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FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 8, 1999

AGENDA ITEM

For Meeting of: 7-15-99

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence M. Noble *LMN*
General Counsel

N. Bradley Litchfield *NBL*
Associate General Counsel

Michael G. Marinelli *MM*
Staff Attorney

SUBJECT: Draft AO 1999-15

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for July 15, 1999.

Attachment

2
3 E. Mark Braden
4 Baker & Hostetler
5 Washington Square, Suite 1100
6 1050 Connecticut Ave. NW
7 Washington, DC 20036-5304

8
9 Dear Mr. Braden:

10
11 This refers to your letters dated July 7, June 3, and May 19, 1999, which request
12 advice concerning the application of the Federal Election Campaign Act of 1971, as
13 amended ("the Act"), and Commission regulations to the membership status within the
14 American Resort Development Association ("ARDA") of individuals who join ARDA-
15 Resort Owners Coalition ("ARDA-ROC"). You state that ARDA proposes that members
16 of ARDA-ROC be solicited for contributions to ARDA PAC or to a political action
17 committee that may be established by ARDA-ROC in the future.

18 **FACTUAL BACKGROUND**

19 *Creation and role of ARDA and ARDA-ROC*

20 You state that ARDA is a District of Columbia non-profit corporation, organized
21 as a trade association under the Internal Revenue Code. ARDA's purposes include
22 uniting persons engaged or interested in the resort development industry and time share
23 issues. You also state that ARDA seeks to provide leadership on issues of concern to
24 members of the association.

25 In 1989, ARDA created ARDA-ROC. ARDA-ROC is currently governed by a
26 nine person executive group and is subject to the bylaws of ARDA, and the ARDA-ROC
27 policy and procedures are written by ARDA. You state that ARDA-ROC is not
28 incorporated, but is part of ARDA. ARDA-ROC, you explain, is dedicated to preserving,

1 protecting and enhancing the ownership of vacation resort properties and the interest of
2 individual owners. Individual timeshare owners have been eligible to join ARDA-ROC
3 by paying an annual \$3.00 fee to ARDA-ROC. You state that ARDA and its members
4 have actively solicited these funds from individual timeshare owners and approximately
5 335,000 individuals have joined ARDA-ROC.

6 You explain that ARDA-ROC engages tax, banking and environmental experts in
7 Washington, D.C. and around the country to represent and defend timeshare owners on a
8 wide range of Federal and State issues that directly affect the value of members' property
9 and the enjoyment of their vacation experience. ARDA-ROC funds have also assisted in
10 increasing the professionalism of resort property management. Your request includes
11 copies of the ARDA-ROC newsletter which illustrates the activities and purposes of the
12 organization.

13 *Proposed changes in ARDA and ARDA-ROC structure*

14 You characterize certain proposed changes in the structure of ARDA and ARDA-
15 ROC changes as providing a more formal cast to ARDA-ROC. The current policy and
16 procedures of ARDA-ROC would become that entity's articles of organization. The
17 individual ARDA-ROC members would be granted a more direct role in its operations,
18 and local chapters would be formally recognized.

19 Local time share owner associations could join ARDA-ROC as local ARDA-ROC
20 chapters. A local timeshare owners association would be eligible to become a local
21 chapter if:

22 (a) it completes the [ARDA-ROC] chapter membership application form;

- 1 (b) it requires its individual owners to pay regular member dues to the local
2 [ARDA-ROC] chapter, a portion of which is transmitted [to ARDA-ROC] as
3 the dues of the local chapter and the individual owner members;
- 4 (c) it assists in the transmission of the ARDA-ROC newsletter and/or other
5 ARDA-ROC membership materials;
- 6 (d) it assists in the conduct of the biannual membership election to the ARDA-
7 ROC executive group, and
- 8 (e) it assists in advancing the interests of timeshares owner members in their state
9 and nationally

10 You state that chapter applications for local membership in ARDA-ROC would
11 be subject to approval by the ARDA-ROC executive group. ARDA-ROC membership
12 would be available only to timeshare owners who pay regular dues as set forth by the
13 executive group and local chapters (if any is available at their resort). Individual
14 timeshare owners members would directly elect an individual to the ARDA-ROC
15 executive group for a two-year term. ARDA-ROC executive group responsibilities
16 would expand to include the selection of one member of the executive group to serve on
17 the ARDA board of directors. The total size of the executive group would be increased to
18 eleven.¹

¹ The other members of the executive group would be the chairman of ARDA-ROC, the legislative council chair, the chairman of ARDA-PAC and the president of ARDA. The chairman of ARDA-ROC would also name 6 other members to the executive group. ARDA-ROC Articles, section A4.

1 There would be parallel changes to the ARDA bylaws to conform to the proposed
2 ARDA-ROC articles of organization. You state that these changes would be in two
3 areas:

- 4 (a) an expansion of ARDA membership categories in Article III to include
5 ARDA-ROC members as an additional, affiliated membership category; and
6 (b) the selection by the ARDA-ROC executive group of a member to serve on the
7 ARDA board of directors

8 Following these modifications in ARDA and ARDA-ROC, you ask two
9 questions: (1) Are the members of ARDA-ROC "members" of ARDA, as defined by the
10 Commission and its regulations? (2) Will the Act permit the solicitation of ARDA-ROC
11 members by the existing ARDA PAC and an ARDA-ROC PAC that might at a future
12 date be created following the adoption of the proposed changes.

13 In posing these questions you explain that ARDA's request is limited to the
14 membership status of individuals who belong to ARDA-ROC. Therefore, this opinion
15 will not consider the memberships status of the other categories of members of ARDA or
16 its affiliated associations. In addition, you state that you assume that any separate
17 political committee that may be formed by ARDA-ROC would be affiliated with ARDA-
18 PAC under the Commission's regulations at 11 CFR 100.5(g)(1) and (2). You further
19 state that any PAC solicitations to any ARDA-ROC member would conform to the
20 Commission's applicable notice requirements

21 ***ACT AND COMMISSION REGULATIONS***

22 The Act prohibits corporations from making any contribution or expenditure in
23 connection with a Federal election. 2 U.S.C. §441b(a). The Act states, however, that the

1 term "contribution or expenditure" does not include "the establishment, administration,
2 and solicitation of contributions to a separate segregated fund to be utilized for political
3 purposes by a corporation, labor organization, membership organization, cooperative, or
4 corporation without capital stock." 2 U.S.C. §441b(b)(2)(C). See also 2 U.S.C.
5 §431(8)(B)(vi) and (9)(B)(v).

6 Under the Act, a corporation or a separate segregated fund established by the
7 corporation may solicit contributions to such a fund from its stockholders and their
8 families and the corporate executive and administrative personnel and their families.
9 2 U.S.C. §441b(b)(4)(A)(i). The Act also provides that an incorporated membership
10 organization, cooperative, or corporation without capital stock, or a separate segregated
11 fund established by such an entity, may solicit voluntary contributions to the fund from
12 the entity's members and their families, as well as the executive and administrative
13 personnel and their families. 2 U.S.C. §441b(b)(4)(C); 11 CFR 114.5(a) and 114.7(a).

14 The Commission's regulations use the term "membership association" to describe
15 the entities covered under 2 U.S.C. §441b(b)(4)(C). A membership association is
16 defined, in part, under 11 CFR 114.1(e)(1), as a membership organization, cooperative, or
17 corporation without capital stock that (i) expressly provides for "members" in its articles
18 and bylaws; (ii) expressly solicits members; and (iii) expressly acknowledges the
19 acceptance of membership, such as by sending a membership card or inclusion on a
20 membership newsletter list. See also 11 CFR 100.8(b)(4)(iv)(A).

21 On the question of what constitutes membership for purposes of the Act, the
22 Supreme Court has suggested that members are to be defined, at least in part, by analogy
23 to stockholders of business corporations and members of labor unions. See *FEC v.*

1 *National Right to Work Committee*, 459 U.S. 197, 202 (1982); see also *Chamber of*
2 *Commerce v. FEC* ("Chamber"), 69 F.3d 600 (D.C.Cir. 1995), *petition for rehearing*
3 *denied*, 76 F.3d 1234 (1996);² See also Advisory Opinions 1999-10, 1999-6 and 1998-
4 19.

5 ***APPLICATION TO ARDA PROPOSAL***

6 ***ARDA as membership association***

7 The factual background of this request indicates that ARDA would qualify as a
8 membership organization under 11 CFR 114.1(e)(1). The bylaws of ARDA provide for
9 members. See ARDA Bylaws, article III. The advertisement materials included in the
10 request indicate that ARDA does solicit members. Finally, your request indicates that
11 ARDA acknowledges its members by sending members newsletters and other materials.

12 The Commission also concludes that the board of directors for ARDA is the
13 highest governing body of ARDA. The Commission notes that the board is given the
14 authority for "the overall supervision, control and direction of the Association." ARDA
15 Bylaws, article VI, section one. This role is confirmed by other provisions in the ARDA

² In 1993, the Commission revised its membership regulations to further define the term "members." However, the court in *Chamber* determined that portions of those regulations were invalid, concluding that they defined the term "member" in an unduly restrictive fashion. See *Chamber* 69 F.3d, at 604-605. (There were not four votes at the Commission to seek further judicial review of this decision.) The regulation at 11 CFR 114.1(e)(2), now invalid in the District of Columbia Circuit, defines members to mean:

all persons who are currently satisfying the requirements for membership in a membership association, affirmatively accept the membership association's invitation to become a member, and either:

- (i) Have some significant financial attachment to the membership association, such as a significant investment or ownership stake (but *not* merely the payment of dues);
- (ii) Are required to pay on a regular basis a specific amount of dues that is predetermined by the association and are entitled to vote directly either for at least one member who has full participatory and voting rights on the highest governing body of the membership association, or for those who select at least one member of those on the highest governing body of the membership association; or
- (iii) Are entitled to vote directly for all of those on the highest governing body of the

1 Bylaws which give the board of directors responsibility for setting policies, procedures
2 and rules for various programs of the association and the power to adopt and revise the
3 association's budget. ARDA Bylaws, article IX, section 1 and article XI, section 5.

4 *Members of ARDA-ROC as members of ARDA*

5 The Commission also concludes that the members of ARDA-ROC qualify as
6 members of ARDA since they would have satisfied even the more restrictive standard
7 struck down in *Chamber*.³ See footnote 5. For example, members of ARDA-ROC pay
8 dues to ARDA-ROC which can be characterized as a subgroup or division of ARDA.⁴ See
9 ARDA-ROC draft Articles, section A1. Furthermore, members of ARDA-ROC elect at
10 least one member of a body (the executive group of ARDA-ROC) that chooses a member
11 of the governing body of ARDA.⁵

membership association.

³ The Commission acknowledges that the portion of the regulations that were not affected by the *Chamber* decision require that the members of an organization "affirmatively accept" membership in the organization. The draft articles of ARDA-ROC contemplate a situation where a pre-existing local timeshare development owners association may become a local chapter of ARDA-ROC. This might, in certain circumstances, create a situation where current members of the local association may automatically become members of ARDA-ROC without an opportunity to affirmatively accept membership in ARDA-ROC on their own under 11 CFR 114.1(e)(2). The Commission notes, however, that initial membership in the local association would indicate a strong affinity of interest with ARDA-ROC and that continued membership in the local chapter can be construed as an affirmative acceptance of membership in ARDA-ROC and ARDA.

⁴ The Commission notes your statement that the funds raised through ARDA-ROC membership dues are placed in a separate account from other funds. The funds in this account however would seem to be controlled in large measure by ARDA. In budgetary matters, the President of ARDA oversees the preparation of the ARDA-ROC budget and may in certain situations directly manage the finances of ARDA-ROC. The proposed ARDA-ROC budget must be presented to the ARDA board of directors. See proposed ARDA ROC-Policy and Procedures section B-5.

⁵ In its continuing review of membership issues following the *Chamber* decision, the Commission published a second notice of proposed rulemaking which may lead to regulation changes concerning the definition of membership. See FEC Notice of Proposed Rulemaking, published in the *Federal Register* on December 16, 1998, at pages 69224 through 69229. The conclusion of this opinion regarding membership could be modified or superseded by the adoption of any new regulations on membership criteria, but the opinion may be relied upon until any change is made. If a change is made, it will become effective on a specific date announced in the *Federal Register*. In addition, the Commission's written explanation and justification for any new rules will identify each past advisory opinion that is modified or superseded.

1 *Affiliation between PACs of ARDA and ARDA-ROC*

2 The Commission also agrees with the assumption made in the request that any
3 separate segregated fund ("SSF" or "PAC") established by ARDA-ROC would be
4 affiliated with ARDA PAC. Advisory Opinion 1996-38 is relevant to this request. In
5 that opinion, the Commission found that the political committee of an unincorporated
6 association created by an incorporated trade association would be affiliated with the trade
7 association's PAC.⁶

8 The relationship between ARDA-ROC and ARDA is closer than that considered
9 in the Advisory Opinion 1996-38. ARDA-ROC was created by ARDA. ARDA-ROC is
10 advertised to prospective members in its solicitation materials as being part of ARDA.⁷ A
11 member of the ARDA-ROC executive group sits on the board of ARDA. The president
12 of ARDA and the chair of ARDA PAC automatically sit on ARDA-ROC's executive
13 board. The president of ARDA appoints the director of ARDA-ROC and other
14 personnel. ARDA-ROC Articles, sections 4 and 6. Finally, all members of ARDA-ROC
15 are members of ARDA. Based on the factors of affiliation used by the Commission,
16 ARDA PAC would be affiliated with any SSF created by ARDA-ROC. See 11 CFR
17 100.5(g)(4)(ii)(B),(C),(D),(F) and (I); and 11 CFR 110.3(a)(3)(ii)(B),(C),(D),(F) and (I).

⁶ Using the factors found at 11 CFR 100.5(g)(4)(i) and 11 CFR 110.3(a)(3)(ii), the Commission noted the relationship between the trade association and the unincorporated association. The Commission observed that the trade association created the unincorporated association, that the governing bodies of these entities shared some common directors and that all members of the association were members of the trade association. See 11 CFR 100.5(g)(4)(ii).

⁷ Under 11 CFR 100.5(g)(3)(iv) committees established by a membership organization and/or related State and local entities of that organization or group are automatically considered affiliated. This *per se* affiliation, however does not apply to ARDA-ROC since, though essentially a division of ARDA, ARDA-ROC itself is not a State or local chapter of ARDA. Therefore, since the relationship between ARDA and ARDA-ROC does not precisely fit into any of the categories found under 100.5(g)(3)(i)-(iv), their relationship is examined under the general factors of affiliation found at 11 CFR 100.5(g)(4)(ii) and 11 CFR 110.3(a)(3)(ii).

