



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

November 7, 1988

CERTIFIED MAIL,  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1988-37

Martin F. Connor  
Washington Corporate Counsel  
General Electric Company  
1331 Pennsylvania Ave., N.W.  
Washington, D.C. 20004

Dear Mr. Connor:

This responds to your letter of August 19, 1988, and the letter and supplemental documents sent by you on September 22, 1988, requesting an advisory opinion on behalf of the Non-Partisan Political Support Committee for General Electric Company Employees ("GEPAC") concerning application of the Federal Election Campaign Act of 1971, as amended, and Commission Regulations to the treatment of two separate segregated funds after a corporate merger.

You state that General Electric Company ("GE") is a publicly owned company, and that General Electric Capital Corporation ("GECC") is a wholly-owned, second-tier subsidiary of GE and is in the business of "initiating, structuring, and financing leveraged buyout transactions." Kidder Peabody Group, Inc. ("KP") is an eighty percent owned second-tier subsidiary of GE. Until June 23, 1988, Montgomery Ward & Co., Inc., ("MW") was a wholly-owned second-tier subsidiary of Mobil Corporation.

As of June 23, 1988, as a result of a leveraged buyout transaction, all of the common stock of MW was acquired by Montgomery Ward Holding Corporation ("MWHC"). Originally, MWHC was known as BFB North River Corporation and then BFB Acquisition Corporation. The Chief Executive Officer and President of this corporation was Bernard F. Brennan, who was and is also the Chief Executive Officer of MW. BFB Acquisition acquired MW from Marcor, a Mobil subsidiary, with the assistance of GECC, and subsequently changed its name to MWHC. Mr. Brennan remains the Chief Executive Officer and President of MWHC and assumed the Board Chairmanship on June 17, 1988.

According to your letter of August 19, 1988, GECC owns forty percent of MWHC's common stock and KP owns ten percent of the common stock, both in the form of Class B common stock. In addition, GECC and KP own all of the preferred stock of MWHC. The management of MWHC holds fifty percent of the common stock, in the form of Class A common stock. Some of these shares are owned by Bernard F. Brennan or held in trust for the benefit of his family. The remainder are held by others in a voting trust, in effect until June, 1998, for which Mr. Brennan is the sole trustee. Mr. Brennan exercises the voting rights for the shares held in the voting trust. Mr. Brennan is neither an officer, director, nor employee of GE or its subsidiaries and has no other affiliation with GE or its subsidiaries. Each share of common stock carries one vote. Shares of preferred stock carry no votes except in the event of certain defaults affecting the distribution of dividends to preferred stockholders or a mandatory redemption of preferred stock, in which event the preferred stockholders will be able to designate an additional member of the Board of Directors.<sup>1</sup>

Pursuant to the Stockholders Agreement among BFB Acquisition, Mr. Brennan, GECC, and others, and, as provided in MWHC's by-laws, the Board of Directors of MWHC consists of thirteen persons, seven of whom are designated by Mr. Brennan and six of whom are designated by GE Capital. You state that none of the directors selected by Mr. Brennan are employees, officers, or directors of GE or its subsidiaries.<sup>2</sup> The by-laws of MW require that all of MW's directors be persons who are MWHC directors. The Board of MWHC manages the affairs of MWHC through its officers, appointed by the Board. The Stockholders Agreement and the by-laws of MWHC provide that the approval of two-thirds of the Board members is required for MWHC to take certain actions. The Stockholders Agreement also requires that the by-laws of all of MWHC's subsidiaries contain a provision stating that all actions to be taken by the subsidiary which would require the approval of two-thirds of MWHC's Board, if taken by MWHC, must be approved by two-thirds of MWHC's Board.

The by-laws list twenty-two situations in which the approval of two-thirds of MWHC's Board is necessary. Some of these situations involve occurrences such as substantial increases of expenditures or indebtedness or substantial financial transactions that may not, at present, be contemplated as part of the anticipated conduct of the corporation as set out in the Stockholder's Agreement, the Voting Trust Agreement, MWHC's Registration Statement with the Securities and Exchange Commission, and other documents submitted by you. Some of the situations listed, however, involve such management functions as amendments to the Certificate of Incorporation or the by-laws, the setting of annual financial goals and targets, certain mergers, consolidations, or other business combinations, the exceeding of capital expenditure targets for a year by over ten percent, and the adoption of a plan of liquidation of the company.

MW is the connected organization of Montgomery Ward & Co., Inc., Political Action Committee ("WARDPAC") and GE is the connected organization of GEPAC. You ask whether WARDPAC and GEPAC are affiliated committees under the Act.<sup>3</sup>

The Act and regulations provide that political committees established, financed, maintained or controlled by the same corporation, person, or group of persons including any parent, subsidiary, branch, division, department, or local unit thereof, are affiliated. Therefore, contributions to or by such committees shall be considered to have been made to or by a single committee. 2 U.S.C.

441a(a)(5); 11 CFR 100.5(g)(2) and 110.3(a)(1)(i). In applying this principle, the Commission may conclude that political committees established by organizations are affiliated when one organization has the authority, power or ability to direct another organization through provisions of by-laws, constitutions, or other documents, or where one organization has the authority to hire, appoint, discipline, discharge, demote, remove or otherwise influence the decision of the officers of an organization. 11 CFR 100.5(g)(2)(ii) and 110.3(a)(1)(iii). See Advisory Opinions 1987-21, 1986-42, 1983-19, 1979-56, and 1978-39.

One half of MWHC common stock, with voting rights, is owned by GECC and KP which are, in turn, wholly or substantially owned by GE. GECC has power to appoint six of the thirteen directors of MWHC. Although GECC appoints one less director than Brennan, the Stockholders Agreement and the by-laws of MWHC require the approval of two-thirds of the Board for certain corporate actions, some of which are customary management functions, e.g., amendment of the by-laws, the setting of annual financial goals and targets. See Henn & Alexander, *Laws of Corporations* § 207 (1983). The inability of the Board to make such decisions without the concurrence of directors appointed by GECC, an entity under GE's control, indicates that GE exercises some direction over MWHC and may influence the decisions of its officers.

The facts presented by you indicate that MW, the connected organization of WARDPAC, is under the control of MWHC. MWHC owns MW and all of MW's directors must come from MWHC's Board of Directors. According to the "Management" section of MWHC's August, 1988, Registration Statement filed with the SEC, "the executive officers and directors of [MW] are the same persons as the executive officers and directors of [MWHC]." All actions taken by MW which, if taken by MWHC would require a two-thirds vote of MWHC's Board, require the approval of two-thirds of MWHC's Board. Indeed, even if the MWHC directors sitting on MW's Board were all Brennan designees, such management decisions would still require the concurrence of or be subject to the veto of the directors appointed by GECC. Therefore, several important management decisions of MW itself require the concurrence of or are subject to the veto of the directors appointed by GECC, which is controlled by GE.

Since GE has power and authority to direct MW and may influence the decisions of its officers through MWHC, the Commission concludes that the separate segregated funds of these corporations, GEPAC and WARDPAC, are affiliated political committees, and are therefore subject to the limits of one committee for making and receiving contributions. In addition, each committee is required to identify the other as an affiliated committee on its statement of organization. 2 U.S.C. 433(b)(2), 11 CFR 102.2(b)(1).

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.

Enclosures (AOs 1987-21, 1986-42, 1983-19, 1979-56, and 1978-39)

P.S. Commissioner Aikens voted against approval of this opinion and will file a dissenting opinion at a later date.

1. According to MWHC's August, 1988, Registration Statement with the Securities and Exchange Commission, sent by you, GECC holds 500 Senior Preferred Shares and 320 Junior Preferred shares and KP holds 80 Junior Preferred shares. Senior Preferred stock is entitled, prior to Junior Preferred Stock, to quarterly cumulative dividends of \$14,500 per share per annum in cash, and Junior Preferred Stock is entitled, prior to Common Stock, to quarterly cumulative dividends of \$15,000 per share per annum in the form of additional shares or in cash. According to the Registration Statement, MWHC does not yet have a plan for common stock dividends.

In its "Index to Consolidated Financial Statements" attached to the Registration Statement, MWHC described the issuance of the shares held. It issued five million shares of Class A Common Stock to the management investors at a purchase price of \$5 million, five million shares of Class B Common Stock to GECC and KP at a purchase price of \$5 million, 500 shares of Senior Preferred Stock to GECC at a purchase price of \$50 million, and 400 shares of Junior Preferred Stock to GECC and KP at a purchase price of \$40 million.

2. The stockholders agreement and MWHC's by-laws also provide for alterations in the composition of the board if certain events occur. If certain defaults of a large nature or a bankruptcy event occurs, two members, both designated by GECC, will be added to the Board. If GECC and KP no longer hold fifty percent of their present shares, Brennan may choose one more member and there will be one less GECC designee. If GECC and KP no longer hold twenty percent of their present shares, the number of directors shall be reduced to nine, seven to be elected by holders of Class A common stock (presently Brennan's group) and two to be elected by holders of Class B common stock, including one selected by GECC if certain other contingencies occur.

3. In your letter of August 19, 1988, you state that, in GE's opinion, the committees are not affiliated. In your supplemental letter of September 22, 1988, you state that GE, through GECC and KP, is "an investor in MW, not an operating partner," and that "[c]ontrol of MW is in the hands of Mr. Brennan."