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FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 21, 1999

MEMORANDUM

AGENDA ITEM

For Meeting of: 10-28-99

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

SUBJECT: Draft AO 1999-28

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 28, 1999.

Attachment

1 ADVISORY OPINION 1999-28

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

DRAFT

8
9 Dear Mr. Burchfield:

10
11 This responds to your letter dated September 15, 1999, on behalf of Bacardi-
12 Martini, USA, Inc. ("BMUSA"), requesting an advisory opinion concerning the
13 application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and
14 Commission regulations to contribution solicitations and election influencing
15 communications that are directed to certain employees of a foreign corporation and its
16 subsidiaries in the United States.

17 BMUSA is a Delaware corporation with its principal place of business in Florida.
18 Its corporate parent is Bacardi Limited ("BL"), a Bermuda corporation, and thus a
19 "foreign principal," as you so state. BL is the sole stockholder (either directly or through
20 a wholly owned subsidiary) of several companies, including BMUSA, that are
21 incorporated and have their principal places of business in the United States. In addition,
22 many of BL's stockholders, officers, directors, and administrative personnel are United
23 States citizens or permanent resident aliens of the United States.

24 Several years ago, BMUSA created a separate segregated fund that is currently
25 registered as the Bacardi-Martini USA, Inc. Political Action Committee ("BAC-PAC").
26 You indicate that no foreign national, including BL, directs or controls the selection of
27 BAC-PAC personnel, or the actions or policies of the committee. Furthermore, you state
28 that BL does not directly or indirectly participate in the decision-making process of BAC-
29 PAC. In addition, you explain that BMUSA "takes reasonable steps to ensure that it
30 solicits only United States citizens or permanent legal residents actually living in the
31 United States at the time of the solicitation [for contributions to BAC-PAC]."

32 Given these factual circumstances, BMUSA asks two questions:

1 (1) May BMUSA communicate election-related messages to, and solicit contributions to
2 BAC-PAC from, the restricted classes of "the other United States-based and United
3 States-incorporated subsidiaries" of BL?

4 (2) May BMUSA communicate election-related messages to, and solicit contributions to
5 BAC-PAC, from the stockholders, officers, directors, and administrative personnel of its
6 parent, BL, to the extent such persons are otherwise eligible to contribute?

7 The Act and Commission regulations prohibit a foreign national from making a
8 contribution, directly or through any other person, or an expenditure in connection with
9 an election to any political office. In addition, it is unlawful to solicit, accept, or receive a
10 contribution from a foreign national. 2 U.S.C. §441e(a); 11 CFR 110.4(a)(1) and (2). As
11 defined in the Act, the term "person" includes a corporation. 2 U.S.C. §431(11). Unlike
12 most of the other provisions of the Act, section 441e applies to any election for any
13 political office, including state and local offices. *United States v. Kanchanalak*, Nos. 99-
14 3019 & 99-3034, 1999 WL 798065, at *9-10 (D.C. Cir. Oct. 8, 1999) [concluding that
15 Commission interpretations of 2 U.S.C. §441e in both its regulations and an advisory
16 opinion have "consistently interpreted §441e as applicable to federal, state, and local
17 elections since 1976."]

18 The term "foreign national" includes a "foreign principal" as defined by 22 U.S.C.
19 §611(b), but does not include any citizen of the United States. 2 U.S.C. §441e(b)(1); 11
20 CFR 110.4(a)(4)(i) and (iii). Section 611(b) defines a "foreign principal" as including:

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

22
23 (2) a person outside of the United States, unless it is established that such
24 person is an individual and a citizen of and domiciled within the United
25 States, or that such person is not an individual and is organized under or
26 created by the laws of the United States or of any State or other place
27 subject to the jurisdiction of the United States and has its principal place of
28 business within the United States; and

29
30 (3) a partnership, association, corporation, organization, or other
31 combination of persons organized under the laws of or having its principal
32 place of business in a foreign country.
33

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

4 Under 22 U.S.C. §611(b), a corporation organized under the laws of any State
5 within the United States, with its principal place of business within the United States, is
6 not a foreign principal. Accordingly, such an entity would not be a foreign national under
7 2 U.S.C. §441e. The Commission has applied section 441e to bar foreign national
8 entities from establishing or administering political committees. Advisory Opinion 1977-
9 53; see also 2 U.S.C. §§431(7) and 441b(b)(2)(C); 11 CFR 100.6 and 114.1(a)(2)(iii).
10 However, as a discrete corporate entity organized under the laws of the State of Delaware
11 and maintaining its principal place of business in Florida, BMUSA is not a foreign
12 principal; therefore, it would not be a foreign national under 2 U.S.C. §441e. Thus,
13 BMUSA may serve as a connected organization for BAC PAC, subject to the conditions
14 set out in Commission regulations and as applied in prior opinions. 11 CFR 110.4(a); see
15 Advisory Opinions 1995-15 and 1990-8.¹

16 The Act prohibits corporations from making any contribution or expenditure in
17 connection with a Federal election. 2 U.S.C. §441b(a). An exception to the prohibition
18 provides that a corporation or its separate segregated fund ("SSF") may solicit
19 contributions to the SSF from a restricted class of persons. 2 U.S.C. §441b(b)(4)(A)(i);
20 11 CFR 114.5(g)(1). A corporation's restricted class consists of its executive and
21 administrative personnel and stockholders, and the families of those persons. 11 CFR
22 114.5(g)(1) and 114.1(j). This class also extends to the executive and administrative
23 personnel of the corporation's subsidiaries, branches, divisions, and affiliates, and the
24 families of such persons. *Id.* Moreover, a corporation may make communications on any

¹ In this regard, Commission regulations, at 11 CFR 110.4(a)(3), are applicable to 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.

See Advisory Opinions 1995-15 and 1990-8 for an application of these restrictions.

1 subject, including communications containing express advocacy, to this same group of
2 persons. 2 U.S.C. §441b(b)(2)(A); 11 CFR 114.3(a) and 114.1(j); see also Federal
3 Election Commission Regulations, *Explanation and Justification*, 60 Fed. Reg. 64262-3
4 (December 14, 1995).

5 Criteria and factors set out in the Act and Commission regulations that govern
6 whether the SSFs of discrete organizations are affiliated are also used to determine
7 whether corporations are affiliates of each other.² See Advisory Opinions 1996-50 and
8 1988-14. Committees, including SSFs, that are established, financed, maintained or
9 controlled by the same corporation, person, or group of persons, including any parent,
10 subsidiary, branch, division, department, or local unit thereof, are affiliated. 2 U.S.C.
11 §441a(a)(5); 11 CFR 100.5(g)(2) and 110.3(a)(1)(ii). According to Commission
12 regulations, the committees of a parent corporation and its subsidiaries are affiliated with
13 each other *per se*. 11 CFR 100.5(g)(3)(i) and 110.3(a)(2)(i); see also Advisory Opinion
14 1990-10. Hence, BMUSA is affiliated with all of BL's subsidiaries, as well as with its
15 parent, BL. See, for example, Advisory Opinions 1994-27 and 1982-18.

16 Under 2 U.S.C. §441e, a foreign national who is a shareholder, or an executive
17 or administrative employee of BL or its subsidiaries, or a family member of such a
18 person, may not make contributions to BAC-PAC nor be solicited for such contributions.
19 However, the Commission has made clear that those individuals in the restricted class
20 who are employed by foreign national corporations, but who are not foreign nationals,
21 may be solicited for contributions to the SSF of a domestic parent. Advisory Opinions
22 1992-7 and 1982-34.

23 There is no different result if the recipient SSF is established and administered by
24 a domestic subsidiary. As indicated above, a domestic subsidiary may establish and
25 administer an SSF subject to certain conditions. Moreover, the above-cited Commission
26 regulations provide for affiliation among all of a corporation's subsidiaries, and
27 Commission opinions have long applied these regulations in a manner that recognizes

² 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

1 that solicitation rights do not move merely in one direction, e.g., parent to subsidiary. 11
2 CFR 100.5(g)(3)(i) and 110.3(a)(2)(i); Advisory Opinions 1994-27, 1994-11, n.2, 1987-
3 34, and 1982-18. Of particular relevance is Advisory Opinion 1982-18, where the
4 Commission held that the SSF of a subsidiary corporation could solicit contributions
5 from the parent's shareholders (and their families) and the executive and administrative
6 personnel (and their families) of the parent and the parent's other subsidiaries. Hence,
7 BMUSA may solicit contributions to BAC-PAC from the stockholders of BL and from
8 executive and administrative personnel, and the families thereof, of BL and of any United
9 States subsidiary of BL, so long as those individuals are not foreign nationals. In view of
10 the ability of a corporation with capital stock (not a trade association or other form of
11 nonstock corporation) to distribute election influencing communications to the same
12 personnel group that may be solicited for contributions to the SSF, BMUSA may also
13 communicate election messages to the foregoing group of individuals.

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

17 Sincerely,

18
19 Scott E. Thomas
20 Chairman

21
22 Enclosures (AOs 1996-50, 1995-15, 1994-27, 1994-11, 1992-7, 1990-10, 1990-8,
23 1988-14, 1987-34, 1982-18, and 1977-53)