FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
CHIEF COMMUNICATIONS OFFICER
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: COMMISSION SECRETARY

DATE: July 27, 2009

SUBJECT: COMMENT ON DRAFT AO 2009-18
Penske Truck Leasing Co., L.P.

Transmitted herewith is a timely submitted comment from Carol A. Laham, Esq., and D. Mark Renaud, Esq., regarding the above-captioned matter.

Proposed Advisory Opinion 2009-18 is on the agenda for Tuesday, July 28, 2009.

Attachment

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July 27, 2009

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Mary W. Dove
Secretary of the Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Advisory Opinion Request 2009-18

Dear Madame Secretary:

On behalf of Penske Truck Leasing Co., L.P. ("Joint Venture"), its general partner Penske Truck Leasing Corporation ("Penske"), and the Joint Venture's separate segregated fund ("SSF) Penske Truck Leasing Co., L.P. Political Action Committee ("Penske PAC") we respectfully submit this response to the July 22, 2009, draft advisory opinion designated 2009-18 issued by the staff of the Federal Election Commission ("FEC" or "Commission") with respect to the disaffiliation of Penske PAC and the SSF of the General Electric Company ("GE"), the General Electric Company Political Action Committee ("GEPAC").

Draft Advisory Opinion 2009-18 recognizes the fact that the Joint Venture's relationship with GE does not fulfill the majority of the Commission's circumstantial factors of affiliation.

- GE entities do not own a controlling interest in the Joint Venture;
- GE does not have the authority to direct the governance of the Joint Venture, and its participation as a minority owner and minority member of the Advisory Board provides no assistance in this manner;
- GE does not have the authority to hire, appoint, demote, or otherwise control the officers or other decision-making employees of the Joint Venture;
- GE does not have common or overlapping officers or employees with the Joint Venture, and the fact that Roger Penske is on the Board of GE is insignificant given the size of GE's Board (currently 16 members);
- GE had no role in the formation of the Penske PAC or of the Joint Venture itself; and

- There are no similar patters of contributions between GEPAC and Penske PAC.

Elevating the one factor related to the line of credit, 11 C.F.R. § 100.5(g)(4)(ii)(G), above all of the rest and even above the combination of all of the other factors in order to find continued affiliation is grossly inappropriate on both policy and factual grounds. This is especially true of non-control factors in the context of joint ventures, where the Commission has always understood that there is participation, investment, and involvement by the minority partners and control, or lack thereof, becomes the focus of the inquiry.

With respect to policy, while the draft opinion acknowledges that there are ten circumstantial factors of affiliation, its conclusion is such that it finds the factors not to be of equal, or even close to equal, weight. This assertion seems to ignore the basic premise of these factors, which is that they are "circumstantial," not evidence of per se affiliation. Indeed, while the Commission's initial factors used to be identified as "indicia" of affiliation, the Commission took pains in 1989 to explain that it was changing the term "indicia" to "circumstantial factors" precisely because it was interested in the "overall" relationship between the committees or their sponsoring organizations." 54 Fed. Reg. 34,099 (Aug. 17, 1989). Given that the relationship between the Joint Venture and GE fulfills none of the other factors, the draft opinion treats the application of 100.5(g)(4)(ii)(G) as if it triggered *per se* affiliation. Instead, the overall relationship is clearly one of separate entities (one with a minority interest in the other), each with its own divergent business and political interests, and this one factor does not change the nature of the relationship.

On factual grounds, the revolving line of credit facility itself is not a "transfer" of funds between the two companies any more than a loan from a bank is a "transfer" between the bank and the recipient organization. As with all lines of credit, the Joint Venture must pay its lender, which in this case, based on their historical relationship, happens to be GE . Instead, the only arguable benefit to the Joint Venture is the differential between market interest rates and the interest rates charged by GE under the revolving line of credit, a spread that might not be that substantial in the current market. This is especially important given the origin of the circumstantial factor at issue, for it is derived from a prior factor that focused solely on transfers of actual committee funds and was then expanded to take into account transfers of in-kind goods and other materials. *See* 54 Fed. Reg.. 34,100 (Aug.17, 1989) .

In any event, the value of the differential is not akin to the value of the entire revolving credit facility or the entirety of the amount loaned from GE to the Joint Venture, which is the conclusion reached in the draft. Moreover, interest rates are subject to negotiation as well so that there is no way to fix that number. Under any circumstances, a precise number is hard to calculate given that there are a number of separate loans under the revolving line of credit with different due dates and interest rates, but it will suffice to say that the Joint Venture does not receive its funds for free – or even at a 30% discount. Nor is the Joint Venture able to avoid paying the loans back or inducing preferred treatment by use of Penske PAC, for the revolving line of credit is a contractual relationship, involving covenants, events of default, and reporting obligations of the sort that would customarily be found in a credit agreement with an unaffiliated lender. Further, the line of credit is coming from the very company within GE that finances other companies. In other words, it is within the ordinary course of business for GE to enter into financial transactions. This is its business. Nobody would argue that each company financed by GE, and there are undoubtedly thousands, is affiliated with GE or that each company that gets a different rate from the next is affiliated.

Further, in order to deconsolidate, GE and Penske were required to and did renegotiate the terms of the line of credit after the change in control between the two entities precisely to take the line of credit out of the GE family of loans. This renegotiation was done at arms length by counsel for each of the Joint Venture, its general partner Penske Corporation, and GE, and GE insisted on normal lender protections of the sort found in any standard line of credit. Thus, the credit facility, as renegotiated when GE became a minority owner, can fairly be viewed as an arms-length transaction except for the interest rate, which is a byproduct of the historical relationship between the companies. It was the very lack of control by GE over the Joint Venture that necessitated the creation of the covenants and other loan terms given that GE could no longer take action through the Joint Venture's Advisory Board to address any concerns involving the lending arrangements. Further, as alluded to in the draft opinion, GE and the Joint Venture have set forth a framework for bringing the revolving line of credit to an end given that the Joint Venture is no longer a subsidiary of GE.

Finally, the draft opinion fails to recognize the business realities associated with the change in structure of the organization. By owning less than 50% of the Joint Venture, GE was able to deconsolidate the Joint Venture from its financial

reporting. There were important financial and other consequences to this deconsolidation both for GE and the Joint Venture, including the renegotiation of the revolving line of credit. The Joint Venture is a profit-making enterprise, as are GE and the other owners of the Joint Venture. Thus, the Joint Venture's credit facility serves to maximize profit for the Joint Venture and ultimately the investors in the Joint Venture. The interest rate spread, then, is another type of investment by GE in the Joint Venture, but it is an investment that does not give the minority partner GE any additional control over the Joint Venture.[1]

Thus, rather than elevating the revolving credit facility factor above all of the rest, the Commission should do precisely what its regulation proposes: examine "the overall relationship between the sponsoring organizations." 11 C.F.R. § 110.3(ii). The Commission also should understand the limited importance of the interest rate differential. In so doing the Commission will recognize, as the draft opinion did, that none of the other factors favors a finding of affiliation and should recognize, as the draft did not, that the rate differential does not change this disaffiliated relationship.

In sum, we urge the Commission to find that Penske PAC and GEPAC are disaffiliated.

Sincerely,

Carol A. Laham

Carol A. Laham
D. Mark Renaud

[1] Forty-nine point nine percent of each extra dollar the Joint Venture would pay GE in interest costs would be GE paying itself.