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ADVISORY OPINION 2007-12

Jan W. Baran, Esq.
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Wiley Rein LLP
1776 K Street, N.W.
Washington, D.C. 20006

Dear Messrs. Baran and Renaud:

We are responding to your advisory opinion request on behalf of Tyco International Management Company (“Tyco US”) and its separate segregated fund (“SSF”), Tyco International Management Company Political Action Committee (“Tyco US PAC”) concerning the application of the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations. Your request concerns the proposed disaffiliation of Tyco US PAC from the SSFs of two other corporations that are domestic subsidiaries of companies that have been spun off from a corporate parent of Tyco US.

The Commission concludes that the three SSFs were disaffiliated from each other as of the close of business on the date of the spin-off, June 29, 2007.

Background

The facts presented in this advisory opinion are based on your letter received on June 25, 2007 as supplemented by an email received on July 6, 2007, and information on file with the Securities and Exchange Commission (the “SEC”).

Tyco US is a wholly owned U.S. subsidiary of Tyco International Ltd. (“Tyco International”), a publicly traded Bermuda company. On June 29, 2007, Tyco International, in a spin-off of two wholly owned Bermuda subsidiaries, separated into

three publicly traded corporations (collectively “the companies” or “the three companies”). The three companies are: (1) Covidien Ltd. (“Covidien”) which now contains Tyco International’s former healthcare businesses; (2) Tyco Electronics Ltd. (“Tyco Electronics”) which now contains Tyco’s former electronics businesses; and (3) Tyco International Ltd., which retains its fire and security and engineered products and services businesses. All three companies are publicly traded on the New York and Bermuda Stock Exchanges. At the time of the spin-off, both Covidien and Tyco Electronics each had wholly owned U.S. subsidiaries, now identified as Covidien (U.S.) and Tyco Electronics Corporation, respectively.

In the spin-off, Tyco International distributed all of its shares of common stock in Covidien and Tyco Electronics to the shareholders of Tyco International’s common stock.¹ Each shareholder received one common share of Covidien stock and one common share of Tyco Electronics stock for every four shares of Tyco International stock he or she held at the close of business on June 18, 2007. Thus, upon completion of the spin-off, the shareholders of Tyco International owned almost 100 percent of Covidien and Tyco Electronics, and none of the three companies owned any shares in either of the other companies. The three companies also executed a Separation and Distribution Agreement to effect the separation and provide a framework for the relationship among the companies after the spin-off.²

Tyco US PAC has been registered as a political committee since 1979. Covidien US PAC and TELPAC are respectively the SSFs of Covidien (U.S.) and Tyco Electronics Corporation. Both SSFs were created in anticipation of the spin-off and filed their Statements of Organization with the Commission on April 3, 2007, when Tyco US was still the connected organization for all three SSFs.³

Question Presented

As of the date of the separation of Covidien and Tyco Electronics from Tyco International, are Tyco International, Covidien, and Tyco Electronics disaffiliated from each other so that the SSFs of their respective U.S. subsidiaries are no longer affiliated with each other?

¹ Although Tyco International has two classes of stock, no preferred stock is issued or outstanding. Hence, the issued shares of each of the three companies consist of one class of common stock.

² This Separation and Distribution Agreement relates to a variety of matters, including the process for the share transactions necessary to effectuate the separation; the allocation of assets, liabilities, and obligations attributable to the period prior to the separation; the allocation of contingent liabilities; the allocation of corporate costs related to the separation; releases and indemnifications; employee matters, including benefits; insurance; records; and intellectual property. The three companies also entered into tax sharing and trademark licensing agreements in contemplation of the separation.

³ Tyco US PAC, Covidien US PAC, and TELPAC will comply with the prohibitions placed on foreign national participation in the funding and the decision-making processes of the SSFs by the Act, Commission regulations, and advisory opinions. See 2 U.S.C. 441e; 11 CFR 110.20. See also Advisory Opinions 2006-15 (TransCanada), 2004-42, n.3 (Pharmavite), and 2000-17 (Extencicare).

Legal Analysis and Conclusions

Yes, Tyco US PAC, Covidien US PAC, and TELPAC were disaffiliated as of the completion of the spin-off at the close of business on June 29, 2007.

a. The Applicable Law

The Act and Commission regulations provide that political committees, including separate segregated funds, that are established, financed, maintained or controlled by the same corporation, person, or group of persons, including any parent, subsidiary, branch, division, department, or local unit thereof, are affiliated. Contributions made to or by such political committees are considered to have been made to or by a single political committee. 2 U.S.C. 441a(a)(5); 11 CFR 100.5(g)(2) and 110.3(a)(1).

b. Per Se Affiliation

Commission regulations identify organizations that are *per se* affiliated, and, hence, whose SSFs are *per se* affiliated. These include a single corporation and/or its subsidiaries, as well as the same person or group of persons. 11 CFR 100.5(g)(3)(i) and (v); 110.3(a)(2)(i) and (v). None of the three companies owns any portion of the other and thus cannot be classified as a subsidiary of either of the other companies. Moreover, as discussed below, neither the three companies nor the SSFs of their U.S. subsidiaries are controlled by the same person or group of persons. Hence, the Commission concludes that the SSFs of the U.S. subsidiaries are not *per se* affiliated.

c. Affiliation Factors

In the absence of *per se* affiliation, Commission regulations provide for an examination of various factors in the context of the overall relationship to determine whether one sponsoring organization has established, financed, maintained, or controlled the other sponsoring organization or committee and, hence, whether, the respective SSFs are affiliated with each other. 11 CFR 100.5(g)(4)(i) and (ii)(A)-(J), and 110.3(a)(3)(i) and (ii)(A)-(J). These ten circumstantial factors do not constitute an exhaustive list and other factors may be considered. *See* Advisory Opinion 2004-41 (CUNA Mutual). Eight of these factors are relevant to your request and are discussed below. In addition, the Commission discusses another factor relevant to disaffiliation resulting from corporate spin-offs – the common shareholders who own the corporations after the spin-offs.

(A) Whether a sponsoring organization owns a controlling interest in the voting stock or securities of the sponsoring organization of another committee. 11 CFR 100.5(g)(4)(ii)(A) and 110.3(a)(3)(ii)(A).

None of the three companies owns any stock in the other two companies. Prior to the spin-off, Tyco US PAC, Covidien US PAC, and TELPAC were *per se* affiliated with each other because Covidien and Tyco Electronics were wholly owned by Tyco

International, and hence the SSFs' respective connected organizations were also wholly owned by Tyco International. Immediately after the spin-off, Covidien and Tyco Electronics, and their wholly owned U.S. subsidiaries, were owned by Tyco International's shareholders, not by Tyco International. The lack of ownership interest by one company in another points toward disaffiliation.

(B) Whether a sponsoring organization or committee has the authority or ability to direct or participate in the governance of another sponsoring organization or committee through provisions of constitutions, bylaws, contracts or other rules, or through formal or informal practices or procedures. 11 CFR 100.5(g)(4)(ii)(B); 110.3(a)(3)(ii)(B).

(C) Whether a sponsoring organization or committee has the authority or ability to hire, appoint, demote or otherwise control the officers, or other decisionmaking employees of another sponsoring organization or committee. 11 CFR 100.5(g)(4)(ii)(C); 110.3(a)(3)(ii)(C).

Factors (B) and (C) pertain to the power and ability of one corporate sponsor to participate in the governance of another corporate sponsor. The bylaws of Covidien and Tyco Electronics do not contain provisions granting authority to Tyco International over operations of those companies.

Other provisions of the bylaws, however, may give Tyco International some limited influence in the other companies. Before the spin-off, Tyco International, as the lone shareholder, selected the current boards of directors of Covidien and Tyco Electronics. In some situations, the Commission has concluded that affiliation continued after a spin-off in part because bylaw provisions that were aimed at preventing outside or hostile takeovers also entrenched the positions of board members appointed by the former parent and limited the control by shareholders after the spin-off. *See* Advisory Opinions 1987-21 (MAXUS Energy) and 1986-42 (Dart & Kraft); *see also* Advisory Opinion 1993-23 (Pacific Telesis Group) (minimizing the significance of such provisions where there was a complete lack of overlap of boards of directors that could be protected by such provisions).

The bylaws of Covidien and Tyco Electronics contain some of these types of provisions, including (1) the ability of the board to increase its size without shareholder approval; (2) the inability of shareholders to remove directors without cause before an annual election or, except in limited circumstances, fill board vacancies; (3) a prohibition on shareholder actions by written consent in lieu of a meeting; and (4) a requirement of an affirmative vote by holders of 80 percent of the issued shares to amend such provisions. *See* Covidien Ltd. Bye-laws in SEC Form 10-12B/A, Exhibit 3.3; Covidien Ltd. Fourth Amended SEC Form 10 at 27; Tyco Electronics Ltd Bye-Laws in SEC Form 10-12B/A, Exhibit 3.3; Tyco Electronics Ltd. Fourth Amended SEC Form 10 at 25. However, the governing documents of Covidien and Tyco Electronics lack other provisions that might entrench the boards of directors chosen by Tyco International. Specifically, directors' terms are not staggered; shareholder elections for the entire board

are to be held annually; a supermajority vote of the shareholders is not required to remove a director; and there are no restrictions on who can serve as a director.

The Commission concludes that the effect on Covidien and Tyco Electronics of the pre-spin-off selection of the boards of directors by Tyco International are outweighed by other facts discussed below such as the minimal nature of director, officer, and employee overlap, the background of the board members selected, and vigorous trading of the shares in the companies resulting in a diversification in the groups of persons holding shares in the three companies.

The Separation and Distribution Agreement provides for some limited participation of Tyco International in the affairs of Covidien and Tyco Electronics. Specifically, Tyco International initially will act as managing party for, and assume control of, all legal matters related to any assumed Tyco International contingent and other corporate liabilities or assets, including settlement of such matters. Moreover, the three companies may decide on an annual basis to change the managing party. *See* Covidien Ltd. Fourth Amended SEC Form 10 at 125, 128; Tyco Electronics Ltd. Fourth Amended SEC Form 10 at 114, 117.⁴ The Commission notes, however, that the limited influence of one company over another that this arrangement may provide would be a natural part of a separation arrangement in view of the fact that the involvement of Covidien and Tyco Electronics in such legal affairs would stem from activities before the spin-off or from the separation itself.

(E) Whether a sponsoring organization or committee has common or overlapping officers or employees with another sponsoring organization or committee which indicates a formal or ongoing relationship between the organizations or committees. 11 CFR 100.5(g)(4)(ii)(E); 110.3(a)(3)(ii)(E).

(F) Whether a sponsoring organization or committee has any members, officers, or employees who were members, officers, or employees of another sponsoring organization or committee which indicates a formal or ongoing relationship or the creation of a successor entity. 11 CFR 100.5(g)(4)(ii)(F); 110.3(a)(3)(ii)(F).

Factors (E) and (F) pertain to overlaps that indicate a formal or ongoing relationship between the companies or the creation of a successor entity. The eleven-member boards of each of the companies have been independent of each other since the spin-off. In addition, since the spin-off, there has been only a minimal personnel overlap between the parent companies. One individual serves on both Tyco Electronics' and Tyco International's boards of directors. Also, Tyco International's Chief Financial Officer serves on Covidien's board of directors. Since the spin-off occurred, there has been no overlap between the group of directors, officers, and employees of one company and its subsidiaries with the corresponding group of either of the other two companies and its subsidiaries, other than these two individuals.

⁴ In addition, under the tax sharing agreement, Tyco International will have the right to administer, control, and settle all U.S. income tax audits for periods prior to and including the date of the spin-off. Covidien Ltd. Fourth Amended SEC Form 10 at 20; Tyco Electronics Ltd. Fourth Amended SEC Form 10 at 19.

In addition, the fact that individuals who used to be officers, directors, or employees of Tyco International currently serve in positions with Covidien or Tyco Electronics (or their subsidiaries) is merely “a function of the division of a major corporation into three parts.” Furthermore, only two of the eleven Covidien directors in place since the spin-off and only three of the eleven Tyco Electronics directors in place since the spin-off previously served as directors or officers of any pre-spin-off Tyco International entities. *See* Covidien Ltd. Fourth Amended SEC Form 10 at 132-135; Tyco Electronics Ltd. Fourth Amended SEC Form 10 at 120-123. Moreover, there are no plans for directors, officers, or employees of one of the three companies or its subsidiaries to change positions and serve in the future as directors, officers, or employees of one of the other companies or its subsidiaries.

Before the spin-off, the three SSFs had the same treasurer, assistant treasurer, and records custodian. After the spin-off occurred, amended statements of organization were filed indicating no overlap among the SSFs with respect to these offices and there are no overlaps with respect to other SSF personnel.⁵ The facts pertaining to factors (E) and (F) are indicators that the companies are no longer affiliated after the spin-off.

(G) Whether a sponsoring organization or committee provides funds or goods in a significant amount or on an ongoing basis to another sponsoring organization or committee. 11 CFR 100.5(g)(4)(ii)(G); 110.3(a)(3)(ii)(G).

(H) Whether a sponsoring organization or committee causes or arranges for funds in a significant amount or on an ongoing basis to be provided to another sponsoring organization or committee. 11 CFR 100.5(g)(4)(ii)(H); 110.3(a)(3)(ii)(H).

With respect to funding of one sponsoring organization by another, Tyco International ceased providing either Covidien and Tyco Electronics with funds to finance their working capital or other cash requirements once the spin-off occurred. *See* Covidien Ltd. Fourth Amended SEC Form 10 at 19; Tyco Electronics Ltd. Fourth Amended SEC Form 10 at 17.

As indicated above, the three companies executed a Separation and Distribution Agreement pertaining to many aspects of the relationship among them, including the apportionment of assets and obligations based on the particular company’s sector or transactions prior to the spin-off. For example, under the Separation and Distribution Agreement and other agreements, Tyco International, Covidien, and Tyco Electronics have agreed to be responsible for 27 percent, 42 percent, and 31 percent respectively of certain of Tyco International’s contingent and other corporate liabilities relating principally to securities litigation and to any actions brought by third parties with respect

⁵ Tyco US PAC, Covidien US PAC, and TELPAC filed amended statements of organization naming the new personnel for these positions on July 19, July 20, and July 27 respectively. However, immediately after the spin-off, the actual operations of each SSF were already conducted only by the personnel of the particular company as constituted after the spin-off; for example, only personnel associated with Covidien engaged in the affairs of Covidien US PAC.

to the separation or stock distribution, but not with respect to liabilities specifically related to one of the three companies. However, if any one of the other companies were to default on its payments, each of the other two companies would be required to pay equally with the other non-defaulting party the amounts in default.⁶ *See* Covidien Ltd. Fourth Amended SEC Form 10 at 10, 19, 125; Tyco Electronics Ltd. Fourth Amended SEC Form 10 at 10, 17, 114.

Separation agreements after corporate spin-offs often entail restrictions on the activities of the companies involved and provide for some continuing transactions between the companies. *See, e.g.*, Advisory Opinions 1996-42 (Lucent Technologies) and 1993-23. Although the separation agreement and other agreements described in the SEC Form 10s of Covidien and Tyco Electronics include some provisions entailing substantial financial arrangements, the Commission cannot fully determine the effects of such arrangements. However, the Commission has concluded in past situations that such provisions were outweighed by other facts, or accepted a representation that such provisions were merely aimed at sorting out the companies' post-spin-off obligations that existed as an outgrowth of their previous relationship and were not aimed at continuing one company's control over another. *See* Advisory Opinions 1996-42 and 1993-23; *see also* Advisory Opinion 1996-23 (ITT). The Commission accepts your similar representation that any payments transferred between the companies, provided for in agreements, "will simply be part of the normal corporate separation process." Moreover, the contingent liabilities relate to activities occurring before the spin-off, or to the separation itself.

(I) Whether a sponsoring organization or committee had an active or significant role in the formation of another sponsoring organization or committee. 11 CFR 100.5(g)(4)(ii)I; 110.3(a)(3)(ii)(I).

Although Covidien and Tyco Electronics were once part of Tyco International, they are now subject to agreements separating them into separate publicly traded corporations.⁷ The previous relationship between sponsoring organizations is part of the context for assessing the overall relationship between such organizations. *See* 11 CFR 100.5(g)(4)(ii) and 110.3(a)(3)(ii); *see also* Advisory Opinion 1996-23. A sponsoring organization's involvement in the formation of a spun off sponsoring organization (or of the SSF of a sponsoring organization or its subsidiary) does not necessitate a finding of continued affiliation when significant changes in the relevant relationships have occurred, such as arrangements separating the operations of the companies and apportioning their assets and obligations, and the nearly complete separation of corporate leadership and personnel.

⁶ In May 2007, a tentative settlement of \$2.975 billion was reached in connection with securities class action litigation involving a large number of cases. As of the date of the spin-off, each company was apportioned a share of the liability, but was also jointly and severally liable for any defaulting party's obligations in settlement of these cases.

⁷ You also note that many of the corporate components of each spun off company pre-dated their absorption into Tyco International.

The Common Shareholder Base

The affiliation provisions of the Act state that “all contributions made by political committees established or financed or maintained or controlled by” any group of persons “shall be considered to have been made by a single political committee.” 2 U.S.C. 441a(a)(5). Drawing directly from the legislative history of this provision, Commission regulations provide for *per se* affiliation between committees established by “the same person or group of persons.” See 11 CFR 100.5(g)(3)(v) and 110.3(a)(2)(v).⁸ In a literal sense, the same group of persons may have owned the three companies at the time of the spin-off. In past advisory opinions, the Commission has recognized that a sizeable break in the common identity of persons owning shares in two companies supported a conclusion that two companies were no longer affiliated after a spin-off, when vigorous public trading was anticipated. See Advisory Opinions 1996-42 and 1993-23 (where IPOs in the spun off company’s stock of 12-14 percent and nearly 18 percent occurred several months before the spin-off); see also Advisory Opinions 1997-25 (Hughes Electronics) and 1996-23. However, the Commission does not consider the occurrence of such sizeable breaks in the common identity of shareholders of large, publicly traded corporations to be a pre-requisite to disaffiliation on a spin-off date where vigorous public trading is anticipated.

Upon completion of the spin-off, Tyco International shareholders owned almost all of the shares of Covidien and Tyco Electronics, and there was almost a complete overlap among the shareholders of the three companies. Nevertheless, this situation involves the spin-off by a large publicly traded company of subsidiaries, resulting in three large, separately listed, publicly traded companies with very specific plans for operations that are separate from each other and that involve differing business sectors. Given that, in general, each of the shareholders of these companies, whether institutional owners, businesses, or individuals, will buy and sell shares in accordance with such shareholder’s own financial interests, it would be very difficult for one group of shareholders to maintain purposefully a large common ownership in more than one publicly traded company.⁹ The usual consequence of such spin-offs is vigorous public trading by shareholders attempting to maximize their own profit, resulting in a sizeable

⁸ See “Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions,” Final Rule, 54 Fed. Reg. 34098, 34099 (August 17, 1989), citing H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 6 (1976) and H.R. Conf. Rep. No. 94-1057, 94th Cong. 2d Sess. 58 (1976).

⁹ Also relevant is the fact that, as of the latest information provided before the spin-off, no single investor owned more than 10 percent of Tyco International stock. The two investors owning more than five percent were institutional investors owning 9.3 percent and 6.4 percent respectively. See Covidien Ltd. Fourth Amended SEC Form 10 at 155; Tyco Electronics Ltd. Fourth Amended SEC Form 10 at 144. The common ownership by a single person in the three companies directly after the spin-off, in these amounts, does not affect the Commission’s conclusion in this situation.

diversification between the identity of the shareholders of the former parent and each of the spun off companies.¹⁰

As of the close of business on June 29, 2007, shareholder diversification was already beginning. Trading in shares of Covidien and Tyco Electronics, apart from shares of Tyco International, began on a “when issued” market on the New York Stock Exchange on June 14, several business days before the record date.¹¹ The daily trading volumes in Covidien shares between June 14 and June 29, 2007, totaled almost 14.2 million shares, or approximately 2.9 percent of Covidien’s outstanding shares. The daily trading volumes in Tyco Electronics shares during that time totaled over 8.5 million shares, or approximately 1.7 percent of Tyco Electronics’ outstanding shares. There was also trading in Tyco International shares between the record date and the spin-off, some of which traded without an entitlement to receive shares in the companies being spun off. As of COB August 29, 2007, an additional 138.1 million shares (adding up the daily volumes) of Covidien, or almost 28 percent of the outstanding shares, were traded on the New York Stock Exchange after June 29. For Tyco Electronics, the figures for that period were very similar. Furthermore, post-spin-off trading in Tyco International was even more vigorous; 215.2 million shares, which was more than 43 percent of Tyco International’s outstanding shares (after a post-spin-off, one to four reverse stock split), were traded after the spin-off up to August 29.¹²

The post-spin-off vigorous trading described above indicates that the large, but ever diminishing, overlap still existing in the first few weeks after the spin-off should not postpone the date of disaffiliation for the purposes of the Act. It confirms that a large common identity of thousands of shareholders in two or more large publicly traded corporations does not, in and of itself, indicate common control of the corporations. Such a common identity does not reflect any effort by such a large group of shareholders to control the stocks of separate publicly traded companies and dissipates rapidly because of the independent financial interests of each shareholder.

¹⁰ Active trading of stocks in spun off companies and their former parents during the weeks and months after the spin-off is illustrated by a study prepared by Goldman Sachs for your advisory opinion request. (See Attachments A, B, and C to the Advisory Opinion Request.) The study uses recent examples involving companies that, like Tyco International, Covidien, and Tyco Electronics, have very large market values.

¹¹ “When issued” trading refers to a sale or purchase made conditionally because the security has been authorized but not yet issued. The “when issued” market was a market for Covidien and Tyco Electronics shares that were to be distributed to Tyco International shareholders on the spin-off date. See Covidien Ltd. Fourth Amended SEC Form 10 at 42; Tyco Electronics Ltd. Fourth Amended SEC Form 10 at 40.

¹² This trading information was compiled from the “historical prices” section of the “finance” sub-website at yahoo.com. See e.g., <http://finance.yahoo.com/q/hp?s=COV>. The figures give an idea of the active trading but do not reflect the possibility that some of the shares may have been traded more than once during the relevant period.

d. Conclusion

In weighing the affiliation factors, the Commission concludes that the three companies and the SSFs of their U.S. subsidiaries were disaffiliated as of COB June 29, 2007, when the spin-off was completed.

There are some continuing legal management and financial arrangements that entail some involvement by Tyco International in the affairs of the other companies and the possibility of some limited involvement by each of the companies in the affairs of the other. In addition, the current boards of Covidien and Tyco Electronics were put in place by Tyco International and are protected by certain provisions (although these provisions are principally aimed at preventing outside takeovers).

Other facts, however, indicate a genuine separation between the companies as of June 29. These are the lack of ownership by one company in the other, the minimal personnel overlap between the companies (including the companies' subsidiaries), the lack of any plan for personnel of one of the companies or its subsidiaries to serve in the future in either of the other companies or its subsidiaries (other than the two currently overlapping individuals), and the fact that nine of the eleven Covidien board members and eight of the eleven Tyco Electronics board members did not serve on the board of, and were not officers of, any pre-spin-off Tyco International entities. In some important respects, the case for the current disaffiliation of the three companies compares favorably with the situations presented in Advisory Opinions 2003-21 (Lehman Brothers) and 2002-12 (American Medical Security), where the Commission found disaffiliation even though one connected organization still owned some shares of the other, and in Advisory Opinion 1996-23 where the Commission found disaffiliation of two spun off companies from the former parent and each other after substantial trading of the shares of the companies, but with markedly greater board overlaps than the overlaps in this situation.

As explained above, the Commission also concludes that the large common identity of shareholders in the three companies as of the date of the spin-off should not result in delaying disaffiliation past that date where vigorous public trading was anticipated and trading had already begun.

For these reasons, the Commission thus concludes that Tyco International, Covidien, and Tyco Electronics were disaffiliated as of the completion of the spin-off at the close of business on June 29, 2007. Hence, the SSFs of their U.S. subsidiaries – Tyco US PAC, Covidien US PAC, and TELPAC – were also disaffiliated at the same date and time.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requester may not rely on that conclusion as support for its proposed activity. All cited advisory opinions are available on the Commission's website at www.fec.gov.

Sincerely,

(signed)
Robert D. Lenhard
Chairman