FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 28, 2009

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2009-14

Jan Witold Baran
Caleb P. Burns
Wiley Rein LLP
1776 K Street, NW
Washington, D.C. 20006

Dear Mr. Baran and Mr. Burns:

We are responding to your advisory opinion request on behalf of Mercedes-Benz USA LLC ("MBUSA LLC") and Sterling Truck Corporation ("Sterling Corp."), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to MBUSA LLC's proposal to pay the administrative costs of a separate segregated fund ("SSF") to be established by Sterling Corp., and whether the SSF may be referred to as "Daimler PAC."

The Commission concludes that MBUSA LLC may administer an SSF to be established by Sterling Corp., and that the name of the SSF may be abbreviated to "Daimler PAC."

Background

The facts presented in this advisory opinion are based on your letter received on May 27, 2009, your email received on June 5, 2009, and conversations with Commission attorneys.

MBUSA LLC is a limited liability company ("LLC") organized under the laws of the State of Delaware and headquartered in New Jersey. MBUSA LLC markets and distributes Mercedes-Benz and Maybach vehicles and products throughout the United States. MBUSA LLC's sole member is Daimler North America Corporation ("DNAC").

Sterling Corp. is a Delaware corporation, headquartered in Oregon. It markets and distributes heavy- and medium-duty trucks and parts throughout North America. Sterling Corp. is the wholly owned subsidiary of Daimler Trucks North America LLC ("DTNA LLC"), the sole member of which is DNAC.

DNAC is a Delaware corporation that is headquartered in New Jersey. It is the wholly owned subsidiary of Daimler AG, a German company that is the ultimate parent of the Daimler-related companies.

Sterling Corp. intends to establish an SSF, and MBUSA LLC would like to use its personnel and resources to administer it, including paying the administrative and solicitation expenses of the SSF. Specifically, MBUSA LLC would pay the SSF's expenses out of its External Affairs and Public Policy-Americas ("EAPP") cost center.[1] MBUSA LLC would, however, invoice Daimler AG for EAPP expenses, which MBUSA LLC pays from U.S.-generated funds, per the terms of an agreement between MBUSA and Daimler AG for the provision of and payment for such services (the "Service Level Agreement"). Rather than reimburse MBUSA LLC directly for EAPP expenses, Daimler AG permits MBUSA LLC to credit those expenses against the amount it owes Daimler AG for vehicles and products. This payment arrangement is detailed in the Service Level Agreement between MBUSA LLC and Daimler AG.

Under the Service Level Agreement, Daimler AG authorizes annual spending levels for the EAPP cost center and "approve[s] the [EAPP] services to be provided by [MBUSA LLC] via the Budgeting and Planning procedures of the Daimler Group." Service Level Agreement, Section 4.2. Daimler AG does not otherwise guide or prioritize how MBUSA LLC must spend EAPP funds. Counsel for requestors has also represented that the SSF would be administered in a manner consistent with Commission regulations as interpreted in prior advisory opinions, including that all decision-making regarding the SSF would be made exclusively by executive or administrative personnel of MBUSA LLC or Sterling Corp. who are U.S. citizens or legal permanent residents. Further, contributions to the SSF would not be solicited or accepted from persons who are foreign nationals.

MBUSA LLC and Sterling Corp. propose a number of official names for the SSF, including Daimler U.S. Employees Political Action Committee, Daimler North America Corporation U.S. Employees Political Action Committee, Sterling Truck Corporation/Daimler U.S. Employees Political Action Committee, and Sterling Truck Corporation/Daimler North America Corporation U.S. Employees Political Action

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[1] The Daimler-related companies have numerous "cost-centers," some of which benefit multiple business units. MBUSA LLC, for example, includes the EAPP cost center, which funds the government affairs operations conducted by MBUSA LLC on behalf of all of Daimler AG's U.S. companies. EAPP expenses are paid from MBUSA LLC's general treasury, which consists of U.S.-generated funds, or using its short-term credit line with Daimler North America Finance Corporation, which MBUSA LLC repays from domestic revenues.

Committee. Regardless of which of these names is chosen, they would like to abbreviate the name of the SSF to "Daimler PAC."

Questions Presented

1. *May Sterling Corp. serve as the connected organization for the proposed SSF?*

2. *May MBUSA LLC use its personnel and resources to administer the SSF?*

3. *May payment of the administrative costs associated with the SSF come from MBUSA LLC's EAPP cost center?*

4. *May Sterling Corp. and MBUSA LLC abbreviate the name of the SSF to Daimler PAC?*

Legal Analysis and Conclusions

1. May Sterling Corp. serve as the connected organization for the proposed SSF?

Yes, Sterling Corp. may serve as the connected organization for the proposed SSF.

A connected organization is any organization that is not a political committee and that directly or indirectly establishes, administers, or financially supports a political committee. *See* 2 U.S.C. 431(7) and 11 CFR 100.6(a). Corporations, labor organizations, membership organizations, cooperatives, and trade associations may serve as connected organizations of their SSFs. *Id*. Payments by a connected organization for the establishment, administration, or solicitation of contributions to its SSF are exempt from the definition of contribution and expenditure. *See* 2 U.S.C. 441b(b)(2)(C) and 11 CFR 114.1(a)(2)(iii); *see also* 2 U.S.C. 431(8)(B)(vi) and (9)(B)(v).

The Commission has held that foreign nationals[2] may not serve as an SSF's connected organization. *See, e.g.*, Advisory Opinions 1977-53 (APCAC); *see also* 1982-34 (Sonat) (stating that a foreign national corporation may not establish and administer its own SSF). However, domestic subsidiaries of foreign corporations may establish and administer SSFs if they are discrete entities whose principal place of business is the United States,[3] and if those exercising decision-making authority over the SSF are not foreign nationals. *See* Advisory Opinions 1980-100 (Revere Sugar), 1980-111 (Portland Cement). Recent amendments to the Act and to Commission regulations expanding the

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[2] The Act and Commission regulations define "foreign national" to include "foreign principals," as defined in 22 U.S.C. 611(b). 2 U.S.C. 441e(b); 11 CFR 110.20(a)(3). Under 22 U.S.C. 611(b)(3), "foreign principal" includes corporations organized under the laws of or having their principal place of business in a foreign country.

[3] Under 22 U.S.C. 611(b), a domestic corporation whose principal place of business is within the United States is not a "foreign principal" and hence not a "foreign national" under 2 U.S.C. 441e.

scope of the restrictions on foreign national involvement in U.S. elections were not intended "to cover U.S. subsidiaries of foreign corporations" and did not prohibit "the participation of such subsidiaries in elections in the United States . . . through separate segregated funds." [4] *See* Explanation and Justification for Final Rules on Contribution Limitations and Prohibitions, 67 FR 69928, 69943 (Nov. 19, 2002); *see also* Advisory Opinion 2006-15 (TransCanada).

Sterling Corp.'s ultimate parent – Daimler AG – is a German company that qualifies as a foreign principal under 22 U.S.C. 611(b) and a foreign national under 2 U.S.C. 441e(b). Nevertheless, Sterling Corp. itself is a discrete operating domestic entity that is organized under the laws of Delaware and is headquartered in Oregon. As such, and given that requestors have represented that foreign nationals will not have decision-making authority regarding the proposed SSF, Sterling Corp. may serve as its connected organization.

2. May MBUSA LLC use its personnel and resources to administer the proposed SSF?

Yes, MBUSA LLC may use its personnel and resources to administer the proposed SSF.

The Act does not extend to a partnership, or an LLC that is treated as a partnership under Commission regulations, the ability granted to a corporation to serve as a connected organization. *See* 2 U.S.C. 431(7) and 11 CFR 100.6(a) (definition of "connected organization" does not include partnerships or LLCs); *see also* Advisory Opinion 2004-42 (Pharmavite). Instead, partnerships and other unincorporated entities may make contributions to Federal candidates and political committees directly. *See* 11 CFR 110.1(e).

Nonetheless, partnerships and LLCs treated as partnerships that are owned entirely by corporations, like MBUSA LLC, warrant special consideration. Under the dual attribution principle for partnership contributions at 11 CFR 110.1(e), contributions by partnerships are attributed not only to the partnership as a whole but also to its partners. Thus, a partnership owned entirely by corporations may not make contributions, either. *See*, *e.g.,* Advisory Opinion 2001-07 (NMC PAC) (LLC electing partnership status, all of whose members are corporations, may not make contributions to, or otherwise support, a non-connected political committee).

To avoid prohibiting these types of partnerships from making contributions <u>and</u> from establishing and administering an SSF, the Commission has interpreted the Act and Commission regulations to permit a partnership (or an LLC electing partnership status) to

[4] In the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"), Congress amended the Act to clarify, strengthen and expand the ban on campaign contributions and donations by foreign nationals. *See* BCRA Section 303, 116 Stat. at 96. Among other changes, BCRA amended 2 U.S.C. 441e to prohibit foreign national contributions and donations that are made "directly or indirectly."

pay the administrative and solicitation costs of an SSF established by the partnership's corporate owner, but only when the partnership is wholly owned by corporations and affiliated with at least one of the corporations.[5] The administrative and solicitation support provided by a partnership wholly owned by affiliated corporations "may be construed as coming from the affiliated corporations." Advisory Opinion 1992-17 (DuPont Merck PAC).

MBUSA LLC is treated as a partnership under Commission regulations because it is a non-publicly traded LLC that has not affirmatively elected treatment as a corporation for tax purposes.[6] 11 CFR 110.1(g)(2) and (3); *see also* Advisory Opinion 2004-42 (Pharmavite). In addition, MBUSA is wholly owned by – and affiliated with – DNAC. 11 CFR 100.5(g)(3)(i) and 110.3(a)(2)(i). Therefore, MBUSA LLC would be able to perform the functions of a connected organization for an SSF connected to DNAC, including paying the SSF's administrative and solicitation costs. *See* Advisory Opinions 2004-42 (Pharmavite) and 1997-13 (USA PAC). For internal business reasons, though, DNAC has chosen not to serve as the connected organization for the proposed SSF; instead, Sterling Corp. will fill that role.

Through DNAC, MBUSA is also affiliated with DNAC's wholly owned subsidiary Sterling Corp. Although previous Commission advisory opinions have not addressed an arrangement whereby an LLC that is wholly owned by and affiliated with one corporation pays the administrative and solicitation costs of another affiliated corporation's SSF, the Commission finds no material difference in the proposed arrangement that would affect the ability of MBUSA LLC to use its resources and personnel to administer Sterling Corp.'s SSF. Given that DNAC could pay the administrative and solicitation costs of Sterling Corp.'s SSF, and that MBUSA LLC could pay the administrative and solicitation costs of DNAC's SSF, it therefore follows that MBUSA LLC may pay the administrative and solicitation costs of Sterling Corp.'s SSF.[7]

[5] *See* Advisory Opinions 2004-42 (Pharmavite) (LLC treated as partnership was wholly owned by a corporation), 2003-28 (Horizon Lines) (LLC treated as a partnership was "owned entirely by corporations" where it was owned by two corporations and another LLC treated as a partnership, which was itself owned by a corporation), 2001-18 (BellSouth) (joint venture LLC treated as partnership was owned entirely by corporations), 1997-13 (USA PAC) (joint venture LLC treated as partnership was "entirely owned by corporations, whose control over [the LLC] is essentially the same as corporate joint venture partners"), 1996-49 (PrimeCo) (joint venture partnership owned entirely by corporations), 1994-11 (FMC) (limited partnership owned by corporations), 1992-17 (Du Pont Merck) (partnership owned by two corporations), and 1987-34 (Telenet) (two corporations formed a joint venture partnership and temporarily conveyed to it ownership of a subsidiary corporation).

[6] As an LLC with a single corporate member, MBUSA LLC is precluded from electing treatment as a partnership for tax purposes; however, MBUSA LLC has not affirmatively elected treatment as a corporation either. 26 CFR 301.7701-3(a). Per Internal Revenue Service ("IRS") regulations, then, MBUSA LLC is considered a "disregarded entity" and is viewed by the IRS as the functional equivalent of a branch or division of the LLC's single member.

[7] Notwithstanding MBUSA LLC's ability to pay administrative and solicitation costs, the SSF still must identify Sterling Corp. as its connected organization on its statement of organization. 2 U.S.C. 433(b)(2) and 11 CFR 102.2(a)(1)(ii); *see* Advisory Opinions 1997-13 (USA PAC) and 1996-49 (PrimeCo).

3. *May payment of the administrative costs associated with the SSF come from MBUSA LLC's EAPP cost center?*

The Commission considered this question but could not approve a response by the required four affirmative votes. 2 U.S.C. 437c(c) and 11 CFR 112.4(a).

4. *May Sterling Corp. and MBUSA LLC abbreviate the name of the SSF to Daimler PAC?*

Yes, the name of the SSF may be abbreviated to Daimler PAC.

The Act and Commission regulations require the name of an SSF to include the full name of its connected organization. 2 U.S.C. 432(e)(5) and 11 CFR 102.14(c). An SSF established by a subsidiary may, but need not, include in its name the name of the subsidiary's parent or another subsidiary of its parent. 11 CFR 102.14(c).

In limited circumstances, the Commission has allowed the name of an SSF to include only the name of an LLC that is in virtually the same position as a corporate subsidiary of the connected corporation that owns the LLC. For example, the Commission concluded that an SSF's name could include only the name of a joint venture LLC that was treated as a partnership under Commission regulations, where the LLC was performing the functions of the SSF's connected organization. *See* Advisory Opinions 2003-28 (Horizon Lines) and 1997-13 (USA PAC). The Commission has also concluded that an SSF could be named after an LLC that is wholly owned by the corporate entity serving as the SSF's connected organization, where naming the SSF after the LLC "would provide the public with a more accurate understanding of the PAC's funding and purpose." *See* Advisory Opinion 2004-42 (Pharmavite).

Here, Sterling Corp. will serve as the connected organization for the proposed SSF, and funding for the administration of and solicitation for the SSF will come from MBUSA LLC. Unlike the facts underlying the advisory opinions cited above, MBUSA LLC is not "in virtually the same position as a corporate subsidiary" of Sterling Corp., so naming the SSF after MBUSA LLC would not be permissible. Rather, the name of the proposed SSF must include the name of the connected organization – Sterling Corp. – and may, but need not, include the names of Sterling Corp.'s parent – DNAC – and a subsidiary of its parent, including MBUSA. Accordingly, the Commission concludes that only one of the names proposed[8] by requestors would be permissible: Sterling Truck Corporation/Daimler North America Corporation U.S. Employees Political Action Committee.

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[8] Sterling Corp. proposes a number of official names for the proposed SSF, including Daimler U.S. Employees Political Action Committee, Daimler North America Corporation U.S. Employees Political Action Committee, Sterling Truck Corporation/Daimler U.S. Employees Political Action Committee, and Sterling Truck Corporation/Daimler North America Corporation U.S. Employees Political Action Committee.

Commission regulations also permit an SSF to use a "clearly recognized abbreviation or acronym by which the connected organization is commonly known." *See* 11 CFR 102.14(c). In determining whether specific terms or names meet this requirement, the Commission has examined whether they give adequate notice to the public as to the identity and sponsorship of the SSF. *See* Advisory Opinions 2004-42 (Pharmavite), 2004-04 (AirPAC), 2000-34 n.4 (SAPPI Paper), 1987-26 (Principal Mutual), and 1980-23 (ADEPT).

The Commission concludes that the proposal to abbreviate the name of the SSF as "Daimler PAC" would, indeed, provide the public with adequate notice as to the identity and sponsorship of the SSF and is therefore permissible. Sterling Corp.'s affiliation with the Daimler family of companies is readily apparent on its web site. Furthermore, while the SSF will be connected to Sterling Corp., it will receive administrative support from MBUSA LLC by virtue of that organization's affiliation with Sterling Corp. through DNAC. Perhaps most importantly, requestors have indicated that while the proposed SSF will be connected to Sterling Corp. and funded by MBUSA LLC, it will operate on behalf of all the Daimler-related companies.

Finally, it is important to note that use of the abbreviation Daimler PAC will not obscure from the public any relevant information regarding the funding or operation of the proposed SSF. The SSF must use both the abbreviation and the full name on the statement of organization, on all filed reports with the Commission, and on all disclaimer notices required by Commission regulations. In addition, Sterling Corp. will be disclosed as the SSF's connected organization on the statement of organization.

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. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. The cited advisory opinions are available on the Commission's Web site at http://saos.nictusa.com/saos/searchao.

On behalf of the Commission,

(signed)
Steven T. Walther
Chairman