CENTER *for* COMPETITIVE POLITICS

Congress shall make no law...

February 11, 2013

Via Electronic Submission System

Federal Election Commission
Attn: Robert M. Knop, Assistant General Counsel
999 E Street, NW
Washington, DC 20463

RE: Notice of Proposed Rulemaking 12-80: Limited Liability Partnerships

Dear Mr. Knop:

Founded in 2005, the Center for Competitive Politics ("CCP") is a non-profit organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. CCP's mission, through litigation, public engagement, and scholarly research, is to defend the constitutional rights of speech, assembly, and petition, and to ensure a more free and competitive electoral process. CCP submits this comment to the Federal Election Commission ("Commission") regarding Notice of Proposed Rulemaking 12-80: Limited Liability Partnerships ("LLPs").

As discussed, *infra*, CCP does not see the need for rules specific to LLPs because the Federal Election Campaign Act ("FECA") did not contemplate regulating LLPs as corporations. Furthermore, existing case law limits the governmental interest for such regulation to the prevention of corruption, its appearance, and the circumvention of contribution limits. These goals are already accomplished by the existing statutory and regulatory framework.

But if the Commission chooses to make a rule, then logically it ought to closely track the current regulations concerning Limited Liability Companies ("LLCs"). LLP Separate Segregated Funds ("SSF") should be able to draw from a broad "restricted class," reflecting the applicable standards in place for corporations and other business entities. Similarly, the costs of operating the SSF should be attributed to the LLP, not to individual partners.

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I. The Commission need not make a rule specific to LLPs because FECA does not contemplate regulating LLPs as corporations.

FECA and its subsequent amendments specifically ban direct corporate contributions in candidate elections.[1] But it carves out exceptions for communications with a corporation's "stockholders and executive or administrative personnel and their families" on "any subject."[2] This group of people is carefully defined in the statute.[3] Furthermore, a corporation's SSF may generally solicit only from the "restricted class,"[4] with the exception of twice yearly written solicitations to the rest of the corporation's employees.[5]

In contrast, FECA does not lay out any such rule for partnerships. Partnerships existed when FECA was enacted and are included in the statutory regime.[6] The statute establishes contribution limits for partnerships.[7] While LLPs were created in the 1990s after the initial enactment of FECA, they are still generally regulated in the states under the Uniform Partnership Act[8] as a subset of partnership law generally. Therefore, in FECA Congress *did* "directly address the precise question" of partnership political activity.[9] Since FECA already addresses partnerships, this Commission need not make a rule to regulate LLPs in a way not contemplated by the Commission's governing statute.

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1 *See, e.g.*, 2 U.S.C. § 441b(a).
2 2 U.S.C.§ 441b(b)(2)(A).
3 2 U.S.C. § 441b(b)(7).
4 2 U.S.C. § 441b(b)(4)(A)(i).
5 2 U.S.C. § 441b(b)(4)(B).
6 2 U.S.C. § 431(11) (2012). ("The term 'person' includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government.")
7 2 U.S.C. § 441(a) (2012).
8 *See*, National Conference of Commissioners on Uniform State Laws, Summary: Uniform Partnership Act (1997) *available at* http://uniformlaws.org/ActSummary.aspx?title=Partnership %20Act. Thirty-seven states, the U.S. Virgin Islands, and the District of Columbia have adopted the Uniform Partnership Act of 1997. The full list of jurisdictions includes: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, U.S. Virgin Islands, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. *Id.* at: http://www.uniformlaws.org/LegislativeFactSheet.aspx?title= Partnership%20Act.
9 *Chevron U.S.A. v. National Resources Defense Council*, 467 U.S. 837, 842 (1984).

II. The Commission need not make a rule specific to LLPs because the existing regulatory framework adequately addresses the constitutionally permissible rationales for regulating campaign activity.

In its LLC rulemaking, the Commission made its decision based on the ability of LLCs to accumulate wealth — the "anti-distortion" rationale. However, the anti-distortion rationale (together with the "dissenting-shareholder" rationale) was repudiated in *Citizens United*.[10] Consequently, the Commission's regulations can only be justified by the governmental interests in preventing corruption or the appearance thereof, or to stop circumvention of the campaign finance laws. Corporate LLPs do not pose a threat to either of these interests sufficient to justify a contribution ban.

A. Anti-Corruption

The anti-corruption rationale was addressed by FECA, which contemplated the existence of partnerships,[11] and therefore subjected them to contribution limits.[12] These contribution limits reflect the judgment of Congress: contributions at or below their level are not corrupting.

The proposed rule allows LLPs to be treated as partnerships if they receive partnership tax treatment. Put more directly, the *only* distinction between so-called "corporate LLPs" and other LLPs is their tax treatment. The Commission's proposed rule thus implies that the solitary, additional benefit conferred by corporate tax status necessarily makes a "corporate LLP" more dangerous, from a corruption standpoint, than a "normal LLP." But the activities of major LLPs indicate that the Commission's assumption is inaccurate.

In its Notice of Proposed Rulemaking, the Commission focuses on large law firms. A cursory look at other major partnerships shows that sometimes partnership tax status is preferable from an economic standpoint, and sometimes not. Blackstone Group L.P., one of the largest partnerships in the world, maintains partnership tax status.[13] Indeed, Blackstone notes in its annual 10-K filing with the SEC that

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[10] *Citizens United v. FEC*, 130 S.Ct. 876, 913 (2010). We do not question the constitutionality of the Commission's LLC rules, which are presumably still valid as anti-corruption and anti-circumvention measures.

[11] 2 U.S.C. § 431(11).

[12] 2 U.S.C. § 441(a) (2012).

[13] The Blackstone Group L.P., Annual Report (Form 10-K) 56 (Feb. 28, 2012). According to its 10-K filings, Blackstone is "one of the largest independent managers of private capital in the world, with assets under management of $166.2 billion as of December 31, 2011." *Id.* at 4.

> *If [Blackstone] were treated as a corporation for U.S. federal income tax or state tax purposes, then our distributions to our common unitholders would be substantially reduced and the value of our common units would be adversely affected.*[14]

Under current tax rates, and with the particular structure of Blackstone, partnership treatment is a superior financial choice. Just as significant is what this statement does *not* say about Blackstone. It does not say that Blackstone is structured more like a corporation than a partnership, and it does not say that corporate tax treatment is a superior method of accumulating wealth.

A rule that treats a small partnership as "corporate," and a multi-billion-dollar entity as a "partnership" – while requiring an SSF for the former and allowing direct contributions by the latter – helps illustrate why the Proposed Rule is both arbitrary and poorly keyed to anti-corruption concerns.

B. Anti-Circumvention

The protection against circumvention is largely based on attribution schemes. The Commission previously rejected a partnership-like attribution regime for LLCs because LLCs do not maintain individual drawing accounts like partnerships and therefore compliance would be exceedingly difficult.[15] However, this concern is not present with LLPs. The majority of states require that LLP partners have detailed individual accounts.[16] Consequently, the compliance concerns which animated the LLC rule do not apply to LLPs. Indeed, because most (if not all) LLPs must maintain individual accounts, the additional compliance costs imposed by the Commission's attribution regime are likely minimal.

FECA established an absolute prohibition on corporate contributions.[17] A major justification for this prohibition is the concern that individuals may establish "sham" corporations for the purpose of circumventing the individual contribution limit. Regardless of the merits of this prohibition, the same circumvention concerns are not present in the LLP context. An individual could not establish a "sham" LLP to conceal his identity, because such an activity would be in clear violation of state reporting requirements.[18] Thus, an LLP partner would have to circumvent multiple

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[14] *Id.* at 56 (italics in original).

[15] 64 Fed. Reg. 37397 (July 12, 1999).

[16] *See, e.g.,* 6 Del. Stat. Ann. 15-401(a) (listing partnership account details) and 6 Del. Stat. Ann. 15-1001(f) (requiring LLPs to satisfy the requirements of general partnerships). The Uniform Partnership Act § 401(a) establishes basic account requirements for the 39 jurisdictions that have adopted it.

[17] 2 U.S.C. § 441b(a).

[18] Even if the individual did somehow bypass clear state law requirements, he would have to pass the second hurdle posed by the Commission's own attribution regime as promulgated at 11 C.F.R. § 110.1(e).

levels of law enforcement and risk severe, even criminal, penalties[19] to exceed the $2,500 individual contribution limit.

III. If the Commission must make a rule, then the LLC rule should serve as an example, as LLPs are substantively similar.

In 1999, the Commission undertook a similar rulemaking regarding limited liability corporations ("LLCs").[20] The Commission noted that LLCs have attributes of both corporations and partnerships.[21] It first considered an attribution regime similar to that used for partnerships, but instead opted to treat LLCs as corporations if they "check[ed] the box" for corporate tax treatment.[22] Significantly, the Commission noted that this was a "narrow exception" to the practice of looking to state law for determination of corporate status.[23]

The Commission's reasoning was essentially that LLCs are much closer to corporations than to partnerships, and that electing corporate tax status tells the IRS as much.[24] LLCs do not have individual drawing accounts like partnerships, and so proper attribution would be difficult.[25] Nor could the Commission treat LLCs like individuals, as a single person could belong to multiple LLCs and circumvent the limit, or alternatively, the presence of a disqualified LLC member (such as a foreign national) could disqualify the entire organization.[26]

LLCs and LLPs are in functionally similar situations when they elect to take corporate tax treatment under 26 C.F.R. § 301.7701-3. Indeed, the Internal Revenue Service ("IRS") uses the *same form*[27] by which an association may elect to be taxed as a corporate entity. This reflects the hybrid nature of both LLCs and LLPs, as both possess qualities of partnerships and corporations. Therefore, if the Commission elects to adopt a rule specific to LLPs electing corporate tax treatment, then it should follow the IRS's lead and treat such LLPs identically to LLCs electing corporate tax treatment.

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[19] *See, e.g., United States v. Leach*, 632 F.2d 1337, 1339 (5th Cir. 1980) (various campaign finance violations by law firm partners); *United States v. Danielczyk*, 683 F.3d 611 (4th Cir. 2012) (a criminal prosecution in the corporation context).
[20] 64 Fed. Reg. 37397.
[21] *Id.*
[22] *Id.* at 37398.
[23] *Id. See also, Id.* at 37399 ("The only reference in the legislative history directs the Commission to look to State law to determine the status of professional corporations, but is silent as to all other types of corporations") (internal citations omitted).
[24] *Id.* at 37399.
[25] *Id.* at 37398 (internal citations omitted).
[26] *Id.* at 37398-99.
[27] IRS Form 8832. *See also,* 26 C.F.R. § 301.7701-3 (describing the corporate tax treatment process for both LLCs and partnerships).

IV. The "restricted class" of an LLP's potential solicitees should be as broad as possible, given the typical organization of LLP-organized entities.

If the Commission chooses to regulate the LLPs which elect corporate tax treatment as "corporations," then the "restricted class" should be broad. The "restricted class" is the group of persons to whom communication about electoral matters is not counted as a contribution or expenditure in FECA.[28] Corporations are permitted to solicit contributions from the "restricted class" more often than their employees generally.[29] The "restricted class" are the corporation's "stockholders and executive or administrative personnel and their families."[30] Every partnership will be different, and this Commission may be required to engage in fact-intensive inquiry for multiple LLPs as each employee's job title may yield different results. What follows below are general guidelines for the Commission when answering the advisory opinion requests from LLPs. They also illustrate the practical difficulties occasioned by the Proposed Rule.

A. Partners are like stockholders.

LLPs are not corporations and so a careful examination of the LLP structure is key to regulating a hypothetical LLP "restricted class." In the corporate context, the stockholders have a role in controlling the entity.[31] In a similar manner, the partners, no matter how senior or junior, own units of the partnership.[32] Furthermore, the partners often have voting rights or other forms of control over the business operations of the entity, and may therefore be executive personnel under FECA and the Commission's regulations.[33] Consequently, the "restricted class" should include the partners of the partnership at all levels of financial investment or seniority.

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[28] 2 U.S.C. § 441b(b)(2)(A); *see also,* 11 C.F.R. § 114.3(a) *and* AO 1978-52 (Sep. 5, 1978).

[29] *Compare* 11 C.F.R. § 114.5(g)(1) ("restricted class" solicitations) *with* 11 C.F.R. § 114.6(a) (solicitations limited to twice yearly for employees not in "restricted class").

[30] 2 U.S.C. § 441b(b)(2)(A); 11 C.F.R. § 114.1(j).

[31] *See, e.g., Sobchack v. American Nat'l Bank & Trust Co. (In re Ionosphere Clubs)*, 17 F.3d 600, 604 (2d Cir. 1994) (examining, among other things, the powers of voting and majority control).

[32] *Compare* Uniform Partnership Act §101(5) (1997) ("'Limited liability partnership' means a partnership that has filed a statement of qualification....") *with id* at § 101(6) ("'Partnership' means an association of two or more persons to carry on *as co-owners* of a business for profit...") (emphasis added) *available at* http://www.uniformlaws.org/shared/docs/partnership/upa_final_97.pdf. Indeed, the Commission's Notice of Proposed Rulemaking acknowledges that any partners with a financial investment in the association are part of the "restricted class." *See* Limited Liability Partnerships — Notice of Proposed Rulemaking, Fed. Election Com'n. Agenda Doc. 12-80, 8 (Nov. 29, 2012).

[33] *See* 2 U.S.C. § 441b(b)(7); 11 C.F.R. § 114.1(c).

B. "Executive or administrative personnel"

FECA and this Commission's regulations define "executive or administrative personnel" as salaried employees who have "policymaking, managerial, professional, or supervisory responsibilities."[34] This definition includes officers and other executives; plant, division, and section managers; and professionals, such as lawyers, accountants, and engineers.[35] The definition *excludes* "[p]rofessionals who are represented by a labor organization," as well as "[s]alaried foremen and salaried lower level supervisors having direct supervision over hourly employees."[36] To help understand these terms, the Commission and corporations may look to the Fair Labor Standards Act ("FLSA") and supporting regulations.[37]

Under the regulations promulgated pursuant to FLSA, "administrative employees" are salaried, non-manual-labor employees whose primary duties are "directly related to the management or general business operations of the employer."[38] The term "directly related to the management or general business operations of the employer" means that the employee performs work directly related to assisting with the running or servicing of the business, as distinguished from such tasks as working on a manufacturing line or retail service.[39]

The employee must "exercise discretion and independent judgment" on "matters of significance."[40] This includes the comparison and evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered.[41] But their decisions need not be absolute and therefore may be subject to later review.[42] "Matters of significance" refers to the level of importance or consequence of the work performed.[43] But merely operating expensive equipment or handling large sums of money do not qualify as "matters of significance."[44]

With these standards, the Commission should take a broad understanding of the "restricted class" applicable to LLPs. While the Notice of Proposed Rulemaking

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[34] *Id.*
[35] 11 C.F.R. §114.1(c)(1).
[36] 11 C.F.R. § 114.1(c)(2).
[37] 11 C.F.R. § 114.1(c)(4) (citing 29 U.S.C. § 201, *et seq.* and 29 C.F.R. § 541 *et seq.*); AO 2011-25 (Jan. 19, 2012) (Atlas Air) 4 (applying 11 C.F.R. § 114.1(c)(4) in the context of airline pilots).
[38] 29 C.F.R. § 541.200(a)(2).
[39] 29 C.F.R. § 541.201(a).
[40] 29 C.F.R. § 541.200(a)(3).
[41] 29 C.F.R. § 541.202(a).
[42] 29 C.F.R. § 541.202(c).
[43] 29 C.F.R. § 541.202(a).
[44] 29 C.F.R. § 541.202(f).

used the staff of a law firm as an example, it is important to note that LLPs can take a variety of service or manufacturing purposes and functions.

1. Partners

As discussed in part III (A), *supra*, partners in an LLP are similar to stockholders in a corporation.[45] Yet partners also have executive control of the business entity either directly, via votes as a council of partners, or by electing an executive committee. In this way, they have a policymaking and supervisory role in the business entity.[46] That is, their function is often similar to officers or executives, satisfying 11 C.F.R. §114.1(c)(1) who have duties that are "directly related to the management or general business operations of the employer."[47] Since partners have such a strong say in the general management of the association, their decisions will generally concern "matters of significance."[48] Partners should always be considered members of the "restricted class" under any future rule.

2. Professionals

Professionals are specifically named in FECA and this Commission's regulations for the "restricted class."[49] This Commission's regulations specifically define "professionals" to include those in recognized professions such as lawyers and engineers.[50] Looking beyond FECA, the FLSA's regulatory definition of "professional" includes anyone whose work requires that the employee must undergo prolonged study or scientific training.[51] Teachers are specifically included as "professionals."[52] Of course, doctors and lawyers are also professionals in the FLSA context.[53] "Professionals" may also be those whose work requires "invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor."[54] This definition is broad and covers artists, musicians, novelists, writers, and actors.[55] Therefore, a "professional" is someone with significant training, scientific expertise, or creativity as part of their employment.

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[45] *See* 2 U.S.C. § 441b(b)(7); 11 C.F.R. § 114.1(c).
[46] 2 U.S.C. § 441b(b)(7); 11 C.F.R. § 114.1(c).
[47] 29 C.F.R. § 541.200(a)(2).
[48] 29 C.F.R. § 541.200(a)(3).
[49] 2 U.S.C. § 441b(b)(7); 11 C.F.R. § 114.1(c)(1)(ii).
[50] 11 C.F.R. § 114.1(c)(1)(ii). Presumably, medical doctors are also included in the "recognized professions."
[51] 29 C.F.R. § 541.300(a)(2)(i).
[52] *See* 29 C.F.R. § 541.303.
[53] 29 C.F.R. § 541.304. The definition includes residents and interns, if they have completed their degree prior to the residency or internship. 29 C.F.R. § 541.304(c).
[54] 29 C.F.R. § 541.300(a)(2)(ii).
[55] 29 C.F.R. § 541.302(c) and (d).

It is important to note that the FLSA's regulations define "professional" quite broadly, to include accountants, nurses, medical assistants, chefs, athletic trainers, and funeral directors.[56] Indeed, the regulation clearly states:

> The areas in which the professional exemption may be available are expanding. As knowledge is developed, academic training is broadened and specialized degrees are offered in new and diverse fields, thus creating new specialists in particular fields of science or learning.[57]

Therefore the trend is clearly on the side of recognizing more professions under FLSA and, consequently, FECA.

In the Notice of Proposed Rulemaking, the Commission specifically asked about paralegals.[58] Under FLSA's regulations, paralegals are generally not "professionals" unless they possess another degree or professional certification that they use in the performance of their employment.[59] While the paralegal situation is specifically addressed and found to not be a "professional" category of work,[60] the overall regulatory trend under FLSA is toward liberally considering many areas of work as "professional."[61] Consequently, CCP suggests that paralegals be included as members of the "restricted class."

3. Managers

FECA and this Commission's regulations define "executive or administrative personnel" as salaried employees who have "policymaking, *managerial*, ... or *supervisory* responsibilities."[62] But "[s]alaried foremen and salaried lower level supervisors having direct supervision over hourly employees" are not included in the "restricted class."[63] Therefore, for managers, the question becomes whether the employee "exercise[s] discretion and independent judgment" on "matters of significance"[64] that is greater than low-level supervision of line employees. This question includes the evaluation of possible courses of conduct and implementing or making a decision after the various possibilities have been considered.[65]

This Commission's own advisory opinions define the role of "manager" quite broadly as distinct from a line foreman. In two separate advisory opinions to the gas

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[56] *See* 29 C.F.R. § 541.301.
[57] 29 C.F.R. § 541.301(f).
[58] Limited Liability Partnerships — Notice of Proposed Rulemaking, 8.
[59] 29 C.F.R. § 541.301(e)(7).
[60] *Id.*
[61] 29 C.F.R. § 541.301(f).
[62] 2 U.S.C. § 441b(b)(7); 11 C.F.R. § 114.1(c) (emphasis added).
[63] 11 C.F.R. § 114.1(c)(2).
[64] 29 C.F.R. § 541.200(a)(3).
[65] 29 C.F.R. § 541.202(a).

station and sandwich restaurant Wawa, Inc., this Commission has taken a liberal view of the meaning of "executive or administrative personnel" as salaried employees who have managerial or supervisory responsibilities.

In AO 2010-04, Wawa asked about specific managerial positions that were not directly related to managing a store or geographic area of stores. The employee positions were Loss Prevention Manager, Payroll Manager, Retail Accounting Manager, and Retail Accounting Assistant Manager – Sales Audit, and Inventory Manager.[66] These employees were based at the corporate headquarters.[67] While Loss Prevention and Inventory Accounting Managers only supervised other salaried employees, the other managers oversaw hourly employees.[68] Yet the Commission found that all five manager positions were eligible for Wawa's "restricted class."[69] The fact that two of the managers *only* supervised hourly employees was not dispositive of defining them as "foremen" under 11 C.F.R. § 114.1(c)(2)(ii).[70] Instead, the Commission looked to whether the managers "exercise[d] discretion and independent judgment on matters of significance."[71]

In AO 2012-02, Wawa sought guidance on whether their area managers and general managers were "executive or administrative" personnel qualifying as members of Wawa's "restricted class."[72] In contrast to the 2010 advisory opinion request, these managers worked regionally or in individual stores.[73] Even though the Area Managers lacked final authority on some major decisions,[74] this Commission found that the Area Managers created, interpreted, and implemented policy and operating practices for Wawa under 26 C.F.R. § 541.202 and therefore qualified for the "restricted class."[75]

Similarly the General Managers supervised hourly employees for 90-95% of their time, with the exception of a store's Assistant General Manager.[76] The General Managers "supervis[ed] day-to-day work" of employees and set daily work schedules and assignments.[77] The General Manager also performed "manual tasks in the stores as needed."[78] The General Managers did not determine merchandise

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[66] AO 2010-04 (Apr. 30, 2012) (Wawa) 2.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 3.
[70] *Id.* at 5.
[71] *Id.* (citing 29 C.F.R. § 541.202).
[72] AO 2012-02 (Feb. 16, 2012) (Wawa) 1.
[73] *Id.*
[74] *See, e.g., id.* at 4 n. 3.
[75] *Id.* at 5.
[76] *Id.* at 2-3.
[77] *Id.* at 3.
[78] *Id.*

selection.[79] Nevertheless, this Commission reasoned that the General Managers had independent judgment and discretion in matters affecting the stores, in particular reviewing inventory shipments, management of safety programs, analysis of store profit and loss, and hiring and firing of employees.[80]

Therefore, while the advisory opinions were limited to the facts presented by Wawa in its requests,[81] the Commission's practice is to look at the whole job description of a particular employee rather than any single factor or talismanic test. The key in both advisory opinions was that the employees had some level of independent judgment over business operations.[82]

4. Other Administrative Support Staff

Whether non-manager administrative support staff qualify for the "restricted class" will vary based upon the facts of each organization and the individual employee roles and responsibilities therein. This will likely require the Commission to handle a large number of Advisory Opinion Requests – and, naturally, require a number of organizations to spend the resources required to obtain such opinions. However, reading this Commission's advisory opinions on the whole, the tendency is to grant "restricted class" status to as many employees as possible.

V. Using the LLC model, the costs of administering an LLP-owned SSF should be attributed to the LLP, and not the partners individually.

When the Commission adopted the rule for LLCs, it simply placed LLCs that sought corporate tax treatment via 26 C.F.R. § 301.7701-3 under the Commission's rules governing corporations under 11 C.F.R. § 114.[83] Effectively, the Commission defined LLCs which checked-the-box on IRS Form 8832 to be "corporations" under FECA.[84] The regulations of corporations include the creation and administrative rules for SSFs.[85]

Under 11 C.F.R. § 114.1(a)(2)(iii), the money and support for the "establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation" are *not* contributions or expenditures.[86] This is the same definition found in 2 U.S.C. §

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[79] *Id.*
[80] *Id.* at 5-6.
[81] AO 2010-04 at 5; AO 2012-02 at 6.
[82] *See* AO 2010-04 at 5; *see also* AO 2012-02 at 5.
[83] 11 C.F.R. § 110.1 (g)(3).
[84] 64 Fed. Reg. at 37399.
[85] *See, e.g.*, 11 C.F.R. § 114.5.
[86] 11 C.F.R. § 114.1(a)(2)(iii).

441b(b)(2)(C). Therefore, a corporation may cover the costs of the creation and administration of the SSF.[87] Since the Commission's rule simply defines an LLC that seeks corporate tax treatment under 26 C.F.R. § 301.7701-3 as a "corporation" and applies the corporation rules therein, an LLC is permitted to create and maintain an SSF.[88]

While "corporation" is not defined in FECA,[89] the Commission looked to state law to define corporations and corporate-like entities when addressing LLCs.[90] In the case of LLCs, the Commission adapted the voluntary election of the LLC to the IRS as a declaration of the LLC's underlying structure, and therefore applied the corporation rules in such cases.[91] That is, the treatment of the LLC under FECA is largely voluntary. If the LLC does nothing, or chooses to be treated as a partnership, then the LLC is covered by the Commission's partnership rules.[92]

Likewise, "partnership" is not defined in FECA.[93] Again, state law largely governs the characteristics and operations of LLPs. If the Commission chooses to now regulate specifically LLPs electing corporate treatment under 26 C.F.R. § 301.7701-3, a similar logic should apply in formulating the new rule.

Rather than declare a rule covering all LLPs, the Commission should recognize an LLP's power of choice. The default should be to treat an LLP as a partnership. But, if it elects corporate tax treatment, then it should simply be subject to the rules and privileges of corporations under FECA and the Commission's regulations. This should include the ability to create and administer an SSF.

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Thank you for considering these comments regarding Notice of Proposed Rulemaking 12-80, Limited Liability Partnerships. Should the Commission choose to hold a hearing on this matter, CCP would appreciate the opportunity to appear through a representative. Similarly, should the Commission have any questions, comments, or concerns, please do not hesitate to contact us.

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[87] 11 C.F.R. § 114.5(b).
[88] *See*, 11 C.F.R. § 110.1(g).
[89] 64 Fed. Reg. at 37399.
[90] *Id.*
[91] *Id.*
[92] 11 C.F.R. § 110.1(g)(2).
[93] *See* 2 U.S.C. § 431.

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