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AGENDA ITEM

For Meeting of: 07-28-09

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *TPD*
General Counsel

Rosemary C. Smith *ACS*
Associate General Counsel

Amy L. Rothstein *ALR*
Assistant General Counsel

David C. Adkins *DA*
Attorney

Subject: Draft AO 2009-14 (Mercedes-Benz USA LLC and Sterling Truck Corporation)
Alternative Draft

We have been asked to circulate the attached alternative draft of the subject advisory opinion. Please place this draft on the agenda for July 28, 2009.

Attachment

1 ADVISORY OPINION 2009-14

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Jan Witold Baran
Caleb P. Burns
Wiley Rein LLP
1776 K Street, NW
Washington, D.C. 20006

ALTERNATIVE DRAFT

10 Dear Mr. Baran and Mr. Burns:

11 We are responding to your advisory opinion request on behalf of Mercedes-Benz
12 USA LLC (“MBUSA LLC”) and Sterling Truck Corporation (“Sterling Corp.”),
13 concerning the application of the Federal Election Campaign Act of 1971, as amended
14 (the “Act”), and Commission regulations to MBUSA LLC’s proposal to pay the
15 administrative costs of a separate segregated fund (“SSF”) to be established by Sterling
16 Corp., and whether the SSF may be referred to as “Daimler PAC.”

17 The Commission concludes that MBUSA LLC may administer an SSF to be
18 established by Sterling Corp., and that the name of the SSF may be abbreviated to
19 “Daimler PAC.”

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received on
22 May 27, 2009, your email received on June 5, 2009, and conversations with Commission
23 attorneys.

24 MBUSA LLC is a limited liability company (“LLC”) organized under the laws of
25 the State of Delaware and headquartered in New Jersey. MBUSA LLC markets and
26 distributes Mercedes-Benz and Maybach vehicles and products throughout the United
27 States. MBUSA LLC’s sole member is Daimler North America Corporation (“DNAC”).

1 Sterling Corp. is a Delaware corporation, headquartered in Oregon. It markets
2 and distributes heavy- and medium-duty trucks and parts throughout North America.
3 Sterling Corp. is the wholly owned subsidiary of Daimler Trucks North America LLC
4 (“DTNA LLC”), the sole member of which is DNAC.

5 DNAC is a Delaware corporation that is headquartered in New Jersey. It is the
6 wholly owned subsidiary of Daimler AG, a German company that is the ultimate parent
7 of the Daimler-related companies.

8 Sterling Corp. intends to establish an SSF, and MBUSA LLC would like to use its
9 personnel and resources to administer it, including paying the administrative and
10 solicitation expenses of the SSF. Specifically, MBUSA LLC would pay the SSF’s
11 expenses out of its External Affairs and Public Policy-Americas (“EAPP”) cost center.¹
12 MBUSA LLC would, however, invoice Daimler AG for EAPP expenses, per the terms of
13 an agreement between MBUSA and Daimler AG for the provision of and payment for
14 such services (the “Service Level Agreement”). Rather than reimburse MBUSA LLC
15 directly for EAPP expenses, Daimler AG permits MBUSA LLC to credit those expenses
16 against the amount it owes Daimler AG for vehicles and products. This payment
17 arrangement is detailed in the Service Level Agreement between MBUSA LLC and
18 Daimler AG.

19 Under the Service Level Agreement, Daimler AG authorizes annual spending
20 levels for the EAPP cost center and “approve[s] the [EAPP] services to be provided by

¹ The Daimler-related companies have numerous “cost-centers,” some of which benefit multiple business units. MBUSA LLC, for example, includes the EAPP cost center, which funds the government affairs operations conducted by MBUSA LLC on behalf of all of Daimler AG’s U.S. companies. EAPP expenses are paid from MBUSA LLC’s general treasury, or using its short-term credit line with Daimler North America Finance Corporation (“DNAFC”).

1 [MBUSA LLC] via the Budgeting and Planning procedures of the Daimler Group.”
2 Service Level Agreement, Section 4.2. Daimler AG does not otherwise guide or
3 prioritize how MBUSA LLC must spend EAPP funds. Counsel for requestors has also
4 represented that the SSF would be administered in a manner consistent with Commission
5 regulations as interpreted in prior advisory opinions, including that all decision-making
6 regarding the SSF would be made exclusively by executive or administrative personnel of
7 MBUSA LLC or Sterling Corp. who are U.S. citizens or legal permanent residents.
8 Further, contributions to the SSF would not be solicited or accepted from persons who
9 are foreign nationals.

10 MBUSA LLC and Sterling Corp. propose a number of official names for the SSF,
11 including Daimler U.S. Employees Political Action Committee, Daimler North America
12 Corporation U.S. Employees Political Action Committee, Sterling Truck
13 Corporation/Daimler U.S. Employees Political Action Committee, and Sterling Truck
14 Corporation/Daimler North America Corporation U.S. Employees Political Action
15 Committee. Regardless of which of these names is chosen, they would like to abbreviate
16 the name of the SSF to “Daimler PAC.”

17 ***Questions Presented***

- 18 1. *May Sterling Corp. serve as the connected organization for the proposed SSF?*
- 19 2. *May MBUSA LLC use its personnel and resources to administer the SSF?*
- 20 3. *May payment of the administrative costs associated with the SSF come from*
21 *MBUSA LLC’s EAPP cost center?*
- 22 4. *May Sterling Corp. and MBUSA LLC abbreviate the name of the SSF to Daimler*
23 *PAC?*

1 ***Legal Analysis and Conclusions***

2 1. *May Sterling Corp. serve as the connected organization for the proposed SSF?*

3 Yes, Sterling Corp. may serve as the connected organization for the proposed
4 SSF.

5 A connected organization is any organization that is not a political committee and
6 that directly or indirectly establishes, administers, or financially supports a political
7 committee. *See* 2 U.S.C. 431(7) and 11 CFR 100.6(a). Corporations, labor
8 organizations, membership organizations, cooperatives, and trade associations may serve
9 as connected organizations of their SSFs. *Id.* Payments by a connected organization for
10 the establishment, administration, or solicitation of contributions to its SSF are exempt
11 from the definition of contribution and expenditure. *See* 2 U.S.C. 441b(b)(2)(C); 11 CFR
12 114.1(a)(2)(iii); *see also* 2 U.S.C. 431(8)(B)(vi) and (9)(B)(v).

13 The Commission has held that foreign nationals² may not serve as an SSF's
14 connected organization. *See, e.g.,* Advisory Opinions 1977-53 (APCAC); *see also* 1982-
15 34 (Sonat) (stating that a foreign national corporation may not establish and administer its
16 own SSF). However, domestic subsidiaries of foreign corporations may establish and
17 administer SSFs if they are discrete entities whose principal place of business is the
18 United States,³ and if those exercising decision-making authority over the SSF are not
19 foreign nationals. *See* Advisory Opinions 1980-100 (Revere Sugar), 1980-111 (Portland

² The Act and Commission regulations define "foreign national" to include "foreign principals," as defined in 22 U.S.C. 611(b). 2 U.S.C. 441e(b); 11 CFR 110.20(a)(3). Under 22 U.S.C. 611(b)(3), "foreign principal" includes corporations organized under the laws of or having their principal place of business in a foreign country.

³ Under 22 U.S.C. 611(b), a domestic corporation whose principal place of business is within the United States is not a "foreign principal" and hence not a "foreign national" under 2 U.S.C. 441e.

1 Cement). Recent amendments to the Act and to Commission regulations expanding the
2 scope of the restrictions on foreign national involvement in U.S. elections were not
3 intended “to cover U.S. subsidiaries of foreign corporations” and did not prohibit “the
4 participation of such subsidiaries in elections in the United States . . . through separate
5 segregated funds.”⁴ See Explanation and Justification for Final Rules on Contribution
6 Limitations and Prohibitions, 67 FR 69928, 69943 (Nov. 19, 2002); see also Advisory
7 Opinion 2006-15 (TransCanada).

8 Sterling Corp.’s ultimate parent – Daimler AG – is a German company that
9 qualifies as a foreign principal under 22 U.S.C. 611(b) and a foreign national under 2
10 U.S.C. 441e(b). Nevertheless, Sterling Corp. itself is a discrete operating domestic entity
11 that is organized under the laws of Delaware and is headquartered in Oregon. As such,
12 and given that requestors have represented that foreign nationals will not have decision-
13 making authority regarding the proposed SSF, Sterling Corp. may serve as its connected
14 organization.

15 2. *May MBUSA LLC use its personnel and resources to administer the proposed SSF?*

16 Yes, MBUSA LLC may use its personnel and resources to administer the
17 proposed SSF.

18 The Act does not extend to a partnership, or an LLC that is treated as a
19 partnership under Commission regulations, the ability granted to a corporation to serve as
20 a connected organization. See 2 U.S.C. 431(7) and 11 CFR 100.6(a) (definition of

⁴ In the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (“BCRA”), Congress amended the Act to clarify, strengthen and expand the ban on campaign contributions and donations by foreign nationals. See BCRA Section 303, 116 Stat. at 96. Among other changes, BCRA amended 2 U.S.C. 441e to prohibit foreign national contributions and donations that are made “directly or indirectly.”

1 “connected organization” does not include partnerships or LLCs); *see also* Advisory
2 Opinion 2004-42 (Pharmavite). Instead, partnerships and other unincorporated entities
3 may make contributions to Federal candidates and political committees directly. *See* 11
4 CFR 110.1(e).

5 Nonetheless, partnerships and LLCs treated as partnerships that are owned
6 entirely by corporations, like MBUSA LLC, warrant special consideration. Under the
7 dual attribution principle for partnership contributions at 11 CFR 110.1(e), contributions
8 by partnerships are attributed not only to the partnership as a whole but also to its
9 partners. Thus, a partnership owned entirely by corporations may not make
10 contributions, either. *See, e.g.*, Advisory Opinion 2001-07 (NMC PAC) (LLC electing
11 partnership status, all of whose members are corporations, may not make contributions
12 to, or otherwise support, a non-connected political committee).

13 To avoid prohibiting these types of partnerships from making contributions and
14 from establishing and administering an SSF, the Commission has interpreted the Act and
15 Commission regulations to permit a partnership (or an LLC electing partnership status) to
16 pay the administrative and solicitation costs of an SSF established by the partnership’s
17 corporate owner, but only when the partnership is wholly owned by corporations and
18 affiliated with at least one of the corporations.⁵ The administrative and solicitation

⁵ *See* Advisory Opinions 2004-42 (Pharmavite) (LLC treated as partnership was wholly owned by a corporation), 2003-28 (Horizon Lines) (LLC treated as a partnership was “owned entirely by corporations” where it was owned by two corporations and another LLC treated as a partnership, which was itself owned by a corporation), 2001-18 (BellSouth) (joint venture LLC treated as partnership was owned entirely by corporations), 1997-13 (USA PAC) (joint venture LLC treated as partnership was “entirely owned by corporations, whose control over [the LLC] is essentially the same as corporate joint venture partners”), 1996-49 (PrimeCo) (joint venture partnership owned entirely by corporations), 1994-11 (FMC) (limited partnership owned by corporations), 1992-17 (Du Pont Merck) (partnership owned by two corporations), and 1987-34 (Telenet) (two corporations formed a joint venture partnership and temporarily conveyed to it ownership of a subsidiary corporation).

1 support provided by a partnership wholly owned by affiliated corporations “may be
2 construed as coming from the affiliated corporations.” Advisory Opinion 1992-17 (Du
3 Pont Merck PAC).

4 MBUSA LLC is treated as a partnership under Commission regulations because it
5 is a non-publicly traded LLC that has not affirmatively elected treatment as a corporation
6 for tax purposes.⁶ 11 CFR 110.1(g)(2) and (3); *see also* Advisory Opinion 2004-42
7 (Pharmavite). In addition, MBUSA is wholly owned by – and affiliated with – DNAC.
8 11 CFR 100.5(g)(3)(i) and 110.3(a)(2)(i). Therefore, MBUSA LLC would be able to
9 perform the functions of a connected organization for an SSF connected to DNAC,
10 including paying the SSF’s administrative and solicitation costs. *See* Advisory Opinions
11 2004-42 (Pharmavite) and 1997-13 (USA PAC). For internal business reasons, though,
12 DNAC has chosen not to serve as the connected organization for the proposed SSF;
13 instead, Sterling Corp. will fill that role.

14 Through DNAC, MBUSA is also affiliated with DNAC’s wholly owned
15 subsidiary Sterling Corp. Although previous Commission advisory opinions have not
16 addressed an arrangement whereby an LLC that is wholly owned by and affiliated with
17 one corporation pays the administrative and solicitation costs of another affiliated
18 corporation’s SSF, the Commission finds no material difference in the proposed
19 arrangement that would affect the ability of MBUSA LLC to use its resources and

⁶ As an LLC with a single corporate member, MBUSA LLC is precluded from electing treatment as a partnership for tax purposes; however, MBUSA LLC has not affirmatively elected treatment as a corporation either. 26 CFR 301.7701-3(a). Per Internal Revenue Service (“IRS”) regulations, then, MBUSA LLC is considered a “disregarded entity” and is viewed by the IRS as the functional equivalent of a branch or division of the LLC’s single member.

1 personnel to administer Sterling Corp.'s SSF. Given that DNAC could pay the
2 administrative and solicitation costs of Sterling Corp.'s SSF, and that MBUSA LLC
3 could pay the administrative and solicitation costs of DNAC's SSF, it therefore follows
4 that MBUSA LLC may pay the administrative and solicitation costs of Sterling Corp.'s
5 SSF.⁷

6 3. *May payment of the administrative costs associated with the SSF come from MBUSA*
7 *LLC's EAPP cost center?*

8 No, MBUSA LLC may not pay the SSF's administrative costs from its EAPP cost
9 center if the payments are reimbursed by Daimler AG.

10 The Act and Commission regulations prohibit a foreign national from "directly or
11 indirectly" making "a contribution or donation of money or other thing of value . . . in
12 connection with a Federal, State, or local election." 2 U.S.C. 441e(a)(1)(A); 11 CFR
13 110.20(b). In addition, the Act and Commission regulations prohibit a foreign national from
14 directly or indirectly making an expenditure, an independent expenditure, or a disbursement
15 in connection with a Federal, State, or local election. 2 U.S.C. 441e(a)(1)(C); 11 CFR
16 110.20(f).

17 The application of this prohibition to the activities of domestic corporations
18 affiliated with, or owned by, foreign corporations depends on the type of activity in
19 question. The Commission has previously explained that domestic subsidiaries of foreign
20 nationals could make donations and disbursements in connection with State or local
21 elections only if the donations and disbursements were made from domestically

⁷ Notwithstanding MBUSA LLC's ability to pay administrative and solicitation costs, the SSF still must identify Sterling Corp. as its connected organization on its statement of organization. 2 U.S.C. 433(b)(2) and 11 CFR 102.2(a)(1)(ii); see Advisory Opinions 1997-13 (USA PAC) and 1996-49 (PrimeCo).

1 generated revenues and were not subsequently reimbursed by the foreign parent. *See*
2 Advisory Opinions 1992-16 (Nansay Hawaii) and 1989-20 (Kulima).

3 Prior to the passage of BCRA, the payment of costs associated with establishing,
4 administering, and soliciting funds for an SSF – which is excluded from the definition of
5 “contribution” and “expenditure” – were treated differently. For example, a domestic
6 trade association could support its SSF with general treasury funds that were made up, in
7 part, of monies derived from dues paid by foreign nationals. *See* Advisory Opinion 1980-
8 111 (Portland Cement). There, the focus was not on the source of funds used to pay
9 administrative and solicitation costs, but rather on the status of the entity making the
10 payments. *See id*; *see also* Advisory Opinion 1980-100 (Revere). Similarly, two foreign
11 subsidiaries could pay the costs associated with administering a payroll deduction plan
12 for the SSF of their domestic parent corporation. *See* Advisory Opinion 1982-34 (Sonat).
13 Because costs of administering the payroll deduction plan were, by definition, not
14 contributions, “the foreign subsidiaries’ payments of those costs on behalf of [the
15 domestic parent corporation were] not prohibited by [2 U.S.C.] 441e.” *Id*.

16 BCRA amended the Act to clarify, strengthen and expand the ban on
17 contributions by foreign nationals. *See* BCRA Section 303, 116 Stat. at 96. Specifically,
18 BCRA clarified that the ban covered contributions *and* expenditures, strengthened it to
19 cover payments made both directly and indirectly, and expanded it to include “donations”
20 and “disbursements.” *See* 2 U.S.C. 441e(a)(1); 11 CFR 110.20; *see also* *Explanation and*
21 *Justification for Regulations on Contribution Limitations and Prohibitions*, 67 Fed. Reg.
22 69940 (Nov. 19, 2002) (“As indicated by the title of section 303 of BCRA,
23 “Strengthening Foreign Money Ban,” Congress amended 2 U.S.C. 441e to further

1 delineate and expand the ban on contributions, donations, and other things of value by
2 foreign nationals.”).⁸

3 Although the Act does not separately address establishment, administrative, or
4 solicitation costs, those payments are analogous to “donation” and “disbursement” which
5 include “any purchase or payment” and “anything of value given to a person” that is not a
6 contribution. 11 CFR 300.2(d) and (e). Thus, the payment by a foreign corporation of an
7 SSF’s establishment, administrative, or solicitation costs is subject to the same
8 prohibition as the payment by a foreign corporation of contributions made in connection
9 with a Federal election and donations in State and local elections. *See Advisory Opinions*
10 *1992-16 (Nansay Hawaii) and 1989-20 (Kulima).*

11 Accordingly, Daimler AG, a foreign corporation, may not, directly or indirectly,
12 pay the administrative costs of the SSFs of its domestic subsidiary Sterling Corp. Any
13 such payments made by MBUSA LLC must consist entirely of domestically generated
14 revenues and may not subsequently be reimbursed by Daimler AG. If MBUSA chooses
15 to use its EAPP cost center to pay these costs it must be able to demonstrate through a
16 reasonable accounting method that it has made the payments from its own revenues and
17 that MBUSA has sufficient funds in its accounts, other than funds given or loaned, or
18 reimbursed by Daimler AG from which the payment is made. *See Advisory Opinion*
19 *1992-16 (Nansay Hawaii).* To the extent that *Advisory Opinions 1980-111 (Portland*
20 *Cement) and 1982-34 (Sonat), which preceded BCRA’s amendments to 2 U.S.C. 441e,*
21 *are inconsistent with this result, they are hereby superseded.*

⁸ The Commission has not addressed the issue of payment of administrative and solicitation costs subsequent to enactment of BCRA’s amendment of the Act with respect to foreign national contributions and expenditures. *See Explanation and Justification for Final Rules, Contribution Limitations and Prohibitions, 67 FR 69928, 69943-44.*

1 4. *May Sterling Corp. and MBUSA LLC abbreviate the name of the SSF to Daimler*
2 *PAC?*

3 Yes, the name of the SSF may be abbreviated to Daimler PAC.

4 The Act and Commission regulations require the name of an SSF to include the
5 full name of its connected organization. 2 U.S.C. 432(e)(5); 11 CFR 102.14(c). An SSF
6 established by a subsidiary may, but need not, include in its name the name of the
7 subsidiary's parent or another subsidiary of its parent. 11 CFR 102.14(c).

8 In limited circumstances, the Commission has allowed the name of an SSF to
9 include only the name of an LLC that is in virtually the same position as a corporate
10 subsidiary of the connected corporation that owns the LLC. For example, the
11 Commission concluded that an SSF's name could include only the name of a joint
12 venture LLC that was treated as a partnership under Commission regulations, where the
13 LLC was performing the functions of the SSF's connected organization. *See Advisory*
14 *Opinions 2003-28 (Horizon Lines) and 1997-13 (USA PAC)*. The Commission has also
15 concluded that an SSF could be named after an LLC that is wholly owned by the
16 corporate entity serving as the SSF's connected organization, where naming the SSF after
17 the LLC "would provide the public with a more accurate understanding of the PAC's
18 funding and purpose." *See Advisory Opinion 2004-42 (Pharmavite)*.

19 Here, Sterling Corp. will serve as the connected organization for the proposed
20 SSF, and funding for the administration of and solicitation for the SSF will come from
21 MBUSA LLC. Unlike the facts underlying the advisory opinions cited above, MBUSA
22 LLC is not "in virtually the same position as a corporate subsidiary" of Sterling Corp., so
23 naming the SSF after MBUSA LLC would not be permissible. Rather, the name of the

1 proposed SSF must include the name of the connected organization – Sterling Corp. –
2 and may, but need not, include the names of Sterling Corp.’s parent – DNAC – and a
3 subsidiary of its parent, including MBUSA. Accordingly, the Commission concludes that
4 only one of the names proposed⁹ by requestors would be permissible: Sterling Truck
5 Corporation/Daimler North America Corporation U.S. Employees Political Action
6 Committee.

7 Commission regulations also permit an SSF to use a “clearly recognized
8 abbreviation or acronym by which the connected organization is commonly known.” *See*
9 11 CFR 102.14(c). In determining whether specific terms or names meet this
10 requirement, the Commission has examined whether they give adequate notice to the
11 public as to the identity and sponsorship of the SSF. *See* Advisory Opinions 2004-42
12 (Pharmavite), 2004-04 (AirPAC), 2000-34 n.4 (SAPPI Paper), 1987-26 (Principal
13 Mutual), and 1980-23 (ADEPT).

14 The Commission concludes that the proposal to abbreviate the name of the SSF as
15 “Daimler PAC” would, indeed, provide the public with adequate notice as to the identity
16 and sponsorship of the SSF and is therefore permissible. Sterling Corp.’s affiliation with
17 the Daimler family of companies is readily apparent on its web site. Furthermore, while
18 the SSF will be connected to Sterling Corp., it will receive administrative support from
19 MBUSA LLC by virtue of that organization’s affiliation with Sterling Corp. through
20 DNAC. Perhaps most importantly, requestors have indicated that while the proposed

⁹ Sterling Corp. proposes a number of official names for the proposed SSF, including Daimler U.S. Employees Political Action Committee, Daimler North America Corporation U.S. Employees Political Action Committee, Sterling Truck Corporation/Daimler U.S. Employees Political Action Committee, and Sterling Truck Corporation/Daimler North America Corporation U.S. Employees Political Action Committee.

1 SSF will be connected to Sterling Corp. and funded by MBUSA LLC, it will operate on
2 behalf of all the Daimler-related companies.

3 Finally, it is important to note that use of the abbreviation Daimler PAC will not
4 obscure from the public any relevant information regarding the funding or operation of
5 the proposed SSF. The SSF must use both the abbreviation and the full name on the
6 statement of organization, on all filed reports with the Commission, and on all disclaimer
7 notices required by Commission regulations. In addition, Sterling Corp. will be disclosed
8 as the SSF's connected organization on the statement of organization.

9 This response constitutes an advisory opinion concerning the application of the
10 Act and Commission regulations to the specific transaction or activity set forth in your
11 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
12 of the facts or assumptions presented, and such facts or assumptions are material to a
13 conclusion presented in this advisory opinion, then the requestor may not rely on that
14 conclusion as support for its proposed activity. Any person involved in any specific
15 transaction or activity which is indistinguishable in all its material aspects from the
16 transaction or activity with respect to which this advisory opinion is rendered may rely on
17 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or

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2 conclusions in this advisory opinion may be affected by subsequent developments in the
3 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

4 The cited advisory opinions are available on the Commission's Web site at

5 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

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Steven T. Walther

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Chairman