

March 25, 2004

NOTICE AO DRAFT COMMENT PROCEDURES

The Commission has approved a revision in its advisory opinion procedures that permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2004-08 is available for public comments under this procedure. It was requested by Paul G. Borron, III (Borron & Delahaye), on behalf of the American Sugar Cane League. The draft may be obtained from the Public Disclosure Division of the Commission.

Proposed Advisory Opinion 2004-08 will be on the Commission's agenda for its public meeting of Thursday April 1, 2004.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (EDT) on March 31, 2004.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case by case basis in special circumstances.

4) All comments timely received will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Disclosure Division.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

**To obtain copy of draft AO 2004-08 contact Public Records Office-
Public Disclosure Division (202) 694-1120, or 800-424-9530.**

**For questions about comment submission procedure contact
Rosemary C. Smith, Associate General Counsel, (202) 694-1650.**

ADDRESSES

Submit single copy of written comments to:

**Commission Secretary
Federal Election Commission
999 E Street NW
Washington, DC 20463**

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FEDERAL ELECTION COMMISSION

Washington, DC 20463

2004 MAR 25 P 4: 22


March 25, 2004


MEMORANDUM


AGENDA ITEM


For Meeting of: 4-01-04


TO: The Commission

THROUGH: James A. Pehrkon 
Staff Director

FROM: Lawrence H. Norton 
General Counsel

Rosemary C. Smith 
Associate General Counsel

Mai T. Dinh 
Acting Assistant General Counsel

Margaret G. Perl 
Attorney

SUBJECT: Draft AO 2004-08- Alternative Drafts

Attached are two proposed drafts of Advisory Opinion 2004-08, which responds to a request from American Sugar Cane League (ASCL), submitted by Paul G. Borron III. ASCL seeks the Commission's determination whether a severance package that it wants to provide to a former executive who is a candidate for Federal office is permissible under the Act or Commission regulations.

Draft A concludes that the severance package would not be permissible because it is compensation provided to the former executive that is not irrespective of his candidacy for Federal office, given the discretionary nature of ASCL's policy pertaining to severance packages. Draft B concludes that ASCL may provide a severance package to its former executive but would limit the package to three months' salary rather than the six months to one year's salary plus benefits that ASCL proposed in its request. On balance, the Office of the General Counsel believes that Draft A is the preferred approach. We request that these drafts be placed on the agenda for April 1, 2004.

Attachments

Drafts A and B

1 **ADVISORY OPINION 2004-08**
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5 **Paul G. Borron, III, Esq.**
6 **Borron & Delahaye**
7 **58065 Meriam Street**
8 **Post Office Drawer 679**
9 **Plaquemine, LA 70765-0679**

10
11 **Dear Mr. Borron:**

12 This responds to your letters dated February 6, 19, and 23, 2004, on behalf of the
13 **American Sugar Cane League ("ASCL")** requesting an advisory opinion concerning the
14 **application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and**
15 **Commission regulations to ASCL's proposed granting of a severance benefits package to a**
16 **former employee who recently resigned his position in order to become a Federal candidate.**

17 ***Background***

18 ASCL is a Louisiana non-profit corporation representing Louisiana sugar cane
19 **growers and processors. ASCL currently employs five people. Your request indicates that**
20 **on February 20, 2004, ASCL's President and General Manager, Charles Melancon,¹**
21 **resigned in order to become a candidate for the U.S. House of Representatives. You state**
22 **that Mr. Melancon had been in that position for approximately 11 years at the time of his**
23 **resignation. ASCL proposes a severance package for Mr. Melancon of full salary for a**
24 **period of six months to one year with the continuation of his health insurance coverage for**
25 **that period.**

¹ Your request does not refer to this former employee by name, however an open letter posted on the ASCL website and public media sources have stated that Charles Melancon, former President and General Manager of ASCL, announced his intention to run as a candidate for the U.S. House of Representatives for the 3rd District in Louisiana. Mr. Melancon filed his Statement of Candidacy and his Statement of Organization with the Commission on February 25, 2004.

1 **You state that ASCL began the practice of offering severance benefits in 1987.**
2 **ASCL has no written policy regarding severance packages for former employees, and no**
3 **formula for the calculation of the benefits to be granted. ASCL does not have a written**
4 **employee handbook and none of its employees, including Mr. Melancon, has a written**
5 **employment agreement. Despite this lack of specific written policies, you state that the**
6 **factors considered in deciding whether to grant a severance package to a former employee,**
7 **and the size of such benefit, are: (1) the position held, (2) the length of time employed, and**
8 **(3) an evaluation of job performance.**

9 **Since 1987, you explain that only 7 employees have terminated employment with**
10 **ASCL. Of those 7 former employees, 4 were granted severance packages. You state that**
11 **each of the former employees granted a severance package was either discharged for cause**
12 **or resigned in lieu of being discharged for cause. You emphasize that Mr. Melancon's**
13 **resignation is voluntary and not the result of any cause for termination.**

14 **The content of these past severance packages vary greatly: a Vice President and**
15 **General Manager with 15 years tenure and an Information Director with 14 years of service**
16 **both received 3 months pay (at the annual rate of \$72,000 and \$40,000, respectively)**
17 **without any continuation of benefits; a former secretary employed for 10 years received 6**
18 **months pay at the annual rate of \$25,000 without any continuation of benefits; and the final**
19 **employee, with a total of 24 years of service including 16 years as Vice President and**
20 **Director of Research, received a much more extensive severance package including one**
21 **year full pay (\$88,690) with one year of health benefits coverage, his company owned**
22 **computer, the option of purchasing his company owned car for "Blue Book" value, and**
23 **ASCL paid for his previously scheduled speaking engagement trip to Australia.**

1 You state that only three other employees have left ASCL since 1987. These three
2 former employees did not receive a severance package of any kind. One former employee
3 retired at age 66 and received retirement benefits from ASCL. The other two employees
4 were each employed for less than one year. You state that one of these employees, a Vice
5 President and General Manager for 11 months, was discharged for cause, but you do not
6 state the circumstances surrounding the departure of the third employee who did not receive
7 a severance benefit.

8 ***Question Presented***

9 May ASCL provide its former President and General Manager severance pay and
10 health insurance benefits for six months to a year without violating the Act's prohibition on
11 contributions by corporations?

12 ***Legal Analysis and Conclusions***

13 ASCL is an incorporated entity and is therefore prohibited from making any
14 "contribution or expenditure" in connection with a Federal election. 2 U.S.C. 441b(a); 11
15 CFR 114.2(b)(1). The term "contribution" is defined in the Act to include "any gift, loan,
16 advance, or deposit of money or anything of value made by any person for the purpose of
17 influencing any election for Federal office." 2 U.S.C. 431(8)(A). Thus, ASCL may only
18 provide Mr. Melancon with the proposed severance package if it does not constitute a
19 contribution under the Act or Commission regulations.

20 Under Commission regulations, payment of compensation for campaign services of
21 an employee, except for certain legal and accounting services, is considered a contribution
22 by the employer. 11 CFR 100.54. However, "No contribution results where the time used
23 by the employee to engage in political activity is *bona fide*, although compensable, vacation

1 time or other earned leave time." 11 CFR 100.54(c). The Act also prohibits the conversion
2 of campaign funds to any personal use. 2 U.S.C. 439a. Under Commission regulations,
3 any third party payment of a candidate expense that would otherwise be paid by personal
4 use funds is considered a contribution unless the payment would have been made
5 "irrespective of the candidacy." 11 CFR 113.1(g)(6).² One of the regulatory examples in
6 this provision specifically addresses payment of compensation:

7 (iii) Payments for that expense were made by the person making the payment before
8 the candidate became a candidate. Payments that are compensation shall be
9 considered contributions unless –

10 (A) The compensation results from *bona fide* employment that is genuinely
11 independent of the candidacy;

12 (B) The compensation is exclusively in consideration of services provided by
13 the employee as a part of this employment; and

14 (C) The compensation does not exceed the amount of compensation which
15 would be paid to any other similarly qualified person for the same work
16 over the same period of time.

17 11 CFR 113.1(g)(6)(iii). ASCL's proposed severance package would be a prohibited
18 corporate contribution to a Federal candidate unless it meets the criteria for something of
19 value given to the candidate "irrespective of the candidacy."

² Commission regulations also prohibit a corporation from paying the employer's portion of fringe benefits, such as health insurance, for employees on leave-without-pay status to participate in a political campaign. 11 CFR 114.12(c)(1); *see also* Advisory Opinion 1992-3. Because Mr. Melancon's employment was terminated, this section is not directly relevant.

1 Under these regulations, any severance package provided to Mr. Melancon must be
2 tied exclusively to services provided by him as a part of his *bona fide* employment. 11 CFR
3 113.1(g)(6)(iii)(A) and (B). However, the ASCL severance program is too discretionary to
4 meet this standard. ASCL's severance package policy is not written in any employee
5 handbook or employment contract. Employees at ASCL do not have any guarantee or
6 entitlement to a severance package when they leave employment. ASCL's stated factors
7 used in deciding whether to offer a severance package include discretionary considerations,
8 such as "job performance," in addition to two more objective factors of position and length
9 of service. Because you state that there is no set formula applied by ASCL when creating a
10 severance package, there is additional discretion in the weight and consideration given to
11 each factor. Based on the discretion inherent in this process, ASCL's proposal to provide a
12 severance benefit to Mr. Melancon would not be viewed as tied exclusively to services
13 provided by Mr. Melancon under 11 CFR 113.1(g)(6)(iii)(A) and (B).

14 Nor does the history of the ASCL severance program support the conclusion that the
15 severance benefits package offered to Mr. Melancon "does not exceed the amount of
16 compensation which would be paid to any other similarly qualified person for the same
17 work over the same period of time" as required by 11 CFR 113.1(g)(6)(iii)(C). According
18 to your information regarding former ASCL employees, 3 out of the 7 former employees
19 who have terminated employment with ASCL since the severance policy was instituted in
20 1987 did not receive any type of severance package. Most notably, every employee who
21 did receive a severance package was either terminated for cause or resigned in lieu of such
22 a termination. ASCL has not established a regular business practice of providing severance
23 benefits outside of the context of terminations for cause. ASCL's severance package to Mr.

1 Melancon, who is resigning voluntarily under good terms, would be unique in the past 17
2 years. ASCL is creating a benefits package for Mr. Melancon when it is not clear that a
3 "similarly qualified person" would have received any severance benefits. Therefore,
4 providing a severance package to Mr. Melancon does not comply with 11 CFR
5 113.1(g)(6)(iii)(C).

6 In addition, the scope of Mr. Melancon's proposed severance benefits package is
7 disproportionate to prior severance payments made to ASCL employees. Mr. Melancon's
8 severance benefits would exceed the compensation paid to other similarly qualified persons
9 under 11 CFR 113.1(g)(6)(iii)(C). ASCL proposes to provide Mr. Melancon with a six
10 month to one-year period of full salary (at \$128,700 per year) and health benefits. In
11 contrast, two former executives with longer service in ASCL executive positions (a 15 year
12 Vice-President and General Manager and a 14 year Information Director) both received
13 only 3 months pay. While the limited facts provided regarding Mr. Melancon's service
14 make it difficult to determine whether his service is comparable to those other executives,
15 this variance in compensation within ASCL past severance packages does not meet the
16 requirements of 11 CFR 113(g)(6).

17 The ASCL severance package proposal is analogous to the request presented to the
18 Commission in Advisory Opinion 2000-1. In that opinion, the Commission decided that a
19 partially paid leave of absence granted to an attorney from his employer while he was a
20 candidate for the U.S. House of Representatives did not qualify as a payment of a
21 candidate's personal expenses that would have been made "irrespective of the candidacy"

1 under 11 CFR 113.1(g)(6).³ This decision focused on the discretionary nature of the
2 employer's program, in which an attorney applied for paid leave and such request was
3 granted "solely in the discretion of the firm" based on factors not exclusively tied to
4 services provided by the employee. Advisory Opinion 2000-1. Therefore, the Commission
5 determined that this proposal for partial paid leave would not be considered compensation
6 "irrespective of the candidacy." Based on the discretion and variance in the ASCL
7 severance program discussed above, ASCL's proposal similarly fails the "irrespective of
8 the candidacy" test and would not be considered within this exception to the definition of
9 "contribution."

10 Finally, your reliance on 11 CFR 100.54(c) is unpersuasive because that regulation
11 is inapplicable to the facts in your advisory opinion request. In Advisory Opinion 1992-3,
12 the Commission applied the exception in 11 CFR 100.54(c) to facts materially different
13 than ASCL's request. In that advisory opinion, the Commission concluded that a 31-day
14 continuation of health coverage after an employee converted to approved leave-without-pay
15 status was a form of "other earned leave time" which did not constitute a prohibited
16 contribution. However, the Commission's determination hinged upon the particular facts
17 and circumstances of that request: that the employer had a written "pre-existing policy
18 covering fringe benefits and unpaid leave which is generally applicable to all employees,"
19 and that the period of such benefits was brief (31 days). See Advisory Opinion 1992-3.
20 Thus, these benefits were actually compensation earned based on past service, where the
21 only discretion lies in when the benefit may be used.

³ The Commission noted in Advisory Opinion 2000-1 that the employee would not be providing any employment services to his employer during the year of paid leave. Similarly, here Mr. Melancon has completely terminated his employment relationship effective February 20, 2004.

1 As discussed above, the ASCL severance policy is a discretionary program which is
2 not written in any employment documents, and which does not appear to apply to all
3 employees equally. There is no employee entitlement to a severance package based on past
4 employment at ASCL. Therefore, ASCL's proposed severance benefits would not meet the
5 exception for "other earned leave time" in 11 CFR 100.54(c) for the same reasons that the
6 severance package does not meet the requirements of 11 CFR 113.1(g)(6). *See Advisory*
7 *Opinion 2000-1* (declining to interpret paid leave program as "other earned leave" under 11
8 CFR 100.54(c)).

9 Since ASCL's proposed severance package would not meet any permitted exception
10 to the regulatory definition of "contribution," it would be considered a contribution to Mr.
11 Melancon's campaign. Because ASCL is a corporation, the payment of a severance
12 package in these circumstances would be prohibited pursuant to 2 U.S.C. 441b(a).
13 Therefore, the Commission concludes that ASCL may not provide the proposed severance
14 benefit to Mr. Melancon.

15 This response constitutes an advisory opinion concerning the application of the Act
16 and Commission regulations to the specific transaction or activity set forth in your request.
17 *See 2 U.S.C. 437f*. The Commission emphasizes that, if there is a change in any of the facts
18 or assumptions presented, and such facts or assumptions are material to a conclusion
19

1 presented in this advisory opinion, then the requestor may not rely on that conclusion as
2 support for its proposed activity.

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Sincerely,

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Bradley A. Smith
Chairman

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11 Enclosures (AOs 2000-1, 1992-3)

1 **ADVISORY OPINION 2004-08**

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16 **former employee who recently resigned his position in order to become a Federal candidate.**

17 ***Background***

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19 **growers and processors. ASCL currently employs five people. Your request indicates that**
20 **on February 20, 2004, ASCL's President and General Manager, Charles Melancon,¹**
21 **resigned in order to become a candidate for the U.S. House of Representatives. You state**
22 **that Mr. Melancon had been in that position for approximately 11 years at the time of his**
23 **resignation. ASCL proposes a severance package for Mr. Melancon of full salary for a**
24 **period of six months to one year with the continuation of his health insurance coverage for**
25 **that period.**

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1 You state that ASCL began the practice of offering severance benefits in 1987.
2 ASCL has no written policy regarding severance packages for former employees, and no
3 formula for the calculation of the benefits to be granted. ASCL does not have a written
4 employee handbook and none of its employees, including Mr. Melancon, has a written
5 employment agreement. Despite this lack of specific written policies, you state that the
6 factors considered in deciding whether to grant a severance package to a former employee,
7 and the size of such benefit, are: (1) the position held, (2) the length of time employed, and
8 (3) an evaluation of job performance.

9 Since 1987, you explain that only 7 employees have terminated employment with
10 ASCL. Of those 7 former employees, 4 were granted severance packages. You state that
11 each of the former employees granted a severance package was either discharged for cause
12 or resigned in lieu of being discharged for cause. You emphasize that Mr. Melancon's
13 resignation is voluntary and not the result of any cause for termination.

14 The content of these past severance packages vary greatly: a Vice President and
15 General Manager with 15 years tenure and an Information Director with 14 years of service
16 both received 3 months pay (at the annual rate of \$72,000 and \$40,000, respectively)
17 without any continuation of benefits; a former secretary employed for 10 years received 6
18 months pay at the annual rate of \$25,000 without any continuation of benefits; and the final
19 employee, with a total of 24 years of service including 16 years as Vice President and
20 Director of Research, received a much more extensive severance package including one
21 year full pay (\$88,690) with one year of health benefits coverage, his company owned
22 computer, the option of purchasing his company owned car for "Blue Book" value, and
23 ASCL paid for his previously scheduled speaking engagement trip to Australia.

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2 former employees did not receive a severance package of any kind. One former employee
3 retired at age 66 and received retirement benefits from ASCL. The other two employees
4 were each employed for less than one year. You state that one of these employees, a Vice
5 President and General Manager for 11 months, was discharged for cause, but you do not
6 state the circumstances surrounding the departure of the third employee who did not receive
7 a severance benefit.

8 ***Question Presented***

9 May ASCL provide its former President and General Manager severance pay and
10 health insurance benefits for six months to a year without violating the Act's prohibition on
11 contributions by corporations?

12 ***Legal Analysis and Conclusions***

13 ASCL is an incorporated entity and is therefore prohibited from making any
14 "contribution or expenditure" in connection with a Federal election. 2 U.S.C. 441b(a); 11
15 CFR 114.2(b)(1). The term "contribution" is defined in the Act to include "any gift, loan,
16 advance, or deposit of money or anything of value made by any person for the purpose of
17 influencing any election for Federal office." 2 U.S.C. 431(8)(A). Thus, ASCL may only
18 provide Mr. Melancon with the proposed severance package if it does not constitute a
19 contribution under the Act or Commission regulations.

20 The Act also prohibits the conversion of campaign funds to any personal use. 2
21 U.S.C. 439a. Under Commission regulations, any third party payment of a candidate
22 expense that would otherwise be paid by personal use funds is considered a contribution
23 unless the payment would have been made "irrespective of the candidacy." 11 CFR

1 113.1(g)(6). One of the regulatory examples in this provision specifically addresses
2 payment of compensation for employment services:

3 (iii) Payments for that expense were made by the person making the payment before
4 the candidate became a candidate. Payments that are compensation shall be
5 considered contributions unless –

6 (A) The compensation results from *bona fide* employment that is genuinely
7 independent of the candidacy;

8 (B) The compensation is exclusively in consideration of services provided by
9 the employee as a part of this employment; and

10 (C) The compensation does not exceed the amount of compensation which
11 would be paid to any other similarly qualified person for the same work
12 over the same period of time.

13 11 CFR 113.1(g)(6)(iii). ASCL's proposed severance package would not be a prohibited
14 corporate contribution to a Federal candidate if it meets the criteria for something of value
15 given to the candidate "irrespective of the candidacy."

16 Under these regulations, any severance package provided to Mr. Melancon must
17 first be tied exclusively to services provided by him as a part of his *bona fide* employment.

18 11 CFR 113.1(g)(6)(iii)(A) and (B). Given the nature of organizations as small as ASCL,
19 the lack of a written severance policy does not necessarily mean that the proposed
20 severance package is not "exclusively in consideration of services" provided by Mr.
21 Melancon during his tenure at ASCL. The history of the ASCL severance program fairly
22 demonstrates that since 1987, ASCL has a regular business practice of providing severance
23 packages to departing long-term employees. According to your information regarding

1 former ASCL employees, 4 out of the 7 former employees who have terminated
2 employment with ASCL since the severance policy was instituted in 1987 received some
3 type of severance package. ASCL's stated factors used in deciding whether to offer a
4 severance package include relatively objective considerations, such as "job performance,"
5 position, and length of service.

6 Because you state that there is no set formula applied by ASCL when creating a
7 severance package, there is some discretion in the weight and consideration given to each
8 factor. In Advisory Opinion 2000-1, the Commission determined that a proposal for partial
9 paid leave would not be considered compensation "irrespective of the candidacy" because
10 the decision to grant a request for partial paid leave was "solely in the discretion of the
11 firm" and based on factors not exclusively tied to services provided by the employee,
12 including the nature of the proposed outside activity, and its benefit to the firm overall. In
13 contrast, ASCL's determination of whether or not to offer severance benefits, although
14 discretionary in part, focuses on factors related solely to the employee's services at ASCL
15 (length of service, position, job performance). ASCL has a sufficient corporate record of
16 providing severance packages to departing employees that the Commission concludes that
17 the payment of a severance package to Mr. Melancon would be tied exclusively to services
18 rendered in his *bona fide* employment with ASCL.

19 However, in order to meet the "irrespective of candidacy" test, ASCL must also
20 demonstrate that the severance benefits package offered to Mr. Melancon "does not exceed
21 the amount of compensation which would be paid to any other similarly qualified person
22 for the same work over the same period of time" as required by 11 CFR 113.1(g)(6)(iii)(C).
23 A comparison of Mr. Melancon's proposed severance package to packages offered by

1 ASCL in the past reveals that the scope of Mr. Melancon's proposed package is
2 disproportionate to prior severance payments made to ASCL employees. Therefore,
3 ASCL's proposal would exceed the compensation paid to other similarly qualified persons
4 under 11 CFR 113.1(g)(6)(iii)(C) and would constitute a contribution to his campaign.

5 ASCL proposes to provide Mr. Melancon with a six month to one-year period of
6 full salary (at \$128,700 per year) and health benefits. In contrast, two prior employees
7 with longer service in ASCL executive positions (a 15 year Vice-President and General
8 Manager and a 14 year Information Director) both received only 3 months pay. Because
9 Mr. Melancon was President and General Manager for 11 years, his employment with
10 ASCL is more comparable to these employees, rather than to the former Vice-President
11 with 24 years of service who received one-year pay with benefits.

12 ASCL is limited to providing Mr. Melancon with a severance package comparable
13 to past employees in compliance with 11 CFR 113.1(g)(6)(iii)(C). Based on the limited
14 facts provided regarding Mr. Melancon's service, the Commission concludes that a
15 severance package of salary for a period of three months without any payment of benefits
16 would satisfy the requirements of 11 CFR 113.1(g)(6)(iii) and would not be a contribution
17 under the Act or Commission regulations.

18 This response constitutes an advisory opinion concerning the application of the Act
19 and Commission regulations to the specific transaction or activity set forth in your request.
20 See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts
21 or assumptions presented, and such facts or assumptions are material to a conclusion

22

1 presented in this advisory opinion, then the requestor may not rely on that conclusion as
2 support for its proposed activity.

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Sincerely,

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Bradley A. Smith
Chairman

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11 Enclosure (AO 2000-1)