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October 2, 2014

VIA FEDEX AND EMAIL

Federal Election Commission
Office of General Counsel
999 E Street, NW
Washington, DC 20463

Re: Advisory Opinion Request

Dear Commissioners:

Bryan Cave LLP represents Berkadia Commercial Mortgage LLC ("Berkadia"). Berkadia respectfully requests an advisory opinion from the Federal Election Commission ("the Commission" or "FEC") pursuant to 2 U.S.C. § 437f, regarding the application of the FEC's regulations and the Federal Election Campaign Act of 1971 ("FECA" or "the Act") to solicitations of Berkadia's employees by a trade association's political action committee ("PAC").

Berkadia is an LLC, wholly owned by corporate members, which has elected partnership treatment for federal tax purposes. Accordingly, Berkadia appears to fall within a gap in the FEC's regulations regarding the permissible scope of solicitations by a trade association's political action committee.

Berkadia acts in all practical respects like any subsidiary corporation. If it were a corporation (or an LLC that elected to be treated as a corporation for tax purposes), then Berkadia could participate in the political process by allowing a trade association of which it is a member to solicit Berkadia's executive and administrative personnel in accordance with the FEC's regulations at 11 C.F.R. §§ 114.7(c), 114.8(d),(e). However, for tax reasons associated with its ownership structure, Berkadia has elected to be treated as a partnership. It is, thus, unclear whether Berkadia may allow a trade association of which it is a member to solicit Berkadia's executive and administrative personnel.

The practical result, given this uncertainty, has been that Berkadia has not allowed any trade association PAC to solicit Berkadia's employees. Additionally,

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Berkadia itself cannot contribute to a trade association PAC because such a contribution would be attributed to its partner members, which ultimately are corporations, rendering such a contribution an impermissible contribution by a corporation under FEC rules.

We respectfully request an advisory opinion clarifying whether Berkadia may permit a trade association, of which it is a member, to allow the trade association's PAC to solicit the executive and administrative personnel of Berkadia provided that Berkadia has given separate and specific approval for such a solicitation and that Berkadia and the trade association follow all other applicable regulations for trade association PAC solicitations of corporate member personnel.

FACTS

Berkadia is a commercial mortgage banking and servicing joint venture formed by Berkshire Hathaway Inc. ("Berkshire") and Leucadia National Corporation ("Leucadia") in 2009. These two corporate entities each have a 50% equity ownership in Berkadia; these ownership interests are held through intermediate entities.¹ Berkadia's owners "checked the box"—electing partnership tax treatment for Berkadia under 26 C.F.R. § 301.7701-3.

Berkadia acts like a subsidiary corporation (independently of its owners) in almost all respects. Berkadia has its own board of four managers. Two of the managers are appointed by Berkshire, and two of the managers are appointed by Leucadia. The assent of at least one manager appointed by Berkshire and one manager appointed by Leucadia is necessary for any decision of the Board. The Board of managers is empowered to control and manage Berkadia including hiring and firing of employees and engaging in other lawful activity necessary for the operation of Berkadia.

The Board delegates some of its authority to officers and authorized representative who are appointed by the Board. Berkadia's executive officers include a CEO, president, several executive vice presidents, and a general counsel. None of these individuals performs work for the parent companies. Additionally, Berkadia currently has 729 employees within the United States and owns a subsidiary in India that employs 635 individuals there.² The aforementioned employees are paid by Berkadia, or its subsidiary, and are direct employees of Berkadia rather than either of Berkadia's owners.

The contracts Berkadia enters into with third parties do not, typically, include Berkshire or Leucadia. For example, Berkadia leases space in 73 locations across the country in its own name. Neither Berkshire nor Leucadia are directly liable for debts incurred by Berkadia owing to its LLC

¹ An organizational chart is attached to this request as Attachment A.

² Berkadia would limit any solicitation by a trade association's PAC to only those employees allowed to contribute in U.S. elections, *i.e.*, U.S. citizens and green card holders.

status, and Berkadia is responsible for its own financing arrangements (aside from one significant credit facility³ that is supported by a Berkshire guarantee).

While Berkadia's owners may withdraw profits from Berkadia, Berkadia itself does accumulate funds which are solely within its control. If a distribution of Berkadia's profits is made, Berkshire and Leucadia each receive a 50% share of the profits.

Berkadia is not the connected organization of any PAC, nor do either of Berkadia's owners serve as the connected organization of any PAC. Berkadia's employees do not maintain a nonconnected PAC. Neither Berkadia's owners nor its subsidiary corporation are members of any trade association that Berkadia might wish to authorize to solicit its restricted class.

Berkadia is currently a member of several trade associations⁴, but while Berkadia has engaged in very preliminary talks regarding whether a trade association's PAC might solicit Berkadia's restricted class of employees, Berkadia has not authorized any trade association to solicit its restricted class due to uncertainty regarding the permissibility of such a solicitation.

THE LAW

FECA and the FEC's implementing regulations prohibit corporations from making contributions in connection with a federal election. See 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(b)(1). This limitation on corporate contributions colors all other FEC regulations that implement FECA in order to prevent circumvention of this central tenant of campaign finance law.

Trade Associations

Trade associations, as defined under the Act, are permitted to establish PACs to solicit contributions from the trade association's membership. 2 U.S.C. § 441b(a)(4)(A), (C); 11 C.F.R. §§ 114.7(a),(c); 114.8(a). However, the trade association PAC may not accept contributions directly from the association's corporate members. 11 C.F.R. § 114.7(b). Instead, the trade association PAC may solicit the restricted classes of the association's corporate members if it follows certain procedures. *Id.* §§ 114.7(c); 114.8 (the restricted class includes the executive and administrative personnel of a corporation as well as the corporation's stockholders).

A trade association must request and receive separate and specific approval from its corporate members before it may solicit the corporate member's restricted class. *Id.* § 114.8(c),(d). This

³ The credit facility is a rated commercial paper program which has been guaranteed by Berkshire.

⁴ Many of the trade associations of which Berkadia is a member include corporate members. Those organizations are likely to qualify as trade associations under FEC regulations. 11 C.F.R. § 114.8.

approval takes the form of a signed written consent that authorizes the trade association to solicit a member corporation's restricted class for a specific calendar year. *Id.* § 114.8(d). A corporation may authorize only one trade association to solicit the corporation's restricted class in a given year, and it may not circumvent this limitation by soliciting its restricted class to contribute to the PAC of a second trade association. *Id.* § 114.8(d).

A trade association is not limited in a similar manner when it solicits its noncorporate members. While a trade association may not solicit the employees of its noncorporate members⁵; it may solicit contributions directly from such members whether the members are individuals or an entity that lacks the corporate form. *Id.* § 114.7(c). When a partnership, or an entity treated as a partnership by FEC regulations, makes a contribution to a trade association's PAC, the contribution is attributed to the partnership itself and to each partner "[i]n direct proportion to his or her share of the partnership profits, according to instructions which shall be provided by the partnership to the political committee or candidate; or by agreement of the partners." *Id.* § 110.1(e). But, the agreed attribution is only permissible "as long as [o]nly the profits of the partners to whom the contribution is attributed are reduced (or losses increased), and [t]hese partners' profits are reduced (or losses increased) in proportion to the contribution attributed to each of them, and . . . [n]o portion of such contribution may be made from the profits of a corporation that is a partner." *Id.*

The Commission's Handling Of LLCs

The Commission has grappled with the issue of how to treat LLCs for nearly 20 years. See Advisory Opinion 1995-11 ("Limited liability companies are a recent innovation in business organizations and have not been considered previously by the Commission."). The Commission's initial treatment of LLCs was dependent on state law characterization of the entity and resulted in rulings that characterized LLCs as neither corporations nor partnerships but still prohibited LLCs from contributing funds that were attributable to a corporation or government contractor, *e.g.*, entities prohibited from making contributions under FECA. See Advisory Opinion 1995-11 (Virginia LLC neither a corporation nor a partnership under FECA); Advisory Opinion 1996-13 (District of Columbia LLC neither a corporation nor a partnership under FECA); Advisory Opinion 1997-4 (Pennsylvania LLC neither a corporation nor a partnership under FECA); Advisory Opinion 1997-17 (Missouri LLC neither a corporation nor a partnership under FECA); Advisory Opinion 1998-11 (California LLC neither a corporation nor a partnership and limiting the LLC's ability to contribute to revenue that was not derived from two subsidiary LLCs that were government contractors); Advisory Opinion 1998-15 (Illinois LLC neither a partnership nor a corporation and highlighting the need to ensure that funds used for LLC's contributions do not come from a prohibited source.)

⁵ Advisory Opinion 1976-63 (advising that a trade association could only solicit its noncorporate members and not the employees of those members); Advisory Opinion 1995-27.

In December 1998 the FEC published a Notice of Proposed Rulemaking regarding its treatment of LLCs. 63 Fed. Reg. 70,065 (Dec. 18, 1998). The Commission proposed to either treat all LLCs as partnerships or to “adopt the IRS’s ‘check the box approach,’ that is, that LLC’s be treated as either partnerships or corporations for FECA purposes based on their chosen treatment under the Internal Revenue Code.” *Id.* The FEC adopted the latter position and now appears to use an LLC’s choice under the Internal Revenue Code to determine whether the LLC is treated as a partnership or corporation under FECA for many purposes. See 64 Fed. Reg. 37,397 (Jul. 12, 1999); 11 C.F.R. § 110.1(g).

But, the Commission has recognized that the “check the box approach” is not suitable for all circumstances. In particular, the Commission has treated LLC’s with only corporate members as though they were corporations under FEC regulations regarding the creation and maintenance of PACs despite the LLCs’ elections under the Internal Revenue Code. Advisory Opinion 2001-18, n. 2 (permitting an LLC owned by two corporate members to establish a PAC despite the LLC’s election of partnership treatment under the Internal Revenue Code); Advisory Opinion 1997-13 (allowing a joint venture LLC equally owned by two corporations to establish its own PAC); see e.g., Advisory Opinion 1992-17 (allowing a joint venture partnership owned equally by two corporations to pay administration and solicitation costs of its PAC).

THE APPARENT GAP IN THE REGULATIONS

As the law currently stands, it is unclear whether Berkadia is prohibited from allowing a trade association to solicit Berkadia’s restricted class even if Berkadia were to provide separate and specific approval for the solicitation. This is because Berkadia’s corporate owners have elected partnership treatment of the LLC under 26 C.F.R. § 301.7701-3. See 11 C.F.R. § 110.1(g)(2). It therefore appears that Berkadia is sometimes treated as a partnership and sometimes treated as a corporation under FECA and the FEC’s implementing regulations.

Ambiguity Regarding Partnership Treatment

The regulations adopted by the Commission in 1999 do not state that an LLC that adopts partnership treatment under the Internal Revenue Code is treated as a partnership for all purposes under FECA; they state that “[a] contribution by an LLC that elects to be treated as a partnership by the Internal Revenue Service . . . shall be considered a contribution from a partnership pursuant to 11 CFR 110.1(e).” *Id.* § (g)(2).

The language used does not mirror the language used for LLCs that elect to be treated as a corporation under the Internal Revenue Service. *Id.* § (g)(3). The language used in Section (g)(3) categorically states that an LLC electing corporate treatment by the IRS “shall be considered a

corporation pursuant to 11 CFR Part 114.” *Id.* This language unambiguously conveys that an LLC adopting corporate treatment is treated as a corporation for all FECA purposes and therefore cannot contribute in its capacity as an LLC. Because the language in Section (g)(2) appears limited to treatment of LLC contributions only, it is unclear on its face whether it is intended to supply a categorical rule for the treatment of LLCs that do not elect corporate treatment by the IRS.

Certain FEC action suggests that it considers Section (g)(2) to supply a categorical rule. The title used in the Federal Register notice announcing the addition of Section (g)(2) is “Treatment of Certain LLCs as Partnerships” (64 Fed. Reg. at 37,398) and the *Federal Election Commission Campaign Guide: Corporations and Labor Organizations* states that “[a]n LLC that elects to be treated as a partnership by the IRS is treated as a partnership under FEC regulations.” *Federal Election Commission Campaign Guide: Corporations and Labor Organizations*, at 8 (January 2007) (“the Campaign Guide”). However, neither the section headings in the Federal Register Notice nor the Campaign Guide are legally authoritative.

Further, the FEC’s allowance for LLCs with corporate ownership to act as connected organizations for PACs suggests that the election of partnership treatment under the Internal Revenue Code does not supply a categorical rule for the treatment of LLCs.

Berkadia Wishes to Allow a Trade Association to Solicit Its Restricted Class

Berkadia wishes to authorize a trade association to solicit Berkadia’s restricted class to allow Berkadia employees to engage in the political process by making contributions to a trade association PAC in response to a solicitation by that PAC. As detailed above, Berkadia functions as a corporation in most respects. It directly employs its employees. Berkadia accumulates substantial funds over which it has direct control. Berkadia enjoys as much autonomy as many subsidiary corporations enjoy from their parent corporations. Berkadia’s owners enjoy limited liability for Berkadia’s actions. Berkadia appears to be permitted to establish its own PAC under FEC guidance regarding the creation of PACs by LLCs with corporate ownership—Berkadia is owned in equal shares by two corporate members which formed Berkadia and which exercise control over Berkadia in a manner consistent with a parent/subsidiary corporate structure.

Furthermore, Berkadia is treated similarly to a corporation under FECA’s most important prohibition—it is prohibited from making contributions in connection with a federal election. Because Berkadia has chosen to be treated as a partnership by the IRS, Section (g)(2) would apply to any contribution Berkadia were to make, treating the contribution as one from a partnership. 11 C.F.R. § 110.1(g)(2). Berkadia’s contribution would then be attributed to its ownership, an ownership which includes corporations. Because corporate contributions are prohibited, Berkadia is, thus, disqualified from making any contributions.

Berkadia therefore finds itself treated as a corporation for most purposes under FECA and its implementing regulations—even when the regulations categorically treat Berkadia as a partnership in Section (g)(2) the net result is that Berkadia is treated as though it were a corporation.

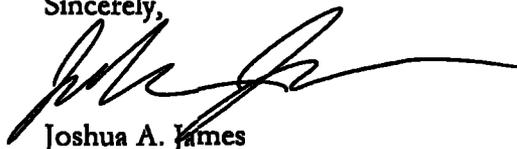
However, despite these indications that Berkadia is treated as a corporation under the FEC's regulations implementing FECA; the text of the regulations regarding solicitations by trade associations appears to treat Berkadia as a partnership which would mean that Berkadia would be prohibited from allowing the trade association to solicit Berkadia's restricted class of employees.

Given the uncertainty in the regulations, Berkadia asks the Commission:

1. Whether a trade association, of which Berkadia is a member, may solicit Berkadia's restricted class if Berkadia has provided separate and specific approval of the solicitation and the trade association complies with the other requirements of 11 C.F.R. § 114.8?

Berkadia appreciates the Commission's consideration of this matter and is available to answer any additional questions the General Counsel or the Commission may have regarding this request.

Sincerely,



Joshua A. James

Attachment A

