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May 18, 1998

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OFFICE OF GENERAL
COUNSEL

VIA FEDERAL EXPRESS

Brad Litchfield, General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Request for Advisory Opinion

Dear Mr. Litchfield:

I represent Patriot Holdings (and its related companies) and on behalf of those companies I request an Advisory Opinion addressing the questions set forth below.

I believe I have provided all relevant facts necessary for your agency to issue an Advisory Opinion. If this is not the case, please contact me and I will promptly provide you with any additional information.

FACTUAL BACKGROUND

Patriot Holdings ("PH"), American Ship Management ("ASM"), and Patriot Contract Services ("PCS") are limited liability companies ("LLC") under California law. The ownership interests of each company are as follows: PH is the parent holding company, owning 90% of both ASM and PCS. ASM owns 10% of PCS and PCS owns 10% of ASM. Both ASM and PCS are "federal contractors" within the meaning of 2 USC section 441c(a)(1) and 11 CFR section 115.2.

The officers and executives of PH direct and control the activities of ASM and PCS and are in fact also the officers and executives of those companies. Additionally, all three companies share the same office. Under the federal election statutes and regulations, each company would be deemed to be "affiliated" with the others.

However, PH does generate its own independent revenue stream (separate from the revenue streams it has attributable to the federal contracting operations of ASM and PCS) from a

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"husbanding"¹ and ship management service, which generates approximately \$175,000 per year in revenue.

With respect to these facts I ask the following questions:

QUESTIONS

(1) Can PH, as a limited liability company under California law, make contributions to federal candidates and committees directly out of its general treasury account from revenue generated from its husbanding and ship management service when it owns and controls two affiliated companies which are federal contractors?

(2) Can PH (or PCS or ASM) "establish" a non-connected PAC? If PCS or ASM may establish a non-connected PAC, is it correct that all establishment, administration and solicitation costs must be paid for out of the PAC? If PH may establish a non-connected PAC, is it correct that all establishment, administration and solicitation costs may be paid for by PH but treated as non-monetary contributions from PH to the PAC subject to the limits?

ANALYSIS OF QUESTION (1)

A. California's Limited Liability Company Law is Similar to the Limited Liability Company Laws of the Other States on Which the FEC Has Previously Opined.

In past Advisory Opinions, when posed the question of whether LLCs are deemed "corporations" under the federal election rules (and therefore prohibited from making federal contributions), the FEC has opined that LLC's are "persons" and therefore subject to the applicable contribution limitations imposed on persons and not the corporate prohibitions. (See, FEC Advisory Opinion 1996-13, Fed. Elec. Camp. Fin. Guide (CCH) p. 6199 (1996) [opining that an LLC organized under District of Columbia LLC law is not a corporation under the federal election rules]; FEC Advisory Opinion 1997-4, Fed. Elec. Camp. Fin. Guide (CCH) p. 6234 (1997) [same with respect to Pennsylvania LLC law]; FEC Advisory Opinion 1995-11, 1995 WL 385470 (1995) [same with respect to Virginia LLC law]; FEC Advisory Opinion 1997-17, 1997

¹ "Husbanding" is a term used in the shipping industry to generally describe shore services provided to other companies' container or commercial ships when such ships make port calls.

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WL 588290 (1997) [same with respect to Missouri LLC law].) In these opinions, the FEC has generally concluded that where the state law at issue sufficiently distinguished between LLCs and corporations and treated the two as distinct and separate legal entities, that LLCs were not to be treated as corporations under the federal election statutes and regulations but rather as "persons" subject to the contribution limits applicable to persons.

Like the state LLC laws at issue in the above Advisory Opinions, California's LLC law² similarly distinguishes between corporations and LLCs. Specifically, under California LLC law:

- LLCs are distinct legal entities, separate from corporations, partnerships and associations (See, e.g., Cal. Stats. 1994 Ch. 1200, Legislative Counsel's Digest, copy attached.);
- LLCs are denoted with business names that include "Limited Liability Company", "LLC" or "LC" whereas corporations are denoted with business names that include "Corporation", "Corp.", "Incorporated", or "Inc." (Cal. Bus. and Prof. Code section 17910.5, copy attached.);
- LLCs dissolve by, among other possibilities, operation of the LLC's articles of organization, or death or resignation of a member and thereby do not have "continuity" or "perpetual life" as is the case in the context of a corporation. (Cal. Corp. Code section 17350, copy attached.); and
- LLCs, unlike corporations, allow for the transferability of ownership interests in an LLC only when approved by other members, or subject to the procedures and limitations of the operating agreement. (Cal. Corp. Code section 17303(a), copy attached.)³

Because California's LLC law distinguishes between corporations and LLCs, and because LLCs organized under

² See, the Beverly-Killea Limited Liability Company Act at Cal. Corp. Code section 17000 et seq.

³ For a general discussion of the California law governing LLCs, see Witkin, Summary of California Law, 9th Edition, Volume 9, section 120.

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California law share the attributes of LLCs organized under the other states on which the FEC has previously opined (see above Advisory Opinions), LLCs organized under California law should be treated as "persons" and not as "corporations" under the federal election statutes and regulations.

B. The FEC's Affiliation Rules are Unclear on Whether Affiliated Entities are Subject to the Federal Law "Prohibitions" Applicable to an Affiliate.

As you know, the federal election rules "affiliate" entities controlled by the same entity or group of entities. (11 CFR sections 100.5(g) and 110.3.) Although these affiliation rules make it clear that entities deemed to be affiliated are subject to the same shared contribution limits, it is unclear whether these rules subject an affiliated entity to the federal election prohibitions applicable to one of its affiliates.

With respect to the facts at hand, both ASM and PCS are "federal contractors" within the meaning of 2 USC section 441c(a)(1), and are therefore prohibited from making direct contributions from their general treasury accounts (assuming, of course, that as California LLC's, these companies are deemed "persons"). Assuming PH as a California LLC is deemed to be a person, it is unclear whether it, as the holding company of two affiliated federal contractors (ASM and PCS), may contribute to federal candidates and committees directly from funds generated by its husbanding and other services or, rather, is subject to the federal contractor prohibition applicable to its affiliates.

ANALYSIS OF QUESTION (2)

A. Under FEC Advisory Opinions, PCS, ASM or PH Should be Permitted to Establish Non-connected PACs.

In Advisory Opinion 1991-1, 1991 WL 415536 (1991), the FEC opined that a federal contractor accounting firm could establish a non-connected PAC provided that all establishment, administration and solicitation costs were paid for by the non-connected PAC thereby avoiding the use of prohibited federal contractor funds in connection with administering the PAC. Please confirm that either ASM or PCS may establish a non-connected PAC provided that, as federal contractors, company

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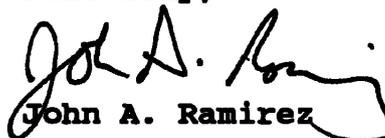
resources or funds may not be used for establishment, administration and solicitations costs.⁴

Additionally, if you conclude in question (1) that PH is not subject to the federal contractor prohibitions applicable to its affiliates (ASM and PCS), please confirm that PH may establish a non-connected PAC and also provide the PAC with resources to administer the PAC (i.e., employee time, etc.) but that such resources provided to administer the PAC would be subject to a \$5,000 per calendar year limitation as non-monetary contributions.⁵

* * * * *

Thank you for your assistance. Needless to say, please call me directly if I may provide you with any additional information.

Sincerely,


John A. Ramirez

JAR/slf
cc: Judy Collins
Dennis Herrera, Esq.

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⁴ For your information (and as I am sure you are aware), it is our understanding that in Advisory Opinion Request 1989-23, the FEC deadlocked on whether a federal contractor accounting firm could deduct voluntary contributions from partnership draws and transmit the funds to a non-connected PAC, presumably due to the fact that this activity would constitute the use of federal contractor resources to administer the PAC.

⁵ We understand that if each company (PH, PCS and ASM) were to establish a PAC (if permitted), that all of the PACs would be "affiliated."

CHAPTER 1200**(Senate Bill No. 469)**

An act to amend Sections 17900, 17902, 17910.5, 17913, and 17914 of, and to add Sections 16602.5 and 17901.5 to, the Business and Professions Code, to amend Section 3307 of the Commercial Code, to amend Sections 161, 190, 1109, 1113, 1201, 15046, 15611, 15632, 15678.2, 25013, and 25019 of, to add Sections 161.7, 167.3, 167.7, 167.8, 171.03, 171.07, 171.3, 174.5, and 190.7 to, and to add Title 2.5 (commencing with Section 17000) to, the Corporations Code, to amend Section 1220 of the Financial Code, to amend Sections 8670.3 and 12185 of, and to add Section 12164.7 to, the Government Code, to amend Sections 25118 and 25281 of the Health and Safety Code, to amend Sections 387 and 653s of the Penal Code, to amend Section 40170 of the Public Resources Code, to amend Sections 19, 64, 480, 480.1, 480.2, 6005, 6829, 7310, 8606, 11204, 17007, 17220, 18402, 18535, 18621.5, 18637, 18638, 18648, 19002, 19009, 19132, 19254, 23036, 23038, 25141, 30010, 38106, 40004, 41003, 43006, 45006, 46020, and 55002 of, to add Sections 28.5, 17087.6, 18633.5, and 23305.5 to, to add Chapter 1.6 (commencing with Section 23091) to Part 11 of Division 2 of, and to repeal Section 28 of, the Revenue and Taxation Code, and to amend Sections 125.4, 135, 135.1, 610, 1116, 1735, 2071, 2107, 2109, 2110, 2110.3, 2110.5, 2110.7, and 13005 of the Unemployment Insurance Code, and to amend Section 675 of the Vehicle Code, relating to limited liability companies, and making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 30, 1994.]

LEGISLATIVE COUNSEL'S DIGEST

SB 469, Beverly. Corporations: limited liability companies.

Existing law authorizes and regulates the formation and operation of corporations, partnerships, and associations in this state. Existing law does not provide for limited liability companies.

This bill would enact the California Limited Liability Company Act and would authorize a limited liability company to engage in any lawful business activity, as specified. Among other things, this bill would:

(1) Govern the formation of limited liability companies, including requiring the members to enter into an operating agreement and to execute and file articles of organization with the Secretary of State.

(2) Establish requirements and procedures for membership interests in limited liability companies, including voting, meeting, and inspection rights.

(3) Set forth the duties and obligations of the managers of a limited liability company or permit the business and affairs of a limited liability company to be managed by the members, as specified.

(4) Establish capital contribution standards and liability of members.

(5) Regulate the allocation of profits and losses distributions of money and property, withdrawal of membership, assignment of interests, and dissolution of limited liability companies.

(6) Require the registration of foreign limited liability companies, as defined, with the Secretary of State, and prohibit the transaction of business in this state by an unregistered foreign limited liability company, subject to specified penalties.

(7) Permit the bringing of class actions or derivative actions by members of a foreign or domestic limited liability company, subject to specified conditions.

(8) Regulate the merger of limited liability companies with other limited liability companies or with one or more other business entities, as specified, including requiring an agreement of merger and protection of the rights and liabilities of limited liability companies, creditors, and dissenting members.

(9) This bill would also impose filing and tax requirements on limited liability companies, as specified, and would make conforming changes to existing law. Since the bill would make limited liability companies and certain of their managers subject to certain criminal provisions, it would impose a state-mandated local program by expanding the scope of a crime.

(10) This bill would appropriate funds from the Secretary of State's Business Fees Fund to the Secretary of State for specified purposes.

(11) The bill would appropriate \$350,000 from the General Fund to the Franchise Tax Board to implement the act.

(12) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

(13) This bill would incorporate additional amendments to Sections 17220, 18402, and 18621.5 of the Revenue and Taxation Code proposed by SB 1805, contingent upon the prior enactment of that bill.

(14) This bill would incorporate additional amendments to Section 23036 of the Revenue and Taxation Code proposed by AB 3316, contingent upon the prior enactment of that bill.

(15) This bill would declare that it would take effect immediately as an urgency statute.

Appropriation: yes.

CHAPTER 8

Dissolution

Section	
17350.	Occurrence of dissolution upon specified event
17351.	Decree of dissolution upon specified event; Avoidance of dissolution
17352.	Winding up of company's affairs; Notice to creditors and claimants; Decree ordering winding up of company; Compensation of managers or members
17353.	Distribution of remaining assets; Preferences
17354.	Continuation of dissolved company for specified purposes; Distribution of assets previously omitted
17355.	Causes of action against dissolved company; Service of process; Continuation of company in quiet title action
17356.	Certificate of dissolution; Certificate of cancellation of articles of organization
17357.	Certificate of continuation

§ 17350. Occurrence of dissolution upon specified event

A limited liability company shall be dissolved and its affairs shall be wound up upon the happening of the first to occur of the following:

- (a) At the time specified in the articles of organization.
- (b) Upon the happening of events specified in the articles of organization or a written operating agreement.
- (c) By the vote of a majority in interest of the members, or a greater percentage of the voting interests of members as may be specified in the articles of organization or a written operating agreement.
- (d) Except as otherwise provided in the articles of organization or a written operating agreement, upon the death, bankruptcy, retirement, resignation, expulsion, or dissolution of any member who is a manager (in the case of a limited liability company managed by one or more managers who are members), or any member (in the case of a limited liability company managed by its members or by one or more managers who are not members), unless, in either case, the business of the limited liability company is continued by a vote of a majority in interest of the remaining members within 90 days of the happening of the event. Notwithstanding anything to the contrary in subdivision (v) of

Section 17001 or 17103, the term "majority in interest of the remaining members" as used in this subdivision shall mean a majority of the profits interests of all of the remaining members and also a majority of the capital interests owned by all the remaining members.

(e) Entry of a decree of judicial dissolution pursuant to Section 17351.

Added Stats 1994 ch 1200 § 27 (SB 469), effective September 30, 1994. Amended Stats 1996 ch 57 § 22 (SB 141), effective June 6, 1996.

Amendments:

1996 Amendment: (1) Substituted "a" for "such" after "members, or" in subd (c); and (2) amended subd (d) by (a) substituting "bankruptcy, retirement, resignation, expulsion, or dissolution of any member who is a manager (in the case of a limited liability company managed by one or more managers who are members), or any member (in the case of a limited liability company managed by its members or by one or more managers who are not members), unless, in either case," for "withdrawal, resignation, expulsion, bankruptcy, or dissolution of a member, unless"; (b) substituting "a majority in interest of" for "all" in the first sentence; and (c) adding the second sentence.

Note—Stats 1996 ch 57 provides:

SEC. 29. It is the intent of the Legislature that existing business entities, such as partnerships and corporations, be permitted to convert into or transfer real property to, limited liability companies without incurring a documentary transfer tax provided that the direct or indirect proportionate interests in the property remain the same.

SEC. 30. Nothing in this act nor Chapter 1010 or Chapter 1200 of the Statutes of 1994 shall be construed to permit a domestic or foreign limited liability company to render professional services, as defined in subdivision (a) of Section 13401 of the Corporations Code, in this state.

Collateral References:

CBC Limited Liability Companies: Law, Practice and Forms §§ 1:05, 2:01 et seq., 3:01-13:01 et seq., Appx 5.

Rutter Cal Prac Guide, Corporations §§ 2:36.13, 2:36.25, 2:61.1.

Law Review Articles:

Review of 1994 legislation; interpretive comments on Corp C §§ 17350 et seq. 26 Pacific LJ 305.

§ 17351. Decree of dissolution upon specified event; Avoidance of dissolution

(a) Pursuant to an action filed by any manager or by any member or members, a court of competent jurisdiction may decree the dissolution of a limited liability company whenever any of the following occurs:

- (1) It is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement.
- (2) Dissolution is reasonably necessary for the protection of the rights or interests of the complaining members.
- (3) The business of the limited liability company has been abandoned.
- (4) The management of the limited liability company is deadlocked or subject to internal dissention.
- (5) Those in control of the company have been guilty of, or have know-

(b) A name that suggests the existence of additional owners within the meaning of subdivision (a) is one which includes such words as "Company," "& Company," "& Son," "& Sons," "& Associates," "Brothers," and the like, but not words that merely describe the business being conducted.

Amended Stats 1994 ch 1200 § 2 (SB 469), effective September 30, 1994; Stats 1995 ch 679 § 1 (SB 513), effective October 10, 1995; Stats 1996 ch 1003 § 1.1 (AB 583).

Amendments:

1994 Amendment: Added subd (a)(5).

1995 Amendment: In addition to making technical changes, added "a registered limited liability partnership that has filed a registration pursuant to Section 15049 of the Corporations Code, or a foreign limited liability partnership that has filed an application for registration pursuant to Section 15055 of the Corporations Code," in subd (a)(2).

1996 Amendment: Amended subd (a)(2) by adding (1) "or 16953" after "Section 15049"; and (2) "or 16959" after "Section 15055".

Collateral References:

B-W Cal Civ Prac, Bus Lit §§ 16:3, 19:6, Corporations §§ 2:8, 2:22, 8:16, Procedure §§ 3:13, 3:20, 3:21, 3:23.

CBC Limited Liability Companies: Law, Practice and Forms §§ 1:05, 2:01 et seq., 3:01-13:01 et seq., Appndx 5.

Review of 1994 legislation; interpretive comments. 26 Pacific LJ 305.

§ 17901.5. "Manager"

As used in this chapter, "manager" means a manager of a limited liability company.

Added Stats 1994 ch 1200 § 3 (SB 469), effective September 30, 1994.

Collateral References:

CBC Limited Liability Companies: Law, Practice and Forms §§ 1:05, 2:01 et seq., 3:01-13:01 et seq., Appndx 5.

Review of 1994 legislation; interpretive comments. 26 Pacific LJ 305.

§ 17902. "Person"

As used in this chapter, "person" includes individuals, *limited liability companies*, partnerships and other associations, and corporations.

Amended Stats 1994 ch 1200 § 4 (SB 469), effective September 30, 1994.

Amendments:

1994 Amendment: Added "limited liability companies,".

Collateral References:

CBC Limited Liability Companies: Law, Practice and Forms §§ 1:05, 2:01 et seq., 3:01-13:01 et seq., Appndx 5.

§ 17910. Time for filing statement

Collateral References:

B-W Cal Civ Prac, Bus Lit §§ 16:3, 19:6, 67:35, Procedure §§ 3:13, 3:20, 3:21, 3:23.

§ 17910.5. Use of corporation designation by noncorporation prohibited

(a) No person shall adopt any fictitious business name which includes "Corporation," "Corp.," "Incorporated," or "Inc.," unless such person is a corporation organized pursuant to the laws of this state or some other jurisdiction.

(b) *No person shall adopt any fictitious business name that includes "Limited Liability Company" (whether using the complete words or the abbreviations "Ltd." and "Co." or either of them) or "LLC" or "LC" unless such person is a limited liability company organized pursuant to the laws of this state or some other jurisdiction.*

§ 17302. Unsatisfied amount of judgment to be charged against membership interest

On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the membership interest of the member with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of the membership interest. This section does not deprive any member of the benefit of any exemption laws applicable to the member's membership interest.

Added Stats 1994 ch 1200 § 27 (SB 469), effective September 30, 1994.

§ 17303. Membership of assignee

(a) Except as otherwise provided in the articles of organization or the operating agreement, an assignee of an interest in a limited liability company may become a member only if a majority in interest of the other members vote in favor of the assignee's admission to the limited liability company as a member.

(b) An assignee who has become a member has, to the extent assigned, the rights and powers, and is subject to the restrictions and liabilities, of a member under the articles of organization, any operating agreement, and this title. An assignee who becomes a member also is liable for the obligations of the assignor to make contributions as provided in Chapter 5 (commencing with Section 17200), and to return any unlawful distributions made to the assignee under Chapter 6 (commencing with Section 17250) or Chapter 8 (commencing with Section 17350). However, the assignee is not obligated for liabilities unknown to the assignee at the time the assignee became a member and that could not be ascertained from the articles of organization or operating agreement.

(c) Whether or not an assignee of a membership interest becomes a member, the assignor is not released from the assignor's liability to the limited liability company under Chapter 5 (commencing with Section 17200) and Chapter 6 (commencing with Section 17250).

Added Stats 1994 ch 1200 § 27 (SB 469), effective September 30, 1994. Amended Stats 1996 ch 57 § 21 (SB 141), effective June 6, 1996.

Amendments:

1996 Amendment: Substituted "a majority in interest of the other members" for "the other members unanimously" in subd (a).

Editor's Notes—For provisions on documentary transfer tax and rendering of professional services, see 1996 Note following Corp C § 17301.

§ 17304. Deceased member; Member adjudged incompetent by court

(a) If a member who is an individual dies or is adjudged by a court of competent jurisdiction to be incompetent to manage the member's person or property, the member's executor, administrator, guardian, conservator, or other legal representative may exercise all of the