



FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 16, 2011

CERTIFIED MAIL RETURN
RECEIPT REQUESTED

ADVISORY OPINION 2011-10

Michael E. Toner, Esquire
Wiley Rein LLP
1776 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Toner:

We are responding to your advisory opinion request on behalf of POET, LLC, POET PAC, and Sioux River Ethanol, LLC, d/b/a POET Biorefining-Hudson, concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the requestors' proposed fundraising program for POET PAC.

The Commission concludes that the requestors may engage in the proposed fundraising program for POET PAC, as described below.

Background

The facts presented in this advisory opinion are based on your letter received on April 20, 2011.

POET, LLC is a single-member, limited liability company organized under the laws of South Dakota that has elected not to be treated as a corporation for income tax purposes. It is wholly owned by the JT Broin Trust, a revocable South Dakota trust established by Mr. Jeff Broin and his wife.

The POET family of companies includes 27 POET plants that produce and refine ethanol. Each POET plant is partly owned, either directly or indirectly, by Mr. Broin or the JT Broin Trust, and partly owned by corn farmers and other investors. Twenty-four of the 27 POET plants are limited liability companies that have elected treatment as partnerships for taxation purposes, and one POET plant is a limited liability partnership.

Of the remaining two POET plants, one is a corporation and the other is a cooperative that has elected treatment as a corporation for taxation purposes.

To produce ethanol, the POET plants purchase corn from corn farmers, the vast majority of which are individuals, partnerships, or limited liability companies electing partnership treatment for tax purposes. Approximately one-third of the thirty thousand corn farmers who sell corn to the POET plants are also investors in the POET plants. The sales are conducted pursuant to sales contracts between the corn farmers and the POET plants. Each POET plant typically mails an average of three hundred such contracts to corn farmers per month, although some POET plants generate more than five hundred contracts in a month.

POET PAC is registered with the Commission as a nonconnected, multicandidate committee. The requestors propose to establish a program, the POET PAC Cultivator Club, to make it easier for corn farmers to contribute to POET PAC.¹ Under the program, the POET plants that plan to participate in the POET PAC Cultivator Club (the “participating POET plants”)² would solicit contributions to POET PAC from the corn farmers with which they do business, and the corn farmers could opt to have the participating POET plants deduct a portion of the money that the participating POET plants owe to them for their corn. Each farmer could choose to have the participating POET plants deduct a certain amount per bushel of corn from the amount due and owing to the farmer, such as one-fourth of a cent, one-half of a cent, or one full cent per bushel of corn sold, and then contribute that amount to POET PAC.³ The participating POET plants would transfer the deducted amounts to POET PAC each week.

A corn farmer wishing to participate in the POET PAC Cultivator Club would check a box on the farmer’s corn sales contract, thereby authorizing the participating POET plant to which it sells corn to make deductions for contribution purposes. A farmer could modify or revoke an authorization to deduct payments for contributions at any time by notifying the participating POET plant in writing and via the POET

¹ Under the proposal, only corn farmers that are individuals, partnerships, or limited liability companies electing to be treated as partnerships for tax purposes could make contributions to POET PAC using the POET PAC Cultivator Club. Corn farmers that are limited liability companies electing corporate treatment for tax purposes would not be able to participate, because they would be considered corporations under Commission regulations. See 2 U.S.C. 441b(a), 11 CFR 114.2(b) (ban on corporate contributions); 11 CFR 110.1(g)(3) (treatment of limited liability company electing tax treatment as a corporation is treated as a corporation under Commission regulations). None of the corn farmers is a foreign national or Federal contractor.

² Only the 24 POET plants that are limited liability companies treated as partnerships and the single POET plant that is a limited liability partnership will participate in the Cultivator Club. The remaining two POET plants, one of which is a corporation and the other of which is treated as such for tax purposes, will not participate.

³ For example, using the average sale of 35,000 bushels of corn per farmer, a one-fourth of a cent deduction per bushel would generate a contribution of \$87.50, a one-half cent deduction per bushel would result in a \$175.00 contribution, and a full cent deduction would result in a total contribution of \$350.00.

companies' website. The authorization to deduct contributions would not carry over from contract to contract. Instead, a corn farmer wishing to continue to participate in the POET PAC Cultivator Club after his or her contract expires would have to affirmatively elect to do so on the new sales contract. The terms of the contracts would not exceed one year.

Under the proposal, the POET PAC solicitation and check-off box would be pre-printed on each corn sales contract, while the disclaimer required by 2 U.S.C. 441d(a) and 11 CFR 110.11, the statement of political purpose required by 11 CFR 102.5(a)(2), and the best efforts statement required by 11 CFR 104.7 would appear with the Terms and Conditions. The Terms and Conditions would also state that contributions from foreign nationals, Federal government contractors, and corporations are prohibited. The contract and Terms and Conditions would be printed together in a double-sided format, with the contract on the front and the Terms and Conditions on the back of the same sheet of paper. The materials would be distributed as a single document, and after being signed by a corn farmer, they would be returned to the participating POET plant as a single document.

In administering the POET PAC Cultivator Club, the requestors would implement compliance safeguards to ensure that POET PAC did not accept any contributions from prohibited sources or in excessive amounts. POET PAC would report all contributions received on its reports filed with the Commission, as required by 2 U.S.C. 434(b) and 11 CFR 104.3(a), and would retain copies of the corn farmers' authorization as required by 2 U.S.C. 432(d) and 11 CFR 102.9(c) and 104.14(b). With respect to contributions from corn farmers that are partnerships or are limited liability companies treated as partnerships for tax purposes, the participating POET plant solicitations would request information as to the amount of the contributions attributed to each partner, and POET PAC would report this information to the Commission. Finally, the POET entities would ensure that the participating POET plants would not transfer funds to POET PAC before the participating POET plants make payments to the corn farmers.

POET PAC proposes to compensate the participating POET plants for the services that they provide in soliciting, deducting, and transmitting contributions by paying the usual and normal charge for these services to the participating POET plants in advance every month.⁴ The payments would be based on estimates of staff compensation and the time involved in administering the fundraising program. POET PAC proposes to reconcile the actual time to amounts paid each calendar quarter.

⁴ POET PAC would also similarly compensate POET, LLC to cover the cost of any POET, LLC staff time spent ensuring that the solicitation program complies with the Act and Commission regulations.

Questions Presented

1. *Is the POET PAC Cultivator Club permissible under the Act and Commission regulations?*
2. *May POET PAC include required disclaimers on a separate Terms and Conditions page rather than on the page with the actual check-off box for the POET PAC Cultivator Club?*
3. *Is a quarterly reconciliation of the actual staff time spent administering the POET PAC Cultivator Club by participating POET plants and POET, LLC employees to the amounts paid in advance by POET PAC permissible?*

Legal Analysis and Conclusions

1. *Is the POET PAC Cultivator Club permissible under the Act and Commission regulations?*

Yes, the POET PAC Cultivator Club is permissible under the Act and Commission regulations, as described below.

Under the Act and Commission regulations, a “contribution” includes “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. 431(8)(A)(i) and 11 CFR 100.52(a). “Anything of value” includes all in-kind contributions, including the provision of goods or services without charge or at a charge that is less than the usual and normal charge. *See* 11 CFR 100.52(d)(1). “Usual and normal charge” is defined as the price of goods in the market from which they ordinarily would have been purchased at the time of the contribution, or the commercially reasonable rate prevailing at the time the services were rendered. *See* 11 CFR 100.52(d)(2).

Here, the participating POET plants are limited liability companies that have elected treatment as partnerships for tax purposes and one limited liability partnership. Limited liability companies that have elected treatment as partnerships for taxation purposes are treated as partnerships under the Act and Commission regulations. *See* 11 CFR 110.1(g)(2). As such, they may make contributions of up to \$5,000 per calendar year to nonconnected multicandidate political committees.⁵ 2 U.S.C. 441a(a)(1)(C); 11 CFR 110.1(d); *see also* Advisory Opinions 2008-05 (Holland & Knight) and 2005-20 (Pillsbury Winthrop Shaw Pittman), n.4.

⁵ Corporations, in contrast, may not make contributions to nonconnected political committees. 2 U.S.C. 441b(a); 11 CFR 114.2(a). They may, however, establish separate segregated funds and pay for their establishment, administration, and solicitation costs without the payments constituting contributions under the Act and Commission regulations. 2 U.S.C. 441b(b)(2)(C); 11 CFR 114.1(b).

The proposed solicitation by the participating POET plants of contributions from the corn farmers and the subsequent deduction and transmittal of those contributions to POET PAC would constitute the provision of services and, therefore, potential in-kind contributions, by the participating POET plants to POET PAC. The Commission has approved similar types of proposals before. In Advisory Opinion 1982-63 (Manatt, Phelps, Rothenberg & Tunney), for example, the Commission determined that a partnership could institute a “check-off” system, under which the noncorporate partners could authorize the partnership to withhold a specified amount of their share of the partnership’s profits and to transfer that amount as contributions to a nonconnected political committee. More recently, in Advisory Opinion 2005-20 (Pillsbury Winthrop Shaw Pittman), the Commission approved a plan to use a partnership’s automatic electronic payroll system to make pre-authorized deductions from the partners’ income distributions for contributions to a nonconnected political committee.⁶

Consistent with these advisory opinions, the participating POET plants may provide the proposed solicitation and contribution processing services to POET PAC.⁷ Given that these services would be in-kind contributions to POET PAC, they would ordinarily be subject to the contribution limitation of \$5,000 per calendar year. In this case, however, POET PAC indicates it will pay in advance for the services furnished by the participating POET plants. The Commission concludes that no contribution will result if POET PAC pays in advance the usual and normal charge for the participating POET plants’ services in soliciting and processing contributions made by corn farmers.⁸ See Advisory Opinion 2005-20 (Pillsbury Winthrop Shaw Pittman).

2. *May POET PAC include required disclaimers on a separate Terms and Conditions page rather than on the page with the actual check-off box for the POET PAC Cultivator Club?*

Yes, POET PAC may include required disclaimers on a separate Terms and

⁶ Although not involving a partnership, in Advisory Opinion 1986-07 (Crystal Sugar Co.), the Commission also approved an incorporated agricultural cooperative’s proposal to make periodic pre-authorized deductions from amounts due to sugar beet farmers for contributions to its separate segregated fund.

⁷ By transmitting contributions received from the corn farmers to POET PAC within seven days of their receipt in all cases, as the requestors indicate the participating POET plants will do, the solicitation plan also meets the requirements of 2 U.S.C. 432(b) and 11 CFR 102.8(b), which require such transmittal within ten or thirty days of receipt, depending upon the amount of the contribution involved. The participating POET plants indicate they will also transmit the required information regarding the contributors’ identification, as required by 2 U.S.C. 434 and 11 CFR 104.3 and 104.8.

⁸ The Commission notes that, pursuant to POET PAC’s bylaws, POET PAC is administered almost exclusively by personnel employed in executive positions by POET, LLC. Thus, because POET PAC is not the separate segregated fund of POET, LLC, to the extent that individuals employed by POET, LLC are compensated by POET, LLC for the time that they spend administering the POET PAC Cultivator Club, that compensation would be an in-kind contribution by POET, LLC to POET PAC, subject to the \$5,000 contribution limit. See, e.g. Response to Advisory Opinion Request 1976-102 by Spears Leeds Kellogg Good Government Committee.

Conditions page rather than on the page with the actual check-off box for the POET PAC Cultivator Club.

Public communications that solicit contributions must include disclaimers. *See* 2 U.S.C. 441d(a); 11 CFR 110.11(a)(3). A “public communication” includes a mass mailing. 2 U.S.C. 431(22); 11 CFR 100.26. A “mass mailing” is defined as “a mailing by United States mail or facsimile of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period.” 2 U.S.C. 431(23); 11 CFR 100.27.

If the public communication is not authorized by a candidate, an authorized committee of a candidate, or an agent of either, the disclaimer must “clearly state the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate’s committee.” 11 CFR 110.11(b)(3); *see also* 2 U.S.C. 441d(a)(3). Every disclaimer “must be presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice of the identity” of the advertisement’s sponsor. 11 CFR 110.11(c)(1). Disclaimers on printed communications must be of sufficient type size to be clearly readable, must have a reasonable degree of color contrast between text and background, and must be contained in a box set apart from the rest of the communication. 2 U.S.C. 441d(c); 11 CFR 110.11(c)(2)(i)-(iii).

In addition to these requirements, political committees are required to make their “best efforts” to gather information about contributors, and to include in solicitations “a clear request for the contributor’s full name, mailing address and name of employer, and . . . an accurate statement of Federal law regarding the collection and reporting of individual contributor identifications.” 11 CFR 104.7(b)(1)(i).

In this case, the requestors intend to include disclaimers that comply with 2 U.S.C. 441d(a) and (c) and 11 CFR 110.11 for each contract that also solicits contributions to POET PAC, even though fewer than five hundred contracts will be mailed in certain months. The requestors also intend to make their “best efforts” to obtain contribution information and to include in the solicitations a statement saying contributions to POET PAC will be used in connection with Federal elections and are subject to the limitations and prohibitions of Federal law. 11 CFR 102.5(a)(2)(ii). The requestors propose to include the disclaimer and statement on the Terms and Conditions side of the document, rather than on the side of the document containing the solicitation.

Commission regulations provide that “[a] communication that would require a disclaimer if distributed separately, that is included in a package of materials, must contain the required disclaimer.” 11 CFR 110.11(c)(2)(v). The Commission has explained that “[a]ll items intended for separate distribution (*e.g.*, a campaign poster included in a mailing of campaign literature) are covered by this requirement.” *See* Explanation and Justification of Final Rule Regarding Communications Disclaimer Requirements, 60 Fed. Reg. 52069, 52071 (Oct. 5, 1995). Nevertheless, a disclaimer

“need not appear on the front or cover page of the communication as long as it appears within the communication, except on communications, such as billboards, that contain only a front face.” 11 CFR 110.11(c)(2)(iv).

Here, POET PAC proposes to place all required disclaimers and “best efforts” information on a single double-sided document that includes the contract on one side and the Terms and Conditions on the other side. The disclaimer will be set apart in a box and it will be printed in the same font size as other material on the rest of the page. The contract and Terms and Conditions will be transmitted to the corn farmers as a single document, and will be returned to the participating POET plants in the same fashion after being signed by the corn farmers.

The Commission concludes that this proposal would satisfy the disclaimer requirement in 11 CFR 110.11(c)(2)(iv). As noted above, a disclaimer need not appear on the front or cover page of a communication so long as it appears within the communication. Given that the disclaimers and the solicitation and check-off will be distributed as a single document, the Commission concludes that they are not separable communications under 11 CFR 110.11(c)(2)(v). Hence, a disclaimer appearing on the Terms and Conditions side of the document will suffice.

POET PAC asks if the phrase “[a]dministration costs and solicitations made on behalf of POET PAC are paid for by POET PAC” may be used as the “paid for by” disclaimer instead of simply “paid for by POET PAC.” It proposes this modification in language because the Terms and Conditions contain information predominantly related to the corn sales contracts, rather than to the solicitation program, and POET PAC intends to pay only the incremental “usual and normal” cost of adding the specific solicitation information and accompanying disclaimers to the pre-existing forms.

The Commission has allowed for some flexibility in the manner of phrasing disclaimers in situations where the Act does not prescribe the exact wording. *See* 2 U.S.C. 441d(d)(2) (precise language prescribed for specific type of “stand by your ad” disclaimer). In Advisory Opinion 1998-17 (Daniels Cablevision), for example, the Commission provided three examples of acceptable disclaimer statements, two of which provided additional elaborating language specifying that free airtime was being provided by Daniels Cablevision.

Given that the proposed modification to the language would provide more accurate and precise information than the standard “paid for by” language, it would fulfill a function similar to that served by the Commission’s suggested alternative language in Advisory Opinion 1998-17 (Daniels Cablevision). *See also* Advisory Opinions 1994-13 (Voter Education Project) and 2004-37 (Waters). Accordingly, the Commission concludes that the requestors may modify the language as proposed.

3. *Is a quarterly reconciliation of the actual staff time spent administering the POET PAC Cultivator Club by participating POET plants and POET, LLC employees to the amounts paid in advance by POET PAC permissible?*

Yes, a quarterly reconciliation of the actual staff time spent administering the POET PAC Cultivator Club by participating POET plants and POET, LLC employees to the amounts paid in advance by POET PAC is permissible.

Neither the Act, nor the Commission's regulations, nor the Commission's prior advisory opinions have addressed the question of when a nonconnected political committee must determine the amount of money that it owes, if any, to a partnership for services rendered. The Commission's prior advisory opinions on similar questions in different contexts are materially distinguishable. For example, in Advisory Opinion 1984-37 (AMA), the Commission determined that a separate segregated fund must determine and pay in advance the full value of consulting services to be provided by its corporate connected organization, in order to avoid receiving a prohibited corporate contribution. Unlike here, however, that advisory opinion involved a prohibited source.

Here, POET PAC plans to provide advance payment to the participating POET plants based on an initial estimate of plant employee time to be spent soliciting and processing contributions in connection with the POET PAC Cultivator Club, and then to adjust these payments each calendar quarter to reflect the actual time spent. The Commission concludes that this proposal is permissible.

Because the participating POET plants do not normally provide solicitation and contributions processing services in their ordinary course of business, they are not "commercial vendors." 11 CFR 116.1(c); Advisory Opinion 2007-04 (Atlatl). Thus, if POET PAC's initial advance payment to the participating POET plant underestimates the amount due to the participating POET plant for the staff time actually expended, the resulting difference would be considered an advance or an extension of credit by the participating POET plant to POET PAC, and therefore a contribution, until it is repaid. 2 U.S.C. 431(8)(A)(i), 11 CFR 100.52(a). As such, it would be subject to contribution limits. *See* 11 CFR 110.1(e).

In its reports filed with the Commission, POET PAC must report each advance payment to a participating POET plant on Schedule B, Line 21(b), as an operating expense, with a memo text explaining that the expense is an advance payment for solicitation and contribution processing services to be provided by the participating POET plant. If POET PAC later determines that its advance payment to a participating POET plant was less than the amount actually due for services rendered, then POET PAC must report the difference between the two amounts as a debt owed to the participating POET plant on Schedule D of its reports to the Commission until the difference is paid in full. *See* 11 CFR 104.11. When POET PAC pays the amount owed to a participating POET plant for services rendered, it must report the payment on Schedule B, Line 21(b), as an operating expense, with a memo text explaining that the amount is additional

payment for services rendered and the date(s) that the services were rendered, and identifying the report in which the advance payment was reported.

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* 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* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or 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. The cited advisory opinions are available on the Commission's Web site, www.fec.gov, or directly from the Commission's Advisory Opinion searchable database at <http://saos.nictusa.com/saos/searchao>.

On behalf of the Commission,

(signed)
Cynthia L. Bauerly
Chair