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September 7, 2000

AGENDA ITEM
For Meeting of: 9-14-00

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield *NBL/ACS*
Associate General Counsel

Jonathan M. Levin *JL*
Senior Attorney

Subject: Draft AO 2000-22

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for September 14, 2000.

Attachment

1 ADVISORY OPINION 2000-22

2
3 Scott A. Sinder
4 Stephen Gold
5 Collier Shannon Scott
6 3050 K Street, N.W.
7 Suite 400
8 Washington, D.C. 20007-5108

DRAFT

9
10 Dear Mr. Sinder:

11 This responds to your letters dated July 31 and August 30, 2000, on behalf of
12 various trade associations requesting an advisory opinion concerning the application of
13 the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission
14 regulations to the use of an electronic signature by a corporate representative to authorize
15 solicitations by a trade association for contributions to its separate segregated fund.

16 ***Background***

17 You represent the Air Transportation Association of America, the American Land
18 Title Association, the Council of Insurance Agents and Brokers, the Independent
19 Insurance Agents of America, and the Society of Independent Gasoline Marketers of
20 America ("the Associations"). These entities are incorporated trade associations with
21 separate segregated funds ("SSFs") that are registered with the Commission, and they
22 each have corporate members. The Associations have solicited contributions to their
23 respective SSFs from the executive or administrative personnel of their respective
24 member corporations, as well as the families of such individuals. As required by 2
25 U.S.C. §441b(b)(4)(D) and 11 CFR 114.8, the Associations have received separate and
26 specific approval from corporate representatives to conduct the solicitations. They have
27 accomplished this by sending an SSF solicitation form (usually by mail) to the
28 representative, which the representative typically signs and mails back to the Association.
29 The Associations propose the additional option of receiving an executed approval from a
30 corporate representative via the use of an electronic signature. You ask whether that
31 would constitute a valid written authorization for a trade association to solicit
32 contributions to its SSF from the restricted class employees of the member corporation.

1 You state that the Associations can and will maintain the necessary security
2 measures to safeguard any electronic signature processes that they institute. There are
3 two separate electronic mechanisms that the Associations would like to use to obtain the
4 requisite approvals.

5 Using the first method, the Association would send an electronic mail message to
6 the corporate representative requesting the corporation's approval with an attached SSF
7 solicitation approval form. Each Association maintains a list of the authorized corporate
8 representatives to whom it can directly send electronic mail. You state that the
9 Association can ensure that the electronic mail to which the executed form is attached
10 was sent from that representative's e-mail address. To so ensure, the e-mail distribution
11 by the Association would be limited to the list of corporate representatives, and the
12 Association would send a confirmation e-mail to each corporate representative upon
13 receipt of a form executed with the electronic signature.

14 Using the second method, each Association would make the corporate approval
15 forms available to the corporate representatives on the secured "members-only" portions
16 of its Internet website. You state that the Association would ensure that only the
17 corporate representatives have access to the forms through the use of coded private
18 passwords that would restrict access to just the corporate representatives. The corporate
19 representative would then be permitted to provide written approval via an electronic
20 signature, and, upon receipt of the executed form, the Association would send a
21 notification to the representative confirming that receipt. You also state that the
22 Associations will maintain a record of the approvals and comply with all other
23 Commission regulatory requirements.¹

24 ***Applicable Law***

25 In an exception to the general prohibition on corporate contributions, the Act and
26 Commission regulations provide that a corporation, including an incorporated trade
27 association, may use general treasury funds for the establishment, administration, and
28 solicitation of contributions to its separate segregated fund. 2 U.S.C. §441b(b)(2)(C); 11

¹ The representative would still have the option of mailing a copy of the form with a traditional handwritten signature.

1 CFR 114.1(a)(2)(iii) and 114.5(b). An organization such as an incorporated trade
2 association, which is not itself a political committee, but which directly or indirectly
3 establishes, administers, or financially supports a political committee, is a “connected
4 organization” of that committee. 2 U.S.C. §431(7); 11 CFR 100.6(a).

5 The connected organization and its SSF are subject to restrictions as to the
6 personnel who may be solicited for contributions to the SSF. 2 U.S.C. §441b(b)(4)(A),
7 (C), and (D); 11 CFR 114.5(g)(1), 114.7(a), and 114.8(c). Specifically, an incorporated
8 trade association and its SSF may solicit the association’s executive or administrative
9 personnel, and the families of such personnel. They may also solicit the stockholders and
10 executive and administrative personnel, and the families of such stockholders and
11 personnel, of the member corporations that separately and specifically approve the
12 solicitations and that have not approved a solicitation by any other trade association for
13 the same calendar year. Moreover, they may solicit members of the association that are
14 not incorporated, without any need to seek prior approval. 11 CFR 114.7(a), 114.7(c),
15 and 114.8(c).

16 The requirements for separate and specific approval are described in
17 11 CFR 114.8(d) and (e). A trade association must make a written request to the member
18 corporation for permission to solicit the member’s restricted class. The request may be
19 sent to the corporate representative with whom the association normally conducts its
20 activities. This request for approval must inform the member corporation that: (1) a
21 separate and specific corporate approval is necessary before the trade association or its
22 SSF may conduct a solicitation; and (2) the corporation may not approve solicitations by
23 another trade association for the same calendar year. 11 CFR 114.8(c) and (d).²

24 Before a trade association may solicit the restricted class of any corporate
25 member, the association must obtain written authorization from the member corporation.
26 The member must designate the calendar year for which the solicitations are authorized,
27 and the authorization applies through that calendar year. There is no limit on the number

² The trade association may enclose a copy of proposed solicitation materials in its request for approval. In addition, the trade association may note that it intends to limit the range of those to be solicited (e.g.,

1 of member corporations from which a trade association can obtain solicitation approvals.
2 In a particular calendar year, however, a corporation is permitted to authorize only one
3 trade association to solicit its restricted class. 11 CFR 114.8(d); Advisory Opinion 2000-
4 10. A copy of each approved request received by a trade association must be retained by
5 the trade association or its SSF for three years from the year for which the approval is
6 given. 11 CFR 114.8(d)(2).

7 *Analysis*

8 The Commission has examined the use of electronic signatures in another context
9 where a written signature has been required to authorize an activity by a connected
10 organization or its SSF. In Advisory Opinion 1999-3, the Commission allowed the use of
11 an electronic signature process, which included safeguards for the security and integrity
12 of the signature, to authorize payroll deductions for voluntary contributions to a
13 corporation's SSF by the corporation's executive or administrative personnel. The
14 opinion concluded that the electronic signature, like a traditional signature, was designed
15 and functioned as a unique identifier of the authorizing employee. In approving the use
16 of the electronic signature, the Commission noted that its advisory opinions have
17 previously interpreted Commission regulations "to be consistent with contemporary
18 technological innovations, including the maintenance of records in non-paper form and
19 the performance of committee transactions, where the use of the technology would not
20 compromise the intent of the Act or regulations."

21 The Commission has also interpreted the Act and regulations to permit retiree
22 members of a labor organization to authorize deductions, by telephone, from their
23 monthly OPM annuities for contributions to the organization's SSF. That proposal
24 entailed the use of a unique account number accompanied by other safeguards giving the
25 member complete control of the authorization process and exclusive access to his account
26 for that purpose. The Commission concluded that the proposal was materially
27 indistinguishable from that presented in Advisory Opinion 1999-3, stating that the

just the executive and administrative personnel, and not the stockholders). Moreover, in its approval, the member corporation may limit the range of solicitees and the number of times solicitations may be made. 11 CFR 114.8(d)(3) and (5), and 114.8(e).

1 absence of a handwritten authorizing signature on a paper document was not significant
2 under the circumstances. Advisory Opinion 1999-6.

3 You have represented that there will be adequate security measures limiting the
4 use of the prior approval form to the authorized corporate representative. Such security
5 measures are important to assuring that the ability to sign and return the prior approval
6 will reside only with that representative.³ The Commission also assumes that the
7 Associations have the ability to verify that the electronically signed authorization came
8 from the particular representative.

9 In addressing prior approvals provided by member corporations, the Commission
10 has sought to make clear that the member corporation is granting the approval and that
11 the corporate representative is doing so on behalf of the corporation. See Advisory
12 Opinions 1984-61 and 1984-33. Thus, the approval form on which the representative
13 enters her electronic signature should also indicate that the signatory is doing so on behalf
14 of the specific named corporation, e.g., “[the signature], for ABC Corp.”

15 Pursuant to 11 CFR 114.8(d)(2), the Associations must also maintain a copy of
16 the approval from each corporation for a period of three years from the year for which the
17 particular corporation’s approval is given. The record must be retained in a retrievable
18 manner so as to be readily available for review by the Commission in the event of an
19 audit or investigation. This would include a record that verifies that the electronic
20 signature came from the particular corporate representative.

21 Based on the foregoing analysis, conditions, and assumptions, the Commission
22 concludes that the use of an electronic signature to grant prior approval for solicitations
23 by the Associations for their respective SSFs is permissible under the Act.⁴

³ The Commission assumes that the Association has adequate password protection procedures to assure integrity and uniqueness with respect to the passwords used by the corporate representatives. See Advisory Opinion 1999-3.

⁴ You assert that the Commission is required to permit the use of electronic signatures to provide SSF solicitation authorizations pursuant to the recently enacted Electronic Signatures in Global and National Commerce Act (“E-Signatures Act”), Pub. L. 106-229 (signed June 30, 2000). This statute provides, in part, that a signature, contract, or other record relating to any transaction in or affecting interstate or foreign commerce may not be denied legal effect, validity, or enforceability solely because it is in electronic form, and that a contract relating to such a transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or record was used in its formation. E-Signatures Act, Section 101(a). The Commission notes, however, that the E-Signatures Act defines “transaction” as follows:

