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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

September 23, 1999

**MEMORANDUM**

TO: The Commission

THROUGH: James A. Pehrkon  
Staff Director

FROM: Lawrence M. Noble  
General Counsel

N. Bradley Litchfield  
Associate General Counsel

Michael G. Marinelli  
Staff Attorney

SUBJECT: Draft AO 1999-20

**AGENDA ITEM**  
For Meeting of: 9-30-99

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for September 30, 1999.

Attachment

1 ADVISORY OPINION 1999-20

2  
3 Evan Migdail  
4 McDermott, Will & Emery  
5 600 13<sup>th</sup> Street, NW  
6 Washington, DC 20005-3096

**DRAFT**

7  
8 Dear Mr. Migdail:

9  
10 This refers to your five letters (dated September 22 and 3, August 31, June 25 and  
11 11, 1999) which request advice concerning the application of the Federal Election  
12 Campaign Act of 1971, as amended ("the Act"), and Commission regulations to selection  
13 of a name for The Equitable Companies, Inc. Political Action Committee ("EQUI-PAC")  
14 and the proposed solicitation of contributions to the Committee from life insurance agents  
15 who represent EQUI-PAC's connected organization, Equitable Life Assurance Society of  
16 the United States ("Equitable Life").

17 **FACTUAL BACKGROUND**

18 You state that in a letter dated June 12, 1996, EQUI-PAC advised the  
19 Commission that it was changing its name to "Equitable Companies, Inc. Political Action  
20 Committee" in order to reflect a change in the name of the parent company of its  
21 connected organization to The Equitable Companies Incorporated. (A copy of the letter  
22 is included in the request.) You explain that under the current corporate structure, The  
23 Equitable Companies Incorporated is the name of a holding company that owns Equitable  
24 Life, which in turn, owns a controlling share of the Alliance Company.

25 You further explain that this request is made in anticipation of a second  
26 impending name change of the holding company from The Equitable Companies  
27 Incorporated to AXA Financial, Inc. Because the connected organization to EQUI-PAC

1 is, in fact, Equitable Life, rather than Equitable Life's holding company, you affirm that  
2 EQUI-PAC wishes now to change its name to "The Equitable Life Assurance Society  
3 Political Action Committee" and to continue using the abbreviated name "EQUI-PAC."  
4 You assert that a change of name to reflect "AXA Financial Inc." would not, in fact,  
5 properly reflect the name of the connected organization. EQUI-PAC, therefore requests  
6 that the Commission approve the requested change in name.

7 EQUI-PAC also asks whether it may solicit contributions from one of two classes  
8 of life insurance agents who represent Equitable Life. This group is classified as "full  
9 time life insurance salespersons."<sup>1</sup> You explain that these agents are paid on a  
10 commission basis, and Equitable Life does not withhold Federal income taxes from their  
11 pay. You further explain that this agent class constitutes the majority of Equitable Life's  
12 sales force and participates in the pension and profit-sharing plans of the company on the  
13 same terms as other Equitable Life employees, but with some minor differences with  
14 respect to the levels of contribution and/or years of service required for coverage. You  
15 explain that for FICA purposes, these are statutory FICA employees for whom Equitable  
16 Life is required to withhold and pay FICA taxes with respect to their earnings. They are  
17 also able to participate in the company's other employee benefits programs.<sup>2</sup>

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<sup>1</sup> A second smaller class of agents are also paid on a commission basis. They do not participate in the benefits programs and are not subject to FICA withholding by Equitable Life. Equitable Life considers these agents as "independent contractors" and does not include them within this request.

<sup>2</sup> You also explain that there are differences with respect to the participation of these agents in Equitable Life's short-term and long-term disability coverage and eligibility for the company's flexible spending (health and dependent care accounts). Specifically, while other employees are immediately eligible for these plans and receive short-term disability coverage at no cost, full time life insurance salespersons are not eligible until their third year of service and are required to contribute toward the cost of their short-term disability coverage. In addition, while other employees must only prove that they have been disabled for five days before receiving benefits, these agents must wait thirty days.

**1 ACT AND COMMISSION REGULATIONS**

2 Under the Act and Commission regulations, the name of any separate segregated  
3 fund must include the full name of its connected organization. 2 U.S.C. §432(e)(5); 11  
4 CFR 102.14(c). A fund established by a corporation which has a number of subsidiaries  
5 need not include the name of each subsidiary in its name. Similarly, a separate  
6 segregated fund established by a subsidiary need not include in its name the name of its  
7 parent or another subsidiary of its parent. The regulations permit the use of a clearly  
8 recognized abbreviation or acronym provided that the separate segregated fund uses both  
9 the abbreviation (or acronym) and the full official name in its Statement of Organization,  
10 in all reports filed by the fund, and in all disclaimer notices. 11 CFR 102.14(c); see also  
11 Advisory Opinions 1993-7, and 1987-26.

12 Under the Act, a corporation, or a separate segregated fund established by a  
13 corporation, may solicit contributions to such a fund from its stockholders and their  
14 families and its executive and administrative personnel and their families. 2 U.S.C.  
15 §441b(b)(4)(A). Commission regulations define executive or administrative personnel as  
16 "individuals employed by a corporation .... who are paid on a salary rather than hourly  
17 basis and who have policymaking, managerial, professional, or supervisory  
18 responsibilities." 11 CFR 114.1(c). Individuals paid on a commission basis may be  
19 considered executive or administrative personnel if they have policymaking, managerial,  
20 professional, or supervisory responsibility and "if the individuals are employees, within  
21 the meaning of 26 CFR 31.3401(c)-1 of the corporation for the purpose of income  
22 withholding tax on employee wages under the Internal Revenue Code of 1954, § 3402."  
23 11 CFR 114.1(c)(3).

1           A corporation, subject to the Act and Commission regulations, may also make  
2 two written contribution solicitations a year to all of its employees and their families for  
3 contributions to its separate segregated fund. It does not matter whether these employees  
4 are stockholders or executive or administrative personnel. 2 U.S.C. §441b(b)(4)(B) and  
5 11 CFR 114.6.

6 ***APPLICATION TO EQUI-PAC PROPOSAL***

7 ***Committee name***

8           The Commission concludes that the Committee may change its official name to  
9 Equitable Life Assurance Society Political Action Committee with one modification. As  
10 the above regulations indicate, the Committee is required include in its official name the  
11 full name of its connected organization. Since the complete name of its connected  
12 organization is Equitable Life Assurance Society of the United States, under 2 U.S.C.  
13 §432(e)(5); and 11 CFR 102.14(c), it must use that complete name in its official name for  
14 its separate segregated fund.<sup>3</sup> Regarding the Committee's continued use of the PAC  
15 acronym "EQUI-PAC," an examination of the web site maintained by Equitable Life  
16 indicates use of the abbreviation EQUI which is also part of a company trademark. In  
17 this situation, the appearance of this abbreviation in public materials supports the claim  
18 that the acronym is clearly recognized within the meaning of 11 CFR 102.14(c).<sup>4</sup> On this  
19 basis the Commission concludes that Equitable Life Assurance Society of the United  
20 States PAC may use EQUI-PAC as a PAC abbreviation.

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<sup>3</sup> This is consistent with the result reached by the Commission in Advisory Opinions 1993-7 and 1987-26.

<sup>4</sup> See Advisory Opinion 1987-26.

1 *Solicitation of insurance agents*

2           The Commission concludes that insurance agents of Equitable Life may not be  
3 solicited for contributions to EQUI-PAC as members of its executive and administrative  
4 class. As the facts indicate, while these individuals do receive benefits from Equitable  
5 Life and are subject to FICA, they are not subject to income tax withholding by the  
6 company. Commission regulations provide that an individual who is paid on a  
7 commission basis may be considered an employee of the corporation only if income taxes  
8 must be withheld from that person's wages by the corporation. 11 CFR 114.1(c)(3).<sup>5</sup>

9           With regard to solicitation under the twice yearly provisions of 11 CFR 114.6(a),  
10 neither the Act, nor Commission regulations contain a general definition of employee.  
11 However, the analysis above regarding the status of the requester's insurance agents as  
12 employees for purposes of the tax code is relevant. The Commission notes, that for  
13 purposes of section 114.1(c)(3), reference to the status of these individuals as  
14 "employees" under the tax code was adopted to provide a reliable determination as to  
15 whether a person associated with a company was an employee. See Federal Election  
16 Commission Regulations, Explanation and Justification, House Document No. 95-44, at

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<sup>5</sup> The Commission notes the distinction you draw between the situation of the insurance agents associated with Equitable Life and agents associated with another insurance company in a prior advisory opinion, Advisory Opinion 1980-1. You point out that, unlike the situation in Advisory Opinion 1980-1, payments for FICA are withheld. Further, the opportunity is given to Equitable Life agents to participate in Equitable Life's benefit programs. Regarding FICA coverage, the Commission notes, as your request recognizes, that insurance companies are specifically required under 26 U.S.C. §3121 to withhold FICA payments for agents associated with the companies. Full time insurance agents are defined as employees for purposes of FICA under 26 U.S.C. §3121(d)(3)(B). This statutory inclusion was inserted when the FICA statutory framework was created since, absent an express inclusion, most courts using common law would have probably held, as they have with various state insurance statutes, that commissioned insurance agents are not employees, but are independent contractors. See Peter G. Guthrie, Annotation, *Insurance Agents or Salesmen as within coverage of Social Security or Unemployment Compensation Acts*, 39 A.L.R. 3<sup>rd</sup> 872 (1972). See also discussion below. Therefore, while the corporation's obligation to withhold FICA

1 63 (1977).<sup>6</sup> Therefore, since Equitable Life's agents are not subject to Federal income tax  
2 withholding and would not be considered employees for purposes of the Internal Revenue  
3 Code, the Commission likewise concludes that these individuals would not be considered  
4 employees of Equitable Life for purposes of the Act and Commission regulations. See 2  
5 U.S.C. §441b(b)(4)(B) and 11 CFR 114.6(a). Accordingly, EQUI-PAC and Equitable  
6 Life may not solicit its insurance agents under the twice yearly solicitation procedures for  
7 non-executive employees pursuant to 11 CFR 114.6(a).<sup>7</sup>

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

11 Sincerely,

12  
13 Scott E. Thomas  
14 Chairman  
15

16 Enclosures (AOs 1998-12, 1996-10, 1994-36, 1993-7, 1987-26 and 1980-1)

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payments for its insurance agents was not noted in Advisory Opinion 1980-1, considering the above statutory requirement, it was nonetheless present.

<sup>6</sup> Where courts have examined an employer's decision not to withhold income taxes, the analysis has often turned on whether the purported employee met the common law definition of employee. See, for example, *REAG, Inc. v. United States*, 801 F. Supp. 494 (W.D. Okla., 1992) (IRS employee determination overturned) and *Titanium Ores Corp. v. United States*, 205 F. Supp 606 (DC Md., 1962) (IRS employee determination upheld).

<sup>7</sup> You have provided information indicating that Equitable Life's agents may purchase stock in Equitable Life and may also acquire such stock through their participation the company's 401(k) retirement plan. Although you have not raised this issue in your request, the Commission notes that any agent who directly owns stock in Equitable Life may be solicited as a stockholder under 2 U.S.C. §441b(b)(4)(A), if the agent meets the definition of stockholder at 11 CFR 114.1(h). Furthermore, agents who own stock through participation in Equitable Life's retirement program may also be solicited, if they meet other requirements. See Advisory Opinions 1998-12, 1996-10 and 1994-36.