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FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 16, 1997

AGENDA ITEM
For Meeting of: 4-24-97

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan M. Levin
Senior Attorney

Subject: Draft AO 1997-04

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for April 24, 1997.

Attachment

DRAFT

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1 **ADVISORY OPINION 1997-4**

2
3 **Robert L. Shuster**
4 **Eckert Seamans Cherin & Mellott, L.L.C.**
5 **213 Market Street**
6 **P.O. Box 1248**
7 **Harrisburg, PA 17108**

8
9 **Dear Mr. Shuster:**

10
11 **This responds to your letters dated February 14 and March 19, 1997, on behalf of**
12 **Eckert Seamans Cherin & Mellott, L.L.C. ("the Firm"), requesting an advisory opinion**
13 **concerning the application of the Federal Election Campaign Act of 1971, as amended**
14 **("the Act"), and Commission regulations to the Firm's ability to make contributions.**

15 **The Firm is a limited liability company ("LLC") formed under the laws of**
16 **Pennsylvania and engaged in the practice of law. It filed a certificate of organization as**
17 **an LLC with the Pennsylvania Department of State on January 2, 1997. According to the**
18 **certificate of organization and the operating agreement executed the previous day, the**
19 **Firm is a specific type of LLC known under Pennsylvania law as[~]restricted professional**
20 **company. 15 Pa.C.S.A. §8996(a). The operating agreement states that the Firm, in its**
21 **previous business form, was a general partnership, and that the equity partners are now**
22 **"automatically" the members of the Firm. The agreement also provides that only natural**
23 **persons licensed to practice law are eligible to be members. Article One. In view of the**
24 **present business form of the Firm, you ask whether it may make contributions to Federal**
25 **candidates and political action committees in its own name out of its general treasury**
26 **funds.**

27 **Under the Act, the term "person" includes an individual, partnership, committee,**
28 **association, corporation, labor organization, or any other organization or group of**
29 **persons. 2 U.S.C. §431(11); 11 CFR 100.10. The Act prohibits corporations from**
30 **making any contribution or expenditure in connection with a Federal election. 2 U.S.C.**
31 **§441b(a); 11 CFR 114.2(b). Contributions by persons whose contributions are not**

1 prohibited by the Act are subject to the limits set out in 2 U.S.C. §441a.¹ More
2 particularly, contributions by partnerships are permitted, although limited by 2 U.S.C.
3 §441a(a). Partnership contributions are also attributed proportionately against each
4 contributing partner's limit for the same candidate and election. 11 CFR 110.1(e).²

5 In previous opinions, the Commission has addressed the ability of LLCs in
6 Virginia and in the District of Columbia to make contributions. Advisory Opinions 1996-
7 13 and 1995-11. In those opinions, the Commission concluded that, in view of the fact
8 that the requesting entities were LLCs and that the LLC was a type of business entity that
9 was distinct from a corporation or partnership under the statutes of those jurisdictions, the
10 requester fell instead within the language "any other organization or group of persons,"
11 which is part of the Act's definition of "person." Hence, as a person, but not a
12 corporation, the company was subject to the Act's contribution limits rather than its
13 prohibitions. In addition, contributions from the company's general operating accounts
14 or treasury would not be attributed to any of its members.³

15 In reviewing the statutes of those two jurisdictions, the Commission specifically
16 noted how the statutes classified the entities in definitional terms and selection of
17 business name. It also considered whether the statutes for LLCs or the rules of an entity
18 itself broadly reflected characteristics that were different from those of a corporation in
19 some instances or a partnership in others. For example, the opinions cited specific
20 statutory language defining LLCs as unincorporated associations without perpetual
21 duration consisting of two or more persons and organized under the specific statutory
22 chapter dealing with LLCs. One opinion noted that D.C. law specifically prohibited the
23 use of terms indicating a corporation or a limited partnership in the LLC's name.

¹ The Act prohibits contributions by several entities: corporations, labor organizations, Federal contractors, and foreign nationals. 2 U.S.C. §§441b, 441c, and 441e; 11 CFR 114.2(b), 115.2, and 110.4(a).

² A corporate partner may not participate in a partnership contribution or accept any attribution of any portion of the contribution through a reduction of its share of partnership profits or an increase of its share of partnership losses. 11 CFR 110.1(e).

³ The Commission notes that this last conclusion was premised on the assumption that none of the individual members of the requesting entity were corporations, Federal contractors or foreign nationals. The participation of corporations, Federal contractors, or foreign nationals as members in an LLC would raise the issue of unlawful contributions or expenditures which are prohibited by 2 U.S.C. §§441b, 441c, and 441e. Advisory Opinions 1996-13, n.6 and 1995-11, n. 9.

1 Moreover, the statutes reflected the corporate characteristic of limitation of liability for
2 all the members of an LLC, along with the lack of other characteristics generally
3 associated with corporations, i.e., free transferability of interest and continuity of life.
4 (For example, an LLC had to indicate the last date by which it must be dissolved.) The
5 opinions also noted how the statutes distinguished LLCs from partnerships, referring to
6 the personal liability of general partners and the fact that the laws of the jurisdictions
7 recognized the LLC as a business form distinct from partnerships. Advisory Opinions
8 1996-13 and 1995-11.⁴

9 Under Pennsylvania statutes, the LLC is a form of business that is distinct from
10 the various forms of corporations and partnerships that are each separately described
11 within Title 15, entitled "Corporations and Unincorporated Associations." An LLC is
12 defined as "[a]n association that is a limited liability company organized and existing
13 under this chapter." 15 Pa.C.S.A. §8903. The Pennsylvania statute states that the name
14 must contain the term "company," "limited," or "limited liability company" (or an
15 abbreviation of one of those terms) *and does not elaborate further* without further elaboration as to denoting the type of
16 business. 15 Pa.C.S.A. §§8905.⁵ Although Pennsylvania law does not require an LLC to
17 state in writing the last date on which the company will dissolve, it provides for
18 dissolution upon events terminating a person's membership, e.g., that person's retirement,
19 death, or expulsion (unless otherwise provided in the operating agreement or by consent
20 of the members). 15 Pa.C.S.A. §§8971⁶ and 8103(c). Under the Pennsylvania statute, an
21 LLC is given limited liability for all its members even if they are involved in
22 management, as is generally the case with corporations and generally distinguishable
23 from partnerships. 15 Pa.C.S.A. §8922. Lastly, the statute provides for limitations on the
24 transferability of interests. A member may not transfer the membership itself and the
25 attendant management rights when transferring the right to receive distributions, unless

⁴ Advisory Opinion 1996-13 also noted that the operating agreement of the requester reflected the attributes generally set out in the law such as limited transferability of interests and lack of continuity of life.

⁵ The Commission notes that Pennsylvania law also provides that the terms "company" and "limited" would fulfill the identifying requirements for a corporation or a registered limited liability partnership. 15 Pa.C.S.A. §§1303(a) and 8203(a).

⁶ This section also provides for dissolution upon events specified in the LLC's governing documents, by unanimous agreement of the members, or by a judicial determination.

1 the other members provide unanimous written consent or there is a provision for such
2 transfer in the operating agreement. 15 Pa.C.S.A. §8924.

3 The Firm's operating agreement corresponds to the above-cited provisions. The
4 agreement explicitly provides for the continuation of the Firm upon the occurrence of
5 events terminating a membership. Article Seven. It also explicitly prohibits the transfer
6 of interests, except a transfer back to the Firm. Article Seventeen. Although some of the
7 statutory provisions (i.e., with respect to the definition, name, and dissolution of an LLC)
8 may not be as expressly prescriptive as provisions reviewed in the previous opinions,
9 most of the provisions appear consistent with the relevant sections of the Uniform
10 Limited Liability Company Act (1995). See U.L.L.C.A. §§101(8), 105(a), 203(d), 303,
11 503, and 801.

12 The Commission acknowledges that the Firm changed its business form from a
13 general partnership to an LLC only recently and many of its rules may have remained
14 essentially the same with different terminology to correspond to its new status as an LLC.
15 Moreover, any perceived flexibility in the State's LLC statutory provisions (whether or
16 not discussed above) or in the statutory provisions related to partnerships or corporations
17 may allow Pennsylvania LLCs to have more common attributes with Pennsylvania
18 corporations or with Pennsylvania partnerships than is the case with corresponding
19 business entities in other jurisdictions.⁷ Nevertheless, the LLC in Pennsylvania is still a
20 separate type of business entity with its own comprehensive statutory framework under
21 the laws of Pennsylvania. In declining to treat business trusts as corporations in Advisory
22 Opinion 1995-27, the Commission noted that, although the trusts had certain corporate
23 attributes under the applicable State laws, those States regarded them as "a separate form
24 of business organization that is distinct from corporations." Advisory Opinion 1995-27.

25 Based on the foregoing analysis, the Commission concludes that the Firm, like the
26 LLCs in Advisory Opinions 1996-13 and 1995-11 may make contributions from its
27 general treasury funds subject to the limits of 2 U.S.C. §441a(a). The Commission

⁷ Without a review of the LLC statutes in all other states, the Commission is not in a position to state whether the Pennsylvania LLC statute is more or less flexible. The Commission also notes that various attributes of corporations and partnerships may vary according to the type of corporation or partnership, as well as the jurisdiction.

Opinion

1 reaches this conclusion on the assumption that the Firm itself is not a Federal contractor.
2 11 CFR 115.2. Moreover, Firm contributions will not be attributed to any of the
3 members who comprise the Firm. As indicated in the cited opinions, the Commission
4 assumes that none of the Firm's members are corporations, Federal contractors, or foreign
5 nationals. See footnote 3 above.

6 This response constitutes an advisory opinion concerning application of the Act,
7 or regulations prescribed by the Commission, to the specific transaction or activity set
8 forth in your request. See 2 U.S.C. §437f.

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Sincerely,

John Warren McGarry
Chairman

Enclosures (AOs 1996-13, 1995-27, and 1995-11)