



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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ADVISORY OPINION 2009-18

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Washington, DC 20006

Dear Ms. Laham and Mr. Renaud:

We are responding to your advisory opinion request on behalf of Penske Truck Leasing Co., L.P. ("Joint Venture"), its general partner Penske Truck Leasing Corporation ("Penske"), and the Joint Venture's separate segregated fund ("SSF") Penske Truck Leasing Co., L.P. Political Action Committee ("Penske PAC"). The request concerns the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the possible disaffiliation of the Penske PAC and the SSF of the General Electric Company ("GE"), the General Electric Company PAC ("GEPAC").

The Commission concludes that Penske PAC and GEPAC may disaffiliate because the GE limited partners have divested themselves of majority ownership status and relinquished majority control of the Joint Venture Advisory Committee to the Penske affiliates.

Background

The facts presented in this advisory opinion are based on your letter and attachments received on June 17, 2009, and an e-mail received on July 2, 2009.

a. The Joint Venture

The Joint Venture is a partnership organized under Delaware partnership law. The business of the partnership is the renting, leasing, and servicing of tractors, trailers, and trucks to third party users and acting as a contract and common motor carrier.

In 1988, Penske formed a limited partnership in which affiliates of General Electric Capital Corporation (“GE Capital Corporation”) became limited partners one month later. Although GE Capital Corporation affiliates became involved shortly after the formation of the Joint Venture, they were not involved in the Joint Venture’s actual creation.¹

In 1988, affiliates of Penske owned 69% of the Joint Venture and affiliates of GE Capital Corporation owned 31%. In 2002, GE affiliates owned 79% of the Joint Venture. Since then, the ownership level of the GE affiliates has steadily decreased, though remaining above 50%, until the execution of the Joint Venture’s Third Amended and Restated Agreement of Limited Partnership of Penske Truck Leasing Co., L.P. (“Third Restated Agreement”) on March 26, 2009.

Currently, Penske, an indirect and wholly owned subsidiary of Penske Corporation, serves as the sole general partner. Of the current eight limited partners, four are GE companies² and four are Penske companies.³

b. The Third Restated Agreement

Following the execution of the Third Restated Agreement, the GE companies’ ownership level of the Joint Venture fell to 49.90%. Currently, Penske, the only general partner, owns 11.70% of the Joint Venture, and the combined ownership of the Penske

¹ In 1982, Penske entered into a joint partnership with Hertz Truck Division. In 1988, Penske purchased Hertz’s remaining share of the joint venture and formed a partnership with General Electric. See <http://www.gopenske.com/penske/history.html> (last visited July 9, 2009).

² The GE companies, and their respective limited partner ownership interest in the Joint Venture, are: General Electric Credit Corporation of Tennessee (“GE Tennessee”), a Tennessee corporation – .50%; and RTLAC Acquisition Corp. (“RTLAC-AC”) – 35.36%, Logistics Holding Corp. (“Holdco”) – 12.09%, and NTFC Capital Corporation (“NTFC”) – 1.95%, all Delaware corporations. Each of these companies is an affiliate of GE Capital Corporation.

³ The Penske companies, and their respective limited partners are: PTLC Holdings Co., LLC (“PTLC-LLC”) – 18.36%, PTLC2 Holdings Co. LLC (“PTLC2-LLC”) – 10.02%, PTLC3 Holdings Co., LLC (“PTLC3-LLC”) – 1.00%, each is a limited liability company organized under the laws of Delaware; and Penske Automotive Group, Inc. – 9.02%, a Delaware corporation.

general partner and the Penske limited partners is 50.10%. Third Restated Agreement at Schedule A.

1. General Operations of the Joint Venture

Under the Third Restated Agreement, Penske, as the general partner, has broad management control of the affairs of the Joint Venture. The “[g]eneral [p]artner shall perform or cause to be performed all management and operational functions relating to the business of the” Joint Venture. *Id.* at Article 6.3(b). Moreover, the limited partners “shall not participate in the control of the business of the [Joint Venture] and shall have no power to act for or bind the [Joint Venture].” *Id.* at Article 6.1(a). The limited partners do, however, have the right to approve certain actions proposed to be taken by the general partner, and certain voting rights, as described more fully in the analysis below.

2. The Advisory Committee

Rather than a board of directors, the Joint Venture has an Advisory Committee consisting of five members, three appointed by the general partner, Penske, and two appointed by the GE companies.⁴ *Id.* at Article 6.4(a). According to the Third Restated Agreement: “the Advisory Committee shall not be deemed to possess and shall not exercise any power that, if possessed or exercised by a [l]imited [p]artner, would constitute participation in the control of the business.” *Id.* at Article 6.4(h).

According to the requestors, GE members of the Advisory Committee often use GE resources to fulfill their limited duties on the Advisory Committee. The Penske members use Penske resources to fulfill their duties.

3. Financing the Joint Venture

Before the execution of the Third Restated Agreement, the Joint Venture received financing from GE Capital Corporation at interest rates and other terms and conditions the same as or no less favorable than those provided to wholly owned subsidiaries of GE Capital Corporation. While this credit line continues to be the Joint Venture’s primary source of financing, the terms of the credit line changed when the GE companies became minority owners of the Joint Venture. Except for the rates, according to Requestors, “the nature of the contractual agreement is now much more akin to agreements with third-party lenders, with affirmative and negative covenants, events of default, [and] reporting obligations.” Furthermore, GE Capital Corporation has rights in the future to reset the rates to market rates and to make the Joint Venture refinance the debt with third-party

⁴ In addition, Penske Automotive Group, Inc., a limited partner in the Joint Venture, has the right to have a non-voting observer on the Advisory Committee, which is entitled to receive all materials and information distributed to members of the Advisory Committee in connection with its meetings, and access to the Joint Venture’s management and records as if the non-voting observer were a member of the Advisory Committee. Third Restated Agreement at Article 6.4(a).

lenders. Various Penske companies also have arm's-length commercial dealings with GE companies.

c. The Penske PAC

In 2002, the Joint Venture's separate segregated fund, Penske PAC, was formed. Since 2002, Penske PAC has identified GE Credit Corporation of Tennessee as a connected organization on its FEC Form 1, due to the ownership level of the GE companies to the Joint Venture, and has identified GEPAC as an affiliated committee.⁵

Additional factual information is provided in the legal analysis that follows.

Question Presented

Are Penske PAC and GEPAC disaffiliated?

Legal Analysis and Conclusions

Yes, Penske PAC is no longer affiliated with GEPAC, following the execution of the Third Restated Agreement in which the GE companies divested themselves of their majority ownership status in the Joint Venture and relinquished equal control of the Joint Venture's governing body to the Penske companies.

a. Applicable Law

The Act and Commission regulations provide that political committees, including SSFs, that are established, financed, maintained, or controlled by the same corporation, labor organization, person, or group of persons, including any parent, subsidiary, branch, division, department, or local unit thereof, are affiliated. *See* 11 CFR 100.5(g)(2) and 110.3(a)(1)(ii). Contributions made to or by such political committees are considered to have been made to or by a single political committee. 2 U.S.C. 441a(a)(5); 11 CFR 100.5(g)(2) and 110.3(a)(1).

b. Per Se Affiliation

Commission regulations identify organizations that are *per se* affiliated, and hence whose SSFs are *per se* affiliated. These organizations include a single corporation and/or its subsidiaries, and the same person or group of persons. *See* 11 CFR 100.5(g)(3)(i) and (v); 110.3(a)(2)(i) and (v). The Joint Venture is not a subsidiary of GE because it is not majority-owned by GE or by any GE companies. Moreover, the Penske partners in the Joint Venture are separate from, and not a subsidiary, branch, division, department, or local unit of GE or any GE companies. Nor do the Joint Venture and the

⁵ GEPAC is the General Electric Company's SSF, and GE Capital Corporation is the General Electric Company's financing unit. *See* http://gecommercialfinance.gecapsol.com/cms/servlet/cmsview/ComFin_Corp/prod/en/main/index.html (last visited July 9, 2009).

GE companies come within any of the remaining categories of organizations identified as *per se* affiliated in Commission regulations. *See* 11 CFR 100.5(g)(1)-(3) and 110.3(a)(1)-(2). Accordingly, the Joint Venture is not *per se* affiliated with the GE companies.

c. Affiliation Factors

In the absence of *per se* affiliation, Commission regulations provide for an examination of various circumstantial, non-exhaustive factors in the context of the overall relationship to determine whether one sponsoring organization has established, financed, maintained, or controlled the other sponsoring organization or committee, and hence, whether their respective SSFs are affiliated. *See* 11 CFR 100.5(g)(4)(i)-(ii) and 110.3(a)(3)(i)-(ii); Advisory Opinion 2007-13 (United American Nurses); *see also* Advisory Opinion 2004-41 (CUNA Mutual).

(A) *Whether one sponsoring organization owns a controlling interest in the voting stock or securities of another sponsoring organization. 11 CFR 100.5(g)(4)(ii)(A) and 110.3(a)(3)(ii)(A).*

According to the Third Restated Agreement, the GE companies own a 49.90% interest in the Joint Venture, down from 79% in 2002. Therefore, the GE companies are the holder of a minority interest that is also a limited partnership interest in the Joint Venture. No GE company owns any voting interest in Penske Corporation or any Penske affiliate.⁶ Under the facts presented, the GE companies no longer have a controlling interest in the Joint Venture. Thus, the application of this factor to these facts does not suggest that the entities are affiliated.

(B) *Whether a sponsoring organization or committee has the authority or ability to direct or participate in the governance of another sponsoring organization or committee through provisions of constitutions, bylaws, contracts or other rules, or through formal or informal practices or procedures. 11 CFR 100.5(g)(4)(ii)(B) and 110.3(a)(3)(ii)(B).*

The general partner, Penske, has broad management control of the affairs of the Joint Venture. Without need for approval from the limited partners, Penske is charged with: expending capital and revenues of the Joint Venture in furtherance of the Joint Ventures' business; paying expenses, debts, and obligations of the Joint Venture; making investments; entering into and terminating contracts with third parties; maintaining adequate records and accounts; purchasing insurance and bonds; employing and terminating consultants, accountants, attorneys, and "others" for the Joint Venture; and incurring indebtedness by the Joint Venture. Third Restated Agreement at Article 6.3(b)(i)-(viii). In addition, a simple majority vote of the Advisory Committee is needed to approve most of the activities relating to the Joint Venture, including: adopting an annual budget, changing the Joint Venture's policies related to credit approval levels;

⁶ Penske Transportation Holding Corporation, a subsidiary of Penske Corporation, owns 100% of the issued and outstanding voting common shares of Penske.

approving officers of the Joint Venture; and commencing actions and claims by the Joint Venture. *Id.* at Article 6.5(b)(ii), (vii), (viii), and (xiii). With the Penske general partner appointing three of the five members on the Advisory Committee, Penske companies have effective control of these decisions.

However, the Third Restated Agreement contains certain provisions intended to protect the GE limited partners' investments in the Joint Venture. Under these provisions, a supermajority of four members of the Advisory Committee is needed to approve certain decisions, such as incurring non-vehicle business debt in excess of \$50 million; changing business conduct policies, name, or accounting policies or methods; making acquisitions in excess of \$10 million; changing the character of the Joint Venture's business from what it did on March 26, 2009; declaring distributions other than annual distributions; increasing or amending compensation arrangements for "direct services" of Roger Penske between the partnership and Mr. Penske or any of his affiliates; and changing auditors. *Id.* at Article 6.5(b)(i), (iii)-(vi), (ix)-(xii). In addition, the general partner may not amend the Third Restated Agreement without written approval from the GE limited partners. *Id.* at Articles 6.5(a)(v) and 2.47. Last, any determination to make a public offering of interests in the Joint Venture requires the unanimous written approval of all partners. *Id.* at Article 6.5(c).

In joint venture situations, the Commission bases its affiliation conclusions on the relationships between the sponsoring organizations and the control and influence exerted by the owner entities on the joint venture. *See* Advisory Opinions 2001-18 (BellSouth) and 1994-11 (FMC). In this situation, the GE companies do not control the day-to-day operations of the Joint Venture. The general partner has "full and complete charge of all affairs of the [Joint Venture], and the management and control of the [Joint Venture's] business shall rest exclusively with the [g]eneral [p]artner." Third Restated Agreement at Article 6.3(a) and (b)(i)-(viii). Moreover, the general partner has a "fiduciary responsibility for the safekeeping and use of all funds and assets (including records)" of the Joint Venture and "shall not employ, or permit another to employ, such fund or assets in any manner except for the exclusive benefit of the [Joint Venture]." *Id.* at Article 6.2.

While a majority of four members of the Advisory Committee is needed to approve certain decisions, including incurring non-vehicle business debt in excess of \$50 million and changing business conduct policies, the Commission has, in the past, concluded that limited partners in a joint venture were not affiliated with the joint venture, despite the existence of supermajority voting rights. *See, e.g.,* Advisory Opinion 2001-07 (Nuclear Management Company PAC) (disaffiliation even though a supermajority vote of all members is required to issue new interests in the joint venture, amend the operating agreement in connection with issuing new interests, elect directors other than company representatives, and amend articles of organization). Thus, the application of this factor to these facts does not suggest that the entities are affiliated.

- (C) *Whether a sponsoring organization or committee has the authority or ability to hire, appoint, demote or otherwise control the officers or other decisionmaking employees of another sponsoring organization or committee. 11 CFR 100.5(g)(4)(ii)(C) and 110.3(a)(3)(ii)(C).*

As mentioned above, the GE companies appoint two members to the Joint Venture's Advisory Committee. The general partner has the authority to appoint officers of the Joint Venture with the approval of three members of the Advisory Committee. Third Restated Agreement at Article 6.5(b)(viii). Therefore, the GE companies do not have the ability to veto the appointment of officers. Except for the fact that the approval of four members of the Advisory Committee is required to increase or amend the compensation arrangements for Mr. Penske's services to the Joint Venture, the GE companies do not have the authority or ability to hire, appoint, demote, or otherwise control the officers or other decisionmaking employees of the Joint Venture. *Id.* at Article 6.5(b)(xii). Nor do the GE companies have the authority or ability to hire, appoint, demote, or otherwise control the officers or decisionmakers of Penske PAC. Thus, the application of this factor to these facts does not suggest that the entities are affiliated.

- (D) *Whether a sponsoring organization or committee has common or overlapping membership with another sponsoring organization or committee which indicates a formal or ongoing relationship between the sponsoring organizations or committees. 11 CFR 100.5(g)(4)(ii)(D) and 110.3(a)(3)(ii)(D).*

Neither the Joint Venture nor the GE companies is a labor organization, membership organization, a cooperative, or a trade association. Thus, this factor does not apply.

- (E) *Whether a sponsoring organization or committee has common or overlapping officers or employees with another sponsoring organization or committee which indicates a formal or ongoing relationship between the organizations or committee. 11 CFR 100.5(g)(4)(ii)(E) and 110.3(a)(3)(ii)(E).*

and

- (F) *Whether a sponsoring organization or committee has any members, officers or employees who were members, officers, or employees of another sponsoring organization or committee which indicates a formal or ongoing relationship or the creation of a successor entity. 11 CFR 100.5(g)(4)(ii)(F) and 110.3(a)(3)(ii)(F).*

The Joint Venture and the GE companies have one official overlapping decision-maker, namely Mr. Penske. Mr. Penske founded the Joint Venture, serves as chairman of

the general partner, Penske, and sits on the Board of Directors of GE.⁷ In addition, there are two GE members on the Advisory Committee of the Joint Venture, and the CEO of the Joint Venture holds an “honorific title” with GE Capital Corporation, which the requestors characterize as “a holdover from when the Joint Venture was majority owned by GE entities.” Currently, there are no other overlapping officers, directors, or employees between the Joint Venture and the GE companies. The requestors have identified no former officers or employees of the GE companies who may work for the Joint Venture or Penske companies other than what “might be expected in the normal employment market.” Nor is there any program or agreement for either the Joint Venture or the Penske companies to hire former GE employees or for GE to hire former Joint Venture or Penske employees.

In past advisory opinions, previously affiliated SSFs were deemed no longer affiliated despite the fact that there was an overlap in officers in the parent organizations. In Advisory Opinion 2007-13 (United American Nurses), there was only one official overlapping decision maker, the union president, and one unofficial overlapping decision maker, the union vice president. Similarly, in Advisory Opinion 1996-23 (ITT), three previously affiliated SSFs were deemed no longer affiliated after a corporate reorganization, despite the fact there was an overlap of three members on one company’s eight-person board of directors, and four members on another company’s eleven-person board. Accordingly, Mr. Penske’s dual positions with Penske and as one of 16 members of GE’s Board of Directors are not by themselves a strong indication of affiliation.⁸

In addition, the two GE members are in the minority of the five-person Advisory Committee to the Joint Venture. The Commission has examined joint ventures in which partners have appointed a minority of members to the governing body of the joint venture, and has concluded that this factor did not weigh in favor of affiliation. *See* Advisory Opinion 1984-36 (American Health Capital) (in a joint venture owned 60-40, the Commission concluded that the parent of the managing partner corporation that owned a 40% interest, but appointed only four of the nine members of the joint venture’s board (while the other owner corporation appointed five), was not affiliated with the joint venture partnership). Thus, the application of this factor to these facts does not suggest that the entities are affiliated.

(G) *Whether a sponsoring organization or committee provides goods in a significant amount or on an ongoing basis to another sponsoring organization or committee. 11 CFR 100.5(g)(4)(ii)(G) and 110.3(a)(3)(ii)(G).*

and

(H) *Whether a sponsoring organization or committee causes or arranges for funds in a significant amount or on an ongoing basis to be provided to another sponsoring organization or committee. 11 CFR 100.5(g)(4)(ii)(H) and 110.3(a)(3)(ii)(H).*

⁷ Mr. Penske also serves as Chairman of the Board and CEO of both Penske Corporation and Penske Automotive Group, Inc.

⁸ *See* <http://www.ge.com/company/leadership/directors.html> (last visited July 9, 2009).

The Joint Venture's primary source of financing is a revolving line of credit held by GE Capital Corporation. This line of credit was established prior to the execution of the Third Restated Agreement. Through it, the Joint Venture has received financing from GE Capital Corporation at interest rates and on other terms and conditions that are the same as or no less favorable to the Joint Venture than would be provided if the Joint Venture were a wholly owned subsidiary of GE Capital Corporation.

Following the execution of the Third Restated Agreement, however, the terms of the contractual agreement establishing the line of credit were renegotiated. The renegotiated agreement gives GE Capital Corporation the right to reset the rates to market rates and to make the Joint Venture refinance the debt with third-party lenders. While GE Capital Corporation has not yet exercised those rights, the requestors anticipate that GE Capital Corporation will exercise those rights in the future. Request at 12. Moreover, the current terms of the contractual agreement to the line of credit are "more akin to agreements with third-party lenders, with affirmative and negative covenants, events of default, [and] reporting obligations." Requestors' Supplemental Information at 1.

The Commission has concluded in prior advisory opinions that disaffiliated companies may maintain some customer-supplier relationships. *See* Advisory Opinions 2000-28 (ASHA), 2003-21 (Lehman Brothers), 2004-41 (CUNA Mutual), 2007-13 (United American Nurses), and 1996-42 (Lucent Technologies). The provision of funding or goods and services between the companies in these prior advisory opinions was either not in significant amounts or represented arm's length transactions at commercially reasonable rates, and the Commission recognized that those "transactions, rather than illustrating the continued affiliation of the two organizations, instead can be seen as part of the process to establish the independence and separation of [an entity] from its organizational parent." Advisory Opinion 2007-13 (United American Nurses) *quoting* Advisory Opinion 2000-28 (American Seniors Housing Association).

Similarly, here, the newly-renegotiated terms of the line of credit between GE Capital Corporation and the Joint Venture may be seen as part of the process by which the Joint Venture is separating from the GE companies.

Thus, the application of this factor to these facts does not suggest that the entities are affiliated.

(I) Whether a sponsoring organization or committee had an active or significant role in the formation of another sponsoring organization or committee. 11 CFR 100.5(g)(4)(ii)(I) and 110.3(a)(3)(ii)(I).

The GE companies were not involved in the formation of the Joint Venture, but affiliates of GE Capital Corporation became involved shortly after its formation in 1988. The Joint Venture and its employees established Penske PAC in 2002, and administer it without the involvement of the GE companies or any employees of the GE companies.

Similarly, there is no indication that the Joint Venture was involved in the formation of GEPAC.⁹ Thus, the application of this factor to these facts does not suggest that the entities are affiliated.

(J) Whether the sponsoring organizations or committees have similar patterns of contributions or contributors which indicate a formal or ongoing relationship between the sponsoring organizations or committees. 11 CFR 100.5(g)(4)(ii)(J) and 110.3(a)(3)(ii)(J).

Penske PAC has not and does not coordinate contributions with GEPAC except to the extent necessary to comply with the shared contribution limits applicable to affiliated committees. There have been no transfers between the two SSFs, and the Joint Venture knows of no overlap between contributors to the two SSFs. Thus, this factor does not indicate that the entities are affiliated.

d. Conclusion

Based on the above analysis, the Commission concludes that the Joint Venture and the GE companies are disaffiliated. The GE companies no longer have a majority interest in the Joint Venture, do not control the day-to-day operations of the Joint Venture or most of its business decisions, and may appoint only a minority of members to the Joint Venture's governing body, the Advisory Committee. In addition, the GE companies were not involved in the formation of Penske PAC and are not involved in its current administration, and the same is true of the Joint Venture and GEPAC. According to requestors, there are not similar patterns of contributors or contributions between the two SSFs. While GE Capital Corporation still provides an open line of credit to the Joint Venture at below-market rates, the parties recently renegotiated the terms of the line of credit such that it is now more akin to agreements with third-party lenders, with affirmative and negative covenants, events of default, and reporting obligations. The requestors have further represented that GE Capital Corporation is expected to exercise its rights in the future to reset the interest rates to market rates and/or to require the Joint Venture to refinance the debt with third parties.

Thus, the Commission concludes that the Joint Venture and the GE companies are no longer affiliated for purposes of the Act. Consequently, Penske PAC and GEPAC may disaffiliate.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in the

⁹ GEPAC registered with the Commission effective January 1, 1993. With respect to the SSFs themselves, each operates independently, and each serves different interests, with the Joint Venture focused on the provision of transportation services and logistics, while GE is a "conglomerate engaged in many lines of business." The Senior Vice President and General Counsel of the Joint Venture serves as Treasurer of Penske PAC. Other employees of the Joint Venture assist in the administration of Penske PAC through an SSF steering committee.

request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. All of the cited advisory opinions are available on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

On behalf of the Commission,

(signed)
Steven T. Walther
Chairman