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May 18, 2010

BY HAND AND FACSIMILE

AOR 2010-12

Thomasenia P. Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: **Advisory Opinion Request**

Dear Ms. Duncan:

On behalf of our clients, the Procter & Gamble Company ("P&G") and its separate segregated fund, the Procter & Gamble Company Good Government Committee ("P&G PAC"), we request an advisory opinion addressing the following question:

May P&G PAC, with prior written authorization from a P&G board member, deduct a contribution to P&G PAC from the board member's quarterly retainer payment?

I. Background

P&G PAC is a separate segregated fund that is registered with the Federal Election Commission ("the Commission"), and P&G is its connected organization. P&G operates a corporate payroll deduction system whereby employees who are members of P&G's restricted class may elect to contribute to P&G PAC. Pursuant to the payroll deduction plan, P&G employees who are members of the restricted class provide P&G with a written authorization to make periodic deductions of contributions to P&G PAC from the employees' salary payments. The compensation participating employees receive is then reduced by the amounts they have elected to contribute to P&G PAC.

P&G would like to extend this payroll deduction program to certain members of its board of directors. P&G is governed by a board of directors which provides general oversight for the company's affairs. The board currently has ten members. Its chair is P&G's President and Chief Executive Officer. Although the other nine board members are not full-time P&G employees,

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P&G compensates them for their service by paying them a compensation package that includes a quarterly director's fee. P&G refers to this director's fee as a "retainer" payment. The payment of these director's fees makes those members of the board who are United States citizens or lawful permanent residents members of P&G's "restricted class." *See* Advisory Opinion 1985-35 (holding that company directors who received an annual director's fee were members of the company's restricted class); Advisory Opinion 1992-9 (directors of a power cooperative would qualify as "executive or administrative personnel" "[t]o the extent they receive a stipend for acting on behalf" of the cooperative); Advisory Opinion 2000-10 (corporate directors who receive a stipend may be considered "executive or administrative personnel").

Each year, board members can choose the form in which they will receive these quarterly retainer payments. Board members can elect to receive these payments in cash (through physical checks or direct deposits to their bank accounts), unrestricted stock, or retirement restricted stock. Board members may divide their fees among the three options in increments of 25%. For example, they may elect to receive 25% of their fees in cash, 25% in unrestricted stock, and 50% in retirement restricted stock. Any combination is acceptable, provided that it is divided in 25% increments. Once a board member chooses a form of payment, that election is irrevocable for the calendar year. If the board member does not make an election, the retainer payment is made in cash (either through a physical check or direct deposit).

Although board members other than P&G's President and Chief Executive Officer are not currently eligible to participate in P&G's payroll deduction program, P&G now proposes to make the payroll deduction plan available to them. Pursuant to this program, board members could choose to have amounts deducted from their quarterly retainer payments and contributed to P&G PAC. This option would be available only to those P&G board members who (i) are United States citizens or lawful permanent residents and (ii) elect to receive at least 25% of their quarterly retainer payments paid out in cash (either through a physical check or direct deposit).

The procedures followed in connection with board members who participate in the payroll deduction plan would be the same as those followed with respect to non-board members participating in the payroll deduction plan. The board member would receive a written solicitation from P&G PAC advising that he or she may choose to have P&G automatically deduct a specified amount from the cash portion of each quarterly retainer payment as a contribution from the board member to P&G PAC. The solicitation would include the required disclaimers. Board members who elect to participate in the payroll deduction program would sign an authorization form and send it to P&G PAC. They would then be enrolled in the payroll deduction program and the cash portion of their quarterly retainer payments, received either

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through a physical check or direct deposit to the board member's bank account, would be reduced by the amount the board member elected to contribute to P&G PAC. In connection with these activities, P&G PAC would continue to ensure that individual contribution limits are not exceeded and that the PAC complies with its record-keeping obligations.

II. Legal Analysis

Commission regulations prohibit corporations from "facilitating the making of contributions to candidates or political committees, *other than* to the separate segregated funds of the corporations." 11 C.F.R. § 114.2(f)(1) (emphasis added). The regulations further provide that "facilitating the making of contributions" does not include enrolling members of a corporation's restricted class "in a payroll deduction plan or check-off system which deducts contributions from dividend or payroll checks to make contributions to the corporation's ... separate segregated fund." *Id.* § 114.2(f)(4)(i); *see also* Advisory Op'n 2000-11 ("Commission regulations permit a corporation to use a payroll deduction system for soliciting and collecting voluntary contributions from its restricted class to the corporation's separate segregated fund."). A written authorization from the restricted class member is required before contributions may be deducted from his or her compensation. 11 C.F.R. § 104.14(b)(1); 71 Fed. Reg. 38513 (July 7, 2006).

P&G's proposal to allow board members to have P&G PAC contributions deducted from their retainer payments is consistent with Commission regulations. Commission regulations expressly allow corporations to "deduct[] contributions from ... payroll checks to make contributions to" their separate segregated funds. *Id.* § 114.2(f)(4)(i). That is what P&G is proposing to do here. Although the term "payroll checks" is not defined in the Commission's regulations or advisory opinions, it seems clear that the term would include the quarterly retainer payments described above. Like other payroll checks, these payments to board members (i) compensate a member of the restricted class for services to P&G and (ii) are made at regular intervals. P&G may therefore "deduct contributions" from these "payroll checks to make contributions" to its PAC, provided the contributions are authorized and voluntary and not excessive.

Even if quarterly retainer checks are not considered "payroll checks" under 11 C.F.R. § 114.2(f)(4)(i), P&G's proposal would still be permissible. As mentioned above, the facilitation of contributions to a corporation's own separate segregated fund is not considered a prohibited facilitation. *Id.* § 114.2(f)(1). The deduction of contributions from payroll checks is just one of the many ways in which a corporation could permissibly facilitate contributions to its own PAC.

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In this case, P&G would be facilitating the making of contributions by board members who are also restricted class members, by allowing them to have P&G deduct a portion of their quarterly retainer payments and contribute that amount to P&G PAC. Such facilitation of contributions from restricted class members is permitted by Commission regulations, *see* 11 C.F.R. § 114.2(f)(1), again, provided that the contributions are authorized and voluntary and are not excessive.

For the foregoing reasons, we therefore request an advisory opinion confirming that P&G may use its payroll deduction system to deduct contributions for P&G PAC from the cash portion of the quarterly retainer payments paid out to board members who are members of P&G's restricted class.

Sincerely,

A handwritten signature in black ink, appearing to be a combination of initials and a name, with a long horizontal line extending to the right.

Robert K. Kelner
Zachary G. Parks



"Kelner, Robert"
 <rkelner@cov.com>
 06/29/2010 06:55 PM

To "'jlevin@fec.gov" <jlevin@fec.gov>, "Parks, Zachary" <zparks@cov.com>
 cc "ARothstein@fec.gov" <ARothstein@fec.gov>, "JClark@fec.gov" <JClark@fec.gov>, "mjohnson@fec.gov" <mjohnson@fec.gov>, "Parks, Zachary"
 bcc

Subject RE: Your Letter on Behalf of Procter & Gamble

History: This message has been replied to.

The factual propositions you have stated below are correct.

Regards,
 Rob Kelner

Robert K. Kelner
 COVINGTON & BURLING LLP
 1201 Pennsylvania Avenue, NW
 Washington, DC 20004
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From: jlevin@fec.gov [mailto:jlevin@fec.gov]
Sent: Tuesday, June 29, 2010 6:07 PM
To: Kelner, Robert; Parks, Zachary
Cc: ARothstein@fec.gov; JClark@fec.gov; mjohnson@fec.gov
Subject: Your Letter on Behalf of Procter & Gamble

Dear Mr. Kelner:

In your telephone conversation yesterday with this Office, you provided us with additional information regarding the request by Procter and Gamble (P&G) for an advisory opinion. We have set out below our understanding of certain points that you made during the conversation. Please review the statements below and either confirm their accuracy or correct any misperceptions.

(1) Members of the P&G Board of Directors are not paid on an hourly basis. Rather, they are paid a fixed retainer that does not depend on the amount of time that they spend

working on P&G business. In addition to the fixed retainer, directors are paid a "per diem" amount for any days on which they attend a P&G Board Meeting.

(2) P&G does not deduct or withhold any amount of the retainer or per diem amount paid to Board members as income tax under Section 3402 of the Internal Revenue Code of 1954.

(3) P&G is the entity that pays the retainer and per diem amount to members of the P&G Board of Directors.

We would appreciate your response by email. This email and your response may become a supplement to your Advisory Opinion Request and, if so, will be made available to the public by the Commission.

Thank you very much for your cooperation.

Sincerely,

Jonathan M. Levin
Senior Attorney
Office of General Counsel
Federal Election Commission