

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

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

DRAFT ADVISORY OPINION 2012-02 is now available for comment. It was requested by Katherine J. Dickinson, Esq., on behalf of Wawa, Inc., and is scheduled to be considered by the Commission at its public meeting on February 16, 2012.

If you wish to comment on DRAFT ADVISORY OPINION 2012-02, 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 February 15, 2012.
- 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
(202) 694-1040

Comment Submission Procedure: Kevin Deeley
Acting Associate General Counsel
(202) 694-1650

Other inquiries:

To obtain copies of documents related to Advisory Opinion 2012-02, 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
999 E Street, NW
Washington, DC 20463

Office of General Counsel
ATTN: Kevin Deeley, Esq.
Federal Election Commission
999 E Street, NW
Washington, DC 20463

AGENDA DOCUMENT NO. 12-11



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Washington, DC 20463

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February 9, 2012

AGENDA ITEM

MEMORANDUM

TO: The Commission

FROM: Anthony Herman *AH*
General Counsel

Kevin Deeley *KD*
Acting Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Joshua Blume *JB*
Attorney

Subject: Draft AO 2012-02 (Wawa, Inc.)

For Meeting of 2-16-12

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 February 16, 2012.

Attachment

1 ADVISORY OPINION 2012-02

2

3 Ms. Katherine J. Dickinson

4 Associate General Counsel

5 Wawa, Inc.

6 260 West Baltimore Pike

7 Wawa, PA 19063

8

DRAFT

9 Dear Ms. Dickinson:

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 (the “Act”),
12 and Commission regulations to the status of certain Wawa employees as members of
13 Wawa’s restricted class.

14 The Commission concludes that the Area Managers and General Managers
15 described in this advisory opinion request are members of Wawa’s restricted class
16 because they are part of Wawa’s “executive or administrative personnel” and thus may be
17 solicited at any time.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter dated
20 November 4, 2011, and on e-mails received on December 19, 2011 and January 11, 2012.

21 Wawa is a corporation organized under the laws of State of New Jersey. Wawa
22 maintains corporate headquarters in Pennsylvania. Wawa’s primary business is the
23 operation of more than 580 convenience stores located in Pennsylvania, New Jersey,
24 Delaware, Maryland, Virginia, and, starting in July 2012, Florida. It has a separate
25 segregated fund – the Wawa Political Action Committee (“Wawa PAC”).

1 This request concerns two types of Wawa employees: Area Managers and
2 General Managers. Wawa's 41 Area Managers cover a defined geographic territory, and
3 12 to 17 General Managers, who are in charge of stores, report to each Area Manager.
4 The advisory opinion request includes detailed job descriptions for Area and General
5 Managers, and also descriptions of the employees whom the General Managers
6 supervise. These positions are summarized below.

7 *Area Manager*

8 The Area Manager works in Wawa's Department of Store Operations and reports
9 to the Director of Store Operations. The Area Manager is paid on a salaried basis.

10 The Area Manager's principal duties include: (1) leading, coaching, mentoring,
11 and facilitating the development of General Managers; (2) workforce planning;
12 (3) developing, implementing, and maintaining operational plans to maintain corporate
13 standards; (4) ensuring compliance with corporate policy and procedures and with local,
14 State, and Federal regulations; (5) resolving crisis situations; (6) analyzing financial
15 statements and developing action plans with General Managers; and (7) participating in
16 the budgeting process.

17 The Area Managers do not supervise the day-to-day work of the General
18 Managers who report to them. They do have the authority to hire and fire the General
19 Managers, evaluate the General Managers' performance, and have the authority to
20 discipline them. Area Managers by themselves do not determine the General Managers'
21 advancement and promotion prospects, but they may be invited to serve on panels of
22 decision-makers that do have that authority. Even if an Area Manager is not invited to

1 serve on such a panel, the panel accords great weight to the Area Manager's opinions on
2 the advancement and promotion of General Managers.

3 Area Managers work with General Managers to resolve store operations issues
4 that may arise. If a General Manager has a grievance connected with the General
5 Manager's own work, the Area Manager will attempt to resolve it, but the Area Manager
6 does not have final authority to do so and the General Manager may pursue the grievance
7 at higher levels. Area Managers do not unilaterally set or adjust General Managers'
8 salaries, but the General Managers' salaries are partly based upon their individual
9 performance evaluations, which the Area Managers complete.

10 *General Manager*

11 The General Manager manages the entire operation at each convenience store.
12 The General Manager works in Wawa's Department of Store Operations and reports to
13 the Area Manager who administers the area within which the General Manager's store is
14 located. The General Manager is compensated on a salaried basis and is a full-time
15 employee.

16 The average General Manager supervises twenty-nine or thirty store employees,
17 and some General Managers supervise as many as fifty store employees. Among the
18 store employees a General Manager supervises are other managers. The General
19 Manager supervises both full and part-time employees, and, with the exception of the
20 Assistant General Manager, all supervised employees are hourly employees. The

1 Assistant General Manager is a full-time employee and has certain supervisory
2 responsibilities.¹

3 The General Manager's principal duties include: (1) supervising the day-to-day
4 work, and performance, of store employees; (2) managing all matters relating to
5 employees, including recruiting, hiring, training, coaching, and managing their
6 performance; (3) ensuring that store employees follow all safety, security, quality, and
7 store operations policies, procedures, and practices; (4) "analyzing results and trends and
8 preparing action plans to leverage the store's strengths and address areas of opportunity";
9 (5) planning and preparing employees' work schedules, and coordinating their daily
10 assignments and activities; and (6) "executing strategy through planning."

11 General Managers spend approximately ninety to ninety-five percent of their time
12 supervising hourly employees. Additionally, the General Managers undertake manual
13 tasks in the stores as needed. General Managers have the authority to discipline the store
14 employees. They plan the work to be done in the store and determine the techniques to
15 be used, dividing the work among the employees.

16 The General Managers determine at their own discretion whether to work
17 manually and what kind of manual work they will do.

18 General Managers usually do not determine which merchandise to buy and sell in
19 the stores; Wawa has a centralized corporate procurement process that makes these
20 decisions.

21

¹ The Assistant General Manager supports the General Manager in managing store operations by recruiting, hiring, training, coaching, managing, and disciplining store employees.

1 ***Question Presented***

2 *Are Wawa's Area Managers and General Managers "executive or administrative*
3 *personnel" as defined in the Act and the Commission regulations such that they fall*
4 *within the restricted class of employees who may be solicited at any time?*

5 ***Legal Analysis and Conclusions***

6 Yes, Wawa's Area Managers and General Managers are "executive or
7 administrative personnel" as defined in the Act the Commission regulations.

8 The Act prohibits corporations from making any contribution in connection with a
9 Federal election. 2 U.S.C. 441b(a). The definition of "contribution" does not, however,
10 include expenses paid by a corporation for "the establishment, administration, and
11 solicitation of contributions to" the corporation's separate segregated fund ("SSF").
12 2 U.S.C. 441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii). A corporation or its SSF may solicit
13 contributions to the SSF from a restricted class of persons. 2 U.S.C. 441b(b)(4)(A)(i); 11
14 CFR 114.5(g)(1). A corporation's restricted class consists of its executive and
15 administrative personnel and stockholders, and the families of those persons. 11 CFR
16 114.5(g)(1), 114.1(j).

17 The Act and Commission regulations define "executive or administrative
18 personnel" as individuals who are employed by a corporation, are paid on a salaried
19 basis, and have "policymaking, managerial, professional, or supervisory responsibilities."
20 2 U.S.C. 441b(b)(7); 11 CFR 114.1(c). This definition includes individuals who run the
21 corporation's business, such as officers, plant, division, and section managers, and
22 professionals, such as lawyers and engineers. 11 CFR 114.1(c)(1). It does not include
23 "[s]alaried foremen and salaried lower level supervisors having direct supervision over

1 hourly employees.” 11 CFR 114.1(c)(2). In determining which individuals have
2 “policymaking, managerial, or supervisory responsibilities,” the Fair Labor Standards
3 Act, 29 U.S.C. 201, *et seq.* (“FLSA”) and the regulations issued under FLSA, 29 CFR
4 541, “may serve as a guideline.”² *See* 11 CFR 114.1(c)(4).

5 The Area Managers and General Managers described in this request are salaried
6 employees of Wawa. They also have policymaking, managerial, or supervisory
7 responsibilities. Area Managers and General Managers are division or section managers
8 who “run the corporation’s business.” 11 CFR 114.1(c)(1). They work in defined units
9 or divisions of the business, at defined geographic areas and at individual convenience
10 stores, and their work has company-wide effect. Both the geographic areas that the Area
11 Managers superintend and the individual stores that the General Managers oversee are
12 “unit[s] with permanent status and [continuing] functions” in the Wawa corporate
13 structure. 29 CFR 541.103. Thus, their responsibilities are consistent with those of
14 managers under the FLSA regulations, under which “customarily recognized”
15 departments or sections are typically managed by salaried executive employees. *See*,
16 *e.g.*, 29 CFR 541.100, .103.

17 Area Managers and General Managers also have responsibilities similar to the
18 managerial responsibilities of executive employees described in the FLSA. Area
19 Managers have the authority to hire and fire General Managers. They also evaluate the
20 General Managers’ performance, may serve on panels that decide their advancement and

² Although the FLSA regulations provide general guidance as to the definition of executive, administrative, and professional employees, the FLSA definitions do not determine as a matter of law whether an individual is a member of an organization’s “executive or administrative personnel” for purposes of the Act or Commission regulations. Advisory Opinion 2010-04 (Wawa), n.1.

1 promotion prospects,³ and discipline them when appropriate. *See, e.g.*, 29 CFR 541.100,
2 .102. Further, while Area Managers do not directly set or adjust the General Managers'
3 pay rates, they do have substantial influence over the General Manager's pay rates by
4 evaluating their performance.

5 General Managers closely supervise the day-to-day work of many store
6 employees. Among other responsibilities, they hire and fire the store employees,
7 evaluate their performance, discipline them, plan the work to be done in the store, and
8 determine the techniques to be used. *See, e.g.*, 29 CFR 541.102.

9 Finally, the Area and General Managers both exercise the kind of discretion and
10 independent judgment that FLSA regulations attribute to managers. The Area Managers
11 formulate, affect, interpret, and implement management policies or operating practices;
12 carry out major assignments in conducting the operations of the business; perform work
13 that affects business operations to a substantial degree; and plan long- and short-term
14 business objectives. The General Managers interpret and implement management
15 policies and operating practices; perform work that affects business operations to a
16 substantial degree; and help to plan long- and short-term business objectives. *See, e.g.*,
17 29 CFR 541.202.

18 Area and General Managers thus fit the description of "executive or
19 administrative personnel" under the Act and the Commission regulations. The
20 Commission concludes that Area and General Managers may be regarded as part of
21 Wawa's executive or administrative personnel.

³ Area Managers are not always invited to serve on such panels. Even in such cases, however, the panels assign great weight to the Area Managers' recommendations on these subjects.

1 The Commission reaches this conclusion with respect to General Managers
2 notwithstanding the fact that they spend most of their workday supervising hourly
3 employees, and may, at their discretion, perform manual tasks. These facts require the
4 Commission to consider whether they are “foremen [or] other lower level supervisors
5 having direct supervision over hourly employees.” 11 CFR 114.1(c)(2)(ii).⁴

6 In Advisory Opinion 2010-04 (Wawa), the Commission considered whether five
7 Wawa managers working at its corporate headquarters were members of Wawa’s
8 “executive or administrative personnel.” Two of the managers at issue in that request
9 supervised only hourly employees. Nonetheless, the Commission concluded that neither
10 was comparable to “salaried foremen” or “other salaried lower level supervisors.” The
11 Commission noted that “the supervised hourly employees at issue [were] in some
12 respects similar to salaried employees.” Advisory Opinion 2010-04 (Wawa). The
13 Commission reasoned that these managers exercised discretion and independent
14 judgment on matters of significance, and otherwise performed managerial and
15 policymaking functions similar to those performed by executive and administrative
16 employees in the FLSA regulations. *Id.*

17 Similarly, the facts in this request suggest that General Managers exercise the
18 same kinds of managerial discretion and independent judgment as executive employees
19 under the FLSA regulations. Specifically, the General Managers have discretionary
20 authority in matters affecting the existence of the stores (e.g., receiving or refusing
21 inventory shipments, management of safety programs, analysis of store profit and

⁴ See also Response to Advisory Opinion Request 1976-75 (Communicators-Political Action Club) (principal function of supervision of hourly employees may indicate foreman status unless there is strong evidence to the contrary).

1 expense statements, and hiring and firing their employees). Request at 3 and 16.
2 Additionally, although the General Managers supervise mostly hourly employees,
3 approximately 41% of the hourly store associates are considered full time and eligible for
4 benefits, and some supervise other hourly employees. Request at 17. As such, many of
5 the hourly employees supervised by General Managers are in some respects similar to
6 salaried employees. *See* Advisory Opinion 2010-04 (Wawa).

7 Further, although the General Managers may perform some manual work in the
8 stores, such work is merely incidental to their managerial duties. How much work they
9 perform is entirely within their own discretion. Accordingly, the Commission concludes
10 that General Managers are not foremen or lower level supervisors, but rather qualify as
11 Wawa's executive or administrative personnel. *Cf.* Advisory Opinion 1978-27
12 (Morrison) ("unit managers" were executive or administrative personnel where they did
13 not spend more than forty percent of their weekly hours performing manual tasks
14 unrelated to their executive functions, and the decision to perform any manual tasks was
15 within the unit manager's sole discretion).⁵

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
18 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
19 of the facts or assumptions presented, and such facts or assumptions are material to a
20 conclusion presented in this advisory opinion, then the requestor may not rely on that
21 conclusion as support for its proposed activity. Any person involved in any specific

⁵ This conclusion is also consistent with the description of executive employees under FLSA regulations, which recognize that executives may perform some non-managerial work in the course of their managerial responsibilities. *See, e.g.*, 29 CFR 541.106(a), .700(b), (c).

1 transaction or activity which is indistinguishable in all its material aspects from the
2 transaction or activity with respect to which this advisory opinion is rendered may rely on
3 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
4 conclusions in this advisory opinion may be affected by subsequent developments in the
5 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
6 The cited advisory opinions are available on the Commission's Web site at
7 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Caroline C. Hunter
Chair