

July 20, 2012

Via Hand Delivery

Anthony Herman, Esquire
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

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FEDERAL ELECTION
COMMISSION
2012 JUL 20 PM 3:25
OFFICE OF GENERAL
COUNSEL

Re: Hawaiian Airlines, Inc. Advisory Opinion Request

Dear Mr. Herman:

On behalf of Hawaiian Airlines, Inc. ("Hawaiian"), we respectfully request an Advisory Opinion pursuant to 2 U.S.C. § 437f with respect to hosting events that will involve candidate appearances. Specifically, Hawaiian asks the Commission to conclude that Hawaiian's plans to host events that will involve separate appearances by each of the three major candidates in the 2012 election to the U.S. Senate from Hawaii and participation by employees of the corporation and other travel and tourism companies in Hawaii will comply with relevant law. The Commission can reach this result by determining that either (1) the non-Hawaiian employees are "other guests of the corporation" as contemplated by 11 C.F.R. § 114.4(b)(1); or, (2) the events will constitute permissible independent expenditures.

FACTUAL BACKGROUND

About Hawaiian. Hawaiian is a business corporation. Since 2008, it has administered a separate segregated fund, the Hawaiian Airlines Inc. Political Action Committee ("PAC"). Hawaiian is the largest and longest-serving airline in Hawaii. The company provides interisland flights and nonstop service between Hawaii and the U.S. mainland, Australia, and Asia. Its operations are closely linked to other members of the travel and tourism industry in Hawaii, such as hotels,

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restaurants, tour operators, and their vendors. Travel and tourism are central to Hawaiian's business and the state's economy.

About Hawaiian's Proposed Candidate Events. Hawaiian plans to organize three morning events that will each feature one of the three major candidates for the 2012 election to the U.S. Senate from Hawaii: former Representative Edward Case (D-HI-2), Representative Mazie Hirono (D-HI-2), and former Governor Linda Lingle (R-HI). These proposed events will be held prior to the two parties' August 11, 2012 primary elections and, for the nominees, the November 6 general election.¹

The events' purpose is to foster an open and robust exchange of ideas about matters of importance to the state travel and tourism industry. Hawaiian plans to invite members of its restricted class and leaders in the Hawaii travel and tourism industry, and anticipates approximately 20-30 attendees for each event. The events will include breakfast, followed by a discussion. Invitees may participate in any, or all three, of the planned candidate meetings.

Hawaiian will pay the costs of organizing the events, inviting attendees, and providing breakfast to the candidates and other participants.² The events will take place in either Hawaiian's corporate office or an offsite location, which might be a candidate's office. In no event will any invited candidate be provided with more time or a substantially better location than the other invited candidates. Hawaiian will limit its discussions with the candidates to the event's structure, format, and timing and shall not discuss the candidates' plans, projects, or needs relating to their campaigns.

¹ We ask that the Commission issue an Advisory Opinion on an expedited basis. We recognize, however, the shortness of time before the August 11 primary. If the Commission is unable to issue an opinion prior to the primary, Hawaiian will endeavor to hold the proposed event with the major candidates in the general election.

² The PAC has contributed the maximum \$2,500 each to the 2012 primary election campaigns of Mr. Case and Ms. Hirono and thus cannot fund the events as contributions before the 2012 primary elections.

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Hawaiian will refrain from expressly advocating the nomination, election, or defeat of any candidate before, during, and after each meeting and will not promote or encourage express advocacy by its employees. Hawaiian does not anticipate endorsing any federal candidate in connection with this election. Hawaiian will not solicit or direct contributions to any political committee, nor will it collect contribution checks or otherwise facilitate contributions. The candidates will not accept contributions before, during, or after the event, but may leave materials or envelopes for the participants.

About the 2012 U.S. Senate Election. Senator Daniel Akaka (D-HI) is retiring from the U.S. Senate in January 2013, at the end of his term. The State of Hawaii Office of Elections lists a total of eleven candidates in this election.³ Hawaiian has selected three—Mr. Case, Ms. Hirono, and Ms. Lingle—to participate in the proposed events. All available polling data in the election indicate that only Mr. Case, Ms. Hirono, and Ms. Lingle have attracted public support of 10 percent or more in any statewide poll.⁴ News reports are devoted almost entirely to these three candidates.⁵

³ State of Hawaii Office of Elections, *2012 Statewide Candidate Report* (June 8, 2012), at http://hawaii.gov/elections/candidates/reports/2012/candidate_report_2012-06-08_CERTIFIED.pdf.

⁴ 2012 Hawaii Senate Race, at www.realclearpolitics.com/epolls/2012/senate/2012_hawaii_senate_race.html (presenting 6 polls in this race). In the most recent poll regarding the Democratic primary, an automated telephone survey of 731 likely voters resulted in a 46 percent tie between Mr. Case and Ms. Hirono, with 8 percent undecided. Michael Levine, *Civil Beat Poll - Case, Hirono Tied In Hawaii U.S. Senate Race*, Honolulu Civil Beat, June 12, 2012, at www.civilbeat.com/articles/2012/06/12/16045-civil-beat-poll-case-hirono-tied-in-hawaii-us-senate-race/. The only publicly available poll regarding the GOP primary election is a survey of 249 likely Republican voters, resulting in 86 percent for Ms. Lingle, 8 percent for John Carroll, and 7 percent undecided. *Id.*

⁵ See e.g., *Rothenberg: Lingle Faces Tough Fight for Senate*, Hawai'i Free Press, March 8, 2012, at www.hawaiifreepress.com/ArticlesMain/tabid/56/articleType/ArticleView/articleId/6274/Rothenberg-Lingle-Faces-Tough-Fight-for-Senate.aspx (describing Ms. Lingle as the Republican opponent of either Mr. Case or Ms. Hirono in the November 6, 2012 general election with no mention of any other candidate seeking the Republican or Democratic nominations).

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DISCUSSION

The Commission should conclude that Hawaiian's proposed events are permissible under the Federal Election Campaign Act of 1971 (the "FECA") and Commission regulations for two reasons. First, the regulations permit "other guests of the corporation" to participate in Section 114.4(b)(1) candidate events. Second, the proposed events are permissible corporate independent expenditures following the U.S. Supreme Court's decision in *Citizens United vs. Federal Election Commission*.

I. The Commission's Rules Permit Hawaiian's Non-Employee Guests to Participate in the Proposed Events

The Commission should conclude that the travel and tourism industry leaders whom Hawaiian will invite to participate in the proposed events are "other guests" as contemplated by Section 114.4(b)(1).

Section 114.4(b)(1) provides the legal framework for appearances by candidates or campaign representatives at corporate events. Permissible attendees include the corporation's restricted class, other employees, their families, "[o]ther guests of the corporation who are being honored or speaking or participating in the event and representatives of the news media."⁶ Coordination is permitted only to discuss the structure, format and timing of the candidate's appearance, and the candidate's positions on issues, but not discussion of the candidate's plans, projects, or needs relating to the campaign.⁷ If the corporation permits a Senate candidate to appear at such a meeting, the corporation must honor requests for similar opportunities to appear by other candidates for that seat.⁸

⁶ 11 C.F.R. § 114.4(b)(1).

⁷ 11 C.F.R. § 114.4(b)(1)(vii).

⁸ 11 C.F.R. § 114.4(b)(1)(i).

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At the event, the candidate or campaign representative may solicit, but not accept, contributions to the campaign.⁹ The corporation and its separate segregated fund may not expressly advocate the nomination, election, or defeat of any candidate in conjunction with the candidate or campaign representative at the event or encourage employees to do so.¹⁰ Finally, the corporation, its restricted class, its employees, and its separate segregated fund may not solicit, or facilitate the making of, contributions to the campaign at the event.¹¹

The Commission has discussed the term, "other guests," only briefly (and specifically in the context of Section 114.3).¹² In 1995, the Commission explained that it intended the term "other guests" to "cover individuals who are part of the program."¹³ In 2003, the Commission applied "other guests" to "speakers and limited special guests" of a trade association event.¹⁴ Neither discussion directly addresses the scope of who is a "guest" under Section 114.4(b)(1).

Here, the Commission should conclude that the non-employee guests will actively participate in the program. This conclusion will comport with the Commission's previous guidance. The non-employees whom Hawaiian proposes to invite will have the opportunity to engage directly with the candidates and each other as "speakers," participating fully in the event. They also are "limited special guests"

⁹ 11 C.F.R. § 114.4(b)(1)(iv).

¹⁰ 11 C.F.R. § 114.4(b)(1)(v).

¹¹ 11 C.F.R. § 114.4(b)(1)(iv).

¹² An online search of the Commission's advisory opinions yielded only three that use the phrase, "other guests," none of which addresses application of the FECA to permitting non-employees' participation in corporate-funded candidate events under Section 114.4(b)(1): Advisory Opinion 2003-5 (discussing "speakers and limited special guests" as "other guests" pursuant to Section 114.3(c)(2)(i), not Section 114.4(b)(1)); Advisory Opinion 1995-14 (describing the types of attendees at a membership organization's convention regarding permissible convention booth solicitations, not event participation); and, Advisory Opinion 1996-16 (describing the audience of a news entity's candidate event).

¹³ Corporate and Labor Organization Activity; Express Advocacy And Coordination With Candidates, 68 Fed. Reg. 64,200 (Dec. 14, 1995).

¹⁴ Advisory Opinion 2003-5.

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due to the structure and intended guest list of the proposed, small group events. All are "part of the program."

Hawaiian's purpose is to invite candidates and certain industry leaders as its guests to discuss matters of public importance in small groups. The very structure of the events—intimate breakfast meetings—permits each guest to participate actively, as distinguished from passive attendance at a speech. Here, all participants are speakers: to each other as peers in the same industry and to the candidates on matters of public importance. Hawaiian's proposed events are distinguishable from the convention speeches the Commission has analyzed previously in advisory opinions,¹⁵ which are public events, because here Hawaiian will restrict participation to a limited number of individuals from its restricted class and other businesses in the state travel and tourism industry.

Hawaiian's invitation criteria—leadership in the state travel and tourism industry—is targeted to bring together thought leaders and those who have the most interest in discussing issues relevant to these industries with the candidates. As such, the participants will be "speakers," "limited special guests," and "part of the program." Consequently, the Commission should conclude that the planned events are permitted by Section 114.4(b)(1).

¹⁵ *E.g.*, Advisory Opinion 1996-11.

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II. Alternatively, the Proposed Events Are Permissible Expenditures

If the Commission concludes that the proposed events are not permissible under Section 114.4, then it should still permit the events because they are expenditures. Following *Citizens United*, corporations may now pay for communications that are expenditures, provided they are not coordinated with a candidate or political party.¹⁶

A. Hawaiian's Expenditures Will Not Be Coordinated With The Campaigns

In 1986, the Commission concluded that a series of separate candidate appearances at a corporate event involving attendees outside the corporation's restricted class "constitute[d] contributions or expenditures within the meaning of 2 U.S.C. 441b."¹⁷ Hawaiian's proposed events are similar to the series of candidate events described in the 1986 advisory opinion to the extent candidates will appear before individuals who are not members of Hawaiian's restricted class. In the absence of coordination, the cost of sponsoring events at which candidates may engage in expressly advocating their own election (or the defeat of their opponents) is not a contribution.¹⁸ Hawaiian's proposed events therefore are expenditures.

A communication is coordinated with a candidate when it (1) is funded by an entity outside the candidate's campaign; (2) satisfies one of the content standards in Section 109.21(c); and, (3) satisfies one of the conduct standards in Section 109.21(d).¹⁹ A communication that does not meet all three elements of this definition is not coordinated and therefore will not constitute an in-kind contribution to the campaign.

¹⁶ *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 918 (2010).

¹⁷ Advisory Opinion 1986-37, at pg. 5.

¹⁸ See 11 C.F.R. § 109.21(b) (treating coordinated communications as in-kind contributions).

¹⁹ 11 C.F.R. § 109.21(a).

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To satisfy the content prong, a communication must be either an electioneering communication or a public communication, as defined by the FECA and Commission regulations. Here, the only communications directed outside the restricted class will be invitations to the event, extended by phone, mail, and email, and through in-person discussions. There will be no broadcast, cable or satellite communication, and thus no electronic communication. There will be no public communication because the email communications are exempt,²⁰ and the mail and telephone communications will not come anywhere near the thresholds of 500 substantially similar calls or letters in a 30-day period.²¹ Accordingly, the communications relating to the proposed events will not meet any of the coordination rule's content standards.

B. Following *Citizens United*, There is No Reason to Limit a Corporation's Political Speech to Its Restricted Class

The Commission's regulation of corporate-funded candidate events and permissible expenditures relies on Section 441b of the Act for its authority. The Court overturned the Section 441b corporate expenditure ban in *Citizens United*. There is no meaningful constitutional distinction between messages a corporation communicates to its own personnel and those it communicates to the general public in connection with an election. Such speech in either form, if conducted without coordinating with a candidate or party, is fully protected by the First Amendment.

²⁰ 11 C.F.R. § 100.26 (exempting Internet communications that are not placed for a fee on another person's web site from the definition of "public communication").

²¹ 11 C.F.R. §§ 100.27 (defining "mass mailing" as comprising more than 500 pieces of mail of an identical or substantially similar nature that are sent within any 30-day period), 100.28 (defining "telephone bank" as comprising more than 500 telephone calls of an identical or substantially similar nature that are made within any 30-day period).

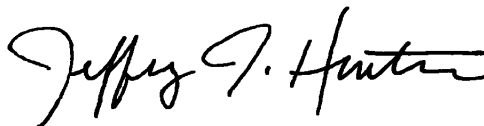
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CONCLUSION

For the reasons discussed above, we urge the Commission to recognize that Hawaiian's proposed events will comply with the FECA. Inviting representatives of other companies in Hawaiian's industry to participate as "other guests of the corporation" in meetings with candidates to discuss issues of concern to the industry and the election is consistent with the candidate event exemption from the corporate contribution ban in Section 114.4(b)(1). Moreover, there is no reason in the wake of *Citizens United* to limit a corporation's political speech to its internal personnel when its messages do not constitute coordinated communications.

Please do not hesitate to contact us if the Commission has any questions or if we may provide additional information.

Respectfully Submitted,



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