

April 26, 2010

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

DRAFT ADVISORY OPINION 2010-04 is available for public comments under this procedure. It was requested by Mark N. Suprenant, Esq., on behalf of WaWa, Inc.

Draft Advisory Opinion 2010-04 is scheduled to be on the Commission's agenda for its public meeting of Thursday, April 29, 2010.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00pm noon (Eastern Time) on April 28, 2010.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Judith Ingram (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2010-04, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at www.fec.gov.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

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April 26, 2010

AGENDA ITEM

For Meeting of 04-29-10

MEMORANDUM

SUBMITTED LATE

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *RCS / by RMK*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Joshua S. Blume *JSB*
Attorney

Neven F. Stipanovic *NFS / by RMK*
Attorney

Subject: Draft AO 2010-04 (WaWa, Inc.)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for April 29, 2010.

Attachment

1 **ADVISORY OPINION 2010-04**

2

3 **Mr. Mark N. Suprenant**
4 **General Counsel and Secretary**
5 **Wawa, Inc.**
6 **260 West Baltimore Pike**
7 **Wawa, PA 19063**

DRAFT

8

9 **Dear Mr. Suprenant:**

10 **We are responding to your advisory opinion request on behalf of Wawa, Inc.**
11 **(“Wawa”), concerning the application of the Federal Election Campaign Act of 1971, as**
12 **amended (the “Act”), and Commission regulations to the status of certain Wawa**
13 **employees as members of Wawa’s “executive or administrative personnel.”**

14 **The Commission concludes that the five Wawa employees at issue in this**
15 **advisory opinion request may be regarded as members of Wawa’s “executive or**
16 **administrative personnel.”**

17 ***Background***

18 **The facts presented in this advisory opinion are based on your letter received on**
19 **March 11, 2010.**

20 **Wawa is a corporation organized under the laws of the State of New Jersey. Its**
21 **separate segregated fund is the Wawa Political Action Committee. Wawa’s primary**
22 **business is the operation of more than 575 convenience stores located in Pennsylvania,**
23 **New Jersey, Delaware, Maryland and Virginia. Wawa maintains corporate headquarters**
24 **in Pennsylvania.**

25 **From its corporate headquarters, Wawa manages the operation of its convenience**
26 **stores located across the several States. Among the salaried managerial employees**

1 working at Wawa's corporate headquarters are: (1) the Loss Prevention Manager, (2) the
2 Payroll Manager, (3) the Retail Accounting Manager, (4) the Retail Accounting Assistant
3 Manager, and (5) the Inventory Accounting Manager. While the Loss Prevention
4 Manager and the Inventory Accounting Manager directly supervise only salaried
5 employees, the Retail Accounting Manager directly supervises five salaried employees
6 and one hourly employee. The Payroll Manager and the Retail Accounting Assistant
7 Manager directly supervise only hourly employees. These hourly employees are full-
8 time "at will" employees who are eligible for Wawa benefits, and there is an expectation
9 of their continued employment. The advisory opinion request includes detailed job
10 descriptions of these five managers and the employees that they directly supervise.
11 Below is a summary of these positions.

12 *Loss Prevention Manager*

13 The Loss Prevention Manager works in the Accounting and Finance Department.
14 This individual directly supervises six employees and reports to the General Counsel and
15 Secretary.

16 Principal duties include identifying and addressing risks to the Wawa organization
17 from criminal acts, company policy violations, and workplace improprieties and
18 indiscretions. This individual conducts high-level corporate investigations and provides
19 recommendations for their resolution, conducts internal investigations for fraud and other
20 violations, and recommends policies and practices that will minimize risk, financial
21 losses, and employee misconduct.

22 *Payroll Manager*

1 **The Payroll Manager manages the activities of the Payroll Department and reports**
2 **to Wawa's Controller. This individual directly supervises two payroll specialists, three**
3 **senior payroll specialists, and one payroll team leader.**

4 **Principal duties include managing the payroll preparation and distribution for**
5 **approximately 17,000 Wawa employees; establishing, coordinating, and directing the**
6 **payroll department objectives; recruiting, hiring, developing, and training departmental**
7 **employees; and representing Wawa at Federal, State, and local wage and hour audits.**

8 ***Retail Accounting Manager***

9 **The Retail Accounting Manager manages the Retail Accounting and Accounts**
10 **Payable Department, which is a division within the Accounting and Finance Department,**
11 **and reports to Wawa's Controller. This individual directly supervises six employees,**
12 **most of whom are themselves managers or supervisors.**

13 **Principal duties include providing strategic leadership and managing the day-to-**
14 **day activities of the Department; establishing departmental standards, policies, and**
15 **procedures; ensuring the timely flow and quality control of information related to sales,**
16 **inventory, and invoices; and managing staffing, including training, evaluating, coaching,**
17 **and developing departmental employees.**

18 ***Retail Accounting Assistant Manager – Sales Audit***

19 **The Assistant Manager manages a Sales Audit team and reports to the Retail**
20 **Accounting Manager. This individual directly supervises four employees, some of whom**
21 **themselves manage or supervise other employees.**

22 **Principal duties include managing the day-to-day activities of the Sales Audit**
23 **staff; overseeing and directing the Retail Accounting Department's projects that impact**

1 Sales Audit; managing resources and project plans; directing training and development
2 efforts of the Sales Audit team; and preparing performance evaluations of the Sales Audit
3 team.

4 *Inventory Accounting Manager*

5 The Inventory Accounting Manager works in the Accounting and Finance
6 Department and reports to the Retail Accounting Manager. This individual directly
7 supervises four employees, some of whom manage or supervise other employees.

8 Principal duties include reviewing and distributing work product prepared by the
9 supervised employees; ensuring that all reporting practices are consistent with generally
10 accepted accounting practices and internal reporting requirements; supervising inventory
11 investigations and ensuring their timely resolutions; managing inventory accounting
12 resources; ensuring compliance with financial reporting deadlines; recruiting, hiring, and
13 supervising the workload; and the development of subordinates.

14 *Questions Presented*

15 *Are the five Wawa employees described in the advisory opinion request*
16 *“executive or administrative personnel” as defined in the Act and the Commission*
17 *regulations?*

18 *Legal Analysis and Conclusions*

19 Yes, the five employees described in this advisory opinion request are “executive
20 and administrative personnel” of Wawa for purposes of the Act and Commission
21 regulations.

22 The Act and Commission regulations define “executive and administrative
23 personnel” as (1) individuals who are employed by a corporation, (2) are paid on a salary

1 rather than hourly basis, and (3) have “policymaking, managerial, professional, or
2 supervisory responsibilities.” 2 U.S.C. 441b(b)(7); 11 CFR 114.1(c). Based upon this
3 statutory language, Commission regulations set forth categories of individuals who would
4 or would not qualify as executive and administrative personnel. Individuals who run the
5 corporation’s business, such as officers; other executives; plant, division, and section
6 managers; and professionals such as lawyers and engineers (so long as they are not
7 represented by a labor organization), would qualify as executive and administrative
8 personnel 11 CFR 114.1(c)(1) and (2). In contrast, “[s]alaried foremen and other
9 salaried lower level supervisors having direct supervision over hourly employees” would
10 not. 11 CFR 114.1(c)(2)(ii).

11 Where there is a question as to whether an individual would be considered as part
12 of the executive and administrative personnel, the inquiry must primarily focus on
13 whether the three requirements of section 441b(b)(7) are met. Based on the information
14 provided in Wawa’s request, the first two requirements are met. Whether its managers,
15 who supervise hourly employees, meet the definition of section 441b(b)(7) must turn on
16 whether they have “policymaking, managerial, professional, or supervisory
17 responsibilities.” *Id.* Commission regulations state that the Fair Labor Standards Act
18 (“FLSA”) and its regulations may serve as a guideline to determine whether an individual
19 has such responsibilities. 11 CFR 114.1(c)(4).¹ The five individuals described in this

¹ While the FLSA may provide general guidance as to the definition of executive, administrative, or professional employees, it is not determinative as a matter of law as to whether an individual is a member of an organization’s “executive or administrative personnel” for purposes of the Act or Commission regulations. See Advisory Opinion 1993-16 (Blue Cross of California) at n.3 (“[A]ccording to the legislative history of the Act, FLSA is relevant . . . only to the limited extent it provides general guidance as to the definition of executive, administrative, or professional employees.”); see also 122 Cong. Rec. S6368 (daily ed. May 3, 1976) (statement of Sen. Cannon).

1 request are salaried employees of Wawa who have policymaking, managerial, or
2 supervisory responsibilities. They supervise and direct the work of other employees,
3 notably including other managers and supervisors. They manage staffing, including
4 recruiting, hiring, and training of employees, and plan and control the day-to-day
5 activities of their departments and sections. These duties are typical of those performed
6 by managers. *See, e.g.*, 29 CFR 541.102.

7 All five individuals are division or section managers who run the corporation's
8 business. *See* 11 CFR 114.1(c)(1). They each work at corporate headquarters and
9 manage departments or sections that affect Wawa's general business operations, such as
10 payroll, accounting, inventory, and sales audit. Work in these kinds of functional areas is
11 described under FLSA regulations as directly related to management or general business
12 operations. *See, e.g.*, 29 CFR 541.201(b). The Payroll Department and sections of the
13 Accounting and Finance Department that are managed by the five Wawa managers also
14 are units that have permanent status and function within Wawa's corporate hierarchy.
15 Such "customarily recognized" departments or sections are typically managed by salaried
16 executive employees. *See, e.g.*, 29 CFR 541.100 and 541.103. Thus, the five Wawa
17 managers appear to fit the description of "executive or administrative personnel" under
18 the Act and the Commission regulations.

19 Nonetheless, because three of the five Wawa managers supervise one or more
20 hourly employees, the question remains whether these three managers would be
21 considered "salaried foremen and other salaried lower level supervisors having direct
22 supervision over hourly employees," and hence whether section 114.1(c)(2)(ii) would
23 exclude them from the definition of "executive or administrative personnel."

1 The legislative history of the Act indicates that Congress intended to exclude from
2 the definition of “executive or administrative personnel” foremen and other lower level
3 supervisors, rather than any supervisor who oversees hourly employees. *See* H.R. REP.
4 NO. 94-1057, at 62 (2d Sess. 1976) (Conf. Report) *reprinted in* LEGISLATIVE HISTORY OF
5 FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1976, at 1056 (1977) (section
6 441b(b)(7) did not intend to include “*foremen who have direct supervision over hourly*
7 *employees or other lower level supervisors such as ‘strawbosses’*”) (emphasis added).
8 Although three of the five Wawa managers supervise hourly employees, and two of them
9 directly supervise only hourly employees, the Commission concludes that this fact alone
10 does not convert these managers into foremen or other lower level supervisors. Rather,
11 typical of executive or administrative personnel, the managers must exercise discretion
12 and independent judgment on matters of significance in performing their duties. *See,*
13 *e.g.,* 29 CFR 541.202. As their job descriptions demonstrate, these individuals carry out
14 major assignments in conducting the operation of Wawa’s business, provide expert
15 advice to senior management, interpret or implement corporate policies or operating
16 practices, investigate and resolve matters of significance, and make recommendations for
17 action.

18 Moreover, the supervised hourly employees at issue here are in some respects
19 similar to salaried employees. They are full-time employees who are eligible for Wawa
20 benefits and have an expectation of continued employment. Indeed, some of the
21 supervised hourly employees themselves manage or supervise other employees. Thus,
22 the fact that the three Wawa managers supervise hourly employees does not negate their
23 status as executive or administrative personnel.

1 Accordingly, the Commission concludes that the five Wawa managers may be
2 regarded as part of Wawa's executive or administrative personnel.

3 This response constitutes an advisory opinion concerning the application of the
4 Act and Commission regulations to the specific transaction or activity set forth in your
5 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
6 of the facts or assumptions presented, and such facts or assumptions are material to a
7 conclusion presented in this advisory opinion, then the requestor may not rely on that
8 conclusion as support for its proposed activity. Any person involved in any specific
9 transaction or activity which is indistinguishable in all its material aspects from the
10 transaction or activity with respect to which this advisory opinion is rendered may rely on
11 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
12 conclusions in this advisory opinion may be affected by subsequent developments in the
13 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
14 The cited advisory opinion is available on the Commission's Web site at
15 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Matthew S. Petersen
Chairman