

April 22, 2010

VIA FACSIMILE

Thomasenia Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on Advisory Opinion Request 2010-04 (Wawa, Inc.)

Dear Ms. Duncan:

We appreciate the opportunity to provide comments regarding Advisory Opinion Request 2010-04 (Wawa, Inc.). We represent a number of corporations, trade associations, and their separate segregated funds (“SSF’s”) across the country. We are submitting these comments in our personal capacities and not on behalf of any particular client.

We strongly support issuing an advisory opinion confirming that the Wawa corporate employees at issue are within Wawa’s restricted class and therefore are solicitable for Wawa’s SSF under the Act. However, as discussed further below, we also urge the Commission to open a rulemaking to revise its regulations concerning the restricted class for corporations and trade associations to provide greater clarity and simplicity in this area of the law.

I. CLEARLY DEFINING “EXECUTIVE OR ADMINISTRATIVE PERSONNEL” IS AN IMPORTANT STRUCTURAL ISSUE

In its advisory opinion request, Wawa raises an important legal issue that corporations, trade associations, and their SSF’s have been grappling with since passage of the Act – defining the scope of their restricted classes. The Act does not define “executive or administrative personnel,” but instead merely provides that “it shall be unlawful for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its *executive or administrative personnel* and their families.” 2 U.S.C. § 441b(b)(4)(A)(i) (emphasis added).

Commission regulations further define “executive or administrative personnel” as “individuals employed by a corporation or labor organization who are paid on a salary rather than hourly basis and who have policymaking, managerial, professional, or supervisory responsibilities.” 11 C.F.R. § 114.1(c). Commission regulations contain several exceptions to this general definition, including employees who are “salaried foremen and other salaried lower level supervisors having direct supervision over hourly employees.” § 114.1(c)(2)(ii). Commission regulations also indicate that “[t]he Fair Labor Standards Act, 29 U.S.C. 201, *et seq.* and the regulations issued pursuant to that Act, 29 C.F.R. part 541, may serve as a guideline in determining whether individuals have policymaking, managerial, professional, or supervisory responsibilities.” § 114.1(c)(4).

Our practical experience has been that corporations and trade associations frequently find it difficult to determine whether certain employees fall within the Commission's definition of "executive or administrative personnel." In particular, although the regulations state that the Fair Labor Standards Act ("FLSA") and its regulations may serve as a "guideline" for determining whether an employee has policymaking, managerial, professional, or supervisory responsibilities, the regulations also indicate that FLSA is not dispositive in making this determination. § 114.1(c)(4). Moreover, the exception of "salaried foreman and other salaried lower level supervisors having direct supervision over hourly employees" creates additional ambiguity, particularly given that the term "lower level supervisors" is not defined in the regulations. See § 114.1(c)(2)(ii).

II. THE COMMISSION SHOULD FIND THAT ALL FIVE OF THE WAWA MANAGERIAL EMPLOYEES AT ISSUE ARE MEMBERS OF THE RESTRICTED CLASS

The Commission should determine that all five of the Wawa's managers that are the subject of Advisory Opinion 2010-04 constitute "executive or administrative personnel" within the meaning of 11 C.F.R. § 114.1(c) and therefore are members of Wawa's restricted class. At issue in Wawa's advisory opinion request is whether the five managers – all of whom are salaried, exempt employees with policymaking, managerial, professional, or supervisory responsibilities, and some of whom also directly supervise non-exempt, hourly employees – are "executive or administrative personnel" as defined by Commission regulations and therefore are members of Wawa's restricted class.

As discussed above, Commission regulations state that "[e]xecutive or administrative personnel means individuals employed by a corporation or labor organization who are paid on a salary rather than hourly basis and who have policymaking, managerial, professional, or supervisory responsibilities. . . . This definition does not include . . . salaried lower level supervisors having direct supervision over hourly employees." § 114.1(c). The exclusion of salaried employees who directly supervise hourly employees in the definition of "executive or administrative personnel" does not necessarily mean that *all* employees meeting the other criteria for being considered "executive or administrative personnel" must be excluded. Rather, the exclusion includes other requirements to be applicable, such as being a "lower level supervisor," and equates this position to that of a "salaried foreman," or a manager charged with supervising a crew of hourly employees.

Although several of the Wawa managerial employees at issue directly supervise at least one hourly employee, these positions appear to have policymaking, managerial, professional, or supervisory responsibilities. These are not "lower level" positions and the managers are not charged with directly supervising many hourly employees. Instead, the positions appear to be mid-level positions with substantial policymaking, managerial, or professional responsibilities that happen to involve the direct supervision of non-exempt, hourly employees who provide professional services. Unlike a foreman and other lower level supervisors, Wawa's managerial employees do not appear to have the primary responsibility of supervising hourly employees; rather, supervising one or at most a handful of hourly employees who provide professional services is incidental to their roles as managers.

In light of the foregoing, Wawa's managerial employees are the types of employees that the Act's restricted class was intended to include. Accordingly, the Commission should determine that the five employees at issue are "executive or administrative personnel" and therefore are members of Wawa's restricted class.

III. THE COMMISSION SHOULD OPEN A RULEMAKING CLARIFYING THE SCOPE OF "EXECUTIVE OR ADMINISTRATIVE PERSONNEL" AND ADOPTING A FLSA-BASED DEFINITION

Wawa's advisory opinion request exemplifies the practical difficulties that can arise in determining whether particular corporate and trade association employees are members of the restricted class. As was noted above, the Commission's regulations state that FLSA "may serve as a guideline in determining whether individuals have policymaking, managerial, professional, or supervisory responsibilities," yet FLSA is not dispositive on this issue. § 114.1(c)(4). We strongly believe that the Commission's regulations should be revised so that FLSA is determinative of this legal issue. Specifically, the Commission should adopt a definition of "executive or administrative personnel" that bases membership in the restricted class on FLSA's definitions of "exempt" and "non-exempt" employees. See 29 U.S.C. § 213(a).

Adopting a FLSA-based definition of "executive or administrative personnel" would provide corporations and trade associations with greater clarity and would be administratively efficient given that every employer in the United States currently must determine whether each of its employees is "exempt" or "non-exempt" under FLSA; thus, every employer in the country is already familiar and comfortable with making these determinations and applying this legal standard. Rather than maintain its own ambiguous definition of "executive or administrative personnel," the Commission could simply incorporate into its regulations FLSA's definition of "exempt" employees and make clear that all "exempt" employees are members of a corporation or trade association's restricted class.

In light of the foregoing, we plan on shortly submitting a petition for rulemaking urging the Commission to revise Part 114 of its regulations to make FLSA dispositive in determining whether a corporation or trade association's employees are executive or administrative personnel under the Act.

We appreciate the opportunity to comment on this matter.

Respectfully submitted,

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