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AGENDA ITEM
For Meeting of: 04-24-03

April 14, 2003

MEMORANDUM

TO: The Commission

THROUGH: James A. Pebrkon *JAP*
Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

James Kahl *JK*
Deputy General Counsel

Rosemary C. Smith *RCS*
Acting Associate General Counsel

John C. Vergelli *JCV (res)*
Acting Assistant General Counsel

Albert Kiss *AK*
Staff Attorney

Subject: Draft AO 2003-04

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for April 24, 2003.

Attachment

1 **ADVISORY OPINION 2003-4**

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4 **R. Patrick Vance**
5 **Jones, Walker, Waechter, Poitevent, Carrère & Denègre, L.L.P.**
6 **201 St. Charles Ave., 49th Floor**
7 **New Orleans, LA 70170-5100**

DRAFT

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10 **Dear Mr. Vance:**

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12 **This refers to your letter of February 25, 2003, and supplement dated March 25, 2003,**
13 **requesting an advisory opinion on behalf of Freeport-McMoRan Copper & Gold, Inc.**
14 **("Freeport") and the Freeport-McMoRan Copper & Gold, Inc. Citizenship Committee ("the**
15 **PAC"), concerning the application of the Federal Election Campaign Act of 1971 ("the Act"),**
16 **and Commission regulations, to a proposed plan under which Freeport would match**
17 **contributions to the PAC with contributions to a charity.**

18 **Freeport is a Delaware corporation, and the PAC is Freeport's separate segregated fund.**
19 **You state that Freeport would like to begin a matching charitable contribution plan to encourage**
20 **participation in the PAC. Under the proposed plan, for each contribution made to the PAC by an**
21 **individual contributor, Freeport would make a matching contribution to any section 501(c)(3)**
22 **organization of the contributor's choice, dollar for dollar, up to the maximum amount an**
23 **individual can contribute to the PAC in a given calendar year. Individuals who are stockholders,**
24 **executives or administrative personnel would be eligible to participate in the proposed matching**
25 **contribution plan. Solicitations would be made both to eligible individuals at Freeport and its**
26 **subsidiary, FM Services Company ("FMS"). Individual contributors would not receive any tax**
27 **benefits from the matching donations made on their behalf. The matching contribution plan**
28 **would be completely voluntary, and individual contributors would not receive any bonuses,**

1 expense accounts or other forms of direct or indirect compensation as a result of their
2 participation in the plan.

3 The Act prohibits a corporation from making contributions or expenditures in connection
4 with any Federal election. 2 U.S.C. 441b(a). However, the Act excludes from the definition of
5 "contribution or expenditure," those costs that are paid by the corporation for "the establishment,
6 administration, and solicitation of contributions to a separate segregated fund to be utilized for
7 political purposes" by the corporation. 2 U.S.C. 441b(b)(2)(C). Although Commission
8 regulations explain that a corporation may use its general treasury monies to pay the expenses of
9 establishing and administering such a separate segregated fund ("SSF") and of soliciting
10 contributions to the SSF, the regulations provide that a corporation may not use this process "as a
11 means of exchanging treasury monies for voluntary contributions." 11 CFR 114.5(b). In this
12 respect, the regulations further explain that a contributor may not be paid for his or her
13 contributions through a bonus, expense account, or other form of direct or indirect compensation.
14 11 CFR 114.5(b)(1).

15 The Act and Commission regulations allow a corporation, or an SSF established by a
16 corporation, to solicit voluntary contributions to the SSF from the corporation's stockholders, its
17 executive and administrative personnel, and their families. 2 U.S.C. 441b(b)(4)(A)(i); 11 CFR
18 114.5(g)(1). Any solicitation of these persons for contributions to the SSF must meet certain
19 requirements. See 11 CFR 114.5(a), and, in particular, 11 CFR 114.5(a)(5).

20 The proposed PAC plan is similar to those approved by the Commission in the past. See

1 **Advisory Opinions 1990-6, 1989-9, 1989-7, 1988-48, 1987-18, and 1986-44.**¹ These past
2 **opinions have all allowed corporations to match contributions made to their SSFs with donations**
3 **to charities. The Commission has viewed a corporation's matching of voluntary political**
4 **contributions with charitable donations as solicitation expenses related to fundraising for its SSF.**
5 **2 U.S.C. 441b(a) and 441b(b)(2)(C). Given that under the proposed PAC plan no individual**
6 **contributor to the SSF would receive a financial, tax, or other tangible benefit from either the**
7 **corporation or the recipient charities, the Commission concludes that there is no exchange of**
8 **corporate treasury monies for voluntary contributions.**² As long as Freeport's charitable
9 **matching plan is implemented so that no contributor to the PAC receives a tangible benefit or**
10 **premium from Freeport, the PAC, or the charity receiving the matching donation, this**

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¹ 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 are followed (that is, employees outside the restricted class).

² 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 the matching charitable donation it makes. G.C.M. 39,877.

1 requirement will be met.³

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

5 This response constitutes an advisory opinion concerning the application of the Act and
6 Commission regulations to the specific transaction or activity set forth in your request. See 2
7 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or
8 assumptions presented, and such facts or assumptions are material to a conclusion presented in
9 this opinion, then the requestor may not rely on that conclusion as support for its proposed
10 activity.

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Sincerely,

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Ellen L. Weintraub
Chair

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19 Enclosures (AOs 1990-6, 1989-9, 1989-7, 1988-48, 1987-18, and 1986-44)

³ The Commission notes that the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. 107-155 (March 27, 2002), and the final regulations on "Prohibited and Excess Contributions: Non-Federal Funds or Soft Money," 67 F.R. 49,064 (July 29, 2002), both of which took effect on November 6, 2002, impose certain restrictions on fundraising for tax-exempt organizations. However, these restrictions apply only to such fundraising by national party committees (see 11 CFR 300.11 and 300.50), by State, district, and local party committees (see 11 CFR 300.37 and 300.51), by Federal candidates and officeholders (see 11 CFR 300.52 and 300.65), as well as to the agents of, and to any entities directly or indirectly established, financed, maintained, or controlled by, such persons. Thus, BCRA does not affect the conclusion reached by the Commission in this opinion (and in the other advisory opinions to which this opinion refers), unless Freeport is acting as the agent of a political party committee or of a Federal candidate or officeholder while administering the contribution-matching program.