op**
26 **PAC. This change of status has a proposed effective date of January 1, 1997.**

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1 The request further explains the composition and relationships between FCC and Co-ops.
2 The major purpose of FCC is to promote the common interests of institutions chartered under the
3 Farm Credit Act of 1971, as amended (The Farm Credit Act). FCC's voting membership, as of
4 January 1, 1996, is comprised of the National Bank for Cooperatives and six District Farm Credit
5 Councils ("Councils" or "Council").¹ The Councils are not mentioned as such in the FCC
6 bylaws (see article III, section 3), but the request explains that they are one and the same as the
7 district trade associations whose voting membership, with one exception, is comprised solely of
8 Farm Credit System institutions (primarily Farm Credit banks) that are chartered under the Farm
9 Credit Act.² The FCC-member Councils are themselves state-chartered corporate entities
10 comprised of 270 Farm Credit banks or similar institutions.³ The six Councils, along with the
11 National Bank for Cooperatives, provide substantial financial resources to FCC in their dues
12 payments which are projected to total just over \$3.5 million for 1997.

13 The purpose of Co-ops is to promote the interests of farm cooperatives, including
14 farmers' rights to market their products collectively. Its membership is comprised of agricultural
15 cooperative associations, state cooperative councils, and certain Farm Credit System
16 institutions.⁴ The request indicates that the current voting membership of Co-ops is comprised of
17 80 major farmer cooperatives (marketing, supply or farm credit-related) and 31 State councils of

¹ Its non-voting membership consists of cooperative agricultural lenders that are not part of the Farm Credit System, agricultural cooperatives, and other borrowers.

² The single exception is a Council with a voting corporate member that is not a Farm Credit System lender but has a direct borrowing relationship, for over 60 years, with a Farm Credit Bank.

³ These banks have a direct role in the management of FCC since their personnel are entitled to be elected, according to a representational formula, as directors of FCC. Bylaws, article IV, section 2.

⁴ The state cooperative councils are eligible to serve on the Co-ops board, but are not entitled to vote on matters before the delegate body. The National Bank for Cooperatives, the District Banks for Cooperatives, and the Farm Credit Banks of any District are the Farm Credit System institutions eligible for voting membership in Co-ops.

1 cooperatives. Seven Farm Credit banks have voting membership in Co-ops and 33 Farm Credit
2 associations have non-voting, "Supporting Members" status in Co-ops. According to the request,
3 a total of 40 Farm Credit institutions pay annual dues to Co-ops in excess of \$200 each, but none
4 of them are members of FCC or its six constituent Councils.

5 The request further states that the affiliated status of the two political committees,
6 beginning in 1985, was based on a variety of factors. First, at that time, FCC and Co-ops
7 management was interrelated. The President of FCC was a Co-ops officer, and the Co-ops Chief
8 Executive Officer participated in the selection of the FCC's President. Second, FCC and Co-ops
9 shared a common treasurer and a common benefit program. Third, FCC and Co-ops shared
10 common office space and equipment. Finally, the PACs of the two corporations shared an
11 assistant treasurer.

12 In addition, the request explains that FCC was restructured and substantially increased the
13 scope of its activities in early 1990; its staffing increased almost tenfold.⁵ At the time of FCC's
14 restructuring, Co-ops and FCC entered into a formal agreement in order to signify that, despite
15 FCC's new size, the two organizations would continue to work towards common goals. The
16 agreement did not alter the affiliated relationship of FCC PAC and Co-op PAC dating back to
17 1985. Among other provisions, the agreement stated that the two corporations would work
18 together to "enhance the political effectiveness and influence of the membership of the [FCC and

⁵ This restructuring occurred because FCC purchased the assets of the Farm Credit Corporation of America, a Denver based organization, on January 31, 1990. By absorbing most of Farm Credit Corporation's employees and assets, FCC was able to devote many more resources to promoting its members' interests.

1 Co-ops].” The agreement expired, according to its own terms, on June 30, 1996, and will not be
2 renewed.

3 Given the lapse of the agreement, the relationship between FCC and Co-ops has
4 materially changed in several respects. According to the representations made in the request,
5 neither FCC nor Co-ops has any controlling interest in the other entity. Neither organization can
6 participate in any way in the other’s governance, through formal or informal means. Each is
7 governed by two independent boards with no overlapping directors. The chief executive of FCC
8 is no longer an officer of Co-ops, and the chief executive of Co-ops no longer participates in the
9 selection of FCC’s chief executive. The two corporations no longer share a common benefits
10 program. Furthermore, they no longer share a common treasurer, and their respective PACs no
11 longer have the same assistant treasurer.

12 There remain two other matters that require review with respect to the continuing
13 connection between FCC and Co-ops. First, because their offices remain in the same building,
14 the two corporations share some office operations that entail minimal shared expenses and
15 payments. For that reason, an incidental administrative relationship will continue between them.
16 For example, they share expenses for certain office facilities and services, such as supplies for
17 copier equipment, and the use of meeting and other office-function rooms.⁶ The request asserts
18 that tenancy in the same building is solely for convenience of location and economies with

⁶ The common office rooms are also shared with two other tenants in the building and costs attributed to these rooms are shared on a rate based on each entity’s total occupied square footage in the building.

1 respect to office costs.⁷ In addition, although the two corporations generally have no common
2 staff personnel, they do share the services of one staff person who is the receptionist for both.
3 This individual is formally an employee of Co-ops, but FCC reimburses Co-ops for a portion of
4 her salary.

5 Secondly, the request explains that there is a limited degree of overlapping membership
6 between the two corporations. Specifically, some of the members of the Councils (which are the
7 voting members of FCC) have among their members a total of seven Farm Credit Banks that are
8 also members of Co-ops. In other words, seven such banks are members of FCC Councils and
9 are also members of Co-ops. As noted above, the Councils represent approximately 230 Farm
10 Credit institutions. It is seven of those 230 who are also within the class of the 80 persons who
11 currently hold all the voting power in Co-ops.

12 ACT AND COMMISSION REGULATIONS

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

⁷ In the past, both corporations have considered changing their office locations, but each has rejected relocation because their prior tenancy in the same building has enabled them to negotiate more favorable rents than would be available in other comparable office space.

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, but are
6 not limited to: (A) the ownership by one sponsoring organization of a controlling interest in the
7 voting stock or securities of another sponsoring organization; (B) the authority or ability of one
8 sponsoring organization to participate in the governance of another sponsoring organization
9 through provisions of constitutions, bylaws, contracts or other rules, or through formal or
10 informal practice or procedures; (C) the authority or ability to hire, demote or otherwise control
11 the decision-makers of another sponsoring organization; (D) whether a sponsoring organization
12 or committee has a common or overlapping membership with another sponsoring organization or
13 committee which indicates a formal or ongoing relationship between the sponsoring
14 organizations or committees, (E) common or overlapping officers or employees, indicating a
15 formal or ongoing relationship between the sponsoring organizations; (G) whether a sponsoring
16 organization or committee provides funds or goods in a significant amount or on an ongoing
17 basis to another sponsoring organization or committee such as through direct or indirect
18 payments for administrative, fundraising or other costs, (H) whether a sponsoring organization or
19 committee causes or arranges for funds in a significant amount or on an ongoing basis to be
20 provided to another sponsoring organization or committee. 11 CFR 110.3(a)(3)(ii) and
21 100.5(g)(4)(ii)(A), (B), (C), (D), (E), (G), and (H).

1 APPLICATION OF ACT AND COMMISSION REGULATIONS

2 The relationship between FCC and Co-ops obviously does not fall within the generally
3 understood notion of a corporate parent and subsidiary relationship since neither of them has
4 issued any shares of stock or holds any stock or other ownership interest in the other.
5 Furthermore, the significantly modified relationship between the two corporations, as described
6 above, when reviewed on the basis of the cited affiliation factors in Commission regulations at
7 sections 100.5 and 110.3, justifies the conclusion that the two entities are no longer affiliated
8 with each other.

9 For example, no longer does either entity have the right to participate in the governance
10 of the other through the naming of directors to each other's board. 11 CFR 100.5(g)(4)(ii)(B)
11 and 110.3(a)(3)(ii)(B). Neither corporation performs a role in the hiring, appointing and
12 demoting of officers and other decision making employees of the other corporation. 11 CFR
13 100.5(g)(4)(ii)(C) and 110.3(a)(3)(ii)(C). While there is some overlapping membership, it is
14 minimal, *i.e.*, seven of the 230 entities that are represented by the six Council members of FCC
15 also have voting memberships in Co-ops which has 80 voting members. The nature and extent
16 of this overlap, considering the total memberships of both corporations and the multiple levels
17 through which voting power is conferred by the governing bylaws of each, does not signify an
18 overlap of either the type or degree that would, without more, signify affiliation. 11 CFR
19 100.5(g)(4)(ii)(D) and 110.3(a)(3)(ii)(D). The agreement for sharing the services (and related
20 costs) of one individual who is the receptionist for both corporations does not adversely effect
21 this conclusion given that this arrangement only involves one employee who holds a non-

1 management position. 11 CFR 100.5(g)(4)(ii)(E) and 110.3(a)(3)(ii)(E).⁸ See Advisory Opinion
2 1989-16.

3 The conclusion that FCC and Co-ops are no longer are affiliated with each other also
4 means that their respective committees, FCC PAC and Co-op PAC, are also no longer affiliated,
5 assuming there are no other facts that would suggest otherwise.⁹ Therefore, each committee, as
6 requested, may amend its statement of organization to indicate that it is no longer affiliated with
7 the other as of January 1, 1997. See generally and compare Advisory Opinions 1996-38, 1996-
8 26, and 1988-14.¹⁰

9 The Commission notes that you have not asked and, accordingly, this opinion does not
10 reach any issues that may arise with respect to the class of individuals who may be lawfully

⁸ The payments made (once a year) by Co-ops to FCC in connection with allocating registration fees paid by persons attending the annual meetings of both corporations, which overlap in timing, represents only an accommodation for mutual administrative convenience; it does not indicate the payment of funds in any significant amount or on an ongoing basis, given the very substantial levels of annual dues payments that are received by FCC from its members to cover operating expenses of FCC. 11 CFR 100.5(g)(4)(ii)(G), (H) and 110.3(a)(3)(ii)(G), (H).

⁹ The request has not presented any facts with regard to the committees' past or future contribution patterns that could implicate the issue of affiliation by virtue of factor (J)--whether committees have similar patterns of contributions or contributors which indicates a formal or ongoing relationship between the committees. 11 CFR 100.5(g)(4)(ii)(J) and 110.3(a)(3)(ii)(J). The request does state that the two committees may contribute to the same candidates in the future, but that decisions to make contributions "are made independently by each PAC." If circumstances arise wherein contributions by both committees in the 1998 and future election cycles reflect "a similar pattern of contributions or contributors," further review of such a pattern may become necessary to determine whether it indicates a formal or ongoing relationship between the committees, irrespective of the lack of affiliation between their connected organizations, FCC and Co-ops.

¹⁰ The situation here differs significantly from the circumstances in these past opinions. In Advisory Opinion 1996-26 when finding affiliation between a non-stock association and a for-profit corporation, the Commission cited the common origin of the two entities, the overlapping membership and client base, the ability of both organizations to appoint members on each other's boards and the joint financial transactions, such as shared trademark use. In Advisory Opinion 1996-38, the Commission found affiliation between two associations based on the establishment of one organization by the other, as well as shared membership, directors and officers, and continuing financial support. Advisory Opinion 1988-14 presented the unusual circumstances of affiliation between for-profit corporations not through stock ownership, but through common shareholders, officer personnel, and overlapping boards.

98-06-076-0314

1 solicited for voluntary contributions to FCC PAC, including the question of whether FCC would
2 qualify as a trade association, a federation of trade associations, or as any other type of corporate
3 entity under the Act and Commission regulations.

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

7 Sincerely,

8
9
10 John Warren McGarry
11 Chairman

12 Enclosures (AOs 1995-38, 1995-26, 1989-16, and 1988-14)

13
14
15
16

95-00-076-0315