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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 16-57-A
AGENDA ITEM
For meeting of November 17, 2016

November 10, 2016

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS*
Acting General Counsel

Adav Noti *AN*
Associate General Counsel

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Acting Assistant General Counsel

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Subject: AO 2016-20 (Mlinarchik) Draft A

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00 pm (Eastern Time) on November 16, 2016.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2016-20

2

3 Christoph Mlinarchik, JD, CFCM

4 4624 Tarpon Lane

5 Alexandria, VA 22309

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8 Dear Mr. Mlinarchik:

DRAFT A

9 We are responding to your advisory opinion request concerning the application of the
10 Federal Election Campaign Act, 52 U.S.C. §§ 30101-30146 (“the Act”), and Commission
11 regulations to your proposal to make contributions as the sole member of a limited liability
12 company (“LLC”) that is a federal contractor. The Commission concludes that because your
13 LLC is disregarded as an entity separate from its owner for federal tax purposes, you are a
14 federal contractor prohibited from making contributions.

15 ***Background***

16 The facts presented in this advisory opinion are based on your letter received on
17 September 29, 2016.

18 You are a U.S. citizen and the sole member of Christoph LLC, a single-member Virginia
19 LLC that has not elected to be treated as a corporation under the Internal Revenue Code. You
20 state that Christoph LLC’s profits are attributable to you and you report the LLC’s profits on
21 your individual federal income tax returns. Through Christoph LLC, you provide advice and
22 consulting in government contracts. Christoph LLC negotiates and signs these contracts, and
23 payments for them are made to Christoph LLC and its business banking account. Christoph LLC
24 is registered in the federal government’s System for Award Management; you are not registered
25 in your individual capacity.

1 ***Question Presented***

2 *As the sole member of a single-member LLC that is treated as a disregarded entity for*
3 *federal income tax purposes and that contracts with the federal government, are you subject to*
4 *the Act's prohibition on contributions by federal contractors?*

5 ***Legal Analysis and Conclusion***

6 Yes, as the sole member of a single-member LLC that is treated as a disregarded entity
7 for federal income tax purposes and that contracts with the federal government, you are a federal
8 contractor, and therefore you are prohibited from making contributions.

9 The Act prohibits federal contractors from “directly or indirectly” making contributions
10 to any political party, political committee, or federal candidate. 52 U.S.C. § 30119(a)(1); *see*
11 *also* 11 C.F.R. § 115.2(a). A federal contractor includes any person who is negotiating or
12 performing a contract with the federal government or its agencies for certain enumerated
13 purposes, including the “rendition of personal services.” 52 U.S.C. § 30119(a)(1); 11 C.F.R.
14 § 115.1(a). The Act defines “person” to include “an individual, partnership, committee,
15 association, corporation, labor organization, or any other organization or group of persons.” 52
16 U.S.C. § 30101(11); 11 C.F.R. § 115.1(a) (citing 11 C.F.R. § 100.10). Individual partners and
17 employees of a partnership that is a federal contractor may make contributions, 11 C.F.R.
18 § 115.4, as may stockholders and officers of a corporation that is a federal contractor, 11 C.F.R.
19 § 115.6. But Commission regulations specifically prohibit individuals or sole proprietors who
20 are federal contractors from making contributions “from their business, personal, or other funds
21 under their dominion or control.” 11 C.F.R. § 115.5.

22 Christoph LLC is currently under contract with the federal government for the provision
23 of consulting services. Christoph LLC is thus a federal contractor under the Act and

1 Commission regulations and is prohibited from making any contributions. Whether you are
2 subject to this prohibition individually depends on whether Christoph LLC's federal contractor
3 status is attributable to you as its sole member.

4 Commission regulations provide that the question of how the Act applies to an LLC's
5 members is determined by the tax treatment that the LLC elects under the Internal Revenue
6 Code. *See* 11 C.F.R. § 110.1(g); Treatment of Limited Liability Companies under the Federal
7 Election Campaign Act, 64 Fed. Reg. 37,397, 37,398 (July 12, 1999) ("Treatment of LLCs").¹
8 For example, if an LLC elects to be treated as a partnership by the IRS, the LLC is subject to the
9 contribution limits and prohibitions that apply to partnerships, and the LLC's individual
10 members are treated as partners. 11 C.F.R. §§ 110.1(g)(2), 115.4. Similarly, if an LLC elects to
11 be treated as a corporation by the IRS, the LLC is subject to the Act's provisions regarding
12 corporate activity, and its members are considered owners or officers of the corporation. 11
13 C.F.R. §§ 110.1(g)(3), 115.6.

14 Critically, a single-member LLC cannot elect to be classified as a partnership for
15 purposes of tax law; rather, it must choose either to be treated as a corporation or to be
16 disregarded as an entity separate from its owner. *See* Advisory Opinion 2009-02 (True Patriot

¹ An LLC, generally, is a "non-corporate business [form] that provides its members with limited liability and allows them to participate actively in the entity's management." Mark A. Sargent & Walter D. Schwidetzky, *Limited Liability Company Handbook* § 1:3 (Thomson Reuters ed., 2014-2015 ed. 2014) (citing Keatinge, et al., *The Limited Liability Company, A Study of the Emerging Entity*, 47 BUS. LAW. 378, 384 (1992)); *see generally* Treatment of LLCs, 64 Fed. Reg. at 37,398. The Act's federal contractor prohibition was enacted well before the advent of LLCs. Congress first enacted the federal contractor prohibition in 1940 as part of the Hatch Act. Act of July 19, 1940, ch. 640, sec. 4, § 5(a), 54 Stat. 767, 772. The first state LLC legislation was not enacted until 1977, the same year that the Commission promulgated its regulations implementing the federal contractor prohibition. Sargent & Schwidetzky, *Limited Liability Company Handbook* § 1:2; *see also* Disclosure Regulations, House Doc. 95-44 at 120 (1977). The next state to adopt LLC legislation did not do so until 1982. Sargent & Schwidetzky, *Limited Liability Company Handbook* § 1:2. Not until 1996 did all 50 states and the District of Columbia have LLC statutes. *Id.* Thus, neither the Act's federal contractor prohibition nor the Commission regulations implementing it specifically address LLCs. *See Wagner v. FEC*, 793 F.3d 1, 30 n.35 (D.C. Cir. 2015) (*en banc*) ("The statute, of course, does not mention LLCs, which first emerged in the late 1970s.").

1 Network) at 3 (citing 26 C.F.R. § 301.7701-3(a)). A single-member LLC that does not
2 affirmatively elect treatment as a corporation is, by default, disregarded as an entity separate
3 from its owner. *See id.* (citing 26 C.F.R. §§ 301.7701-3(b)(1), 7701-2(c)(2)). Commission
4 regulations specifically provide that “[a] contribution by an LLC with a single natural person
5 member that does not elect to be treated as a corporation” by the IRS “shall be attributed only to
6 that single member.” 11 C.F.R. § 110.1(g)(4). This attribution is appropriate “[b]ecause of the
7 unity of the member and the LLC in this situation.” *Treatment of LLCs*, 64 Fed. Reg. at 37,399.
8 And because there is no legal distinction between contributions made by a non-corporate single-
9 member LLC and its single member, the Act’s prohibition on contributions by federal
10 contractors necessarily applies equally to contributions by the LLC and its sole member.

11 Christoph LLC is a single-member LLC that has not elected to be treated as a corporation
12 for federal income tax purposes. As the AOR notes, Christoph LLC is thus a “disregarded
13 entity” under the Internal Revenue Code. Given Christoph LLC’s elected tax status and the
14 resulting unity between the LLC and its owner, Christoph LLC is similarly disregarded as an
15 entity separate from its owner for purposes of the Act: Commission regulations do not
16 distinguish between contributions made by you and those made by Christoph LLC. *Cf.* 11
17 C.F.R. § 110.1(g)(4); Advisory Opinion 2009-02 (*True Patriot Network*) at 2 (determining that
18 single-member LLC is subject to individual contribution limits of its sole member); *Treatment of*
19 *LLCs*, 64 Fed. Reg. at 37,398 (explaining that Act’s limitations and prohibitions apply to LLC
20 according to tax treatment that LLC elects). Indeed, your situation is indistinguishable from that
21 of an individual who conducts business as a sole proprietor, and Commission regulations prohibit
22 sole proprietors who are federal contractors from making contributions. 11 C.F.R. § 115.5.
23 Accordingly, because Christoph LLC is not a partnership or corporation for federal tax purposes,

1 but rather is disregarded as an entity separate from its owner, you as the sole member of the LLC
2 are a federal contractor prohibited from making contributions under 52 U.S.C. section 30119.

3 Applying the prohibition on federal contractor contributions in this circumstance also
4 furthers the governmental interests that the prohibition is intended to address. As the U.S. Court
5 of Appeals for the District of Columbia Circuit recently recognized, the prohibition furthers two
6 important interests: (1) protection against *quid pro quo* corruption and its appearance, and (2)
7 protection against interference with merit-based public administration. *Wagner v. FEC*, 793 F.3d
8 1, 8 (D.C. Cir. 2015) (*en banc*) (upholding constitutionality of prohibition in challenge brought
9 by individual federal contractor). In considering the first interest, the court noted numerous
10 examples of corruption in government contracting at the federal and state level, *id.* at 15-18, and
11 observed the significant risk of the appearance of corruption in the contracting context: “[A]
12 contribution made while negotiating or performing a contract looks like a *quid pro quo*, whether
13 or not it truly is.” *Id.* at 22. The court recognized that the ban serves to “prevent those who are
14 making money out of governmental contracts from making contributions to any political party,”
15 and thereby to “prevent them from making contributions which may be considered in some
16 instances as bribery in order to secure government contracts for themselves.” *Wagner*, 793 F.3d
17 at 12 (citing statement of Sen. Harry Byrd, 86 Cong. Rec. 2982 (1940)).

18 With respect to the government’s second interest, the court observed that the Supreme
19 Court has “‘upheld a narrow class of speech restrictions that operate to the disadvantage of
20 certain persons, . . . based on an interest in allowing governmental entities to perform their
21 functions.’” *Id.* at 8 (quoting *Citizens United v. FEC*, 558 U.S. 310, 341 (2010)). The D.C.
22 Circuit went on to explain that Supreme Court jurisprudence recognizes two components to this
23 second interest: (1) the interest in having government “operate effectively and fairly”; and (2)

1 “the employees’ interest in being ‘sufficiently free from improper influence’ or coercion.” *Id.* at
2 9. The court noted that there has been an “enormous increase in the government’s reliance on
3 contractors to do work previously performed by employees If anything, that shift has only
4 strengthened the original rationales for the contractor contribution ban by increasing the number
5 of potential targets of corruption and coercion.” *Id.* at 19.

6 These governmental interests in reducing the risk of *quid pro quo* corruption or its
7 appearance and in limiting interference with merit-based public administration are fully
8 implicated here, where an individual has created an LLC of which he or she is the only member
9 and seeks to sell his or her services to the federal government. Because Christoph LLC is
10 negotiating and fulfilling government contracts, contributions made by its sole member would
11 give rise to the appearance of a *quid pro quo* that the Act is intended to prevent, as well as to
12 potential coercion of the contractor. Indeed, the *Wagner* court suggested that allowing sole
13 members of federal contractors LLCs that are treated as disregarded entities to make
14 contributions might constitute a “loophole.” 793 F.3d at 30.² And permitting such a
15 circumvention mechanism would, at a minimum, undermine the prohibition as applied to
16 individuals and sole proprietors. 11 C.F.R. § 115.5.

17 In sum, the Commission’s regulations governing the treatment of LLCs under the Act
18 dictate that a single-member LLC that is disregarded as an entity separate from its owner for
19 federal income tax purposes be treated as an individual or sole proprietorship for the purposes of

² The plaintiff in *Wagner* argued, among other things, that the federal contractor prohibition is underinclusive because an individual could establish an LLC to formally contract with the government while retaining the ability to make contributions. 793 F.3d at 30. The court, referencing the Commission’s statement that it had “not addressed the application of [the Act’s] contractor contribution prohibition to contributions made by an individual who is the sole member of an LLC that is a federal contractor” and observing that there was “no evidence in the record” of “circumvention-by-LLC,” declined to use the “failure to plug this speculative loophole” as a basis for invalidating the statute. *Id.*

1 the federal contractor prohibition, consistent with the legislative history and the courts’
2 consideration of the federal contractor prohibition. Because Christoph LLC has a single member
3 and is disregarded as an entity separate from its owner by the IRS for federal income tax
4 purposes, it is also a disregarded entity for the purposes of the Act under 11 C.F.R. § 110.1(g)(4).
5 Therefore, as the sole member of Christoph LLC, a federal contractor, the Act prohibits you from
6 making contributions.³

7 This response constitutes an advisory opinion concerning the application of the Act and
8 Commission regulations to the specific transaction or activity set forth in this advisory opinion
9 request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of
10 the facts or assumptions presented, and such facts or assumptions are material to a conclusion
11 presented in this advisory opinion, then you may not rely on that conclusion as support for its
12 proposed activity. Any person involved in any specific transaction or activity which is
13 indistinguishable in all its material aspects from the transaction or activity with respect to which
14 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.
15 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
16 affected by subsequent developments in the law including, but not limited to, statutes,
17 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
18 on the Commission’s website.

19 On behalf of the Commission,
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³ The Commission notes that federal contractor status is not permanent. To the contrary, Commission regulations specify the time period during which the federal contractor prohibition applies: It extends from the commencement of the contract negotiations until the completion of the contract performance or the termination of negotiations. 11 C.F.R. §§ 115.1(b), 115.2(b). Outside of the time period established in section 115.1(b), neither the Act nor Commission regulations prohibit a person who has been or might become a federal contractor from making a contribution.

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Matthew S. Petersen
Chairman