

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

Members of the public may submit written comments on draft advisory opinions.

DRAFT ADVISORY OPINION 2010-12 is now available for comment. It was requested by Robert K. Kelner, Esq., and Zachary G. Parks, Esq., on behalf of Procter & Gamble Company and Procter & Gamble Company Good Government Committee.

If you wish to comment on the DRAFT ADVISORY OPINION 2010-12, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand delivery or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by 12:00 p.m. noon (Eastern Time) on August 10, 2010.
- 4) The Commission generally will not accept comments received after the deadline. 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.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

FOR FURTHER INFORMATION:

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Commission Secretary:

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Rosemary C. Smith
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Other inquiries:

To obtain copies of documents related to 2010-12, please contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at www.fec.gov.

MAILING ADDRESSES

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

FEDERAL ELECTION
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SECRETARIAT

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August 4, 2010

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *TJD*
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Subject: Draft AO 2010-12 (Procter & Gamble)

Attached is a proposed draft of the subject advisory opinion. We set August 10, 2010 as the deadline for public comments on the attached draft advisory opinion. We plan to circulate the attached draft for a 48-hour tally vote on August 11, 2010.

Attachment

1 ADVISORY OPINION 2010-12

2
3 Robert K. Kelner
4 Zachary G. Parks
5 Covington & Burling, LLP
6 1201 Pennsylvania Avenue, NW
7 Washington, DC 20004-2401

DRAFT

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9 Dear Messrs. Kelner and Parks:

10 We are responding to your advisory opinion request on behalf of the Procter &
11 Gamble Company ("P&G") and its separate segregated fund ("SSF"), the Procter &
12 Gamble Company Good Government Committee ("P&G PAC"), concerning the
13 application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and
14 Commission regulations to the deduction by P&G of contributions to P&G PAC from
15 P&G's quarterly cash retainer payments to members of its board of directors.

16 The Commission concludes that P&G directors, who receive retainer payments on
17 a salary rather than hourly basis, are members of P&G's restricted class and, thus, are
18 eligible for solicitation by P&G PAC. The Commission also concludes that contributions
19 made by directors through pre-authorized deductions from their quarterly retainer
20 payments are, as proposed, permissible under the Act and Commission regulations.

21 ***Background***

22 The facts presented in this advisory opinion are based on your letter received on
23 May 18, 2010, on your email of June 29, 2010, and on telephone conversations with
24 Commission staff.

25 P&G PAC is an SSF of P&G and is registered with the Commission as a political
26 committee. P&G currently operates a corporate payroll deduction system whereby
27 employees in P&G's restricted class may elect to contribute to P&G PAC by

1 pre-authorizing periodic deductions from their salary payments. P&G proposes to extend
2 this program to certain members of its ten-member board of directors.

3 The board's chair, who is also P&G's President and Chief Executive Officer, is a
4 full-time employee of P&G. The nine other directors are not full-time P&G employees,
5 but do receive quarterly retainer payments from P&G as compensation for their board
6 service. These retainer payments are issued on a salary rather than hourly basis, meaning
7 that the retainer amount is not determined by the amount of time a director spends on
8 board responsibilities. Directors may elect to receive their quarterly retainer payments in
9 cash (through physical checks or direct deposit), unrestricted stock, retirement restricted
10 stock, or a combination of the above options.

11 Under P&G's proposal, P&G PAC would follow the same procedures for
12 directors that it currently follows for non-directors participating in the payroll deduction
13 plan. P&G PAC would send a written solicitation to the director, informing him or her of
14 the choice to have P&G automatically deduct a specified amount from the cash portion of
15 each quarterly retainer payment as a contribution from the director to P&G PAC.
16 Directors wishing to participate would return a signed authorization form to P&G PAC.
17 P&G PAC intends to solicit only those directors (1) who are United States citizens or
18 lawful permanent residents; and (2) who elect to receive at least 25 percent of their
19 retainer payments in cash. P&G indicates that the solicitations would comply with the
20 provisions of 11 CFR 114.5(a) and that the contributions received would not exceed the
21 limitations in the Act and Commission regulations.

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1 ***Question Presented***

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

5 ***Legal Analysis and Conclusions***

6 Yes, P&G may, with prior written authorization from a P&G board member,
7 deduct a contribution to P&G PAC from a board member's quarterly retainer payment.

8 The Act and Commission regulations prohibit corporations from making any
9 contributions in connection with a Federal election. 2 U.S.C. 441b(a);
10 11 CFR 114.2(b)(1). Corporations are also generally prohibited from facilitating the
11 making of contributions to candidates or political committees. 11 CFR 114.2(f)(1).
12 Facilitation means using corporate resources or facilities to engage in fundraising
13 activities in connection with any Federal election. *Id.*

14 A corporation's use of general treasury funds to establish, administer, and solicit
15 contributions from its restricted class to its SSF is not a contribution to a candidate or
16 political committee, and does not facilitate the making of a contribution to a candidate or
17 political committee. 2 U.S.C. 441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii), and 114.5(b). A
18 corporation's restricted class includes stockholders and their families, and executive or
19 administrative personnel and their families. 2 U.S.C. 441b(b)(4)(A)(i); 11 CFR
20 114.5(g)(i). The term "executive or administrative personnel" means "individuals
21 employed by a corporation who are paid on a salary, rather than hourly, basis and who
22 have policymaking, managerial, professional, or supervisory responsibilities." 2 U.S.C.
23 441b(b)(7); *see also* 11 CFR 114.1(c).

1 Members of a corporation's board of directors are not automatically considered to
2 be members of a corporation's executive and administrative class. *See*
3 11 CFR 114.5(g)(1) and 114.1(c)(1)-(3); Advisory Opinion 2000-10 (America's
4 Community Bankers). To be a member of the restricted class, "a director must be paid a
5 salary or stipend in order to be solicited (assuming the director is not otherwise solicitable
6 as a stockholder or as an executive employee of the corporation)." Advisory Opinion
7 2000-10 (America's Community Bankers); *see also* Advisory Opinions 1992-09 (KAMO
8 Power), 1985-35 (Weirton), and 1977-18 (Proprietary Institute PAC). Because P&G
9 pays its directors' retainers on a salary rather than hourly basis, the directors are members
10 of P&G's restricted class and may be solicited by P&G PAC.

11 Commission regulations provide that facilitating the making of contributions does
12 not include "[e]nrolling members of a corporation's . . . restricted class in a payroll
13 deduction plan or check-off system which deducts contributions from dividend or payroll
14 checks to make contributions to the corporation's . . . separate segregated fund."
15 11 CFR 114.2(f)(4)(i). In prior advisory opinions, the Commission has approved
16 arrangements in which a corporation administers contributions to its SSF via payroll
17 deduction or check-off. *See, e.g.,* Advisory Opinions 2001-04 (MSDW PAC) and
18 1999-03 (Microsoft PAC). P&G's proposal is analogous to arrangements the
19 Commission has approved in the past. For example, in Advisory Opinion 2009-31
20 (MAXIMUS, Inc.), the Commission approved a proposal to allow employees to
21 contribute the value of earned "credits," which were part of the corporation's employee
22 compensation plans, to the corporation's SSF. In Advisory Opinion 1999-06 (Rural

1 Letter Carriers), the Commission approved a proposal to allow members to contribute to
2 a labor organization's SSF through deductions from their annuity payments.

3 P&G's proposal would provide for pre-authorized deductions of a fixed amount
4 from regularly scheduled periodic payments by the corporation to members of its
5 restricted class. Thus, like these prior proposals, P&G's proposal is permissible under the
6 Act and Commission regulations.

7 The permissibility of P&G's proposal is conditioned upon compliance with the
8 voluntariness requirements of 2 U.S.C. 441b(b)(3) and 11 CFR 114.5(a), including the
9 continuing right of contributors to revoke their authorizations or modify their
10 contribution amounts at any time. *See* Advisory Opinions 2000-04 n.8 (NAFCU),
11 1999-03 (Microsoft PAC), and 1991-19 (GTE). Additionally, in order to avoid making
12 contributions from its general treasury funds, P&G must ensure that it does not forward
13 any contributions to P&G PAC until the time the quarterly retainers are paid to the
14 director making the contribution. Otherwise, the contributions would constitute an
15 advance of corporate funds, prohibited by 2 U.S.C. 441b(a). *See* 2 U.S.C. 441b(b)(2);
16 11 CFR 114.1(a)(1); Advisory Opinion 2006-34 (Working Assets, Inc.).

17 This response constitutes an advisory opinion concerning the application of the
18 Act and Commission regulations to the specific transaction or activity set forth in your
19 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
20 of the facts or assumptions presented, and such facts or assumptions are material to a
21 conclusion presented in this advisory opinion, then the requestor may not rely on that
22 conclusion as support for its proposed activity. Any person involved in any specific
23 transaction or activity which is indistinguishable in all its material aspects from the

1 transaction or activity with respect to which this advisory opinion is rendered may rely on
2 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
3 conclusions in this advisory opinion may be affected by subsequent developments in the
4 law, including, but not limited to, statutes, regulations, advisory opinions, and case law.
5 The cited advisory opinions are available on the Commission's website at
6 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

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Matthew S. Petersen
Chairman