

**DISSENTING OPINION
BY COMMISSIONER LEE ANN ELLIOTT
REGARDING ADVISORY OPINION 1985-27**

The issue of affiliation presented in Advisory Opinion 1985-27, is one of first impression for the Commission. However, the majority fails to consider the impact of the unique merger agreement and instead elects to view it as analogous to other affiliation issues previously considered by the Commission. I disagree with the conclusion that Reynolds had control for purposes of determining affiliation under 100.5(g) by virtue of purchasing 50.2% of Nabisco stock on July 2, 1985. From both a legal analysis of our statute and regulations and from a policy standpoint, I would determine that Reynolds and Nabisco PACs were affiliated as of September 10, 1985, the date the merger agreement was ratified by the stockholders.

In the previous advisory opinions cited in the majority opinion (AOs 1983-28, 1983-19, 1980-18), the entities involved were not in a state of flux but rather organized in a way in which control could easily be verified by virtue of their stockholdings and organization. I agree with those cases. I also agree with that portion of this Advisory Opinion which uses "control" as the determinative issue as to when Reynolds and Nabisco are affiliated. But it is for that reason, I disagree with the July 2nd date.

In Advisory Opinion 1984-36, the Commission set out three criteria for determining when corporate entities are affiliated pursuant to 11 CFR 100.5(g):

"(1.) Ownership in controlling interest in voting shares or securities;

(2.) Provisions of by-laws, constitution, or other documents by which one entity has the authority, power or ability to direct another entity; and

(3.) The authority, power, or ability to hire, appoint, discipline, discharge, demote, remove or otherwise influence the decision of the officers or members of any entity." (Footnote omitted).

Applying those three criteria to this case, we find that only the first element is fulfilled by Reynolds.

It is a fact that Reynolds purchased 50.2%, thus controlling interest in the voting shares on July 2, 1985. However, the merger agreement contains numerous restrictive covenants to each company involving stock issuance, dividends, personnel, and business operations. In

addition, the appointment of the new members of the Board of Directors was not to take affect until the effective date of the merger agreement. (See Article 6, Merger Agreement). Each company also agreed to conduct their respective operations according to their ordinary and usual course of business and to exercise their best efforts to keep intact their respective business organizations. (See Article 10, Merger Agreement). Such provisions inhibit the ability of Reynolds to exercise control over the by-laws of Nabisco and also precludes Reynolds from hiring and firing or disciplining any Nsbisco officers or employoes. Thus, notwithstanding the fact that Reynolds controlled 50.2% of the Nabisco stock, Reynolds inability to exercise the power which is typically associated with majority stock ownership was effectively precluded by the terms of the merger agreement until such time as the merger was ratified by the stockholders. I must conclude based on our own criteria for affiliation, that during the period in which the merger agreement was effective, Reynolds lacked control of Nabisco for purposes of determining that their PACs were affiliated. September 10, 1985, which is the date the merger was ratified by the stockholders is, in my opinion, the earliest date in which the Commission could conclude that the two corporate PACs were affiliated.

From a policy standpoint, the September date would likewise be the more preferable one. Once the PACs are determined to be affiliated, not only are they subject to one contribution limit; but, in addition, such affiliation inables the Reynolds PAC to solicit the restrictive class of Nabisco and vice versa. For the Commission to determine that Reynolds could solicit the executive and administrative personnel, and stockholders of Nabisco during that period of time in which the merger egræment was in control, and when many employees were uncertain about the continuity of their jobs, creates a potential for pressure that is disruptive and, in my opinion, contrary to the purpose of the Federal Election Campaign Act. For these reasons, I would prefer to have seen the Commission conclude that September 10, 1985 was the date the two PACs were affiliated.

November 1, 1985
Date


LEE ANN ELLIOTT
Commissioner