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FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 11, 2005

MEMORANDUM

AGENDA ITEM
For Meeting of: 10-19-05

TO: The Commission

THROUGH: Robert J. Costa
Acting Staff Director

FROM: James A. Kahl
Deputy General Counsel

Rosemary C. Smith
Associate General Counsel

Brad C. Deutsch
Assistant General Counsel

Jonathan M. Levin
Senior Attorney

Subject: Draft AO 2005-14

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 19, 2005.

Attachment

ADVISORY OPINION 2005-14

Andrew C. Selden, Esquire
Neal T. Buethe, Esquire
Briggs and Morgan
2200 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402

DRAFT

Dear Messrs. Selden and Buethe:

We are responding to your advisory opinion request on behalf of the Association of Kentucky Fried Chicken Franchisees, Inc. ("AKFCF") and its separate segregated fund ("AKFCF PAC"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to AKFCF's status as a federation of trade associations and its ability to solicit contributions to AKFCF PAC from the solicitable class of incorporated Kentucky Fried Chicken ("KFC") franchisees that are members of AKFCF's regional trade associations, and from unincorporated franchisees, including individuals, that are members of the regional trade associations.

The Commission concludes that AKFCF is a federation of trade associations comprised of affiliated regional trade associations that are, in turn, comprised of KFC franchisees. Hence, AKFCF and AKFCF PAC may solicit the owners and executive and administrative personnel of the incorporated franchisee-members of the regional trade associations, and the families of those individuals, for contributions to AKFCF PAC. AKFCF and AKFCF PAC may also solicit contributions from franchisee-members who are individuals or unincorporated entities.

1 ***Background***

2 The facts of this request are presented in your letter and attachments received on July 20,
3 2005, and follow-up letters and e-mail communications received between August 1 and
4 September 15, 2005.

5 *1. AKFCF, the regional associations, and AKFCF PAC*

6 AKFCF is a Georgia corporation that characterizes itself as a trade association. AKFCF's
7 articles of incorporation provide that it functions "as a business league as that term is used in
8 Section 501(c)(6) of the Internal Revenue Code," that it "is not organized and shall not be
9 operated for pecuniary gain or profit" and that no income or profit shall "be distributable to or
10 inure to the benefit of its members, directors, officers, or any other individual." AKFCF Articles
11 of Incorporation, Articles III and IV. AKFCF's only members are ten separately incorporated
12 regional associations, the members of which are franchisees of KFC Corporation.[1]

13 The articles of incorporation and/or by-laws of five of the seven domestic regional
14 associations contain provisions similar to those found in AKFCF's articles of incorporation with
15 respect to functioning as a business league, to their status as non-profit organizations and
16 operations, and to the non-distribution of income or profits. Regarding the remaining two
17 domestic regional associations, the Northwest association is officially organized as a Washington
18 State for-profit organization and the Southern California association is organized under the broad
19 category of California "nonprofit mutual benefit corporation." However, you represent that these
20 two regional associations also conduct themselves in a manner consistent with the provisions

[1] AKFCF consists of seven domestic and three international regional associations. The seven domestic regionals are Southeast, Northeast, Great Lakes, Upper Midwest, Northwest, Southern California, and Southwest. The international regionals are Caribla (Caribbean and Latin America), Canada, and Mexico. You state that members of the international regional associations will not be solicited for contributions to AKFCF PAC and that "non-U.S. Region officers are not on the AKFCF PAC Board."

1 described above; they are non-stock membership associations functioning as non-profits, no
2 dividend or profits are ever paid to the members, and any annual surplus is used in programming
3 sponsored by the association for its members.

4 The regional associations are composed of members who are KFC franchisees. These
5 franchisee-members are all either closely-held corporations, limited liability companies
6 ("LLCs"), partnerships, or individuals.

7 In 2005, AKFCF established a separate segregated fund ("SSF"), AKFCF PAC, "in order
8 to support conditions that favor federal legislation favorable to franchisees." AKFCF PAC filed
9 its Statement of Organization with the Commission on June 2, 2005. None of the regional
10 associations sponsors its own SSF.

11 *2. Purpose of AKFCF and the regional associations*

12 AKFCF was formed in 1975 to coordinate the activities of the regional associations that
13 either had been formed or were then being formed. Among AKFCF's stated purposes are
14 fostering and coordinating the activities of the regional associations, developing the industry
15 composed of KFC franchised food outlets, improving the nature of services in the industry,
16 encouraging inventiveness and communication within the industry, and securing for the industry
17 fair and equitable treatment in transactions with manufacturers of, and dealers in, supplies.
18 AKFCF Articles of Incorporation, Article III. The stated purposes of the regional associations
19 vary but each is organized to promote the mutual interests of the KFC franchisees in its own
20 region.

21 *3. Structure of AKFCF and the regional associations*

22 The AKFCF by-laws set forth the role of the leaders of the regional associations in
23 governing AKFCF, and, in turn, the seven domestic regional associations' by-laws indicate the

1 role of the members of each regional association in selecting those leaders who govern AKFCF.
2 The affairs of AKFCF are "managed by, or under the direction of," its Board of Directors.
3 AKFCF By-laws, Section 4.1. The Board is composed of three high-ranking officers from each
4 of the regional associations. AKFCF By-laws, Section 4.2. At its annual regular meeting, the
5 AKFCF Board appoints five "Principal officers" for one-year terms. The Immediate Past
6 President and the Principal officers sit on the Board and manage AKFCF's day-to-day affairs.
7 AKFCF By-laws, Sections 4.2, 4.7, 5.1, and 5.2. Each Principal officer must be either a director
8 already, or a past or current officer of one of the regional associations and a member in good
9 standing of that association.[2] AKFCF By-laws, Section 5.1.

10 The by-laws of the seven domestic regional associations indicate that their high-ranking
11 officers are elected by their franchisee-members, and that most or all of their directors are elected
12 directly by their franchisee-members. Generally, the directors and high-ranking officers of the
13 regional associations must be franchisee-members of the association or, in the case of franchisees
14 that are not individuals, representatives of those franchisees.

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[2] A Director "must be and remain" either (i) a "Principal officer" as described by the AKFCF By-laws; or (ii) a person franchised by the KFC Corporation, or by a KFC licensee or affiliate, to operate a KFC food outlet, or a shareholder or principal officer of such franchisee. That director must also be a member in good standing of the regional association that appointed him or her, and not an employee of KFC Corporation's parent company or its affiliates. AKFCF By-laws, Section 4.3.

Questions Presented

1. *Is AKFCF a federation of trade associations comprised of regional trade associations that are affiliated with AKFCF?*
2. *May AKFCF or AKFCF PAC solicit the owners and executive and administrative personnel of the incorporated franchisee-members of the domestic regional associations, and the families of those individuals, for contributions to AKFCF PAC? May AKFCF or AKFCF PAC solicit contributions from unincorporated franchisee-members, including individuals, of the domestic regional associations?*

Legal Analysis and Conclusions

1. *Is AKFCF a federation of trade associations comprised of regional trade associations that are affiliated with AKFCF?*

Yes, AKFCF is a federation of trade associations comprised of regional trade associations that are affiliated with AKFCF.

Commission regulations define a trade association as:

> generally a *membership organization* of persons engaging in a similar or related line of commerce, organized to promote and improve business conditions in that line of commerce and not to engage in a regular business of a kind ordinarily carried on for profit, and no part of the net earnings of which inures to the benefit of any member.

11 CFR 114.8(a) (emphasis added). Accordingly, in order to qualify as a trade association, an association must first qualify as a membership organization under Commission regulations.

AKFCF and each of the domestic regional associations qualifies as a membership organization under Commission regulations. Specifically, AKFCF and the domestic regional associations are composed of persons (*i.e.*, entities and individuals) that are "members" as defined by the Act and regulations, in that the persons must satisfy the membership requirements

1 set out in their respective by-laws, affirmatively accept an invitation to become a member, and,
2 with the exception of a few classes in some of the domestic regional associations, pay annual
3 membership dues of a pre-determined amount specified by the Boards or by-laws of AKFCF or
4 the domestic regional associations.[3] 11 CFR 100.134(f) and 114.1(e)(2). With respect to the
5 definition of "membership organization," all of the members of AKFCF and at least some of the
6 members of each domestic regional association, as Board members or officers, have the authority
7 to operate their respective association pursuant to their by-laws. AKFCF and each domestic
8 regional association sets out the membership requirements in its by-laws and, as evidenced by
9 their web sites, the domestic regional associations expressly solicit persons to become members.
10 The Commission assumes that AKCF and each domestic regional association makes its formal
11 organizational documents available to its members upon request and expressly acknowledges the
12 acceptance of membership. Finally, neither AKFCF nor the regional associations is organized
13 primarily for the purpose of influencing an election of any individual to Federal office. 11 CFR
14 100.134(e) and 114.1(e)(1).

15 AKFCF and each of the domestic regional associations also qualifies as a trade
16 association in accordance with 11 CFR 114.8(a). Each is a membership organization of persons
17 engaging in a similar line of commerce, and each is organized to promote and improve business
18 conditions in that line of commerce. Neither AKFCF nor any of the domestic regional
19 associations is organized to engage in a regular business of a kind ordinarily carried on for profit.

[3] In each of the seven domestic regional associations, the requirements for all of the membership classes consisting of franchisees include the obligation to pay annual dues.

1 Moreover, no part of the net earnings of AKFCF or any of the domestic regional associations
2 inures to the benefit of any member.[4]

3 Commission regulations define a federation of trade associations as "an organization
4 representing trade associations involved in the same or allied line of commerce." 11 CFR
5 114.8(g)(1). In determining whether an entity is a federation of trade associations, the
6 Commission has examined a variety of organizational structures, which are typically composed
7 of one coordinating organization interconnected with regional (*e.g.*, State) organizations.
8 Notably, the Commission has concluded that an entity is a federation of trade associations when a
9 significant portion of its board of directors consists of representatives of the State trade
10 associations, and the State trade associations participate as principal or important units in the
11 governance of the federation. *See, e.g.,* Advisory Opinions 1998-19, 1995-17, and 1977-44.
12 Under AKFCF's by-laws, the highest governing body consists mostly of high-ranking officers of
13 the regional trade associations, and the Principal officers operating AKFCF on a day-to-day basis
14 must also be past or current officers of a regional association. Consistent with past
15 determinations by the Commission, AKFCF thus qualifies as a federation of the regional trade
16 associations.

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[4] The Explanation and Justification for the definition of trade association at 11 CFR 114.8(a) states: "The general definition of a trade association is based on the treatment in the tax code of business associations. See Regulation Section 501(c)(6) of the Internal Revenue Code." Federal Election Commission Regulations, *Explanation and Justification*, House Document No. 95-44, 95th Cong., 1st Sess. at 112 (1977). Neither AKFCF nor any of the regional associations files with IRS as an entity exempt from taxation under 26 U.S.C. 501(c)(6) because of an IRS interpretation, deferred to in *National Muffler Dealers Association, Inc. v. U.S.*, 440 U.S. 472 (1979), of the meaning of "business league" as used in that section. Under 26 CFR 1.501(c)(6)-1, an association's activities must be "directed to the improvement of business conditions of one or more lines of business," and the IRS has determined that an association that confines its membership to dealers in a particular brand name does not qualify as a "business league." Nevertheless, the wording of the Explanation and Justification of 11 CFR 114.8(a) merely provides a description of the type of organization that qualifies as a trade association and, by doing so, makes clear that Commission regulations do not require that the association qualify for a tax exemption under 26 U.S.C. 501(c)(6). As indicated above, the governing documents of AKFCF and the regional associations, as well as other information provided by you, indicate that the entities behave as non-profit, tax-exempt 501(c)(6) organizations. *See* Advisory

1 Under 11 CFR 114.8(g)(1), a federation of trade associations may solicit contributions to
2 its SSF from the members of the federation's regional, state, or local affiliates or members
3 provided that the federation and the affiliates or members qualify as "affiliated" under the Act
4 and Commission regulations. "Affiliation" among the organizations is based on specific factors
5 set forth at 11 CFR 100.5(g)(4) (and repeated at 11 CFR 110.3(a)(3)). 11 CFR 114.8(g)(1).
6 These factors – which pertain to the relationship between sponsoring organizations as to
7 governance, common officers and personnel, financing, and the formation of the organizations –
8 are to be examined in the context of the overall relationship between sponsoring organizations.
9 *See* 11 CFR 100.5(g)(4)(i) and (ii)(A)-(J), and 110.3(a)(3)(i) and (ii)(A)-(J).
10 In past advisory opinions, many of the very facts that led to a conclusion that an entity
11 was an interconnected multi-tiered structure of regional or State trade associations, and hence a
12 federation of trade associations, were the same facts that also fit within the affiliation factors at
13 11 CFR 100.5(g)(4), and led to the conclusion that, in the context of their relationship, the
14 federation and the State or regional trade associations were affiliated with each other. *See*
15 Advisory Opinions 1998-19 and 1995-17. That is the situation presented here, and the
16 Commission concludes that AKFCF and the regional trade associations are affiliated.
17 Specifically, the governing documents of AKFCF indicate that the regional trade
18 associations have the ability to direct or participate in the governance of AKFCF through the
19 mandatory presence of three high-ranking officers from each regional association on AKFCF's
20 Board of Directors and the requirement that AKFCF's Principal officers must be selected from
21 among the other directors or from past or current officers of a regional association. *See* 11 CFR

Opinion 1978-39 (Commission referred to the International Association of Holiday Inns, Inc., an association comprised of Holiday Inn franchisees, as a "trade association").

100.5(g)(4)(ii)(B). In view of the required composition of AKFCF's Principal officers and of the remainder of AKFCF's Board, which manages and directs AKFCF, the regional associations also have the ability to hire, demote, or otherwise control AKFCF's officers and decisionmaking employees. *See* 11 CFR 100.5(g)(4)(ii)(C). Moreover, this governance structure indicates an overlap between the current directors of AKFCF and the current and former officers of the regional associations. *See* 11 CFR 100.5(g)(4)(ii)(E) and (F). Finally, AKFCF was established by the regional associations that were in existence at the time of its formation. *See* 11 CFR 100.5(g)(4)(ii)(I). The Commission also notes that the franchisee-members of the regional associations elect the individuals who, by virtue of AKFCF's by-laws, automatically become the majority of AKFCF's directors, thus further indicating a direct relationship between the franchisee-members and AKFCF, via the regional associations.

2. *May AKFCF or AKFCF PAC solicit the owners and executive and administrative personnel of the incorporated franchisee-members of the domestic regional associations, and the families of those individuals, for contributions to AKFCF PAC? May AKFCF or AKFCF PAC solicit contributions from unincorporated franchisee-members, including individuals, of the domestic regional associations?*

Yes, under the conditions described below, AKFCF and AKFCF PAC may solicit the owners and executive and administrative personnel of the incorporated franchisee-members of the domestic regional trade associations, and the families of those individuals, for contributions to AKFCF PAC. AKFCF and AKFCF PAC may also solicit contributions from unincorporated franchisee-members, including individuals.

An incorporated connected organization and its SSF are subject to restrictions as to the persons who may be solicited for contributions to the SSF. 2 U.S.C. 441b(b)(4)(A), (C), and (D); 11 CFR 114.5(g)(1), 114.7(a), and 114.8(c). Specifically, under 11 CFR 114.8, a trade association or its SSF may not solicit contributions from member-corporations themselves, but

1 may solicit contributions from the stockholders and executive and administrative personnel, and
2 their families, ("solicitable class") of the member-corporations that separately and specifically
3 approve the solicitations and that have not approved a solicitation by any other trade association
4 for the same calendar year. 11 CFR 114.8(c).[5] Section 114.8(g)(2) provides that, under those
5 conditions, a federation of trade associations or its SSF may also solicit contributions from the
6 solicitable class of the incorporated members of its affiliated trade associations. Thus, so long as
7 AKFCF receives prior approval on an annual basis from an incorporated franchisee-member of
8 one of the domestic regional associations, AKFCF or its PAC may solicit that member's
9 solicitable class for contributions to AKFCF PAC.

10 The provisions governing solicitations by membership organizations for contributions to
11 an SSF apply when a trade association or a federation of trade associations solicits contributions
12 from members that are individuals or unincorporated business entities.[6] 11 CFR 114.7(c).
13 Individuals who are franchisee-members of the domestic regional associations, and the families
14 of these individuals, may be solicited for contributions to AKFCF without the need to seek and
15 obtain prior approval. 11 CFR 114.7(a) and (c). Unincorporated entities that are franchisee-
16 members of domestic regional associations may also be solicited without the need for prior
17 approval. AKFCF or AKFCF PAC may address solicitations for contributions from
18 unincorporated franchisee-members to the one or two individuals who normally represent the
19 unincorporated franchisee-member in its dealings with AKFCF or the regional association. *See*
20 Advisory Opinions 1997-22 and 1995-27. The solicitation may ask for contributions only from
21 the unincorporated entity itself, not from the one or two individual representatives or from the

[5] The requirements for separate and specific approval are described in 11 CFR 114.8(d) and (e).

stockholders or executive or administrative personnel of the member, unless such individuals qualify as members in their own right. *See* Advisory Opinions 1995-27 and 1988-03.[7]

The Commission expresses no opinion regarding the application of the Internal Revenue Code to the proposed activities because these topics are not within the Commission's jurisdiction.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

Scott E. Thomas
Chairman

Enclosures (AOs 2001-07, 2000-15, 1998-19, 1997-22, 1995-27, 1995-17, 1988-03, 1978-39, and 1977-44)

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[6] Such entities would include partnerships, and those LLCs that do not elect to be treated as a corporation by the IRS and do not have publicly traded shares. *See* 11 CFR 110.1(g)(2) and (3); *see also* Advisory Opinion 2001-07.
[7] AKFCF may also solicit contributions from the executive and administrative personnel (and families thereof) of the regional affiliates. 11 CFR 114.8(i)(2); Advisory Opinion 2000-15. *See also* 11 CFR 114.1(c) for the definition of "executive or administrative personnel."