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June 14, 2000

MEMORANDUM

AGENDA ITEM
For Meeting of: 6-22-00

TO: The Commission

THROUGH: James A. Pehrkon 
Staff Director

FROM: Lawrence M. Noble 
General Counsel

N. Bradley Litchfield 
Associate General Counsel

Jonathan M. Levin 
Senior Attorney

Subject: Draft AO 2000-11

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for June 22, 2000.

Attachment

1 ADVISORY OPINION 2000-11

2
3 Jan Witold Baran
4 Carol A. Laham
5 Wiley, Rein & Fielding
6 1776 K Street, N.W.
7 Washington, D.C. 20006

DRAFT

8
9 Dear Mr. Baran:

10 This responds to your letter dated May 12, 2000, on behalf of the Georgia-Pacific
11 Corporation ("Georgia-Pacific") and its separate segregated fund, G-P Employees Fund
12 of Georgia-Pacific (the "Fund"), requesting an advisory opinion concerning the
13 application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and
14 Commission regulations to the misplacement of checks transmitting contributions
15 received through payroll deduction.

16 ***Background***

17 The Fund is a political committee that filed its statement of organization with the
18 Commission on May 6, 1975. It has had monthly filer status since 1978. Georgia-Pacific
19 operates a payroll deduction plan whereby eligible employees contribute to the Fund.
20 The Fund's immediate past treasurer, a Georgia-Pacific employee, assumed her position
21 in 1991 and was replaced in early 2000. You state that, upon taking office, the new
22 treasurer reviewed the Fund's reports for 1998 and 1999 and noticed that only \$65,535
23 had been reported as deposited in 1998.¹ Based on his prior experience with the Fund, he
24 believed that the total contribution figure, based on payroll deductions alone, should have
25 been significantly greater. Thus, he asked the Georgia-Pacific payroll deduction
26 department to prepare a schedule of all the payroll deduction checks it had issued to the
27 Fund from January 1, 1997, to the end of 1999. After receiving the information, he
28 examined the Fund's bank statements to determine which checks had been deposited in
29 the Fund's accounts. Two checks dated 12/23/97 and 1/5/98 had not been deposited.
30 Several other checks dated between 7/27/98 and 5/18/99 also had not been deposited.

¹ All dollar figures in this opinion are stated without cents. This has a slight effect on the total dollar amount, stated below, of payroll deduction checks issued from 1997 to 1999.

1 Specifically, in 1997, 25 checks were issued to the Fund by the payroll
2 department in the aggregate amount of \$114,133. Of these, the last check of the year, in
3 the amount of \$5,656, was not deposited. In 1998, 22 payroll checks were issued
4 aggregating \$125,904, of which eight checks aggregating \$64,969 were not deposited. In
5 1999, 16 payroll checks aggregating \$125,530 were issued, of which five checks
6 aggregating \$55,184 were not deposited. Thus, during the three years, \$365,569 in
7 payroll deduction checks were issued, of which \$125,809 in 14 checks were never
8 deposited.

9 To ensure that no money had been misappropriated, the new treasurer asked the
10 company's accounting department to confirm that none of the checks had been
11 negotiated. Accordingly, the new treasurer ascertained that \$125,809 in properly
12 withheld payroll deductions contributions had not been deposited by the former treasurer.
13 You explain that the Georgia-Pacific accounting department has a system in place
14 whereby letters are sent to all "vendors" if a check has not been cashed within six months
15 of issuance. Such a letter was sent with respect to the 1997 check, but the letter was
16 received by the former treasurer. No additional letters were issued because there was a
17 system-wide problem for all checks cut from the Georgia-Pacific headquarters. Letters
18 were issued through October 1998 for checks issued with dates in 1997 or earlier. Due to
19 a systems conversion occurring during 1999, however, no letters were issued to any
20 vendors with respect to 1998 or 1999 checks.

21 Georgia-Pacific asked the former treasurer for an explanation of where the checks
22 were and why they had not been deposited. She had no explanation as to why they had
23 not been deposited, as she had regularly done earlier in the course of her tenure as
24 treasurer. After searching her office, she was able to find most of the checks that had not
25 been deposited in the Fund's account. Shortly thereafter, she resigned her position with
26 Georgia-Pacific and the Fund after being put on notice that that her employment would be
27 terminated.

28 The new treasurer notified the Commission's Reports Analysis Division
29 ("RAD") of this problem. After several discussions with RAD, the Fund was uncertain
30 how to proceed. In view of the fact that the undeposited checks are stale-dated and thus

1 non-negotiable, the Fund wishes to obtain replacement checks. Having read cautionary
2 language in Advisory Opinion 1999-33, however, the Fund determined that it should seek
3 an advisory opinion as to whether the issuance and deposit of such replacement checks
4 would be lawful.

5 In addition, after discovering the undeposited checks, Georgia-Pacific conducted
6 an internal audit of the Fund's accounts. This resulted in the Fund filing comprehensive
7 amendments to its FEC reports to correct mistakes, other than the non-deposit of the 14
8 checks, made over the past three years. Furthermore, the Fund has recently adopted a
9 policy of conducting an annual audit. The Fund will also now send a monthly report to
10 Georgia-Pacific's senior management and to the Fund's advisory board, which will
11 include a membership report, anticipated receipts, and monthly bank balances. All
12 documents will now require the review and approval of the Fund's treasurer and assistant
13 treasurer so that this situation cannot occur again.

14 You ask whether the Fund may accept new payroll deduction checks to replace
15 those not deposited by the former treasurer, and report the contributions as of the dates of
16 the payroll deductions. You state that the Fund is prepared to file an omnibus
17 amendment for each affected calendar year. These amendments will provide the year-end
18 figures on the summary and detailed summary pages, as well as a new schedule A for line
19 11(a)(i) which will identify all payroll deduction contributors that should have been
20 itemized for each calendar year, in addition to the non-payroll deduction contributors
21 previously itemized on reports.

22 *Applicable Law and Analysis*

23 Commission regulations permit a corporation to use a payroll deduction system
24 for soliciting and collecting voluntary contributions from its restricted class to the
25 corporation's separate segregated fund ("SSF"). See 11 CFR 114.5(k)(1) and 114.1(f);
26 see also 11 CFR 114.1(j), 114.5(g)(1), and Advisory Opinions 1999-33 and 1999-3. A
27 corporation that collects and transmits contributions to its SSF is thereby acting as a
28 "collecting agent" under Commission regulations. 11 CFR 102.6(b)(1)(ii).² Such a

² A collecting agent may be either: (i) a committee, whether or not it is a political committee, that is affiliated with the SSF; (ii) the SSF's connected organization; (iii) a parent, subsidiary, branch, division,

1 corporation that follows the procedures for collecting agents set out at 11 CFR 102.6(c) is
2 not required to register and report as a political committee, provided that it does not
3 engage in other activities such as making contributions or expenditures for the purpose of
4 influencing a Federal election. 11 CFR 102.6(b)(2).

5 When a collecting agent receives contributions such as those collected from
6 contributors through a payroll deduction system, one of its options is to retain the funds
7 in its treasury and keep separate records of such contributions. 11 CFR
8 102.6(c)(4)(ii)(B). However, the collecting agent has certain obligations with respect to
9 the transmittal of such contributions. An individual's contribution of \$50 or less shall be
10 forwarded to the SSF's treasurer within 30 days of the collecting agent's receipt. 11 CFR
11 102.6(c)(4) and 102.8(b)(1); 2 U.S.C. §432(b)(2)(A). If the contribution exceeds \$50, the
12 collecting agent must forward the contribution within 10 days of its receipt, along with
13 the name and address of the contributor and the date of receipt of the contribution. For
14 contributions over \$200, the contributor's occupation and employer must also be
15 forwarded with the contribution. 11 CFR 102.6(c)(4) and (5), and 102.8(b)(2); 2 U.S.C.
16 §432(b)(2)(B). The date of receipt of the contribution is the date that the collecting agent
17 obtains possession. 11 CFR 102.8(b)(2); see, e.g., Advisory Opinion 1999-33.
18 Commission regulations also require the deposit of committee receipts in the committee's
19 depository within ten days of the receipt by the committee treasurer. 11 CFR 103.3(a).³
20 Thus, in the case of a check containing payroll deducted contributions, that is transmitted
21 by a collecting agent to a committee, the check must be deposited within ten days of the
22 receipt of the check.

23 Commission regulations provide that contributions are considered to be made
24 when the contributor relinquishes control over the contributions, and that a contributor
25 relinquishes control when the contribution is delivered by the contributor to the political

department, or local unit of the connected organization; or (iv) a local, national, or international union collecting contributions on behalf of the SSF of any federation with which the union is affiliated. 11 CFR 102.6(b)(1)(i)-(iv).

³ The Act and Commission regulations also contemplate that the treasurer will have authorized agents to receive contributions and make expenditures for the committee. See 2 U.S.C. §432(a); 11 CFR 102.9. Thus, the Commission has construed 11 CFR 103.3(a) to apply to committee employees and others who were performing treasurer duties. See Advisory Opinions 1992-29 and opinions cited therein.

1 committee or an agent of the committee. 11 CFR 110.1(b)(6). Thus, contributions by
2 payroll deduction are made by the donors on each date that the funds are withheld from
3 salary payments made to them. See Advisory Opinion 1999-33. In a payroll deduction
4 system, contributions are also, in effect, received by the collecting agent and, hence, by
5 the committee on that date. *Id.*

6 When an individual's contributions aggregate in excess of \$200 for the calendar
7 year, the SSF must disclose the date of receipt for the contribution that brings the total
8 amount above \$200, along with the identification of the contributor and his aggregate
9 year-to-date total. 2 U.S.C. §434(b)(3)(A); 11 CFR 104.3(a)(4)(i). The identification of
10 the contributor is her name, address, occupation, and name of employer. 2 U.S.C.
11 §431(13)(A); 11 CFR 100.12. An SSF receiving contributions through payroll deduction,
12 however, does not need to separately itemize each contribution received from the
13 contributor during that reporting period. Instead, for the reporting period in which the
14 \$200 aggregate amount has been exceeded and for each succeeding reporting period in
15 that year, it may report the aggregate amount received from the contributor through
16 payroll deduction during the reporting period, the identification of the individual, and a
17 statement of the amount deducted per pay period. 11 CFR 104.8(b). In addition, the SSF
18 must report the totals of the contributions received and the amounts that were itemized
19 and unitemized. 2 U.S.C. §434(b)(2)(A); 11 CFR 104.3(a)(2)(i). The foregoing
20 information is required to be disclosed in the reports covering the period in which the
21 contributions were received. See 2 U.S.C. §434(a)(4); 11 CFR 104.5(c).

22 In a recent opinion, the Commission examined a situation where certain payroll
23 deducted monthly contributions to a corporation's SSF, collected over a 20-month period
24 from restricted class employees in a particular region, were inadvertently held by the
25 corporation in a general ledger account because the region had not been converted to the
26 corporation's new centralized payroll system and operated on a separate stand alone
27 system. Advisory Opinion 1999-33. The retention of the contributions was detected
28 when the regional office converted to the new system and the PAC received year-to-date
29 PAC contribution information on the contributing employees in that region. The
30 corporation asked the Commission whether it could deposit the funds in the PAC

1 accounts and report them appropriately on monthly reports. The Commission concluded
2 that the contributions could be deposited into the PAC account, but that report
3 amendments were required for each of the 20 reports covering the periods in which the
4 payroll deducted contributions were originally received and not properly reported in
5 compliance with the above-described reporting provisions.

6 The Commission concludes that the Fund's situation may be treated similarly to
7 that of the PAC in Advisory Opinion 1999-33. In each situation, the failure to comply
8 with the rules related to the forwarding and deposit of contributions already collected
9 (forwarding in Advisory Opinion 1999-33 and deposit in the Fund's situation) does not
10 appear to have been intentional.⁴ Moreover, regardless of the stage at which the
11 forwarding of contributions stopped (i.e., whether before or after the actual transmittal of
12 funds to the PAC by the collecting agent), the contributions at issue were deducted from
13 the contributors' payroll checks. Thus, the contributor not only released control of the
14 funds, but also no longer had possession of them; in each case, they were in the accounts
15 of the collecting agent. *Compare* Advisory Opinion 1992-29 (where the funds
16 represented by checks sent to an authorized committee, but not deposited, were still in the
17 contributors' accounts). Those who contributed by payroll deduction to the PAC had
18 presumably already manifested an intent over a period of time (via an unrevoked,
19 voluntary payroll deduction authorization), to relinquish control over those funds on a
20 periodic basis for the purpose of allowing the PAC to use them.⁵ Thus, a sanction, as part
21 of the advisory opinion process, barring the deposit of the funds into the PAC account
22 would not effectuate the intent of contributors who have lawfully relinquished control and
23 possession of the funds.

24 Accordingly, the Fund may accept new payroll deduction checks to replace those
25 not deposited by the former treasurer. Your proposed report amendment procedure is,
26 however, inadequate for the situation presented. As in Advisory Opinion 1999-33, the

⁴ From the account in your request, it appears that, although the treasurer must have known that she had received checks and that they were supposed to be deposited in the PAC's account, her failure to deposit does not appear to have been for the purpose of self enrichment or any other improper disposition.

⁵ The Commission presumes that these contributions complied with the Act's limits and were from lawful sources.

1 Fund must fully report the contributions as of the date of the deductions in accordance
2 with the specific requirements of the Act and regulations. The Fund must amend each of
3 the previous monthly and other required reports (e.g., pre-general and post-general
4 reports) covering the periods of these payroll deductions in order to reflect the dates of
5 receipt of the contributions. Each report shall be amended in accordance with the
6 disclosure provisions discussed above. Thus, each of the amended reports shall include
7 revised totals on the summary page and detailed summary page, and the Schedule A of
8 each report naming a contributor should be amended.⁶ Each amended report should also
9 be accompanied by a short statement which explains why the report is being amended
10 (including the reasons for the late disclosure) and which makes reference to this advisory
11 opinion. The required amendments should be filed with the Commission within 30 days
12 after the Fund receives the first replacement check from Georgia-Pacific.⁷

13 The Commission cautions that this advisory opinion may not fully resolve the
14 issues raised by this matter. Advisory opinions address specific transactions or activity
15 that the requester "plans to undertake or is presently undertaking and intends to undertake
16 in the future." 11 CFR 112.1(b). They do not address past activity, except to the extent
17 past activity is proposed to continue or recur. The activities of the Fund and its treasurer
18 may be addressed in an enforcement context by the Commission. See 2 U.S.C. §437g; 11
19 CFR Part 111. If so, there may be remedies and penalties in that process that would be
20 separate and distinct from the actions already implemented by the Fund and those
21 prescribed in this opinion.

⁶ You may follow the procedures set out in 11 CFR 104.8(b) for contributions aggregating in excess of \$200 in the calendar year, and the amounts in excess of \$200 should be included in the itemized totals on the detailed summary page. For an illustration of reporting by SSFs under 11 CFR 104.8(b), refer to the Commission's publication, *Campaign Guide for Corporations and Labor Organizations*, on page 32.

⁷ These amended reports will also need to include reports for periods during which the former treasurer deposited the checks, because the Fund's year to date contribution totals and cash-on-hand figures, as well as individual contributor's totals, will be affected.

