



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Elliott Johnson
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SECRETARY

JUN 8 4 45 PM '95

June 8, 1995

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director *[Signature]*

FROM: Lawrence M. Noble
General Counsel *[Signature]*

N. Bradley Litchfield
Associate General Counsel *[Signature]*

Jonathan M. Levin
Senior Attorney

SUBJECT: Draft AO 1995-15 *JL*

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for June 15, 1995.

AGENDA ITEM
For Meeting of: JUN 15 1995

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ADVISORY OPINION 1995-15

Beth Taylor, Treasurer
Allison Engine Company Political Action Committee
P.O. Box 420
Indianapolis, IN 46206-0420

DRAFT

Dear Ms. Taylor:

This responds to your letter dated April 27, 1995, on behalf of Allison Engine Company Political Action Committee ("Allison PAC" or "the PAC"), requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the conduct of a program whereby Allison Engine employees may earmark contributions to candidates.

Allison PAC is the separate segregated fund of Allison Engine Company ("the company").^{1/} The company is a corporation organized under Delaware state law, and its principal place of business is Indianapolis, Indiana. On November 21, 1994, Rolls-Royce plc ("Rolls-Royce"), a corporation registered in the United Kingdom, indicated its intention to acquire the company by purchasing 100 percent of its stock. In order to ensure that contributions by Allison PAC would not be considered to be foreign national contributions after the company is purchased by Rolls-Royce, the ^{PAC} company has adopted by-laws governing the conduct of the committee. These by-laws will be discussed in more detail below. You seek the Commission's opinion as to the adequacy

^{1/} Allison PAC filed its statement of organization with the Commission on July 25, 1994.

of these arrangements.

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In addition, Allison PAC proposes to implement an earmarking program whereby an employee voluntarily fills out a contribution election form on which he or she designates up to three candidates to receive a disbursement from the employee's contribution to Allison PAC in an amount determined by the employee. You wish to know whether Allison PAC may implement such a program.

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Finally, you seek clarification as to whether "salaried, non-managerial employees who receive a solicitation at home no more than twice a year" may use the contribution election form (which you have attached to your request) to establish a fully revocable payroll deduction as their method of contribution. You note that this group of employees, which is not in the restricted class under 11 CFR 114.5, does not include employees covered in the collective bargaining unit.^{2/}

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Foreign National Contributions

The Act and Commission regulations prohibit foreign nationals from making a contribution directly or through any other person, or making an expenditure, in connection with an election to any political office. In addition, it is unlawful to solicit, accept or receive a contribution from a foreign national. 2 U.S.C. §441e(a); 11 CFR 110.4(a)(1) and (2). As defined in the Act, the term "person" includes a

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^{2/} The company's hourly workers are represented by the United Auto Workers and make their PAC contributions to UAW-PAC.

3 corporation or a committee. 2 U.S.C. §431(11).

4 The term "foreign national" includes a "foreign
5 principal" as defined by 22 U.S.C. §611(b). 2 U.S.C.
6 §441e(b)(1); 11 CFR 110.4(a)(4). Section 611(b) defines a
7 "foreign principal" as including:

8 (1) a government of a foreign country and a
9 foreign political party;

10 (2) a person outside of the United States, unless
11 it is established that such person is an individual
12 and a citizen of and domiciled within the United
13 States, or that such person is not an individual
14 and is organized under or created by the laws of
the United States or of any State or other place
subject to the jurisdiction of the United States
and has its principal place of business within the
United States; and

15 (3) a partnership, association, corporation,
16 organization, or other combination of persons
organized under the laws of or having its principal
17 place of business in a foreign country.

18 Under 22 U.S.C. §611(b), a corporation organized under
19 the laws of any state within the United States, with a
20 principal place of business within the United States, is not
21 a foreign principal and, accordingly, would not be a foreign
22 national under 2 U.S.C. §441e. As a discrete corporate
23 entity organized under the laws of Delaware and with its
24 principal place of business in Indiana, the company is not a
25 foreign principal and, accordingly, would not be a foreign
26 national under 2 U.S.C. §441e.

27 In addressing situations involving the political
28 committee of a foreign corporation's domestic subsidiary, the
29 Commission has consistently sought to ensure that foreign
30 nationals do not make contributions in connection with an

3 election through the direction or control of the PAC. See
4 Advisory Opinion 1990-8 and opinions cited therein.

5 Commission regulations state as follows:

6 A foreign national shall not direct, dictate,
7 control, or directly or indirectly participate in
8 the decision-making process of any person, such as
9 a corporation, labor organization, or political
10 committee, with regard to such person's Federal or
11 nonfederal election-related activities, such as
12 decisions concerning the making of contributions or
13 expenditures in connection with elections for any
14 local, State, or Federal office or decisions
15 concerning the administration of a political
16 committee.

17 11 CFR 110.4(a)(3). In applying this regulation to a
18 domestic subsidiary of a foreign corporation, the Commission
19 conditioned its approval of the establishment and operation
20 of an SSF by the subsidiary on the basis that the foreign
21 national members of the subsidiary's board would abstain from
22 voting on matters concerning the SSF and that such board
23 members would abstain from voting on the selection of
24 individuals to operate the committee and exercise
25 decision-making authority with respect to its contributions
26 and expenditures. Advisory Opinion 1990-8. See Advisory
27 Opinion 1992-16.

28 You have enclosed the by-laws adopted by Allison Engine
29 PAC, in anticipation of the acquisition by Rolls-Royce, to
30 ensure compliance with election laws pertaining to foreign
31 national involvement. The by-laws list the ten members of
32 the PAC, by name and company position, and note that they are
33 all U.S. citizens. In addition, the by-laws note (in
34 pertinent part) the following: (1) that the PAC has elected

3 three of those ten members as PAC officers; (2) that changes
4 to the PAC, including PAC membership, and determinations as
5 to disbursements by the PAC are to be made by a majority vote
6 of the PAC and all PAC members must be U.S. citizens; (3)
7 that all contributors to the PAC must be U.S. citizens; (4)
8 that contributors must certify that they were not influenced
9 by any intervention or action by a foreign national to make
10 the designation of the ultimate recipient candidate or
11 committee; and (5) that no PAC disbursement will be made on
12 the basis of any action by a foreign national to influence
13 the disbursement, and members of the PAC will disclose any
14 such effort to influence.^{3/}

15 The Commission concludes that the proposed activities of
16 the PAC described in its by-laws indicate that, after the
17 company is acquired by a foreign corporation, foreign
18 nationals will not direct, control, or otherwise participate
19 directly or indirectly in the decision-making process of the
20 PAC, including the administration of or contributions by the
21 PAC. In addition, the by-laws indicate that the PAC will not
22 receive contributions from foreign national sources. See 11
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27 ^{3/} Your contribution election form states that the PAC may
28 accept contributions only from U.S. citizens or permanent
29 residents. The form also contains the contributor's
30 certification of no influence by a foreign national. Although the certification is a helpful assurance, the Act and regulations contain no requirement for a signed certification by the contributor.

McGarry and Thomas - will say NO by - Edwards and
Maddalena re: participation in PAC, 11 CFR 110.4(a)(2)(ii)

CFR 110.4(a)(2).^{4/} The Commission, therefore, considers your proposed safeguards to be sufficient to ensure the PAC's compliance with the prohibition on foreign national participation.

Employee Earmarking Program

Each year, the employees of the company voluntarily fill out a contribution election form issued by Allison PAC. The form gives a choice of making a contribution in the form of a payroll deduction or a personal check in an amount to be chosen by the individual; no amount is suggested. The payroll deduction option provides for a monthly deduction from the employee's salary in the amount designated, with the funds to be forwarded to the PAC. Such deduction would continue until the amount is amended or revoked by the employee. The form also provides for a certification by the contributor that he or she has been informed that no favor or disadvantage from the company will result by reason of the amount given or the decision not to contribute.

In the lower portion of the form, the employee may designate a percentage of his yearly deduction total to go to as many as three candidates of the employee's choice. No candidates are suggested by the PAC. The form states that the disbursements so designated will be made in October of

^{4/} The Commission notes that, while the PAC by-laws appear in some instances to use U.S. citizenship as the criterion for participation or making contributions, the Act permits such activity by legal "permanent residents" as well. 11 CFR 110.4(a)(2)(ii).

each year and that, after October, a re-designation would be needed. It is also stated that if no designee is named, the PAC "will distribute the contributions."

You provide the following example of how the program works: An employee contributing \$30 per month, for a total of \$360 per year, may choose to designate that one-third goes to candidate A, one-third to candidate B, and that the remaining third is spent pursuant to the PAC's determination. Each month, the \$30 is deposited into the PAC. In October of each year, PAC checks with accompanying letters from the PAC are sent to candidate A in the amount of \$120 and to candidate B in the same amount, and the PAC will determine what disbursements, if any, will be made with the remaining \$120. The PAC reports the \$360 as a contribution to the PAC and the disbursements of \$120 as PAC contributions to candidates A and B, to be counted against the Act's limits. Another possible variation is that an employee may notify the PAC that he or she wishes to make a designation later in the year. In those cases, the individual may make a designation in October or shortly before. You state that the same treatment as described above is applied to these contributions for reporting and limitation purposes.

The letter from the PAC to the recipient candidate that accompanies the checks states that the check is from Allison PAC and that the amount "was determined through the specific request of one or more Allison Engine employee(s) who designated all or a portion of their voluntary contribution."

3 The letter also states that the check does not represent a
4 decision by the PAC but solely reflects the contributor's
5 designation.

6 For corporations wishing to encourage employees to make
7 contributions to committees supporting Federal candidates,
8 the Act and Commission regulations permit "the establishment,
9 administration and solicitation of contributions to a
10 separate segregated fund to be utilized for political
11 purposes by a corporation." 2 U.S.C. §441b(b)(2)(C).
12 Commission regulations permit corporations to use a payroll
13 deduction plan for contributions to its separate segregated
14 fund from the personnel in its restricted class, i.e.,
15 executive and administrative personnel. 11 CFR 114.5(k) and
16 114.1(c)(1).^{5/} Advisory Opinions 1994-23, 1991-29, and
17 1991-19. Your proposal raises a number of questions,
18 however, as to the timing and attribution of contributions.

19 The Act provides that contributions made by a person
20 which are earmarked or otherwise directed through an
21 intermediary or conduit to a candidate shall be treated as
22 contributions from that person to the candidate. 2 U.S.C.
23 §441a(a)(8). Commission regulations define "earmarking" as:

24 a designation, instruction, or encumbrance,
25 whether direct or indirect, express or implied,
26 oral or written, which results in all or any part
27 of a contribution or expenditure being made to, or

28 ^{5/} The restricted class, i.e., the class that may be
29 solicited by a corporation or its SSF for contributions to
30 the SSF at any time, consists of the corporation's
stockholders, its executive and administrative personnel, and
the families of such persons. 2 U.S.C. §441b(b)(4)(A); 11
CFR 114.5(g)(1).

4 expended on behalf of, a clearly identified
5 candidate or a candidate's authorized committee.

6 11 CFR 110.6(b)(1). Contributions that are earmarked shall
7 be forwarded by the conduit to the ultimate recipient
8 candidate in accordance with the requirements of 11 CFR
9 102.8. 11 CFR 110.6(b)(2)(iii). This means that
10 contributions designated for a candidate's authorized
11 committee shall be forwarded no later than 10 days after the
12 conduit's receipt of such contributions. See 11 CFR
13 102.8(a). Generally, a conduit's contribution limits are not
14 affected by passing on earmarked contributions, except where
15 the conduit exercises "any direction or control over the
16 choice of the recipient candidate." 11 CFR 110.6(d)(1). If
17 "direction or control" is exercised by the conduit, the
18 earmarked contribution will be considered a contribution by
19 both the original contributor and the conduit. 11 CFR
20 110.6(d)(2). See Advisory Opinion 1981-57.

21 Under your proposal, the employee would designate a
22 portion of his or her contribution to be sent to a specific
23 candidate or committee during the next October. The PAC
24 would forward the contribution long after its receipt of the
25 funds and long after its receipt of the designation. By
26 forwarding the funds in this belated manner, the PAC would
27 not be in compliance with the 10 day time limit applicable to
28 committees acting as conduits for donor designated
29 contributions to candidates. Accordingly, Allison PAC will
30 have to implement its earmarking program in another manner.

Sumner

1. Amending

In Advisory Opinion 1991-29, the Commission addressed a proposal by which employees would make contributions to the separate segregated fund in anticipation, and with the stated intention, of subsequently making earmarked contributions to candidates from the funds. A corporation provided a payroll deduction plan to permit eligible employees to contribute funds to "individual accounts" maintained by the SSF in its general bank account through administrative recordkeeping. Contributions to candidates from employees' "accounts" required approval by means of employees' signatures on a form requesting that a check for a specific amount be contributed to a candidate.

The Commission concluded that the funds received by the SSF's bank account were contributions to the SSF at the time it received the funds. In addition, the Commission treated this process as a deferred earmarking program whereby contributions resulting from employee designations under the program later became earmarked contributions from the employees through the conduit SSF. Because the designations of candidate donees were made by the employee after the funds were received by the SSF in accordance with a specific program which contemplated designations in that manner, the contributions were treated as subject to a "designation, instruction, or encumbrance" within the meaning of 11 CFR 110.6. See Advisory Opinion 1981-21. The Commission, however, did not address a situation where the forwarding of the designated contribution by the conduit would occur many

3 weeks or months after the designation.

4 Assuming Allison PAC wishes to send the funds to
5 designated committees in October of each year, it may still
6 operate its plan subject to modification as to when the
7 employee actually makes the designation. The PAC may send a
8 solicitation requesting the approval by the employee of a
9 monthly payroll deduction in a certain amount or the pledge
10 of a check in a certain amount. That solicitation would also
11 inform the employee that the opportunity for designating
12 candidate recipients, and the amounts they each should
13 receive, would occur during a certain ten day window of time,
14 specified in the solicitation, in the following October, and
15 that the PAC would disburse the funds according to the
16 designation instructions at the end of that period. Since
17 the PAC also wishes to provide an opportunity for
18 non-designation, and the disbursement by the PAC of
19 non-designated funds for political uses it determines, the
20 solicitation would permit the employee to denote a percentage
21 of funds that he or she wished to have subject solely to the
22 PAC's discretion for distribution at any time.

23 As in Advisory Opinion 1991-29, the funds that the
24 employee wished to be subject to a future candidate
25 designation would be accounted for in individual book
26 accounts. See Advisory Opinion 1981-21. This would
27 constitute a reasonable accounting method for assuring that
28 funds to be designated for a candidate would not be used
29 until the time of designation. During the ten day forwarding
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period, the PAC would accept a designation form completed by the employee which lists the candidates, if any, that he or she wishes to receive contributions and in what amounts or percentages. The PAC may also take the opportunity to allow the employee to denote that funds in the book account may be used in a manner solely to be determined by the PAC.

As noted above, the passing on of earmarked contributions by a conduit does not generally affect the contribution limits of the conduit. 11 CFR 110.6(d)(1). If, however, the conduit "exercises any direction or control over the choice of recipient candidate," the earmarked contribution is considered a contribution by both the original contributor and the conduit, and must be so reported. 11 CFR 110.6(d)(1) and (2). The Commission notes that, under your proposed program, contributions made to candidates under the program are treated as contributions by Allison PAC and subject to the PAC's contribution limits under the Act. See Advisory Opinion 1991-29.

There are a number of reporting considerations with respect to your program based upon the above analysis. Consistent with Advisory Opinion 1991-29, Allison PAC should report receipts from participating employees as contributions to the PAC at the time the PAC receives the monthly deduction proceeds from the employee's salary or receives the employee's check. These contributions are received into the PAC's bank account at that time and are held for a period of months, as opposed to situations in which the conduit passes

3 on the funds shortly after of receipt of the funds. Such
4 contributionss are itemizable when the employee's total for
5 the calendar year exceeds \$200. 2 U.S.C. §434(b)(3)(A); 11
6 CFR 104.3(a)(4)(i). They are subject to the limits of
7 individual contributions to PACs under 2 U.S.C.
8 §441a(a)(1)(C).

9 As a conduit of earmarked contributions, Allison PAC
10 should identify the original donor and disclose the conduit
11 transaction in its reports, pursuant to 11 CFR 110.6(c)(1).
12 The contributions to Federal candidates through your program
13 are viewed as being made by the original participant and,
14 since you are counting the disbursements as PAC contributions
15 to the candidate, as contributions made by the PAC. The
16 limits of 2 U.S.C. §441a(a)(1)(A) apply to the employees and
17 the limits of 2 U.S.C. §441a(a)(2)(C) apply to the PAC.

18 The Commission notes that the PAC's letter to the
19 designated committee accompanying the contribution check
20 describes the check as "a check in the amount of \$__ from
21 Allison [PAC]." It proceeds to state that the check does not
22 represent the PAC's decision but solely "the designated
23 request of the voluntary contribution(s)." The letter does
24 not state that this check is a contribution from the PAC.
25 The fact that an earmarked contribution is forwarded by a
26 conduit's check does not mean, by itself, that it is a
27 contribution from the conduit. See 11 CFR 110.6(d) and
28 110.6(c)(1)(v). In order to clarify that Allison PAC
29 considers the amounts sent to the designee as contributions
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3 from the PAC, it should state that this check is a
4 contribution from the PAC.

5 The letter also does not identify the individuals who
6 earmarked the contributed amounts. The letter should state
7 the pertinent identifying information for each employee and,
8 if the check includes designations by more than one employee,
9 the amount earmarked by each employee. Otherwise, the
10 recipient will not be able to properly report the receipt of
11 the contribution. See 11 CFR 110.6(c)(1) and (2).

12 Use of Payroll Deduction for Non-Restricted Employees

13 You ask whether a written authorization solicited
14 through twice yearly mailings directly to the home address of
15 non-restricted class employees provide an acceptable basis
16 for the company to establish a payroll deduction for PAC
17 contributions by such employees.

18 As stated above, solicitations of restricted class
19 personnel for contributions may be done through a payroll
20 deduction. 11 CFR 114.5(k). Employees who are not executive
21 or administrative employees under 11 CFR 114.1(c)(1) and (2)
22 will not be able to participate in a payroll deduction plan
23 under 11 CFR 114.5 (i.e., for solicitations at any time)
24 unless they qualify for the restricted class in another way,
25 e.g., as a stockholder. See Advisory Opinion 1983-17.

26 The Act and Commission regulations also provide that a
27 corporation or its SSF may solicit contributions to its SSF
28 from corporate employees who are not in the restricted class.
29 These solicitations may be sent only twice a year, must be in
30

written form, and must be mailed to the employee's residence. The solicitation program must be designed so that neither the corporation nor its SSF may determine who makes a contribution of \$50 or less, or who does not contribute. 2 U.S.C. §441b(b)(4)(B). Commission regulations require the establishment of a custodial arrangement, whose requirements are described in detail, in order to protect the anonymity of employees who do not wish to contribute or who wish to respond with a single contribution of \$50 or less or contributions aggregating \$200 or less in a calendar year. 11 CFR 114.6(d). In addition, Commission regulations specifically forbid the establishment of a payroll deduction plan to facilitate contributions in response to these twice-yearly solicitations. 11 CFR 114.6(e)(1). Advisory Opinions 1994-23, 1991-19, and 1981-14. This prohibition exists along with, not in place of, the other above-described conditions. The Commission concludes, therefore, that the employees you describe in your final question may not participate in a payroll deduction plan.

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,

Danny L. McDonald
Chairman

Enclosures (AOs 1994-23, 1992-16, 1991-29, 1991-19, 1990-8, 1983-17, 1981-57, 1981-21, and 1981-14)