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February 5, 2018

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson LJS
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Subject: AO 2017-13 (NSP and Sorghum PAC) 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 12:00 pm (Eastern Time) on February 7, 2018.

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 <https://www.fec.gov/legal-resources/advisory-opinions-process/>

Attachment

1 ADVISORY OPINION 2017-13

2

3 Mr. John Duff

4 National Sorghum Producers

5 4201 North Interstate 27

6 Lubbock, TX 79403

7

8 Dear Mr. Duff:

DRAFT A

9 We are responding to your advisory opinion request on behalf of National Sorghum
10 Producers (“NSP”) and National Sorghum Producers Political Action Committee (“Sorghum
11 PAC”) concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45
12 (the “Act”), and Commission regulations to the relationship between NSP and state sorghum
13 producer organizations, NSP’s proposed checkoff system for contributions to Sorghum PAC, and
14 NSP’s proposed use of certain state producer organizations as collecting agents. The
15 Commission concludes that NSP and the state producer organizations constitute a federation of
16 trade associations and that NSP’s proposed checkoff system and use of certain state producer
17 organizations as collecting agents are permissible under the Act and Commission regulations.

18 **Background**

19 The facts presented in this advisory opinion are based on your letter received on
20 November 7, 2017, your e-mail received on December 22, 2017, and supplemental information
21 you provided on January 9, 2018 (collectively “advisory opinion request” or “AOR”), and
22 information available on NSP’s and the state organizations’ public websites.

23 NSP is incorporated in Texas as a non-profit, non-stock corporation with members, that
24 has been recognized as an organization exempt from federal income tax under section 501(c)(5)
25 of the Internal Revenue Code. AOR001. NSP was organized for the purpose of promoting and
26 protecting the interests of U.S. sorghum producers. *Id.* NSP has two classes of members:
27 producer members and associate members; the AOR concerns only activities in relation to NSP’s

1 producer members. *Id.* Producer members are defined as individuals or other entities engaged in
2 the production of sorghum and paying dues as determined by NSP’s current dues structure. *Id.*;
3 AOR010. Approximately 5,000 U.S. sorghum producers are NSP producer members. AOR001.
4 NSP is managed by a board of directors; the directors must be members of NSP and at least
5 seven of the eleven directors must be producer members. AOR011. The directors select NSP’s
6 chief executive officer and its other staff members, approve NSP’s annual budget, establish
7 committees, submit nominees for the board of directors, and may amend the bylaws. *Id.*;
8 AOR014-16.

9 NSP collects dues from sorghum producers through grain elevators known as “E-
10 Members.” In general, participating grain elevators collect \$0.0028 per bushel of sorghum sold
11 by each sorghum producer and remit it to NSP on behalf of the producer as that member’s NSP
12 dues; in Texas, grain elevators collect and remit \$0.0056 per bushel. AOR002, AOR038.

13 U.S. sorghum producers are also represented by state-level sorghum producer
14 organizations (“state organizations”). *See* AOR017. Of these state organizations, five might
15 participate in the activities proposed in this advisory opinion: Colorado Sorghum Producers
16 Association (the “Colorado Association”), Kansas Grain Sorghum Producers Association (the
17 “Kansas Association”), New Mexico Sorghum Association (the “New Mexico Association”),
18 Oklahoma Sorghum Association (the “Oklahoma Association”), and Texas Grain Sorghum
19 Association (the “Texas Association”). AOR046. These five state organizations are structured
20 and governed similarly to NSP. AOR018-29, AOR037, AOR049-059.

21 These state organizations and NSP are connected in a number of ways. Twenty percent
22 of dues collected by NSP are shared with the state organizations (AOR002, AOR023, AOR033,

1 AOR037), and E-Member customers receive membership in both NSP and their state
2 organization. AOR033, AOR038. Three of the five state organizations also share a staff
3 position with NSP. AOR048 (providing partial NSP funding for executive director position
4 shared by Colorado, New Mexico, and Oklahoma Associations). The agreement funding the
5 shared executive director position also grants NSP authority to administer state funds and
6 programs, and provides that the executive director shall report to NSP on performance, activities,
7 and funds spent. AOR048. At least one state organization, the Kansas Association, also
8 expressly states that it will collaborate with NSP to coordinate activities at the state and national
9 levels and to collect membership dues, and that it will adopt a code of ethics and other internal
10 policies comparable to NSP's corresponding policies. AOR030, AOR033.

11 Sorghum PAC is the separate segregated fund ("SSF") established and administered by
12 its connected organization, NSP. AOR002. NSP and Sorghum PAC propose to establish a
13 voluntary checkoff system for producer members to make contributions to Sorghum PAC, using
14 the E-Member program as the primary vehicle. *Id.* Under the proposed checkoff system,
15 Sorghum PAC would solicit individual sorghum producer members to make voluntary
16 contributions to Sorghum PAC through a preauthorized automatic deduction from the proceeds
17 due to them from the E-Member grain elevators, at a suggested rate per bushel. *Id.*; AOR038-45.
18 Producer members who choose to participate will sign forms authorizing their E-Member
19 elevators to automatically deduct funds from the members' individual accounts and transfer the
20 funds to Sorghum PAC. AOR002. Contributions made through the checkoff system would be
21 entirely voluntary, and would not reduce any member's dues obligation to NSP. *Id.* NSP
22 members would not receive any tangible or valuable benefit from NSP as a result of making

1 contributions to Sorghum PAC, and NSP would not discriminate against or penalize any member
2 who chooses not to contribute to Sorghum PAC or contributes an amount different from the
3 suggested amount. *Id.*; AOR039-041. E-Members and Sorghum PAC will ensure that the
4 contributions collected through the proposed system would be received by Sorghum PAC within
5 ten or thirty days, as required under 11 C.F.R. § 102.8. AOR002.

6 **Questions Presented**

7 1. *Are NSP and its state affiliates a federation of trade associations?*

8 2. *Is the voluntary per-bushel contribution deduction used in the proposed checkoff
9 system a permissible method of soliciting contributions to Sorghum PAC?*

10 3. *May NSP's state affiliates serve as collecting agents (either through the checkoff
11 system described above or otherwise) for Sorghum PAC?*¹

12 **Legal Analysis and Conclusions**

13 1. *Are NSP and its state affiliates a federation of trade associations?*

14 Yes, NSP and the state organizations constitute a federation of trade associations.

15 Commission regulations define a federation of trade associations as “an organization

16 representing trade associations involved in the same or allied line of commerce.” 11 C.F.R.

17 § 114.8(g)(1). The regulation provides that “[s]uch a federation may . . . solicit the members of

18 the federation’s regional, [s]tate or local affiliates or members, provided that all of the political

19 committees established, financed, maintained or controlled by the federation and its regional,

20 [s]tate, or local affiliates or members are considered one political committee for the purposes of

¹ Although the AOR presents these questions in a different order, the Commission addresses the third question presented first, because the analysis of whether NSP and its state affiliates are a federation of trade associations informs the analysis of the other two questions.

1 the limitations in §§ 110.1 and 110.2. The factors set forth at § 100.5(g)(4) shall be used to
2 determine whether an entity is a regional, [s]tate or local affiliate of a federation of trade
3 associations.” *Id.*

4 Under Commission regulations, a trade association is defined as “a membership
5 organization of persons engaging in a similar or related line of commerce, organized to promote
6 and improve business conditions in that line of commerce” 11 C.F.R. § 114.8(a). NSP was
7 established for the purpose of promoting and protecting the interests of U.S. sorghum producers,
8 and therefore it constitutes a trade association if it qualifies as a membership organization.

9 Commission regulations define a “membership organization” as a trade association,
10 cooperative, corporation without capital stock, or a local, national, or international labor
11 organization that:

12 (1) Is composed of members, some or all of whom are vested with the power
13 and authority to operate or administer the organization, pursuant to the organization’s
14 articles, bylaws, constitution or other formal documents;

15 (2) Expressly states the qualifications for membership in its articles, bylaws,
16 constitution or other formal organizational documents;

17 (3) Makes its articles, bylaws, constitution or other formal documents
18 available to its members;

19 (4) Expressly solicits persons to become members;

20 (5) Expressly acknowledges the acceptance of membership, such as by
21 sending a membership card or including the member’s name on a membership newsletter
22 list; and

1 (6) Is not organized primarily for the purpose of influencing the nomination
2 for election, or election, of any individual for [f]ederal office.

3 11 C.F.R. §§ 100.134(e), 114.1(e)(1).

4 NSP, a corporation without capital stock, satisfies all six criteria and thus is a
5 membership organization under Commission regulations.

6 First, NSP is composed of members who have the power and authority to operate and
7 administer the organization. Commission regulations define “member” to include all persons
8 who satisfy the requirements for membership in a membership organization, affirmatively accept
9 the membership organization’s invitation to become a member, and either (i) have some
10 significant financial attachment to the organization; (ii) pay membership dues at least annually,
11 of a specific amount predetermined by the organization; or (iii) have a significant organizational
12 attachment to the membership organization. 11 C.F.R. §§ 114.1(e)(2)(i)-(iii), 100.134(f)(1)-(3).

13 NSP’s producer members qualify as “members” under these criteria because they must satisfy
14 NSP’s requirements for membership — they must be engaged in the production of sorghum —
15 and pay dues at a predetermined, per-bushel rate. AOR010, AOR038. Further, NSP is governed
16 by a board of directors, the majority of whom are producer members, who have the authority to
17 manage the affairs of the organization. AOR011.

18 Second, as required by section 100.134(e)(2), NSP’s bylaws expressly state that to
19 qualify as a producer member, an individual or other legal entity must be engaged in the
20 production of sorghum and pay dues as determined by the board of directors’ current dues
21 structure. AOR010.

1 Third, NSP makes its bylaws available to its members through its website, consistent with
2 11 C.F.R. § 100.134(e)(3).²

3 Fourth, NSP expressly solicits sorghum producers to become members, as required by
4 section 100.134(e)(4). NSP's website promotes the benefits of membership and provides an
5 application for membership.³ See Advisory Opinion 1999-40 (NRECA) at 8 (concluding that
6 organization satisfied this criterion where its website promoted benefits of membership and
7 included application for membership).

8 Fifth, in accordance with section 100.134(e)(5), NSP acknowledges acceptance of
9 membership, including by distributing a monthly magazine and a weekly electronic newsletter to
10 members. AOR038. See Advisory Opinion 1999-40 (NRECA) at 8 (concluding that
11 organization satisfied this criterion where it acknowledged acceptance of membership by
12 distributing monthly magazine to members).

13 Sixth, consistent with 11 C.F.R. § 100.134(e)(6), NSP is not organized primarily for the
14 purpose of influencing the nomination or election of any individual to federal office; it is instead
15 organized for the purpose of promoting and protecting the business interests of U.S. sorghum
16 producers. AOR010.

17 NSP meets all the criteria for a "membership organization" set forth in sections
18 100.134(e) and 114.1(e), and is an organization of persons engaged in sorghum production,
19 organized for the purpose of promoting the interests of that business. Accordingly, NSP

² See National Sorghum Producers, Vision and Mission, <http://sorghumgrowers.com/vision-and-mission/>.

³ See National Sorghum Producers, Producer Membership, <http://sorghumgrowers.com/producer-membership/>.

1 constitutes a trade association under Commission regulations. 11 C.F.R. § 114.8(a). Further,
2 based on the state organizations' bylaws and other information provided by NSP, the five state
3 organizations at issue are structured and governed similarly to NSP and likewise meet the criteria
4 in sections 100.134(e) and 114.1(e) for a "membership organization." AOR19-20, AOR024-25,
5 AOR027-28, AOR037, AOR049-50, AOR055-56. Moreover, because the state organizations,
6 like NSP itself, are "organized to promote and improve business conditions" for sorghum
7 producers (AOR018, AOR024, AOR027, AOR049, AOR055), the state organizations also meet
8 section 114.8(a)'s definition of a trade association.

9 As stated above, Commission regulations specify that "[t]he factors set forth at
10 § 100.5(g)(4) shall be used to determine whether an entity is a regional, [s]tate or local affiliate
11 of a federation of trade associations." 11 C.F.R. § 114.8(g)(1). Section 100.5(g)(4)(ii), which
12 describes features of affiliated organizations in the context of political committees, provides that
13 in determining whether entities are affiliated, the Commission will consider ten factors "in the
14 context of the overall relationship between committees or sponsoring organizations." 11 C.F.R.
15 § 100.5(g)(4)(ii).

16 NSP identifies five state affiliates that could participate in Sorghum PAC functions.
17 AOR017, 046. Considering the factors set forth in section 100.5(g)(4)(ii) in the context of the
18 overall relationship between NSP and the state organizations, several links between NSP and the
19 state organizations indicate affiliation and thus a federation structure.

20 First, NSP and the state organizations share overlapping membership, as all E-Member
21 customers receive membership in both NSP and their state's sorghum organization. *See* 11
22 C.F.R. § 100.5(g)(4)(D). AOR038. Second, twenty percent of dues collected by NSP are shared

1 with the state organizations, constituting funds provided by one organization to others “in a
2 significant amount or on an ongoing basis,” consistent with the affiliation analysis in 11 C.F.R.
3 § 100.5(g)(4)(G). AOR002. Third, three of the five state organizations — the Colorado, New
4 Mexico, and Oklahoma Associations — share a staff position with each other and with NSP, *see*
5 11 C.F.R. § 100.5(g)(4)(E), and the agreement funding that shared staff position also grants NSP
6 authority to administer state funds and programs and provides that the state executive director
7 shall report to NSP on performance, activities, and funds spent, consistent with the analysis in 11
8 C.F.R. § 100.5(g)(4)(B). AOR048. Finally, although the other two state organizations — the
9 Kansas and Texas Associations — do not share staff with NSP, they do expressly identify
10 themselves as affiliates of NSP.⁴

11 The presence of these factors, when considered in the context of the overall relationship
12 between NSP and the Colorado, Kansas, New Mexico, Oklahoma, and Texas Associations,
13 indicates that all five state organizations are affiliated with NSP and are the state affiliates of
14 NSP in a federation of trade associations. 11 C.F.R. § 114.8(g). Accordingly, NSP may solicit
15 the members of these five state organizations and their corporate members’ restricted classes. In
16 addition, the five state organizations’ SSFs and Sorghum PAC are considered one political
17 committee for purposes of the contribution limitations in 11 C.F.R. § 110.1. *See* 11 C.F.R.
18 114.8(g)(1).

⁴ *See* Kansas Grain Sorghum Producers Association, About the Producers Association, <https://ksgrainsorghum.org/producers-association/>; Texas Grain Sorghum Association, About Us, <http://texasgsa.com/about-us/>.

1 2. *Is the voluntary per-bushel contribution deduction used in the proposed checkoff*
2 *system a permissible method of soliciting contributions to Sorghum PAC?*

3 Yes, the proposed checkoff system is a permissible method for Sorghum PAC to solicit
4 and receive contributions from individual producer members of NSP and its state affiliates, and
5 from the restricted classes of corporate members of NSP and its state affiliates.

6 Commission regulations expressly permit a trade association or its SSF to solicit
7 contributions from the stockholders and executive and administrative personnel of member
8 corporations of the trade association and the families of such stockholders and personnel,
9 provided the member corporation has approved such solicitation. 11 C.F.R. § 114.8(c). As
10 discussed above, because NSP is a federation of trade associations, NSP and Sorghum PAC may
11 solicit members of the state affiliates and their restricted classes. 11 C.F.R. § 114.8(g)(1)-(2);
12 *but see* 11 C.F.R. 114.8(b) (“Nothing in this section waives the prohibition on contributions by
13 corporations which are members of trade associations.”).

14 Under Commission regulations, “[t]here is no limitation on the method of soliciting
15 voluntary contributions or the method of facilitating the making of voluntary contributions which
16 a trade association may use.” 11 C.F.R. § 114.8(e)(3).

17 In previous advisory opinions, the Commission has approved checkoff systems similar to
18 NSP’s and Sorghum PAC’s proposed system to solicit and collect contributions from their
19 members. For example, in Advisory Opinion 1986-07 (American Crystal Sugar Company), the
20 Commission considered a proposal whereby an agricultural cooperative that made regular
21 payments to its members for their crops would solicit contributions from those members, and
22 collect the contributions by deducting them from the payments owed to the members. The

1 Commission concluded that because there is no limitation on a cooperative's method of
2 facilitating contributions from its members, the proposed collection system was permissible. *See*
3 11 C.F.R. § 114.7(f) (applicable to cooperatives and analogous to § 114.8(e)(3)).

4 Similarly, in Advisory Opinion 1998-19 (CUNA), the Commission concluded that a
5 credit union trade association's proposal to solicit and collect contributions to its SSF through
6 preauthorized automatic transfers from members' credit union accounts was also permissible
7 under Commission regulations. In both cases, as in NSP's and Sorghum PAC's proposed
8 checkoff system, the connected organization or SSF solicited contributions from members, the
9 members signed forms authorizing deductions of a predetermined amount from their funds, and
10 the connected organizations ensured that the contributions were received by the SSF within the
11 time period required under Commission regulations.

12 Under sections 114.8(e)(5) and 114.5(a) of the Commission's regulations, a trade
13 association or its SSF may provide guidelines for suggested contributions, so long as any person
14 solicited is informed (1) of the political purposes of the SSF; (2) that the guidelines are merely
15 suggestions; (3) that the person is free to contribute more or less than the suggested amount; and
16 (4) that the organization will not favor or disadvantage a member by reason of the amount of the
17 person's contribution or decision not to contribute. 11 C.F.R. § 114.5(a)(2)-(4); *see* 11 C.F.R.
18 § 114.8(e)(5) (providing that a trade association and its SSF are subject to the provisions of
19 section 114.5(a)); Advisory Opinion 2016-11 (Plains Cotton Growers) (requiring solicitations of
20 members to satisfy requirements of section 114.5(a)); Advisory Opinion 2012-15 (APTA)
21 (same); Advisory Opinion 2011-22 (Virginia Poultry Growers Cooperative) (same); *see also* 52

1 U.S.C. § 30118(b)(3) (outlining statutory prohibitions on certain activities in connection with an
2 SSF's contributions or solicitation of contributions to an SSF);

3 NSP's and Sorghum PAC's proposed checkoff system satisfies these requirements. The
4 sample contribution form provided by NSP and Sorghum PAC states that they are soliciting
5 contributions "for the purposes of supporting and electing political candidates who support
6 agriculture and the sorghum industry and influencing agricultural legislation reform," and that
7 Sorghum PAC is "recommending" a per-bushel amount to contribute but that "the recommended
8 contributions are only suggestions and any NSP sorghum producer member may contribute more
9 or less than the recommendations." AOR041. The form also states that neither NSP nor
10 Sorghum PAC "will favor nor disadvantage anyone by reason of the amount of their contribution
11 or their decision not to contribute" and that members "may refuse to contribute without reprisal."
12 *Id.* The form NSP and Sorghum PAC will use to obtain the permission of corporate members to
13 solicit their restricted classes also states that "a sorghum producer member's decision whether or
14 not to voluntarily participate will in no way be favored or disfavored and shall be free of any
15 reprisal for the sorghum producer member's decision." AOR039. These forms clearly
16 communicate to members the information required by section 114.5(a).

17 Accordingly, the proposed use of the checkoff system to solicit and collect contributions
18 to Sorghum PAC from member sorghum producers and their restricted classes is permissible
19 under the Act and Commission regulations.

1 3. *May NSP’s state affiliates serve as collecting agents (either through the checkoff*
2 *system described above or otherwise) for Sorghum PAC?*

3 Yes, NSP’s state affiliates may serve as collecting agents for Sorghum PAC.

4 Commission regulations define a “collecting agent” as “an organization or committee that
5 collects and transmits contributions to one or more separate segregated funds to which the
6 collecting agent is related.” 11 C.F.R. § 102.6(b)(1). The regulation provides that an SSF’s
7 connected organization or any of its branches, divisions, or local units may serve as a collecting
8 agent for the SSF. 11 C.F.R. § 102.6(b)(1)(ii), (iii).

9 As the connected organization of Sorghum PAC, NSP may therefore act as a collecting
10 agent for Sorghum PAC. 11 C.F.R. § 102.6(b)(1)(ii). The Commission has previously
11 concluded that a state affiliate of a federation of trade associations “may be considered as a
12 ‘branch, division . . . or local unit’ of [the federation] under 11 C.F.R. 102.6(b)(1)(iii) and may
13 therefore act as collecting agents in receiving or transmitting contributions for [the federation’s
14 SSF].” Advisory Opinion 1998-19 (CUNA) at 10; *see also* Advisory Opinion 1999-40
15 (NRECA) at 9 (concluding that state affiliates of federated cooperative are considered local units
16 that may act as collecting agents for contributions to federated cooperative’s SSF);⁵ Advisory
17 Opinion 1995-12 (Independent Bankers) at 9 (concluding that state trade associations affiliated
18 with national trade association may act as fundraising arms for national trade association’s SSF,
19 including acting as collecting agents for national trade association’s SSF). Similar to the state
20 affiliates in previous advisory opinions, each of NSP’s state affiliates “may be considered a

⁵ A federated cooperative is treated similarly to a federation of trade associations for the purposes of solicitation and contribution limits; the applicable regulatory provision, 11 C.F.R. § 114.7(k)(1), is nearly identical to the provision concerning federations of trade associations at 11 C.F.R. § 114.8(g).

1 'branch, division . . . or local unit'" of NSP and therefore may act as a collecting agent for
2 contributions to Sorghum PAC.

3 This response constitutes an advisory opinion concerning the application of the Act and
4 Commission regulations to the specific transaction or activity set forth in your request. *See*
5 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or
6 assumptions presented, and such facts or assumptions are material to a conclusion presented in
7 this advisory opinion, then the requestor may not rely on that conclusion as support for its
8 proposed activity. Any person involved in any specific transaction or activity which is
9 indistinguishable in all its material aspects from the transaction or activity with respect to which
10 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.
11 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
12 affected by subsequent developments in the law including, but not limited to, statutes,
13 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
14 on the Commission's website.

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On behalf of the Commission,

Caroline C. Hunter,
Chair