



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

November 6, 2014

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2014-17

Joshua A. James Esq.  
Bryan Cave LLP  
1155 F Street, NW  
Washington, D.C. 20004

Dear Mr. James:

We are responding to the advisory opinion request that you submitted on behalf of Berkadia Commercial Mortgage LLC (“Berkadia”) concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-30146 (formerly 2 U.S.C. §§ 431-457) (the “Act”), and Commission regulations to potential trade association solicitations of Berkadia’s administrative and executive personnel. Because Berkadia is wholly owned by two corporations and affiliated with each of them, the Commission concludes that Berkadia may authorize a trade association of which it is a member to solicit its administrative and executive personnel.

### ***Background***

The facts presented in this advisory opinion are based on your letter received on October 2, 2014.

Berkadia is a limited liability company that has elected to be treated as a partnership under the Internal Revenue Code for federal tax purposes. It was formed as a joint venture by two corporations: Berkshire Hathaway Inc. (“Berkshire”) and Leucadia National Corporation (“Leucadia”).<sup>1</sup> Berkadia also wholly owns one incorporated subsidiary, Berkadia Commercial

---

<sup>1</sup> Berkshire and Leucadia hold ownership interests in Berkadia through intermediate entities. See Advisory Opinion Request at Attachment A (Oct. 2, 2014) (providing organizational chart of Berkadia’s ownership).

Mortgage Inc. Berkadia and its subsidiary currently employ 729 people in the United States and 635 people in India.<sup>2</sup>

Berkshire and Leucadia each own a fifty percent interest in Berkadia and share fifty percent of its profits. And they each appoint two individuals to Berkadia's four-member board of managers (the "Board"). All decisions of the Board require the assent of at least one Berkshire and one Leucadia appointee. The Board controls and manages Berkadia and has the authority to hire and fire its employees. The Board also delegates some of its authority to Berkadia's officers and to an authorized representative that it appoints; these include a chief executive officer, a president, several executive vice presidents, and a general counsel. None of these officers works for Berkshire or Leucadia.

Berkadia is independent of its corporate owners in some respects. Berkadia pays employees with its own funds and treats them as "direct employees" of Berkadia rather than as employees of its corporate owners. Berkadia typically contracts with third parties without involving Berkshire or Leucadia, for example by leasing office space in 73 locations throughout the United States in its own name. Neither Berkshire nor Leucadia is directly liable for Berkadia's debts because of its LLC status, and with one exception Berkadia is responsible for its own financing arrangements.<sup>3</sup>

Neither Berkadia nor its corporate owners serve as the connected organization of any separate segregated fund ("SSF"). Neither Berkadia's owners nor its subsidiary corporation are members of any trade association that Berkadia might wish to authorize to solicit its executive and administrative personnel. Berkadia, however, is currently a member of several trade associations that administer their own SSFs. Berkadia has engaged in "very preliminary talks" with one or more trade associations about possibly allowing one of them to solicit Berkadia's executive and administrative personnel, but Berkadia has not authorized any trade association to solicit its personnel out of concern that such solicitations may be impermissible.

### ***Question Presented***

*May Berkadia permit a trade association of which it is a member to solicit Berkadia's executive and administrative personnel for contributions to the trade association's SSF, so long as 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?*

### ***Legal Analysis and Conclusion***

Yes, Berkadia may permit a trade association of which it is a member to solicit Berkadia's executive and administrative personnel for contributions to the trade association's

---

<sup>2</sup> Berkadia represents that it would limit any solicitations for contributions to those employees who are United States citizens or permanent residents.

<sup>3</sup> The one exception is Berkadia's "rated commercial paper program," which has been guaranteed by Berkshire.

SSF, so long as Berkadia has provided separate and specific approval of the solicitation and the trade association complies with the requirements of 11 C.F.R. § 114.8.

*1. Trade association solicitations*

As an exception to the Act's prohibition on corporate contributions, a corporation and its SSF may solicit the corporation's solicitable class for contributions to the corporation's SSF. 52 U.S.C. § 30118(b)(4) (formerly 2 U.S.C. § 441b(b)(4)); 11 C.F.R. § 114.1(j). Incorporated trade associations may solicit their executive and administrative personnel and the families of such personnel. They may also solicit their members who are individuals and their families, and members that are unincorporated entities. 52 U.S.C. § 30118(b)(4)(A), (C) (formerly 2 U.S.C. § 441b(b)(4)(A), (C)); 11 C.F.R. §§ 114.7(a), (c), 114.8(i)(2). An incorporated trade association may not solicit contributions from its incorporated members, but it may solicit the stockholders and executive and administrative personnel, and their families, of any incorporated members that provide separate and specific approval to the trade association for the making of such solicitations during a calendar year and that have not approved a solicitation by any other trade association for the same calendar year. 52 U.S.C. § 30118(b)(4)(D) (formerly 2 U.S.C. § 441b(b)(4)(D)); 11 C.F.R. § 114.8(c), (d).

Under Commission regulations, contributions by an LLC that elects to be treated as a partnership for tax purposes are treated as contributions from a partnership. 11 C.F.R. § 110.1(g)(2). Unlike corporations, partnerships may contribute directly to federal candidates and political committees. 11 C.F.R. § 110.1(e). But contributions by partnerships are attributed not only to the partnership but also to the partners themselves. *Id.* Thus, a partnership in which each partner is a corporation may not make contributions. *See* Advisory Opinion 2001-07 at 8 (Nuclear Management Company PAC) ("NMC PAC") (concluding that LLC treated as partnership and wholly owned by corporations may not contribute to nonconnected political committee).

Berkadia is treated as a partnership under Commission regulations because it is an LLC that has elected to be treated as a partnership under the Internal Revenue Code. *See* 11 C.F.R. § 110.1(g)(2). The Commission's regulations governing trade association solicitations, however, do not squarely address solicitations of partnerships that are wholly owned by corporations. In general, these solicitation regulations are designed to permit a trade association to solicit *either* its members (if those members are unincorporated) *or* its members' executive and administrative personnel (if the members are incorporated). *See* 11 C.F.R. §§ 114.7(c), 114.8(c). Here, however, a trade association may not solicit Berkadia directly for contributions because Berkadia's contributions would be attributed to its corporate owners, who are prohibited from making contributions. And because Berkadia is not treated as a corporation, Commission regulations do not explicitly allow a trade association to solicit Berkadia's executive and administrative personnel, either. *See, e.g.,* Advisory Opinion 2005-14 (Association of Kentucky Fried Chicken Franchisees) (concluding that national trade association may solicit unincorporated entities that are members of regional associations but not their personnel); Advisory Opinion 1995-27 (National Association of Real Estate Investment Trusts) (concluding that trade association may solicit unincorporated real estate investment trust members but not

their personnel).<sup>4</sup> Thus, the regulations do not clearly indicate how Berkadia may lawfully participate in the SSF of a trade association of which Berkadia is a member.

## 2. *Commission treatment of partnerships and LLCs that may not make contributions*

In analogous situations, the Commission has recognized that partnerships (and LLCs electing partnership treatment) wholly owned by corporations “warrant special consideration.” *See* Advisory Opinion 2010-16 at 3 (EmblemHealth Services) (“EmblemHealth”). Specifically, “[t]o avoid prohibiting these types of partnerships from making contributions *and* from establishing and administering [their own SSFs],” the Commission has permitted such entities to pay the administration and solicitation costs of a corporate owner’s SSF, but “only when the partnership is wholly owned by corporations and is affiliated with at least one of the corporations.” *Id.* (citing Advisory Opinion 2009-14 at n.5 (Mercedes-Benz USA *et al.*)). Accordingly, the relevant question here is whether Berkadia is affiliated with at least one of its corporate owners; if so, under the rationale of these prior advisory opinions, Berkadia may be treated as a corporation for purposes of trade association SSF solicitations.

Political committees, including SSFs, that are established, financed, maintained, or controlled by the same corporation, labor organization, person, or group of persons, including any parent, subsidiary, branch, division, department, or local unit thereof, are affiliated. 52 U.S.C. § 30116(a)(5) (formerly 2 U.S.C. § 441a(a)(5)); 11 C.F.R. §§ 100.5(g)(2), 110.3(a)(1)(ii). Committees’ sponsoring organizations are also considered to be affiliated with each other when such organizations are established, financed, maintained or controlled by the same corporation, person, or group of persons. *See* 11 C.F.R. §§ 100.5(g)(4), 110.3(a)(3).

Commission regulations identify certain organizations that are *per se* affiliated, and hence whose SSFs are *per se* affiliated. These organizations include a single corporation and its subsidiaries, as well as a single person or group of persons. 11 C.F.R. §§ 100.5(g)(3)(i), 110.3(a)(2)(i). Under the Act, a parent-subsidiary relationship, and thus *per se* affiliation, is created when a parent company owns a majority interest in another organization. *See* Advisory Opinion 2003-28 (Horizon Lines) (finding *per se* affiliation where corporation owned controlling interest in LLC); Advisory Opinion 1985-27 (R.J. Reynolds Industries) (finding *per se* affiliation where parent corporation owned controlling interest in another corporation); *see also* Advisory Opinion 2003-21 (Lehman Brothers Holdings) (finding that minority ownership interest in corporation does not create parent-subsidiary relationship). Berkadia is not *per se* affiliated with Berkshire or Leucadia because neither owns a majority interest in Berkadia.

If *per se* affiliation is absent, the Commission examines “the relationship between organizations that sponsor committees, between the committees themselves, [and] between one sponsoring organization and a committee established by another organization to determine whether [the organizations] are affiliated.” *See* 11 C.F.R. § 100.5(g)(4)(i). Commission regulations provide a non-exhaustive list of ten “circumstantial factors” to be considered “in the

---

<sup>4</sup> The Commission, however, presumed in these advisory opinions that the unincorporated members were permitted by the Act to make direct contributions to federal candidates and political committees. Berkadia’s circumstances are materially different from those unincorporated entities as it may not contribute to a trade association’s SSF.

context of the overall relationship” to determine whether the respective committees or their sponsoring organizations are appropriately considered affiliated. 11 C.F.R. §§ 100.5(g)(4)(i)-(ii), 110.3(a)(3)(i)-(ii).

In cases of joint venture partnerships or LLCs owned “50-50” by two corporations, as is the case here, the Commission has consistently found the partnership or LLC to be affiliated with both corporate owners under the relevant affiliation factors. For example, in Advisory Opinion 1997-13 (United Space Alliance PAC) (“USA PAC”), the Commission found that the LLC was affiliated with its two corporate owners because the owners selected an equal number of individuals to an advisory board overseeing the LLC’s operations, both owners had to approve the LLC’s “significant policy determinations,” and officials from both companies selected the LLC’s officers. *Id.* at 3 (citing 11 C.F.R. § 110.3(a)(3)(ii)(A), (B), (C), (I)). Similarly, in Advisory Opinion 1992-17 (Du Pont Merck Program for Active Citizenship) (“Du Pont”), the Commission found that the LLC was affiliated with its two corporate owners because the owners each controlled fifty percent of the LLC’s Board of Directors and the assent of each was needed for the LLC’s major decisions, including the hiring and firing of key employees. *See id.* at 3 (citing 11 C.F.R. § 110.3(a)(3)(ii)(B), (C), (E), (F), (I)); *see also* Advisory Opinion 1994-09 (Armco Steel) (finding that LLC was affiliated with its two corporate owners because the owners shared equal control of the LLC’s board).

Berkshire and Leucadia jointly established Berkadia and own equal shares of it. That they also share equal control of Berkadia is evidenced by the fact that the two corporations each appoint an equal number of individuals to Berkadia’s Board that oversees its operations, and at least one appointee of each corporation must approve all of the Board’s actions. Significantly, the two corporate owners also share equally in Berkadia’s profits. These factors of shared, exclusive control indicate that Berkadia is affiliated with both Berkshire and Leucadia.<sup>5</sup> *See* 11 C.F.R. § 110.3(a)(3)(ii)(B), (C), (I).

### 3. *Applying the trade association solicitation rules to Berkadia*

The Commission has concluded that partnerships and LLCs that “warrant special consideration” under the foregoing criteria, as Berkadia does here, may establish and administer an SSF even though such entities may not otherwise do so under the Act. *See* Advisory Opinion 1997-13 (USA PAC) (concluding that joint venture owned 50-50 by two corporations and affiliated with both of them may pay establishment, administration, and solicitation costs of political committee); Advisory Opinion 1992-17 (Du Pont) (same); Advisory Opinion 1994-09 (Armco Steel) (same); Advisory Opinion 1996-49 (PrimeCo Personal Communications) (“PrimeCo”) (concluding that joint venture partnership owned 50-25-25 by three corporations and affiliated with the 50% owner but not the other two could establish and administer an SSF). And the executive and administrative personnel of such partnerships or LLCs may be solicited

---

<sup>5</sup> That Berkshire and Leucadia hold ownership interest through intermediate entities is not material to the affiliation analysis. *See* Advisory Opinion 2003-28 (Horizon Lines) (concluding that LLC treated as partnership was affiliated with one of its corporate owners even though that corporation’s ownership interest was held through another LLC).

for contributions to their SSF or an SSF of their affiliated corporate owner, even though the Act does not otherwise allow partnership personnel to be solicited for contributions to an SSF. *See* Advisory Opinion 2010-16 (EmblemHealth) (finding that SSF connected to corporate owner of affiliated LLC may solicit LLC's executive and administrative personnel); Advisory Opinion 1994-11 (FMC Corporation) (same); Advisory Opinion 1996-49 (PrimeCo) (concluding that SSF established by joint venture partnership may solicit executive and administrative personnel of partnership).<sup>6</sup> The Commission reasoned in these advisory opinions that the partnership's ability to establish and administer an SSF and have its personnel solicited for contributions "may be construed as coming from the affiliated corporations." *See, e.g.*, Advisory Opinion 1992-17 at 4 (Du Pont).

The Commission finds that the same considerations that allow a partnership owned by corporations to establish an SSF and have its executive and administrative personnel solicited for contributions also warrant allowing the trade association solicitations at issue here. As in the matters discussed above, Berkadia's inability to participate in a trade association's SSF derives from the fact that the Commission's regulations do not explicitly account for partnerships owned and controlled exclusively by corporations. Thus, to avoid prohibiting Berkadia from making contributions to a trade association's SSF *and* from having its executive and administrative personnel solicited for contributions to such an SSF, the Commission interprets the Act and Commission regulations as allowing trade associations to solicit the executive and administrative personnel of partnerships (and LLCs electing tax treatment as partnerships) that are wholly owned by and affiliated with corporations. *Cf.* Advisory Opinion 2010-16 at 3 (EmblemHealth) (construing regulations to avoid prohibiting corporate-owned partnerships from participating in SSFs). Accordingly, the Commission concludes that Berkadia may authorize trade associations of which it is a member to solicit Berkadia's executive and administrative personnel, so long as Berkadia and the trade associations abide by the requirements of 11 C.F.R. § 114.8.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 52 U.S.C. § 30108 (formerly 2 U.S.C. § 437f). The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B) (formerly 2 U.S.C. § 437f(c)(1)(B)). Please note that the analysis or

---

<sup>6</sup> In cases where the partnership or LLC treated as a partnership was not affiliated with at least one of its corporate owners, the Commission found that this exemption from the generally applicable regulations was unwarranted. *See* Advisory Opinion 2001-07 (NMC PAC) (finding that LLC wholly owned by seven corporations but not affiliated with any one of them could not pay for establishment, administration, and solicitation expenses of political committee); Advisory Opinion 1984-36 (American Health Capital) (finding that corporation owning 40% interest in joint venture partnership could not solicit partnership's executive and administrative personnel because corporation and partnership were not affiliated).

conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions and enforcement materials cited herein are available on the Commission's website.

On behalf of the Commission,

(signed)  
Lee E. Goodman  
Chairman