

July 21, 2008

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

Two alternative DRAFTS of ADVISORY OPINION 2008-05 are available for public comments under this procedure. It was requested by Christopher DeLacy, Esq., on behalf of Holland & Knight, LLP.

Two alternative drafts of Advisory Opinion 2008-05 are scheduled to be on the Commission's agenda for its public meeting of Monday, July 28, 2008.

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 12:00pm noon (Eastern Time) on July 25, 2008.

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 2008-05, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at www.fec.gov.

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

MAILING ADDRESSES

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Federal Election Commission
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Washington, DC 20463

Rosemary C. Smith
Associate General Counsel
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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM

For Meeting of: 07-28-08

July 21, 2008

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Jonathan M. Levin *JML*
Senior Attorney

Albert J. Kiss *ASK by JML*
Attorney

Subject: Draft AO 2008-05

Attached are two alternative proposed drafts of the subject advisory opinion. We request that these drafts be placed on the agenda for July 28, 2008.

Attachment

1 ADVISORY OPINION 2008-05

2
3 Christopher DeLacy, Esq.
4 Holland & Knight LLP
5 2099 Pennsylvania Ave., N.W., Suite 100
6 Washington, D.C. 20006-6081

DRAFT A

7
8 Dear Mr. DeLacy:

9 We are responding to your advisory opinion request on behalf of Holland &
10 Knight (the "Firm"), concerning the application of the Federal Election Campaign Act of
11 1971, as amended (the "Act"), and Commission regulations to the Firm's status as a
12 corporation or a partnership under the Act and Commission regulations. The Firm asks if
13 it may administer and "financially support" the Holland & Knight Committee for
14 Effective Government (the "Committee") as its separate segregated fund ("SSF").

15 The Commission concludes that the Firm is a partnership under the Act and
16 Commission regulations, and not a corporation. Hence, all administrative and financial
17 support provided to the Committee by the Firm would constitute contributions subject to
18 the Act's amount limitations.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on
21 May 13, 2008, and your emails received on May 15, 2008 and June 26, 2008.

22 The Firm is a law firm that is a limited liability partnership ("LLP") organized
23 under the laws of Florida. On October 1, 2007, the Firm elected to classify itself as an
24 association taxable as a corporation for federal tax purposes pursuant to 26 CFR
25 301.7701-3. The Firm will continue to be treated as an LLP under Florida law and the
26 law of all other states in which it operates. The Firm will be taxed as a partnership in

1 Massachusetts and Florida, although it will be taxed as a corporation in other States in
2 which it operates.

3 The Committee filed a statement of organization on December 12, 2006 and is a
4 nonconnected multicandidate committee.

5 ***Questions Presented***

6 *(1) Is the Firm a corporation or a partnership under the Act and Commission*
7 *regulations?*

8 *(2) May the Firm administer and financially support the Committee as its SSF?*

9 *(3) If the answer to Question 2 is no, may the Firm continue to contribute to the*
10 *Committee as a nonconnected political committee?*

11 ***Legal Analysis and Conclusions***

12 *(1) Is the Firm a corporation or a partnership under the Act and Commission*
13 *regulations?*

14 The Firm is a partnership under the Act and Commission regulations because it is
15 an LLP under Florida law.

16 As described in more detail below, whether the Firm is a corporation for purposes
17 of the Act determines whether it may pay administrative expenses of the Committee
18 without those amounts being a “contribution or expenditure” as defined in the Act and
19 Commission regulations.¹

¹ The definition of “contribution or expenditure” includes a “gift of money . . . or anything of value” in connection with a Federal election. 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a); *see also* 2 U.S.C. 431(8) and (9); 11 CFR 100.52 and 100.111.

1 Neither the Act, Commission regulations, nor the Act’s legislative history define
2 “corporation” or “partnership.” Instead, the Act’s legislative history and Commission
3 regulations rely on State law to distinguish a partnership from a corporation. For
4 example, in considering how the predecessor of 2 U.S.C. 441b’s prohibition on corporate
5 contributions applied to a “professional corporation composed of doctors, lawyers,
6 architects, engineers, etc.,” the Committee on House Administration stated that
7 “[w]hether or not a professional association is a corporation is a matter determined under
8 State law.” See H.R. Rep. 93-1239, 93d Cong., 2d Sess., at 21 (1974), *reprinted in*
9 *Legislative History of the Federal Election Campaign Act Amendments of 1974* (“1974
10 *Act Legislative History*”), at 655 (1977); accord H.R. Rep. No. 93-1438, 93d Cong., 2d
11 Sess., at 68 (1974) (Conf. Rep.), *reprinted in 1974 Act Legislative History*, at 1012
12 (1977).²

13 The Commission created a limited exception to the application of State law when
14 it promulgated regulations with respect to a different business form, limited liability
15 companies (“LLCs”). While Commission regulations define an LLC as “a business
16 entity that is recognized as a limited liability company under the laws of the State in
17 which it is established,” the regulations treat as corporations LLCs that elect to be treated
18 as corporations by the Internal Revenue Service under 26 CFR 301.7701-3. 11 CFR
19 110.1(g)(1) to (3). However, in promulgating its LLC rules, the Commission emphasized
20 that:

² Commission regulations addressing membership organizations, cooperatives and corporations without capital stock similarly state that “[t]he question of whether a professional organization is a corporation is determined by the law of the State in which the professional organization exists” [emphasis added]. 11 CFR 114.7(d).

1 [Section 110.1(g)(1) to (3)] should be viewed as a narrow exception to its
2 general practice of looking to State law to determine corporate status. The
3 Commission will continue to treat all entities that qualify as corporations
4 under State law as corporations for FECA purposes.

5
6 *Explanation and Justification to Final Rules on Treatment of Limited Liability*

7 *Companies Under the Federal Election Campaign Act, 64 FR 37397, 37398 (July 12,*
8 *1999) (“LLC E&J”).*

9 Thus, because the Firm is not an LLC, the Commission looks to State law in the
10 Firm’s State of organization to determine whether the Firm is a corporation.

11 Accordingly, because the Firm is organized and operates as an LLP under the laws of
12 Florida, and not as a corporation, it is treated as a partnership under the Act and
13 Commission regulations.³

14 *(2) May the Firm administer and financially support the Committee as its SSF?*

15 No, because the Firm is a partnership, it may not pay the Committee’s
16 administrative expenses if these amounts exceed \$5,000 per calendar year.

17 Although the Act generally prohibits a corporation from making contributions or
18 expenditures in connection with a Federal election, the Act exempts from the definition
19 of “contribution or expenditure” a corporation’s costs for establishing, administering, or
20 soliciting contributions to, its SSF established for political purposes. *See* 2 U.S.C.

21 441b(a) and 441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii) and 114.2(b). However, the Act
22 generally does not extend to a partnership the ability granted to a corporation to set up an
23 SSF and avail itself of the contribution and expenditure exemptions. *See, e.g.,*

³ This conclusion is consistent with the Firm’s operation as a partnership in other States. It is also consistent with previous advisory opinions involving limited liability partnerships where the Commission treated these entities as partnerships for purposes of the Act and Commission regulations. *See* Advisory Opinions 2006-13 (Spivack) and 2005-20 (Pillsbury Winthrop Shaw Pittman).

1 Advisory Opinions 2001-07 (NMC PAC), 1991-1 (Deloitte & Touche PAC) and 1990-20
2 (Bradbury, Bliss); *see also* 2 U.S.C. 441b(b)(2)(C) and 11 CFR 114.1(a)(2)(iii). Because
3 the Firm is not a corporation under the Act and Commission regulations, the Firm may
4 not treat the Committee as its SSF and may not treat disbursements for the costs for
5 administering the Committee, or for soliciting contributions to the Committee, as exempt
6 from the definition of “contribution or expenditure” in the Act and Commission
7 regulations.

8 *(3) If the answer to Question 2 is no, may the Firm continue to contribute to the*
9 *Committee as a nonconnected political committee?*

10 Yes, the Firm may make contributions to the Committee of up to \$5,000 per year.

11 A partnership is a person under the Act and Commission regulations. 2 U.S.C.
12 431(11); 11 CFR 100.10. As such, a partnership is limited to contributing no more than
13 \$5,000 per year to a nonconnected committee. *See* 2 U.S.C. 441a(a)(1)(C) and 11 CFR
14 110.1(d).⁴ Thus, the Firm may make contributions of up to \$5,000 per year to the
15 Committee. In addition, these contributions are attributable both to the Firm and to its
16 partners.⁵ 11 CFR 110.1(e)(1) and (2).

⁴ Further, contributions by the Firm to the Committee must be paid for with funds from permissible sources (*i.e.*, funds not prohibited by 2 U.S.C. 441b, 441c, 441e, 441f, and 441g).

⁵ Although you assert that the Firm’s election to classify itself as an association taxable as a corporation for federal tax purposes would make it difficult (or impossible) for the Firm to comply with section 110.1(e)(1), it is not clear why the Firm could not attribute contributions among the Firm’s partners in proportion to partners’ shares of Firm profits, or pursuant to an agreement among partners, so long as no portion of the contribution comes from profits of a partner who is a prohibited source (*e.g.*, a corporation). *See* 11 CFR 110.1(e). It is also not clear why the Firm could not attribute contributions among the Firm’s partners in proportion to their ownership interests in the Firm. *Id.*

1 The Commission expresses no opinion regarding any tax ramifications of the
2 proposed activities because those questions are not within the Commission's jurisdiction.

3 This response constitutes an advisory opinion concerning the application of the
4 Act and Commission regulations to the specific transaction or activity set forth in your
5 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
6 of the facts or assumptions presented, and such facts or assumptions are material to a
7 conclusion presented in this advisory opinion, then the requestor may not rely on that
8 conclusion as support for its proposed activity. All cited advisory opinions are available
9 on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Donald F. McGahn II
Chairman

1 ADVISORY OPINION 2008-05

2
3 Christopher DeLacy, Esq.
4 Holland & Knight LLP
5 2099 Pennsylvania Ave., N.W., Suite 100
6 Washington, D.C. 20006-6081

DRAFT B

7
8 Dear Mr. DeLacy:

9 We are responding to your advisory opinion request on behalf of Holland &
10 Knight (the "Firm"), concerning the application of the Federal Election Campaign Act of
11 1971, as amended (the "Act"), and Commission regulations to the Firm's status as a
12 corporation or a partnership under the Act and Commission regulations. The Firm asks if
13 it may administer and "financially support" the Holland & Knight Committee for
14 Effective Government (the "Committee") as its separate segregated fund ("SSF").

15 The Commission concludes that the Firm is a corporation under the Act and
16 Commission regulations, and not a partnership. Hence, the Firm may administer the
17 Committee as its SSF, and it may pay certain Committee expenses described below.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on
20 May 13, 2008, and your emails received on May 15, 2008 and June 26, 2008.

21 The Firm is a law firm that is a limited liability partnership ("LLP") organized
22 under the laws of Florida. On October 1, 2007, the Firm elected to classify itself as an
23 association taxable as a corporation for federal tax purposes pursuant to 26 CFR
24 301.7701-3. The Firm will continue to be treated as an LLP under Florida law and the
25 law of all other states in which it operates. The Firm will be taxed as a partnership in

1 Massachusetts and Florida, although it will be taxed as a corporation in other States in
2 which it operates.

3 The Committee filed a statement of organization on December 12, 2006, and is a
4 nonconnected multicandidate committee.

5 ***Questions Presented***

6 *(1) Is the Firm a corporation or a partnership under the Act and Commission*
7 *regulations?*

8 *(2) May the Firm administer and financially support the Committee as its SSF?*

9 ***Legal Analysis and Conclusions***

10 *(1) Is the Firm a corporation or a partnership under the Act and Commission*
11 *regulations?*

12 The Firm is a corporation and not a partnership under the Act and Commission
13 regulations because the Firm has elected to be taxed as a corporation by the IRS.

14 As described in more detail below, whether the Firm is a corporation for purposes
15 of the Act determines whether it may pay administrative expenses of the Committee
16 without those amounts being a “contribution or expenditure” as defined in the Act and
17 Commission regulations.¹

18 Neither the Act, nor Commission regulations define “corporation” or
19 “partnership.” Instead, while Commission regulations generally rely on State law to
20 distinguish a “partnership” from a “corporation,” specific regulations govern limited

¹ The definition of “contribution or expenditure” includes a “gift of money . . . or anything of value” in connection with a Federal election. 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a); *see also* 2 U.S.C. 431(8) and (9); 11 CFR 100.52 and 100.111.

1 liability companies (“LLCs”), a form of business entity that is similar to LLPs. Under
2 these rules, LLCs that elect to be treated as corporations by the Internal Revenue Service
3 under 26 CFR 301.7701-3 are also treated as corporations for purposes of the Act.
4 11 CFR 110.1(g)(2) to (3). The Explanation and Justification for these rules explains that
5 to treat as corporations LLCs that elect to be taxed as corporations advances the
6 legislative purpose of the Act’s prohibition against corporate contributions, *i.e.*,
7 preventing conversion of the “ ‘substantial aggregations of wealth amassed by the special
8 advantages which go with the corporate form of organization’ ” into “ ‘political war
9 chests.’ ” *See Explanation and Justification to Final Rules on Treatment of Limited*
10 *Liability Companies Under the Federal Election Campaign Act*, 64 FR 37397, 37399
11 (July 12, 1999) (“LLC E&J”), citing *FEC v. National Right to Work Committee*, 459 U.S.
12 197, 207 (1982). The Commission reasoned:

13 When an LLC elects corporate status for IRS purposes, it is essentially
14 telling the IRS that its organizational structure and functions are more akin
15 to a corporation than a partnership. This allows the LLC to accumulate
16 capital at the corporate level, and to take advantage of favorable tax
17 treatment of corporate losses and dividends received. Rather than
18 attempting to determine whether an LLC more closely resembles a
19 corporation versus a partnership, or simply classifying an LLC as a
20 partnership without any reference to its actual structure or form, the
21 Commission believes it can most effectively carry out [the Act’s] intent by
22 classifying LLCs according to their federal tax status, which most
23 accurately describes whether an LLC’s structure and function are more
24 akin to a “corporation” or a “partnership.”

25 LLC E&J at 37399.

26 Here, the Firm has elected to be taxed as a corporation by the IRS, thereby in
27 effect “telling the IRS that its organizational structure and functions are more akin to a
28 corporation than a partnership” and putting itself into a position “to accumulate capital at

1 the corporate level, and to take advantage of favorable tax treatment of corporate losses
2 and dividends received.” *Id.* Moreover, the Firm is also taxed as a corporation in all
3 States in which it operates, except Florida and Massachusetts. Finally, like corporations
4 and LLCs, the Firm, as an LLP, provides limited liability to its owners. *See Austin v.*
5 *Michigan Chamber of Commerce*, 494 U.S. 652, 658-659 (1990) (noting that the limited
6 liability enjoyed by corporations is one of the “special advantages” granted by State law
7 “that enhance[s] their ability to attract capital and to deploy their resources in ways that
8 maximize the return on their shareholders’ investments”). Thus, the same rationale that
9 has led the Commission to treat as corporations those LLCs that elect to be taxed as
10 corporations also leads the Commission to conclude here that the Firm is a corporation
11 for purposes of the Act, even though the Firm is an LLP and not an LLC.

12 (2) *May the Firm administer and financially support the Committee as its SSF?*

13 Yes, because the Firm is a corporation, it may pay for certain of the Committee’s
14 expenses described below.

15 Although the Act generally prohibits a corporation from making contributions or
16 expenditures in connection with a Federal election, the Act and Commission regulations
17 exempt from the definition of “contribution or expenditure” a corporation’s costs for
18 establishing, administering, or soliciting contributions to, its SSF established for political
19 purposes. *See* 2 U.S.C. 441b(a) and 441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii) and 114.2(b).
20 Therefore, the Firm may pay the costs for administering the Committee and for soliciting
21 contributions to the Committee. These payments would be exempt from the definition of
22 “contribution or expenditure” in the Act and Commission regulations. *Id.*

1 The Commission notes that the Committee must also file an amended Statement
2 of Organization as an SSF, listing the Firm as its connected organization, no later than ten
3 days after the issuance of this advisory opinion. *See* 2 U.S.C. 433(a) and (b); 11 CFR
4 102.2(a) and (b). In addition, the Committee must file reports with the Commission as an
5 SSF rather than as a nonconnected committee. Finally, the Commission also notes that,
6 once the Firm files its amended Statement of Organization, it may no longer make
7 contributions as a partnership.

8 The Commission expresses no opinion regarding any tax ramifications of the
9 proposed activities because those questions are not within the Commission's jurisdiction.

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

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On behalf of the Commission,

Donald F. McGahn II
Chairman