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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

August 21, 2012

MEMORANDUM

**AGENDA ITEM**

TO: The Commission

FROM: Anthony Herman *AH*  
General Counsel

Kevin Deeley *KS*  
Acting Associate General Counsel

Robert M. Knop *RMK*  
Assistant General Counsel

Anthony T. Buckley *ATB*  
Attorney

Subject: AO 2012-29 (Hawaiian Airlines, Inc.) (Draft A)

For Meeting of 8/23/12

**SUBMITTED LATE**

Attached is a proposed draft of the subject advisory opinion (Draft A). We have been asked to have this draft placed on the Open Session agenda for August 23, 2012.

Attachment

1 ADVISORY OPINION 2012-29

2

3 Ronald M. Jacobs

4 Lawrence H. Norton

5 Jeffrey J. Hunter

6 Venable LLP

7 575 Seventh Street, NW

8 Washington, DC 20004

9

10 Dear Messrs. Jacobs, Norton and Hunter:

**DRAFT A**

11 We are responding to your advisory opinion request concerning the application of  
12 the Federal Election Campaign Act of 1971, as amended (the “Act”) and Commission  
13 regulations to the plan by Hawaiian Airlines, Inc. (“Hawaiian”) to host appearances by  
14 candidates for the US Senate at Hawaiian-sponsored events that will include attendance  
15 by members of the general public. The Commission concludes that Hawaiian may not  
16 use general treasury funds to pay for these planned events because such payments would  
17 constitute in-kind contributions to the candidates.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on  
20 July 20, 2012 and your supplemental e-mail received on August 17, 2012.

21 Hawaiian is a business corporation. Hawaiian Airlines Inc. Political Action  
22 Committee is Hawaiian’s separate segregated fund. Hawaiian provides inter-island  
23 flights and nonstop service between Hawaii and the U.S. mainland, Australia, and Asia.  
24 Its business operations are closely linked to other members of the travel and tourism  
25 industry in Hawaii, such as hotels, restaurants, tour operators, and their vendors.

1 Hawaiian intends to organize morning events each of which will feature a general  
2 election candidate for the 2012 election to the U.S. Senate from Hawaii.<sup>1</sup> These events  
3 will include breakfast, followed by a discussion. Hawaiian plans to invite members of its  
4 restricted class and leaders in the Hawaii travel and tourism industry to the events.  
5 Slightly less than half of the invitees will be Hawaiian employees, all of whom are  
6 executive or administrative employees within Hawaiian's restricted class, and slightly  
7 more than half of the invitees will be leaders of the tourist industry who are neither  
8 employees nor stockholders of Hawaiian.<sup>2</sup> Invitees may participate in as many of the  
9 events as they desire.

10 Hawaiian will pay the costs of organizing the events, inviting attendees, and  
11 providing breakfast. The event will take place either in Hawaiian's offices or an offsite  
12 location, possibly the candidate's office. Discussions prior to the event between  
13 Hawaiian and the candidate will be limited to the event's structure, format, and timing.  
14 There will be no discussion of the candidate's plans, projects, or needs, relating to the  
15 campaign.

16 Hawaiian will refrain from expressly advocating the nomination, election, or  
17 defeat of any candidate before, during, and after each event and will not promote or  
18 encourage express advocacy by its employees. Hawaiian does not anticipate endorsing  
19 any federal candidate in connection with this election. Hawaiian will not solicit or direct  
20 contributions to any political committee, nor will it collect contribution checks or

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<sup>1</sup> Hawaiian also asked about similar events that it had planned to organize in advance of the primary elections. Those elections have already occurred, however, so that part of their request is moot.

<sup>2</sup> There may be several Hawaiian employees assisting with the event, such as a secretary handing out name tags and a waiter or other company catering personnel.

1 otherwise facilitate contributions. The candidates will not accept contributions before or  
2 during the event, but may leave materials or envelopes for attendees.

3 ***Question Presented***

4 *May Hawaiian use general treasury funds to pay for appearances by candidates*  
5 *for the U.S. Senate that will include attendance by members of the general public?*

6 No, Hawaiian may not use general treasury funds to pay for appearances by U.S.  
7 Senate candidates at Hawaiian-sponsored events that will be attended by members of the  
8 general public.<sup>3</sup>

9 The Act and Commission regulations prohibit corporations from making a  
10 contribution in connection with a Federal election. *See* 2 U.S.C. 441b(a); 11 CFR  
11 114.2(b)(1). A “contribution” includes “any gift, subscription, loan, advance, or deposit  
12 of money or anything of value made by any person for the purpose of influencing any  
13 election for Federal office.” 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a); *see also* 2 U.S.C.  
14 441b(b)(2); 11 CFR 114.2(b)(1). “Anything of value” includes all in-kind contributions,  
15 including the provision of goods or services without charge or at a charge that is less than  
16 the usual and normal charge. *See* 11 CFR 100.52(d)(1). Corporations are not permitted  
17 to make contributions with general treasury funds “in connection with” any Federal  
18 election, 2 U.S.C. 441b(a), but may establish separate segregated funds (“SSFs”) for

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<sup>3</sup> The Commission is considering revisions to certain of the regulations addressed in this Advisory Opinion in response to the Supreme Court’s decision in *Citizens United*, 558 U.S. \_\_\_, 138 S.Ct. 876 (2010). *See* Notice of Proposed Rulemaking: Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, 76 Fed. Reg. 80803, 80807-09 (Dec. 27, 2011). Although the current regulations remain operative, the Commission notes that none of the proposed revisions would affect the outcome of this Advisory Opinion.

1 voluntary contributions from a restricted class of persons to make contributions. 2 U.S.C.  
2 441b(b)(2)(C); 11 CFR 114.1(a).

3 An “expenditure” includes “any purchase, payment, distribution, loan, advance,  
4 deposit, or gift of money or anything of value, made by any person for the purpose of  
5 influencing any election for Federal office.” 2 U.S.C. 431(9)(A)(i). “Expenditures made  
6 by any person in cooperation, consultation, or concert, with, or at the request or  
7 suggestion of, a candidate, his authorized political committees, or their agents shall be  
8 considered to be a contribution to such candidate,” 2 U.S.C. 441a(a)(7)(B)(i).  
9 Commission regulations refer to such expenditures as “coordinated.” 11 CFR 109.20(a).

10 Commission regulations include several exceptions permitting corporate activity  
11 that would otherwise constitute a coordinated expenditure or other type of in-kind  
12 contribution. *See* 11 CFR 114.1(a)(2)(x) (excluding from the definition of “contribution”  
13 and “expenditure” any corporate or union activity “specifically permitted by [11 CFR]  
14 part 114”).<sup>4</sup> The regulations explain, “[d]isbursements by corporations . . . for the  
15 election-related activities in 11 CFR 114.3 and 114.4 will not cause those activities to be  
16 contributions or expenditures, even when coordinated with any candidate . . . to the extent  
17 permitted in those sections.” 11 CFR 114.2(c).<sup>5</sup>

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<sup>4</sup> The Commission has described various provisions of part 114 as both exemptions and exceptions. *See, e.g.,* Advisory Opinion 1986-37 (National Conservative Foundation) (“exemptions”); Advisory Opinion 2000-03 (American Society of Anesthesiologists) (“exception”); Advisory Opinion 1996-11 (National Right to Life Conventions, Inc.) (“exceptions”).

<sup>5</sup> *See also* Explanation and Justification, Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates (“1995 E&J”), 60 FR 64267 (Dec. 14, 1995) (“Prohibited contributions include in-kind contributions resulting from the coordination of election-related corporate . . . communications with candidates, except for certain activities described in [11 CFR 114.3 and 114.4], which may involve limited types of coordination with candidates.”)

1           These exceptions include permission for a corporation to allow a candidate to  
2 address a meeting, convention, or other function of the corporation. *See* 11 CFR  
3 114.3(c)(2)(i) (appearances before a corporation’s restricted class); 11 CFR 114.4(b)(1)  
4 (appearances before employees beyond a corporation’s restricted class). The rules for  
5 candidate appearances to the restricted class differ in certain ways from appearances that  
6 extend to all employees. *Compare, e.g.*, 11 CFR 114.3(c)(2)(ii) (addressing candidate  
7 appearances at events limited to restricted class) *with* 114.4(b)(2)(i) (addressing candidate  
8 appearances at events not limited to restricted class).

9                           *A.     In-kind Contribution Analysis*

10           Hawaiian proposes to invite each of the candidates in the general election to the  
11 events. They are thus appearances “in connection with” the election. 2 U.S.C. 441b(a).  
12 *See* Advisory Opinion 1999-2 (Premera Blue Cross) (“[I]nvitations extended to multiple  
13 candidates for the same office, or invitations extended to candidates qua candidates,  
14 establish that the event planned is, in fact, in connection with a Federal election.”)  
15 (citations omitted).

16           Hawaiian’s hosting of the events will provide something of value to the  
17 candidates. Hawaiian proposes to pay the costs of organizing the events, inviting  
18 attendees, and providing breakfast. Hawaiian’s payment of such costs will provide a  
19 forum for the candidates to address the attendees, and potentially to leave campaign  
20 materials and envelopes for the attendees. Expenditures in connection with the planned  
21 events from general treasury funds would constitute a prohibited in-kind contribution to

1 that candidate, unless subject to an exception. *See* 11 CFR 109.20, 109.21. Hawaiian’s  
2 planned events are not covered by any such exception.<sup>6</sup>

3 *B. Candidate Appearance Exception Analysis*

4 Commission regulations specifically permit candidates under certain  
5 circumstances to address a corporation’s employees, stockholders, and the families of  
6 those persons at that corporation’s functions. *See* 11 CFR 114.3(c)(2)(i) (appearances  
7 before restricted class, *i.e.*, executive and management employees and stockholders);  
8 11 CFR 114.4(b)(1) (appearances that include employees outside the restricted class,  
9 *i.e.* rank and file employees). Hawaiian’s proposal would thus be permissible if they fit  
10 within one of the candidate appearance exceptions to the definitions of contribution and  
11 expenditure.

12 Hawaiian proposes to host events for the candidates at which there will be  
13 breakfast followed by a discussion with the 20-30 attendees. Slightly more than half of  
14 the invitees will not be Hawaiian employees or stockholders. Slightly less than half of  
15 the invitees will be Hawaiian executive or administrative personnel. Because Hawaiian’s  
16 proposed events include persons who are not Hawaiian employees, stockholders, or  
17 employee/stockholder family members, they do not fit within the candidate appearance

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<sup>6</sup> The Commission need not consider whether such an in-kind contribution to the candidate is “coordinated” within the meaning of the Commission’s regulations. 11 CFR 109.20-109.21. The Act’s prohibition on corporate contributions extends to all direct and indirect payments, services, or things of value given to a candidate. 2 U.S.C. 441b(b)(2). For example, a supporter of a candidate could learn from a vendor to that candidate’s campaign committee that the committee owed money for past services rendered. If the supporter paid the candidate’s bill, he or she would not have interacted with the candidate in any way but such payment would nevertheless constitute payment for an in-kind contribution.

1 exceptions. 11 CFR 114.3(c)(2)(i); 11 CFR 114.4(b)(1).<sup>7</sup> *See also* Advisory Opinion  
2 1996-11 (National Right to Life Conventions, Inc.) (finding that functions with attendees  
3 primarily from “the general public . . . do not fall within the limited scope of the  
4 [candidate appearance] exceptions”).

5         The candidate appearance exceptions do contemplate that corporations may allow  
6 the presence of “other guests of the corporation . . . who are being honored or speaking or  
7 participating in the event.” 11 CFR 114.3(c)(2)(i); 11 CFR 114.4(b)(1) (same). As the  
8 Commission explained in the context of one of the exceptions, “[t]his is intended to cover  
9 individuals who are part of the program.” 1995 E&J at 64266. In the course of the  
10 rulemaking process, the Commission specifically considered carving out an exception for  
11 “limited guests and observers” to attend such candidate events, but declined to do so;  
12 instead the Commission decided to limit the exception to speakers who are part of the  
13 program at an event. *Id.*

14         Hawaiian represents that the proposed events are small enough that the  
15 non-employee guests will “have the opportunity to engage directly with the candidates  
16 and each other” at the events. Advisory Opinion Request, at 5-6. Hawaiian thus asserts  
17 that the non-employee guests will be “participating” in the events, within the meaning of  
18 the regulations. *Id.* While the non-employees may be “participating” in a more general

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<sup>7</sup> Because Hawaiian does not propose to invite any rank and file employees to the events, the exception for appearances before a corporation’s restricted class at 11 CFR 114.3(c)(2)(i) would appear to be the one under which their proposal should be analyzed. The administrative assistant and catering personnel assisting at the function are employees “outside the restricted class . . . who are necessary to administer the meeting,” not attendees. *Id.* The two candidate appearance exceptions contain the same scope with respect to participants and guests who are neither part of the restricted class or employees, however, so the Commission’s analysis of that issue is not altered by which exception is analyzed. *See* 11 CFR 114.3(c)(2)(i); 114.4(b)(1).

1 sense, Hawaiian will be extending invitations to these individuals as “attendees” at hosted  
2 candidate appearances and they will not be “participating in the event” as envisioned by  
3 the Commission when it adopted this limited exception. Therefore, the Commission  
4 concludes that the persons unaffiliated with Hawaiian are attendees – and not  
5 “participants.” Permitting all the persons at a function to be deemed “part of the  
6 program” would be inconsistent with the Commission’s intent in limiting attendance by  
7 people from outside the sponsoring corporation at candidate functions to those who play  
8 roles such as speakers or moderators.

9 In sum, because Hawaiian plans to invite members of the general public to  
10 sponsored events at which candidates will appear, the events do not fall within the  
11 candidate appearance exceptions. The Commission concludes that the planned events  
12 would result in in-kind contributions to the Senate candidates who would attend.  
13 Accordingly, Hawaiian may not use general treasury funds to pay for the planned events.<sup>8</sup>  
14 Any such payment would constitute an impermissible corporate contribution to the  
15 attending candidate.<sup>9</sup>

16 This response constitutes an advisory opinion concerning the application of the  
17 Act and Commission regulations to the specific transaction or activity set forth in your

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<sup>8</sup> The Commission notes that corporations are permitted to pay for such expenses as in-kind contributions with funds from their SSFs subject to the contribution limits of the Act.

<sup>9</sup> Hawaiian argues in the alternative that the sponsored events are permissible expenditures under the Act, in part because neither Hawaiian nor its employees will engage in express advocacy in connection to the events. However, regardless of whether Hawaiian or its employees engage in express advocacy, Hawaiian is providing a forum for the candidates themselves to do so at Hawaiian’s expense. The Commission has long deemed such facts sufficient to meet definition of “contribution” in the Act, as explained above. Contrary to Hawaiian’s suggestion, *Citizens United* has not displaced any of this analysis. Although *Citizens United* struck down the prohibition on corporate independent expenditures and electioneering communications, it did not disturb the statutory ban on corporate contributions. See *United States v. Danielczyk*, 683 F.3d 611 (4th Cir. 2012).

1 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
2 of the facts or assumptions presented, and such facts or assumptions are material to a  
3 conclusion presented in this advisory opinion, then the requestor may not rely on that  
4 conclusion as support for its proposed activity. Any person involved in any specific  
5 transaction or activity which is indistinguishable in all its material aspects from the  
6 transaction or activity with respect to which this advisory opinion is rendered may rely on  
7 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or  
8 conclusions in this advisory opinion may be affected by subsequent developments in the  
9 law including, but not limited to, statutes, regulations, advisory opinions, and case law.  
10 The cited advisory opinion is available on the Commission's website, or directly from the  
11 Commission's Advisory Opinion searchable database at <http://www.fec.gov/searchao>.

12 On behalf of the Commission,

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14  
15 Caroline C. Hunter  
16 Chair