FEDERAL ELECTION COMMISSION
Washington, DC 20463

November 4, 1985

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1985-27

Loren D. McManus, Associate Counsel
R.J. Reynolds Industries, Inc.
World Headquarters
Winston-Salem, N.C. 27102

Dear Ms. McManus:

This responds to your letters of August 27 and September 6, 1985, requesting an advisory opinion on behalf of R.J. Reynolds Industries, Inc., concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the application of the contribution limitations in the context of a corporate combination between R.J. Reynolds Industries and Nabisco Brands.

You state that both R.J. Reynolds Industries ("Reynolds") and Nabisco Brands ("Nabisco") are corporations organized under the laws of the State of Delaware. Reynolds has established a separate segregated fund, RJR Good Government Fund ("Reynolds PAC"), registered with the Commission as a Federal political committee.[1] Nabisco has also established a separate segregated fund, Nabisco Brands Inc. Program for Active Citizenship ("Nabisco PAC"), registered with the Commission as a Federal political committee.[2]

According to the information you have provided in your request, Reynolds and Nabisco entered into discussions in April 1985 regarding a possible business combination involving the two companies. These discussions and further negotiations culminated in a merger agreement on June 1, 1985, between Reynolds (a holding company), Nabisco, and Reynolds Acquisition Corp., a wholly-owned subsidiary of Reynolds.[3] This agreement constituted a binding contract between Reynolds and Nabisco that governed the tender offer, the purchase of shares, and the merger. It placed limitations on the activities of the two corporations with respect to their maintaining the status quo in their business operations and to their issuing stock and declaring and paying dividends. It also provided for regular and frequent consultations between representatives of the

two corporations, for reasonable access to the books and records of each corporation, and for the sharing of information regarding the necessary premerger filings.

Pursuant to this agreement, Reynolds made a tender offer for up to 29,000,000 shares of Nabisco common stock at $85 per share. The offer was oversubscribed with more than 52,000,000 out of nearly 58,000,000 outstanding shares being tendered by the expiration date. On July 2, 1985, Reynolds accepted for payment and purchased 29,000,000 shares, representing 50.2 percent of Nabisco's outstanding shares.

Also pursuant to the merger agreement, Nabisco held a shareholder's meeting on September 10, 1985, to approve the merger between Nabisco and Reynolds Acquisition Corp., the constituent corporations to the merger. Reynolds Acquisition Corp. was merged into Nabisco, which became the surviving corporation to the merger. As a result of this merger, Reynolds acquired all of the common stock of Nabisco, which then became a wholly-owned, first-tier subsidiary of Reynolds. On September 12, 1985, Reynolds PAC amended its Statement of Organization to add Nabisco PAC as an affiliated committee.[4]

You state that as a result of this merger Reynolds is concerned about the contribution limitations for Reynolds PAC and Nabisco PAC prior to the merger and the shared limit after the merger. You pose these two questions:

(1) Since Reynolds PAC and Nabisco PAC may wish to make political contributions to Federal candidates prior to the affiliation, is there any restriction regarding the amount which may be contributed other than the $5,000 limitation of 2 U.S.C. 441a(a)(2)(A)?

(2) If both Reynolds PAC and Nabisco PAC have contributed to the same candidate before their affiliation, how is the amount of those contributions aggregated with respect to the $5,000 limitation of 2 U.S.C. 441a(a)(2)(A)?

The Act and Commission regulations provide that a multicandidate political committee may not make contributions to any Federal candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000. 2 U.S.C. 441a(a)(2)(A) and 11 CFR 110.2(a)(1). This limitation applies separately with respect to each election. 2 U.S.C. 441a(a)(6) and 11 CFR 110.2(d).[5]

With respect to these contribution limitations, the Act further provides that:

> all contributions made by political committees established or financed or maintained or controlled by any corporation...including any parent, subsidiary, branch, division, department, or local unit of such corporation...shall be considered to have been made by a single political committee... ... In any case in which a corporation and any of its subsidiaries, branches, divisions, departments, or local units... establish or finance or maintain or control more than one separate segregated fund, all such separate segregated funds shall be treated as a single separate segregated fund... .

2 U.S.C. 441a(a)(5). The purpose of this section is "to prevent corporations...from evading the contribution limits." H.R. Rep. No. 1057, 94th Cong., 2d Sess. 58 (1976), reprinted in Legislative History of Federal Election Campaign Act Amendments of 1976 at 1052 (GPO 1977). Thus, Commission regulations provide that contributions made by affiliated committees shall be treated as if made by a single committee and that such contributions shall be aggregated for contribution limitation purposes. 11 CFR 110.3(a)(1); see also 11 CFR 100.5(g)(2).

Your request presents a threshold question concerning on what date Reynolds PAC and Nabisco PAC became affiliated committees under the Act and Commission regulations for purposes of the contribution limitations. As noted above, the Act and Commission regulations provide for the affiliation of separate segregated funds of a corporation and any of its subsidiaries based on the relationship of the corporate organizations. 2 U.S.C. 441a(a)(5) and 11 CFR 100.5(g)(2)(i)(A); see Advisory Opinion 1983-28.

The Act and Commission regulations also 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. 2 U.S.C. 441a(a)(5); 11 CFR 100.5(g)(2) and 110.3(a)(1)(i). The regulations further provide that the indicia of establishing, financing, maintaining, or controlling includes the "[o]wnership of a controlling interest in voting shares or securities." 11 CFR 100.5(g)(2)(ii)(A) and 110.3(a)(1)(iii)(A).

Both your request and the timing of the filing of the amended Statement of Organization for Reynolds PAC are premised on the assumption that Reynolds PAC and Nabisco PAC did not become affiliated until the merger of September 10, 1985. As explained below, the Act and Commission regulations provide for the affiliation of political committees, especially separate segregated funds, in a broader set of circumstances.

With the July 2nd purchase, Reynolds obtained ownership of a majority of the voting shares in Nabisco. Such ownership generally gives a majority stockholder, including a corporation as the majority stockholder, the ability to control the corporation through such powers as those to change the by-laws, amend the certificate of incorporation, elect directors, vote at stockholder meetings, and approve mergers. See Del. Code Ann. tit. 8, §§109, 123, 141, 212, 242, and 251 (1983); Fletcher Cyc Corp §§2097 and 5717 (Perm Ed).[6] Moreover, the proxy statement and prospectus that accompanied the August 5th notice to Nabisco stockholders stated that the waiting period under the Hart-Scott-Rodino Act had expired on June 18, 1985, and that all federal or state regulatory requirements had been met. Thus, Reynolds was able to exercise its powers as the majority stockholder and discharge its obligations under the June 1st merger agreement by voting its shares in favor of the merger as soon as practicable.[7] This purchase of Nabisco shares gave Reynolds ownership of a controlling interest in Nabisco's voting securities. See Advisory Opinions 1983-19 and 1980-18.

Furthermore, the July 2nd purchase by Reynolds of a majority of the outstanding shares in Nabisco also created a parent-subsidiary relationship between the two corporations. The Commission notes that a subsidiary corporation is generally defined as one in which another (the parent) corporation owns at least a majority of the shares and thus has control. See, e.g., 26

U.S.C. 425(f) (definitions relating to stock options and corporate reorganizations); Fletcher Cyc Corp §2821 (Perm Ed); 18 Am. Jur. 2d Corporations §35 (1985). Delaware (the state of incorporation for both Reynolds and Nabisco) also has recognized that a corporation's ownership of a majority of another corporation's stock results in a parent-subsidiary relationship. See, e.g. Gabelli & Co. v. Liqqett Group, Inc., 444 A.2d 261, 263 (Del.Ch. 1982), aff'd, 479 A.2d 276 (Del. 1984) (ownership of 85 percent of the shares); and Getty Oil Co. v. Skelly Oil Co., 267 A.2d 883, 884-5 (Del.Supr.Ct. 1970) (ownership of 71 percent of the shares). Thus, the July 2nd purchase by Reynolds of a majority of Nabisco's outstanding shares not only gave Reynolds ownership of a controlling interest in Nabisco but also created for purposes of the Act a parent-subsidiary relationship between the two corporations. Accordingly, the Commission concludes that Reynolds PAC and Nabisco PAC became affiliated for purposes of the Act on July 2, 1985. See 2 U.S.C. 441a(a)(5); 11 CFR 100.5(g)(2)(i)(A) and 110.3(a)(1)(ii)(A).[8]

With regard to your first question, the Commission concludes that contributions made by Reynolds PAC and Nabisco PAC prior to the date of affiliation were subject to the contribution limitations of 2 U.S.C. 441a(a)(2) as well as the other provisions of the Act. Such contributions were not subject to a shared aggregate limit at the time they were made.

With respect to your second question, the Commission concludes that the anti-proliferation and contribution limitation provisions of the Act and regulations require that the amount of pre-affiliation contributions must be aggregated with the amount of post-affiliation contributions for purposes of the $5,000 limitation of 2 U.S.C. 441a(a)(2). This required aggregation includes pre-affiliation contributions made to the same candidate with respect to the same election by both Reynolds PAC and Nabisco PAC as well as by either Reynolds PAC or Nabisco PAC alone. The following examples of contributions made in 1985 (the 1986 election cycle) illustrate this requirement:[9]

(1) Prior to affiliation, Nabisco PAC made a $1,000 general election contribution to a candidate to whom Reynolds PAC had made a $250 general election contribution and a $750 primary election contribution. After affiliation, Nabisco PAC and Reynolds may make additional contributions to this candidate which in the aggregate do not exceed $3,750 with respect to the general election and $4,250 with respect to the primary election.

(2) Prior to affiliation, Reynolds PAC made an aggregate of $4,000 in primary election contributions and a $1,000 general election contribution to a candidate, while Nabisco had made no contributions to this candidate. After affiliation, Reynolds PAC and Nabisco PAC may make additional contributions to this candidate which in the aggregate do not exceed $1,000 with respect to the primary election and $4,000 with respect to the general election.

A similar aggregation procedure also applies with respect to contributions made pursuant to 2 U.S.C. 441a(a)(2)(B) and 441a(a)(2)(C). For instance, Nabisco PAC's 1985 pre-affiliation contribution of $1,500 to a national political party's congressional campaign committee must be aggregated with any post-affiliation contributions to this committee by Reynolds PAC or, Nabisco PAC during the remainder of calendar year 1985 for a total not to exceed $15,000 for 1985. Reynolds PAC's pre-affiliation contribution of $5,000 to a nonparty multicandidate

committee, however, would preclude any further contributions to this committee after affiliation during 1985 either by Reynolds PAC or Nabisco PAC.

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)

John Warren McGarry
Chairman for the Federal Election Commission

Enclosures (AOs 1983-28, 1983-19 and 1980-18)

1. RJR Good Government Fund lists on its Statement of Organization four other political committees as affiliated committees: Del Monte Voluntary Nonpartisan Good Government Fund, Franchisee Legislative Action Group Political Action Committee, Heublein Employees' Political Participation Committee, and Kentucky Fried Chicken Political Action Committee. All of these committees are collectively referred to as "Reynolds PAC" in this opinion.

2. The Statement of Organization filed by Nabisco PAC does not list any affiliated committees.

3. Reynolds and Nabisco also executed an asset option agreement and a stock option agreement. Reynolds has announced that it has no present expectation of exercising either option.

4. On October 15, 1985, Nabisco PAC amended its Statement of Organization to show its affiliation with Reynolds PAC. See 11 CFR 102.2(a)(2).

5. Both Reynolds PAC and Nabisco PAC have qualified as multicandidate political committees. See 2 U.S.C. 441a(a)(4) and 11 CFR 100.5(e)(3). The Act and regulations also prohibit multicandidate political committees from making contributions to political committees, other than candidate or party committees, that in the aggregate exceed $5,000 "in any calendar year." 2 U.S.C. 441a(a)(2)(C) and 11 CFR 110.2(a)(3); see also 2 U.S.C. 441a(a)(2)(B) and 11 CFR 110.2(a)(2).

6. The June 1st merger agreement placed restrictions on the activities of Reynolds and Nabisco regarding their issuance of stock, their declaration and payment of dividends, and their on-going business affairs and operations. Such powers generally reside in the board of directors of a corporation rather than its stockholders. Del. Code Ann. tit.8, §§141, 161, and 170 (1983); Fletcher Cyc Corp §§505 and 2100 (Perm Ed). Thus, these provisions of the merger agreement did not dilute the power of Reynolds as the majority stockholder to exercise the control over Nabisco accorded to such a stockholder.

7. The Commission does not address the circumstances in which ownership of less than a majority of outstanding shares may nevertheless constitute ownership of a controlling interest in the voting securities of a corporation. See generally, Fletcher Cyc Corp §2020 (Perm Ed).

8. The Commission also concludes that affiliation of Reynolds PAC and Nabisco PAC did not occur with the execution of the June 1st merger agreement.

9. These examples are drawn from the reports filed with the Commission by Reynolds PAC and Nabisco PAC. The Commission does not reach questions arising from other situations in which contributions to the same candidate with respect to the same election prior to the date of affiliation may occur. See 11 CFR 112.1(b).