



FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 30, 1995

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1995-15

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

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 has adopted by-laws governing its conduct. These by-laws will be discussed in more detail below. You seek the Commission's opinion as to the adequacy of these arrangements.

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.

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/}

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

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

- (1) a government of a foreign country and a foreign political party;
- (2) a person outside of the United States, unless it is established that such person is an individual and a citizen of and domiciled within the United States, or that such person is not an individual 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
- (3) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.

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

In addressing situations involving the political committee of a foreign corporation's domestic subsidiary, the Commission has consistently sought to ensure that foreign nationals do not make contributions in connection with an election through the direction or control of the PAC. See Advisory Opinion 1990-8 and opinions cited therein. Commission regulations state as follows:

A foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision-making process of any person, such as a corporation,

labor organization, or political committee, with regard to such person's Federal or nonfederal election-related activities, such as decisions concerning the making of contributions or expenditures in connection with elections for any local, State, or Federal office or decisions concerning the administration of a political committee.

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

You have enclosed the by-laws adopted by Allison Engine PAC, in anticipation of the acquisition by Rolls-Royce, to ensure compliance with election laws pertaining to foreign national involvement. The by-laws list the ten members of the PAC, by name and company position, and note that they are all U.S. citizens. In addition, the by-laws note (in pertinent part) the following: (1) that the PAC has elected three of those ten members as PAC officers; (2) that changes to the PAC, including PAC membership, and determinations as to disbursements by the PAC are to be made by a majority vote of the PAC and all PAC members must be U.S. citizens; (3) that all contributors to the PAC must be U.S. citizens; (4) that contributors must certify that they were not influenced by any intervention or action by a foreign national to make the designation of the ultimate recipient candidate or committee; and (5) that no PAC disbursement will be made on the basis of any action by a foreign national to influence the disbursement, and members of the PAC will disclose any such effort to influence.^{3/}

The Commission concludes that the proposed activities of the PAC described in its by-laws indicate that, after the company is acquired by a foreign corporation, foreign nationals will not direct, control, or otherwise participate directly or indirectly in the decision-making process of the PAC, including the administration of or contributions by the PAC. In addition, the by-laws indicate that the PAC will not receive contributions from foreign national sources. See 11 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 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 check 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." The letter also states that the check does not represent a decision by the PAC but solely reflects the contributor's designation.

The Act and Commission regulations permit "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation." 2 U.S.C. 441b(b)(2)(C). Because you choose to treat the contributions raised and made under the program as contributions to and by the PAC, the company's funds may be used to administer the program and solicit the contributions. Commission regulations permit corporations to use a payroll deduction plan for contributions to its separate segregated fund from the personnel in its restricted class, i.e., executive and administrative personnel. 11 CFR 114.5(k) and 114.1(c)(1).^{5/} Advisory Opinions 1994-23, 1991-29, and 1991-19. Your proposal raises a number of questions, however, as to the timing and attribution of contributions.

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

a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee.

11 CFR 110.6(b)(1). Contributions that are earmarked shall be forwarded by the conduit to the ultimate recipient candidate in accordance with the requirements of 11 CFR 102.8. 11 CFR 110.6(b)(2)(iii). This means that contributions designated for a candidate's authorized committee shall be forwarded no later than 10 days after the conduit's receipt of such contributions. See 11 CFR 102.8(a).

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

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 weeks or months after the designation.

Assuming Allison PAC wishes to send the funds to designated committees in October of each year, it may still operate its plan subject to modification as to when the employee actually makes the designation. The PAC may send a solicitation requesting the approval by the employee of a monthly payroll deduction in a certain amount or the pledge of a check in a certain amount. That solicitation would also inform the employee that the opportunity for designating candidate recipients, and the amounts they each should receive, would occur during a certain ten day window of time, specified in the solicitation, in the following October, and that the PAC would disburse the funds according to the designation instructions at the end of that period. Since the PAC also wishes to provide an opportunity for non-designation, and the disbursement by the PAC of non-designated funds for political uses it determines, the solicitation would permit the

employee to denote a percentage of funds that he or she wished to have subject solely to the PAC's discretion for distribution at any time.

As in Advisory Opinion 1991-29, the funds that the employee wished to be subject to a future candidate designation would be accounted for in individual book accounts. See Advisory Opinion 1981-21. This would constitute a reasonable accounting method for assuring that funds to be designated for a candidate would not be used until the time of designation. During the ten day 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.

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

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

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

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

Use of Payroll Deduction for Non-Restricted Employees

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

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

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

(signed)

Danny L. McDonald
Chairman

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

Endnotes:

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

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

3/ Your contribution election form states that the PAC may accept contributions only from U.S. citizens or permanent residents. The form also contains the contributor's 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.

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)(4)(ii).

5/ The restricted class, i.e., the class that may be solicited by a corporation or its SSF for contributions to 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).

6/ The solicitation should inform the employee that the amounts designated for candidates will be treated as contributions from Allison PAC, as well as from the individual employee, and that the PAC will be subject to the \$5,000 per election limit on contributions by a multicandidate committee to a particular candidate. The solicitation, therefore, should also note the possibility that all or part of the amount designated by an individual for a particular candidate will not be sent to that candidate and should also explain other options for the PAC's use of the funds. After the designations are made, and the funds sent by the PAC, the PAC should send a notice to the individual employee informing him or her as to the amount of contributions attributed to the employee with respect to each candidate.