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July 21, 1994

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael Marinelli *mm*
Staff Attorney

SUBJECT: Draft AO 1994-18

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for July 28, 1994.

Attachment

AGENDA ITEM
For Meeting of: JUL 28 1994

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DRAFT

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1994-18

Edward J. Sack, Staff Vice President
International Council of Shopping Centers
665 Fifth Avenue,
New York, N.Y. 10022-5370

Dear Mr. Sack:

This refers to your letters of July 15, May 31 and May 23, 1994, requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the membership structure of the International Council of Shopping Centers ("the ICSC").

You state that the ICSC is a membership corporation organized under the Not-For-Profit Corporation Law of Illinois. You also state that ICSC is the trade association for the shopping center industry whose members include developers, owners, retailers, lenders, attorneys, accountants, architects and all others having a professional interest in the shopping center industry.^{1/} The International Council of Shopping Centers, Inc. Political Action Committee ("the PAC"), is the separate segregated fund established by the ICSC. The specific focus of your request is the application to the ICSC of Commission regulations defining

^{1/} The ICSC Bylaws state that, among its purposes, is to "advance the development of the shopping center industry and to establish the individual shopping center as a major institution in the community..." ICSC Bylaws, Article I.

3 "members" for purposes of the Act.^{2/}

4 You provide various ICSC documents with your request
5 including its articles of incorporation, its bylaws, a
6 membership brochure and membership solicitation materials.
7 These materials provide information, which is analyzed below,
8 regarding the membership structure of the ICSC.

9 THE ICSC MEMBERSHIP STRUCTURE

10 Classes of Membership

11 As outlined by its bylaws, the ICSC's various classes of
12 membership are: regular, associate, public/academic, and
13 affiliate. The ICSC also has honorary, retired and student
14 members.^{3/}

15 Regular membership is limited to business firms,
16 whatever their organizational form, "engaged in the
17 development, ownership or management of one or more shopping
18 centers, or engaged in the business as a merchant located in
19 a shopping center." ICSC Bylaws, Article III, section 1.
20 Lending institutions which have provided equity or financing
21 of shopping centers from their own funds may also qualify to
22 become regular members.

23 Associate membership is open to "any corporation,

24
25 ^{2/} The relevant regulations are found at 11 CFR 100.8(b)(4)
and 114.1(e).

26 ^{3/} According to the information you have provided in your
27 request, the ICSC has a total of 22,343 members in the United
28 States. Of these, 19% are regular members, 7% are associate
members, 1% are public/academic members and 73% are affiliate
members. The numbers of honorary, retired and student
members are not given.

3 partnership, association or individual in a trade, profession
4 or industry presently or formerly allied to the shopping
5 center field, including any merchant's association located in
6 a shopping center." ICSC Bylaws, Article III, section 2.
7 Public/academic membership is open to "any governmental
8 entity and any appointed or elected public official at the
9 city, state or national level." Id., section 3. This
10 membership class is also open to "any educator or
11 administrator with a recognized college, university or
12 educational institution." Any such institution is also
13 eligible for public/academic membership. Id. Each regular,
14 public/academic and associate member must designate one
15 person to act as its "official member" in the organization.
16 ICSC Bylaws, Article III. It is this individual who
17 represents the member in the organization and exercises that
18 member's rights of participation.

19 Affiliate membership is open to officers, partners or
20 executives employed by regular, associate and public/academic
21 members. The officers of a merchant's association located in
22 a shopping center of a regular member are also eligible to
23 become affiliate members.

24 Individuals are chosen by the ICSC's Board of Trustees
25 ("the Board") to become honorary members as a reward for
26 distinguished service to organization. Retired members are
27 individuals who have been ICSC members for at least five
28 years and have retired from their business activities.
Finally, student membership is open to any student at a

3 recognized educational institution.

4 Obligations and Benefits of Members

5 According to the information provided in your request,
6 regular, associate, public/academic members and affiliate
7 members are all required to pay dues. The dues structure
8 ranges from \$500 for regular members to \$50 for affiliate
9 members who are associated with public/academic institutions.

10 Certain benefits and rights of membership pertain to
11 all classes of membership. All members may attend meetings,
12 ICSC education courses and conventions, and may receive other
13 services at charges set by the Board; they may also serve on
14 certain committees. ICSC Bylaws, Article III, section 8 and
15 Article VII, section 1. All members have the right to
16 examine the financial records and books of the ICSC. ICSC
17 Bylaws, Article XI. Finally, if the ICSC dissolves, all
18 remaining ICSC assets (after the payment of all indebtedness)
19 would be divided among the current members in proportion to
20 the amount of dues paid by each member, respectively, during
21 the five calendar years preceding the dissolution. ICSC
22 Bylaws, Article XIV.

23 However, certain rights of governance are reserved to
24 regular members; chief among these is the power to vote.
25 Only the regular members, through their designated
26 representatives, the "official members," may vote for
27 candidates to the Board; may nominate trustees by petition;
28 may be appointed to several select committees, including the
nominating committee; and may vote to change the method of

3 amending the bylaws. ICSC Bylaws, Article III, section 8;
4 Article V, section 6; and Article XVIII. Further, only the
5 official representative of a regular member may serve as a
6 trustee, with the exception that two official representatives
7 of associate members may also be elected.^{4/} Most officers, in
8 turn, are selected by the Board and must be trustees.^{5/}

9
10 ^{4/} The ICSC Bylaws delineate two institutions which play
11 roles in the governance of the ICSC-- the Board of Trustees
12 and the Executive Committee. For purposes of the analysis
13 below, the Commission concludes that the Board, rather than
14 the Executive Committee, is the highest governing body of the
15 ICSC. In the past, the Commission has based such
16 determinations on which governing institution of a membership
17 organization holds pre-eminent power. See Advisory Opinions
18 1993-24 and 1994-12.

19
20 The Commission notes that under the ICSC Bylaws, the
21 Executive Committee, while responsible for the day-to-day
22 running of the organization, has important limitations to its
23 power. For example, under Article VII, section 3, the
24 Executive Committee may act on behalf of the Board "with
25 respect to the ordinary business of the council..." but may
26 not "adopt a plan for the distribution of the assets of the
27 Council, or for dissolution;" may not "adopt, amend, or
28 repeal the bylaws or the articles of incorporation;" and may
not "amend, alter, repeal or take action inconsistent with
any resolution or action of the [Board] when the resolution
or action of the [Board] provides by its terms that it shall
not be amended, altered, or repealed by action of a
committee." All these powers are instead reserved to the
Board itself.

29
30 ^{5/} The ICSC Board consists of at least 46 members. Forty
31 trustees are chosen from the "official members" representing
32 regular members, although two of the forty may be elected
33 from the official members of associate members. Six other
34 trustees represent past ICSC presidents who are part of the
35 Board if they are still "official members." The president of
36 the ICSC, following his election, automatically becomes a
37 member of the Board and becomes its 47th member if he does
38 not already occupy a Board seat as a trustee.

39
40 The Board chooses all of the officers of the ICSC,
41 including the ICSC president. All officers must be trustees
42 with certain exceptions. The president, if not a trustee,
43 must have served as trustee within the past 24 months prior

3 THE ACT AND COMMISSION REGULATIONS

4 The Act prohibits corporations from making any
5 contribution or expenditure in connection with a Federal
6 election. 2 U.S.C. §441b(a). The Act states, however, that
7 the term "contribution or expenditure" does not include "the
8 establishment, administration, and solicitation of
9 contributions to a separate segregated fund to be utilized
10 for political purposes by a corporation, labor organization,
11 membership organization, cooperative, or corporation without
12 capital stock." 2 U.S.C. §441b(b)(2)(C). See also 2 U.S.C.
13 §431(8)(B)(vi) and (9)(B)(v).

14 The general prohibition of 2 U.S.C. §441b(a), however,
15 has the additional exception that allows an incorporated
16 membership organization to communicate with its members on
17 "any subject" including partisan electioneering messages.
18 2 U.S.C. §441b(b)(2)(A). See also 2 U.S.C. §431(9)(B)(iii).
19 Commission regulations expressly permit incorporated
20 membership organizations to make partisan communications to
21 their individual members. See 11 CFR 114.3(a)(2), 114.3(c),
22 and 114.7(h).

23 Under 2 U.S.C. §441b(b)(4)(A), a corporation, or a
24 separate segregated fund established by a corporation, may
25 only solicit contributions to such a fund from its
26 stockholders and their families, and from its executive or

27 (Footnote 5 continued from previous page)
28 to his or her election. Current trustees cannot serve as
executive vice president. Assistant secretaries and
treasurers need not be trustees.

administrative personnel and their families. An exception set forth in 2 U.S.C. §441b(b)(4)(C) allows a corporation without capital stock or a separate segregated fund established by a corporation without capital stock, including a trade association, to solicit contributions to the fund from members of the nonstock corporation. A "Membership Association," a term which includes trade associations and other corporations without stock, is defined by Commission regulations as a membership organization that (i) expressly provides for "members" in its articles and bylaws; (ii) expressly solicits members; and (iii) expressly acknowledges the acceptance of membership, such as by sending a membership card or inclusion on a membership newsletter list. 11 CFR 100.8(b)(4)(iv), 114.1(e)(1).

Commission regulations provide guidance as to the definition of the term "members." Under 11 CFR 100.8(b)(4)(vi)(B) and 114.1(e)(2), "members" means all persons who are currently satisfying the requirements for membership in a membership association, who affirmatively accept the membership association's invitation to become a member, and who meet one of the following requirements:

(i) Have some significant financial attachment to the membership association, such as a significant investment or ownership stake (but not merely the payment of dues);

(ii) Are required to pay on a regular basis a specific amount of dues that is predetermined by the association and are entitled to vote directly either for at least one member

who has full participatory and voting rights on the highest governing body of the membership association, or for those who select at least one member of those on the highest governing body of the membership association; or

(iii) Are entitled to vote directly for all of those on the highest governing body of the membership association.

The regulations also provide that the Commission "may determine, on a case by case basis, that persons seeking to be considered members of a membership association for purposes of this section have significant organizational and financial attachment to the association under circumstances that do not precisely meet the requirements of the general rule." See 11 CFR 100.8(b)(4)(vi)(B) and 114.1(e)(3).

APPLICATION OF MEMBERSHIP REGULATIONS TO THE ICSC

The ICSC as a Membership Association.

The facts and background to this request indicate that the ICSC is a membership association for purposes of the Act. For example, Article III of the ICSC Bylaws meets the requirements of 11 CFR 100.8(b)(4)(iv)(A) and 114.1(e)(1) by expressly providing for membership. The ICSC also sends a membership card to members. Therefore, the requirement that membership be expressly recognized is also met. See 11 CFR 11 CFR 100.8(b)(4)(iv)(A) and 114.1(e)(1)(iii). The facts of the request and materials, such as the membership brochure, suggest that the ICSC expressly solicits members. See 11 CFR 100.8(b)(4)(iv) and 114.1(e)(2).

3 Status of ICSC Members

4 Under the membership regulations, regular members of the
5 ICSC would be considered "members" of the ICSC for purposes
6 of the Act. Because of their obligation to pay dues and
7 their voting rights in the governance of the ICSC, these
8 individuals and organizations meet the membership
9 requirements of section 100.8(b)(4)(iv)(B) and
10 114.1(e)(2)(ii).

11 A different situation exists for the remaining classes
12 of members: associate, public/academic and affiliate. While
13 individuals and organizations holding these classes of
14 membership pay dues and have certain participatory rights,
15 they do not have the right to vote for any trustee or any
16 person who can vote for a trustee. Therefore, they do not
17 meet the requirements of sections 114.1(e)(2)(ii) and (iii)
18 or 100.8(b)(4)(iv)(B)(2) and (3).^{6/}

19 The Commission also concludes that these classes of
20 members do not meet the requirements of section
21 114.1(e)(2)(i) and 100.8(b)(4)(iv)(B)(1). In Advisory
22 Opinion 1993-24, as an example of a "significant financial
23 attachment" or a "significant investment or ownership stake"

24
25 ^{6/} It is clear that the nonvoting members of the ICSC
26 possess certain rights of participation in policy matters,
27 but this, in and of itself, is not sufficient to meet the
28 requirements of section 114.1(e)(2)(ii) and (iii). The
Explanation and Justification for these provisions of the
regulations notes: "The Commission stresses that so-called
'governance' voting is required, as opposed to voting for the
association's policies or positions." 58 Fed. Reg. 45771
(August 30, 1993).

3 in the membership organization beyond the payment of dues,
4 the Commission cited the amounts (tens of thousands of
5 dollars) necessary to acquire nonvoting membership seats in
6 stock and commodity exchanges. See Advisory Opinion 1993-24,
7 see also 58 Fed. Reg. 45771 (August 30, 1993). The factual
8 material submitted in this opinion request indicates that
9 associate, public/academic, and affiliate members do not have
10 this type of connection to the ICSC.^{7/}

11 Lastly, the Commission addresses the application of the
12 regulation's definition of "members" under the case by case
13 approach of section 114.1(e)(3) and 100.8(b)(4)(iv)(C). In
14 Advisory Opinion 1993-24, the Commission concluded that
15 114.1(e)(3) requires the presence of some level of voting
16 rights. Since, again, the remaining membership classes have
17 no voting rights, those belonging to these classes cannot be

18
19 ^{7/} Your request suggests that the right of ICSC members to
20 receive ICSC assets in case of the organization's dissolution
21 should be viewed as giving all ICSC members a "significant
22 financial attachment" or a "significant investment or
23 ownership stake" in the organization. The Commission notes
24 that the right to assets in the event of an organization's
25 dissolution is, at best, a speculative or contingent right
26 which, standing alone, is not substantial enough to create a
27 significant attachment, ownership or investment stake in the
28 organization.

29 In this particular case, the amount of funds available
30 to each member on dissolution of the ICSC would, in any case,
31 be small. Your July 15, 1994, letter indicates that, once
32 all ICSC obligations were paid, the average amount available
33 for distribution would be \$688 per member. In practice,
34 since actual payments are based on the amount of dues paid as
35 well as the length of time of membership, and since the
36 nonvoting ICSC "members" tend to pay the least in dues, the
37 actual amounts they could receive might be less than the
38 average.

3 considered members under section 114.1(e)(3) or
4 100.8(b)(4)(iv)(C).^{8/}

5 Therefore, the Commission concludes that the ICSC may
6 make partisan communications to regular members. It may also
7 solicit contributions to the PAC from regular members who are
8 individuals or partnerships. 11 CFR 114.7(c). The
9 Commission notes, however, that the ICSC is subject to the
10 prior solicitation approval rules with respect to PAC
11 contribution solicitations of qualified personnel of its
12 regular members who are corporations. 11 CFR 114.8(d); see
13 generally 11 CFR 114.8.^{9/}

14 The Commission also concludes that the ICSC and the PAC
15 may not solicit contributions to the PAC from the other
16 membership classes who lack the right to vote for members of
17 the ICSC Board of Trustees. Similarly, ICSC may not make
18 partisan communications to such members. However, Commission
19 regulations permit the PAC to use voluntary contributions it
20 has received to communicate with the general public

21
22 ^{8/} While your request concerns the status of regular,
23 associate, affiliate, and public/academic members, the
24 conclusions in this opinion would apply to other classes of
ICSC membership that also lack voting rights; that is, the
honorary, retired and student classes.

25 ^{9/} The Commission notes that while nonvoting ICSC "members"
26 could not be solicited as members under Commission
27 regulations, any such person that belongs to the restricted
28 class of a regular ICSC corporate member could be solicited
if that corporate member granted its prior approval.
Restricted class means an individual who is an executive or
administrative employee of an ICSC regular corporate member,
or a stockholder of such a member, or within the family of
either class.

3 (including all the ICSC membership classes), as long as such
4 communications do not solicit contributions to the PAC.

5 11 CFR 114.5(i).

6 This response constitutes an advisory opinion concerning
7 application of the Act, or regulations prescribed by the Com-
8 mission, to the specific transaction or activity set forth in
9 your request. See 2 U.S.C. §437f.

10
11 For the Commission,

12
13 Trevor Potter
14 Chairman

15 Enclosures (AOs 1994-12 and 1993-24)
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