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September 15, 1999

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BY HAND

Lawrence M. Noble, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

AOR 1999-28

Dear Mr. Noble:

On behalf of our client Bacardi-Martini USA, Inc., a Delaware corporation with its principal place of business in Florida ("BMUSA"), and pursuant to 2 U.S.C. § 437f, we request an advisory opinion from the Federal Election Commission on the questions set forth below.

BMUSA previously submitted this request to the Commission last year. Although the Commission staff submitted a draft Advisory Opinion (attached as Exhibit A) agreeing with BMUSA's reading of the statute and regulations, the Commission deadlocked by a vote of 2-2 on the issues raised. Commissioners Elliott and Aikens supported the staff's recommendation; Commissioners McDonald and Thomas opposed that recommendation based on their longstanding disagreement with Commission precedent allowing United States subsidiaries of foreign corporations to establish separate segregated funds;

Lawrence M. Noble, Esq.
September 15, 1999
Page 2

Commissioner McGarry did not participate; and one seat was vacant. Recognizing that the Commission now has a full complement of six Commissioners, BMUSA is resubmitting its request.

The questions presented by this request are as follows:

1. May a wholly owned domestic subsidiary of a foreign corporation treat the eligible officers, directors and administrative personnel of other wholly owned domestic subsidiaries of the same foreign parent as part of its own restricted class, for purposes of --
 - (a) allowing unrestricted communications by that subsidiary to the restricted classes of the other domestic subsidiaries pursuant to 11 C.F.R. § 114.1(a)(2)(i); and
 - (b) soliciting contributions to that subsidiary's separate segregated fund?

2. Are the eligible stockholders, officers, directors, and administrative personnel of a foreign parent corporation deemed to be part of the restricted class of its wholly owned domestic subsidiary for purposes of --
 - (a) allowing unrestricted communications by that subsidiary to the eligible stockholders, officers, directors, and administrative personnel of the foreign parent pursuant to 11 C.F.R. § 114.1(a)(2)(i); and
 - (b) soliciting contributions to that subsidiary's separate segregated fund?

I. Background.

Bacardi Limited, a Bermuda corporation, is the sole stockholder (either directly or through a wholly owned

Lawrence M. Noble, Esq.
September 15, 1999
Page 3

subsidiary) of several companies that are incorporated and have their principal places of business in the United States. In addition, many of Bacardi Limited's stockholders, officers, directors, and administrative personnel are United States citizens or permanent resident aliens eligible to make contributions for the purpose of influencing federal elections.

Several years ago, BMUSA created a separate segregated fund ("BAC-PAC") pursuant to 2 U.S.C. § 441b. Commission precedent is clear that a United States subsidiary of a foreign corporation may establish, maintain, and operate a separate segregated fund if the subsidiary engages in bona fide revenue generating activities in the United States and if officers and eligible employees of the domestic subsidiary, rather than the foreign parent, control the activities of the separate segregated fund. See, e.g., Adv. Op. No. 1978-21, Fed. Election Camp. Fin. Guide Transfer Binder (CCH) ¶ 5327; Adv. Op. No. 1989-29, Fed. Election Camp. Fin. Guide Transfer Binder (CCH) ¶ 5976; Adv. Op. No. 1995-15, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 6152. BMUSA complies with these guidelines, and takes reasonable steps to ensure that it solicits only United States citizens or permanent legal residents actually living in the United States at the time of the solicitation.

Lawrence M. Noble, Esq.
September 15, 1999
Page 4

BMUSA asks whether it and BAC-PAC may communicate on any subject with and solicit funds from the restricted classes of the other United States-based and United States-incorporated subsidiaries of Bacardi Limited; and whether it may communicate on any subject with and solicit funds from the stockholders, officers, directors, and administrative personnel of its parent, Bacardi Limited, to the extent such individuals are otherwise eligible to contribute.

**II. Communications with and Solicitations of
Restricted Classes of United States Subsidiaries
of Bacardi Limited.**

The Federal Election Commission has stated that:

a corporation may make communications to and solicit the restricted class (i.e., executive and administrative personnel and stockholders, and the families thereof) of its subsidiaries or other affiliates for contributions to the corporation's separate segregated fund. 2 U.S.C. § 441b(b)(2)(A) and (4)(A)(i); 11 C.F.R. 114.3(a)(1) and 114.5(g)(1).

Adv. Op. No. 1997-13, 1 Fed. Election Camp. Fin. Guide (CCH)

¶ 6241 (emphasis added). Therefore, if BMUSA is affiliated with the other United States subsidiaries of Bacardi Limited, BMUSA may solicit the restricted classes of these affiliates for contributions to BAC-PAC. Further, if BMUSA as an affiliated entity can directly ask for contributions to BAC-PAC -- the part

Lawrence M. Noble, Esq.
September 15, 1999
Page 5

of the federal election process most regulated by the F.E.C.A. -
- then logically BMUSA should be allowed to communicate with
these same individuals on any subject, within the meaning of 11
C.F.R. § 114.1(a)(2)(i).

As a matter of corporate law, wholly owned
subsidiaries of the same parent obviously are affiliated; but
neither the Federal Election Campaign Act nor the Commission's
regulations directly define affiliate status for corporations.
Nevertheless, the Commission's regulations at 11 C.F.R.
§§ 110.3(a) and 100.5(g) address whether two separate segregated
funds are affiliated by examining the relationship between the
two sponsoring corporations of the funds. Thus, in practical
effect, these regulations simultaneously (i) define whether two
separate segregated funds are affiliated and (ii) as the
Commission has stated, "provide for an examination
of . . . whether one entity (such as a corporation) is an
affiliate of another" Adv. Op. No. 1996-50, 1 Fed.
Election Camp. Fin. Guide (CCH) ¶ 6228.

Under several of the factors examined by the
Commission - in particular overlapping officers and directors,
similar contribution patterns, and an overlapping shareholder
base - all U.S. subsidiaries of Bacardi Limited are affiliates.

Lawrence M. Noble, Esq.
September 15, 1999
Page 6

11 C.F.R. §§ 100.5(g)(4)(ii)(E) and (J); Adv. Op. No. 1996-42, 1
Fed. Election Camp. Fin. Guide (CCH) ¶ 6225. Commission
regulations also state that separate segregated funds
established by a single corporation or its subsidiaries are
affiliated. 11 C.F.R. §§ 110.3(a)(2)(i); 100.5(g)(3)(i)
(emphasis added). Bacardi Limited is the sole controlling
stockholder of all its United States subsidiaries. If other
domestic subsidiaries of Bacardi Limited were to establish their
own separate segregated funds, they would doubtless be deemed
affiliates of BAC-PAC and all these separate segregated funds
would be treated as a single fund. As a result, BMUSA is
"affiliated" with all the other United States subsidiaries of
Bacardi Limited, since BAC-PAC would be affiliated with any
separate segregated fund of any such subsidiary.

The logic is compelling that BAC-PAC should be
considered the separate segregated fund for all domestic
subsidiaries of Bacardi Limited, and therefore BMUSA should be
allowed to solicit contributions from, and freely communicate
with, the restricted class of each of those domestic
subsidiaries.

Lawrence M. Noble, Esq.
September 15, 1999
Page 7

**III. Communications with and Solicitations of
Stockholders, Officers, Directors and
Administrative Personnel of Bacardi Limited.**

Bacardi Limited is a foreign principal, and as such it may not provide anything of value in connection with a United States election, or directly or indirectly participate in the decision-making processes of a separate segregated fund.

2 U.S.C. § 441e; 22 U.S.C. § 611(b); 11 C.F.R. § 110.4(a)(2).

Therefore, a foreign corporation probably may not create, or provide the administrative costs for, a separate segregated fund of its own. Adv. Op. No. 1982-34, Fed. Election Camp. Fin. Guide Transfer Binder (CCH) ¶ 5678. Accordingly, Bacardi Limited has no separate segregated fund, and does not directly or indirectly participate in the decision-making process of BAC-PAC.

Nevertheless, domestic subsidiaries of foreign corporations may form separate segregated funds, under conditions which have been set forth by the Commission and followed strictly by BAC-PAC. See, e.g., Adv. Op. No. 1990-8, Fed. Election Camp. Fin. Guide Transfer Binder (CCH) ¶ 5986. In compliance with these rules, neither Bacardi Limited nor any other foreign national directs or controls the selection of BAC-PAC personnel, or the actions or policies of BAC-PAC.

Lawrence M. Noble, Esq.
September 15, 1999
Page 8

Even though BAC-PAC may not be controlled by or receive financial support from Bacardi Limited, any stockholder, officer, director, or administrator of Bacardi Limited who is a United States citizen or a permanent resident alien has a personal right to make contributions to federal candidates and parties, subject to the limits of the F.E.C.A. Prior advisory opinions have not addressed whether the foreign status of a corporate parent entity prevents otherwise permissible communications by a domestic subsidiary to the stockholders, officers, directors, or administrative personnel of the parent. It is clear, however, that domestic parent corporations and their separate segregated funds may solicit eligible employees of foreign affiliates, and a foreign subsidiary of a domestic corporation may even "pay the administrative costs of providing payroll deduction for its eligible United States citizen employees." Adv. Op. No. 1982-34, Fed. Election Camp. Fin. Guide Transfer Binder (CCH) ¶ 5678. The Commission has even permitted a separate segregated fund to solicit from eligible contributors who worked for foreign franchisees of the fund's domestic sponsoring organization. Adv. Op. No. 1992-7, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 6051.

Lawrence M. Noble, Esq.
September 15, 1999
Page 9

The Commission has made clear that separate segregated funds may solicit eligible employees of foreign affiliated entities. There is no policy rationale for a different result simply because the foreign affiliate is the parent, rather than the subsidiary. BMUSA and BAC-PAC plan to solicit from and communicate with stockholders, officers, directors, and administrators of Bacardi Limited that they have confirmed to be eligible to contribute either as permanent resident aliens currently residing in the United States, or as United States citizens. As a result, there will be no illegal solicitation of or contribution by foreign nationals.

Given these facts, the policy implicated by the solicitation of the Bacardi Limited stockholders, officers, directors, and administrative personnel eligible to contribute is not the ban on foreign contributions, since no ineligible individuals will be solicited. Rather, it is the requirement that corporations solicit only from a limited class of persons. In that regard, there is no prohibition on soliciting the restricted class of the parent for contributions to a subsidiary's separate segregated fund. The Commission has stated explicitly that "corporate affiliates would also include the parent corporation of a subsidiary that established a

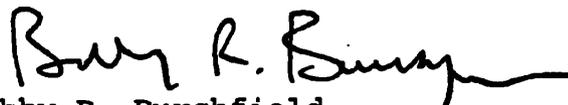
Lawrence M. Noble, Esq.
September 15, 1999
Page 10

separate segregated fund"; and that "a corporation may . . . solicit the stockholders or their families of . . . its parent corporation." Adv. Op. No. 1983-49, Fed. Election Camp. Fin. Guide Transfer Binder (CCH) ¶ 5749; Adv. Op. No. 1994-27, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 6127.

Therefore, BMUSA should be permitted to solicit from and freely communicate with the stockholders, officers, directors, and administrative personnel of Bacardi Limited. Moreover, as set out in Section II, the individuals who can be asked to contribute should be deemed to be part of BMUSA's restricted class, thereby allowing communications to these individuals on any subject, within the meaning of 11 C.F.R. § 114.1(a)(2)(i).

Thank you for your prompt attention to this advisory opinion request. Should you need any additional information, please do not hesitate to contact us.

Respectfully submitted,



Bobby R. Burchfield
Robert K. Kelner

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COMMISSION
SECRETARY

APR 23 12 00 PM '98



FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 23, 1998

MEMORANDUM

AGENDA ITEM
For Meeting of: 4-30-98

TO: The Commission

THROUGH: John C. Surina *John C. Surina*
Staff Director

FROM: Lawrence M. Noble *Lawrence M. Noble*
General Counsel

N. Bradley Litchfield *N. Bradley Litchfield*
Associate General Counsel

Jonathan M. Levin *JM 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

FEDERAL
COMMISSION
ON
ELECTIONS
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)(i).

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.

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

10 Under 2 U.S.C. §441e, foreign nationals who are shareholders, or executive or
11 administrative employees of BL or its subsidiaries, or family members thereof, may
12 neither make contributions to BAC-PAC nor be solicited for such contributions.
13 However, the Commission has made clear that those individuals in the restricted class
14 who are employed by foreign national corporations, but who are not foreign nationals,
15 may be solicited for contributions to the SSF of a domestic parent. Advisory Opinions
16 1992-7 and 1982-34; see also Advisory Opinion 1979-59.

17 There is no different result if the recipient SSF is established and administered by
18 a domestic subsidiary. As indicated above, a domestic subsidiary may establish and
19 administer an SSF subject to certain conditions. Moreover, the above-cited Commission
20 regulations provide for affiliation among all of a corporation's subsidiaries, and
21 Commission opinions have long held that solicitation rights do not move merely in one
22 direction, e.g., parent to subsidiary. 11 CFR 100.5(g)(3)(i) and 110.3(a)(2)(i); Advisory
23 Opinions 1994-27, 1994-11, n.2, 1987-34, and 1982-18. Of particular relevance is
24 Advisory Opinion 1982-18, where the Commission held that the SSF of a subsidiary
25 corporation could solicit contributions from the parent's shareholders (and their families)
26 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