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OUR FILE NO.

AOR 1994-24

BY HAND

Federal Election Commission
Office of General Counsel
999 E Street, NW
Washington, DC 20463

Attn: N. Bradley Litchfield, Esq.

Re: Advisory Opinion Request
Pursuant to 11 CFR Part 112

Dear Mr. Litchfield:

Pursuant to 11 CFR Part 112, we hereby request, on behalf of our client, Chattem, Inc. ("the Company"), an advisory opinion as to whether (1) a lump sum separation payment disbursed to an employee who left the Company's full-time salaried employ and converted to the status of "hourly employee" in order to run for Congress, or (2) continuation of medical benefits to such employee during the time he was an hourly employee, is a "contribution or expenditure" within the meaning of the Federal Election Campaign Act of 1971, as amended ("the Act").

I. Applicable Law

The Act makes it unlawful for "any corporation . . . to make a *contribution or expenditure* in connection with any election at which . . . a Senator or Representative in . . . Congress are to be voted for, or in connection with any primary election . . . to select candidates for any of the foregoing offices, . . . prohibited by this section." 2

U.S.C. § 441b(a) (emphasis added)[1]; *see* 11 CFR § 114.2(b). "Contribution or expenditure" is defined to "include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate . . . in connection with any election to any of the offices referred to in this section . . . ." 2 U.S.C. § 441b(b)(2); *see* 11 CFR § 114.1(a)(1).

The Commission's Regulations specify that "No contribution results where an employee engages in political activity during what would otherwise be normal working hours if the employee is . . . paid only for work actually performed and the employee's time is considered his or her own to use as he or she sees fit." 11 CFR § 100.7(a)(3)(ii).

II. Description of Transaction

On December 23, 1993, the Company entered into a Separation Agreement (the "Separation Agreement") with one of its long-standing employees, who, prior to departure, held a "senior executive" position. The employee is currently a candidate for the House of Representative in an August 2, 1994, primary election.

The Separation Agreement entailed two principal provisions: (1) a lump sum payment; and (2) a transition period during which the employee would receive medical benefits as well as compensation based on work actually performed, on an hourly basis. Nothing in the Separation Agreement contemplates rehiring the employee, and the Company currently has no plans to rehire the employee.

A. Lump Sum Payment

Pursuant to the Separation Agreement, the employee received separation pay in a lump sum, the specific level of

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1/ Even if the specific transaction described in this request were to constitute a "contribution or expenditure" within the meaning of the Federal Election Campaign Act of 1971, as amended, there would still be an issue as to whether the transaction fell within the category of "contribution or expenditure . . . *prohibited by this section*." 2 U.S.C § 441b(a) (emphasis added). This Advisory Opinion request does not broach that issue.

which is confidential by the terms of the Separation Agreement. The amount was calculated as follows:

(i) Severance pay based on 18 months pay at the employee's past annual salary; and

(ii) An additional payment representing the employee's expected "bonus" under the Company's fiscal years 1991-1993 long-term incentive plan, payment for which had been earned in the three-year period ended November 30, 1993, calculated in accordance with the incentive plan document and approved by the Compensation Committee of the Company's Board of Directors.

B. Continuing Status as Hourly Employee, with Medical Benefits

Pursuant to the Separation Agreement, the employee converted from his prior salaried position to the status of an "hourly employee" for the period January 1, 1994 through May 31, 1994. During this period, the employee was entitled to be paid at an hourly rate for hours actually worked or while traveling on the Company's behalf, up to a maximum of eight hours per day. In order to be paid during this period, the employee was required to submit detailed, written monthly billings.

Also pursuant to the Separation Agreement and consistent with the Company's long-standing policy of providing medical benefits to hourly employees who are scheduled to work 20 or more hours per week, the employee's regular and normal medical benefits were continued through the period January 1, 1994 to May 31, 1994.

III. Discussion and Analysis

A. Lump Sum Payment

Even though the employee left the full-time salaried employ of the Company in order to run for Congress, the lump sum payment provision of the severance package is not a "contribution or expenditure" within the meaning of the Act, because the severance package is fully consistent

with pre-existing Company policy with regard to departing senior employees, which policy was not "created for the benefit of a particular employee-candidate." FEC Advisory Opinion No. 1992-3 (March 11, 1992). The lump sum payment was a routine disbursement to a departing employee.

The Commission's Opinion No. 1992-3 dealt with an employee in a private company who also served in the Virginia State Legislature (whose session lasts but 60 days of the year), and who was contemplating running for Congress. That company had a long-standing policy of permitting employees to take unpaid leave, with benefits, while serving in the State Legislature. In that instance, the employee anticipated declaring her candidacy for the United States Congress during the State Legislature session, while in an unpaid leave status from her employer.

The issue addressed by the FEC in Opinion No. 1992-3 was whether continuation of company benefits for a period of 31 days after declaration of candidacy was a "Contribution" within the meaning of the Act and the Commission's Regulations. The Commission concluded that due to the fact that the company "has a pre-existing policy covering fringe benefits and unpaid leave which is generally applicable to all employees," "[t]he limited continuation would not be a contribution to the employee's campaign and would not be prohibited by the Act or Commission Regulations."

The lump sum separation payments to the employee at issue in this request were fully consistent with arrangements that have been negotiated, on a case-by-case basis, with other highly compensated employees of the Company. For instance, outlined below are the main features of the three most recent severance packages for senior level employees of the Company:

(i) An executive officer of the Company, subsequent to the execution of the Severance Agreement, received a severance package that included, *inter alia*, 24 months of severance pay;

(ii) A divisional officer effectively received 15 months of severance pay in 1994; and

(iii) Another divisional officer received 18 months of severance pay in 1992.

Moreover, the Company's outside compensation consultants advised the Company that the Separation Agreement "is consistent with general market practice, and in fact, the cash portion of the payment is on the conservative side of market practice." In any case, nothing in the employee severance package at issue in this Advisory Opinion request is different from any other severance package because of the campaign the departing employee was about to enter.

As the lump sum payment at issue here was calculated in a manner, as outlined above, on terms fully consistent with the Company's historical experience, the lump sum payment is not a "contribution or expenditure" within the meaning of the Act. Rather, it is simply a routine disbursement to a departing senior employee.

B. Continuing Status as Hourly Employee, with Medical Benefits

While neither the statute nor the implementing regulations specify whether or how a corporation may continue to pay fringe benefits to an hourly employee who is running for Congress, the regulations do specify that "No contribution results where an employee engages in political activity during what would otherwise be normal working hours if the employee is . . . paid only for work actually performed and the employees's time is considered his or her own to use as he or she sees fit." 11 CFR § 100.7(a)(3)(ii). This Regulation appears to encompass the situation at issue here, as under the terms of the Separation Agreement the employee is entitled to be paid only for hours actually worked or while traveling on the Company's behalf, up to a maximum of eight hours per day. Moreover, the determination to continue medical benefits was made by Company management in consideration of the Company's policy manual, which stipulates that hourly employees who work 20 or more hours per week receive full benefits, and based upon a considered and well-founded projection that the

employee would work at least 20 hours per week during the interim period.[2/]

The Commission has recognized that "an individual may pursue gainful employment while a candidate for Federal office." FEC Advisory Opinion No. 1979-74 (January 11, 1980). In Opinion No. 1979-74, the Commission outlined the "criteria which, if satisfied, would mean that compensation received by a candidate would not qualify as a contribution to the candidate from the employer":

> (i) the compensation results from bona fide employment genuinely independent of one's candidacy;
>
> (ii) the compensation is exclusively in consideration of services performed by the candidate; and
>
> (iii) the compensation does not exceed the amount of compensation which would be paid to any other similarly qualified person for the same work over the same period of time.

Id. (citing Advisory Opinions 1977-45, 1977-68 and 1978-6); *see* Advisory Opinion 1980-115 (Oct. 14, 1980) ("the Commission concludes that to the extent compensation paid to Mr. O'Donnell from the firm is not reduced to reflect the lower number of hours he will work for the firm because of his candidacy, there is a contribution from the firm to Mr. O'Donnell's campaign . . . .").

2/ The Commission's restriction against paying "the employer's share of the cost of fringe benefits, such as health and life insurance and retirement, for employees and members on leave-without-pay to participate in political campaigns of Federal candidates," 11 CFR § 114.12(c)(1), by negative implication suggests that a corporation *may* pay to a bona-fide (albeit part-time) hourly employee, such as the one at issue here, fringe benefits -- even while the employee is running for office on non-company time.

As in the situation at issue in Opinion No. 1979-74, the Company's payments of hourly-rate pay and benefits[3/] to its employee-candidate in this instance relate to "bona fide employment genuinely independent of [the employee's] candidacy," "compensation is exclusively for his services," and "the rate of compensation is the same as a similarly qualified person would receive." Opinion No. 1979-74 at 2. Accordingly, the compensation paid to the Company's employee pursuant to the Separation Agreement "would not constitute a contribution or expenditure under the Act or Commission regulations." *Id.*

IV. Conclusion

Neither the lump sum payment nor the continuation of medical benefits to a former full-time salaried employee who, pursuant to a Separation Agreement, converts to the status of hourly employee for a limited period of time while running for Congress, is a "contribution or expenditure" within the meaning of the Act. We would appreciate your timely confirmation of this conclusion in an advisory opinion pursuant to 11 CFR Part 112.

Very truly yours,

R. Bruce Dickson
Joseph E. Schmitz
of PAUL, HASTINGS, JANOFSKY & WALKER

Counsel to the Company

3/ In Opinion No. 1992-3, *supra*, the Commission concluded that when a company had "a pre-existing policy covering fringe benefits and unpaid leave which is generally applicable to all employees," "[t]he limited continuation [of benefits] would not be a contribution to the employee's campaign and would not be prohibited by the Act or Commission Regulations." *A fortiori*, as the employee in this instance never took "unpaid leave," a similar conclusion is warranted with regard to continuation of benefits during the period from January 1, 1994 to May 31, 1994.