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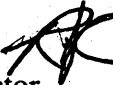
FEDERAL ELECTION COMMISSION
Washington, DC 20463


March 1, 2006


AGENDA ITEM
For Meeting of: 03-09-06


MEMORANDUM


TO: The Commission

THROUGH: Robert J. Costa 
Acting Staff Director

FROM: Lawrence H. Norton 
General Counsel

Rosemary C. Smith 
Associate General Counsel

Mai T. Dinh 
Assistant General Counsel

Jonathan M. Levin 
Senior Attorney

Subject: Draft AO 2006-02

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for March 9, 2006.

Attachment

1 ADVISORY OPINION 2006-02

2
3 Robert F. Bauer, Esq.

4 Judith L. Corley, Esq.

5 Perkins Coie

6 607 14th Street, N.W.

7 Washington, D.C. 20005-2011

8
9 Dear Mr. Bauer and Ms. Corley:

DRAFT

10 We are responding to your advisory opinion request on behalf of Robert Titley,
11 concerning the application of the Federal Election Campaign Act of 1971, as amended (the
12 “Act”), and Commission regulations to the establishment of a limited liability company (“the
13 Company”) that will express views on candidates and issues, and to the establishment by the
14 Company of a separate segregated fund (“SSF”) that will solicit contributions from individuals
15 who will pay dues to the Company in order to become “members.” You ask whether, under the
16 Act and Commission regulations, the Company is a “membership organization,” and whether the
17 dues-paying individuals qualify as “members,” so that the Company may make express advocacy
18 communications to those individuals and solicit contributions from them for the Company’s SSF.

19 The Commission concludes that the Company does not qualify as a membership
20 organization under the Act and Commission regulations, and the dues-paying individuals are
21 therefore not members. Accordingly, the Company may not make express advocacy
22 communications to the dues-paying individuals or solicit them for contributions to the SSF,
23 unless such individuals are otherwise within the Company’s restricted class.

24 ***Background***

25
26 The facts presented in this advisory opinion are based on your letters dated November 28,
27 2005, and January 18, 2006.

28

1 *Company Structure*

2 Robert Titley proposes to establish the Company as a limited liability company (“LLC”)
3 that would provide a website as a vehicle for the expression of positions on issues and
4 candidates. The website would contain a portion accessible by the general public and another
5 portion accessible only by individuals, whom you call “Participating Members,” who pay dues to
6 the Company.

7 The Company will be a for-profit business and will elect to be taxed as a corporation for
8 Federal income tax purposes. Mr. Titley and other individuals are the Founders of the Company.
9 They developed the plan for the Company, are “committing both management expertise and
10 capital to the project,” and will own the Company. Only they will control the business affairs of
11 the Company. The Founders will make capital contributions of cash, assets, or services. Their
12 initial capital contributions will provide the necessary start-up capital and other resources to
13 establish the Company’s website, implement the Company’s marketing plan, pay the legal and
14 accounting expenses associated with formation of the new enterprise, and obtain the initial
15 inventory of contents and merchandise that will be provided or sold by the Company to users of
16 the website. The Company’s profits, losses and distributions of its distributable cash will be
17 allocated among the Founders in proportion to their ownership interest. The Company’s
18 Operating Agreement will set forth the rights of each Founder with respect to the allocation of
19 profits, losses, and distributions and may also contain transfer restrictions, covenants with respect

1 to future capital contributions by Founders, and a description of each Founder's right to
2 participate in management decisions.¹

3 Revenue will be generated through the payment on-line of annually assessed dues of no
4 less than \$50 from a second group of individuals, the "Participating Members." The
5 "Participating Members" will have no rights under State law to manage the business affairs of the
6 Company, and they will not participate in any allocation of profits, losses, or distributions. Their
7 rights will be limited to: (1) access to features on a portion of the website accessible only to
8 them; (2) participation in the Company's Policy Board, which is empowered to help shape the
9 issue positions expressed on a portion of the website available to the public (including the
10 endorsement of candidates); and (3) the right as Policy Board members to influence the approval
11 or disapproval of the Company's proposals as to the recipients of SSF contributions.²

12 The on-line dues payment form will advise "Participating Members" of these rights. The
13 only requirement to become a "Participating Member" will be the payment of dues, and a
14 delinquent "Participating Member," after an appropriate grace period, will be barred from access
15 to the website's members-only portion and participation in the Policy Board. Notwithstanding
16 the payment of dues, the Company may expel any "Participating Member" who becomes
17 disruptive or fails to adhere to the website's "etiquette guidelines" (which are part of the terms of
18 use of the site, agreed to by all members).

19 _____
¹ The Company will be managed by one or more Managers who will have authority to manage the affairs of the Company, with the exception of certain transactions that may require approval by the Founders, such as a sale of nearly all of the Company's assets or a merger with another entity.

² The Founders and Managers may also choose, upon payment of dues, to become "Participating Members" and participate in the Policy Board.

1 *The Website*

2 The actual website has not been designed, but your request provides a description of both
3 the public and members-only portions of the site. The public portion will contain information
4 about the purpose of the Company and the benefits of membership, ads for merchandise, general
5 information about issues identified by the "Participating Members" as important to them, and
6 candidate endorsements. The members-only portion will include information about the SSF and
7 how to participate in it; information about the candidates supported by the SSF and the reasons
8 they are supported; on-line polling of the members to help define issues important to them;
9 development of a platform of issues important to the members, including white papers and
10 detailed background materials; news resources and editorials about those issues; ads for issue-
11 related merchandise not available on the public portion and ads for entertainment events; music
12 content; issue-related interviews of, and commentary by, music celebrities; on-line civics
13 educational tools; and fundraising for charities selected by members and artists.

14 *Question Presented*

15 *Will the Company qualify as a "membership organization" under the Act and*
16 *Commission regulations and, if so, will the "Participating Members" qualify as "members" so*
17 *that the Company may solicit them for contributions to its SSF and make express advocacy*
18 *communications to them?*

19 *Legal Analysis and Conclusions*

20 No. For the reasons stated below, the Company will not qualify as a membership
21 organization under the Act and Commission regulations. Therefore, the "Participating Members"
22 will not qualify as "members" who can be solicited for contributions to the Company's SSF and
23 receive express advocacy communications from the Company.

1 Because the Company will elect to be treated by the Internal Revenue Service as a
2 corporation, it must be considered a corporation under Commission regulations at 11 CFR
3 110.1(g)(3). Therefore, it will be subject to the prohibition on corporate contributions and
4 expenditures at 2 U.S.C. 441b(a).³ There are several exceptions to that prohibition at 2 U.S.C.
5 441b(b).

6 One of the exceptions to the prohibition permits a corporation to use corporate treasury
7 funds to solicit the corporation's restricted class for contributions to the corporation's SSF. 2
8 U.S.C. 441b(b)(4); 11 CFR 114.1(j); *see also* 2 U.S.C. 441b(b)(2)(C). The restricted class of a
9 corporation includes the corporation's executive and administrative personnel, and their families,
10 as well the corporation's stockholders, and their families. 2 U.S.C. 441b(b)(4)(A) and 11 CFR
11 114.5(g). The restrictions on corporate solicitations, however, do not prevent an incorporated
12 membership organization from soliciting contributions from its "members"⁴ and their families. 2
13 U.S.C. 441b(b)(4)(C) and 11 CFR 114.7(a). The definitions of "membership organization" and
14 "member" are specified in Commission regulations at 11 CFR 100.134(e) through (g) and
15 114.1(e)(1) through (3).

16 Another exception to the prohibition on corporate contributions and expenditures permits
17 corporations and incorporated membership organizations to communicate with their restricted
18 classes on any subject, including communications expressly advocating the election or defeat of a
19 clearly identified Federal candidate. 2 U.S.C. 441b(b)(2)(A) and 431(9)(B)(iii); 11 CFR
20 114.3(a)(1) and (2), 114.3(c), 100.134(a), and 114.1(j). Certain Federal election-related

³ 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.

⁴ Members falling within categories of persons prohibited from contributing in connection with a Federal election, such as foreign nationals, may not be solicited. *See* 11 CFR 114.7(b); *see also* 11 CFR 110.20(g), and 115.2(c).

1 communications made to those outside the restricted class, including endorsements, are limited
2 or prohibited. *See* 11 CFR 114.4.⁵

3 For a corporation to qualify as a membership organization, it must satisfy two
4 requirements. First, the corporation must be a “trade association, cooperative, [or] corporation
5 without capital stock.” 11 CFR 114.1(e)(1); 11 CFR 100.134(e). Second, the corporation must
6 satisfy *all* six criteria set forth in 11 CFR 114.1(e)(1)(i) through (vi); *see also* 11 CFR 100.134
7 (e)(1)-(6). The Company will not satisfy either of these two requirements.

8 First, the Company will be neither a trade association nor a cooperative. The question
9 remains whether the Company is a corporation without capital stock. *See* 2 U.S.C. 441b(b)(4)(C)
10 and 431(9)(B)(iii). For the purposes of the Act and regulations, the Company operates as a for-
11 profit corporation owned by stockholders. It has elected corporate treatment under 11 CFR
12 110.1(g)(3), and is owned exclusively by the Founders, who will make initial and subsequent
13 capital investments. The Founders will receive profits and distributions of cash from the
14 business, and incur losses, in proportion to their individual ownership interests. Thus, their
15 ownership interests are equivalent to their owning stock in the Company.

16 Furthermore, the Supreme Court indicated that the rationale for the exception for
17 membership organizations at 2 U.S.C. 441b(b)(4)(C) is because membership organizations do
18 not have stockholders, and their members are, in part, analogous to stockholders of stock
19 corporations. *FEC v. National Right to Work Committee*, 459 U.S. 197, 204 (1982) (quoting
20 from the 1976 floor statement from the provision’s principal sponsor, Senator James Allen, at

⁵ For example, a corporation may publicly announce an endorsement of a Federal candidate and convey the reasons for the endorsement only in accordance with 11 CFR 114.4(c)(6). This section allows such an announcement to be made through a press release or press conference if the press release or notice of the press conference is distributed only to the representatives of the news media that the corporation customarily contacts when issuing a non-political

1 122 Cong. Rec. 7198 (1976)). Thus, the rationale for the exception for the solicitation of
2 members does not apply to the Company's situation.

3 Second, the Company does not satisfy the first of the six criteria for being a membership
4 organization, *i.e.*, the Company is not "composed of members, some or all of whom are vested
5 with the power and authority to operate or administer the organization, pursuant to the
6 organization's articles, bylaws, constitution or other formal organizational documents." *See* 11
7 CFR 100.134(e)(1), 114.1(e)(1)(i). Although the "Participating Members" have the ability to
8 help determine the issues and issue positions presented on the website and the candidates to be
9 supported by the SSF, none of them, by virtue of being a "Participating Member," will be vested
10 with the power and authority to operate or administer the Company.⁶ The Founders and the
11 Managers chosen by them will be the only group that manages the business of the Company. The
12 Founders' ownership interests correspond to their being a class of stockholders.⁷

13 Consequently, the Company may not solicit the "Participating Members" for
14 contributions to the SSF, and is subject to the restrictions in 11 CFR 114.4 as to the
15 communications made to them. Additionally, the Company may not place its endorsements of
16 Federal candidates on its website unless access to the website is restricted to the Founders and
17 their families and to the Company's executive and administrative personnel and their families.
18 *See* Advisory Opinion 2000-07; 11 CFR 114.4(c)(6). The Company, however, may solicit, and
19 communicate on any subject with, the individual Founders and their families, and the Company's

press release or holding a press conference for other purposes. Moreover, the announcement may not be coordinated with the candidate, his agents, or his authorized committee.

⁶ The ability to be polled on the selection of such issues and on the organization's positions does not constitute the power and authority to operate or administer the organization.

⁷ Because the Company does not satisfy the first criterion for being a membership organization, it is not necessary to analyze whether the Company satisfies the remaining five criteria. *See* 11 CFR 100.134(e)(2)-(6) and 114.1(e)(1)(ii)-(vi).

1 executive and administrative personnel and their families. *See* 2 U.S.C. 431(9)(B)(iii),
2 441b(b)(2)(A) and (4)(A); 11 CFR 100.134(a), 114.3(a) and (c), and 114.5(g).

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* 2
5 U.S.C. 437f. 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.

9 Sincerely,

10
11
12 Michael E. Toner
13 Chairman
14

15 Enclosure (AO 2000-07)
16
17