

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

Members of the public may submit written comments on draft advisory opinions.

DRAFT ADVISORY OPINION 2011-22 is now available for comment. It was requested by Elliot S. Berke, Esq., on behalf of Virginia Poultry Growers Cooperative, Inc., and is scheduled to be considered by the Commission at its public meeting on December 15, 2011.

If you wish to comment on DRAFT ADVISORY OPINION 2011-22, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand delivery or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by noon (Eastern Time) on December 14, 2011.
- 4) The Commission will generally not accept comments received after the deadline. 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.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

REQUESTOR APPEARANCES BEFORE THE COMMISSION

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

Under the program:

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor or requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under these circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).
- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will consider the advisory opinion request. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2). The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email (Secretary@fec.gov), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.
- 3) Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.
- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.

FOR FURTHER INFORMATION

Press inquiries: Judith Ingram
Press Officer
(202) 694-1220

Commission Secretary: Shawn Woodhead Werth
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Other inquiries:

To obtain copies of documents related to Advisory Opinion 2011-22, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

ADDRESSES

Office of the Commission Secretary
Federal Election Commission
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Washington, DC 20463

Office of General Counsel
ATTN: Rosemary C. Smith, Esq.
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December 12, 2011

AGENDA ITEM

MEMORANDUM

TO: The Commission

For Meeting of 12-15-11

FROM: Anthony Herman *AH*
General Counsel

SUBMITTED LATE

Rosemary C. Smith *RCS*
Associate General Counsel

Robert M. Knop *RMK (RCS)*
Assistant General Counsel

Joanna Waldstreicher *JW (RCS)*
Attorney

Subject: Draft AO 2011-22 (Virginia Poultry Growers Cooperative, Inc.)

Attached is a proposed draft of the subject advisory opinion. We have been asked to have this draft placed on the Open Session agenda for December 15, 2011.

Attachment

1 ADVISORY OPINION 2011-22

2
3 Elliot S. Berke, Esq.
4 McGuireWoods LLP
5 2001 K St. N.W. Suite 400
6 Washington, DC 20006-1040

DRAFT

7
8 Dear Mr. Berke:

9 We are responding to your advisory opinion request concerning the application of
10 the Federal Election Campaign Act of 1971, as amended (the "Act") and Commission
11 regulations to the Virginia Poultry Growers Cooperative, Inc.'s ("VPGC") establishment
12 and administration of a separate segregated fund ("SSF").

13 The Commission concludes that, under the Act and Commission regulations,
14 VPGC may establish an SSF because VPGC is a membership organization with
15 incorporated and unincorporated members. VPGC may solicit contributions to its SSF
16 from its unincorporated members, and it may deduct those contributions from settlement
17 payments owed by VPGC to these members. The Commission further concludes that
18 VPGC and its SSF may not solicit contributions to the SSF from the executive and
19 administrative personnel of VPGC's incorporated members.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received on
22 October 28, as well as telephone conversations with Commission staff on November 3
23 and 7, 2011.

24 VPGC is incorporated in the Commonwealth of Virginia and is organized as an
25 agricultural cooperative corporation under the Virginia Agricultural Cooperative
26 Association Act.¹ VPGC's purpose "is to grow and process turkeys and to engage in any

¹ Va. Code Sec. 13.1-312 *et seq.*

1 other lawful activity” permitted under the Virginia Agricultural Cooperative Association
2 Act.² VPGC currently has 154 members, including corporations, partnerships, limited
3 liability companies, and sole proprietorships.

4 VPGC’s requirements for membership are stated in its Articles of Organization
5 and Bylaws. Producers of poultry products that are located in the territory served by
6 VPGC may become members of VPGC by entering into a production contract with
7 VPGC, consenting to membership in writing, and acquiring one share of Class A
8 common stock of VPGC. Potential members are contacted by VPGC when the
9 organization requires additional production capacity, and, when a potential member’s
10 facilities are deemed adequate, the potential member will be recommended to the Board
11 of Directors for membership. Once the Board of Directors votes to approve the
12 membership, the producer will be informed of the approval, and will then sign a
13 production contract with VPGC and consent to membership in a written notice of
14 consent. The new member will be issued a Subscription Agreement and a Class A
15 common stock certificate, which represents the member’s share in the cooperative and
16 VPGC’s express acknowledgement of membership.

17 Pursuant to its Articles of Organization and Bylaws, VPGC members have the
18 power to operate and administer the organization; voting rights are vested in Class A
19 common stockholder-members.³ Each member is entitled to one vote, regardless of the

² VPGC Articles of Incorporation, Art. II.

³ VPGC Articles of Incorporation, Art. III Sec. 4.

1 number of shares of common stock it owns.⁴ VPGC makes its Articles of Organization
2 and its Bylaws available to members upon request.

3 VPGC proposes to establish an SSF and to solicit contributions to the SSF from
4 its executive and administrative personnel and their families. VPGC intends to request
5 that its executive and administrative personnel make contributions to the SSF by means
6 of payroll deductions, with the employees' written authorization.

7 VPGC also intends to solicit contributions to the SSF from its unincorporated
8 members. VPGC pays settlement payments to its members pursuant to their poultry
9 production contracts, and it proposes to request that participating unincorporated
10 members authorize contributions to the SSF by means of deductions from the members'
11 first settlement payments of the year.

12 VPGC also proposes to solicit the executive and administrative personnel of its
13 incorporated members for contributions to its SSF.

14 ***Questions Presented***

15 1. *Does VPGC qualify as a membership organization with "members" under*
16 *FEC regulations?*

17 2. *May VPGC collect contributions from its unincorporated members by the*
18 *solicitation and payment methods described above and serve as a collecting agent for the*
19 *SSF?*

20 3. *May VPGC solicit and collect contributions to its SSF from the executive*
21 *and administrative personnel of its incorporated members?*

⁴ *Id.*

1 ***Legal Analysis and Conclusions***

2 ***1. Does VPGC qualify as a membership organization with “members” under***
3 ***FEC regulations?***

4 **Yes, VPGC constitutes a membership organization under Commission regulations**
5 **because it is a cooperative that meets all six criteria required to be a “membership**
6 **organization.”**

7 **Commission regulations define a “membership organization” as a “trade**
8 **association, cooperative, or corporation without capital stock, or a local, national, or**
9 **international labor organization that:**

10 **(i) Is composed of members, some or all of whom are vested with the**
11 **power and authority to operate or administer the organization, pursuant to**
12 **the organization’s articles, bylaws, constitution or other formal**
13 **organizational documents;**

14
15 **(ii) Expressly states the qualifications and requirements for membership in**
16 **its articles, bylaws, constitution or other formal organizational documents;**

17
18 **(iii) Makes its articles, bylaws, constitution, or other formal organizational**
19 **documents available to its members upon request;**

20
21 **(iv) Expressly solicits persons to become members;**

22
23 **(v) Expressly acknowledges the acceptance of membership, such as by**
24 **sending a membership card or including the member’s name on a**
25 **membership newsletter list; and**

26
27

1 (vi) Is not organized primarily for the purpose of influencing the
2 nomination for election, or election, or any individual to Federal office.”

3
4 11 CFR 114.1(e)(1); *see also* 11 CFR 100.134(e).⁵

5 First, as required by section 114.1(e)(1)(i), VPGC is composed of members that
6 have the power and authority to operate and administer the organization. Specifically,
7 voting rights in VPGC are vested in all Class A common stockholders equally, with one
8 vote per stockholder, regardless of the number of shares owned. Class A stockholders
9 have the right to vote on any corporate action by VPGC, including election of directors,
10 merger, sale, or other disposition of VPGC’s assets.

11 Under Commission regulations, “members” include all persons who satisfy the
12 requirements for membership in a membership organization, affirmatively accept the
13 membership organization’s invitation to become a member, and either:

14 (i) Have some significant financial attachment to the membership organization,
15 such as a significant investment or ownership stake; or

16 (ii) Pay membership dues at least annually, of a specific amount predetermined by
17 the organization; or

18

⁵ The definition of “membership organization” applies to “a trade association, cooperative, corporation without capital stock, or a local, national, or international labor organization.” VPGC specifically asks the Commission to confirm that the phrase “without capital stock” modifies only “corporation” and not also the other types of entities listed in the definition. The use of commas to set apart “corporation without capital stock” from the other types of enumerated entities is intended to make clear that “without capital stock” is a limitation only on the types of corporations that may be membership organizations, and not a limitation on trade associations’ or cooperatives’ status as membership organizations. This interpretation is consistent with Advisory Opinion 1986-07 (Crystal Sugar Co.), in which the Commission concluded that an incorporated agricultural cooperative with capital stock could establish an SSF and solicit contributions from its executive and administrative personnel and their families for the SSF.

1 (iii) Have a significant organizational attachment to the membership organization
2 which includes: affirmation of membership on at least an annual basis; and direct
3 participatory rights in the governance of the organization.

4 11 CFR 114.1(e)(2)(i)-(iii) and 100.134(f)(1)-(3).

5 Holders of VPGC Class A common stock qualify as “members” under these
6 criteria because (1) they satisfy VPGC’s requirements for membership; (2) they
7 affirmatively accept VPGC’s invitation to become members by entering production
8 contracts; and (3) they have significant financial attachments to VPGC, in the form of the
9 stock they are issued upon joining the organization and the settlement payments they
10 receive under their production contracts with VPGC. *See* Advisory Opinion 2008-21
11 (CME Group, Inc.) (concluding that the fact that members’ “livelihoods . . . are
12 dependent upon their continued status in their [membership organizations] suffices as a
13 significant financial attachment” to confer membership).

14 Second, VPGC expressly states the qualifications and requirements for
15 membership in its Articles of Incorporation and Bylaws, as required by section
16 114.1(e)(1)(ii). VPGC requires that members be *bona fide* producers of poultry products
17 located in the territory served by VPGC; that they execute a grower, egg production, or
18 other similar contract; that they provide written notice of consent to membership; that
19 they acquire one share of Class A common stock of VPGC; and that they fulfill any
20 additional membership requirements that may be adopted by the Board of Directors.

21 Third, VPGC makes its Articles of Incorporation and its Bylaws available to
22 members of the organization upon request, in accordance with section 114.1(e)(1)(iii).

1 Fourth, VPGC expressly solicits producers to become members, consistent with
2 section 114.1(e)(1)(iv). When VPGC requires additional production capacity, it contacts
3 poultry producers who might meet its production needs to discuss VPGC's program and
4 invite them to become members. If a producer meets VPGC's production needs and
5 wishes to become a member, a VPGC representative recommends them for membership
6 and the Board of Directors votes on the recommendation.

7 Fifth, as required by section 114.1(e)(1)(v), VPGC expressly acknowledges
8 acceptance of membership. Upon the Board's approval of a producer's membership, a
9 VPGC representative will contact and inform the producer of the Board's approval. The
10 member and VPGC both sign a production contract. The member is issued a
11 Subscription Agreement and a stock certificate, which represents the member's
12 ownership share in the cooperative and the organization's acknowledgement of
13 membership.

14 Sixth, in accordance with section 114.1(e)(1)(vi), VPGC is not organized
15 primarily for the purpose of influencing the nomination or election of any individual to
16 Federal office. VPGC is organized for the purpose of growing and processing turkeys.

17 Accordingly, VPGC constitutes a membership organization under Commission
18 regulations and may establish an SSF.

19 2. *May VPGC collect contributions from its unincorporated members by the*
20 *solicitation and payment methods described above and serve as a collecting agent for the*
21 *SSF?*

22 Yes, VPGC may collect contributions to its SSF from its unincorporated members

1 by means of deductions from settlement payments owed to those members and may serve
2 as a collecting agent for its SSF.

3 Commission regulations at 11 CFR 114.7(f) do not set any limitation on a
4 membership organization's method of soliciting voluntary contributions from its
5 members or its method of facilitating the making of voluntary contributions. 11 CFR
6 114.7(f). The Commission has previously concluded that this provision permits a
7 cooperative to collect contributions to its SSF from its unincorporated members by means
8 of deductions from regular payments owed by the cooperative to the members, similar to
9 the method proposed by VPGC. *See* Advisory Opinion 1986-07 (Crystal Sugar Co.).

10 Under section 114.7(g), a membership organization and its SSF are also subject to
11 the provisions of section 114.5(a), which implements 2 U.S.C. 441b(b)(3). Under these
12 provisions, a membership organization or its SSF may suggest a guideline for suggested
13 contributions, provided that any person solicited is informed of the political purposes of
14 the fund, that the guidelines are merely suggestions, that the person is free to contribute
15 more or less than the suggested amount, and that the organization will not favor or
16 disadvantage a member by reason of the amount of any person's contribution or decision
17 not to contribute. 2 U.S.C. 441b(b)(3) and 11 CFR 114.5(a)(2)-(4).

18 The Commission has previously concluded that where an SSF's solicitable class
19 includes unincorporated entities, the SSF or its connected organization may solicit
20 contributions from such entities by addressing solicitations to the one or two individuals
21 who normally represent the entity in its dealings with the SSF or the connected
22 organization. *See* Advisory Opinion 2005-14 (AKFCF).

1 Commission regulations define a “collecting agent” as “an organization or
2 committee that collects and transmits contributions to one or more separate segregated
3 funds to which the collecting agent is related.” 11 CFR 102.6(b)(1). The regulation
4 provides that a collecting agent may include “[t]he connected organization of the
5 separate segregated fund” 11 CFR 102.6(b)(1)(ii). VPGC, as the connected
6 organization of the SSF it intends to establish, will thus qualify as a collecting agent for
7 the SSF, and may collect and forward contributions to its SSF in accordance with the
8 procedures set forth in that section.

9 In sum, the Commission concludes that VPGC may serve as a collecting agent for
10 its SSF and may collect contributions to the SSF from its unincorporated members by
11 means of deductions from the settlement payments payable to those members, so long as
12 it complies with the requirements of section 114.5(a).⁶

13 3. *May VPGC solicit and collect contributions to its SSF from the executive*
14 *and administrative personnel of its incorporated members?*

15 No, VPGC may not solicit and collect contributions to its SSF from the executive
16 or administrative personnel of its incorporated members because the Act and
17 Commission regulations do not permit a membership organization to solicit contributions

⁶ Contributions to the SSF are limited to \$5,000 per person. 2 U.S.C. 441a(a)(1)(C); 11 CFR 110.1(d). Contributions by a partnership are attributed to the partnership and to each partner as set forth in 11 CFR 110.1(e), and contributions by a limited liability company are attributed based on the company’s tax treatment, as set forth in 11 CFR 110.1(g). Any members of VPGC that are Federal government contractors or foreign nationals are prohibited from contributing to the SSF, and they may not be solicited for contributions. 2 U.S.C. 441c(a) and 441e(a); 11 CFR 115.2 and 110.20(c) and (g).

1 to its SSF from persons other than its members and its executive or administrative
2 personnel and their families.⁷

3 Under the Act, a corporation or its SSF may not solicit contributions to the SSF
4 from persons other than the corporation's stockholders and their families and its
5 executive or administrative personnel and their families. 2 U.S.C. 441b(b)(4)(A). The
6 Act contains a limited exception to this prohibition for membership organizations or SSFs
7 established by membership organizations, with respect to "soliciting contributions to such
8 a fund from members of such organization" 2 U.S.C. 441h(b)(4)(C). Accordingly,
9 Commission regulations state that "membership organizations . . . or separate segregated
10 funds established by such persons may solicit contributions to the fund from members
11 and executive or administrative personnel, and their families, of the organization"
12 11 CFR 114.7(a).

13 In contrast, the Act contains a broader exception for trade associations and their
14 SSFs. The Act specifies that the general limitation on corporate solicitation "shall not
15 prevent a *trade association* or a separate segregated fund established by a trade
16 association from soliciting contributions from the stockholders and *executive or*
17 *administrative personnel* of the member corporations of such trade association and the
18 families of such stockholders or personnel" 2 U.S.C. 441b(b)(4)(D) (emphasis
19 added). Accordingly, Commission regulations state that a trade association or an SSF

⁷ The Commission has not had occasion previously to address this issue. The Commission has previously considered advisory opinion requests in which incorporated cooperatives with both incorporated and unincorporated members proposed to solicit contributions to their SSFs from their unincorporated members. See Advisory Opinions 1986-07 (Crystal Sugar Co.) and 2006-17 (Berkeley). In each of these cases, however, the requestors stated that they would solicit only their unincorporated members for contributions, and did not propose to solicit any personnel of their incorporated members.

1 established by a trade association may solicit contributions from the stockholders and
2 executive and administrative personnel, or their families, of corporations that are
3 members of the trade association, provided they adhere to certain requirements. 11 CFR
4 114.8(c).

5 As explained in the response to question 1, VPGC is a membership organization.
6 VPGC is not, however, a trade association. Although some membership organizations
7 may be trade associations, VPGC is not a trade association as defined in Commission
8 regulations. The regulations define “trade association” as “a membership organization of
9 persons engaging in a similar or related line of commerce, organized to promote and
10 improve business conditions in that line of commerce and not to engage in a regular
11 business of a kind ordinarily carried on for profit, and no part of the net earnings of which
12 inure to the benefit of any member.” 11 CFR 114.8(a). VPGC is a membership
13 organization of persons engaged in a similar line of commerce, but it is organized for the
14 purpose of growing and processing turkeys, a business ordinarily carried on for profit.
15 Moreover, VPGC’s profits inure to its members in the form of settlement payments and
16 stock dividends.⁸ Therefore VPGC is not a trade association, and does not fall within the
17 statutory provision pertaining to trade associations.

⁸ *Cf., e.g.*, Advisory Opinion 1982-02 (NRBA) (concluding that the National Radio Broadcasters Association was a trade association because it was formed to promote and improve business conditions in radio broadcasting; it “represents the interests of radio broadcasters before the Federal Communications Commission and before Congress; distributes weekly information to its members on trends in radio broadcasting . . . ; and distributes the “Washington Memo,” a monthly publication which discusses federal regulations and other matters pertaining to broadcasting”; and no part of its earnings inure to the benefit of any member); Advisory Opinion 1982-40 (Ohio Farm Bureau Federation) (concluding that OFBF was a trade association because “it is organized to promote agriculture; it is not engaged in a business for profit; and no net earnings inure to the benefit of any members”); Advisory Opinion 2000-04 (NAFCU) (concluding that “in view of NAFCU’s principal purpose of improving business conditions for Federal credit unions, it also qualifies as a trade association under 11 CFR 114.8(a)”).

1 The Commission has previously noted that a membership organization other than
2 a trade association (or an SSF established by a membership organization other than a
3 trade association) may not solicit the executive and administrative personnel of
4 incorporated members of the organization. *See* Advisory Opinions 1990-18 (Oahu FCU)
5 and 1990-22 (Blue Cross/Blue Shield).⁹

6 The Commission concludes, therefore, that VPGC and its SSF may not solicit
7 contributions to the SSF from the executive or administrative personnel of VPGC's
8 incorporated members.

9 This response constitutes an advisory opinion concerning the application of the
10 Act and Commission regulations to the specific transaction or activity set forth in your
11 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
12 of the facts or assumptions presented, and such facts or assumptions are material to a
13 conclusion presented in this advisory opinion, then the requestor may not rely on that
14 conclusion as support for its proposed activity. Any person involved in any specific
15 transaction or activity which is indistinguishable in all its material aspects from the
16 transaction or activity with respect to which this advisory opinion is rendered may rely on
17 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis on
18 conclusions in this advisory opinion may be affected by subsequent developments in the
19 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

⁹ In Advisory Opinion 2005-17 (American Crystal Sugar), the Commission concluded that a membership organization could solicit contributions to its SSF from the executive and administrative personnel of corporate members of a trade association that was affiliated with the membership organization. However, such solicitation was permissible only because the membership organization was affiliated with the trade association, which itself could have solicited contributions to an SSF from the executive and administrative personnel of its incorporated members.

1 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
2 directly from the Commission's Advisory Opinion searchable database at
3 <http://www.fec.gov/searchao>.

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On behalf of the Commission,

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Cynthia L. Bauerly
Chair

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