



FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 17, 1988

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1988-4

Roger C. Wilson
Merrill Lynch World Headquarters
North Tower
World Financial Center
New York, NY 10281-1222

Dear Mr. Wilson:

This responds to letters of November 17, 1987 and January 11, 1988 requesting an advisory opinion on behalf of the Merrill Lynch Political Action Committee concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the treatment of two separate segregated funds after a corporate merger.

You state that the Borg-Warner Corporation ("BW") and Merrill Lynch & Co., Inc. ("ML") are incorporated under Delaware law and have each sponsored separate segregated funds that are registered with the Commission as political committees. BW sponsors the Borg-Warner Political Action Committee ("BWPAC") and ML sponsors the Merrill Lynch Political Action Committee ("MLPAC").

Upon request of the Office of General Counsel, you provided a Proxy Statement Prospectus that states that in late 1986 and early 1987 officials from ML and BW entered into discussions regarding a possible business combination involving the two companies. These discussions and further negotiations culminated in the signing of a merger agreement on April 10, 1987 between Acquiring Corporation ("Acquiring"), a wholly-owned subsidiary of Borg-Warner Holdings Corporation ("Holdings"), and BW. This agreement governed the tender offer, the purchase of shares, and the leveraged buyout. Agreement and Plan of Merger, arts. I-II.

Holdings is a Delaware corporation organized at the direction of Merrill Lynch Capital Partners, Inc. ("MLCP") for the purpose of acquiring the entire equity interest in BW. MLCP is a Delaware corporation and a wholly owned subsidiary of ML. MLCP initiates and structures

leveraged buyouts involving publicly owned companies and manages a fund of equity capital committed by institutional investors for investment in the equity portions of leveraged buyout transactions. Prospectus at 86. Part of this fund is called ML Entities. ML Entities is comprised of four partnerships for which MLCP is, or controls, the managing partner of each. Id. Substantially all of the equity interests of these partnerships, however, are owned by investors other than NLCP or any of its affiliates. Prospectus at 87.

On April 13, 1987, Acquiring commenced a tender offer at \$48.50 per share for up to 77,600,000 shares of BW common stock. Prospectus, summary at V. On May 18, 1987, Acquiring purchased 77,600,000 shares, representing eighty-nine percent of BW's outstanding stock. Id. On the same day, by agreement, all of BW's Directors, except three, resigned. The remaining Directors then reduced the size of the Board from fourteen to nine members. Following the agreement, Holdings then designated six persons to fill the empty Directors positions. Prospectus, summary at V.

At a special meeting on July 30, 1987, BW's stockholders approved BW's leveraged merger with Acquiring. Prospectus, summary at IV. Pursuant to the merger agreement, owners of BW's outstanding shares received for each share \$19.75 cash and \$54.25 principal in debentures due in 2007. Id. Subsequent to this leveraged buyout, Acquiring merged with BW leaving BW as the surviving subsidiary of Holdings. Id.

As a result of this merger, you ask whether the two political committees, NLPAC and BWPAC, are under the control of one corporation or group of corporations and therefore regarded as affiliated committees under the Act.

The Act and regulations provide that for purposes of the Act's contribution limitations, all contributions made by political committees established, financed, maintained, or controlled by any corporation including any parent, subsidiary, branch division, department, or local unit of such corporation are considered to have been made by a single political committee or by a single separate segregated fund. 2 U.S.C. 441a(a)(5). Therefore, the separate segregated fund of an acquired corporation that is a direct subsidiary of an acquiring corporation is automatically affiliated with the separate segregated fund of that acquiring corporation. 2 U.S.C. 441a(a)(5), 11 CFR 110.3(a)(1)(ii)(A); Advisory Opinions 1987-21, 1986-42 and 1985-27.

Because BW is not a direct subsidiary of ML, their respective separate segregated funds are not automatically considered affiliated. If not automatically affiliated, however, the separate segregated fund of an acquired corporation may still be affiliated with the separate segregated fund of an acquiring corporation through indicia set forth in the regulations. Commission regulations explain that indicia of establishing, financing, maintaining, or controlling include (1) ownership of a controlling interest in voting shares or securities (2) provisions of by-laws, constitutions, or other documents by which one entity has the authority, power, or ability to hire, appoint, discipline, discharge, demote, remove, or otherwise influence the decision of the officers of an entity. 11 CFR 110.3(a)(1)(iii) (A), (B), and (C).

ML, through the direction of MLCP, established Holdings for the purpose of acquiring the entire equity interest in BW. MLCP manages the ML Entities which financed the capital for Holdings

to exercise the leveraged buyout of BW stock. As manager of ML Entities, you point out that MLCP does not itself own a controlling interest in BW. You suggest that MLCP owns the right to vote a controlling interest in BW shares through the ML Entities, but that such a right is constrained by fiduciary obligations to vote shares on behalf of others. MLCP, however, in addition to managing Holdings equity interest in BW, has a direct relationship with the six Directors that Holdings appointed to BW's Board. See Advisory Opinion 1986-42. All six currently hold executive positions in MLCP or Merrill Lynch, Pierce, Fenner, and Smith Incorporated, ML's principal subsidiary. Prospectus at 74.

These facts demonstrate that, for purposes of the Act and Commission regulations, ML, through MLCP, established and continues to maintain an affiliated relationship with BW. Therefore, the Commission concludes that BWPAC and MLPAC should be treated as a single separate segregated fund or a single political committee for purposes of the Act's contribution limitations.

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)

Thomas J. Josefiak
Chairman for the Federal Election Commission

Enclosures (AOs 1987-21, 1986-42, 1985-27)