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April 17, 1992

BY HAND

N. Bradley Litchfield, Esq.
Associate General Counsel
Federal Election Commission
999 E Street, Northwest
Washington, D.C. 20463

7 PM 5:33

Dear Mr. Litchfield:

We file this advisory opinion request on behalf of Du Pont Merck Program for Active Citizenship, Inc. ("Du Pont Merck PAC"), an incorporated non-connected political committee.

E.I. Du Pont de Nemours and Company ("Du Pont"), a corporation, sponsors the E.I. Du Pont de Nemours and Company Good Government Fund ("Du Pont PAC"),* a separate segregated fund ("SSF"). Merck & Co., Inc. ("Merck"), a corporation, sponsors the Merck & Co., Inc. Political Action Committee ("Merck PAC"), an SSF. Calgon Corporation ("Calgon"), a corporation, is an indirect wholly-owned subsidiary of Merck.

Du Pont Merck

Du Pont Merck Pharmaceutical Company ("Du Pont Merck") is a Delaware general partnership equally owned by Du Pont and Calgon. Du Pont Merck is an independent worldwide pharmaceutical company established in 1991. Du Pont Merck's goals and focus are distinct from those of Du Pont and Merck. Du Pont Merck employs 4,000 employees. Its first year research and development expenditures of over \$230 million focused on the development of drugs for cardiovascular disease, cancer, viral and central nervous system diseases.

* Du Pont PAC is affiliated with Conoco PAC, but the affiliation of those entities has no bearing on the issues posed in this advisory opinion request.

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Du Pont Merck has a six member Board of Directors, three members representing Du Pont and three members representing Merck. In the event of a deadlock, either Du Pont or Merck may request that the deadlocked issue be resolved by referring the issue to the chief executive officers of Du Pont and Merck. Du Pont Merck's Board of Directors make certain major decisions concerning the partnership. The other decisions are made by Du Pont Merck's officers and employees without input from Du Pont Merck's Board. Examples of decisions reserved to Du Pont Merck's Board concern acquiring other companies, making large capital investments, admitting a new partner, amending the partnership agreement, filing for bankruptcy, making major borrowing commitments, approving charitable and political contributions in excess of \$50,000, and authorizing certain other large expenditures.

Du Pont Merck PAC

Du Pont Merck PAC is a non-connected separately incorporated entity located in the District of Columbia. (Du Pont Merck PAC Articles of Incorporation and By-Laws are attached.) Du Pont Merck PAC raises contributions by soliciting the executive and administrative personnel of Du Pont Merck. Du Pont Merck PAC is responsible for indemnifying its own directors and officers, pays for its own expenses, and does not coordinate its activities with Du Pont PAC or Merck PAC.

Questions Posed

1. Is Du Pont Merck PAC affiliated with Du Pont PAC and Merck PAC?
2. May Du Pont and/or Merck pay the administration and solicitation costs of Du Pont Merck PAC?

Analysis

1. Du Pont Merck PAC is not affiliated with Du Pont PAC or Merck PAC

The Commission should find that Du Pont Merck PAC is not affiliated with Du Pont PAC or Merck PAC. The Commission has considered the affiliation of political commit-

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tees involving joint ventures in several opinions. The issue raised in this situation, however, is different from the opinions where the Commission found affiliation because those opinions dealt with the relationship between SSFs and not with the relationship between an SSF and a non-connected PAC. See, e.g., In Re Telenet, FEC Advisory Opinion 1987-34 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5920 (1988); In Re Scott Paper Company and Mead Corporation, FEC Advisory Opinion 1979-56, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5445 (1979).

In fact, in only one opinion has the Commission determined that a non-connected PAC is affiliated with an SSF. In Re Trammel Crow, FEC Advisory Opinion 1979-77 (1980), 1 Fed. Elec. Camp. Fin. Guide ¶ 5454 (1980). In Trammel Crow, the Commission determined that a corporate sponsored SSF and a non-connected PAC (associated with a partnership) were affiliated with each other because the same individuals who were instrumental in organizing and running the non-connected PAC were also executive officers of the corporation that established the SSF. In addition, the partnership that was associated with the non-connected PAC owned all the capital stock of the corporation that sponsored the affiliated SSF. That finding of affiliation was based not only on the domination that the partnership had over the interests of the corporation but also on the relationship between the individuals who ran the political committees. This case is different from Trammel Crow because Du Pont Merck does not operate as a subsidiary of Du Pont or Merck, and the activities of Du Pont Merck PAC are legally and factually independent from the activities Du Pont PAC and Merck PAC.

2. If Du Pont Merck PAC is affiliated with Du Pont PAC and Merck PAC, Du Pont and/or Merck may pay Du Pont Merck PAC's administrative and solicitation costs

Although Du Pont Merck believes it is not affiliated with Du Pont or Merck, if the Commission finds, as a matter of law, that Du Pont PAC and Merck PAC are affiliated with the Du Pont Merck PAC, then the Commission should find that Du Pont and/or Merck may pay the administration and solicitation costs of Du Pont Merck PAC. The Commission has found that a corporation which has a 50% ownership

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in an incorporated joint venture may pay the administration and solicitation costs of the SSF sponsored by the joint venture. See In Re Alumax Inc., AO 1983-19, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5722 (1983). In the same way, Du Pont and/or Merck, each of which has a 50% ownership in Du Pont Merck should be able to pay Du Pont Merck's administration and solicitation expenses under 2 U.S.C. § 441b(b)(2)(C).

This situation is different from In Re Satellite Business Systems, AO 1981-56, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5646 (1982), because none of the partners in that opinion had a 50% interest in the partnership. See also In Re Telenet, AO 1987-34 (unpublished concurring opinion of Commissioner Thomas which discussed the possibility of a corporation which holds a 50% ownership in the joint venture paying the administration and solicitation costs of a non-connected PAC associated with an unincorporated joint venture). Thus, based on the Commission's finding in Alumax, the Commission should find that Du Pont and/or Merck may pay the administration and solicitation costs of Du Pont Merck PAC pursuant to 2 U.S.C. § 441b(b)(2)(C).

3. Conclusion

The Commission should find that Du Pont Merck PAC is not affiliated with Du Pont PAC or Merck PAC and therefore Du Pont Merck PAC contributions are not aggregated with contributions made by either Du Pont PAC or Merck PAC. Alternatively, should the Commission find that Du Pont Merck PAC is affiliated with Du Pont PAC and Merck PAC, based on the relationship of their sponsoring organizations, then Du Pont and/or Merck should be able to pay Du Pont Merck PAC's administration and solicitation costs.

Thank you for your consideration of this request.

Respectfully submitted,


Kenneth A. Gross

Attachments

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUSINESS REGULATION ADMINISTRATION



CERTIFICATE

92 APR 17 PM 5:33

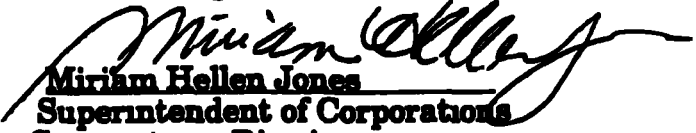
THIS IS TO CERTIFY that all applicable provisions of the DISTRICT OF COLUMBIA NONPROFIT CORPORATION ACT have been complied with and accordingly, this **CERTIFICATE of INCORPORATION** is hereby issued to

**DU PONT MERCK PROGRAM FOR ACTIVE
CITIZENSHIP, INC.**

as of **SEPTEMBER 16TH, 1991.**

Aubrey H. Edwards
Acting Director

Paul E. Waters
Acting Administrator
Business Regulation Administration


Miriam Hellen Jones
Superintendent of Corporations
Corporations Division

Sharon Pratt Dixon
Mayor

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUSINESS REGULATION ADMINISTRATION



THIS IS TO CERTIFY that the pages attached hereto constitute a full, true and complete copy of:

CERTIFICATE AND ARTICLES OF INCORPORATION OF:

DU PONT MERCK PROGRAM FOR ACTIVE CITIZENSHIP, INC.

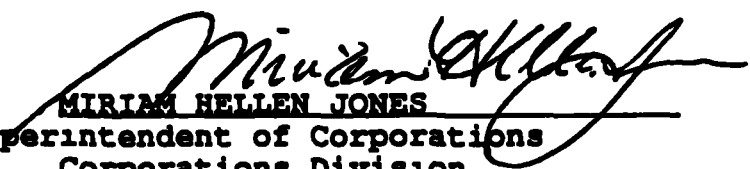
AS RECEIVED AND FILED ON SEPTEMBER 16, 1991.

as the same appears of record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of this office to be affixed, this the 16TH day of SEPTEMBER, 1991.

Aubrey H. Edwards
Acting Director

Paul E. Waters
Acting Administrator

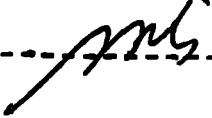

MIRIAM HELLEN JONES
Superintendent of Corporations
Corporations Division

Government of the District of Columbia
Sharon Pratt Dixon, Mayor

ARTICLES OF INCORPORATION
OF
DU PONT MERCK PROGRAM FOR
ACTIVE CITIZENSHIP, INC.

FILED

SEP 16 1991

BY: 

We, the undersigned natural persons of the age of twenty-one years or more, acting as incorporators of a corporation under the Non Profit Corporation Act (D.C. Code, 1981 edition, Title 29, Chapter 5), adopt the following Articles of Incorporation:

ARTICLE I

NAME

The name of the Corporation is Du Pont Merck Program for Active Citizenship, Inc. (the "PAC").

ARTICLE II

DURATION

The duration of the PAC shall be perpetual.

ARTICLE III

PURPOSES AND POWERS

The purposes for which the PAC is formed are:

- A. To preserve and promote good government.
- B. To achieve these purposes, the PAC is authorized to solicit and accept voluntary personal po-

litical contributions, insofar as it may be lawful. The PAC is empowered to expend such contributions to support or oppose any resolution or ballot issue, and for such other purposes consistent with these Articles of Incorporation and as prescribed in the By-laws of the PAC.

C. All solicitations, contributions and expenditures by the PAC shall be made in accordance with applicable laws and regulations, the provisions of these Articles of Incorporation, and the By-laws of the PAC.

D. Consistent with the above, the PAC may exercise all powers available to corporations under the District of Columbia Non-Profit Corporation Act subject to restrictions contained in these Articles of Incorporation and the PAC's By-laws, and provided, however, that the PAC is not organized for profit and no part of the net earnings of the PAC shall inure to the benefit of any director or individual, and that the PAC shall exercise only such powers as are consistent with the exempt status of organizations described in Section 527 of the Internal Revenue Code of 1986 (or the corresponding provision of any future United States internal revenue law), and the regulations thereunder, as the same now exists or as they may be hereafter amended from time to time.

ARTICLE IV

MEMBERSHIP STATUS

The PAC shall have no members.

ARTICLE V

BOARD OF DIRECTORS

The number of members of the Board of Directors may be fixed from time to time by the By-laws and the number may be increased or decreased as therein provided, provided that in no case shall the number be less than three. The members of the Board of Directors shall be elected in the manner provided in By-laws which the Board of Directors may enact, and shall serve as Directors until his successor is appointed and shall qualify.

ARTICLE VI

DISSOLUTION

In the event of termination, dissolution, or winding up of the PAC in any manner for any reason whatsoever, its remaining assets, if any, shall be distributed exclusively to one or more organizations consistent with the requirements of Section 527 of the Internal Revenue Code of 1986 (or the corresponding provision of any future United States internal revenue law) and appli-

cable federal, state, and local campaign finance laws, as shall be determined pursuant to the By-laws of the PAC.

ARTICLE VII

REGISTERED OFFICE AND REGISTERED AGENT

A. The address of the initial registered office of the PAC is 1050 Connecticut Avenue, Washington, D.C. 20036.

B. The name of the initial registered agent at the foregoing office is Corporation Service Company.

ARTICLE VIII

INITIAL DIRECTORS

The number of directors constituting the initial Board of Directors is three (3) and the names and addresses of the persons who are to serve as the initial Directors until their successors have been elected and qualify are:

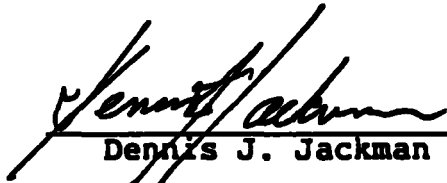
<u>Name</u>	<u>Address</u>
Thomas J. Bucknum	906 DuPont Road Westover Hills Wilmington, Delaware 19807
Richard L. Dunning	906 Cecil Road Westover Hills Wilmington, Delaware 19807
Dennis J. Jackman	4713 Asbury Place, N.W. Washington, D.C. 20016

ARTICLE IX
INCORPORATORS


The names and addresses of the incorporators of the PAC are:

<u>Name</u>	<u>Address</u>
Dennis J. Jackman	4713 Asbury Place, N.W. Washington, D.C. 20016
Patrice Storm Taylor	6414 Brookes Lane Bethesda, Maryland 20815
Thomas J. Bucknum	906 DuPont Road Westover Hills Wilmington, Delaware 19807

The incorporators hereof have signed these Articles of Incorporation on the date indicated beside their signatures.



Dennis J. Jackman



Date

Sworn to and Subscribed before me this
9th day of September, 1991.



Notary Public

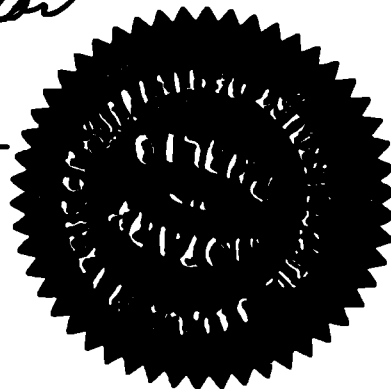
SANDRA R CLINE
EFFECTIVE 2/25/91
2-YEAR COMMISSION
EXPIRES 2/25/93
NEW CASTLE COUNTY

Patrice Storm Taylor
Patrice Storm Taylor

9-10-91
Date

Sworn to and Subscribed before me this
10 day of September, 1991.

Kate Belle Harrison
Notary Public
My Commission Expires June 30, 1996



Thomas J. Bucknum
Thomas J. Bucknum

September 9, 1991
Date

Sworn to and Subscribed before me this
9th day of September, 1991.

Sandra R. Cline
Notary Public

**SANDRA R. CLINE
EFFECTIVE 2/25/91
2-YEAR COMMISSION
EXPIRES 2/25/93
NEW CASTLE COUNTY**

BY-LAWS
OF
DU PONT MERCK PROGRAM FOR
ACTIVE CITIZENSHIP, INC.

ARTICLE I

Offices

The principal office of Du Pont Merck Program for Active Citizenship, Inc. (the "PAC") shall be located at 1701 Pennsylvania Avenue, Northwest, Suite 900, Washington, D.C. 20006.

ARTICLE II

Board of Directors

Section 1. **General Powers.** The Board of Directors shall have all the powers and duties necessary for the administration and implementation of the affairs of the PAC, consistent with the purposes set forth in the Articles of Incorporation of the PAC.

Section 2. **Number.** The number of Directors shall not be less than three. This number may be increased by amendment to these By-laws, provided that no such change may operate to shorten or lengthen the term of any incumbent Director. Directors need not be residents of the District of Columbia.

Section 3. Election and Tenure. The initial Directors shall be those named in the Articles of Incorporation. The Directors shall be appointed by a majority of the Directors then in office, and shall continue in office until his or her successor shall have been elected and qualified, or until his or her death, resignation, or removal.

Section 4. Quorum. Unless otherwise provided by law or these By-laws, a majority of the number of Directors fixed by the By-laws shall constitute a quorum for the transaction of business at any meeting of the Board of Directors; but if less than a majority of the Directors are present at said meeting, a majority of the Directors present may adjourn the meeting from time to time without further notice.

Section 5. Manner of Acting. A majority vote of the Directors present at a meeting at which a quorum is present shall constitute a vote of the Board of Directors.

Section 6. Vacancies. Any vacancy occurring in the Board of Directors and any directorship to be filled by reason of an increase in the number of Directors may be filled by the affirmative vote of a majority of the Directors then in office, though less than a quo-

rum. A Director elected to fill a vacancy shall be elected for the unexpired term of such Director's predecessor in office. A Director elected as a result of an increase in the number of Directors shall hold office until such Director's successor is duly elected and qualified.

Section 7. Resignation; Removal. Any Director may resign by delivering a written resignation to the Board of Directors. Such resignation shall be effective upon receipt unless it is specified to be effective at some other time upon the happening of some other event. Except as otherwise provided in the Articles of Incorporation, a Director may be removed from office by a majority vote of the Directors then in office.

Section 8. Action by Consent. Unless otherwise provided by the Articles of Incorporation or these By-laws, any action required or permitted to be taken at a meeting of the Board of Directors or any committee thereof may be taken without a meeting if a consent in writing, setting forth the action so taken, is signed by all the members of the Board of Directors.

ARTICLE III

Officers

Section 1. General. The management of the PAC shall consist of its officers, who shall number at least three voting members. The officers shall include a Chairman, a President and Executive Director, a Treasurer, an Assistant Treasurer, and a Secretary, and may also consist of such other officers as the Board of Directors of the PAC deem necessary. The Secretary shall be a non-voting officer and the Assistant Treasurer shall have a vote only in the absence of the Treasurer. Any number of offices may be held by the same person except as otherwise prohibited by law, the Articles of Incorporation, or these By-laws.

Section 2. Appointment. The Board of Directors shall appoint the officers of the PAC. The officers shall hold their offices for such terms and shall exercise such powers and perform such duties as shall be determined from time to time by the Board of Directors of the PAC. All officers of the PAC shall hold office until their successors are chosen and qualified or until their earlier removal by the Board of Directors.

Section 3. The Officers. The officers of the PAC shall direct the day-to-day operations of the PAC and do such things as may be necessary or desirable to attain its purposes.

Section 4. Chairman. The Chairman of the PAC shall be the chief executive officer of the PAC. The Chairman shall preside at all meetings of the PAC.

Section 5. President and Executive Director. The President shall serve as the Executive Director of the PAC. The President shall assume the duties of the Chairman in the absence of the Chairman. The Executive Director, under the supervision of the Board of Directors, shall serve as the chief administrative officer of the PAC. Subject to the instructions, directions and delegations of authority by the Board of Directors, the Executive Director shall have day-to-day charge of the affairs of the PAC and such other duties as may be assigned from time to time by the Board of Directors. The Executive Director is empowered to perform specific duties of the PAC, such as the power to sign and execute, in the name and on behalf of the PAC, documents and other instruments appropriate to the conduct of the PAC's affairs. The Executive Director shall have the authority to hire and fire other employees within guidelines and

rules issued by the Board of Directors and within the overall budget approved by the board.

Section 6. Treasurer. The Treasurer shall be the chief financial officer of the PAC. Subject to the provisions of the Articles of Incorporation and applicable law, the Treasurer shall have the custody of all funds of the PAC, shall keep full and accurate accounts of receipts and disbursements in books belonging to the PAC, shall cause all funds to be deposited and shall keep detailed accounts, records, bills and receipts in accordance with applicable law and with the directives of and in a manner authorized by the PAC. The Treasurer or his agent shall disburse the funds of the PAC as provided for in Articles V and VII and take proper vouchers for such disbursements. The Treasurer shall also prepare, sign, file and maintain copies of all reports in respect of the activities of the PAC as required by applicable law or the officers of the PAC.

Section 7. Assistant Treasurer. The Assistant Treasurer shall assume the duties of the Treasurer in the absence of the Treasurer. The Assistant Treasurer shall have a vote only in the absence of the Treasurer.

Section 8. Secretary. The Secretary shall be responsible for recording all the proceedings of meetings

in a book to be kept for that purpose. The Secretary shall give, or cause to be given, notice of all meetings of the PAC to the officers, and shall perform such other duties as may be prescribed by the officers of the PAC. The Secretary shall not be a voting officer.

Section 9. Other Officers. Such other officers as the Board of Directors may choose shall perform such duties and have such powers as from time to time may be assigned to them by the Chairman.

ARTICLE IV

Advisory Committee

The PAC shall have an Advisory Committee. The members of the Advisory Committee shall consist of the voting officers of the PAC and those individuals who the Chairman of the PAC shall appoint. The Advisory Committee members shall determine by a vote to whom or on whose behalf contributions or expenditures will be made to support or oppose the candidacy for federal, state, or local office, or to support or oppose any resolution or ballot issue.

ARTICLE V

Meetings and Votes

Section 1. Meetings of the Officers and the Advisory Committee. There shall be a quorum of the officers of the PAC when a majority of the officers participate in a meeting of the PAC. There shall be a quorum of the Advisory Committee of the PAC when a majority of the members of the Advisory Committee participate in a meeting of the Advisory Committee of the PAC. At all meetings of the officers and the Advisory Committee of the PAC, votes shall be cast in person. There shall be no voting by proxy. Officers and Advisory Committee members of the PAC may participate in any meeting thereof by means of a conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other. Participation in a meeting in this manner shall constitute presence in person at such meeting. A meeting of the officers of the PAC shall be required (a) to amend the Articles of Incorporation or these By-laws, (b) to determine the disposition of funds belonging to the PAC upon its dissolution, and (c) such other matters as may be determined from time to time by a majority of the officers. Except as provided for in Articles V and VII of these By-laws, a meeting

of the Advisory Committee of the PAC shall be required to determine to whom or on whose behalf contributions or expenditures will be made to support or oppose the candidacy, nomination and election of candidates for federal, state, or local office, or to support or oppose any resolution or ballot issue.

Section 2. Required Vote. In the case of a vote on any matter specified in Article V, Section 1(a), (b), and (c) of these By-laws, the affirmative vote of a majority of the officers present at the meeting of the PAC shall be the action of the PAC. In the case of a vote on any matter requiring the vote of the Advisory Committee of the PAC, the affirmative vote of a majority of the Advisory Committee members present at the meeting shall be the action of the Advisory Committee of the PAC. In the event of a tie vote at a meeting of the officers or the Advisory Committee, the vote of the Chairman shall be determinative.

ARTICLE VI

Solicitation of Voluntary Contributions

Section 1. Solicitations. The PAC may, pursuant to applicable law, solicit and accept voluntary personal political contributions.

Section 2. Deposits of Funds. Voluntary political contributions received by the PAC shall be deposited by the Treasurer or his agent in a checking account or similar transaction account designated by a majority of the officers as the depository of the PAC. Except as provided by applicable law, all voluntary contributions shall be deposited within 10 days of the Treasurer's receipt thereof. Funds in the depository account, and any other accounts maintained by the Treasurer on behalf of the PAC, shall be reported, maintained and disbursed from said accounts in accordance with applicable law.

Section 3. Investment of Funds. Funds may be transferred from the depository account for investment purposes, but shall be returned to the depository account before being used to make contributions or expenditures to or on behalf of federal, state, or local candidates, or in support of or in opposition to any resolution or ballot issue.

Section 4. No Commingling. No funds belonging to the PAC shall be commingled with any personal funds of any individual or any funds of any entity other than the PAC.

ARTICLE VII

Contributions and Expenditures

Section 1. Contributions. The Treasurer shall cause to be made such disbursement or disbursements in support of or in opposition to federal, state, or local candidates or in support of or in opposition to any resolution or ballot issue as shall be determined by the vote of the majority of the Advisory Committee of the PAC. The President of the PAC shall direct the timing of the disbursements. Notwithstanding any provision in these By-laws, the Chairman or the President of the PAC may determine, without obtaining the approval of the Advisory Committee or the officers of the PAC, to make contributions or expenditures on behalf of a candidate or political committee not to exceed \$1,000 per election and contributions and expenditures on behalf of all candidates and political committees in an election cycle not to exceed \$20,000. An election cycle is a two year period beginning on January 1 and ending on December 31 of the following year after a regularly scheduled general election e.g., January 1, 1991 through December 31, 1992. In no event shall such disbursements to or on behalf of any single candidate or political committee or political committees, or the aggregate of all disbursements made to

or on behalf of all candidates, exceed any maximum amounts applicable to the PAC pursuant to applicable law.

Section 2. Other Expenditures. In accordance with applicable law, the PAC may make such other expenditures, contributions, and disbursements as may be authorized by a majority of the Advisory Committee of the PAC. Notwithstanding any provision in these By-laws, the Treasurer may make certain disbursements, as required by law (such as administrative expense reimbursements from the PAC to Du Pont Merck Pharmaceutical Company or payment of tax obligations) on behalf of the PAC without obtaining the approval of the Advisory Committee or the officers of the PAC.

ARTICLE VIII

Indemnification

Section 1. Power to Indemnify. To the extent not prohibited by applicable law, the PAC shall indemnify any present or former director, officer, employee or agent of the PAC who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding by reason of the fact that such person is or was a director, officer, employee, or agent of the PAC, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement

actually and reasonably incurred by such person in connection with such action, suit or proceeding if such person acted in good faith and in a manner such person reasonably believed to be in or not opposed to the best interests of the PAC.

Section 2. Authorization of Indemnification.

Any indemnification under this Article VIII (unless ordered by a court) shall be made subject to Section 6 of this Article VIII and only as authorized in the specific case upon a determination that indemnification is proper in the circumstances. Such determination shall be made (a) by the Board of Directors by a majority vote of a quorum consisting of directors who were not parties to such action, suit or proceeding, or (b) if such a quorum is not obtainable, or, even if obtainable a quorum of disinterested directors so directs, by independent legal counsel in a written opinion, or (c) by a court of competent jurisdiction.

Section 3. Expenses Payable in Advance. Subject to Section 6 of this Article VIII, expenses incurred in defending or investigating a threatened or pending action, suit or proceeding may be paid by the PAC in advance of the final disposition of such action, suit or proceeding as authorized by the Board of Directors in the

specific case upon receipt of an undertaking by or on behalf of the director, officer, employee or agent to repay such amount unless it shall ultimately be determined that such person is entitled to be indemnified by the PAC as authorized in this Article VIII.

Section 4. Non-exclusivity and Survival of Indemnification. The indemnification provided by this Article VIII shall not be deemed exclusive of any other rights to which those seeking indemnification may be entitled under any by-law, agreement, contract, or pursuant to the direction of any court of competent jurisdiction or otherwise, both as to action in such person's official capacity and as to action in another capacity while holding such office, it being the policy of the PAC that, subject to Section 6 of this Article VIII, indemnification of the persons specified in Section 1 of this Article VIII shall be made to the fullest extent permitted by law. The indemnification provided by this Article VIII shall continue as to a person who has ceased to be a director, officer, employee, or agent and shall inure to the benefit of the heirs, executors, and administrators of such person.

Section 5. Insurance. Subject to Section 6 of this Article VIII, the PAC may purchase and maintain insurance on behalf of any person who is or was a director, officer, employee, or agent of the PAC against any liability asserted against such person and incurred by such person in any such capacity, or arising out of such person's status as such, whether or not the PAC would have the power or the obligation to indemnify such person against such liability under the provisions of this Article VIII.

Section 6. Certain Restrictions. Notwithstanding anything contained in this Article VIII to the contrary, no indemnification, payment for insurance premiums or advances for expenses provided for in this Article VIII shall be made by the PAC or on its behalf, which either (1) is not permitted by applicable federal, state, or local laws or (11) would result in any adverse tax consequences to the PAC or its contributors. Notwithstanding anything contained in this Article VIII to the contrary, the PAC shall not be required to indemnify any person against expenses incurred in connection with any action or proceeding voluntarily initiated or prosecuted by such person unless the initiation or prosecution of such action or proceeding was authorized by the affirma-

tive vote of a majority of the Board of Directors then in office, provided, however, that the Board of Directors may, in its discretion, indemnify such a person.

ARTICLE IX

Amendments to By-Laws

These By-laws may be amended or repealed, or new By-laws may be proposed and adopted in whole or in part, by a majority of the officers of the PAC.



FEDERAL ELECTION COMMISSION
WASHINGTON DC 20463

April 29, 1992

Kenneth A. Gross
Skadden, Arps, Slate, Meagher & Flom
1440 New York Avenue, NW
Washington, DC 20005-2107

Dear Mr. Gross:

This responds to your letter dated April 17, 1992, with enclosures, requesting an advisory opinion on behalf of Du Pont Merck Program for Active Citizenship, Inc. ("the PAC"), concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to the PAC's relationship with two other political committees.

Your letter states that the PAC is an incorporated, non-connected political committee. It proposes to solicit contributions from the executive and administrative personnel of the Du Pont Merck Pharmaceutical Company ("DPM") which is a Delaware general partnership equally owned by E.I. Du Pont de Nemours and Company ("Du Pont") and Calgon Corporation. Calgon is a wholly-owned subsidiary of Merck & Co., Inc. ("Merck"). Dupont and Merck have each established their own separate segregated funds which are active, registered political committees according to their filings with the Commission.

You seek an advisory opinion whether the PAC is affiliated with Du Pont PAC and Merck PAC. You also ask whether Du Pont or Merck may pay the administrative and solicitation costs of the PAC.

The Act authorizes the Commission to issue an advisory opinion in response to a "complete written request" from any person with respect to a specific transaction or activity by the requesting person. 2 U.S.C. §437f(a). Commission regulations explain that such a request "shall include a complete description of all facts relevant to the specific transaction or activity with respect to which the request is made." 11 CFR 112.1(c).

To address the affiliation issue requires analysis of the circumstantial factors of affiliation that are enumerated in Commission regulations at 11 CFR 100.5(g)(4). Such an analysis requires a factual framework as to the relationships

between the sponsoring entities of each of the three political committees. The relevant facts may be available from the applicable partnership agreement(s) that created and govern DPM. Please answer the following questions about DPM's governance and its shared or joint control by Du Pont and Merck.

1) Describe the composition of the six member DPM board that manages and gives general direction to the business and affairs of DPM. Are there any circumstances under which the size of the board may be enlarged by either partner or by DPM itself? Describe the appointment process followed for the selection of each individual who is a voting or non-voting member of such board. Explain the quorum provisions that apply to the transaction of board business; for example, does either general partner have any advantage over the other in convening a quorum or in voting power generally?

2) State whether the relevant agreement reserves authority for the DPM board to appoint key employees of DPM, set their compensation terms, and to enter employment contracts with such personnel; e.g. the DPM president, chief finance officer, directors of major departments or divisions for research, sales, marketing, manufacturing and the like.

3) State whether and the extent to which DPM or Du Pont or Merck have any overlapping officers and employees. Your answer should specifically clarify the current or recent status of Joseph A. Mollica who is identified in business reference directories as the president and chief executive officer of DPM and as a vice president of Du Pont (under the name J. A. Mollica).

4) Explain the scope of the DPM board's reserved authority to make political contributions in excess of \$50,000. For example, does this refer to the aggregate total of all contributions during any tax year of DPM, to each contribution per donee, or to the aggregate total of all political contributions made while the partnership agreement remains in force? Is there another interpretation of the board's authority in this respect? If so, please clarify.

5) Explain the procedure for resolving deadlock votes on the DPM board. If the deadlock matter is referred to the chief executive officers of Du Pont and Merck and remains unresolved after their consideration, what is the resolution of the matter? For example, if the deadlock matter pertains to the discharge of a key employee, does such employee retain his/her position?

6) Does one or the other of the two general partners have a predominant management role or controlling position in DPM on the basis of corporate history or tradition or practical considerations such as the sharing of office

Letter to Kenneth A. Gross

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facilities, equipment, research expertise, or the background and employment history of employees with either Du Pont or Merck and their comparative financial interests in either corporation?

7) One current business reference directory indicates that Merck is also a 50% partner in a joint venture known as Johnson & Johnson Merck Consumer Pharmaceuticals Co. State whether the PAC proposes any contribution solicitations of personnel employed by that entity and whether the joint venture has any organizational connections or relationships with DPM, e.g. overlapping personnel such as directors or key employees.

Upon receiving your responses to the foregoing questions, this office and the Commission will give further consideration to your inquiry as an advisory opinion request. If you have any questions about the advisory opinion process, or this letter, please contact Mr. Litchfield.

Sincerely,

**Lawrence M. Noble
General Counsel**

BY:



**N. Bradley Litchfield
Associate General Counsel**

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May 12, 1992

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N. Bradley Litchfield, Esq.
Associate General Counsel
Office of the General Counsel
Federal Election Commission
999 E Street, Northwest
Washington, D.C. 20463

AOR 1992-17

Re: Du Pont Merck Program for
Active Citizenship, Inc.

Dear Mr. Litchfield:

This letter is in response to several questions posed in your letter of April 29, 1992.

Question 1. Describe the composition of the six member Du Pont Merck Pharmaceutical Company ("DPM") board that manages and gives general direction to the business and affairs of DPM. Are there any circumstances under which the size of the board may be enlarged by either partner or by DPM itself? Describe the appointment process followed for the selection of each individual who is a voting or non-voting member of such board. Explain the quorum provisions that apply to the transaction of board business; for example, does either general partner have any advantage over the other in convening a quorum or in voting power generally?

Response: There are three E.U. du Pont de Nemours and Company, Inc. ("Du Pont") board members and three Merck and Co., Inc. ("Merck") board members. There are no circumstances under which the board may be enlarged by either Du Pont, Merck, or DPM. Du Pont appoints its board members and Merck appoints its board members. The DPM board members can appoint non-voting (ex-officio) members from among the officers of DPM. The President of DPM is automatically an ex-officio member of the DPM board. Neither Du Pont nor Merck has any advantage over the other partner in convening a quorum of the board or in voting power generally.

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Question 2. State whether the relevant agreement reserves authority for the DPM board to appoint key employees of DPM, set their compensation terms, and to enter employment contracts with such personnel; e.g. the DPM president, chief financial officer, directors of major departments or divisions for research, sales, marketing, manufacturing and the like.

Response: Yes. The DPM board reserves the authority to appoint key employees of DPM, set their compensation terms, and to enter into employment contracts with certain key employees, such as the DPM president, chief financial officer, and officers with principal authority for sales, marketing, and manufacturing.

Question 3. State whether and the extent to which DPM or Du Pont or Merck have any overlapping officers and employees. Your answer should specifically clarify the current or recent status of Joseph A. Mollica who is identified in business reference directories as the president and chief executive officer of DPM and as a vice president of Du Pont (under the name J.A. Mollica).

Response: DPM does not have and has never had any overlapping officers and employees with Du Pont or Merck. In the case of Mr. Mollica, he resigned from Du Pont in December 1990, and became an officer of DPM after his resignation as an officer of Du Pont. There was no overlap.

Question 4: Explain the scope of the DPM board's reserved authority to make political contributions in excess of \$50,000. For example, does this refer to the aggregate total of all contributions during any tax year of DPM, to each contribution per donee, or to the aggregate total of all political contributions made while the partnership agreement remains in force? Is there another interpretation of the board's authority in this respect? If so, please clarify.

Response: The board's reserved authority with regard to contributions applies to charitable as well as political contributions, and the \$50,000 threshold is a per-contribution threshold, not an aggregate threshold.

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Question 5: Explain the procedure for resolving deadlock votes on the DPM board. If the deadlock matter is referred to the chief executive officers of Du Pont and Merck and remains unresolved after their consideration, what is the resolution of the matter? For example, if the deadlock matter pertains to the discharge of a key employee, does such employee retain his/her position?

Response: If the Chief Executive Officers of Du Pont and Merck cannot resolve a deadlocked issue, there is no further provision for resolution. With regard to the discharge of a key employee, neither partner will unreasonably withhold consent to removal of a key employee.

Question 6: Does one or the other of the two general partners have a predominant management role or controlling position in DPM on the basis of corporate history or tradition in practical considerations such as the sharing of office facilities, equipment, research expertise, or the background and employment history of employees with either Du Pont or Merck and their comparative financial interests in either corporation?

Response: Neither Du Pont nor Merck has a predominant management role or controlling position in DPM based on corporate history, tradition, practical considerations, or on any other basis.

Question 7: One current business reference directory indicates that Merck is also a 50% partner in a joint venture known as Johnson & Johnson Merck Consumer Pharmaceutical Co. State whether the PAC proposes any contribution solicitations of personnel employed by that entity and whether the joint venture has any organizational connections or relationships with DPM, e.g. overlapping personnel such as directors or key employees.

Response: DPM will not solicit Johnson & Johnson Merck Consumer Pharmaceutical Co. employees for contributions to the DPM PAC. The Johnson & Johnson Merck joint venture has no organizational connections or relationship with DPM except that one individual, Jerry Jackson, serves as a director of both DPM and Johnson & John-

N. Bradley Litchfield, Esq.
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son Merck joint venture. There are no other overlapping directors or officers between the joint ventures.

Please let me know if we can be of further assistance.

Sincerely,



Kenneth A. Gross