FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 12, 2003

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2003-33

Kenneth A. Gross
Ki P. Hong
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Ave.
Washington, DC 20005-2111

Dear Mr. Gross and Mr. Hong:

This refers to your letter of November 3, 2003, requesting an advisory opinion on behalf of Anheuser-Busch Companies, Inc. and its subsidiaries ("A-B"), concerning the application of the Federal Election Campaign Act of 1971 ("the Act"), and Commission regulations, to a proposed plan involving A-B's federally registered political action committee, Anheuser-Busch Companies, Inc. Political Action Committee ("AB-PAC").

A-B is a domestic corporation, and the AB-PAC is A-B's separate segregated fund. Your request relates to two separate programs currently administered by A-B: (1) the Charitable Matching Program and (2) the United Way Program. Under the Charitable Matching Program, which has been in effect since 1989, if an eligible employee of A-B makes a contribution to the AB-PAC, A-B matches that contribution, dollar-for-dollar, by making a donation to a charity in the same amount as the contribution to AB-PAC and in the name of the contributing employee. You state that, other than the requirement that the charity be exempt from federal income taxes under section 501(c)(3) of the Internal Revenue Code, the contributing employee is free to choose the charity to which the matching donation is to be made.

Under the United Way Program, which has been in effect for at least 25 years, A-B provides prizes to employees who donate a certain amount to the United Way. Specifically, you state that if an employee donates $100 or more to the United Way, the employee is provided with a beer ticket entitling him or her to a free case of beer, which typically costs A-B no more than $10.

You further state that an employee who donates a certain percentage of his or her salary to the United Way is considered a "Fair Share" participant and receives an item such as a beer stein, plaque or wall print, which costs A-B between $30 and $52.

You state that, prior to 2002, there was no interaction between the Charitable Matching Program and the United Way Program, meaning that an employee that designated the United Way to receive his or her charitable match under the Charitable Matching Program would not have the amount of the charitable match counted toward the thresholds for qualifying for prizes under the United Way Program. In 2002, however, A-B started to count such charitable matching contributions made to the United Way, along with the employee's direct contributions to the United Way, toward those prize thresholds.[1] Consequently, an employee who makes a contribution to the AB-PAC and designates the United Way under the Charitable Matching Program receives two benefits – (1) a matching contribution in the employee's name to the United Way and (2) a prize under the United Way Program.

The Act prohibits a corporation from making contributions or expenditures in connection with any Federal election. 2 U.S.C. 441b(a). However, the Act excludes from the definition of "contribution or expenditure," those costs that are paid by the corporation for "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes" by the corporation. 2 U.S.C. 441b(b)(2)(C). Although Commission regulations provide that a corporation may use its general treasury monies to pay the expenses of establishing and administering such a separate segregated fund ("SSF") and of soliciting contributions to the SSF, the regulations also state that a corporation may not use this process "as a means of exchanging treasury monies for voluntary contributions." 11 CFR 114.5(b). In this respect, the regulations specify that a contributor may not be paid for his or her contributions through a bonus, expense account, or other form of direct or indirect compensation. 11 CFR 114.5(b)(1). The Act and Commission regulations allow a corporation, or an SSF established by a corporation, to solicit voluntary contributions to the SSF from the corporation's stockholders, its executive and administrative personnel, and their families. 2 U.S.C. 441b(b)(4)(A)(i); 11 CFR 114.5(g)(1). Any solicitation of these persons for contributions to the SSF must meet certain requirements. *See* 11 CFR 114.5(a), and, in particular, 11 CFR 114.5(a)(5).

The Commission has previously approved charitable matching programs similar to the Charitable Matching Program described in your letter. *See* Advisory Opinions 2003-4, 1990-6, 1989-9, 1989-7, 1988-48, 1987-18, and 1986-44.[2] These past opinions have all allowed corporations to match contributions made to their SSFs with donations to charities under certain conditions. The Commission has viewed the costs of such a matching program as solicitation expenses related to fundraising for its SSF. 2 U.S.C. 441b(a) and 441b(b)(2)(C). Given that under the Charitable Matching Program no individual contributor to the SSF would receive a financial, tax, or other tangible

[1] You state that, pending to outcome of this advisory opinion request, A-B has ceased its practice of counting the Charitable Matching Program donations it makes to the United Way toward the United Way Program prize thresholds.

[2] *See also* Advisory Opinions 1994-7, 1994-6 and 1994-3, where the Commission considered and approved the use of matching charitable contribution plans for employees who are only solicitable under the twice yearly procedures, provided that all other Commission regulations applicable to the solicitation of these personnel (that is, employees outside the restricted class) are followed.

benefit from either the corporation or the recipient charities, the Commission concludes that there is no exchange of corporate treasury monies for voluntary contributions.[3] Provided that A-B's charitable matching plan is implemented so that no contributor to the PAC receives a tangible benefit or premium from A-B, AB-PAC, or the charity receiving the matching donation, the matching donation to the charity will be treated as a solicitation expense and not as an impermissible contribution from A-B.

The Commission has previously approved of providing contributors to SSFs with prizes or tokens of appreciation similar to the items that A-B employees receive under the United Way Program. *See* Advisory Opinion 1981-40. Such prizes have been permitted so long as they are not disproportionately valuable in relation to the contributions generated. The Commission's regulations provide that a "reasonable practice to follow is for the separate segregated fund to reimburse the corporation or labor organization for costs which exceed one-third of the money contributed." 11 CFR 114.5(b)(2). In your letter, you state that under no circumstances does the portion of the cost of any prize awarded under the United Way Program that is attributable to the matching donations made under the Charitable Matching Program exceed one-third of the amount of the contribution made to AB-PAC.

Under the proposed plan described in your request, those A-B employees who contribute to AB-PAC and designate the United Way to receive their charitable matching donation will, in effect, receive two benefits in return for their contribution – (1) the charitable matching donation made in their name under the Charitable Matching Program and (2) the token gift they will receive under the United Way Program.[4] As set forth above, if certain guidelines are followed, providing either of these benefits separately in return for contributions to a corporation's SSF would be permissible under the Act. The charitable matching donation is permissible under the Commission's advisory opinions cited above, and the token gift is permissible under the "one-third" rule set forth at 11 CFR 114.5(b)(2). Your request raises the question of whether providing these two benefits together would violate the Act.

As explained above, in permitting corporations to implement charitable matching plans like the one at issue in this request, the Commission has determined that the matching donations are solicitation expenses and do not provide any tangible benefit to the contributing employee. The Commission does not believe that the additional benefit

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[3] The Commission's conclusion regarding matching charitable contributions by separate segregated funds is consistent with the Internal Revenue Code's treatment of the tax consequences of such programs. The Internal Revenue Service has concluded that a matching charitable contribution plan grant to a section 501(c)(3) organization should not be recharacterized as payment of compensation to the employee and a subsequent payment by the employee to the section 501(c)(3) organization. G.C.M. 39,877 (August 27, 1992); Rev. Rul. 67-137, 1967-1 C.B. 63. The Internal Revenue Service has also concluded that the corporation may not receive a tax deduction for matching charitable donations it makes. G.C.M. 39,877.

[4] It is not clear how many A-B employees will be entitled to receive these combined benefits. Your letter indicates that in 2002, when A-B counted donations made to the United Way under the Charitable Matching Program toward the thresholds for prizes under the United Way Program, less than twenty percent of the employees contributing to AB-PAC designated the United Way to receive their charitable matching donation.

to the employee represented by the token gift or prize, of beer, a beer stein, a plaque or a wall print, which he or she would receive under the United Way Program, alters the nature of the charitable matching donation so as to make it a tangible benefit to the employee. Likewise, if receipt of a token gift or prize of less than one-third the value of the contribution, standing alone, does not amount to the exchange of corporate treasury money for voluntary contributions, the Commission does not believe that such a token gift or prize, when combined with the receipt of a charitable matching donation, would amount to the exchange of corporate treasury money for voluntary contributions. Consequently, the Commission concludes that A-B may count donations made to the United Way under the Charitable Matching Program toward an employee's eligibility to receive a prize under the United Way Program.

The Commission expresses no opinion regarding any implications of the proposed matching charitable contribution plan under the Internal Revenue Code because those issues are outside the Commission's jurisdiction.

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 requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

Ellen L. Weintraub
Chair

Enclosures: (AOs 2003-4, 1994-7, 1994-6, 1994-3, 1990-6, 1989-9, 1989-7, 1988-48, 1987-18, 1986-44, and 1981-40)