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FEDERAL ELECTION COMMISSION
Washington, DC, 20463

May 6, 1999

AGENDA ITEM
For Meeting of: 5-13-99

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan M. Levin
Senior Attorney

Subject: Draft AO 1999-10

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for May 13, 1999.

Attachment

1 ADVISORY OPINION 1999-10

2
3 Andrew B. Clubok
4 Kirkland & Ellis
5 655 Fifteenth Street, N.W.
6 Washington, D.C. 20005
7

DRAFT

8 Dear Mr. Clubok:

9
10 This responds to your letters dated February 25 and March 29, 1999, on behalf of
11 Nationwide Political Participation Committee ("the Committee"), requesting an advisory
12 opinion concerning the application of the Federal Election Campaign Act of 1971, as
13 amended ("the Act"), and Commission regulations to the solicitation of contributions
14 from member policyholders of the connected organization.

15 The Committee is the separate segregated fund of the Nationwide Mutual
16 Insurance Company and its affiliate, the Nationwide Mutual Fire Insurance Company
17 (collectively "the Nationwide companies" or "the companies").¹ The Committee has
18 been registered with the Commission since March 7, 1977. The Nationwide companies
19 were organized under section 3941.02 of the Ohio Code, which governs the formation
20 and incorporation of mutual insurance companies, and are nonprofit companies under
21 Ohio law. Because they are mutual insurance companies, they have member
22 policyholders rather than shareholders. In accordance with Ohio law, each of the
23 Nationwide companies' policyholders is a member while his policy is in force, and each
24 member has equal voting rights. You state that the Committee would like to solicit
25 voluntary contributions from those policyholders who are independent contractor agents
26 of the Nationwide companies.

27 ***Factual Background***

28 With your request, you have submitted the articles of incorporation and by-laws
29 of each of the companies. The governing documents of the companies are virtually
30 identical. The articles of incorporation provide that the company is formed "for the
31 purpose of transacting a general insurance and reinsurance business except life insurance

¹ The companies are corporations within Nationwide Insurance Enterprise, an insurance and financial services company.

1 ...,” and that such insurance business shall be on the “mutual plan.” The by-laws
2 explicitly provide that each policy holder whose policy is in force is a member of the
3 company. This is the only class of members provided for in the by-laws. By-laws
4 Article I. The companies each hold an annual meeting of the members and may hold
5 special meetings as well. Article II, sections 2 and 3. Notice of the annual meeting is
6 printed in the member’s policy, and other notice provisions govern special meetings.
7 Article II, sections 4 and 5. Each member has the right to cast one vote in person or by
8 proxy on each proposal brought before a meeting, and with the exception of amending the
9 articles of incorporation (which requires a supermajority), a proposal is passed upon the
10 affirmative vote of the majority of members present in person or by proxy. Article II,
11 sections 7 and 8. The members, voting in person or by proxy, elect all of the 16 persons
12 to serve on the companies’ Board of Directors at the annual meetings or at special
13 meetings called for that purpose. Article IV, sections 2 and 3, Article II, section 7, and
14 Article VII.

15 The corporate powers and business of each company are conducted and controlled
16 by, or under the direction of, its Board except as otherwise provided by statute, the
17 articles of incorporation, or the by-laws with regard to action to be taken or approved by
18 the members. Article IV, section 1. The Board elects top officers of the company (e.g.,
19 the chairman, president, one or more vice presidents, secretary, treasurer, assistant
20 secretaries and treasurers), who must be members of the company. Article VII. The
21 Board may appoint an Executive Committee to exercise the powers of the Board in the
22 interim between Board meetings, but the Executive Committee is subject at all times to
23 any instructions issued by the Board. Article VI.

24 You have also submitted a page containing language, relevant to your proposal,
25 that appears in each policy issued by the Nationwide companies. This language states
26 that the policyholder is a member of the company while any of his policies are in force,
27 and informs him of his voting rights.

28 You have described the role of the independent contractor agent, who is hired to
29 sell Nationwide insurance products and service policyholders. The agents act in a
30 fiduciary capacity for the companies and may not represent any companies outside of

1 Nationwide without the prior consent of Nationwide. They have the right to exercise
2 independent judgment as to the time, place, and manner of soliciting insurance, servicing
3 policy holders, and otherwise performing their roles as agents. The agents may accept or
4 reject, at their discretion, offers of training, counsel, and guidance from Nationwide.

5 ***Act and Commission Regulations as to Members***

6 The Act prohibits corporations from making any contribution or expenditure in
7 connection with a Federal election. 2 U.S.C. §441b(a). The Act states, however, that the
8 term "contribution or expenditure" does not include "the establishment, administration,
9 and solicitation of contributions to a separate segregated fund to be utilized for political
10 purposes by a corporation, labor organization, membership organization, cooperative, or
11 corporation without capital stock." 2 U.S.C. §441b(b)(2)(C). See also 2 U.S.C.
12 §431(8)(B)(vi) and (9)(B)(v).

13 Under the Act, a corporation or a separate segregated fund established by the
14 corporation may solicit contributions to such a fund from its stockholders and their
15 families and the corporate executive and administrative personnel and their families. 2
16 U.S.C. §441b(b)(4)(A)(i). The Act also provides that an incorporated membership
17 organization, cooperative, or corporation without capital stock, or a separate segregated
18 fund established by such an entity, may solicit voluntary contributions to the fund from
19 the entity's members and their families, as well as the executive and administrative
20 personnel and their families. 2 U.S.C. §441b(b)(4)(C); 11 CFR 114.5(a) and 114.7(a).
21 The Commission's regulations use the term "membership association" to describe the
22 entities covered under the latter provision. A membership association is defined, in part,
23 under 11 CFR 114.1(e)(1), as a membership organization, cooperative, or corporation
24 without capital stock that (i) expressly provides for "members" in its articles and bylaws;
25 (ii) expressly solicits members; and (iii) expressly acknowledges the acceptance of
26 membership, such as by sending a membership card or inclusion on a membership
27 newsletter list. See also 11 CFR 100.8(b)(4)(iv)(A).

28 On the question of what constitutes membership for purposes of the Act, the
29 Supreme Court has suggested that members are to be defined, at least in part, by analogy
30 to stockholders of business corporations and members of labor unions. See *FEC v.*

1 *National Right to Work Committee*, 459 U.S. 197; 202 (1982), see also *Chamber of*
2 *Commerce v. FEC*, 69 F.3d 600 (D.C.Cir.1995); *petition for rehearing denied*, 76 F.3d
3 1234 (1996);² see also Advisory Opinions 1998-19, 1997-22, and 1997-16.

4 *Companies as Membership Associations*

5 The factual background of this request indicates that the Nationwide companies
6 are membership associations under 11 CFR 114.1(e)(1). The bylaws of the companies
7 provide for members, who are the policyholders. As ongoing businesses, the companies
8 solicit new policyholders, and section 3941.07 of the Ohio Code provides that every
9 policyholder of a domestic mutual company is a member while the policy is still in force.
10 The companies acknowledge the acceptance of membership in the policy it issues to the
11 policyholder, which specifically states he is a member.

12 *Policyholders as Members*

13 The policyholders have both a financial attachment to the companies and
14 participatory rights. The policyholder pays a significant amount in premiums, and a
15 mutual insurance company, by definition, is a type of insurance company in which the
16 policyholders are the owners. See Black's Law Dictionary 1021 (6th ed. 1990). In

² In 1993, the Commission revised its membership regulations to further define the term "members." However, the court in *Chamber* determined that portions of those regulations were invalid, concluding that they defined the term "member" in an unduly restrictive fashion. See *Chamber*, at 604-605. (There were not four votes at the Commission to seek further judicial review of this decision.) The regulation at 11 CFR 114.1(e)(2), now invalid in the District of Columbia Circuit, had defined members to mean:

all persons who are currently satisfying the requirements for membership in a membership association, affirmatively accept the membership association's invitation to become a member, and either:

(i) Have some significant financial attachment to the membership association, such as a significant investment or ownership stake (but *not* merely the payment of dues);

(ii) Are required to pay on a regular basis a specific amount of dues that is predetermined by the association and are entitled to vote directly either for at least one member who has full participatory and voting rights on the highest governing body of the membership association, or for those who select at least one member of those on the highest governing body of the membership association; or

(iii) Are entitled to vote directly for all of those on the highest governing body of the membership association.

1 addition, each of the policyholders has the right to cast one vote on matters brought up at
2 the annual and special meetings.³ In each of the Nationwide companies, this includes the
3 right to vote in the elections for all of the seats on the Board of Directors, which is the
4 highest governing body. Thus, the situation of the policyholders is analogous to that of a
5 stockholder in a capital stock corporation, and the policyholders appear to satisfy even the
6 more restrictive standard struck down in *Chamber*. See footnote 2.⁴ Therefore, the
7 Committee may solicit voluntary contributions from the described policyholders of the
8 Nationwide companies, including those who are independent contractor agents of the
9 companies, so long as they are not otherwise prohibited by the Act and regulations from
10 making contributions. See 2 U.S.C. §§441b, 441c, and 441e; 11 CFR 114.2, 115.2, and
11 110.4(a).⁵

12 Because the question has been resolved through a determination that
13 policyholders are members under the Act, there is no need for the Commission to address
14 the issue of whether the agents are solicitable by virtue of their status as agents. See 11
15 CFR 114.1(c) (defining "executive or administrative personnel"); see also Advisory
16 Opinion 1980-1. (This opinion, which did not address any membership issue, concluded
17 that agents of a mutual insurance company, who were paid on a commission basis and
18 were not employees under 11 CFR 114.1(c)(3), were not solicitable as executive or
19 administrative personnel.)

³ This requirement is also set out in section 3941.07 of the Ohio Code.

⁴ Commission regulations directly address "mutual life insurance" companies (emphasis added), stating that such a company may solicit its policyholders "if the policyholders are members within the organizational structure." 11 CFR 114.7(i). This provision is based on a discussion between Senators Cannon and Allen during the debates on the Conference Report for the 1976 amendments to the Act, appearing at 122 *Cong. Rec.* S6478 (daily ed. May 4, 1976). In explaining the amendment permitting the solicitation by an incorporated membership organization of its members, Senator Cannon used the mutual life insurance company as an example, and Senator Allen expressed his specific approval of this example, noting that the policyholders "are the group that make up the corporation." As the owners and voters in the Nationwide companies, the policyholders appear to be in the same position as policyholders in a mutual life insurance company.

⁵ In its continuing review of membership issues following the *Chamber* decision, the Commission published a second notice of proposed rulemaking which may lead to regulation changes concerning the definition of membership. See FEC Notice of Proposed Rulemaking, published in the *Federal Register* on December 16, 1998, at pages 69224 through 69229. The conclusion of this opinion regarding membership could be modified or superseded by the adoption of any new regulations on membership criteria, but the opinion may be relied upon until any change is made. If a change is made, it will become effective on a

