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FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

August 27, 1998

TO: The Commission
THROUGH: James A. Pehrkon
Acting Staff Director
FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan Levin
Senior Attorney

AGENDA ITEM
For Meeting of: 9-2-98

SUBJECT: Alternative Draft Advisory Opinion 1998-15

Attached is an alternative draft of the subject advisory opinion, as requested by the Commission at the meeting of August 20, 1998. The new text in this alternative draft, as compared to text in Agenda Document No. 98-52, is presented in bold font. Please note that OGC earlier circulated, as an attachment to the alternative draft for AO 1998-11, a copy of IRS Form 8832 (four pages) which illustrates and explains how a limited liability company would "check-the-box" to elect tax treatment as a corporation or as a partnership. The form instructions also explain the "default rules" which permit some LLC's to take partnership tax treatment without filing the form.

We request that both this alternative draft and Agenda Document No. 98-52 be placed on the agenda for September 2, 1998.

Attachment

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DRAFT

1 ADVISORY OPINION 1998-15

2
3 Richard A. Roggeveen, Treasurer
4 Fitzgerald for Senate, Inc.
5 50 N. Brockaway
6 Suite 4-5
7 Palatine, IL 60067

8
9 Dear Mr. Roggeveen:

10
11 This responds to your letter dated June 30, 1998, on behalf of Fitzgerald for
12 Senate, Inc. ("the Committee"), requesting an advisory opinion concerning the
13 application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and
14 Commission regulations to contributions from Illinois limited liability companies.

15 The Committee is the principal campaign committee of Peter Fitzgerald, the
16 Republican nominee for the United States Senate in the 1998 general election in Illinois.
17 The Committee filed its statement of organization with the Commission on February 19,
18 1997.

19 You ask whether the Committee may receive contributions from Illinois limited
20 liability companies ("LLCs"). You note that the Commission has already concluded that
21 LLCs in four jurisdictions may make contributions, and assert that Illinois law is similar
22 to their laws.

23 Under the Act, the term "person" includes an individual, partnership, committee,
24 association, corporation, labor organization, or any other organization or group of
25 persons. 2 U.S.C. §431(11); 11 CFR 100.10. The Act prohibits corporations from
26 making any contribution or expenditure in connection with a Federal election. 2 U.S.C.
27 §441b(a); 11 CFR 114.2(b). Contributions by persons whose contributions are not
28 prohibited by the Act are subject to the limits set out in 2 U.S.C. §441a.¹ Contributions
29 by partnerships are permitted, but are limited under 2 U.S.C. §441a(a). In addition,
30 lawful contributions from a partnership are attributed proportionately against each

¹ The Act prohibits contributions by several entities: corporations, labor organizations, Federal contractors, and foreign nationals. 2 U.S.C. §§441b, 441c, and 441e; 11 CFR 114.2(b), 115.2, and 110.4(a).

1 **contributing partner's limit for the same candidate and election. 11 CFR 110.1(e);**
2 **see 11 CFR 110.1(b), 110.1(c) and 110.1(d) .**

3 **As you indicate, the Commission has addressed the ability of LLCs in Virginia,**
4 **the District of Columbia, Pennsylvania, and Missouri to make contributions. Advisory**
5 **Opinions 1997-17, 1997-4, 1996-13, and 1995-11. In those opinions, the Commission**
6 **concluded that, in view of the fact that the LLC was a type of business entity that was not**
7 **a corporation or partnership under the statutes of those jurisdictions, it fell instead within**
8 **the language "any other organization or group of persons," which is part of the Act's**
9 **definition of "person." Hence, as a person, but not a corporation, the LLC was subject to**
10 **the Act's contribution limits rather than its prohibitions, provided none of its members**
11 **were prohibited by the Act from making a contribution. In addition, contributions**
12 **from the LLC's general operating accounts or treasury would be attributed only to**
13 **the contribution limit of the LLC and not to the contribution limits of any of its**
14 **members.**

15 **The Commission's past analysis required a review of State law regarding**
16 **classification of LLCs and their attributes, as compared with the similar attributes**
17 **of both partnerships and corporations in the relevant State. These aspects of LLCs**
18 **have also concerned the Internal Revenue Service ("IRS") for Federal income tax**
19 **purposes. Starting in 1988, the IRS used an approach similar to that followed by**
20 **the Commission (since 1995) by focusing on those attributes of an LLC that made it**
21 **both different from and similar to corporations and partnerships. IRS scrutiny of**
22 **the characteristics of individual LLCs was necessary to determine whether they**
23 **should be taxed as corporations or as partnerships.² However, in view of changes by**
24 **the States allowing greater flexibility in their LLC statutes that, in effect,**
25 **considerably blurred or narrowed the traditional differences between corporations**
26 **and partnerships, the IRS concluded in 1996 that it should adopt regulations**
27 **reflecting those altered circumstances. The IRS regulations abandoned the past**
28 **State by State LLC approach in the interest of achieving greater simplification and**

² **These characteristics were the corporate characteristics of limited liability for all members, perpetual duration, free transferability of interests, and centralization of management.**

1 conserving both IRS and taxpayer resources. Known as the "check-the-box" rules,
2 they permit entities that are not corporations under State law, such as LLCs, to
3 designate themselves on an IRS form as either corporations or partnerships for
4 Federal tax purposes. 26 CFR 302.7701-3. An LLC with two or more members is
5 automatically treated as a partnership for tax purposes and need not file the tax
6 form, unless it wishes to "check-the-box" and elect to take corporate tax treatment.³

7 Having reviewed the IRS historical approach to the taxation of LLCs and its
8 recent regulation revisions that achieve several elements of simplification and
9 national uniformity of Federal taxation policy, the Commission now concludes that
10 it should adopt a somewhat similar approach to the treatment of contributions by
11 LLCs for purposes of the Act and Commission regulations. Accordingly, the
12 Commission will take the following position regarding contributions by any LLC
13 that is eligible to "check-the-box" under the IRS regulations. If an LLC is classified
14 as a partnership for IRS purposes, either by application of the default provisions in
15 the IRS rules or because it lawfully elects taxation as a partnership on the IRS form,
16 such an LLC will be treated as a partnership under the Act and Commission
17 regulations.⁴

18 In view of the default provisions and information provided informally by
19 IRS staff, it appears that the vast majority of domestic (U.S.) LLCs will be treated
20 as partnerships for Federal income tax purposes. Any LLC treated as a partnership
21 for that purpose may contribute to a Federal campaign or political committee as a
22 partnership.⁵ Consistent with Commission regulations on partnerships, the LLC's

³ Some LLC's are not eligible for partnership treatment and are required to file as corporations. One example is an LLC with publicly traded shares or ownership interests. The IRS regulations and IRS Form 8832 (including its instructions) provide further details as to those entities that may or may not elect to be treated as a partnership for Federal income taxation purposes.

⁴ The Commission notes that this analysis applies only to limited liability companies. It does not apply to any situation where the organization is incorporated under State law. See 11 CFR 114.7(d) (whether a professional organization is a corporation is determined by the law of the State in which the professional organization exists); see also the 1974 Conference Report, H.R. Rep. No. 93-1438, 93 Cong., 2d Sess. 68 (1974) ("Whether or not a professional association is a corporation is a matter determined under State law. If under State law such an association is a corporation, it would be prohibited from making a political contribution as a corporation.")

⁵ The Commission does not reach a conclusion as to the legality of contributions from LLCs that are treated as corporations for Federal income tax purposes.

1 contribution to the Committee will be subject to the limits of 2 U.S.C.
2 §441a(a)(1)(A), and must also be attributed to the members for the purposes of their
3 individual contribution limits. See 11 CFR 110.1(e). The LLC must attribute the
4 contribution to each member in direct proportion to his or her share of the LLC's
5 profits; or by agreement of the members, as long as only the profits of the members
6 to whom the contribution is attributed are reduced (or losses increased) and those
7 members' profits are reduced (or losses increased) by the amount attributed to each
8 of them. See 11 CFR 110.1(e)(1) and (2). A member that falls within one of the
9 Act's prohibited categories (e.g., corporation, Federal contractor, or foreign
10 national) may not participate in an LLC contribution or accept any attribution of
11 any portion of the contribution through a reduction of its share of LLC profits or an
12 increase of its share of LLC losses. See 11 CFR 110.1(e); 2 U.S.C. §§441b, 441c, and
13 441e.⁶

14 Accordingly, when an LLC that is treated as a partnership for Federal tax
15 purposes contributes to the Committee, it should state its Federal tax status in
16 writing and include a written notice of the contributing members and the amounts
17 attributed to each member. See 11 CFR 110.1(e)(1). If the Committee receives this
18 information with the contribution and the contribution is lawful in accordance with
19 the above conclusions, the Committee may accept the contribution and deposit it in
20 the Committee's account. If the Committee does not receive the information as to
21 the tax status or the contributing members at the time of the receipt of the
22 contribution, it should deposit the contribution in a campaign depository within ten
23 days of its receipt, and ask the LLC for such information. See 11 CFR 103.3(b)(1).
24 If the Committee does not receive such information within thirty days of the receipt
25 of the contribution, the contribution must be returned at that point. See 11 CFR
26 103.3(b)(1). Until the Committee receives the information indicating its ability to
27 accept the contribution lawfully, the contribution cannot be used for any committee
28 disbursements. The Committee must either deposit the contribution in a separate

⁶ In view of the conclusion in this opinion that LLCs receiving partnership tax treatment under the new IRS provisions will be permitted to contribute, this opinion pertains to contributions received by

1 **account established (in a campaign depository) for contributions that await a**
2 **determination of legality, or maintain sufficient funds to make all of its necessary**
3 **refunds. 11 CFR 103.3(b)(4).**

4 **The Commission recognizes that the foregoing conclusion regarding the**
5 **treatment of contributions by LLCs differs substantially from the analysis and**
6 **conclusions reached in Advisory Opinions 1997-17, 1997-4, 1996-13, and 1995-11.**
7 **These prior opinions on limited liability companies are therefore overruled and**
8 **superseded.⁷ For LLC contributions received by the Committee prior to its receipt**
9 **of this advisory opinion, the Committee may rely upon the superseded opinions.**
10 **For any contributions received after the Committee's receipt of this opinion, the**
11 **conclusions set out in this opinion apply.**

12 **The Commission further recognizes that the conclusions in this opinion may**
13 **affect current fundraising practices of those persons who requested these**
14 **superseded opinions and who either made or accepted LLC contributions. This**
15 **change in the Commission's interpretation may also affect the conduct of additional**
16 **unknown persons who previously relied on the now superseded opinions to accept**
17 **contributions from LLC's, or to make LLC contributions, that were**
18 **"indistinguishable in all ... material aspects from" the LLC contributions permitted**
19 **in the superseded opinions. 2 U.S.C. §437f(c). Accordingly, those political**
20 **committees or Federal candidates who requested the superseded opinions and**
21 **others who relied on them, will be required to comply with the conclusions of this**
22 **opinion with respect to any LLC contributions they receive after October 4, 1998.**
23 **Contributions received from LLCs before (or on) that date will be lawful if they**
24 **comply with the terms of the now superseded opinions.**

the Committee from all such LLCs, not just LLCs organized under the laws of the State of Illinois.
⁷ The Commission notes that, in view of the fact that contributions by LLCs are not specifically addressed in the Act or Commission regulations and have been periodically addressed in the advisory opinion process, the Commission may address these issues in a future rulemaking project. If such rules are promulgated, they will, of course, supersede any inconsistent advice set out in this opinion.

