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AGENDA ITEM
For meeting of November 6, 2014
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November 4, 2014

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS by GMB*
Deputy General Counsel

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Subject: AO 2014-17 (Berkadia) Draft A

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 9:00 am (Eastern Time) on November 6, 2014.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2014-17

2

3

4 Joshua A. James Esq.

5 Bryan Cave LLP

6 1155 F Street, NW

7 Washington, D.C. 20004

8

9

DRAFT A

10 Dear Mr. James:

11 We are responding to the advisory opinion request that you submitted on behalf of
12 Berkadia Commercial Mortgage LLC (“Berkadia”) concerning the application of the Federal
13 Election Campaign Act, 52 U.S.C. §§ 30101-30146 (formerly 2 U.S.C. §§ 431-457) (the “Act”),
14 and Commission regulations to potential trade association solicitations of Berkadia’s
15 administrative and executive personnel. Because Berkadia is wholly owned by two corporations
16 and affiliated with each of them, the Commission concludes that Berkadia may authorize a trade
17 association of which it is a member to solicit its administrative and executive personnel.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on October
20 2, 2014.

21 Berkadia is a limited liability company that has elected to be treated as a partnership
22 under the Internal Revenue Code for federal tax purposes. It was formed as a joint venture by
23 two corporations: Berkshire Hathaway Inc. (“Berkshire”) and Leucadia National Corporation
24 (“Leucadia”).¹ Berkadia also wholly owns one incorporated subsidiary, Berkadia Commercial

¹ Berkshire and Leucadia hold ownership interests in Berkadia through intermediate entities. See Advisory Opinion Request at Attachment A (Oct. 2, 2014) (providing organizational chart of Berkadia’s ownership).

1 Mortgage Inc. Berkadia and its subsidiary currently employ 729 people in the United States and
2 635 people in India.²

3 Berkshire and Leucadia each own a fifty percent interest in Berkadia and share fifty
4 percent of its profits. And they each appoint two individuals to Berkadia’s four-member board
5 of managers (the “Board”). All decisions of the Board require the assent of at least one
6 Berkshire and one Leucadia appointee. The Board controls and manages Berkadia and has the
7 authority to hire and fire its employees. The Board also delegates some of its authority to
8 Berkadia’s officers and to an authorized representative that it appoints; these include a chief
9 executive officer, a president, several executive vice presidents, and a general counsel. None of
10 these officers works for Berkshire or Leucadia.

11 Berkadia is independent of its corporate owners in some respects. Berkadia pays
12 employees with its own funds and treats them as “direct employees” of Berkadia rather than as
13 employees of its corporate owners. Berkadia typically contracts with third parties without
14 involving Berkshire or Leucadia, for example by leasing office space in 73 locations throughout
15 the United States in its own name. Neither Berkshire nor Leucadia is directly liable for
16 Berkadia’s debts because of its LLC status, and with one exception Berkadia is responsible for
17 its own financing arrangements.³

18 Neither Berkadia nor its corporate owners serve as the connected organization of any
19 separate segregated fund (“SSF”). Neither Berkadia’s owners nor its subsidiary corporation are
20 members of any trade association that Berkadia might wish to authorize to solicit its executive

² Berkadia represents that it would limit any solicitations for contributions to those employees who are United States citizens or permanent residents.

³ The one exception is Berkadia’s “rated commercial paper program,” which has been guaranteed by Berkshire.

1 and administrative personnel. Berkadia, however, is currently a member of several trade
2 associations that administer their own SSFs. Berkadia has engaged in “very preliminary talks”
3 with one or more trade associations about possibly allowing one of them to solicit Berkadia’s
4 executive and administrative personnel, but Berkadia has not authorized any trade association to
5 solicit its personnel out of concern that such solicitations may be impermissible.

6 ***Question Presented***

7

8 *May Berkadia permit a trade association of which it is a member to solicit Berkadia’s*
9 *executive and administrative personnel for contributions to the trade association’s SSF, so long*
10 *as Berkadia has provided separate and specific approval of the solicitation and the trade*
11 *association complies with the other requirements of 11 C.F.R. § 114.8?*

12 ***Legal Analysis and Conclusion***

13 Yes, Berkadia may permit a trade association of which it is a member to solicit
14 Berkadia’s executive and administrative personnel for contributions to the trade association’s
15 SSF, so long as Berkadia has provided separate and specific approval of the solicitation and the
16 trade association complies with the requirements of 11 C.F.R. § 114.8.

17 *1. Trade association solicitations*

18 As an exception to the Act’s prohibition on corporate contributions, a corporation and its
19 SSF may solicit the corporation’s solicitable class for contributions to the corporation’s SSF.
20 52 U.S.C. § 30118(b)(4) (formerly 2 U.S.C. § 441b(b)(4)); 11 C.F.R. § 114.1(j). Incorporated
21 trade associations may solicit their executive and administrative personnel and the families of
22 such personnel. They may also solicit their members who are individuals and their families, and
23 members that are unincorporated entities. 52 U.S.C. § 30118(b)(4)(A), (C) (formerly 2 U.S.C.
24 § 441b(b)(4)(A), (C)); 11 C.F.R. §§ 114.7(a), (c), 114.8(i)(2). An incorporated trade association

1 may not solicit contributions from its incorporated members, but it may solicit the stockholders
2 and executive and administrative personnel, and their families, of any incorporated members that
3 provide separate and specific approval to the trade association for the making of such
4 solicitations during a calendar year and that have not approved a solicitation by any other trade
5 association for the same calendar year. 52 U.S.C. § 30118(b)(4)(D) (formerly 2 U.S.C.
6 § 441b(b)(4)(D)); 11 C.F.R. § 114.8(c), (d).

7 Under Commission regulations, contributions by an LLC that elects to be treated as a
8 partnership for tax purposes are treated as contributions from a partnership. 11 C.F.R.
9 § 110.1(g)(2). Unlike corporations, partnerships may contribute directly to federal candidates
10 and political committees. 11 C.F.R. § 110.1(e). But contributions by partnerships are attributed
11 not only to the partnership but also to the partners themselves. *Id.* Thus, a partnership in which
12 each partner is a corporation may not make contributions. *See* Advisory Opinion 2001-07 at 8
13 (Nuclear Management Company PAC) (“NMC PAC”) (concluding that LLC treated as
14 partnership and wholly owned by corporations may not contribute to nonconnected political
15 committee).

16 Berkadia is treated as a partnership under Commission regulations because it is an LLC
17 that has elected to be treated as a partnership under the Internal Revenue Code. *See* 11 C.F.R.
18 § 110.1(g)(2). The Commission’s regulations governing trade association solicitations, however,
19 do not squarely address solicitations of partnerships that are wholly owned by corporations. In
20 general, these solicitation regulations are designed to permit a trade association to solicit *either*
21 its members (if those members are unincorporated) *or* its members’ executive and administrative
22 personnel (if the members are incorporated). *See* 11 C.F.R. §§ 114.7(c), 114.8(c). Here,
23 however, a trade association may not solicit Berkadia directly for contributions because

1 Berkadia’s contributions would be attributed to its corporate owners, who are prohibited from
2 making contributions. And because Berkadia is not treated as a corporation, Commission
3 regulations do not explicitly allow a trade association to solicit Berkadia’s executive and
4 administrative personnel, either. *See, e.g.*, Advisory Opinion 2005-14 (Association of Kentucky
5 Fried Chicken Franchisees) (concluding that national trade association may solicit
6 unincorporated entities that are members of regional associations but not their personnel);
7 Advisory Opinion 1995-27 (National Association of Real Estate Investment Trusts) (concluding
8 that trade association may solicit unincorporated real estate investment trust members but not
9 their personnel).⁴ Thus, the regulations do not clearly indicate how Berkadia may lawfully
10 participate in the SSF of a trade association of which Berkadia is a member.

11 2. *Commission treatment of partnerships and LLCs that may not make contributions*

12 In analogous situations, the Commission has recognized that partnerships (and LLCs
13 electing partnership treatment) wholly owned by corporations “warrant special consideration.”
14 *See* Advisory Opinion 2010-16 at 3 (EmblemHealth Services) (“EmblemHealth”). Specifically,
15 “[t]o avoid prohibiting these types of partnerships from making contributions *and* from
16 establishing and administering [their own SSFs],” the Commission has permitted such entities to
17 pay the administration and solicitation costs of a corporate owner’s SSF, but “only when the
18 partnership is wholly owned by corporations and is affiliated with at least one of the
19 corporations.” *Id.* (citing Advisory Opinion 2009-14 at n.5 (Mercedes-Benz USA *et al.*)).
20 Accordingly, the relevant question here is whether Berkadia is affiliated with at least one of its
21 corporate owners; if so, under the rationale of these prior advisory opinions, Berkadia may be

⁴ The Commission, however, presumed in these advisory opinions that the unincorporated members were permitted by the Act to make direct contributions to federal candidates and political committees. Berkadia’s circumstances are materially different from those unincorporated entities as it may not contribute to a trade association’s SSF.

1 treated as a corporation for purposes of trade association SSF solicitations.

2 Political committees, including SSFs, that are established, financed, maintained, or
3 controlled by the same corporation, labor organization, person, or group of persons, including
4 any parent, subsidiary, branch, division, department, or local unit thereof, are affiliated.

5 52 U.S.C. § 30116(a)(5) (formerly 2 U.S.C. § 441a(a)(5)); 11 C.F.R. §§ 100.5(g)(2),
6 110.3(a)(1)(ii). Committees' sponsoring organizations are also considered to be affiliated with
7 each other when such organizations are established, financed, maintained or controlled by the
8 same corporation, person, or group of persons. *See* 11 C.F.R. §§ 100.5(g)(4), 110.3(a)(3).

9 Commission regulations identify certain organizations that are *per se* affiliated, and hence
10 whose SSFs are *per se* affiliated. These organizations include a single corporation and its
11 subsidiaries, as well as a single person or group of persons. 11 C.F.R. §§ 100.5(g)(3)(i),
12 110.3(a)(2)(i). Under the Act, a parent-subsidiary relationship, and thus *per se* affiliation, is
13 created when a parent company owns a majority interest in another organization. *See* Advisory
14 Opinion 2003-28 (Horizon Lines) (finding *per se* affiliation where corporation owned controlling
15 interest in LLC); Advisory Opinion 1985-27 (R.J. Reynolds Industries) (finding *per se* affiliation
16 where parent corporation owned controlling interest in another corporation); *see also* Advisory
17 Opinion 2003-21 (Lehman Brothers Holdings) (finding that minority ownership interest in
18 corporation does not create parent-subsidiary relationship). Berkadia is not *per se* affiliated with
19 Berkshire or Leucadia because neither owns a majority interest in Berkadia.

20 If *per se* affiliation is absent, the Commission examines “the relationship between
21 organizations that sponsor committees, between the committees themselves, [and] between one
22 sponsoring organization and a committee established by another organization to determine
23 whether [the organizations] are affiliated.” *See* 11 C.F.R. § 100.5(g)(4)(i). Commission

1 regulations provide a non-exhaustive list of ten “circumstantial factors” to be considered “in the
2 context of the overall relationship” to determine whether the respective committees or their
3 sponsoring organizations are appropriately considered affiliated. 11 C.F.R. §§ 100.5(g)(4)(i)-(ii),
4 110.3(a)(3)(i)-(ii).

5 In cases of joint venture partnerships or LLCs owned “50-50” by two corporations, as is
6 the case here, the Commission has consistently found the partnership or LLC to be affiliated with
7 both corporate owners under the relevant affiliation factors. For example, in Advisory Opinion
8 1997-13 (United Space Alliance PAC) (“USA PAC”), the Commission found that the LLC was
9 affiliated with its two corporate owners because the owners selected an equal number of
10 individuals to an advisory board overseeing the LLC’s operations, both owners had to approve
11 the LLC’s “significant policy determinations,” and officials from both companies selected the
12 LLC’s officers. *Id.* at 3 (citing 11 C.F.R. § 110.3(a)(3)(ii)(A), (B), (C), (D)). Similarly, in
13 Advisory Opinion 1992-17 (Du Pont Merck Program for Active Citizenship) (“Du Pont”), the
14 Commission found that the LLC was affiliated with its two corporate owners because the owners
15 each controlled fifty percent of the LLC’s Board of Directors and the assent of each was needed
16 for the LLC’s major decisions, including the hiring and firing of key employees. *See id.* at 3
17 (citing 11 C.F.R. § 110.3(a)(3)(ii)(B), (C), (E), (F), (I)); *see also* Advisory Opinion 1994-09
18 (Armco Steel) (finding that LLC was affiliated with its two corporate owners because the owners
19 shared equal control of the LLC’s board).

20 Berkshire and Leucadia jointly established Berkadia and own equal shares of it. That
21 they also share equal control of Berkadia is evidenced by the fact that the two corporations each
22 appoint an equal number of individuals to Berkadia’s Board that oversees its operations, and at
23 least one appointee of each corporation must approve all of the Board’s actions. Significantly,

1 the two corporate owners also share equally in Berkadia's profits. These factors of shared,
2 exclusive control indicate that Berkadia is affiliated with both Berkshire and Leucadia.⁵ *See*
3 11 C.F.R. § 110.3(a)(3)(ii)(B), (C), (D).

4 *3. Applying the trade association solicitation rules to Berkadia*

5 The Commission has concluded that partnerships and LLCs that "warrant special
6 consideration" under the foregoing criteria, as Berkadia does here, may establish and administer
7 an SSF even though such entities may not otherwise do so under the Act. *See* Advisory Opinion
8 1997-13 (USA PAC) (concluding that joint venture owned 50-50 by two corporations and
9 affiliated with both of them may pay establishment, administration, and solicitation costs of
10 political committee); Advisory Opinion 1992-17 (Du Pont) (same); Advisory Opinion 1994-09
11 (Armco Steel) (same); Advisory Opinion 1996-49 (PrimeCo Personal Communication)
12 ("PrimeCo") (concluding that joint venture partnership owned 50-25-25 by three corporations
13 and affiliated with the 50% owner but not the other two could establish and administer an SSF).
14 And the executive and administrative personnel of such partnerships or LLCs may be solicited
15 for contributions to their SSF or an SSF of their affiliated corporate owner, even though the Act
16 does not otherwise allow partnership personnel to be solicited for contributions to an SSF. *See*
17 Advisory Opinion 2010-16 (EmblemHealth) (finding that SSF connected to corporate owner of
18 affiliated LLC may solicit LLC's executive and administrative personnel); Advisory Opinion
19 1994-11 (FMC Corporation) (same); Advisory Opinion 1996-49 (PrimeCo) (concluding that SSF
20 established by joint venture partnership may solicit executive and administrative personnel of

⁵ That Berkshire and Leucadia hold ownership interest through intermediate entities is not material to the affiliation analysis. *See* Advisory Opinion 2003-28 (Horizon Lines) (concluding that LLC treated as partnership was affiliated with one of its corporate owners even though that corporation's ownership interest was held through another LLC).

1 partnership).⁶ The Commission reasoned in these advisory opinions that the partnership’s ability
2 to establish and administer an SSF and have its personnel solicited for contributions “may be
3 construed as coming from the affiliated corporations.” *See, e.g.*, Advisory Opinion 1992-17 at 4
4 (Du Pont).

5 The Commission finds that the same considerations that allow a partnership owned by
6 corporations to establish an SSF and have its executive and administrative personnel solicited for
7 contributions also warrant allowing the trade association solicitations at issue here. As in the
8 matters discussed above, Berkadia’s inability to participate in a trade association’s SSF derives
9 from the fact that the Commission’s regulations do not explicitly account for partnerships owned
10 and controlled exclusively by corporations. Thus, to avoid prohibiting Berkadia from making
11 contributions to a trade association’s SSF *and* from having its executive and administrative
12 personnel solicited for contributions to such an SSF, the Commission interprets the Act and
13 Commission regulations as allowing trade associations to solicit the executive and administrative
14 personnel of partnerships (and LLCs electing tax treatment as partnerships) that are wholly
15 owned by and affiliated with corporations. *Cf.* Advisory Opinion 2010-16 at 3 (EmblemHealth)
16 (construing regulations to avoid prohibiting corporate-owned partnerships from participating in
17 SSFs). Accordingly, the Commission concludes that Berkadia may authorize trade associations
18 of which it is a member to solicit Berkadia’s executive and administrative personnel, so long as
19 Berkadia and the trade associations abide by the requirements of 11 C.F.R. § 114.8.

⁶ In cases where the partnership or LLC treated as a partnership was not affiliated with at least one of its corporate owners, the Commission found that this exemption from the generally applicable regulations was unwarranted. *See* Advisory Opinion 2001-07 (NMC PAC) (finding that LLC wholly owned by seven corporations but not affiliated with any one of them could not pay for establishment, administration, and solicitation expenses of political committee); Advisory Opinion 1984-36 (American Health Capital) (finding that corporation owning 40% interest in joint venture partnership could not solicit partnership’s executive and administrative personnel because corporation and partnership were not affiliated).

