

**PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS**

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

DRAFTS A and B of ADVISORY OPINION 2012-37 are now available for comment. They were requested by Bryan P. Tyson, Esq., on behalf of Yamaha Motor Corporation, USA, and are scheduled to be considered by the Commission at its public meeting on December 6, 2012. The meeting will begin at 10:00 a.m. and will be held in the 9<sup>th</sup> 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 DRAFTS A and B of ADVISORY OPINION 2012-37, 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 5, 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@fee.gov](mailto:Secretary@fee.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 2012-37, 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. 12-84**

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FEDERAL ELECTION  
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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

2012 DEC -3 PM 4: 23

December 3, 2012

**MEMORANDUM**

**AGENDA ITEM**

TO: The Commission

FROM: Anthony Herman  
General Counsel

*AH*

For Meeting of 12-6-12

Kevin Deeley  
Acting Associate General Counsel

*TML for KD*

**SUBMITTED LATE**

Amy Rothstein  
Assistant General Counsel

*TML for AR*

Anthony T. Buckley  
Attorney

*TML for ATB*

Subject: AO 2012-37 (Yamaha Motor Corporation, USA) (Drafts A and B)

Attached are proposed drafts of the subject advisory opinion. We have been asked to have these drafts placed on the Open Session agenda for December 6, 2012.

Attachment

1 ADVISORY OPINION 2012-37

2

3 Bryan P. Tyson, Esq.  
4 Strickland Brockington Lewis LLP  
5 1170 Peachtree Street, NE, Suite 2200  
6 Atlanta, GA 30309

**DRAFT A**

7

8 Dear Mr. Tyson:

9

10 We are responding to your advisory opinion request on behalf of Yamaha Motor  
11 Corporation U.S.A. (“Yamaha”) concerning the application of the Federal Election  
12 Campaign Act of 1971, as amended (the “Act”), and Commission regulations to  
13 Yamaha’s proposed establishment of a separate segregated fund (“SSF”) and solicitation  
14 of contributions to the SSF from the executive and administrative personnel of a Yamaha  
15 division’s dealers and service centers, as well as from the dealers and service centers that  
16 are individuals or partnerships.

17 The Commission concludes that Yamaha may establish an SSF, but that it may  
18 not solicit contributions from the executive and administrative personnel of the division’s  
19 corporate dealers and service centers, or from non-corporate dealers and service centers.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received on  
22 November 5, 2012.

23 Yamaha is a California corporation that is the wholly owned subsidiary of  
24 Yamaha Motor Co., Ltd. (“YMC”), a foreign company. Yamaha distributes in the United  
25 States various motorized products manufactured by YMC, by Yamaha Motor  
26 Manufacturing Corporation of America, and by Tennessee Watercraft, Inc.

27 Yamaha wishes to create an SSF to contribute to Federal candidates. The  
28 President of the Marine Division of Yamaha would be solely responsible for the

1 management and oversight of Yamaha's SSF.<sup>1</sup> The President of the Marine Division is a  
2 U.S. citizen. The foreign parent of Yamaha would not finance any of the SSF's  
3 activities, and the bylaws of the SSF will require that no foreign nationals participate in  
4 the operation of the SSF or in any decisions regarding the distribution of funds. The SSF  
5 will not accept contributions from foreign nationals, and any foreign nationals in the  
6 leadership structure of Yamaha will delegate authority over the operation of the SSF to  
7 U.S. citizens.

8 Yamaha wishes to solicit contributions to the SSF from the Marine Division's  
9 Dealers and Service Centers.

10 *Yamaha Product Dealers*

11 Yamaha sells its Marine Division's products through a network of dealers. These  
12 dealers provide retail sales and service of those products, and provide the only way for  
13 customers to purchase new marine products.

14 Each dealer is a separate entity from Yamaha; Yamaha does not own any of the  
15 dealers. Some dealers are associations or partnerships, but most are small- to mid-sized  
16 corporations. While some dealers sell other marine products, most deal exclusively in  
17 Yamaha Marine Division products.

18 Yamaha's relationship with its dealers is governed by a standard Sales and  
19 Service Agreement (the "Dealer Agreement") entered into after dealers are selected by  
20 Yamaha. Dealers are selected by Yamaha through an application process. To be

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<sup>1</sup> The Marine Division of Yamaha sells and distributes outboard engines under the Yamaha brand name. The President of the Marine Division has been authorized by the Board of Yamaha to manage and oversee the operations of the Marine Division.

1 considered for a dealership, dealers must disclose a significant amount of financial and  
2 credit information to Yamaha.

3       After being selected, prospective dealers must complete a number of training  
4 requirements, including operational training and training on servicing Yamaha products.  
5 *See Dealer Agreement, 2.2, 3.2.* Some training takes place online and other training takes  
6 place in one of two physical training locations operated by Yamaha. Achieving higher  
7 levels of certification from Yamaha, which can be used in advertising, requires additional  
8 participation in online training modules. Each dealer is assigned a District Marketing  
9 Manager, who visits each location no less than quarterly to evaluate the displays, setup of  
10 the store, and the dealer's operations.

11       Although dealers may identify themselves as authorized dealers of Yamaha  
12 Marine Division products, they are prohibited from using Yamaha's trademarks or  
13 tradenames as part of their corporate names. *See Dealer Agreement, 5.4.* Yamaha does  
14 not grant its dealers a license to use its marks. Instead, Yamaha retains control over its  
15 marks through a Yamaha Visual Identity Manual (the "Manual") and review of dealer  
16 advertisements. Dealers are not required to obtain pre-approval of advertisements that  
17 use Yamaha's marks and follow the Manual, but they have to submit advertisements for  
18 approval to receive partial reimbursement for the cost of the advertisement. Dealers must  
19 in all cases comply with the Manual.

20       Under the Dealer Agreement, Yamaha has the right to evaluate periodically each  
21 dealer's level of performance. *See Dealer Agreement, 2.4, 3.3.* Other provisions in the  
22 Dealer Agreement include a requirement that each dealer must conduct its operations in

1 such a manner as to develop and maintain good customer relations;<sup>2</sup> not make any false,  
2 misleading, or disparaging representations about Yamaha or Yamaha's products;<sup>3</sup>  
3 conduct operations in the normal course of business during usual business hours,  
4 consistent with the dealer's location;<sup>4</sup> maintain a prominent display of the entire line of  
5 Yamaha products, consistent with Yamaha's guidelines;<sup>5</sup> report to Yamaha on retail sales  
6 of Yamaha's products;<sup>6</sup> and provide financial reports to Yamaha.<sup>7</sup> Under the terms of the  
7 Dealer Agreement, dealers may not assign the agreement or change their ownership or  
8 management without Yamaha's prior written consent.<sup>8</sup>

9 *Yamaha Product Service Centers*

10 Yamaha selects entities to serve as service centers to service Yamaha Marine  
11 Division products and sell boats powered with Yamaha outboard motors provided by boat  
12 builders. Service centers may also sell some Yamaha marine parts as part of their service  
13 but do not sell loose Yamaha outboard motors.

14 After selecting a service center through the same process described above for  
15 dealers, Yamaha and the service center enter into a standard Outboard Motors Service  
16 Center Agreement (the "Service Center Agreement"). Yamaha describes this agreement  
17 as "provid[ing] less control over the operations of the service center than the Dealer  
18 [A]greement." The Service Center Agreement is nonetheless similar to the Dealer  
19 Agreement in several respects, including with regard to hours of operation;<sup>9</sup> customer

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<sup>2</sup> See Dealer Agreement, 2.5.

<sup>3</sup> See Dealer Agreement, 2.5.

<sup>4</sup> See Dealer Agreement, 2.6.

<sup>5</sup> See Dealer Agreement, 2.7.

<sup>6</sup> See Dealer Agreement, 2.8.

<sup>7</sup> See Dealer Agreement, 5.5.

<sup>8</sup> See Dealer Agreement, 7.1, 7.2.

<sup>9</sup> See Service Center Agreement, 4.4.



1 relations;<sup>10</sup> representations about Yamaha and Yamaha's products;<sup>11</sup> use of Yamaha's  
2 trademarks;<sup>12</sup> and limitations on assignment of the agreement.<sup>13</sup>

3 Additional facts appear in the Legal Analysis and Conclusions, below.

4 ***Questions Presented***

5 1. *May Yamaha establish an SSF?*

6 2. *If Yamaha may establish an SSF, may it solicit and accept contributions from the*  
7 *executive and administrative personnel of a Yamaha division's dealers and service*  
8 *centers, as well as from dealers and service centers that are individuals or partnerships?*

9 ***Legal Analysis and Conclusions***

10 1. *May Yamaha establish an SSF?*

11 Yes, Yamaha may establish an SSF.

12 Corporations may not make contributions in connection with Federal elections.

13 2 U.S.C. 441b(a). The term "contribution" does not include expenses paid by a  
14 corporation for "the establishment, administration, and solicitation of contributions to"  
15 the corporation's SSF. 2 U.S.C. 441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii).

16 Foreign nationals may not make contributions or expenditures in

17 connection with any Federal, State, or local election. 2 U.S.C. 441e(a); 11 CFR

18 110.20. "Foreign national" includes "foreign principals," as defined in 22 U.S.C.

19 611(b), such as corporations organized under the laws of or having their principal

20 place of business in a foreign country. 2 U.S.C. 441e(b)(1); 11 CFR

21 110.20(a)(3)(i); 22 U.S.C. 611(b)(3). Foreign nationals also may not directly or

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<sup>10</sup> See Service Center Agreement, 4.3.

<sup>11</sup> See Service Center Agreement, 4.3.

<sup>12</sup> See Service Center Agreement, 4.2.

<sup>13</sup> See Service Center Agreement, 6.1.

1 indirectly participate in decisions involving election-related activities, or in the  
2 decision-making process of any political committee with regard to its  
3 election-related activities. 11 CFR 110.20(i). Because SSFs make contributions  
4 and expenditures, a foreign national corporation may not establish or administer  
5 an SSF. *See* Advisory Opinion 1982-34 (Sonat).

6 A domestic corporation with a principal place of business within the United States  
7 is not a “foreign principal,” and hence is not a “foreign national” under 2 U.S.C. 441e.  
8 *See* 22 U.S.C. 611(b)(3). Domestic subsidiaries of foreign corporations may establish  
9 and administer SSFs if they are “discrete entities whose principal place of business is the  
10 United States, and if those exercising decision-making authority over the SSF are not  
11 foreign nationals.” Advisory Opinion 2009-14 (Mercedes-Benz USA/Sterling).<sup>14</sup>

12 Yamaha’s parent – YMC – may well be a “foreign principal” and a “foreign  
13 national.” *See* 22 U.S.C. 611(b)(3); 2 U.S.C. 441e(b)(1). But Yamaha itself is neither.  
14 Yamaha is headquartered in and incorporated under the laws of California and is  
15 therefore a separate corporate entity. Yamaha has represented that YMC will not provide  
16 any financing for the proposed SSF and that foreign nationals will not have decision-  
17 making authority regarding the proposed SSF. Yamaha may thus establish an SSF.

18 2. *If Yamaha may establish an SSF, may it solicit and accept contributions from the*  
19 *executive and administrative personnel of a Yamaha division’s dealers and service*  
20 *centers, as well as from dealers and service centers that are individuals or partnerships?*

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<sup>14</sup> *See also* Advisory Opinion 1980-111 (Portland Cement); Advisory Opinion 1980-100 (Revere Sugar); Explanation and Justification for Final Rules on Contribution Limitations and Prohibitions, 67 FR 69928, 69943 (Nov. 19, 2002) (explaining that the restrictions on foreign national involvement in U.S. elections were not intended “to cover U.S. subsidiaries of foreign corporations” and did not prohibit “the participation of such subsidiaries in elections in the United States . . . through separate segregated funds”); Advisory Opinion 2006-15 (TransCanada).

1           No, Yamaha’s SSF may not solicit and accept contributions from the executive  
2 and administrative personnel of a Yamaha division’s dealers and service centers, or from  
3 non-corporate dealers and service centers.

4           A corporation and its SSF may solicit contributions to the SSF from a restricted  
5 class of persons. 2 U.S.C. 441b(b)(4)(A)(i); 11 CFR 114.5(g)(1). A corporation’s  
6 restricted class consists of its executive and administrative personnel and stockholders,  
7 and their families. 11 CFR 114.5(g)(1), 114.1(j).

8           An SSF may also solicit contributions from the executive and administrative  
9 personnel of the corporation’s “subsidiaries, branches, divisions, and affiliates and their  
10 families.” 11 CFR 114.5(g)(1). The Commission considers the factors at 11 CFR  
11 100.5(g)(4) to determine whether entities are affiliated. 11 CFR 114.5(g)(2). These  
12 factors include: (1) whether one entity has the authority or ability to direct or participate  
13 in the governance of the other entity through provisions of constitutions, bylaws,  
14 contracts, or other rules, or through practices and procedures; (2) whether one entity has  
15 the authority or ability to hire, appoint, demote, or otherwise control the officers, or other  
16 decisionmaking employees or members of the other entity; and (3) whether one entity  
17 had an active or significant role in the formation of the other entity. 11 CFR  
18 100.5(g)(4)(ii)(B), (C), (I); *see also* 11 CFR 110.3(a)(3)(ii).

19           In previous advisory opinions addressing the affiliation of franchisees/licensees to  
20 the franchisor/licensor corporation, the Commission has found affiliation where the  
21 franchisor/licensor exercised significant control over the business policies, practices, and  
22 procedures of the franchisee/licensee, and the franchisee/licensee had extensive  
23 contractual obligations to the franchisor/licensor. For example, in Advisory Opinion

1 1992-07 (H&R Block), the Commission found affiliation between H&R Block and its  
2 franchisees where each franchisee was required to operate its business of preparing  
3 income tax returns and related services under H&R Block's licensed marks only; each  
4 franchisee agreed not to compete with H&R Block or other franchisees in tax return  
5 preparation or related services during the duration of the franchise and for a period  
6 following termination or transfer of the agreement; certain franchisees were subject to  
7 audit by H&R Block to assure compliance with the franchise agreement and H&R Block's  
8 policies and procedures; and H&R Block furnished its franchisees with guidelines in the  
9 selection and location of offices, information necessary to establish an operating budget,  
10 forms to use in tax return preparation, and, if requested, assistance in handling managerial  
11 or other problems.

12 Most recently, in Advisory Opinion 2012-12 (Dunkin' Brands), the Commission  
13 found affiliation where the franchisee agreed not to compete with Dunkin' Brands by  
14 selling products similar to those sold by the Dunkin' Brands franchise; Dunkin' Brands  
15 maintained the right to establish standards for its franchisees with respect to the location,  
16 physical characteristics and quality of operating systems of restaurants, products sold, and  
17 qualifications of suppliers; Dunkin' Brands established standards and specifications for a  
18 franchisee's design, layout, construction, furnishings and equipment; and Dunkin' Brands  
19 controlled all advertising, marketing, and promotional programs of each franchisee. The  
20 Commission concluded that these facts "indicate significant continuing control and  
21 direction by Dunkin' Brands over its franchisees/licensees." Advisory Opinion 2012-12  
22 (Dunkin' Brands).

1           In both of these advisory opinions, the Commission found affiliation because of  
2 the extent to which the franchisor/licensor controlled its franchisee/licensee's business  
3 policies, practices, and procedures and the nature and extent of the franchisee/licensees'  
4 contractual obligation to the franchisor/licensor. *See also* Advisory Opinion 1988-46  
5 (Collins Foods); Advisory Opinion 1979-38 (Hardee's).

6           By contrast, the Commission has found that there is no affiliation where the  
7 relationship more closely reflects a typical business contract between two independent and  
8 separate entities, as distinguished from the relationship created where one entity exercises  
9 close supervision and direction over the daily operations and business policies of another  
10 entity. In Advisory Opinion 1985-07 (Anheuser-Busch), the Commission concluded that  
11 Anheuser-Busch was not affiliated with its wholesalers despite the existence of an agreement  
12 that spelled out the operating, sales, and merchandising methods and standards to which each  
13 wholesaler had to adhere; gave Anheuser-Busch a right to participate in each wholesaler's  
14 business and financial planning; and required each wholesaler to provide financial  
15 information to Anheuser-Busch.

16           The Commission determined that the degree of influence exercised by  
17 Anheuser-Busch over the wholesalers was insufficient to meet the standards set forth in the  
18 Commission's previous advisory opinions for two reasons. First, under the agreement, each  
19 wholesaler maintained its status as an independent business, and its independence was not  
20 significantly impaired by the contractual relationship with Anheuser-Busch. Even though  
21 Anheuser-Busch had a limited right to approve each wholesaler's designation of a  
22 successor-manager, the agreement stated that each wholesaler retained responsibility for  
23 the management of its own business and that Anheuser-Busch would not attempt to usurp

1 the right of the wholesaler to choose its own manager. Second, each wholesaler could  
2 market the products of other brewers along with those of Anheuser-Busch. The  
3 Commission concluded that “because the Equity Agreements merely set forth certain  
4 standards for the wholesalers’ activities, the wholesalers would not be considered  
5 ‘affiliates’ of Anheuser-Busch.” Advisory Opinion 1985-07 (Anheuser-Busch).

6 Although Yamaha has the right to approve transfers and changes in the location,  
7 management, and ownership of the dealers and service centers,<sup>15</sup> the facts here differ  
8 from those in which the Commission has previously found affiliation. Most significantly,  
9 there is no element of exclusivity in the agreements between Yamaha and the dealers and  
10 service centers. Compare Advisory Opinion 2012-12 (Dunkin’ Brands); Advisory  
11 Opinion 1992-07 (H&R Block); Advisory Opinion 1988-46 (Collins Foods). Indeed, the  
12 Dealer Agreement and Service Center Agreement explicitly provide that they are not  
13 exclusive.<sup>16</sup> Dealers are free to sell competing products. Dealer Agreement, 2.3. Any  
14 dealer that sells competing products must give Yamaha’s products only “at least as much  
15 effort as Dealer gives to competitive products handled by Dealer in terms of promotion  
16 and sale, floor space, inventory and service.” *Id.* In this respect, the Dealer Agreement  
17 demonstrates independence of the dealers that is similar to the independence of the  
18 wholesalers who could market other brewers’ products alongside those of  
19 Anheuser-Busch in Advisory Opinion 1985-07 (Anheuser-Busch).

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<sup>15</sup> See Dealer Agreement, 1.3, Service Center Agreement, 1.2 (permitting Yamaha to terminate its agreement with any dealer or service center that fails to obtain Yamaha’s written consent prior to changing location or establishing a branch location for the sale or service of Yamaha products); Dealer Agreement, 7.1, Service Center Agreement, 6.1 (requiring Yamaha’s prior written consent for assignments, transfers, or changes in ownership or management of the dealers and service centers).

<sup>16</sup> See Dealer Agreement, 2.3 (“Yamaha recognizes that Dealer may handle brands which are competitive with the Products sold to Dealer pursuant to this Agreement.”); *id.* at 1.4 (“The rights granted herein are nonexclusive.”); Service Center Agreement, 1.3 (“The rights granted herein are nonexclusive.”).

1 Other provisions in the Dealer Agreement and Service Center Agreement do not  
2 impose obligations on the dealers and service centers beyond what any other unrelated  
3 product manufacturer might impose as a condition of selling or servicing its product.  
4 Those provisions include Customer Relations (the dealer/service center must conduct its  
5 operations “in such a manner as to develop and maintain good customer relations”);<sup>17</sup>  
6 Hours of Business (must be “not less than the usual number of days of the week and  
7 hours of the day which are customary for the same type of business in the [dealer’s and  
8 service center’s] market area”);<sup>18</sup> and Display and Inventory (dealer must maintain a  
9 prominent display of Yamaha’s products and maintain a reasonable inventory of the  
10 products adequate to meet demand).<sup>19</sup>

11 The Commission concludes, therefore, that Yamaha does not exercise sufficient  
12 control over its dealers and service centers to support a finding that the entities are  
13 affiliated. Accordingly, Yamaha may not solicit voluntary contributions from the  
14 executive and administrative personnel of the Marine Division’s corporate dealers and  
15 service centers, or from dealers and service centers that are individuals or partnerships.<sup>20</sup>

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

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<sup>17</sup> Dealer Agreement, 2.5; Service Center Agreement, 4.3.

<sup>18</sup> Dealer Agreement, 2.6; Service Center Agreement, 4.4.

<sup>19</sup> Dealer Agreement, 2.7.

<sup>20</sup> Yamaha personnel are nonetheless free to form a nonconnected committee and solicit persons associated with Yamaha’s dealers and service centers if they wish to do so, providing that no foreign nationals are involved in the effort. *See, e.g.*, Advisory Opinion 2008-05 (Holland & Knight); Advisory Opinion 1997-26 (Association of Metropolitan Sewerage Agencies).

1 conclusion presented in this advisory opinion, then the requestor may not rely on that  
2 conclusion as support for its proposed activity. Any person involved in any specific  
3 transaction or activity which is indistinguishable in all its material aspects from the  
4 transaction or activity with respect to which this advisory opinion is rendered may rely on  
5 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or  
6 conclusions in this advisory opinion may be affected by subsequent developments in the  
7 law, including, but not limited to, statutes, regulations, advisory opinions, and case law.  
8 The cited advisory opinions are available on the Commission's website, [www.fec.gov](http://www.fec.gov), or  
9 directly from the Commission's Advisory Opinion searchable database at  
10 <http://www.fec.gov/searchao>.

11

On behalf of the Commission,

12

13

14

15

16

Caroline C. Hunter  
Chair



1 ADVISORY OPINION 2012-37

2

3 Bryan P. Tyson, Esq.  
4 Strickland Brockington Lewis LLP  
5 1170 Peachtree Street, NE, Suite 2200  
6 Atlanta, GA 30309

**DRAFT B**

7

8 Dear Mr. Tyson:

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10 We are responding to your advisory opinion request on behalf of Yamaha Motor  
11 Corporation U.S.A. (“Yamaha”) concerning the application of the Federal Election  
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11 Although dealers may identify themselves as authorized dealers of Yamaha  
12 Marine Division products, they are prohibited from using Yamaha's trademarks or  
13 tradenames as part of their corporate names. See Dealer Agreement, 5.4. Yamaha does  
14 not grant its dealers a license to use its marks. Instead, Yamaha retains control over its  
15 marks through a Yamaha Visual Identity Manual (the "Manual") and review of dealer  
16 advertisements. Dealers are not required to obtain pre-approval of advertisements that  
17 use Yamaha's marks and follow the Manual, but they have to submit advertisements for  
18 approval to receive partial reimbursement for the cost of the advertisement. Dealers must  
19 in all cases comply with the Manual.

20 Under the Dealer Agreement, Yamaha has the right to evaluate periodically each  
21 dealer's level of performance. See Dealer Agreement, 2.4, 3.3. Other provisions in the  
22 Dealer Agreement include a requirement that each dealer must conduct its operations in

1 such a manner as to develop and maintain good customer relations;<sup>2</sup> not make any false,  
2 misleading, or disparaging representations about Yamaha or Yamaha's products;<sup>3</sup>  
3 conduct operations in the normal course of business during usual business hours,  
4 consistent with the dealer's location;<sup>4</sup> maintain a prominent display of the entire line of  
5 Yamaha products, consistent with Yamaha's guidelines;<sup>5</sup> report to Yamaha on retail sales  
6 of Yamaha's products;<sup>6</sup> and provide financial reports to Yamaha.<sup>7</sup> Under the terms of the  
7 Dealer Agreement, dealers may not assign the agreement or change their ownership or  
8 management without Yamaha's prior written consent.<sup>8</sup>

9 *Yamaha Product Service Centers*

10 Yamaha selects entities to serve as service centers to service Yamaha Marine  
11 Division products and sell boats powered with Yamaha outboard motors provided by boat  
12 builders. Service centers may also sell some Yamaha marine parts as part of their service  
13 but do not sell loose Yamaha outboard motors.

14 After selecting a service center through the same process described above for  
15 dealers, Yamaha and the service center enter into a standard Outboard Motors Service  
16 Center Agreement (the "Service Center Agreement"). Yamaha describes this agreement  
17 as "provid[ing] less control over the operations of the service center than the Dealer  
18 [A]greement." The Service Center Agreement is nonetheless similar to the Dealer  
19 Agreement in several respects, including with regard to hours of operation;<sup>9</sup> customer

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<sup>2</sup> See Dealer Agreement, 2.5.

<sup>3</sup> See Dealer Agreement, 2.5.

<sup>4</sup> See Dealer Agreement, 2.6.

<sup>5</sup> See Dealer Agreement, 2.7.

<sup>6</sup> See Dealer Agreement, 2.8.

<sup>7</sup> See Dealer Agreement, 5.5.

<sup>8</sup> See Dealer Agreement, 7.1, 7.2.

<sup>9</sup> See Service Center Agreement, 4.4.

1 relations;<sup>10</sup> representations about Yamaha and Yamaha's products;<sup>11</sup> use of Yamaha's  
2 trademarks;<sup>12</sup> and limitations on assignment of the agreement.<sup>13</sup>

3 Additional facts appear in the Legal Analysis and Conclusions, below.

4 ***Questions Presented***

5 1. *May Yamaha establish an SSF?*

6 2. *If Yamaha may establish an SSF, may it solicit and accept contributions from the*  
7 *executive and administrative personnel of a Yamaha division's dealers and service*  
8 *centers, as well as from dealers and service centers that are individuals or partnerships?*

9 ***Legal Analysis and Conclusions***

10 1. *May Yamaha establish an SSF?*

11 Yes, Yamaha may establish an SSF.

12 Corporations may not make contributions in connection with Federal elections.

13 2 U.S.C. 441b(a). The term "contribution" does not include expenses paid by a  
14 corporation for "the establishment, administration, and solicitation of contributions to"  
15 the corporation's SSF. 2 U.S.C. 441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii).

16 Foreign nationals may not make contributions or expenditures in

17 connection with any Federal, State, or local election. 2 U.S.C. 441e(a); 11 CFR

18 110.20. "Foreign national" includes "foreign principals," as defined in 22 U.S.C.

19 611(b), such as corporations organized under the laws of or having their principal

20 place of business in a foreign country. 2 U.S.C. 441e(b)(1); 11 CFR

21 110.20(a)(3)(i); 22 U.S.C. 611(b)(3). Foreign nationals also may not directly or

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<sup>10</sup> See Service Center Agreement, 4.3.

<sup>11</sup> See Service Center Agreement, 4.3.

<sup>12</sup> See Service Center Agreement, 4.2.

<sup>13</sup> See Service Center Agreement, 6.1.

1 indirectly participate in decisions involving election-related activities, or in the  
2 decision-making process of any political committee with regard to its  
3 election-related activities. 11 CFR 110.20(i). Because SSFs make contributions  
4 and expenditures, a foreign national corporation may not establish or administer  
5 an SSF. *See* Advisory Opinion 1982-34 (Sonat).

6 A domestic corporation with a principal place of business within the United States  
7 is not a “foreign principal,” and hence is not a “foreign national” under 2 U.S.C. 441e.  
8 *See* 22 U.S.C. 611(b)(3). Domestic subsidiaries of foreign corporations may establish  
9 and administer SSFs if they are “discrete entities whose principal place of business is the  
10 United States, and if those exercising decision-making authority over the SSF are not  
11 foreign nationals.” Advisory Opinion 2009-14 (Mercedes-Benz USA/Sterling).<sup>14</sup>

12 Yamaha’s parent – YMC – may well be a “foreign principal” and a “foreign  
13 national.” *See* 22 U.S.C. 611(b)(3); 2 U.S.C. 441e(b)(1). But Yamaha itself is neither.  
14 Yamaha is headquartered in and incorporated under the laws of California and is  
15 therefore a separate corporate entity. Yamaha has represented that YMC will not provide  
16 any financing for the proposed SSF and that foreign nationals will not have decision-  
17 making authority regarding the proposed SSF. Yamaha may thus establish an SSF.

18 2. *If Yamaha may establish an SSF, may it solicit and accept contributions from the*  
19 *executive and administrative personnel of a Yamaha division’s dealers and service*  
20 *centers, as well as from dealers and service centers that are individuals or partnerships?*

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<sup>14</sup> *See also* Advisory Opinion 1980-111 (Portland Cement); Advisory Opinion 1980-100 (Revere Sugar); Explanation and Justification for Final Rules on Contribution Limitations and Prohibitions, 67 FR 69928, 69943 (Nov. 19, 2002) (explaining that the restrictions on foreign national involvement in U.S. elections were not intended “to cover U.S. subsidiaries of foreign corporations” and did not prohibit “the participation of such subsidiaries in elections in the United States . . . through separate segregated funds”); Advisory Opinion 2006-15 (TransCanada).

1           Yes, Yamaha’s SSF may solicit and accept contributions from the executive and  
2 administrative personnel of a Yamaha division’s dealers and service centers, and from  
3 non-corporate dealers and service centers.

4           A corporation and its SSF may solicit contributions to the SSF from a restricted  
5 class of persons. 2 U.S.C. 441b(b)(4)(A)(i); 11 CFR 114.5(g)(1). A corporation’s  
6 restricted class consists of its executive and administrative personnel and stockholders,  
7 and their families. 11 CFR 114.5(g)(1), 114.1(j).

8           An SSF may also solicit contributions from the executive and administrative  
9 personnel of the corporation’s “subsidiaries, branches, divisions, and affiliates and their  
10 families.” 11 CFR 114.5(g)(1). The Commission considers the factors at 11 CFR  
11 100.5(g)(4) to determine whether entities are affiliated. 11 CFR 114.5(g)(2). These  
12 factors include: (1) whether one entity has the authority or ability to direct or participate  
13 in the governance of the other entity through provisions of constitutions, bylaws,  
14 contracts, or other rules, or through practices and procedures; (2) whether one entity has  
15 the authority or ability to hire, appoint, demote, or otherwise control the officers, or other  
16 decisionmaking employees or members of the other entity; and (3) whether one entity  
17 had an active or significant role in the formation of the other entity. 11 CFR  
18 100.5(g)(4)(ii)(B), (C), (D); *see also* 11 CFR 110.3(a)(3)(ii).

19           In previous advisory opinions addressing the affiliation of franchisees/licensees to  
20 the franchisor/licensor corporation, the Commission has found affiliation where – like  
21 here – the franchisor/licensor exercised significant control over the business policies,  
22 practices, and procedures of the franchisee/licensee, and the franchisee/licensee had  
23 extensive contractual obligations to the franchisor/licensor. For example, in Advisory

1 Opinion 1992-07 (H&R Block), the Commission found affiliation between H&R Block  
2 and its franchisees where each franchisee was required to operate its business of  
3 preparing income tax returns and related services under H&R Block's licensed marks  
4 only; each franchisee agreed not to compete with H&R Block or other franchisees in tax  
5 return preparation or related services during the duration of the franchise and for a period  
6 following termination or transfer of the agreement; certain franchisees were subject to  
7 audit by H&R Block to assure compliance with the franchise agreement and H&R Block's  
8 policies and procedures; and H&R Block furnished its franchisees with guidelines in the  
9 selection and location of offices, information necessary to establish an operating budget,  
10 forms to use in tax return preparation, and, if requested, assistance in handling managerial  
11 or other problems.

12 Most recently, in Advisory Opinion 2012-12 (Dunkin' Brands), the Commission  
13 found affiliation where the franchisee agreed not to compete with Dunkin' Brands by  
14 selling products similar to those sold by the Dunkin' Brands franchise; Dunkin' Brands  
15 maintained the right to establish standards for its franchisees with respect to the location,  
16 physical characteristics and quality of operating systems of restaurants, products sold, and  
17 qualifications of suppliers; Dunkin' Brands established standards and specifications for a  
18 franchisee's design, layout, construction, furnishings and equipment; and Dunkin' Brands  
19 controlled all advertising, marketing, and promotional programs of each franchisee. The  
20 Commission concluded that these facts "indicate significant continuing control and  
21 direction by Dunkin' Brands over its franchisees/licenseses." Advisory Opinion 2012-12  
22 (Dunkin' Brands).



1           Likewise, here the facts indicate that Yamaha exercises significant continuing  
2 control and direction over its dealers and service centers. Most significant is the  
3 requirement that dealers and service centers obtain written approval from Yamaha prior  
4 to changing their location, and prior to any assignment, transfer, or change of ownership  
5 or management, key personnel, or legal form of business.<sup>15</sup> In the absence of Yamaha's  
6 prior approval, any transfers by dealers and service centers are void and permit Yamaha  
7 to terminate the agreement.<sup>16</sup>

8           Yamaha also exercises significant direction and control over the day-to-day  
9 operations of the dealers and service centers. This direction and control encompasses the  
10 manner in which dealers and service centers train their personnel;<sup>17</sup> display their  
11 products;<sup>18</sup> maintain their inventory;<sup>19</sup> and deal with their customers;<sup>20</sup> as well as their  
12 hours of operation<sup>21</sup> and the location, size, and layout of their buildings, showrooms,  
13 offices, parts departments, and service operations.<sup>22</sup> Dealers and service centers also are  
14 required to provide service to any person who has purchased a Yamaha product,  
15 regardless of where that product was purchased,<sup>23</sup> and to purchase tools and equipment  
16 prescribed by Yamaha to service Yamaha products.<sup>24</sup>

17           The agreements between Yamaha and its dealers and service centers go well  
18 beyond the "typical business contract between two independent and separate entities" that

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<sup>15</sup> Dealer Agreement, 1.3, 7.1, 7.2; Service Center Agreement, 1.2, 6.1.

<sup>16</sup> Dealer Agreement, 7.1; Service Center Agreement, 6.1.

<sup>17</sup> Dealer Agreement, 2.2, 3.2; Service Center Agreement, 2.2.

<sup>18</sup> Dealer Agreement, 2.7.

<sup>19</sup> Dealer Agreement, 2.7.

<sup>20</sup> Dealer Agreement, 2.5; Service Center Agreement, 4.3.

<sup>21</sup> Dealer Agreement, 2.6; Service Center Agreement, 4.4.

<sup>22</sup> Dealer Agreement, 2.10.

<sup>23</sup> Dealer Agreement, 3.1; Service Center Agreement, 2.1.

<sup>24</sup> Dealer Agreement, 3.2; Service Center Agreement, 2.2.

1 the Commission considered in Advisory Opinion 1985-07 (Anheuser-Busch). In that  
2 advisory opinion, the Commission concluded that Anheuser-Busch was not affiliated  
3 with wholesalers of its product, when the agreement between Anheuser-Busch and each  
4 wholesaler explicitly provided that the wholesaler had the “responsibility and  
5 prerogative” to choose its own managers “in conducting its independent business” and  
6 limited the rights given to Anheuser-Busch to approve the wholesaler’s designation of a  
7 successor manager. No such stipulation or limitation is present here.

8       Because of the extent to which Yamaha controls the business policies, practices,  
9 and procedures of its Marine Division’s dealers and service centers, and the nature and  
10 extent of the dealers’ and service centers’ contractual obligations to Yamaha, the  
11 Commission concludes that Yamaha is affiliated with the dealers and service centers. *See*  
12 *also* Advisory Opinion 1988-46 (Collins Foods); Advisory Opinion 1979-38 (Hardee’s).  
13 Accordingly, Yamaha may solicit voluntary contributions from the executive and  
14 administrative personnel of the Marine Division’s corporate dealers and service centers,  
15 and from dealers and service centers that are individuals or partnerships.

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  
22 transaction or activity which is indistinguishable in all its material aspects from the  
23 transaction or activity with respect to which this advisory opinion is rendered may rely on

1 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or  
2 conclusions in this advisory opinion may be affected by subsequent developments in the  
3 law, including, but not limited to, statutes, regulations, advisory opinions, and case law.  
4 The cited advisory opinions are available on the Commission's website, [www.fec.gov](http://www.fec.gov), or  
5 directly from the Commission's Advisory Opinion searchable database at  
6 <http://www.fec.gov/searchao>.

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On behalf of the Commission,

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Caroline C. Hunter  
Chair