

September 22, 2004

**AO DRAFT COMMENT PROCEDURES**

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2004-32 is available for public comments under this procedure. It was requested by counsel, Yvonne L. Ramos on behalf of Spirit Airlines, Inc.

Proposed Advisory Opinion 2004-32 is scheduled to be on the Commission's agenda for its public meeting of Thursday, September 30, 2004.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on September 29, 2004.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

**CONTACTS**

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2004-32, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

**MAILING ADDRESSES**

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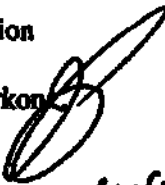
September 22, 2004

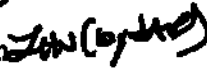
## AGENDA ITEM


For Meeting of: 9-30-04


### MEMORANDUM


TO: The Commission

THROUGH: James A. Pehrkonig   
Staff Director

FROM: Lawrence H. Norton   
General Counsel

Rosemary C. Smith   
Associate General Counsel

Brad C. Deutsch   
Assistant General Counsel

Esa L. Sferra   
Attorney

Subject: Draft AO 2004-32

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for September 30, 2004.

Attachment

1 Advisory Opinion 2004-32

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4 Yvonne L. Ramos, Esq.  
5 Assistant General Counsel and  
6 Director Governmental & Community Affairs  
7 Spirit Airlines, Inc.  
8 2800 Executive Way  
9 Miramar, FL 33025

**DRAFT**

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12 Dear Ms. Ramos,

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15 This responds to letters dated June 11, July 22, and August 5, 2004, submitted on  
16 behalf on Spirit Airlines, Inc. ("Spirit") requesting an advisory opinion concerning the  
17 application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and  
18 Commission regulations, to proposed solicitations of contributions to Spirit's separate  
19 segregated fund, Spirit Airlines, Inc. PAC ("Spirit PAC"), from the directors and senior  
20 employees of Oaktree Capital Management LLC ("Oaktree").

20 ***Background***

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Spirit is a privately held U.S. airline and is the connected organization of Spirit  
PAC. Oaktree is a limited liability company that provides investment management for  
"various Oaktree funds," which are "diversified private equity vehicles." Through two  
existing Oaktree funds and three Oaktree-managed holding companies, created  
specifically for investment in Spirit, Oaktree has invested \$125 million in Spirit.

The two existing Oaktree funds, Oaktree Principal Opportunities Fund II ("POF  
II") and Oaktree Principal Opportunities Fund III ("POF III"), are limited partnerships  
over which Oaktree "maintains control by acting as general partner of each such fund."  
The limited partners in POF II and POF III are both U.S. citizen and non-U.S. citizen  
investors.

1           The three Oaktree-managed holding companies, which were created for POF II  
2 and POF III's investment in Spirit, are limited liability companies: POF Spirit Foreign  
3 Holdings, LLC ("Foreign Holdings"), POF Spirit Domestic Holdings, LLC ("Domestic  
4 Holdings"), and OCM Spirit Holdings, LLC ("Spirit Holdings"). Oaktree is the  
5 managing member of each of the holding companies.

6           You state that the "need for multiple investment entities in this instance reflects  
7 regulatory considerations, specifically the need to separate the U.S. citizen and non-  
8 citizen investors of the two [already] established Oaktree funds . . . into discrete legal  
9 entities." You state that the creation of the Oaktree-managed holding companies, Foreign  
10 Holdings and Domestic Holdings, was necessary in order to separate POF II and POF  
11 III's foreign investors and U.S. citizen investors into separate investment entities in order  
12 to facilitate the U.S. Department of Transportation's determination of the degree of non-  
13 citizen ownership of Spirit, pursuant to 49 U.S.C. 40102, which permits only a limited  
14 percentage of foreign ownership of a corporate air carrier.

15           Through the two existing Oaktree funds and the three Oaktree-managed holding  
16 companies, Oaktree controls 51% of the voting stock in Spirit.<sup>1</sup> Specifically, Foreign  
17 Holdings, which is the investment vehicle for the foreign investors in POF II and POF III,  
18 directly owns 2.3% of the voting stock in Spirit. Domestic Holdings, which is the  
19 investment vehicle for the domestic investors in POF II and POF III, owns 77.9% interest  
20 in Spirit Holdings, which directly owns 48.7% of the voting stock of Spirit.

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<sup>1</sup> Spirit has three types of stock: Class A Common, Class A convertible Preferred Stock, and Class B Common. Holders of Class A Common stock and Class A convertible Preferred Stock are entitled to vote on all matters submitted to the shareholders for a vote. Holders of Class B Common stock are entitled to vote only under certain circumstances, such as mergers, consolidations, recapitalizations, and reorganizations. Amended and Restated Certificate of Incorporation of Spirit Airlines, Inc., Article 4.

1           You state that Oaktree has the ability to “direct or participate in the governance of  
2 Spirit.” As explained below, Oaktree has the ability to select Spirit’s board of directors  
3 and has a significant presence on that board.

4 ***Question Presented***

5           **May Spirit PAC solicit contributions from Oaktree’s directors and senior  
6 employees?**

7 ***Legal Analysis and Conclusions***

8           The Commission concludes that Spirit PAC may make the proposed solicitations,  
9 provided that Oaktree’s directors and senior employees qualify as members of Oaktree’s  
10 restricted class, because Spirit and Oaktree are affiliated under the Commission’s  
11 affiliation factors. Additionally, if any of these Oaktree senior employees do not qualify  
12 as members of its restricted class, Spirit PAC may still solicit such persons as part of a  
13 permissible twice-yearly solicitation of all employees of Spirit and its affiliates.

14 **I. Affiliation**

15           The Act permits a corporation or its separate segregated fund (“SSF”) to solicit its  
16 restricted class, which consists of its stockholders and executive or administrative  
17 personnel, and their families, for contributions to its SSF. 2 U.S.C. 441b(b)(4)(A)(i); 11  
18 CFR 114.5(g)(1) and 114.1(j). Additionally, a corporation or its SSF may also solicit the  
19 restricted class of the corporation’s subsidiaries, branches, divisions, and affiliates and  
20 their families. 11 CFR 114.5(g)(1); *see also* Advisory Opinions 2001-18 and 1997-25.  
21 The Commission has long held that affiliates may include entities other than  
22 corporations, such as partnerships and limited liability companies. Advisory Opinion  
23 2001-18. Once the Commission has determined entities are affiliated, any one affiliate

1 may solicit the restricted class of any of the other affiliated entities. *See* Advisory  
2 Opinion 2001-18; *see also* Advisory Opinions 1999-28 and 1982-18 (SSF of a subsidiary  
3 corporation may solicit contributions from a parent's restricted class and from the  
4 restricted class of parent's other subsidiaries).

5       The Commission considers an entity that owns a majority interest of another  
6 organization to be affiliated *per se* with that other organization. *See* 11 CFR 100.5(g)(2).  
7 In the absence of *per se* affiliation, however, section 114.5(g)(1) of the Commission's  
8 regulations provide for a case-by-case examination of ten circumstantial factors found at  
9 11 CFR 100.5(g)(4)(i) and (ii)(A)-(J) to determine whether an organization is an affiliate  
10 of a corporation. An examination of these factors, in the context of the overall  
11 relationship between Spirit and Oaktree, leads to the conclusion that Spirit and Oaktree  
12 are affiliated because Oaktree controls 51% of the voting stock in Spirit and has the  
13 ability to direct or participate in Spirit's governance and control Spirit's officers.

14       One of the affiliation factors the Commission considered in the context of the  
15 overall relationship between Spirit and Oaktree is whether one organization "owns [a]  
16 controlling interest in the voting stock" of another organization. 11 CFR  
17 100.5(g)(4)(ii)(A); *see also* Advisory Opinion 1989-17. Although Oaktree does not  
18 directly own a controlling interest in Spirit, Oaktree controls 51% of the voting stock of  
19 Spirit through the two Oaktree funds and three Oaktree-managed holding companies.  
20 Specifically, Oaktree, as the managing member of Spirit Holdings, has the right to vote  
21 all of the 48.7% voting stock of Spirit held by Spirit Holdings. Additionally, as a  
22 managing member, Oaktree controls the 2.3% of the voting stock of Spirit owned by  
23 Foreign Holdings. Therefore, the Commission concludes that Oaktree's control of 51%

1 of the voting stock of Spirit is, in the context of the overall relationship, strong evidence  
2 of affiliation.

3 Section 100.5(g)(4)(ii)(B) addresses whether one organization has the authority or  
4 ability to direct or participate in the governance of another sponsoring organization  
5 through provisions of constitutions, bylaws, contracts or other rules, or through formal or  
6 informal practices or procedures. Oaktree has appointed four of Spirit's seven directors  
7 and two of these directors are Oaktree principals. Oaktree also has the ability to control  
8 the selection of all seven directors because Spirit's bylaws state that its directors are  
9 elected annually by holders of voting stock and that such elections are "determined by a  
10 plurality of the votes cast." Amended and Restated Bylaws of Spirit Airlines, Inc.,  
11 Article I, Section 7. Because Oaktree has the ability to vote a majority of Spirit's voting  
12 stock, Oaktree has the ability to elect all of Spirit's directors.

13 Finally, section 100.5(g)(4)(ii)(C) addresses whether an organization has the  
14 authority or ability to hire, appoint, demote, or otherwise control the officers, or other  
15 decision making employees of another organization. Spirit's bylaws state that its  
16 directors annually elect its officers and may dismiss its officers without cause. Amended  
17 and Restated Bylaws of Spirit Airlines, Inc., Article IV, Section 1 and 14. Because  
18 Oaktree controls a majority of voting stock in Spirit, Oaktree has the ability to control the  
19 election of all of Spirit's directors on an annual basis. Therefore, Oaktree also has the  
20 ability, acting through Spirit's directors, to hire, appoint, and dismiss Spirit's officers.<sup>2</sup>

21 Accordingly, considering the factors discussed above in the context of the overall  
22 relationship between Spirit and Oaktree, the Commission concludes that Spirit and  
23 Oaktree are affiliated for the purposes of the Act and Commission regulations.

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<sup>2</sup> Factors listed in 11 CFR 100.5(g)(4)(ii)(D)-(J) are not relevant to this advisory opinion.



1 **2. Solicitation**

2           **Whether Spirit PAC may solicit Oaktree's directors and senior employees, at any**  
3 **time, depends on whether such Oaktree employees constitute part of Oaktree's restricted**  
4 **class. Under Commission regulations, a corporation's restricted class is its stockholders**  
5 **and executive or administrative personnel, and their families. 11 CFR 114.1(j).**  
6 **"Executive or administrative personnel" are defined in Commission regulations as**  
7 **individuals employed by a corporation who are paid on a salary rather than hourly basis**  
8 **and who have policymaking, managerial, professional, or supervisory responsibilities. 11**  
9 **CFR 114.1(c). This definition of executive or administrative personnel includes**  
10 **individuals who run the corporation's business such as officers, and other executives. 11**  
11 **CFR 114.1(c)(1)(i). If Oaktree's directors and senior employees fall within the definition**  
12 **of executive or administrative personnel, then they may be solicited at any time by Spirit**  
13 **PAC.<sup>3</sup>**

14           **If Oaktree's senior employees do not qualify as members of Oaktree's restricted**  
15 **class, Spirit PAC may, nonetheless, solicit them as part of Spirit's permissible twice-**  
16 **yearly solicitation. Under the Act and Commission regulations, a corporation and/or its**  
17 **SSF may make a total of two written solicitations per calendar year for contributions to**  
18 **the SSF from the corporation's employees other than those that qualify as members of the**

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<sup>3</sup> You state that Foreign Holdings is the investment vehicle for foreign investors of POF II and POF III. Accordingly, the Commission notes that Spirit PAC is prohibited from soliciting any foreign national. The Act and Commission regulations prohibit any "person," the definition of which includes corporations and SSFs, from soliciting, accepting or receiving a contribution or donation from a foreign national. 2 U.S.C. 441e(a)(2) and 110.20(g). The Act and Commission regulations also prohibit a foreign national from making a contribution, directly or through any other person, or an expenditure in connection with a Federal, State, or local election. 2 U.S.C. 441e(a)(1) and 11 CFR 110.20(b). Additionally, no foreign national may be involved with the decisions of Spirit PAC, Spirit, or its affiliates regarding solicitation of contributions. Commission regulations prohibit a foreign national from directing, dictating, controlling, or directly or indirectly participating in the decision-making process of a corporation or political committee with regard to Federal or non-Federal election-related activities, such as the making of contributions. 11 CFR 110.20(i).

1 corporation's restricted class. 2 U.S.C 441b(b)(4)(B) and 11 CFR 114.6(a). This twice-  
2 yearly solicitation rule also applies to employees of the corporation's affiliates. *See, e.g.,*  
3 Advisory Opinion 1990-25. Accordingly, for any of Oaktree's employees who do not  
4 qualify as members of Spirit's restricted class, Spirit PAC may solicit such employees as  
5 part of its twice-yearly solicitation under the conditions set out in 11 CFR 114.5(a) and  
6 114.6. *See also* Advisory Opinion 1994-7.

7         This response constitutes an advisory opinion concerning the application of the  
8 Act and Commission regulations to the specific transaction or activity set forth in your  
9 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
10 of the facts or assumptions presented and such facts or assumptions are material to a  
11 conclusion presented in this advisory opinion, then the requester may not rely on that  
12 conclusion as support for its proposed activity.

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Sincerely,

Bradley A. Smith  
Chairman

Enclosures (AOs 2001-18, 1999-28, 1994-7, 1990-25, 1989-17, and 1982-18)