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FEDERAL ELECTION COMMISSION
Washington, DC 20463

Dec 6 2 47 PM '00

December 6, 2000

AGENDA ITEM
For Meeting of: 12-14-00

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence M. Noble *LMN (RCS)*
General Counsel

N. Bradley Litchfield *NBL (RCS)*
Associate General Counsel

Jonathan M. Levin *JL*
Senior Attorney

Subject: Draft AO 2000-36

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for December 14, 2000.

Attachment

1 ADVISORY OPINION 2000-36

2
3 John C. Keeney, Jr.
4 Hogan & Hartson, LLP
5 Columbia Square
6 555 Thirteenth Street, N.W.
7 Washington, D.C. 20004-1109

DRAFT

8
9 Dear Mr. Keeney:

10 This responds to your letters dated October 26 and November 30, 2000, on behalf
11 of Andersen Consulting PAC ("ACPAC"), requesting an advisory opinion concerning the
12 application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and
13 Commission regulations to ACPAC's proposed disaffiliation from Arthur Andersen PAC
14 ("AAPAC").

15 ***Background and Question***

16 ACPAC is a multicandidate political committee maintained and controlled by the
17 partners of Andersen Consulting LLP ("AC"), the U.S. entity among 44 Andersen
18 Consulting firms worldwide. AAPAC is a multicandidate political committee maintained
19 and controlled by the partners of Arthur Andersen LLP ("AA"), the U.S. entity among 93
20 Arthur Andersen firms worldwide. AAPAC filed its statement of organization with the
21 Commission on January 15, 1988. On January 19, 1995, the treasurer of AAPAC, then
22 known as Arthur Andersen/Andersen Consulting PAC, filed an amended statement of
23 organization to change its name to Arthur Andersen PAC, along with a statement of
24 organization for the new PAC, Andersen Consulting PAC. The statement of organization
25 of each PAC disclosed the other PAC as an affiliated committee.¹ The two PACs have
26 operated as separate but affiliated PACs since January 1995. Since 1998, ACPAC has
27 solicited individual contributions solely from the partners of AC, and AAPAC has
28 solicited contributions solely from the partners of AA.

29 You have attached a decision and order of the Secretariat of the International
30 Court of Arbitration, International Chamber of Commerce (dated July 28, 2000), which,
31 you state, "confirm[s] the final separation of Andersen Consulting LLP and Arthur

¹ On the date of those filings, AAPAC, in effect, split into two PACs, with AAPAC providing the initial funding for ACPAC via a \$29,670 transfer.

1 Andersen in all respects.” You state that the effective date of the order was August 7,
2 2000. The decision describes the history of the worldwide Arthur Anderson organization
3 and its relationship to Andersen Consulting worldwide, a relationship that was terminated
4 by the decision. In 1977, Arthur Andersen & Company created a new structure, the
5 Andersen Worldwide Organization (“AWO”) which was designed to “maintain the one
6 firm concept” for all the Arthur Andersen partnerships throughout the world. The AWO
7 is comprised of a Swiss cooperative entity, Arthur Andersen & Co. Societe Cooperative
8 (“AWSC”) which acts as the “umbrella” entity for the organization, the AWO member
9 firms, and the partners. AWSC has been the entity that coordinates the professional
10 practices of the partners on a worldwide basis, and the instrumentality for partners to
11 participate in shaping and implementing the reciprocal commitment of resources and the
12 coordination of common efforts. Each member firm (and its partners) enters into a
13 Member Firm Interfirm Agreement (“MFIFA”) with AWSC in which it agrees to adhere
14 to certain standards coordinated by AWSC, adopt compatible policies, and carry out
15 certain other responsibilities.

16 Andersen Consulting had its origins in the Management Information Consulting
17 Division of the Arthur Andersen organization. In 1989, the organization split into two
18 different business units, Arthur Andersen, which would conduct audit, tax, and other
19 financial and specialty services, and Andersen Consulting, which would conduct
20 strategic services, systems integration, and other management consulting. The Andersen
21 Consulting firms, like the Arthur Andersen firms, became AWO member firms, entered
22 into MFIFAs with AWSC, and were under the coordinating umbrella of AWSC.

23 Due to disagreements between the business units, including what Andersen
24 Consulting considered to be unacceptable overlap in the consulting business, Andersen
25 Consulting filed for arbitration in December 1997. Citing the “Award” section, you note
26 that the arbitration order, *inter alia*: (1) excused AC (and the other 43 Anderson
27 Consulting entities outside the U.S.) from any further obligations to AWSC (and thus to
28 any Arthur Andersen member firm, including AA) under the MFIFAs; (2) ordered that
29 AC (and its sister entities) “cease to represent themselves as associated” with any Arthur
30 Andersen member firm and discontinue use of the Andersen name later than December

1 31, 2000; and (3) ordered that AC (and its sister entities) end their use of certain
2 "Andersen technology."

3 You state that the separation of the Andersen Consulting business unit from the
4 Arthur Andersen unit is final, and you note that the time for appealing the order has
5 expired. You also state that AC "is no longer connected with [AA] in any way." Based
6 on the effect of the arbitration order and facts described below related to affiliation
7 factors listed in Commission regulations, you ask that the Commission conclude that the
8 two PACs are no longer affiliated as of the effective date of the arbitration order,
9 August 7, 2000.

10 *Applicable Law and Regulations*

11 The Act and Commission regulations provide that committees, including separate
12 segregated funds, that are established, financed, maintained or controlled by the same
13 corporation, person, or group of persons, including any parent, subsidiary, branch,
14 division, department, or local unit thereof, are affiliated. Contributions made to or by
15 such committees shall be considered to have been made to or by a single committee and
16 thus such committees share contribution limits. 2 U.S.C. §441a(a)(5); 11 CFR
17 100.5(g)(2), 110.3(a)(1), and 110.3(a)(1)(ii). Moreover, transfers between affiliated
18 committees are not limited by 2 U.S.C. §441a. 11 CFR 102.6(a)(1). Commission
19 regulations denote categories of sponsoring entities whose political committees would be
20 affiliated *per se*. These include (i) a single corporation and/or its subsidiaries; and (v) the
21 same person or group of persons. 11 CFR 100.5(g)(3)(i) and (v), 110.3(a)(2)(i) and (v);
22 *see* Advisory Opinion 1997-25.

23 Where entities do not readily fit into a *per se* category, Commission regulations
24 provide for an examination of various factors in the context of an overall relationship to
25 determine whether one company is an affiliate of another and, hence, whether the
26 political committees controlled by the companies or their principals are affiliated with
27 other. 11 CFR 100.5(g)(4)(i) and (ii)(A)-(J), and 110.3(a)(3)(i) and (ii)(A)-(J). The same
28 examination of factors may be done for the relationships between the committees

1 themselves.² As discussed below, the relevant factors in the situation you have presented
2 are as follows: (A) whether a sponsoring organization owns a controlling interest in the
3 voting stock or securities of another sponsoring organization; (B) whether a sponsoring
4 organization or committee has the authority or ability to direct or participate in the
5 governance of another sponsoring organization or committee through provisions of
6 constitutions, by-laws, contracts or other rules, or through formal or informal practices or
7 procedures; (C) whether a sponsoring organization or committee has the authority or
8 ability to hire, appoint, demote or otherwise control the officers, or other decisionmaking
9 employees of another sponsoring organization or committee; (E) whether a sponsoring
10 organization or committee has common or overlapping officers or employees with
11 another sponsoring organization or committee which indicates a formal or ongoing
12 relationship between the organizations; (F) whether a sponsoring organization or
13 committee has any members, officers, or employees who were members, officers, or
14 employees of another sponsoring organization or committee which indicates a formal or
15 ongoing relationship or the creation of a successor entity; (G) whether a sponsoring
16 organization or committee provides goods in a significant amount or on an ongoing basis
17 to another sponsoring organization or committee; (H) whether a sponsoring organization
18 or committee causes or arranges for funds in a significant amount or on an ongoing basis
19 to be provided to another sponsoring organization or committee; (I) whether a sponsoring
20 organization or committee had an active or significant role in the formation of another
21 sponsoring organization or committee; and (J) whether the sponsoring organizations or
22 committees have similar patterns of contributions or contributors which indicates a
23 formal or ongoing relationship. 11 CFR 100.5(g)(4)(ii) and 110.3(a)(3)(ii). The list of ten
24 circumstantial factors set out at 11 CFR 100.5(g)(4)(ii) and 110.3(a)(3)(ii) is not an
25 exclusive list, and other factors may be considered. *See* Advisory Opinion 1995-36.

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² Specifically, the regulations, at 11 CFR 110.3(a)(3)(ii), state in part:

The Commission will examine these factors in the context of the overall relationship between committees or sponsoring organizations to determine whether the presence of any factor or factors is evidence of one committee or organization having been established, financed, maintained or controlled by another committee or sponsoring organization.

1 *Analysis and Conclusions*

2 In addition to information presented in the arbitration decision and determinations
3 in the order, you present further information about the relationship between the
4 sponsoring organizations and between the PACs. As analyzed under the factors, these
5 facts, along with the decision and order, tend to illustrate a lack of affiliation between
6 ACPAC and AAPAC as of August 7, 2000.

7 Neither partnership owns any financial interest in the other. Each of the
8 partnerships is owned by its individual partners. See 11 CFR 100.5(g)(4)(ii)(A),
9 110.3(a)(3)(ii)(A). Prior to the effective date of the arbitration order, AC and AA were
10 signatories to MFIFAs entered into with the AWSC and were thereby subject to
11 coordination and limited governance by the same body. Such an arrangement may have
12 been, in some way, akin to the relationship of subsidiaries of the same parent entity,
13 although neither partnership was owned by the AWSC. Moreover, because they were
14 participants in that structure, and because there were some member partners who worked
15 directly for AWSC, the two partnerships may also be said to have had some limited role
16 in the governance or decisions of each other's managers. The arbitration order has
17 terminated AC's role within that structure. You also specifically state that no AA partner,
18 nor any Arthur Andersen entity, has the authority or ability to participate in AC's
19 governance; that no partner in AA, nor any Arthur Andersen entity, has personnel
20 authority over any officer of AC; and that AC has no further obligations to any Arthur
21 Andersen entity after August 7 except to change its name and return certain Andersen
22 technology. You state that there is no joint management, control, or operation, and that
23 the governance of each of AC and AA is exclusively by its own partners. With respect to
24 PAC activities, you state that no partner in AA nor any Arthur Andersen entity has
25 personnel authority over any officer of ACPAC or the ability to participate in ACPAC.³
26 See 11 CFR 100.5(g)(4)(ii)(B) and (C), 11 CFR 110.3(a)(3)(ii)(B) and (C).

³ The Commission also assumes that the same is true with respect to personnel authority and governance by partners in AC or any Andersen Consulting entity with respect to AAPAC.

1 You represent that, since August 7, there have been no common partners,
2 officers, or employees between AC and AA, and that the PACs do not share any officers
3 or employees. *See* 11 CFR 100.5(g)(4)(ii)(E), 11 CFR 110.3(a)(3)(ii)(E).

4 From the materials submitted by you, it appears that Andersen Consulting had its
5 origins in Arthur Andersen and, prior to 1989, some current partners of AC were partners
6 in AA. In addition, ACPAC was originally funded by a transfer of \$29,670 from
7 AAPAC in 1995, and the two PACs shared a treasurer, an assistant treasurer, and a PAC
8 Board member until January 1999. Moreover, although the two partnerships themselves
9 have not had an overlap in partners since 1995, partners of one of the two business units
10 who performed functions for AWSC may be considered as having constituted an overlap
11 between AC and AA, and the partners of the two firms were also partners in AWSC.

12 You note, however, that the vestiges of the common historical origin have been severed
13 by the arbitration order. You state that there is no formal or ongoing relationship between
14 AC and AA, and that the only ongoing relationship between ACPAC and AAPAC is the
15 monitoring of expenditures so as not to exceed the single contribution limit shared by
16 affiliated committees. *See* 11 CFR 100.5(g)(4)(ii)(F) and (I), 110.3(a)(3)(ii)(F) and (I).

17 You state that, since August 7, there is no significant transfer of funds, services, or
18 goods between AC and AA, and that "all such non-significant transfers are at arms
19 length." You also state that there is no significant transfer of funds on an ongoing basis
20 among AC, AA, and any particular third party. Commission records indicate that, other
21 than the above-mentioned transfer from AAPAC to ACPAC in January 1995 and a \$336
22 transfer from ACPAC to AAPAC in March 1995, there have been no transfers between
23 the PACs. The arbitration order mandates substantial payments between the Andersen
24 Consulting business unit, the Arthur Andersen business unit, and AWSC for expenses in
25 connection with the arbitration such as court administrative costs, arbitrator's fees and
26 expenses, and costs of the three parties. In a certain respect, some of these payments will
27 be made by and to AC and AA. Nevertheless, these are payments that are made pursuant
28 to the equivalent of a court order that separates AC from AWSC and AA, and are
29 pursuant to the separation process. *See* Advisory Opinion 1996-42 (where the
30 Commission concluded that PACs were disaffiliated even though there were agreements

1 involving the distribution of assets and liabilities and the continuation of a customer-
2 supplier relationship for a specified amount of goods and services); *see also* Advisory
3 Opinions 1996-23 and 1993-23. *See* 11 CFR 100.5(g)(4)(ii)(G) and (H),
4 110.3(a)(3)(ii)(G) and (H).

5 As indicated above, the two PACs have, in some instances, contributed to the
6 same candidates and have monitored such contributions for the purpose of staying within
7 the contribution limits. You also indicate that, since 1998, ACPAC has solicited only AC
8 partners for contributions and AAPAC has solicited only AA partners for contributions.⁴
9 From the circumstances presented, the Commission assumes that the PACs have been
10 administered independently of each other since August 7 and will be in the future, and
11 any similar patterns in the contributions made since that date and in the future are the
12 result of independent judgment. *See* 11 CFR 100.5(g)(4)(J), 110.3(a)(3)(ii)(J).

13 Based on the facts and representations submitted in this request, the application of
14 Commission regulations to them, and the above assumptions, the Commission concludes
15 that ACPAC and AAPAC were no longer affiliated as of August 7, 2000.

16 As multicandidate committees, ACPAC and AAPAC are subject to the limits of 2
17 U.S.C. §441a(a)(2), rather than §441a(a)(1), thus enabling them to contribute \$5,000,
18 rather than \$1,000, to a Federal candidate with respect to an election.⁵ As indicated
19 above, contributions by affiliated committees are aggregated with each other for the
20 purposes of the limits. As a result of the disaffiliation on August 7, 2000, ACPAC and
21 AAPAC will operate under separate limits after that date. Nevertheless, because of their
22 affiliated status before that date, the two committees cannot disregard the other's pre-
23 August 7 contributions for the purpose of complying with the limitations. *See* Advisory
24 Opinions 1997-25 and 1993-23. In determining the amount that a committee may have

⁴ You indicate that, during the years 1995 to 1997, there were 15 partners among the two firms who made contributions in excess of \$200 per year (and therefore, itemized) to both PACs. There have been no itemized common contributors since then.

⁵ Multicandidate committee status, however, limits the committee's contributions to a national party committee to \$15,000 in a calendar year, rather than \$20,000. 2 U.S.C. §441a(a)(1)(B) and (2)(B).

1 given (or may give in the event of debt retirement by the recipient candidate) from
2 August 7 on, the committees must add the amounts given for a particular election before
3 that date and subtract that amount from the limit. For example, if before August 7,
4 ACPAC gave \$1,000 to House Candidate X for the 2000 general election and AAPAC
5 gave \$2,000 to X for the same election, it would follow that, from August 7 on, each can
6 contribute \$2,000 to X for that election. This result stems from the required attribution of
7 a combined \$3,000 contribution to both PACs as a consequence of their affiliation. Post-
8 disaffiliation contributions by each PAC would only be attributed to the committee
9 making the contribution.

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

13 Sincerely,

14
15 Darryl R. Wold
16 Chairman

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18 Enclosures (AOs 1997-25, 1996-42, 1996-23, 1995-36, and 1993-23)
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