



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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December 8, 2004

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon  
Staff Director

FROM: Lawrence H. Norton  
General Counsel

Rosemary C. Smith  
Associate General Counsel

Brad C. Deutsch  
Assistant General Counsel

Esa L. Sferra  
Attorney

Subject: Draft AO 2004-42

**AGENDA ITEM**  
For Meeting of: 12-16-04

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for December 16, 2004.

Attachment

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3  
4 Robert K. Kelner, Esq.  
5 Covington & Burling  
6 1201 Pennsylvania Avenue, NW  
7 Washington, DC 20004-2401  
8

9  
10 Dear Mr. Kelner,

11  
12 We are responding to your inquiry regarding (1) whether Pharmavite LLC  
13 (“Pharmavite”), a California limited liability company, may pay the administrative and  
14 solicitation costs of a separate segregated fund (“SSF”), for which Pharmavite’s sole  
15 member will be the connected corporate organization, and (2) whether the SSF may be  
16 named after Pharmavite under the Federal Election Campaign Act of 1971, as amended  
17 (the “Act”), and Commission regulations.

18 Although Pharmavite is treated as a partnership under Commission regulations,  
19 because Pharmavite is *per se* affiliated with its sole member, a corporation, Pharmavite  
20 may pay the administrative and solicitation costs of its sole member’s SSF. Additionally,  
21 because Pharmavite is in the position of the connected organization’s subsidiary and  
22 because naming the PAC after Pharmavite will give the public a more accurate  
23 understanding of the PAC’s funding and purpose, the SSF may be named after  
24 Pharmavite instead of its connected organization.

25 ***Background***

26 The facts of this request are presented in your letter dated October 22, 2004.

27 Pharmavite is a limited liability company (“LLC”) with its principal place of  
28 business in California. Under Internal Revenue Service (“IRS”) regulations, an LLC may  
29 choose for tax purposes to be treated as either a corporation or a partnership. 26 CFR

1 301.7701-3(a). However, because Pharmavite's sole member, Otsuka America, Inc.  
2 ("OAI"), is a corporation, Pharmavite is precluded from choosing to be treated as a  
3 partnership under IRS regulations.<sup>1</sup> 26 CFR 301.7701-2(c)(1). Because Pharmavite has  
4 not affirmatively elected treatment as a corporation for tax purposes, Pharmavite is  
5 considered a "disregarded entity" by the IRS. 26 CFR 301.7701-3(b)(1) and 7701-  
6 2(c)(2). A disregarded entity's activities are treated by the IRS in the same manner as a  
7 branch or division of its owner. 26 CFR 301.7701-2(a).

8 Pharmavite wishes to pay the administrative and solicitation costs for an SSF for  
9 which its sole member, OAI, will be the connected organization.<sup>2</sup> The SSF would be  
10 named "Pharmavite LLC Political Action Committee," and the name would be  
11 abbreviated as "Pharmavite PAC" (the "PAC") for permissible purposes under the Act  
12 and Commission regulations. Pharmavite's primary business is manufacturing and  
13 selling dietary supplements, and the principal focus of the PAC will be issues of interest  
14 to Pharmavite and its employees.

15 Pharmavite will conduct the day-to-day operations of the PAC through  
16 Pharmavite personnel. Any decisions concerning the PAC, other than the decision to  
17 form the PAC, will be made by a special committee consisting of the non-foreign  
18 national board members of OAI and Pharmavite, each of which has one U.S. citizen on  
19 its governing board. OPC and any directors, officers, or employees of OPC, OAI, or  
20 Pharmavite who are foreign nationals will be recused from directly or indirectly  
21 participating in the decision-making process of the SSF. Additionally, the PAC will not

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<sup>1</sup> An entity can only be classified as a partnership if it is not a corporation and has at least two members. 26 CFR 301.7701-2(c)(1).

<sup>2</sup> OAI is a wholly-owned subsidiary of a Japanese corporation, Otsuka Pharmaceutical Company, Ltd. ("OPC").

1 solicit or accept contributions from OPC and OAI executive or administrative personnel  
2 and stockholders, and their families, or from any foreign national.<sup>3</sup>

### 3 *Questions Presented*

- 4  
5 1. *May an LLC that is a “disregarded entity” under IRS regulations, and*  
6 *that is wholly owned by a single incorporated member, pay the*  
7 *administrative and solicitation costs of an SSF for which the corporate*  
8 *member will be the connected organization?*  
9  
10 2. *May an SSF with a corporate connected organization be named after the*  
11 *LLC that pays the SSF’s administrative and solicitation costs?*  
12

### 13 *Legal Analysis and Conclusions*

14 *Question 1: May Pharmavite pay the PAC’s administrative and solicitation costs?*

15 Under 2 U.S.C 441b(b)(2)(C), a corporation may use its general treasury funds to  
16 pay for the costs of establishing, administering, or soliciting contributions to its SSF,  
17 without a resultant contribution or expenditure. *See also* 2 U.S.C. 431(8)(B)(vi) and  
18 (9)(B)(v). A corporation that directly or indirectly establishes, administers, or financially  
19 supports a political committee is the connected organization of that committee. 2 U.S.C.  
20 431(7) and 11 CFR 100.6(a). The Act does not extend to a partnership, or an LLC that is  
21 treated as a partnership under Commission regulations, the ability granted to a  
22 corporation to conduct itself as a connected organization and avail itself of the

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<sup>3</sup> The Commission notes that Commission regulations prohibit a foreign national from directing, dictating, controlling, or directly or indirectly participating in the decision-making process of a corporation or political committee with regard to Federal or non-Federal election-related activities, such as the making of contributions. 11 CFR 110.20(i). Additionally, the Act and Commission regulations prohibit any “person,” the definition of which includes corporations and SSFs, from soliciting, accepting or receiving a contribution or donation from a foreign national. 2 U.S.C. 441e(a)(2) and 110.20(g). The Act and Commission regulations also prohibit a foreign national from making a contribution, directly or through any other person, or an expenditure in connection with a Federal, State, or local election. 2 U.S.C. 441e(a)(1) and 11 CFR 110.20(b). You indicate that that Pharmavite, a California LLC, conducts its business and generates revenues in the United States, and that OAI is a domestic holding company for Pharmavite and for a range of other businesses operating in the United States. Therefore, these companies are *bona fide* operating domestic entities and the Commission assumes, based on your representations, that the control, operations, and activities of the PAC will be in compliance with 2 U.S.C. 441e and 11 CFR 110.20. *See* Advisory Opinion 2000-17.

1 contribution and expenditure exemptions. *See* 11 CFR 100.6(a) (definition of “connected  
2 organization” does not include partnerships or LLCs) and Advisory Opinions 2001-07  
3 and 1992-17. Nevertheless, the Commission has interpreted the Act and Commission  
4 regulations to permit a partnership, or an LLC treated as a partnership under Commission  
5 regulations, that is owned entirely by one or more corporations and affiliated with at least  
6 one of those corporations, to pay the administrative and solicitation costs for the  
7 partnership’s political action committee.<sup>4</sup> *See* Advisory Opinions 2003-28, 2001-18,  
8 2001-07, and 1997-13.

9         Although Pharmavite is treated as a disregarded entity by the IRS because it has  
10 not elected treatment as a corporation and is not eligible under IRS regulations to elect  
11 treatment as a partnership, Commission regulations provide that a non-publicly traded  
12 LLC that does not affirmatively elect treatment for tax purposes as a corporation is  
13 treated by the Commission as a partnership. Accordingly, Pharmavite is treated as a  
14 partnership under Commission regulations. 11 CFR 110.1(g)(2) and (3).

15         Under Commission affiliation regulations, Pharmavite is *per se* affiliated with  
16 OAI because OAI is Pharmavite’s sole member. 11 CFR 100.5(g)(3)(i) and  
17 110.3(a)(2)(i); *see also* Advisory Opinion 1990-10. Additionally, the Commission has  
18 long held that affiliates may include entities other than corporations, such as partnerships  
19 and LLCs. *See* Advisory Opinions 2004-32, 2001-18, and 1992-17.

20         Although Pharmavite is treated as a partnership for the purposes of the Act and  
21 Commission regulations, because it is owned entirely by, and affiliated with, OAI, a  
22 corporation, Pharmavite may perform the functions of a connected organization for the

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<sup>4</sup> The Commission generally permits a corporation’s affiliates to pay the administrative and solicitation costs of the corporation’s SSF. *See, e.g.*, Advisory Opinion 1997-13.

1 PAC, including paying administrative and solicitation costs. *See* Advisory Opinions  
2 1997-13 and 1994-11. Such support provided by Pharmavite is deemed to be from OAI  
3 and the PAC must list OAI as its connected organization on its statement of organization,  
4 as it already plans to do. 2 U.S.C. 433(b)(2) and 11 CFR 102.2(a)(1)(ii); *see* Advisory  
5 Opinions 1997-13 and 1996-49.

6 *Question 2: May the PAC be named after Pharmavite?*

7         Although the PAC must list OAI as its connected organization, it need not include  
8 OAI's name in the PAC's name. While the name of an SSF generally must include the  
9 full name of its connected organization, 2 U.S.C. 432(e)(5) and 11 CFR 102.14(c), the  
10 Commission has permitted an SSF's name to include only the name of a joint venture  
11 LLC that was treated as a partnership under Commission regulations, where the LLC was  
12 performing the functions of the SSF's connected organization. *See* Advisory Opinions  
13 2003-28 and 1997-13; *see also* Advisory Opinion 2001-18. Under such circumstances,  
14 the Commission has allowed the SSF to omit the corporate names of the LLC's affiliated  
15 corporate owners from its name because the LLC was in virtually the same position as a  
16 corporate subsidiary of the owner corporation. 11 CFR 102.14(c) (A subsidiary need not  
17 include its corporate parent's or other subsidiaries' names in the name of its PAC); *see*  
18 Advisory Opinions 2003-28 and 1997-13.

19         Like the joint venture LLCs, Pharmavite is a wholly corporate-owned LLC treated  
20 as a partnership under Commission regulations that is in the position of a subsidiary.  
21 Although Pharmavite cannot serve as the PAC's connected organization, it may perform  
22 the functions of a connected organization because it is in the same position of a  
23 subsidiary of OAI. Therefore, the PAC's name may include Pharmavite's name alone.

1 *See, e.g.*, Advisory Opinions 2003-28, 2001-18, and 1997-13. Further, because OAI must  
2 be listed in the PAC's statement of organization as the PAC's connected organization,  
3 OAI's relationship to the PAC will be disclosed to the public. *See generally* Advisory  
4 Opinion 1997-13. Additionally, because the PAC's primary focus will be issues of  
5 interest to Pharmavite and its employees, and Pharmavite will use its personnel to  
6 conduct the day-to-day operations of the PAC, the use of Pharmavite's name in the  
7 PAC's name will provide the public with a more accurate understanding of the PAC's  
8 funding and purpose.<sup>5</sup>

9 The Commission expresses no opinion regarding any tax ramifications of the  
10 proposed activities because those issues are not within its jurisdiction.

11 This response constitutes an advisory opinion concerning the application of the  
12 Act and Commission regulations to the specific transaction or activity set forth in your  
13 request. *See* 2 U.S.C. 437f. We emphasize that if there is a change in any of the facts or  
14 assumptions presented, and such facts or assumptions are material to a conclusion  
15 presented in this advisory opinion, then the requestor may not rely on that conclusion as  
16 support for its proposed activity.

17 Sincerely,

18  
19 Bradley A. Smith  
20 Chairman  
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<sup>5</sup> You also ask whether Pharmavite LLC PAC may use the name "Pharmavite PAC" as an abbreviation. Commission regulations allow the use of "a clearly recognized abbreviation or acronym by which the connected organization is commonly known" provided that the SSF uses both the abbreviation (or acronym) and the full name on the SSF's Statement of Organization, on all reports filed with the Commission, and on all disclaimer notices required by 11 CFR 109.11 and 110.11. The SSF may make contributions using the abbreviation or acronym. 11 CFR 102.14(c). The Commission has interpreted this regulation to allow the use of the abbreviation on such common uses as PAC checks and letterhead. *See* Advisory Opinions 2002-04 and 2000-34. The Commission concludes that the use of the name Pharmavite PAC, which nearly replicates the LLC's complete name and gives a clear indication as to the company supporting the PAC, is permissible for such purposes.

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- 2 Enclosures (AOs 2004-32, 2003-28, 2001-18, 2001-07, 1997-13, 1996-49, 1994-11,
- 3 1992-17, and 1990-10)