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FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 15, 1999

MEMORANDUM

AGENDA ITEM
For Meeting of: 7-22-99

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 1999-16

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for July 22, 1999.

Attachment

1 ADVISORY OPINION 1999-16

2
3 Michael A. Nemeroff
4 Sidley & Austin
5 1722 Eye Street, N.W.
6 Washington, D.C. 20006

DRAFT

7
8 Dear Mr. Nemeroff:

9
10 This responds to your letter dated June 4, 1999, on behalf of the Commercial
11 Finance Association ("CFA"), requesting an advisory opinion concerning the application
12 of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission
13 regulations to CFA's relationship to its regional chapters.

14 CFA is a not-for-profit tax exempt organization, incorporated in Delaware, and is
15 the trade group for the asset-based financial services industry. It consists of more than
16 300 members, both "regular" and "limited," including nearly all of the money center
17 banks, small independent finance companies, and large commercial banks that are
18 publicly held or owned by industrial companies and foreign banks. CFA members
19 provide asset-based commercial financing and factoring products and services to small
20 and medium sized businesses on an international, national, regional, and local scale.

21 Since 1986, CFA has established 15 regional chapters to offer business forums,
22 networking opportunities, and educational programs to the employees of CFA member
23 companies.¹ Only one of the chapters is incorporated. The total membership of the
24 chapters, which presently numbers almost 3,000, is limited to directors, officers, and
25 employees of the CFA member companies.

26 CFA has a separate segregated fund, the Commercial Financial Association
27 Political Action Committee ("CFA PAC"), which registered with the Commission on
28 May 23, 1984. None of the chapters has established a political committee. You assert
29 that CFA and its chapters constitute a federation of trade associations and ask whether the
30 chapter members may be solicited by CFA PAC for contributions. Your request briefly
31 describes the relationship between CFA and the chapters, and you enclose a copy of

1 CFA's bylaws, a model set of bylaws that a chapter adopts, a model affiliation agreement
2 entered into by CFA and a chapter, and a CFA brochure that invites member's employees
3 to join their regional chapter. In order to respond to your question, the Commission
4 needs to examine the structure of the organizations as it pertains to the rights of its
5 members, the nature of the organizations, and the relationship of the organizations to each
6 other.

7 **FACTUAL BACKGROUND**

8 *CFA's Structure and Membership*

9 CFA's regular members are proprietorships, partnerships, limited liability
10 companies and corporations engaged in the business of secured commercial lending or
11 providing factoring services.² CFA By-laws, Section 2.2(a). To become a member, a
12 firm must file a written application with a designation of a representative to serve as a
13 director of CFA (see below), and must agree to comply with the bylaws and standards of
14 conduct adopted by the board of directors ("the board"). The application is subject to
15 approval by the board or the executive committee, and a rejection may be appealed by the
16 applicant. CFA By-laws, Section 2.4.

17 The bylaws provide that the members "shall act through the Board of Directors on
18 all matters requiring a vote of Members." CFA By-laws, Section 3.1. Each member is
19 entitled to designate one person to serve on the board as its voting representative. The
20 board meets at least twice a year, at an annual meeting and the mid-year meeting, to
21 transact business. CFA By-laws, Section 3.3. At the annual meeting, the member's
22 representatives voting in person or by proxy, elect members of the executive committee
23 and officers, and at the mid-year meeting, the members elect a nominating committee.
24 CFA By-laws, Sections 3.8, 3.9, and 12.4.

¹ The chapter regions are as follows: Atlanta, Baltimore, California, Carolina, Houston, Midwest, New England, New Jersey, New York, Northern California, Ohio, Philadelphia, Pittsburgh, Southwest, and Tennessee.

² In addition to regular members, the by-laws provide for "limited members," which are the subsidiaries or parents of the regular members and have fewer participatory rights than the regular members. See CFA By-laws, section 2.2(b). You have stated by phone that regular members constitute over 90 percent of the membership. Hence, any further reference to the rights or membership status of CFA members in this opinion will pertain to those of a regular member.

1 The bylaws provide that the executive committee is the governing body of CFA
2 and that CFA's business and affairs "shall be managed and controlled by" the executive
3 committee. CFA By-laws, section 4.1. It is chaired by CFA's president and consists of
4 most of CFA's officers, the immediate past board chairman, and 23 directors representing
5 members, who are elected annually by the other member's representatives on the board.
6 CFA By-laws, Sections 4.2 and 4.3. The bylaws also provide for participation on various
7 committees by board members and by employees of CFA members. CFA By-laws,
8 Sections 5.1, 5.4, and 6.1.

9 The bylaws provide that the members must pay dues in a timely manner to remain
10 in good standing. CFA By-laws, Sections 2.3, 9.3, and 9.4. According to the
11 *Encyclopedia of Associations* (34th Ed. 1999), annual dues range from \$1,500 to \$6,000,
12 depending upon the member's assets.

13 *Structure and Membership of Chapters*

14 The bylaws of a chapter state that the chapter "shall be an unincorporated
15 association which, subject to the authority of Commercial Finance Association, shall
16 represent the interests of Commercial Finance Association in the City of ____." Chapter
17 Bylaws, Article I. The membership is open to any officer, director; or employee of a
18 CFA member. Chapter Bylaws, Section 2.1. To become a member, an individual must
19 file a written application with the chapter's board of directors, and a rejection is
20 appealable to that board. Chapter Bylaws, Section 2.2.

21 The bylaws provide that the chapter's board of directors determine the policies
22 and activities of the chapter, approve the financial activities, and "have general
23 management" of the chapter. Chapter Bylaws, Article IV. The members elect the
24 chapter officers, including the officers that comprise the board of directors,³ by secret
25 ballot at the chapter's annual meeting. Chapter Bylaws, Article V. Members also vote on
26 bylaws amendments and are eligible to serve on standing committees of the chapter.
27 Articles VII and X.

³ The board consists of the president, vice president, secretary/treasurer, and immediate past president.
Chapter Bylaws, Article IV.

1 The bylaws provide that the annual dues and any assessments and charges will be
2 set by the board and approved by the membership, and that the amount of dues each year
3 should be sufficient to take care of all the chapter's operating expenses and purchases.

4 **Article VIII.**

5 *Relationship between CFA and Chapters*

6 Apart from the documents, you assert that many chapter members are on the CFA
7 board and CFA committees. The documents themselves explicitly discuss the chapter-
8 CFA relationship. CFA's bylaws provide that the executive committee may establish
9 chapters in various geographic areas upon terms that it deems to be in CFA's best
10 interests. CFA By-laws, Section 2.6.⁴ The bylaws of the chapter provide that the chapter
11 president will represent it at CFA's annual convention and board meetings, and also
12 provide that the chairmen of two of the standing committees shall act as liaison with CFA
13 counterparts. Chapter Bylaws, Articles VII and IX. They state that, in recognition of the
14 fellowship and cooperation available to the chapter and its members "through its
15 privileges and rights of participation in the activities" of CFA, a major policy of the
16 chapter is to fully exercise those privileges and rights and discharge all obligations
17 imposed by CFA. Chapter Bylaws, Article IX. Moreover, chapter bylaws amendments
18 are effective only after approval by CFA. Chapter Bylaws, Article X.

19 The sample affiliation agreement provides that the chapter represents CFA in its
20 region, and will support the objectives of the CFA and enhance CFA's reputation and
21 goodwill. Clauses 1 and 2. The agreement mandates that the chapter membership consist
22 solely of individuals, that the chapter endeavor to sustain membership growth, and that
23 the chapter support the policy of encouraging cooperation with CFA and the other
24 chapters "in order to develop and provide membership services, legislative efforts and
25 programs without conflict." Clause 3. CFA is to designate a member of its management
26 committee to be the liaison with the chapter. Clause 4. The agreement describes the
27 organization and operating responsibilities of the chapter, requiring that it conduct its

⁴ That section also provides that the terms governing the chapters and their relationship with CFA may vary. This opinion, however, is based on the materials provided by you, which include model chapter bylaws and an affiliation agreement issued by CFA, and the Commission assumes that there are no material

1 business in accordance with generally accepted principles of non-profit business
2 organizations, that it be governed by a board of directors, that it adopt bylaws that
3 conform substantially to model bylaws provided by CFA with any additional rules
4 subject to CFA approval, and that it maintain financial self-sufficiency through the
5 collection of dues and assessments. Clauses 4, 5, and 8. CFA can modify the geographic
6 area assigned to the chapter. Clause 7. The agreement allows the chapter, however, to
7 choose its own business form (e.g., unincorporated association or not-for-profit
8 corporation) and provides that neither the chapter nor CFA shall be the agent of the other,
9 nor incur any "liability obligation or expense" on behalf of the other. Clauses 4 and 7. In
10 addition, the documents you submitted do not indicate any official voting participation by
11 the chapters in the governance of CFA.⁵

12 LEGAL ANALYSIS

13
14 A response to your question entails a discussion of the organizations as trade
15 associations, which includes a discussion as to whether they are membership
16 organizations or associations, and a determination as to whether the relationship between
17 CFA and a chapter is such that a chapter member is solicitable.

18 Commission regulations at 11 CFR 114.8(a) define and describe a trade
19 association as:

20 generally a membership organization of persons engaging in a similar or
21 related line of commerce, organized to promote and improve business
22 conditions in that line of commerce and not to engage in a regular business
23 of a kind ordinarily carried on for profit, and no part of the net earnings of
24 which inures to the benefit of any member.

25
26 As indicated in the above definition, an organization must qualify as a
27 membership organization. In defining such organizations, Commission regulations use
28 the term "membership association." To qualify as a "membership association," an entity
29 must (i) expressly provide for "members" in its articles and bylaws; (ii) expressly solicit

differences among the chapters with respect to the structure and membership of the chapters and their relationship with CFA.

⁵ The chapter brochure, in addition to describing the educational and networking benefits of chapter membership, lists the informational resources that CFA provides and directs the prospective applicant to call the CFA offices which will refer him to a chapter officer.

1 members; and (iii) expressly acknowledge the acceptance of membership, such as by
2 sending a membership card or inclusion on a membership newsletter list. 11 CFR
3 114.1(e)(1); see also 11 CFR 100.8(b)(4)(iv)(A).

4 On the question of what constitutes a member under the above definition and for
5 purposes of the Act (such as for solicitations for contributions to an SSF), the Supreme
6 Court has suggested that members of non-stock corporations are to be defined, at least in
7 part, by analogy to stockholders of business corporations and members of labor unions.
8 See *FEC v. National Right to Work Committee*, 459 U.S. 197, 202 (1982), see also
9 *Chamber of Commerce v. FEC*, 69 F. 3d 600 (D.C. Cir. 1995); *petition for rehearing*
10 *denied*, 76 F. 3d 1234 (1996);⁶ see also Advisory Opinions 1999-10, 1998-19, and 1997-
11 22.

12 Both CFA and the chapters are organizations consisting of entities or persons
13 engaged in the same line of business and organized for furthering the purposes of that
14 line. CFA is a not-for-profit corporation and, according to the affiliation agreement with
15 CFA, the chapters are obligated to operate as non-profit business organizations.

16 Both CFA and the chapters qualify as membership associations under the
17 regulations. Both CFA and the chapters expressly provide for "members" in their

⁶ 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*, 69 F.3d 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, defines 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 bylaws, expressly solicit members,⁷ and acknowledge the acceptance of membership. 11
2 CFR 114.1(e)(1). In addition, the situation of the members of each organization is
3 analogous to that of a stockholder in a capital stock corporation or a labor union member,
4 and these members appear to satisfy even the more restrictive standard struck down in
5 *Chamber*. See footnote 6.⁸ The “members” of each organization have an annual dues
6 obligation to the particular organization and have participatory rights. In CFA, each
7 member company selects its own representative on the board of directors, and this person
8 has the right to vote for the executive committee, which is the highest governing body,
9 and to vote for officers. In a chapter, the individual member has the right to vote for the
10 officers who comprise the board of directors, which is the highest governing body, and to
11 amend the by-laws, subject to the approval of CFA. Based on the foregoing, CFA and
12 the individual chapters each meet the definition of trade association under Commission
13 regulations, with the members of CFA and the individual chapters each qualifying as
14 members of their particular organizations under the Act.

15 Under the Act and Commission regulations, a corporation, including an
16 incorporated trade association, may use general treasury funds, including dues moneys or
17 membership fees, for the establishment, administration, and solicitation of contributions
18 to its separate segregated fund, and such support would not result in a contribution to that
19 fund. 2 U.S.C. §441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii) and 114.5(b). A corporation and
20 its SSF are subject to restrictions as to the category of persons who may be solicited for
21 contributions to the committee. 2 U.S.C. § 441b(b)(4)(A), (C), and (D); 11 CFR
22 114.5(g)(1), 114.7(a), and 114.8(c). Specifically, an incorporated trade association and
23 its SSF may solicit the association’s executive and administrative personnel, and the

⁷ The chapter brochure is an express solicitation for membership in the chapter. Although you have not submitted similar materials with respect to CFA, CFA membership has grown over the years, and the CFA website invites the reader to ask for membership information.

⁸ 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 specific date announced in the *Federal Register*. In addition, the Commission's written explanation and justification for any new rules will identify each past advisory opinion that is modified or superseded.

1 families of such personnel. They may also solicit the stockholders and executive and
2 administrative personnel, and the families of such stockholders and personnel, of the
3 member corporations that separately and specifically approve the solicitations and that
4 have not approved a solicitation by any other trade association for the same calendar year.
5 Moreover, they may solicit members of the association that are not incorporated, without
6 any need to seek a prior approval. 11 CFR 114.7(a), 114.7(c), and 114.8(c) and (d).
7 Commission regulations also provide for the solicitation of the persons in the solicitable
8 classes of affiliated entities. See, e.g., 11 CFR 114.5(g); Advisory Opinions 1997-25
9 (eligible employees of affiliated corporations) and 1981-55 (members of affiliated
10 organizations).

11 The Act and Commission regulations provide that committees, including separate
12 segregated funds, that are established, financed, maintained or controlled by the same
13 corporation, person, or group of persons, including any parent, subsidiary, branch,
14 division, department, or local unit thereof, are affiliated. 2 U.S.C. §441a(a)(5); 11 CFR
15 100.5(g)(2). Contributions made to or by such committees shall be considered to have
16 been made to or by a single committee. 2 U.S.C. §441a(a)(5); 11 CFR 100.5(g)(2),
17 110.3(a)(1), and 110.3(a)(1)(ii). In addressing committee affiliation, the regulations
18 examine the relationship of the entities maintaining political committees. Included
19 among the categories of entities that are *per se* affiliated are a membership organization,
20 including a trade or professional association, and related State and local entities of that
21 organization. 11 CFR 100.5(g)(3)(iv) and 110.3(a)(2)(iv). The reference in 11 CFR
22 114.8(g) to 11 CFR 100.5(g)(4) is to the factors that are examined in the context of an
23 overall relationship to determine affiliation in the absence of *per se* affiliation. 11 CFR
24 100.5(g)(4)(ii)(A)-(J) and 110.3(a)(3)(ii)(A)-(J). These include: (B) whether a sponsoring
25 organization has the authority or ability to direct or participate in the governance of
26 another sponsoring organization through provisions of constitutions, by-laws, contracts or
27 other rules, or through formal or informal practices or procedures; (C) whether a
28 sponsoring organization has the authority or ability to hire, appoint, demote or otherwise
29 control the officers, or other decisionmaking employees of another sponsoring
30 organization; (E) whether a sponsoring organization has common or overlapping officers

1 or employees with another sponsoring organization; and (I) whether a sponsoring
2 organization had an active or significant role in the formation of another sponsoring
3 organization. 11 CFR 100.5(g)(4)(ii)(B), (C), (E), and (I), and 110.3(a)(3)(ii)(B), (C),
4 (E), and (I).

5 CFA may best be characterized as a trade association having a national base of
6 corporate (and other business entity) members but also comprised of its local unit
7 affiliates which, in turn, are comprised of employees of the member business entities. It
8 appears therefore that the relationship of CFA and its chapters fits into the *per se*
9 definition of affiliation at 11 CFR 100.5(g)(3)(iv) and 110.3(a)(2)(iv). A review of the
10 above-cited factors that apply when organizations are not *per se* affiliated is relevant to
11 the determination that there is such a relationship in these circumstances. CFA has
12 created the chapters for the express purpose of representing it at the local level, and the
13 documents submitted indicate that CFA has the ability to direct or participate in the
14 governance of the chapters, and to exercise control over the activities of the officers. 11
15 CFR 100.5(g)(4)(ii)(I), (B), and (C), and 110.3(a)(3)(ii)(I), (B), and (C). In addition, you
16 state that many chapter members are on CFA's board and CFA committees. 11 CFR
17 100.5(g)(4)(ii)(E), and 110.3(a)(3)(ii)(E).

18 The Commission has long held that affiliates may include entities other than a
19 corporation, such as a limited liability company, partnership, or other unincorporated
20 association. See Advisory Opinions 1997-13, 1996-38, 1989-8, and 1983-48. It has
21 concluded that the restricted class of such entities may be solicited for contributions to
22 the incorporated entity's SSF (just as with the restricted class of incorporated affiliates).
23 Advisory Opinions 1989-8 and 1983-48; see 11 CFR 114.5(g). Usually, opinions dealing
24 with non-corporate entities have involved or addressed solicitations by for-profit business
25 entities of the executive and administrative personnel of affiliated entities, and in an
26 opinion that involved a membership association other than a federated structure, all the
27 members of the unincorporated entity were also members of the other, incorporated,
28 entity. See Advisory Opinion 1996-38. Nevertheless, the Commission concludes that, as
29 individuals who qualify as members under the Act, the members of the chapters are in the
30 restricted class of their particular chapters and are therefore solicitable by CFA or CFA

1 PAC for contributions to the PAC. 11 CFR 114.7(a) and (c); see also Advisory Opinion
2 1981-55 (where both membership associations were incorporated). Given the affiliated
3 relationships of CFA with its 15 chapters, CFA's status as a federation of trade
4 associations under 11 CFR 114.8(g) is not addressed in this opinion because it is
5 unnecessary for a response to your question.⁹

6 The Commission also notes that some of the chapter members may be executive
7 or administrative personnel of incorporated regular CFA members and, therefore,
8 solicitable, assuming compliance with the separate and specific approval requirements of
9 11 CFR 114.8(c) and (d).¹⁰

10 This response constitutes an advisory opinion concerning application of the Act
11 and Commission regulations to the specific transaction or activity set forth in your
12 request. 2 U.S.C. §437f.

13 Sincerely,

14
15 Scott E. Thomas
16 Chairman
17

18 Enclosures (AOs 1999-10, 1998-19, 1997-25, 1997-22, 1997-13, 1996-38, 1989-8,
19 1983-48, 1981-55, and 1979-62)
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⁹ The Commission notes that, in Advisory Opinion 1979-62, it concluded that a trade association could not solicit the executive and administrative personnel of members of another group with which it was "affiliated but not federated." Nevertheless, according to the opinion, the requester had characterized the affiliation as "loose," and the opinion itself did not focus on the relationship other than the similarity of goals and membership requirements and a partial overlap in membership. The opinion reached no conclusion as to whether the organizations were affiliated under the Act and regulations.

¹⁰ The Commission notes your statement that some CFA members are owned by foreign banks. In this opinion, the Commission is not addressing any issues that may be raised with respect to the application of 2 U.S.C. §441e and 11 CFR 110.4(a). In addition, the Commission notes that nothing in this opinion should be construed as stating a conclusion as to the membership status of limited members or the solicitability of the executive and administrative personnel of incorporated limited members.