



FEDERAL ELECTION COMMISSION
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ADVISORY OPINION 1998-11

CONCURRING OPINION

VICE CHAIRMAN SCOTT E. THOMAS
COMMISSIONER DANNY LEE MCDONALD

Although we agree with the result reached by the Commission in Advisory Opinion 1998-11, we wish to emphasize two points. First, the advisory opinion concludes that an LLC holding company (Patriot Holdings) may make contributions to Federal candidates and committees even though its two subsidiary LLCs are Federal government contractors operating under the prohibitions of 2 U.S.C. §441c. Where a permissible source entity controls several impermissible source entities, we agree that the “top” entity—the upstream entity—may make contributions to the extent that it is permissible for an LLC and so long as certain other restrictions are followed such as the prohibition on use of revenues of its subsidiaries.

Our conclusion would be different, however, if the roles were reversed and we had an impermissible source at the upstream level and it controlled permissible source entities down below. In that situation, we would not be willing to say those otherwise permissible source entities down below could make contributions simply because they were assertedly “separate” entities. In our view, the Commission should require an entity that is controlled by a prohibited source upstream to live with the same prohibitions which apply to that controlling entity.

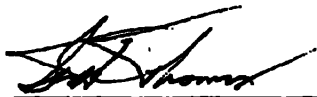
Second, we wish to discuss the broader, and still unresolved, proliferation problem which exists more generally with respect to LLCs. The Commission has yet to address the issue of whether multiple LLCs controlled by the same person, or substantially same group of persons, are subject to one, shared contribution limitation. See Advisory Opinion 1996-13, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶6199 (concurring opinion of Commissioners McGarry, Thomas and McDonald). Under 2 U.S.C. §441a, each person is entitled to one contribution limitation. However, if one person could establish and control multiple LLCs—each of which would have its own contribution limitation—that one person could use those LLCs to make a number of contributions to the same federal committee and, thus, could easily evade the contribution limitations.

Traditional affiliation concepts would close the door on a control group setting up a number of LLCs and otherwise getting around the law. In our view, current statutory language compels treatment of multiple LLCs as entities subject to one, aggregated contribution limit. Section 441a indicates that “[n]o *person* shall make contributions” in excess of certain limitations. 2 U.S.C. §441a (emphasis added). The statute defines the term “person” to include “an individual, partnership, committee, association, corporation, labor organization, *or any other organization or group of persons.* . . .” 2 U.S.C. §431(11)(emphasis added). Thus the reach of the statutory term “person” would plainly include an affiliated “group of persons” such as multiple LLCs established, financed, maintained or controlled by the same entity. Indeed, in passing the affiliation provision found at 2 U.S.C. §441a(a)(5), Congress explained in the accompanying Conference Report that “[t]he anti-proliferation rules established by the conference substitute are intended to prevent corporations, labor organizations, *or other persons or groups of persons from evading the contribution limits of the conference substitute.*” H.R. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 58 (1976)(emphasis added).

It is appropriate for the Commission to apply these affiliation concepts to non-committee entities. In the past, for example, the Commission has routinely applied affiliation concepts to non-committee entities for the purpose of determining cross-solicitation eligibility. *See, e.g.*, Advisory Opinion 1989-8, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶5959 (“In past opinions, the Commission has concluded that the executive and administrative personnel of a partnership *affiliated* with the connected organization of a separate segregated fund may be solicited for contributions to that fund.”)(emphasis added) *citing* Advisory Opinions 1987-34 and 1983-48 at 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶¶5920 and 5749, respectively.

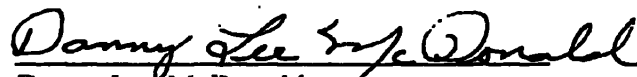
The legal concept of LLCs and the questions of their place and treatment under the Federal Election Campaign Act are relatively new. We fully agree with the Commission’s September 2, 1998 decision directing the Office of General Counsel to draft a notice of proposed rulemaking which will address contributions by LLCs. Consideration of the issues raised in this concurrence, as well as those raised by other Commissioners during the advisory opinion process, will surely benefit from the full dress treatment they will receive in a rulemaking forum.

10/2/98
Date



Scott E. Thomas
Vice Chairman

10-2-98
Date



Danny Lee McDonald
Commissioner