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FEDERAL ELECTION COMMISSION

Washington, DC 20463

April 23, 1998

AGENDA ITEM

For Meeting of: 4-30-98

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan M. Levin
Senior Attorney

Subject: Draft AO 1998-06

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for April 30, 1998.

Attachment

R
FEDERAL ELECTION
COMMISSION
SECRETARY
DRAFT
APR 23 12 00 PM '98

1 **ADVISORY OPINION 1998-6**

2
3 **Bobby R. Burchfield**
4 **Covington & Burling**
5 **1201 Pennsylvania Avenue, N.W.**
6 **P.O. Box 7566**
7 **Washington, D.C. 20044-7566**
8

9 **Dear Mr. Burchfield:**

10
11 **This responds to your letter dated March 19, 1998, as supplemented by your letter**
12 **dated March 24, 1998, on behalf of Bacardi-Martini, USA, Inc. ("BMUSA"), requesting**
13 **an advisory opinion concerning the application of the Federal Election Campaign Act of**
14 **1971, as amended ("the Act"), and Commission regulations to the solicitation of, and**
15 **communications to, the eligible employees of a foreign corporation and its subsidiaries.**

16 **BMUSA is a Delaware corporation with its principal place of business in Florida.**
17 **Its corporate parent is Bacardi Limited ("BL"), a privately held corporation. BL is a**
18 **Bermuda corporation and is the sole stockholder (either directly or through a wholly**
19 **owned subsidiary) of several companies, including BMUSA, that are incorporated and**
20 **have their principal places of business in the United States. In addition, many of BL's**
21 **stockholders, officers, directors, and administrative personnel are U.S. citizens or**
22 **permanent resident aliens. In 1982, BMUSA created a separate segregated fund,**
23 **presently named Bacardi-Martini USA, Inc. Political Action Committee ("BAC-PAC").¹**
24 **You state that neither BL nor any other foreign national directs or controls the selection**
25 **of BAC-PAC personnel, or the actions or policies of BAC-PAC.**

26 **BMUSA asks two questions: (1) May BMUSA communicate election-related**
27 **messages to, and solicit contributions to BAC-PAC from, the restricted classes of "the**
28 **other United States-based and United States-incorporated subsidiaries" of BL? (2) May**
29 **BMUSA communicate election-related messages to, and solicit contributions to BAC-**
30 **PAC from the stockholders, officers, directors, and administrative personnel of its parent,**
31 **BL, to the extent such persons are otherwise eligible to contribute? You note that**

¹ **BAC-PAC, which was originally named Bacardi Imports, Inc. Political Action Committee, filed its statement of organization with the Commission on August 23, 1982.**

1 BMUSA does not intend to communicate election-related messages to, or solicit PAC
2 contributions from, persons who are lawfully admitted for permanent residence in the
3 United States, but who nevertheless live outside the United States at the time of the
4 communication or solicitation.

5 The Act and Commission regulations prohibit a foreign national from making a
6 contribution directly or through any other person, or making an expenditure, in
7 connection with an election to any political office. In addition, it is unlawful to solicit,
8 accept, or receive a contribution from a foreign national. 2 U.S.C. §441e(a); 11 CFR
9 110.4(a)(1) and (2). As defined in the Act, the term "person" includes a corporation. 2
10 U.S.C. §431(11). Unlike most of the other provisions of the Act, section 441e applies to
11 any election for any political office, including state and local offices.

12 The term "foreign national" includes a "foreign principal" as defined by 22 U.S.C.
13 §611(b), but does not include any citizen of the United States. 2 U.S.C. §441e(b)(1); 11
14 CFR 110.4(a)(4)(i) and (iii). Section 611(b) defines a "foreign principal" as including:

15 (1) a government of a foreign country and a foreign political party;

16
17 (2) a person outside of the United States, unless it is established that such
18 person is an individual and a citizen of and domiciled within the United
19 States, or that such person is not an individual and is organized under or
20 created by the laws of the United States or of any State or other place
21 subject to the jurisdiction of the United States and has its principal place of
22 business within the United States; and

23
24 (3) a partnership, association, corporation, organization, or other
25 combination of persons organized under the laws of or having its principal
26 place of business in a foreign country.

27
28 The term "foreign national" also includes an individual who is not a citizen of the
29 United States and who is not lawfully admitted for permanent residence in the U.S. as
30 defined by 8 U.S.C. §1101(a)(20). 2 U.S.C. §441e(b)(2); 11 CFR 110.4(a)(4)(ii).

31 Under 22 U.S.C. §611(b), a corporation organized under the laws of any State
32 within the United States, with its principal place of business within the United States, is
33 not a foreign principal and, accordingly, would not be a foreign national under 2 U.S.C.
34 §441e. The Commission has barred foreign national entities from establishing or

1 administering political committees. Advisory Opinion 1977-53; see also 2 U.S.C.
2 §§431(7) and 441b(b)(2)(C); 11 CFR 100.6 and 114.1(a)(2)(iii). However, as a discrete
3 corporate entity organized under the laws of the State of Delaware and maintaining its
4 principal place of business in Florida, BMUSA is not a foreign principal and, accordingly
5 would not be a foreign national under 2 U.S.C. §441e. BMUSA may therefore serve as a
6 connected organization for BAC PAC, subject to conditions set out in prior opinions and
7 11 CFR 110.4(a). Advisory Opinions 1995-15 and 1990-8.²

8 The Act prohibits corporations from making any contribution or expenditure in
9 connection with a Federal election. 2 U.S.C. §441b(a). An exception to the prohibition
10 provides that a corporation or its separate segregated fund ("SSF") may solicit
11 contributions to the SSF from a restricted class of persons. 2 U.S.C. §441b(b)(4)(A)(i);
12 11 CFR 114.5(g)(1). A corporation's restricted class consists of its executive and
13 administrative personnel and stockholders, and the families of those persons. 11 CFR
14 114.5(g)(1) and 114.1(j). This class also extends to the executive and administrative
15 personnel of the corporation's subsidiaries, branches, divisions, and affiliates, and the
16 families of such persons. *Id.*; see Advisory Opinion 1997-13. Moreover, a corporation
17 may make communications on any subject, including communications containing express
18 advocacy, to this same group of persons. 2 U.S.C. §441b(b)(2)(A); 11 CFR 114.3(a) and
19 114.1(j); see also Federal Election Commission Regulations, *Explanation and*
20 *Justification*, 60 Fed. Reg. 64262-3 (December 14, 1995).

21 Criteria and factors set out in the Act and Commission regulations that govern
22 whether the SSFs of discrete organizations are affiliated are also used to determine

² You state that neither BL nor any other foreign national directs or controls the selection of BAC-PAC personnel or the actions or policies of BAC-PAC. In addressing situations involving the political committee of a foreign corporation's domestic subsidiary, the Commission has consistently sought to ensure that foreign nationals do not make contributions in connection with an election through the direction or control of a PAC. See Advisory Opinions 1995-15, 1990-8, and advisory opinions cited therein. Commission regulations, at 11 CFR 110.4(a)(3), specify further requirements that govern the operations and control of BAC-PAC:

A foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision-making process of any person, such as a corporation, labor organization, or political committee, with regard to such person's Federal or nonfederal election-related activities, such as decisions concerning the making of contributions or expenditures in connection with elections for any local, State, or Federal office or decisions concerning the administration of a political committee.

whether corporations are affiliates of each other.³ See Advisory Opinions 1996-50 and 1988-14. Committees, including SSFs, that are established, financed, maintained or controlled by the same corporation, person, or group of persons, including any parent, subsidiary, branch, division, department, or local unit thereof, are affiliated. 2 U.S.C. §441a(a)(5); 11 CFR 100.5(g)(2) and 110.3(a)(1)(ii). According to Commission regulations, the committees of a parent corporation and its subsidiaries are affiliated with each other *per se*. 11 CFR 100.5(g)(3)(i) and 110.3(a)(2)(i); Advisory Opinion 1990-10. Hence, BMUSA is affiliated with all of BL's subsidiaries, as well as with its parent, BL. See Advisory Opinions 1994-27 and 1983-48.

Under 2 U.S.C. §441e, foreign nationals who are shareholders, or executive or administrative employees of BL or its subsidiaries, or family members thereof, may neither make contributions to BAC-PAC nor be solicited for such contributions. However, the Commission has made clear that those individuals in the restricted class who are employed by foreign national corporations, but who are not foreign nationals, may be solicited for contributions to the SSF of a domestic parent. Advisory Opinions 1992-7 and 1982-34; see also Advisory Opinion 1979-59.

There is no different result if the recipient SSF is established and administered by a domestic subsidiary. As indicated above, a domestic subsidiary may establish and administer an SSF subject to certain conditions. Moreover, the above-cited Commission regulations provide for affiliation among all of a corporation's subsidiaries, and Commission opinions have long held that solicitation rights do not move merely in one direction, e.g., parent to subsidiary. 11 CFR 100.5(g)(3)(i) and 110.3(a)(2)(i); Advisory Opinions 1994-27, 1994-11, n.2, 1987-34, and 1982-18. Of particular relevance is Advisory Opinion 1982-18, where the Commission held that the SSF of a subsidiary corporation could solicit contributions from the parent's shareholders (and their families) and the executive and administrative personnel (and their families) of the parent and the

³ Committees, such as SSFs, affiliated with each other are treated as a single committee for the purposes of the contribution limits in the Act. 2 U.S.C. §441a(a)(5); 11 CFR 110.3(a)(1) and 110.3(a)(1)(ii). In other words, such committees must aggregate contributions that are made by or to them for the purposes of those limits. *Id.* Transfers between affiliated committees are not subject to the limits of 2 U.S.C. §441a. 11 CFR 102.6(a)(1).

1 parent's other subsidiaries. Hence, BMUSA may solicit contributions to BAC-PAC from
2 the stockholders of BL and from executive and administrative personnel, and the families
3 thereof, of BL and BL's U.S. subsidiaries, so long as those individuals are not foreign
4 nationals. In view of the ability of a corporation to communicate with the same group
5 that may be solicited for contributions to the SSF, BMUSA may also communicate
6 election-related messages to the foregoing group of individuals.

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

10 Sincerely,

11
12 Joan D. Aikens
13 Chairman
14

15 Enclosures (AOs 1997-13, 1996-50, 1995-15, 1994-27, 1994-11, 1992-7, 1990-10,
16 1990-8, 1988-14, 1987-34, 1983-48, 1982-18, 1979-59, and 1977-53)
17