FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
CHIEF COMMUNICATIONS OFFICER
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: COMMISSION SECRETARY

DATE: July 27, 2009

SUBJECT: COMMENT ON DRAFT AO 2009-14
Mercedes-Benz USA LLC

Transmitted herewith is a timely submitted comment from Jan Witold Baran, Esq., and Caleb P. Burns, Esq., regarding the above-captioned matter.

Proposed Advisory Opinion 2009-14 is on the agenda for Tuesday, July 28, 2009.

Attachment

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Federal Election Commission
c/o Ms. Mary Dove
Commission Secretary
999 E Street, NW
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Re: AOR 2009-14 Comments

Dear Commissioners:

On behalf of our clients Mercedes-Benz USA LLC ("MBUSA LLC") and Sterling Truck Corporation ("Sterling Corp."), we respectfully submit these comments to the alternative draft of Advisory Opinion 2009-14, designated Agenda Document 09-54-A ("Alternative Draft").

The proposed new legal principles contained in the Alternative Draft violate central tenants of administrative law, the Federal Election Campaign Act, and the Commission's own regulations. Accordingly, the Commission should reject the Alternative Draft and approve the original draft of the Advisory Opinion, designated Agenda Document 09-54 ("Original Draft").

In addition, the Alternative Draft is ambiguous and seemingly inconsistent and contradictory. The Alternative Draft holds that "MBUSA LLC may administer an SSF to be established by Sterling Corp." but does not clearly explain the factual basis for this holding. Even if legally correct, the Alternative Draft ignores the fact that (a) the EAPP costs of MBUSA LLC are not "reimbursed" by Daimler AG and (b) MBUSA LLC has sufficient domestic revenues to pay its EAPP expenses.

1. The Analysis and Legal Conclusions of the Alternative Draft Are Fundamentally Flawed As a Matter of Law and Should Be Rejected.

The Alternative Draft argues as follows:

The Bipartisan Campaign Reform Act of 2002 ("BCRA") amended the Federal Election Campaign Act of 1971 ("FECA") (collectively the "Act") to include "donations" and "disbursements" among the prohibitions that apply to foreign nationals. *See* page 9, line 16 through page 10, line 2. The Alternative Draft concedes that the Act does not include the "establishment, administrative, or

solicitation" costs of an SSF in the foreign national prohibition, but determines that the terms "donation" or "disbursement" include payments for such costs. *See* page 10, lines 3-6. For that reason, foreign nationals may not pay the "establishment, administrative, or solicitation" costs of a U.S. corporation's SSF and the Commission's Advisory Opinions to the contrary, 1980-111 (Portland Cement) and 1982-34 (Sonat), are overruled. *See* page 10, lines 6-10 and lines 19-21.

As explained in our Advisory Opinion Request and the Original Draft, Congress intended – and the Commission concluded in its 2002 notice and comment rulemaking – that the terms "donation" and "disbursement" apply to State and local elections and other activities that were not otherwise covered by the Act (e.g., soft money donations to the national political parties). *See* 67 Fed. Reg. 69928, 69943-45 (Nov. 19, 2002). More importantly, the rulemaking thoroughly examined whether BCRA altered the manner in which foreign owned U.S. companies could administer an SSF. The answer from scores of interested persons – including the BCRA co-sponsors, reform groups, and others – was a resounding "No."

Congress did not intend for BCRA to disturb the manner in which domestic subsidiaries of foreign corporations administered their SSFs. *See id.*; *see also* Comments by Senators McCain and Feingold and Representatives Shays and Meehan (Sept. 13, 2002) ("The Commission asks whether BCRA addresses ... U.S. subsidiaries of foreign corporations. It does not. As the legislative record makes clear, the widely acknowledged problem BCRA addressed with respect to foreign nationals was the massive and scandalous funneling of foreign soft money to political parties. The issue of whether foreign-controlled U.S. corporations should be barred from ... establishing a federal political action committee, is a controversial one that would have been addressed explicitly had BCRA intended to address it.")

The record in this regard is voluminous and consistent. *See, e.g.*, Comments by Senators Reid and Ensign (Sept. 13, 2002) ("If Congress had intended to make a change of this significance in the campaign finance laws of the United States, it certainly would have done so explicitly or would have explained its intent in the voluminous legislative history of the BCRA, as was the case with the many other changes we made in existing law."); Comments by The Campaign and Media Legal Center (Sept. 13, 2002) ("[T]he Commission seeks comment regarding any specific impact of BCRA on the ability of foreign-controlled U.S. corporations, including U.S. subsidiaries of foreign corporations, ... to establish and maintain a separate

segregated fund (or PAC). We are surprised at this inquiry, as BCRA's legislative history does not reveal any intent that the Commission visit this specific issue.")[1]

In the absence of any such Congressional intent and for the "substantial policy reasons set forth in the long line of Commission advisory opinions" that for "more than two decades ... affirmed the participation of such subsidiaries in elections in the United States," the Commission concluded in its notice and comment rulemaking proceeding that BCRA did not affect the administration of SSFs by domestic subsidiaries of foreign nationals. *See* 67 Fed. Reg. at 69943-44. The Alternative Draft ignores the Commission's rulemaking, the comments of the co-sponsors of BCRA, and the voluminous record.

"Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulations itself: through the process of notice and comment rulemaking." *Alaska Professional Hunters Assoc., Inc. v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999) (quoting *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997); *see also Ball Memorial Hospital v. Leavitt*, Civ. Act. No.04-2254 (RMC), 2006 WL 2714920 (D.D.C. 2006) (quoting the same and concluding that the "law of this circuit is clear"). This basic tenant of administrative law precludes the Commission from using an advisory opinion to alter a conclusion the Commission previously reached in a notice and comment rulemaking. The Alternative Draft reverses the rulemaking and would thereby violate clear administrative law. On this basis alone it should not be approved.

Similarly, the Alternative Draft overrules advisory opinions that have been effectively codified by regulation, thereby exceeding the scope of what the Act and Commission regulations permit to be accomplished through the advisory opinion process. The Commission's notice and comment rulemaking specifically cited the Sonat Advisory Opinion as one in "the long line of Commission advisory opinions" that for "more than two decades ... have affirmed the participation of such subsidiaries in elections in the United States." *See* 67 Fed. Reg. at 69943-44. In so doing, the Commission directly incorporated the rationale and results of Sonat and the rest of "the long line of Commission advisory opinions" – including Portland

[1] DaimlerChrysler also filed comments which noted its longstanding history of supporting an SSF after it was merged with a German company.

Cement – into the regulation itself.[2] However, the Act and Commission regulations state that an advisory opinion may not be used to impose a new "rule of law" unless "initially proposed only as a rule or regulation." 2 U.S.C. § 437f(b); 11 C.F.R. § 112.4(e); *see also* Peter L. Strauss, The Rulemaking Continuum, 41 Duke L.J. 1463, 1467 (1992) ("a valid legislative rule may be modified only by adoption of an amending rule or overruling statute"). By overruling advisory opinions specifically incorporated into a Commission regulation as a rule of law, the Alternative Draft is doing by advisory opinion what can only be done by a new rulemaking.

The dictates of administrative law, the Act, the Commission's own 2002 rulemaking, and other Commission regulations contradict the analysis and legal conclusions reached by the Alternative Draft. Accordingly, the Alternative Draft cannot be supported as a matter of law and the Commission should reject it in favor of the Original Draft.

2. The Factual Basis for the Holding of the Alternative Draft is not Clearly Stated.

The Alternative Draft holds that "MBUSA LLC may administer an SSF to be established by Sterling Corp." *See* page 1, lines 17-18. Nonetheless, the Alternative Draft then states that "MBUSA LLC may not pay the SSF's administrative costs from its EAPP cost center if the payments are reimbursed by Daimler AG" unless MBUSA LLC is "able to demonstrate through a reasonable accounting method that it has made the payments from its own revenues and that MBUSA has sufficient funds in its accounts, other than funds given or loaned, or reimbursed by Daimler AG from which the payment is made." *See* page 8 lines 8-9 and page 10, lines 14-19.[3] To hold that "MBUSA LLC may administer an SSF,"

[2] Portland Cement also filed comments in the 2002 notice and comment rulemaking that ultimately left the Portland Cement Advisory Opinion undisturbed. *See* Comments by Portland Cement Association (Sept. 13, 2002). The Alternative Draft proposes to overrule the Portland Cement Advisory Opinion without providing Portland Cement the procedural protections afforded to it by a new notice and comment rulemaking.

[3] The Commission should be cognizant of the wide-ranging consequences this test, if ever adopted, would have on all U.S. corporations with overseas operations. For example, would Ford Motor Company be required to account for its significant international sales to ensure that only domestically generated revenues are used to administer its SSF? No such accounting is currently required pursuant to the Sonat and Portland Cement Advisory Opinions upon which the Original Draft relies. By the same token, how would a U.S. company account for administrative costs of

the Alternative Draft must have concluded that MBUSA LLC satisfies these requirements. However, the Alternative Draft does not explain how even though the Advisory Opinion Request describes in great detail MBUSA LLC's accounting practices.

We explained that (a) the EAPP costs of MBUSA LLC are not "reimbursed" by Daimler AG with foreign funds and (b) MBUSA LLC necessarily has sufficient domestic revenues to pay its EAPP expenses because they are paid as they are incurred. *See* Advisory Opinion Request pages 2-4. The Alternative Draft should have explicitly stated as much for the sake of clarity and completeness.

(a) EAPP expenses are not "reimbursed" by Daimler AG.

As explained in the Advisory Opinion Request (at pages 11-12), no foreign money flows from Daimler AG to MBUSA LLC to reimburse its EAPP expenses. Rather, U.S. dollars generated in the U.S. from MBUSA LLC's commercial activities in the U.S. are transferred back to Daimler AG. It is these same dollars that are used to pay MBUSA LLC's EAPP expenses. Because these dollars would not have existed but for MBUSA LLC's commercial activities in the U.S., it is not accurate to classify the portion that is not remitted to Daimler AG as a "reimbursement" by Daimler AG. They are U.S. dollars generated by MBUSA LLC in the U.S. They are not foreign funds generated by Daimler AG and paid to MBUSA LLC as a "reimbursement."

(b) MBUSA LLC necessarily has sufficient U.S. revenues to pay its EAPP expenses.

The Advisory Opinion Request also explains (at pages 11-12) that MBUSA LLC pays its EAPP expenses as they are incurred from MBUSA LLC's U.S. revenues. Accordingly, it is not necessary for MBUSA LLC to perform a separate accounting to determine whether MBUSA LLC "has made the payments from its own revenues and that MBUSA has sufficient funds in its accounts, other than funds given or loaned, or reimbursed by Daimler AG." This requirement is necessarily satisfied because MBUSA LLC pays its EAPP expenses at the outset with U.S. revenues. It is only after-the-fact that these expenses are accounted for and reconciled against what MBUSA LLC remits to Daimler AG to determine profit and performance.

soliciting and collecting SSF contributions of U.S. citizens working at its foreign-parent or subsidiary company?

* * *

The Alternative Draft cannot be reconciled with basic principals of administrative law, the Act, or the Commission's own regulations. Accordingly, it should be rejected in favor of the Original Draft which does not suffer from these critical flaws. Moreover, the Alternative Draft fails to clearly state the precise factual basis for its holding that "MBUSA LLC may administer an SSF to be established by Sterling Corp." For all these reasons, the Commission should adopt the Original Draft.

Sincerely,

Jan Witold Baran
Caleb P. Burns

cc: Office of General Counsel (via facsimile 202.219.3923)