



FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 3, 1991

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1991-29

Bradley J. Considine
Sundstrand Corporation
4949 Harrison Avenue
P.O. Box 7003
Rockford, Illinois 61125-7003

Dear Mr. Considine:

This responds to your letter of July 2, 1991, as supplemented by your letters dated August 30 and November 1, 1991, requesting an advisory opinion on behalf of the Sundstrand Corporation ("Sundstrand") concerning the application of the Federal Election Campaign Act of 1971, as amended, to the structure and operation of the Sundstrand Corporation Good Government Pledge Program (the "Pledge Program").

You state that the Pledge Program was established by Sundstrand in 1978 and is a political committee.¹ You explain that the fundamental principle of the program is to encourage members of the restricted class (the executive or administrative or stockholder personnel of Sundstrand) to participate in the political process through program activities and financial contributions from individually controlled accounts.

You describe the Pledge Program as having a "unique" structure:

Members of the restricted class contribute, through payroll deduction or direct payment, to accounts in their names which are established by the Company but controlled completely by the contributing individual. "Complete control" means that the individual is free to withdraw any or all monies from his or her account without restriction. And, it is only at the individual's direction that money from the account can be disbursed to the Good Government Pledge Program political action committee for contribution to a candidate or political organization of the person's choice.

According to the information you have provided, the Pledge Program is administered by an Advisory Board (the "Board") consisting of eight members appointed by Sundstrand management. The Advisory Board reviews requests for political contributions and selects candidates, parties or committees to be recommended for financial support. The Board's recommendations are then submitted to Pledge Program participants in letters soliciting contributions to the candidate or committee. To contribute, participants can sign a form requesting that a check for a specific amount be contributed to a candidate or committee. They then receive a copy of the check drawn against amounts recorded in the person's Pledge Program account. Participants may choose to authorize a contribution to a recommended candidate or committee or make contributions to candidates not endorsed by the Board. Participants may also request checks from their individual account made out to themselves, and then send out a personal check for their contributions.

Funds from all individual accounts are kept in one non-interest bearing account administered by Sundstrand at a local bank. You state that the cumulative total of the participants' individual accounts is not reported in the committee's monthly FEC filings, as you view these funds as "still controlled by the individuals." Once an individual designates funds for a contribution to a candidate or committee, those funds are then "considered to be under the control of the political action committee and are thus treated as a contribution to the PAC."² You state that the contribution is then reported as a receipt on Schedule A, and the disbursement is reported as a Schedule B expenditure. You further state that the Act's \$5,000 limit for multi-candidate committee contributions (per candidate per campaign) is applied to all political contributions from the Pledge Program and the Sundstrand Good Government Support Fund, an affiliated committee created by Sundstrand. You ask whether the described reporting of the activity of the Pledge Program would comport with the Act and Commission regulations.

I. Contributions to and by a separate segregated fund

The Act prohibits a corporation from making contributions or expenditures in connection with a Federal election. 2 U.S.C. 441b(a). The Act and Commission regulations provide limited exceptions to this broad prohibition. For corporations wishing to encourage employees to make contributions to committees supporting Federal candidates, 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). A corporation must establish, operate and report the activity of a separate segregated fund in order to raise and disburse contributions for Federal candidates from its employees or to act as a conduit for employee contributions. Advisory Opinion 1986-4. See 11 CFR 110.6(b)(2)(ii). See also Advisory Opinions 1987-29 and 1982-2. Commission regulations permit corporations to use a payroll deduction plan for employee contributions to a separate segregated fund. 11 CFR 114.5(k). See Advisory Opinion 1991-19.

The Pledge Program is registered with the Commission as a separate segregated fund and reports its receipts and disbursements. All corporate activity in support of Federal candidates is conducted through the Pledge Program or an affiliated Federal committee (the Sundstrand Good Government Support Fund). Contributions to candidates through designations of employees from their individual accounts are made by PAC check and treated as contributions from the Pledge

Program, and are subject to the PAC's \$5000 limit under the Act. Employees are solicited to participate in the Federal political activity of the PAC through a payroll deduction plan or by direct payments, and monies are received from employees and collected by the corporation for such purposes. Funds received by the PAC from employees under this program are deposited in the Pledge Program PAC's bank account. In most respects, therefore, the described operation of the Pledge Program matches a conventional separate segregated fund under the Act and Commission regulations.

However, according to your request, funds are not attributed or reported as contributions to the Pledge Program PAC at the time of donation by the employee. The money is considered to reside in an individual "account" for each employee participating in the program, and to remain the personal funds of the participant.³ Donations of employees are not viewed as contributions to the PAC until such time as a contribution to a recipient candidate or other political committee is designated by the employee. According to your letter of November 1, 1991, the program's contributions to candidates are accompanied by a letter to the recipient indicating the contribution represents a contribution from a particular employee participant, and separate PAC checks are sent for each participating employee who designates a contribution to a recipient.

Not attributing or reporting receipts of the Pledge Program as contributions to the PAC when received -- having solicited such funds from participating employees for the purpose of making political contributions from the PAC to Federal candidates -- is inconsistent with separate segregated fund activity as prescribed in the Act and Commission regulations. See Advisory Opinions 1986-4 and 1981-21 (and discussion in section IV of this opinion). Your proposed use of an individual "account" approach for participants in the Pledge Program (and the existence of Sundstrand's Good Government Support Fund, a more conventional PAC) indicates your interest in alternative methods for directly involving employees in making contributions to candidates under the program (discussed immediately below).

II. Employee participation plans

The Pledge Program described in your request demonstrates an intention by Sundstrand to permit employees an opportunity to set up individual accounts, administered by the corporation but remaining the property of the employee, from which contributions to Federal candidates or political committees may subsequently be drawn. Section 114.11 of Commission regulations provides for such "employee participation plans" subject to several conditions. Sundstrand's Pledge Program resembles such a program in some aspects, particularly as to the intended treatment of receipts from employees as individual accounts remaining under employee dominion. However, the Pledge Program differs from the type of plan permitted under 114.11 in several important respects.

The Pledge Program does not utilize separate "trustee" accounts for individual employee funds, but instead utilizes one bank account, registered as a separate segregated fund of the corporation, to hold funds of all participating individuals. See 11 CFR 114.11(a). Contributions to candidates are made from the PAC itself, following authorization by a participant, and in a manner that identifies the corporation sponsoring the program. 11 CFR 114.11(d). The program allows corporate personnel and officers of the separate segregated fund to view account activity and to

know the source and recipients of contributions made through it. See 11 CFR 114.11(a)(2). The Pledge Program is not open to all employees. See 11 CFR 114.11(b).

Thus, as it is presently structured and administered, the Pledge Program would not qualify for this exception to the Act's prohibition on corporate contributions or expenditures. See Advisory Opinion 1986-4. Absent qualification under Commission regulations as an "employee participation plan," Sundstrand would have to operate through a separate segregated fund in order to provide a corporate sponsored mechanism for employees to make contributions to Federal candidates or political committees.

III. Earmarked 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).

Generally, a conduit's contribution limits are not affected by passing on earmarked contributions, except where the conduit exercises "any direction or control over the choice of the recipient candidate." 11 CFR 110.6(d)(1). If "direction or control" is exercised by the conduit, the earmarked contribution will be considered a contribution by both the original contributor and the conduit. 11 CFR 110.6(d)(2).

a. Advisory Opinion 1981-21

A conduit or intermediary for an earmarked contribution is not usually viewed as itself receiving a contribution (or that part of a contribution) it merely passes on to the intended recipient, and would not generally report the earmarked contribution as a contribution to it (but would report its conduit activity). Moreover, employee suggestions or designations for a recipient candidate of a PAC contribution, subsequent to the employee having contributed to the PAC, would not usually constitute an "earmarked contribution" from the employee to the recipient of the PAC contribution, since the funds contributed to the PAC would no longer be the employee's.

In Advisory Opinion 1981-21, however, the Commission recognized circumstances in which employees could make contributions to the corporation's separate segregated fund in anticipation, and with the stated intention, of subsequently making earmarked contributions to candidates from the funds. Under the facts of that request, similar to those presented in your request, a corporation provided a payroll deduction plan to permit eligible employees to contribute funds to "individual accounts" maintained by the separate segregated fund in its general bank account through administrative recordkeeping. Contributions to candidates from employees' "accounts" required approval by means of employees' signatures on a Funds Release form.

The Commission concluded in Advisory Opinion 1981-21 that receipts of the Federal PAC (transfers of affiliated State PACs' receipts from employees) were contributions to the PAC. However, the Commission viewed contributions to candidates resulting from employee designations under that program as constituting "earmarked contributions" from the employees through the conduit PAC. Although employees had made contributions to the PAC without contemporaneously earmarking them for transmittal to identified candidates, those contributions were made through a program (and under an agreement) in which subsequent earmarking by employees was explicitly contemplated. Employee contributions to the PAC through the payroll deduction plan were thereby subject to "a designation, instruction or encumbrance" within the meaning of the Commission's "earmarking" regulations at 11 CFR 110.6, permitting 'deferred earmarking' by the employee. See also Advisory Opinion 1981-57. When a participating employee later decides to earmark a contribution to a particular candidate, the conduit PAC is obligated by 110.6 to pass on the contribution, much as if the conduit PAC had initially received a check from the employee that was made out to the PAC but earmarked for a candidate recipient.

b. "Direction or control"

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)(2).

The Commission discussed application of the "direction or control" standard under 11 CFR 110.6(d) to the circumstances presented by your request, but could not reach a majority decision. The Commission notes, however, you describe the Pledge Program as treating contributions made to candidates under the program as PAC contributions and subject to the PAC's contribution limits under the Act.

IV. Reporting obligations

You propose a "unique" structure for Sundstrand's Pledge Program to permit greater involvement of individual participants in choosing candidates for support by the PAC. As a preliminary matter, however, the Commission views monies solicited for Federal political purposes and received by a separate segregated fund as contributions to the fund. See 2 U.S.C. 431(8)(A)(i) and 434(b). See also Advisory Opinion 1981-21.

Thus, the Commission first concludes the Pledge Program should report receipts from participating employees as contributions to the PAC at the time such funds are donated and transmitted to the PAC's bank account, whether through payroll deduction or direct payment, and irrespective of the disposition of such funds thereafter. If you wish to continue operating the Pledge Program in a manner by which contributions to candidates are considered from the PAC itself, the program should continue to report contributions to candidates or political committees

from the PAC on Schedule B. Contributions by the PAC are subject to the PAC's contribution limits at 2 U.S.C. 441a.⁴

The Commission's conclusion in Advisory Opinion 1981-21 allows Sundstrand to give participants in the Pledge Program the ability to make "earmarked contributions" to their choice of recipient candidates from funds previously contributed to the PAC. Commission regulations require conduits or intermediaries to identify the original donor to the recipient and to report the conduit transaction pursuant to 11 CFR 110.6(c)(1). Under the approach described in that opinion, contributions to Federal candidates through the Pledge program are viewed as made by the individual participant (and also from the PAC if the PAC or its connected organization exercises any direction or control over the choice of recipient candidates.)⁵

The Commission notes you also describe an alternative approach under the Pledge Program by which contributors to the PAC may request amounts previously donated to the program be returned so that the employee may contribute directly to the chosen candidate recipient by personal check. Although, under the Commission's analysis, such previously donated funds would be considered to belong to the PAC and not the individual, the Act and Commission regulations would not preclude the PAC from choosing to refund contributions to employees, for whatever reason, and disclosing such refunds on its reports to the Commission.

Commission regulations provide for special reporting obligations in earmarking situations. See 11 CFR 110.6(c). The Pledge Program must report the original source and the recipient candidate or authorized committee of each earmarked contribution which report must be filed with the Commission, the Clerk of the House of Representatives or the Secretary of the Senate (as appropriate). In addition, the Pledge Program must report the contribution to the recipient candidate or authorized committee. 11 CFR 110.6(c)(1)(i). The report to the Commission should be included in the Pledge Program's report to Commission for the reporting period in which the original donor submitted his or her earmarked instructions to the Program. 11 CFR 110.6(c)(1)(ii). The report to the recipient candidate or authorized committee should be made when the earmarked contribution is forwarded to the recipient candidate or authorized committee. 11 CFR 110.6(c)(1)(iii).⁶

This response constitutes an advisory opinion concerning the 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)

John Warren McGarry
Chairman for the Federal Election Commission

Enclosures (AOs 1991-19, 1987-29, 1986-4, 1982-2, 1981-57 and 1981-21)

1/ According to Commission records, the Statement of Organization of the Pledge Program identifies the committee as a separate segregated fund established by Sundstrand Corporation.

2/ You note, however: "Such 'control' notwithstanding, funds are always disbursed as directed by the employee."

3/ According to Article V of the Pledge Program's bylaws: "At all times, funds deducted from a participant's paycheck and on deposit with the Bank remain the property of the participant. At any time, a participant may receive any part of the funds on deposit in his account."

4/ Commission regulations allow complete control of a separate segregated fund to reside with the corporation (or labor organization) that established the fund. 11 CFR 114.5(d). The method by which a separate segregated fund selects recipients of contributions from the fund is an internal management and policy matter. For example, a fund may employ a "donor selection" approach that permits PAC "members to choose a candidate recipients for PAC contributions (as distinct from individual contributor "earmarking," as indicated in the facts of your request). See 11 CFR 114.5 (c)(1)(iii).

5/ If such earmarked contributions from employees are forwarded from funds previously contributed by the employee to the Pledge Program, and are not also considered contributions from the PAC, the PAC would report a refund of an equivalent portion of the employee's PAC contributions as occurring simultaneously with its receipt and transmittal of the employee's earmarked contribution.

If such earmarked contributions from employees are forwarded from funds previously contributed by the employee to the Pledge Program, and are also considered contributions from the PAC, the PAC would report the disbursement of the earmarked contributions as attributable to both itself and the employee. See 11 CFR 110.6(d)(2).

6/ The information which the Pledge Program is required to provide includes the name and address of each contributor giving in excess of \$200; the amount of each earmarked contribution, the date it was received by the Pledge Program, and the name of the intended recipient; and the date each earmarked contribution was forwarded to the intended recipient. 11 CFR 110.6(c)(1)(iv).

If the earmarked contribution passed through the Pledge Program's account then the above information should be itemized in the appropriate schedules of receipts and disbursements attached to its report. However, for each earmarked contribution forwarded in the form of the contributor's check or other written instrument, the information should be disclosed as a memo entry on the appropriate schedule attached to the Pledge's Program's report. 11 CFR 110.6 (c)(1)(v).