

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

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

DRAFT ADVISORY OPINION 2012-23 is now available for comment. It was requested by Jan Witold Baran, Esq., and D. Mark Renaud, Esq., on behalf of Snake River Sugar Company, *et al.*, and is scheduled to be considered by the Commission at its public meeting on August 2, 2012. The meeting will begin at 10:00 a.m. and will be held in the 9th Floor Hearing Room at the Federal Election Commission, 999 E Street, NW, Washington, DC. Individuals who plan to attend the public meeting and who require special assistance, such as sign language interpretation or other reasonable accommodations, should contact the Commission Secretary, at (202) 694-1040, at least 72 hours prior to the meeting date.

If you wish to comment on DRAFT ADVISORY OPINION 2012-23, 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 August 1, 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 2012-23, 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

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July 26, 2012

AGENDA ITEM

MEMORANDUM

TO: The Commission

FROM: Anthony Herman *AH*
General Counsel

Kevin Deeley *KD*
Acting Associate General Counsel

Amy Rothstein *AR by KD*
Assistant General Counsel

Anthony T. Buckley *ATB*
Attorney

Subject: Draft AO 2012-23 (Snake River Sugar Company, *et al.*)

For Meeting of 8-2-12

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 August 2, 2012.

Attachment

1 ADVISORY OPINION 2012-23

2
3 Jan Witold Baran, Esq.
4 D. Mark Renaud, Esq.
5 Wiley Rein LLP
6 1776 K Street NW
7 Washington, DC 20006

DRAFT

8
9 Dear Messrs. Baran and Renaud:

10 We are responding to your advisory opinion request concerning the application of
11 the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission
12 regulations to the relationship between seven sugarbeet growers associations
13 (collectively, "the Associations") and Snake River Sugar Company ("Snake River"), an
14 agricultural cooperative. The Commission concludes that the Associations are trade
15 associations affiliated with Snake River, and that they may therefore solicit their
16 members, executive and administrative personnel, and their families, as well as the
17 shareholders and executive and administrative personnel of their corporate members and
18 their families under the conditions described below, for contributions to Snake River's
19 separate segregated fund ("SSF").

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received on
22 May 8 and your email received on June 25, 2012.

23 ***A. The Associations***

24 The Associations are nonprofit Idaho corporations without capital stock that are
25 organized under section 501(c)(5) of the Internal Revenue Code (26 U.S.C. 501(c)(5)). They
26 consist of sugarbeet growers in Idaho and Oregon and are organized by geographic
27 region. They are the Nyssa-Nampa Sugarbeet Growers Association, Inc.; the Elwyhee

1 Sugarbeet Growers Association, Inc.; the Upper Snake River Valley Sugarbeet Growers
2 Association, Inc.; the Minidoka County Sugarbeet Growers Association, Inc.; the Cassia
3 County Sugarbeet Growers Association, Inc.; the Twin Falls County Sugarbeet Growers
4 Association, Inc.; and the Northside Sugarbeet Growers Association, Inc.

5 The Associations were established as “grower-member” associations to promote
6 the interests of their members in the sugarbeet industry. The Associations promote the
7 production of sugarbeets; propose, support, or oppose legislation relating to the sugarbeet
8 industry; promote and participate in research to improve industry practices; cooperate
9 with other entities to improve operating conditions for sugarbeet growers; and coordinate
10 the management of sugarbeet receiving stations and the disposition of tare dirt (dirt
11 removed from sugarbeets). The Associations also fund the Snake River Sugarbeet
12 Research and Seed Committee, which funds research on varieties of sugarbeets and
13 selects the varieties of sugarbeets that the members of the Associations and Snake River
14 must grow during a given season.¹

15 The Associations solicit members in cooperation with Snake River by targeting
16 growers in their respective growing districts. Membership in an Association is open to
17 any person or entity that is both “actively engaged in the cultivation of sugarbeets” on
18 lands situated within that Association’s growing district and a member of Snake River.
19 Association Bylaws, Art. 3.1.² The payment of membership dues, fees, and assessments
20 is required to maintain membership. *Id.*, Art. 3.2. The Associations acknowledge

¹ The Snake River Sugarbeet Research and Seed Committee is currently an unincorporated association. It will soon become a limited liability company, the members of which will be the Associations, Snake River, and The Amalgamated Sugar Company LLC.

² The terms of the Associations’ bylaws are largely identical to each other. Thus, unless otherwise indicated, a citation to “Association Bylaws” refers to each Association’s bylaws.

1 membership by issuing notices of meetings to their members, and make their bylaws
2 available to members upon request. *Id.*, Art. 3.5.

3 Each Association is governed by a board of directors, the members of which are
4 chosen by vote of the Association's members. *Id.*, Art. 4.2. The directors choose the
5 Association's officers. *Id.*, Art. 5.1. Each member of an Association is allocated a single
6 vote on all decisions brought before the Association.

7 The Associations are funded exclusively by membership dues. These dues are
8 remitted to the Associations by Snake River, which withholds money for them from its
9 payments to members for the sugarbeets they produce. The Associations "serv[e] a vital
10 communication pipeline for Snake River to get information to its members" and
11 participate in managing the receiving stations in their areas to which the farmers bring
12 their sugarbeets for delivery to Snake River. Letter from Jan Baran, Esq. and Mark
13 Renaud, Esq. received on May 8, 2012.

14 *B. Snake River Sugar Company*

15 Between 1994 and 1996, the Associations organized the growers in the Idaho,
16 Oregon, and Washington sugarbeet growing region. These organized growers formed
17 Snake River, an Oregon agricultural cooperative, in 1994.³ Snake River became
18 operational in 1996.

19 The primary purpose of Snake River is to handle, manufacture, process, and
20 market the sugarbeets grown by its members. Snake River purchases all of the
21 sugarbeets grown by its members, and sells them to The Amalgamated Sugar Company

³ All but three of Snake River's original 24 directors were officers or directors of an Association.

1 LLC (“Amalgamated”) for processing.⁴ Amalgamated processes the sugarbeets, sells the
2 resulting sugar and related products, and then returns the net proceeds to Snake River for
3 distribution to Snake River’s members, less the funds that Snake River withholds and
4 remits to the Associations as members’ dues.

5 Membership in Snake River is limited to agricultural producers “that are actually
6 engaged in the production of sugar beets” and their cooperative associations.⁵ Snake
7 River Third Amended and Restated Articles of Incorporation, Art. IV, Sec. 2. Snake
8 River currently has 805 members, all but three of which are also members of an
9 Association. Although not Association members, these three Snake River members
10 participate in the Nyssa-Nampa Sugarbeet Growers Association and provide funding to
11 the Research and Seed Committee and the American Sugarbeet Growers Association by
12 paying assessments to the Nyssa-Nampa Sugarbeet Growers Association.

13 Snake River’s business affairs are managed by a board of directors, with the
14 directors elected by Snake River’s members. All but three of Snake River’s original 24
15 directors were also officers or directors of an Association; currently, two of Snake
16 River’s directors are officers or directors of an Association.

⁴ Snake River purchased Amalgamated in 1997 and currently owns 95 percent of the voting interest in it; the remaining five percent is owned by ASC Holdings, Inc., which in turn is owned by Valhi, Inc.

⁵ The conditions for membership include applying for membership, consenting in writing to take distributions, being approved for membership by Snake River’s board of directors, and executing a grower agreement with Snake River. Snake River Third Amended Bylaws, Art. 1, Sec. 1.

1 ***C. Proposed Activities***

2 Snake River is the connected organization of Snake River PAC, an SSF.⁶ The
3 Associations propose to solicit contributions to Snake River PAC from the shareholders,
4 executive and administrative personnel, and their families, of corporations that are
5 Association members. The Associations plan to solicit contributions only after receiving
6 exclusive written approval to make such solicitations for a given calendar year from their
7 corporate members. The requestors represent that these solicitations would be
8 accompanied by all required legal notices and disclaimers.

9 Additional facts appear in the legal analysis below.

10 ***Questions Presented***

- 11 1. ***Are the Associations "trade associations" under the Commission's***
12 ***regulations?***
- 13 2. ***Are the Associations and Snake River affiliated for purposes of the Act and***
14 ***Commission regulations?***
- 15 3. ***May the Associations solicit the executive and administrative personnel,***
16 ***stockholders, and family members of their member corporations that have provided prior***
17 ***approval for such solicitations, for contributions to Snake River PAC?***

18 ***Legal Analysis and Conclusions***

- 19 1. ***Are the Associations "trade associations" under the Commission's***
20 ***regulations?***

⁶ Snake River PAC is affiliated with Amalgamated's SSF, The Amalgamated Sugar Company LLC Political Action Committee. See Statement of Organization, Snake River Sugar Company Political Action Committee (filed on June 18, 2009). Unlike Amalgamated, the Associations do not have their own SSFs.

1 Yes, the Associations are trade associations under the Commission's regulations.

2 The Commission's regulations define a trade association as:

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

8 11 CFR 114.8(a). Thus, to qualify as a trade association, an organization must first
9 qualify as a membership organization under Commission regulation. A "membership
10 organization" is a trade association, cooperative, or corporation without capital stock that:
11 (1) is composed of members, some or all of whom are vested with the power and
12 authority to operate or administer the organization, pursuant to the organization's articles,
13 bylaws, constitution or other formal organizational documents; (2) expressly states the
14 qualifications and requirements for membership in its articles, bylaws, constitution or
15 other formal organizational documents; (3) makes its articles, bylaws, constitution, or
16 other formal organizational documents available to its members upon request;
17 (4) expressly solicits persons to become members; (5) expressly acknowledges the
18 acceptance of membership, such as by sending a membership card or including the
19 member's name on a membership newsletter list; and (6) is not organized primarily for
20 the purpose of influencing the nomination for election, or election, of any individual for
21 Federal office. 11 CFR 114.1(e)(1)(i)-(vi); *see also* 11 CFR 100.134.

22 The Associations satisfy these criteria. Each Association is a corporation without
23 capital stock that (1) is composed of members, each of whom can vote on matters brought
24 before the Association and in elections for the Association's governing board of

1 directors;⁷ (2) expressly states the qualifications and requirements for membership in its
2 organizational documents;⁸ (3) make its bylaws available to members upon request;
3 (4) expressly solicits persons to become members by targeting growers in the relevant
4 growing district; (5) expressly acknowledges the acceptance of membership by issuing
5 notices of meetings to its members;⁹ and (6) is organized primarily to promote the
6 interests of the sugarbeet industry, rather than for the purpose of influencing Federal
7 elections.¹⁰ Thus, the Associations qualify as membership organizations.¹¹

8 The Associations also satisfy the remaining criteria for trade associations under
9 Commission regulations. 11 C.F.R. 114.8(a). They consist of persons engaged in a
10 similar line of commerce: here, the business of growing sugarbeets. Their purpose is “to
11 promote the interests of the sugarbeet industry, including promoting the efficient,
12 successful, and profitable production of sugarbeets,” and not to engage in business that is
13 ordinarily carried on for profit. *See* Association Articles of Incorporation, Art. II.¹² The
14 Associations’ revenue is derived from their members’ dues, no part of which inures to the
15 benefit of any individual member. The Commission concludes, therefore, that the
16 Associations qualify as trade associations under 11 CFR 114.8(a).

⁷ *See* Association Bylaws, Art. 4.2.

⁸ *See id.*, Arts. 3.1-3.2.

⁹ *Id.*, Art. 3.5.

¹⁰ *See supra* p. 2 (listing examples of Association activities, including promoting and participating in research to improve industry practices, cooperating with other entities to improve operating conditions for sugarbeet growers, and coordinating the management of sugarbeet receiving stations); Association Bylaws, Art. 1 (describing the same activities as purposes of the Associations).

¹¹ Based on representations made by requestors, the Commission assumes for the purpose of this advisory opinion that the Association’s members are “members” under 11 CFR 114.1(e)(2)(ii), (iii) or (3). *See also* Advisory Opinion 2012-15 (APTA); Advisory Opinion 2011-08 (American Society of Anesthesiologists).

¹² The terms of the Associations’ articles of incorporation are largely identical to each other. “Association Articles of Incorporation” thus refers to each Association’s articles of incorporation.

1 2. *Are the Associations and Snake River affiliated for purposes of the Act and*
2 *Commission regulations?*

3 Yes, the Associations and Snake River are affiliated for purposes of the Act and
4 Commission regulations.

5 Political committees, including SSFs, that are established, financed, maintained,
6 or controlled by the same corporation, labor organization, person, or group of persons,
7 including any parent, subsidiary, branch, division, department, or local unit thereof, are
8 affiliated. *See* 2 U.S.C. 441a(a)(5); 11 CFR 100.5(g)(2), 110.3(a)(1)(ii). Committees'
9 sponsoring organizations are also considered to be affiliated with each other when such
10 organizations are established, financed, maintained or controlled by the same corporation,
11 person, or group of persons. *See* 11 C.F.R. 100.5(g)(4), 110.3(a)(3).

12 Commission regulations identify certain organizations that are *per se* affiliated,
13 and hence whose SSFs are *per se* affiliated. These organizations include a single
14 corporation and its subsidiaries, as well as a single person or group of persons.
15 *See* 11 CFR 100.5(g)(3)(i), 110.3(a)(2)(i).

16 In the absence of *per se* affiliation, the Commission considers various factors to
17 determine whether political committees or their sponsoring organizations are affiliated.
18 *See* 11 CFR 100.5(g)(4); 110.3(a)(3). These factors – pertaining to the relationship
19 between sponsoring organizations, as to governance, common officers, employees, or
20 members indicating a formal or ongoing relationship, financing, and the formation of the
21 organizations – are examined in the context of the overall relationship between

1 sponsoring organizations. *See* 11 CFR 100.5(g)(4); *see also* 110.3(a)(3); Advisory
2 Opinion 2005-14 (AKFCF).

3 Several factors indicating affiliation are present here. The most striking
4 indication is the marked degree of overlap in the membership and governance of Snake
5 River and the Associations. 11 CFR 100.5(g)(4)(ii)(D), (E). Each member of an
6 Association is (and, indeed, must be) a member of Snake River, and 99.6 percent of
7 Snake River's members are also Association members. Further, all directors of the
8 Associations are shareholders of Snake River, and 24 of Snake River's 25 directors are
9 Association members.

10 The officers and directors of the Associations and Snake River also overlap.
11 11 CFR 100.5(g)(4)(ii)(B). Currently, the officers and directors of two Associations
12 serve on Snake River's board of directors.¹³

13 Furthermore, Snake River plays a critical role in funding the Associations.
14 11 CFR 100.5(g)(4)(ii)(H). Snake River purchases all of the sugarbeets grown by
15 members of the Associations, withholds members' Association dues from its payments to
16 the growers, and remits those funds to the Associations. These funds represent the
17 entirety of the Associations' revenues.

18 The Associations also participate formally and financially in the operation of
19 Snake River, by arranging funds and in-kind services for the benefit of Snake River.
20 11 CFR 100.5(g)(4)(ii)(G). For example, the Associations make annual payments to, and
21 participate in, Snake River's Research and Seed Committee. In addition to running trials

¹³ The presidents of all of the Associations also attend and participate in the meetings of the Snake River board of directors, although they have no official vote at such meetings.

1 and conducting research to further sugarbeet production in Idaho, Oregon, and
2 Washington, the Committee selects the varieties to be used by Snake River growers and
3 sets the rules for their use. Snake River growers must conform to these rules in order to
4 make deliveries to Snake River. Each Association appoints two people to this
5 Committee, Snake River appoints one individual, and Amalgamated appoints four
6 people.

7 The Associations also participate in the operations of Snake River by participating
8 in the management of the receiving stations. Each Association appoints a station director
9 for each receiving station; coordinates the schedule for the delivery of sugarbeets to that
10 station; works with Amalgamated to address any special issues related to that station as
11 they arise; and facilitates deliveries of sugarbeets to Snake River by removing tare dirt
12 from each station.

13 Finally, the Associations participated in the formation of Snake River. 11 CFR
14 100.5(g)(4)(ii)(I). They organized the growers for the common purpose of establishing
15 Snake River, and all but three of Snake River's original 24 directors were Association
16 officers.

17 Based on these facts, the Commission concludes that Snake River and the
18 Associations are affiliated. This conclusion is consistent with the Commission's
19 determinations in prior advisory opinions. *See, e.g.,* Advisory Opinion 2005-17
20 (American Crystal Sugar).

21 3. *May the Associations solicit the executive and administrative personnel,*
22 *stockholders, and family members of their member corporations that have provided prior*

1 *approval for such solicitations, for contributions to Snake River PAC?*

2 Yes. Because Snake River and the associations are affiliated, the Associations
3 may solicit the executive and administrative personnel, stockholders, and family
4 members of their member corporations that have provided prior approval for such
5 solicitations, for contributions to Snake River PAC.

6 As an exception to the prohibition on corporate contributions, a corporation and
7 its SSF may solicit the corporation's solicitable class for contributions to the
8 corporation's SSF. 2 U.S.C. 441b(b)(4); *see also* 11 CFR 114.1(j). Incorporated trade
9 associations may solicit their executive and administrative personnel and the families of
10 such personnel. They may also solicit their members who are individuals and their
11 families, and members that are unincorporated entities. 2 U.S.C. 441b(b)(4)(A), (C);
12 11 CFR 114.7(a), (c), 114.8(i)(2). An incorporated trade association may not solicit
13 contributions from its incorporated members, but it may solicit the stockholders and
14 executive and administrative personnel, and their families, of any incorporated members
15 that 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
17 trade association for the same calendar year. 2 U.S.C. 441h(b)(4)(D); 11 CFR
18 114.8(c), (d).

19 Where, as here, a trade association is affiliated with an SSF's connected
20 organization, the trade association may solicit contributions to its affiliate's SSF in the
21 same manner as if the trade association itself were the connected organization of the SSF.
22 Advisory Opinion 2005-17 (American Crystal Sugar). Thus, the Associations may solicit

1 their executive and administrative personnel and the families of such personnel for
2 contributions to Snake River PAC. They may also solicit their members who are
3 individuals and their families; members that are unincorporated entities; and the
4 stockholders and executive and administrative personnel, and their families, of any
5 incorporated members that provide separate and specific approval to the trade association
6 for the making of such solicitations during a calendar year and that have not approved a
7 solicitation by any other trade association for the same calendar year.

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

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

3 On behalf of the Commission,

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6

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Caroline C. Hunter
Chair