



FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 24, 1987 (Reconsideration)
January 16, 1987*

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1986-42

Vigo T. Nielsen, Jr.
Nielsen, Hodgson, Parrinello & Mueller
Suite 2650
650 California Street
San Francisco, CA 94108

Dear Mr. Nielsen:

This responds to your letters of November 4 and 21, 1986, requesting an advisory opinion on behalf of Dart & Kraft, Inc., concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the treatment of two separate segregated funds after a corporate reorganization.

You state that Dart & Kraft, Inc. ("DKI"), is a Delaware corporation with principal offices in Northbrook, Illinois. It is a holding company formed in 1980 through the combination of Kraft, Inc., a Delaware corporation organized in 1923, and Dart Industries, Inc., a Delaware corporation organized in 1928, both of which then became wholly-owned subsidiaries of DKI. Between 1981 and 1986, DKI sold 38 businesses and acquired 8 new businesses. In 1981, DKI established Dart & Kraft PAC, the separate segregated fund of DKI, and registered it with the Commission as a political committee. Dart & Kraft PAC has also qualified as a multicandidate political committee.

On June 19, 1986, the DKI board of directors authorized a corporate reorganization through the separation of various DKI businesses by a stock distribution that would qualify as a tax-free spin-off. This action did not require approval by DKI shareholders. In contemplation of this reorganization, DKI formed on August 29, 1986, Premark International, Inc. ("Premark"), a Delaware corporation, as a wholly-owned subsidiary of DKI. Although 100,000,000 shares of Premark stock were authorized, only 1,000 shares were issued to, and were held by, DKI as the sole shareholder. DKI established Premark so that it would eventually become a new holding company for DKI's Tupperware, West Bend, Ralph Wilson Plastics Company ("Wilsonart"), and

Food Equipment Group (Hobart and Vulcan-Hart) businesses. On September 4, 1986, DKI and its constituent businesses entered into an agreement to effect the proposed corporate reorganization and stock distribution. Pursuant to this agreement, DKI undertook several actions that are relevant to the issues presented in this request.

As the sole shareholder, DKI elected all of the current 12 members of Premark's board of directors. Seven of these 12 Premark directors, including Premark's president and chief executive officer, also serve as DKI directors, constituting 7 out of 14 members of DKI's board of directors. All Premark employees resigned as officers or as members of boards or governing bodies of DKI or DKI subsidiaries, except for one individual who was formerly president and chief operating officer of DKI and is now president and chief executive officer of Premark and a member of the boards of both Premark and DKI. All DKI employees resigned as officers or as members of boards of governing bodies of Premark or Premark subsidiaries. The executive officers of Premark, however, are drawn primarily from former officers of DKI.

Also as the sole shareholder, DKI made certain amendments to Premark's certificate of incorporation and by-laws that make it more difficult for a shareholder to change a majority of the membership or gain control of Premark's board or to acquire control of Premark through tender offers, open market purchases, or proxy fights. These amendments include requiring 80 percent shareholder approval to make changes in Premark's certificate and by-laws or to effect corporate reorganizations through mergers, dissolutions, or stock changes. These amendments also limit the voting rights of any shareholder beneficially owning more than 10 percent of Premark's outstanding stock. This latter provision, however, will expire on December 31, 1992, unless renewed by Premark's board.

DKI also classified Premark's board of directors into three groups to provide for staggered terms for the directors. As a result of such classification, any shareholder(s) will require two annual meetings in order to replace a majority of Premark's board. DKI also gave Premark's board the power to enlarge the size of the board and to fill vacancies on the board, while at the same time limiting the ability of shareholders to remove directors. According to the Information Statement for Premark dated October 21, 1986, submitted as part of the request, it is acknowledged that with these powers "the Premark Board could prevent any shareholder from obtaining majority representation on the Premark Board by enlarging the Premark Board and new directorships with its own nominees." It further states that such powers "will preclude shareholders from removing incumbent directors without cause and filling the vacancies created by such removal with their own [the shareholders'] nominees." The statement also notes that the "limitation on the voting power of substantial shareholders...can increase the difficulty of obtaining the majority shareholder vote required for removal of directors." Furthermore, five of the seven DKI directors who are also Premark directors constitute five of the six members of the Premark board's committee on directors, which makes recommendations to the board on candidates for Premark directorships.

Finally, pursuant to the September 4 agreement, DKI transferred the assets of its Tupperware, West Bend, Wilsonart, and Food Equipment Group businesses to Premark. In exchange, Premark transferred approximately 33,800,000 shares of Premark stock to DKI, an amount necessary for the planned distribution. Also, the agreement stipulated that after the distribution date, Premark and its subsidiaries should not represent to third parties that any of them is affiliated with DKI or a DKI subsidiary except that Premark and its subsidiaries could continue to use any existing printed material showing such affiliation for a period not to exceed six months after the distribution date.

On October 31, 1986 (the "distribution date"), DKI effected a pro rata distribution of the 33,800,000 shares of Premark stock to DKI shareholders in the ratio of one share of Premark stock to each four shares of DKI stock. DKI shareholders received cash for any fractional shares. Immediately after this distribution, all outstanding Premark shares were owned by DKI shareholders, and Premark became a separate corporation. Premark initially had approximately 68,000 shareholders, none of whom owned more than five percent of the outstanding Premark shares. The officers and directors of Premark collectively owned less than 0.73 percent of the outstanding Premark shares. Premark's stock was provisionally approved for listing on the New York Stock Exchange.

On November 6, 1986, DKI authorized the merger of DKI and Kraft, Inc., with the name of the surviving corporation to be Kraft, Inc. ("Kraft"), effective November 21, 1986. Kraft has changed the name of Dart & Kraft PAC, the separate segregated fund of its connected organization DKI, to Kraft PAC to correspond to the change in the name of the connected organization. Premark has established a separate segregated fund, Premark PAC, with Premark as its connected organization.

You ask these questions with respect to Kraft PAC and Premark PAC:

- (1) After amending Dart & Kraft PAC's Statement of Organization to change the name to Kraft PAC, will it retain the status of a multicandidate political committee?
- (2) If Kraft PAC does not retain the status of a multicandidate political committee, will it be required to aggregate the contributions to candidates by Dart & Kraft PAC in previous years with contributions to candidates by Kraft PAC in computing contribution limitations under the Act for 1986, 1988, and 1990 elections?
- (3) After Premark establishes Premark PAC, will Premark PAC be considered affiliated with Kraft PAC?
- (4) After its establishment, must Premark PAC aggregate its contributions to candidates with those previously made by Dart & Kraft PAC in computing its contribution limitations under the Act?

(5) After its establishment, must Premark PAC aggregate its contributions to candidates with contributions to candidates made by Kraft PAC in computing contribution limitations under the Act, and vice versa?

I. Kraft PAC After the Reorganization

As part of the corporate reorganization, Dart & Kraft, Inc., the connected organization of Dart & Kraft PAC, was merged with Kraft, Inc., and took the name of Kraft, Inc. Accordingly, Dart & Kraft PAC changed its name to Kraft PAC to reflect the change in the name of its connected organization as required by the Act and Commission regulations at 2 U.S.C. 432(e)(5) and 11 CFR 102.14(c). Dart & Kraft PAC has also met the requirements of the Act and regulations to qualify as a multicandidate political committee. See 2 U.S.C. 441a(a)(4); 11 CFR 100.5(e)(3).

Since Dart & Kraft PAC has previously qualified as a multicandidate political committee and since only its name is being changed to correspond with the name change for its connected organization, its successor (Kraft PAC) will retain the status of a multicandidate political committee. Accordingly, it follows that Kraft PAC will be required to aggregate the contributions to candidates made by Dart & Kraft PAC, prior to the reorganization, with contributions made to those candidates with respect to the same elections by Kraft PAC, after the reorganization, for purposes of the Act's contribution limitations. See Advisory Opinions 1985-27 and 1980-40. This responds to your questions 1 and 2.

II. Premark PAC After the Reorganization

The Act and regulations provide that for purposes of the Act's contribution limitations, all contributions made by political committees established, financed, maintained, or controlled by any person or group of persons or made by all separate segregated funds established, financed, maintained, or controlled by any corporation including any parent, subsidiary, branch, division, department, or local unit of such corporation are considered to have been made by a single political committee or by a single separate segregated fund. 2 U.S.C. 441a(a)(5); 11 CFR 110.3(a)(1)(i), 110.3(a)(1)(ii)(A), and 110.3(a)(1)(ii)(E).

Although Premark was established by DKI as a wholly-owned subsidiary, Premark was spun-off by DKI through a distribution of Premark stock to DKI stockholders as part of this corporate reorganization. Premark no longer appears to be a subsidiary of DKI, a relationship which would by itself result in the affiliation of Kraft PAC and Premark PAC. See 2 U.S.C. 441a(a)(5); 11 CFR 110.3(a)(1)(ii)(A); Advisory Opinion 1985-27. Accordingly, the Commission looks to the indicia set forth in its regulations in order to determine affiliation.

Commission regulations explain that indicia of establishing, financing, maintaining, or controlling include: (1) ownership of a controlling interest in voting shares or securities; (2) provisions of by-laws, constitutions, 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 of an entity. 11 CFR 110.3(a)(1)(iii)(A), (B), and (C). Commission regulations also provide that a

corporation may exercise control over its separate segregated fund. 11 CFR 114.5(d). Thus, the Act and regulations provide for the affiliation of separate segregated funds based on the relationship of their respective connected organizations. See Advisory Opinion 1985-27.

As noted above, Premark was originally established by DKI as a wholly-owned subsidiary of DKI. Immediately after the distribution date, all of Premark's stock was owned by DKI's shareholders. While Premark was a wholly-owned DKI subsidiary, DKI as the sole shareholder elected the current Premark board and amended Premark's certificate and by-laws. In electing all 12 Premark directors, DKI also chose 7 of DKI's 14 directors to be 7 of the 12 Premark directors, thus giving DKI directors majority control of Premark's board. Compare Advisory Opinions 1983-48 and 1982-18 with Advisory Opinion 1984-36. In amending Premark's certificate and by-laws, DKI took steps, as described in your request and in this opinion, to perpetuate the control of the DKI-elected Premark board for the foreseeable future and to make it more difficult for shareholders to acquire control of Premark, either by electing a majority of Premark's directors or by tender offers, open market purchases, or proxy fights. These facts demonstrate that, for purposes of the Act and Commission regulations, DKI established and continues to maintain an affiliated relationship with Premark. Thus, it follows that Dart & Kraft PAC, now Kraft PAC, and Premark PAC are treated as a single separate segregated fund or a single political committee for purposes of the Act's contribution limitations.

Accordingly, Kraft PAC and Premark PAC should each amend their Statements of Organization to show the other as an affiliated committee. See 2 U.S.C. 433(b)(2); 11 CFR 102.2(a)(1)(ii) and 102.2(b)(1)(ii). Premark PAC must also aggregate its contributions to candidates with those previously made by Dart & Kraft PAC to the same candidates with respect to the same elections for purposes of the Act's contribution limitations. Also, as affiliated committees, Premark PAC and Kraft PAC must aggregate their contributions, each with the other's, to the same candidates with respect to the same elections for purposes of the Act's contribution limitations. Because Premark PAC is considered affiliated with Kraft PAC (which is a multicandidate political committee), Premark PAC also qualifies as a multicandidate political committee. See Advisory Opinion 1980-40. The two committees will remain separate committees for reporting purposes. See Advisory Opinion 1985-6. This responds to your questions 3, 4, and 5.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely yours,

(signed)

Scott E. Thomas
Chairman for the
Federal Election Committee

Enclosures (AOs 1985-27, 1985-6, 1984-36, 1983-48, 1982-18, and 1980-40)