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FEDERAL ELECTION COMMISSION
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October 26, 2005

AGENDA ITEM

For Meeting of: 11-03-05

MEMORANDUM

TO: The Commission

THROUGH: Robert J. Costa *RJC*
Acting Staff Director

FROM: Lawrence H. Norton *LHN (by JAE)*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Mai T. Dinh *MTD (RCS)*
Assistant General Counsel

Jonathan M. Levin *JL*
Senior Attorney

Subject: Draft AO 2005-17

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for November 3, 2005.

Attachment

1 ADVISORY OPINION 2005-17

2
3 Jan Witold Baran, Esquire
4 Wiley, Rein & Fielding, LLP
5 1776 K Street, N.W.
6 Washington, D.C. 20006

DRAFT

7
8 Dear Mr. Baran:

9 We are responding to your advisory opinion request on behalf of the American Crystal
10 Sugar Company (“American Crystal”) and the Red River Valley Sugarbeet Growers Association,
11 Inc. (“the Association”), concerning the application of the Federal Election Campaign Act of
12 1971, as amended (the “Act”), and Commission regulations to (i) the Association’s status as a
13 trade association, (ii) the affiliation of American Crystal and the Association, and (iii) the ability
14 of either the Association or American Crystal to solicit the stockholders, executive and
15 administrative personnel, and the families thereof, of the Association’s incorporated members for
16 contributions to American Crystal’s separate segregate fund, American Crystal Sugar Company
17 Political Action Committee (“American Crystal PAC”).

18 The Commission concludes that (i) the Association qualifies as a trade association under
19 Commission regulations; (ii) American Crystal and the Association are affiliated; and (iii) that
20 both the Association and American Crystal may solicit contributions to American Crystal PAC
21 from the stockholders, executive and administrative personnel, and the families thereof, of those
22 incorporated members of the Association that have granted exclusive, separate and specific
23 written approval to the Association for such solicitations for the given calendar year.

24 ***Background***

25 The facts presented in this opinion are based on your letter and attachments received on
26 September 12, 2005, and a phone conversation that occurred on October 25, 2005.

1 *1. The Association*

2 The Association was founded in 1926 and, since then, has represented the interests of
3 sugarbeet growers in North Dakota and Minnesota. According to the Association's Articles of
4 Incorporation, the Association's purposes include "advanc[ing] the educational, civic and
5 agricultural interests of sugarbeet growers within the area of it members," addressing problems of
6 sugarbeet growing, assisting members in working with regulatory agencies, promoting grower
7 communication, promoting consumer and public relations, and assisting in the development of
8 public and governmental policies with respect to sugarbeet production. Association Articles of
9 Incorporation, Article IV. To effectuate these purposes the Association has worked with
10 Congress on sweetener legislation, including farm and trade bills, and has worked with
11 regulatory agencies and the Minnesota and North Dakota State legislatures on matters affecting
12 growers.

13 The Association is a North Dakota non-profit corporation that is tax-exempt as a "labor,
14 agricultural, or horticultural organization" under 26 U.S.C. 501(c)(5). No individual member,
15 officer, or employee may receive any pecuniary gain or profit from the Association's operations
16 (except reasonable compensation for services rendered), nor may any assets, income, or profits
17 inure to the benefit of any member, director, or officer. Articles of Incorporation, Article V. The
18 Association consists of 2,859 members, who pay dues on an annual basis, all of whom grow
19 sugarbeets in Minnesota and North Dakota. The members include individuals, partnerships,
20 corporations, limited liability companies, estates, trusts, and other types of members. The
21 Association is governed by a board of directors elected by the members. Bylaws, Articles III, IV,
22 and V.

23 The Association does not have its own separate segregated fund.

1 2. *American Crystal*

2 American Crystal is an agricultural cooperative incorporated under Minnesota law. It
3 purchases sugarbeets from its members and processes them into sugar and sugar-related products.
4 Its membership is open to any person or entity that (i) is a sugarbeet farm operator in the territory
5 covered by the cooperative; (ii) agrees to purchase securities of the cooperative and abide by its
6 rules; and (iii) is approved by American Crystal's board of directors. American Crystal Bylaws,
7 Article I. Currently, American Crystal has 2,873 members, who are also its only holders of
8 common stock. The members (or "common shareholders") include individuals, corporations,
9 and unincorporated entities. Each member owns one share of common stock in American
10 Crystal and is thereby entitled to cast one vote with respect to the cooperative's affairs, including
11 the election of the board of directors. Articles of Incorporation, Articles III and IV; Bylaws,
12 Articles I-III.¹ No other persons have voting power in the cooperative. Articles of Incorporation,
13 Article III. Currently, American Crystal solicits contributions to American Crystal PAC from its
14 members that are individuals or unincorporated entities.

15 3. *Relationship Between the Association and American Crystal*

16 The Association was formed by sugarbeet growers in the Red River Valley when the
17 American Beet Sugar Company, "the precursor of American Crystal," constructed its first sugar
18 refinery in the Valley. In 1973, under the leadership of the Association, the members of the
19 Association founded a cooperative that then purchased and merged with the pre-existing
20 American Crystal Sugar Company. Currently, all of the Association's members are common

21 _____
¹ Each common shareholder is also obligated to purchase non-voting, preferred stock in the cooperative in an amount proportionate to the acreage of sugarbeets that the common shareholder places under contract to American Crystal. Bylaws, Article I.

1 shareholders of American Crystal and 99.5 percent of American Crystal's shareholders are
2 members of the Association. All of the Association's directors are common shareholders of
3 American Crystal and 14 of American Crystal's 15 directors are members of the Association.
4 American Crystal plays a "critical role" in the funding of the Association because American
5 Crystal withholds Association dues payments from the sugarbeet payments American Crystal
6 makes to 99.5 percent of its shareholders (for the sugarbeets grown by the shareholders for the
7 cooperative), and transmits those funds directly to the Association. These dues payments
8 constitute almost all of the Association's revenues.

9 ***Questions Presented***

- 10 1. *Does the Association qualify as a trade association under Commission regulations?*
11 2. *Are American Crystal and the Association affiliated with each other?*
12 3. *May American Crystal and the Association solicit contributions to American Crystal*
13 *PAC from the stockholders, executive and administrative personnel, and the families*
14 *thereof, of those incorporated members of the Association that have granted exclusive,*
15 *separate and specific written approval to the Association for such solicitation for the*
16 *given calendar year?*

17 ***Legal Analysis and Conclusions***

- 18 1. *Does the Association qualify as a trade association under Commission regulations?*

19 Yes, the Association qualifies as a trade association under Commission regulations.

20

21 Commission regulations define a trade association as:

22

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

1
2 11 CFR 114.8(a).²

3 As stated above, the Association is tax exempt under 26 U.S.C. 501(c)(5). You note that
4 the Explanation and Justification for 11 CFR 114.8(a) specifically refers to section 501(c)(6). It
5 states: “The general definition of a trade association is based on the treatment in the tax code of
6 business associations. See Regulation Section 501(c)(6) of the Internal Revenue Code of 1954.”
7 Federal Election Commission Regulations, *Explanation and Justification*, House Document No.
8 95-44, 95th Cong., 1st Sess. at 112 (1977). Section 501(c)(6) provides tax exemption for
9 “[b]usiness leagues, chambers of commerce [and other organizations] . . . not organized for
10 profit and no part of the net earnings of which inures to the benefit of any private shareholder or
11 individual.” Treasury regulations at 26 CFR 1.501(c)(6) - 1 define “business league” as “an
12 association of persons having some common business interest, the purpose of which is to
13 promote such common interest and not to engage in a regular business of a kind ordinarily
14 carried on for profit.” You ask the Commission to conclude that, although the Association is tax
15 exempt under section 501(c)(5), instead of section 501(c)(6), it still qualifies as a trade
16 association under 11 CFR 114.8(a).

² In order to qualify as a trade association, an association must first qualify as a membership organization under Commission regulations. The Commission concludes that the Association qualifies as a “membership organization” and is composed of persons who are “members.” Specifically, the bylaws of the Association indicate that it is composed of persons that are “members” as defined by the regulations, in that the persons must satisfy specific membership requirements, persons affirmatively accept the organization’s invitation to become a member, and members pay annual dues of a pre-determined amount. Bylaws, Articles I and VIII. 11 CFR 100.134(f) and 114.1(e)(2). With respect to the definition of “membership organization,” at least some of the members, as board members or officers, have the authority to operate the Association, pursuant to the Association’s bylaws. The Association sets out the membership requirements in its bylaws and expressly solicits persons to become members. The Association makes its formal organizational documents available to its members upon request. It expressly acknowledges the acceptance of membership through the notice of membership meetings. Finally, it is not organized primarily for the purpose of influencing an election of any individual to Federal office. Articles of Incorporation, Article IV; Bylaws, Articles I, IV-VI. 11 CFR 100.134(e) and 114.1(e)(1).

1 Nothing in either section 114.8(a) or its Explanation and Justification requires that a trade
2 association be tax exempt under 26 U.S.C. 501(c)(6). Instead, the rule simply describes the type
3 of organization that qualifies as a trade association. Using the description in 11 CFR 114.8, the
4 Commission finds that the Association is a membership organization (*see* footnote 2) made up of
5 persons engaging in a similar line of commerce, the raising of sugarbeets, and it is organized to
6 promote and improve business conditions in that line of commerce. In line with its 501(c)(5)
7 status and also consistent with 501(c)(6) status, the Association does not engage in a regular
8 business of a kind ordinarily carried on for profit and no part of its net earnings inures to the
9 benefit of any member. *See* Articles of Incorporation, Articles IV and V. The Commission thus
10 concludes that the Association qualifies as a trade association under 11 CFR 114.8(a).

11 2. *Are American Crystal and the Association affiliated with each other?*

12 Yes, American Crystal and the Association are affiliated with each other.

13 Under the Act and Commission regulations, committees, including separate segregated
14 funds (“SSFs”), that are established, financed, maintained or controlled by the same corporation,
15 person, or group of persons, including any parent, subsidiary, branch, division, department, or
16 local unit thereof, are affiliated. 2 U.S.C. 441a(a)(5); 11 CFR 100.5(g)(2) and 110.3(a)(1)(ii).
17 Committees’ sponsoring organizations are also considered to be affiliated with each other when
18 such organizations are established, financed, maintained or controlled by the same corporation,
19 person, or group of persons. *See* 11 CFR 100.5(g)(4) and 110.3(a)(3).

20 In the absence of *per se* affiliation as set out at 11 CFR 100.5(g)(3), the factors set forth at
21 11 CFR 100.5(g)(4) are used to determine affiliation between political committees or between
22 their sponsoring organizations. *See also* 11 CFR 110.3(a)(3). These factors – which pertain to
23 the relationship between sponsoring organizations as to governance; common officers,

1 employees, or members indicating a formal or ongoing relationship; financing; and the formation
2 of the organizations – are to be examined in the context of the overall relationship between
3 sponsoring organizations. *See* 11 CFR 100.5(g)(4)(i) and (ii)(A)-(J); *see also* 110.3(a)(3)(i) and
4 (ii)(A)-(J).

5 As indicated above, the Association played a significant role in the founding of what is
6 now American Crystal in the early 1970s. 11 CFR 100.5(g)(4)(ii)(I). The continuing close
7 relationship of the two organizations has resulted in, and is evidenced by, the 99.5 percent
8 overlap between the membership of the two organizations. 11 CFR 100.5(g)(4)(ii)(D). This
9 ability of each organization to exert some control over the governance of the other and,
10 indirectly, over the hiring or removal of the other organization's key personnel results from this
11 nearly complete overlap of members who can vote for the boards of directors of the
12 organizations, and from the fact that all of Association's directors are American Crystal
13 shareholders and nearly all of American Crystal's directors are Association members. 11 CFR
14 100.5(g)(4)(ii)(B) and (C). Finally, American Crystal collects and transmits to the Association
15 almost all of the revenues of the Association. 11 CFR 100.5(g)(4)(ii)(H). The Commission thus
16 concludes that, under the Act and Commission regulations, American Crystal and the
17 Association are affiliated.

18 3. *May American Crystal and the Association solicit contributions to American Crystal*
19 *PAC from the stockholders, executive and administrative personnel, and the families*
20 *thereof, of those incorporated members of the Association that have granted exclusive,*
21 *separate and specific written approval to the Association for such solicitation for the*
22 *given calendar year?*

1 Yes. Because American Crystal and the Association are affiliated, the Commission
2 concludes that either American Crystal or the Association, or both corporations, may solicit
3 contributions to American Crystal PAC from the stockholders and executive and administrative
4 personnel (and the families thereof) of the incorporated members of the Association that have
5 granted exclusive, separate and specific written approval to the Association for the calendar year.

6 As an exception to the prohibition on corporate contributions, the Act and Commission
7 regulations permit a corporation or its SSF to solicit the corporation's solicitable class for
8 contributions to the SSF. 2 U.S.C. 441b(b)(4); *see also* 11 CFR 114.1(j). An incorporated trade
9 association, such as the Association, may solicit its executive and administrative personnel and
10 the families of such personnel. It may also solicit its members who are individuals (and their
11 families) and members that are unincorporated entities. 2 U.S.C. 441b(b)(4)(A) and (C); 11 CFR
12 114.7(a) and (c) and 114.8(i)(2). An incorporated trade association may not solicit contributions
13 from its incorporated members, but may solicit the stockholders and executive and administrative
14 personnel, and the families of such stockholders and personnel, of the incorporated members that
15 provide separate and specific approval to the trade association for the making of such
16 solicitations during a calendar year and that have not approved a solicitation by any other trade
17 association for the same calendar year. 2 U.S.C. 441b(b)(4)(D); 11 CFR 114.8(c) and (d).

18 American Crystal, as a cooperative, qualifies as a membership organization under the Act
19 and Commission regulations.³ Like trade associations, a membership organization may solicit its

³ The Commission concludes that, under Commission regulations, American Crystal qualifies as a "membership organization" and is composed of persons who are "members." Specifically, its governing documents indicate that it is composed of persons that are "members," in that the persons must satisfy specific membership requirements, persons wishing to join have to agree to purchase shares so persons affirmatively accept the organization's invitation to become a member, and members have significant organizational attachments. Articles of Incorporation, Articles I and III; Bylaws, Article I-III, and V. 11 CFR 100.134(f) and 114.1(e)(2). With respect to the definition of "membership organization," at least some of American Crystal's members, as Board members or officers, have the

1 own executive and administrative personnel and the families of such personnel, and it may solicit
2 its members who are individuals (and their families) and members that are unincorporated
3 entities. The membership organization, however, may not solicit contributions from its
4 incorporated members' stockholders and executive and administrative personnel, and the
5 families of such individuals. *See* 2 U.S.C. 441b(b)(4)(C); 11 CFR 114.7(a).

6 Generally, a corporation may solicit contributions to its SSF from the solicitable class of
7 its subsidiaries or other affiliates. *See* 11 CFR 114.5(g)(1). With respect to membership
8 organizations, this principle extends beyond the executive and administrative personnel to the
9 membership of an affiliated organization. *See* Advisory Opinions 2005-03, 1999-16, and 1981-
10 55; *see also* Advisory Opinion 2002-15. In addition, a corporation that is affiliated with the
11 connected organization of an SSF may perform the same functions for the SSF as the connected
12 organization, *i.e.*, pay administration and solicitation costs, or perform actual solicitation or
13 collection functions itself. *See* 11 CFR 114.5(g)(1); Advisory Opinions 2000-15, 1997-13, 1996-
14 26, and 1983-19; *see also* Advisory Opinions 2002-15, 1996-38, and 1988-14.

15 Although the Commission has concluded that different types of corporations may be
16 affiliated, the Commission has not previously addressed the ability of a non-trade association
17 membership organization to solicit contributions to its SSF from the owners and executive and
18 administrative personnel of an affiliated trade association's incorporated members. *See* Advisory
19 Opinions 1996-26, 1994-19, and 1978-39. Under the affiliation provisions of the Act and

20

 authority to operate the cooperative, pursuant to governing documents. American Crystal sets out the membership requirements in its bylaws and expressly solicits persons to become members. It makes its formal organizational documents available to its members upon request. It expressly acknowledges acceptance of membership through the notice of shareholder meetings. Finally, it is not organized primarily for the purpose of influencing an election of any individual to Federal office. Articles of Incorporation, Articles I, III, and IV; Bylaws, Article I-IV. 11 CFR 100.134(e) and 114.1(e)(1).

1 regulations, contributions made to or by affiliated SSFs are considered to have been made to or
2 by a single committee, and thus such committees share contribution limits. 2 U.S.C.
3 §441a(a)(5); 11 CFR 100.5(g)(2), and 110.3(a)(1). Commission regulations thus permit such
4 affiliated SSFs to make unlimited transfers of Federally permissible funds to each other. 11 CFR
5 102.6(a)(1) and 110.3(c)(1). Therefore, if the Association were to establish its own SSF
6 receiving Federally permissible contributions from persons solicitable under the rules at 11 CFR
7 114.8, that SSF could transfer such funds in an unlimited amount to American Crystal PAC.
8 This transfer could be made even if such funds were derived from contributions by persons that
9 could not be solicited for contributions to American Crystal PAC under the solicitation
10 restrictions for SSFs of non-trade association membership organizations. *See* 11 CFR 114.7.

11 The Commission concludes that, in view of these provisions of the Act and regulations,
12 the Association need not take the extra step of establishing its own SSF. After an incorporated
13 member of the Association has granted separate and specific written approval to the Association
14 under 11 CFR 114.8(c) and (d), either American Crystal or the Association, or both, may solicit
15 contributions to American Crystal PAC from that member's stockholders and executive and
16 administrative personnel, and their families. Either of the two corporations may pay for and
17 perform that connected organization function for American Crystal PAC.

18 The Commission expresses no opinion regarding the application of the
19 Internal Revenue Code to the proposed activities because those questions are not within the
20 Commission's jurisdiction.

21 This response constitutes an advisory opinion concerning the application of the Act and
22 Commission regulations to the specific transaction or activity set forth in your request. *See*

1 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or
2 assumptions presented, and such facts or assumptions are material to a conclusion presented in
3 this advisory opinion, then the requestor may not rely on that conclusion as support for its
4 proposed activity.

5 Sincerely,

6
7 Scott E. Thomas
8 Chairman

9
10 Enclosures (AOs 2005-03, 2002-15, 2000-15, 1999-16, 1997-13, 1996-38, 1996-26, 1994-19,
11 1988-14, 1983-19, 1981-55, and 1978-39)