

**Holland+Knight**

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2008 MAY 13 P 3:08

May 13, 2008

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**BY HAND DELIVERY**

Federal Election Commission  
Office of General Counsel  
999 E Street, N.W.  
Washington, D.C. 20463

AOR 2008-05

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Re: Request for Advisory Opinion

Dear Commissioners:

On behalf of Holland & Knight LLP, I respectfully request an advisory opinion from the Federal Election Commission ("FEC") pursuant to 2 U.S.C. §437f of the Federal Election Campaign Act of 1971 ("FECA"), as amended. I seek guidance as to whether the FEC considers Holland & Knight LLP a corporation pursuant to 11 C.F.R. §114 or a partnership pursuant to 11 C.F.R. §110.1(e).

**FACTUAL BACKGROUND**

Holland & Knight LLP is a limited liability partnership ("LLP") organized under the laws of Florida. On October 1, 2007, Holland & Knight LLP elected to classify itself as an association taxable as a corporation with the Internal Revenue Service ("IRS") pursuant to 26 C.F.R. §301.7701-3. Holland & Knight LLP currently sponsors the Holland & Knight Committee for Effective Government, a nonconnected political committee registered with the FEC (Committee ID: C00171330).

*State Law*

Holland & Knight LLP is taxed as a corporation in all states where it operates, except Massachusetts and Florida, which tax Holland & Knight LLP as a partnership. Holland & Knight LLP is considered an LLP under state law in all states where it operates. In addition to Florida and Massachusetts, Holland & Knight LLP operates in California, Georgia, Illinois, Maryland, New York, Oregon, Virginia, Washington, D.C. and several foreign countries.

### *Procedural Background*

Holland & Knight LLP first presented this question to the FEC in Advisory Opinion Request ("AOR") 2007-25. However, the 5 FEC Commissioners were unable to reach a 4 vote majority on AOR 2007-25 as required by FECA. During the December 6, 2007 FEC open meeting, 3 Commissioners indicated they supported "Draft B" which would have treated Holland & Knight LLP as a corporation for purposes of FECA, while 2 Commissioners indicated they supported "Draft A" which would have treated Holland & Knight LLP as a partnership for purposes of FECA. Consideration of AOR 2007-25 was carried over to the December 14, 2007 FEC open meeting, but again the Commissioners were unable to approve either Draft A or Draft B. A "no decision" letter was mailed from the FEC to Holland & Knight LLP on December 14, 2007.

### **QUESTIONS PRESENTED**

Does the FEC consider Holland & Knight LLP a corporation pursuant to 11 C.F.R. §114 or a partnership pursuant to 11 C.F.R. §110.1(e)?

May Holland & Knight LLP administer and financially support the Holland & Knight Committee for Effective Government as a separate segregated fund pursuant to 2 U.S.C. §441b(b) and 11 C.F.R. §114.5?

May Holland & Knight LLP continue to sponsor the Holland & Knight Committee for Effective Government as a nonconnected political committee?

### **LEGAL ANALYSIS**

Only corporations, labor unions, membership organization, cooperatives and corporations without capital stock may establish, administer, and solicit contributions to a separate segregated fund. 2 U.S.C. §441b(b)(2)(C); 11 C.F.R. §114.1(a)(2)(iii).

The FEC considers a limited liability company ("LLC") that elects to be treated as a corporation by the IRS pursuant to 26 C.F.R. §301.7701-3 to be a corporation. 11 C.F.R. §110.1(g)(3). The FEC regulations are silent as to whether an LLP that elects to be treated as a corporation by the IRS pursuant to 26 C.F.R. §301.7701-3 is considered a corporation. However, the IRS considers an association taxable as a corporation to be a corporation for federal tax purposes. 26 C.F.R. §301.7701-2(b)(2).

### *LLPs vs. LLCs*

LLCs and LLPs did not exist when FECA was enacted in 1971. Until Wyoming enacted an LLC statute in 1977, the choice for business entities was generally limited to partnerships and corporations. Since the 1970s, several new business entities have emerged including LLCs and LLPs. Currently all states have adopted LLC and LLP statutes.

While LLC and LLP laws vary from state to state, LLCs and LLPs are similar entities that have characteristics of both partnerships and corporations. For example, like a partnership, LLCs and LLPs can be managed by their members, managers, or partners. However, like a corporation, LLCs and LLPs provide limited liability. Since 1997 the IRS has allowed LLCs and LLPs to elect to classify themselves as associations taxable as a corporation pursuant to 26 C.F.R. §301.7701-3.

### *Corporate Attributes of LLPs*

Corporate attributes include limited liability and the ability to accumulate capital. LLPs that elect to be taxed as a corporation by the IRS share these same attributes.

Like a corporation, all LLP partners are provided a form of limited liability, similar to shareholders of a corporation. Section 306(c) of Uniform Partnership Act ("UPA") (1997) grants LLPs a form of limited liability similar to that of a corporation:

An obligation of a partnership incurred while the partnership is a limited liability partnership, whether arising in contract, tort, or otherwise, is solely the obligation of the partnership. A partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for such an obligation solely by reason of being or so acting as a partner.

Comment 3 of Section 306 of the UPA further explains:

Subsection (c) alters classic joint and several liability of general partners for obligations of a partnership that is a limited liability partnership. Like shareholders of a corporation and members of a limited liability company, partners of a limited liability partnership are not personally liable for partnership obligations incurred while the partnership liability shield is in place solely because they are partners. As with shareholders of a corporation and members of a limited liability company, partners remain personally liable for their personal misconduct.

Also like a corporation, an LLP that elects to classify itself as an association taxable as a corporation with the IRS also gains the ability to accumulate capital at the corporate level to provide for the reasonably anticipated needs of the business. 26 U.S.C. §537; Treas. Reg. §1.537-1. However, it is unlikely a significant number of LLPs will make a similar election with the IRS because most partners in small to medium-size LLPs wish to be treated as self-employed individuals for tax purposes.

#### *Corporate Attributes of Holland & Knight LLP*

The partners of Holland and Knight LLP, as with any other LLP, are provided a form of limited liability similar to shareholders of a corporation. However, because Holland & Knight LLP elected to classify itself as an association taxable as a corporation with the IRS, it also has the ability to accumulate capital at the corporate level. This situation, which appears to be unique, makes Holland & Knight LLP more like a corporation than most, if not all, other LLPs.

#### *Corporations under FECA*

For 100 years it has been illegal for corporations to contribute funds out of the corporate treasury directly to a candidate for federal office. Tillman Act of 1907, Pub. L. 59-36, 34 Stat. 864. FECA prohibits corporations from using their general treasury funds for contributions or expenditures in connection with federal elections. Pub. L. 92-225, 86 Stat. 9; 2 U.S.C. §441b(a). Corporate "soft money" (non-federal) contributions to the national political parties have been illegal since enactment of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). Pub. L. 107-155, 116 Stat. 81. In addition, it is illegal for corporations to facilitate the making of a contribution to a federal candidate or to reimburse employees for contributions to a federal candidate. 11 C.F.R. §114.2(f); 2 U.S.C. §441f; 11 C.F.R. §114.2(e).

The intent of FECA is to "restrict the influence of political war chests funneled through the corporate form" and to "regulate the substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization." *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 501 (1985), quoting *National Right to Work Committee v. FEC*, 459 U.S. 197, 210 (1982).

#### *Partnerships under FECA*

A partnership is a person under FECA and FEC regulations. 2 U.S.C. §431(11); 11 C.F.R. §100.10. As such, a partnership may contribute to political committees, including candidates, political party committees, and other political committees. 2 U.S.C. § 441a(a)(1); 11 C.F.R. §110.1. A partnership is not an "individual" under FECA and therefore is not subject to the aggregate biennial contribution limitation for individuals. 2 U.S.C. § 441a(a)(3); 11 C.F.R. §110.5.

### *LLCs under FECA*

Neither FECA nor FEC regulations define "corporation" or "partnership." As LLCs became more common in the 1990s, the FEC addressed the issue of whether to classify LLCs as corporations or partnerships for purposes of FECA. As you are aware, the 1999 FEC rulemaking on LLCs states:

Rather than attempting to determine whether an LLC more closely resembles a corporation versus a partnership, or simply classifying an LLC as a partnership without any reference to its actual structure or form, the Commission believes it can most effectively carry out FECA's intent by classifying LLCs according to their tax status, which most accurately describes whether an LLC's structure and function is more akin to a "corporation" or a "partnership."

**Treatment of Limited Liability Companies Under the Federal Election Campaign Act, 64 Fed. Reg. 37399 (July 12, 1999).**

Prior to the 1999 LLC rulemaking, the regulated community and FEC staff were required to analyze the nuances of state LLC laws to determine whether an entity was more like a partnership or a corporation. The LLC rulemaking was intended to avoid this process and provide both the regulated community and FEC staff with a bright-line test. The logic of the LLC rulemaking also extends to LLPs.

### *Holland & Knight LLP under FECA*

As stated above, Holland & Knight LLP possesses at least two corporate attributes - limited liability and the ability to accumulate capital. Accordingly, allowing Holland & Knight LLP to make partnership contributions to federal political committees appears to be in direct conflict with the intent of FECA as articulated above in *FEC v. National Conservative Political Action Committee* and *National Right to Work Committee v. FEC*.

In addition, because Holland & Knight LLP elected to classify itself as an association taxable as a corporation with the IRS, deductible expenses (such as charitable contributions) or non-deductible expenses (such as political contributions) no longer flow through to its partners in accordance with their ownership share in the entity. This would make it difficult or impossible for Holland & Knight LLP to comply with the FEC's partnership attribution rules in 11 C.F.R. §110.1(e).

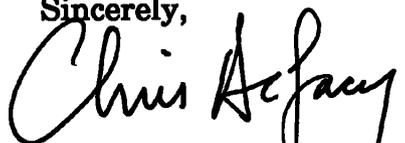
## **Conclusion**

Holland & Knight LLP appears to be unique among LLPs in that it possesses the corporate attributes of both limited liability and the ability to accumulate capital. Under these circumstances, allowing Holland & Knight LLP to make partnership contributions to federal political committees appears hostile to the intent of FECA. However, treating Holland & Knight LLP as a corporation furthers the objectives of FECA and correctly aligns the FEC with the IRS.

Holland & Knight LLP submits this advisory opinion request as part of its best efforts to comply with FECA and all relevant FEC regulations. Please let me know if you require any additional information.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Chris DeLacy". The signature is written in a cursive, flowing style.

Christopher DeLacy, Esq.



<chris.delacy@hklaw.com>  
05/15/2008 06:33 PM

To <rkatwan@fec.gov>, <akiss@fec.gov>  
cc  
bcc

Subject Holland & Knight LLP AO request - follow-up information

History:      ↻ This message has been forwarded.

Ron and Al:

Per our phone conversation, below is some additional information. Specifically, you asked me to elaborate on the following statement:

**"In addition, because Holland & Knight LLP elected to classify itself as an association taxable as a corporation with the IRS, deductible expenses (such as charitable contributions) or non-deductible expenses (such as political contributions) no longer flow through to its partners in accordance with their ownership share in the entity. This would make it difficult or impossible for Holland & Knight LLP to comply with the FEC's partnership attribution rules in 11 C.F.R. §110.1(e)."**

Here is some additional information provided by our General Counsel:

**"Because Holland & Knight LLP has elected to classify itself as an association taxable as a corporation with the IRS, all expenses are incurred and recognized only by the entity and no longer flow through to its partners in accordance with their ownership share in the entity. Holland & Knight LLP's previous pass-through allocations were dictated by its classification as a partnership with the IRS. Holland & Knight LLP's partnership agreement does not provide a mechanism for such pass-through allocations. Accordingly, any allocation of expenses to the partners of Holland & Knight LLP would be artificial, much like allocating expenses among the shareholders of a corporation."**

Please let me know if you need any additional information.

Thank you.

Chris

## **Holland + Knight**

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