FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DISSENTING OPINION

OF

COMMISSIONER DANNY LEE MCDONALD

COMMISSIONER SCOTT E. THOMAS

ADVISORY OPINION 1989-29

The Federal Election Campaign Act of 1971, as amended ("the Act") bans foreign nationals from making contributions either directly or through any person in connection with election to any political office. 2 U.S.C. §441e. In Advisory Opinion 1989-29, a majority of the Commissioners concludes that a corporation, which is a wholly-owned subsidiary of a foreign national corporation, may make contributions to candidates for political office. Because we cannot accept the representations of independence upon which this conclusion is based, we dissent.

I.

The central question for the Commission in this Advisory Opinion is whether the foreign national parent corporation (Seiyu Ltd.) exercises control over its domestic subsidiary (GEM of

Hawaii, Inc.) such that contributions made by the domestic subsidiary are, in effect, contributions from the foreign parent. Recognizing that §441e prohibits contributions by a foreign national "through any other person," the majority requires that:

> in order to comply with §441e, GEM must ensure that neither the foreign national parent, nor any other foreign nationals, including directors, officers, or other personnel of [GEM] participate in any decisions by GEM to contribute to GEM PAC or to other committees or campaigns for state or local office.

Advisory Opinion 1989-29 at 4. The majority further points out that "GEM has stated that its revenues are derived from the operations of its stores in Hawaii." Id. at 3. "[S]ubject to the conditions set out," the majority concludes that "GEM itself may contribute to state and local campaign committees and to GEM PAC to the extent permitted by state and local laws." Id. at 4.

We disagree with the majority's approach. Throughout the Act and Commission regulations, a parent corporation and its subsidiary corporations are viewed as one entity. We see no reason why the Commission should treat a parent corporation and its subsidiaries as one entity under the contribution limits and corporate solicitation provisions, but consider them as separate, distinct and presumably independent entities for purposes of the §441e foreign national provision.

The Act and Commission regulations both treat the separate segregated funds set up by a parent corporation and its subsidiaries as one entity subject to a single contribution

limitation. Specifically, 2 U.S.C. §441a(a)(5) provides that the separate segregated funds established, financed, maintained or controlled by the same corporation "including any parent, subsidiary, branch, division, department, or local unit of such corporation" are automatically affiliated.[1] Under this per se rule, contributions made by the separate segregated funds of a parent corporation and its subsidiary corporation are considered to have been made by a single committee and subject to a single contribution limit. 2 U.S.C. §441a(a)(5); 11 C.F.R. §§100.5(g)(2) and 110.3(a)(1)(i). Likewise, contributions made to the separate segregated funds of a parent corporation and its subsidiary corporation are considered to have been made to a single entity and subject to a single contribution limit.

The §441a(a)(5) "anti-proliferation" provision was designed "to prevent evasion of the Act's contribution limits by the existence of splinter political action committees (PAC's) which were ostensibly separate entities, but were in fact set up, aided, directed or controlled in some manner by the parent organization." Advisory Opinion 1976-104, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5255 (emphasis added). As the House Conference Report explains, "The anti-proliferation rules established by the

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1. The Commission may also make a finding of "affiliation" based upon various indicia of control. These include, for example, whether one organization has the authority or ability to direct or participate in the governance of another organization through provisions of by-laws, constitutions or other documents or the authority or ability to hire, appoint, demote or otherwise control decision-making employees. 11 C.F.R. §110.3(a)(3)(ii)(B) and (C). This proof of control is unnecessary, however, for a corporation and its subsidiaries which are automatically affiliated.

conference substitute are intended to prevent corporations, labor organizations, or other persons or groups of persons from evading the contribution limits of the conference substitute." H.R. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 58 (1976).[2] Through the §441a(a)(5) mechanism, Congress hoped to prevent corporations and labor organizations "from evading contribution limitations through a Hydra-like proliferation of segregated funds, each making separate contributions, but each being a part of the same beast." FEC v. Sailors' Union of the Pacific Political Fund, 828 F.2d 502, 505 (9th Cir. 1987).[3]

Commission regulations also treat a parent corporation and its subsidiary as one entity under the corporate solicitation rules. The Act permits a corporation to solicit contributions for its separate segregated fund from its stockholders, executive

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2. In presenting the Conference Report on the House floor, House Administration Committee Chairman Hays explained the broad intent of §441a(a)(5):

> Yet another major step to strengthen the contribution limitation provisions is the one that assures that closely connected entities cannot defeat the contribution limitations stated in the bill. To achieve this objective the complex and amorphous control criteria embodied in the 1974 Act are replaced by a far simpler formal relations test whose meaning is spelled out in detail in the conference report.

122 Cong. Rec. H3778 (daily ed. May 3, 1976) (remarks of Rep. Hays)(emphasis added).

3. During the floor debate, it was pointed out that §441a(a)(5) would "place[ ] some rational organizational framework on the proliferation of PAC'S by both business and labor, thus avoiding the anonymity of multi-PAC's, and lessening the chances for Watergate-type laundering and other abuses." 122 Cong. Rec. 8881 (1976) (remarks of Rep. Thompson).

or administrative personnel and their families. 2 U.S.C. §441b(b)(4)(A)(i). Again viewing the parent corporation and its subsidiary as one entity, however, Commission regulations and rulings go even further and specifically allow a corporation to solicit the executive or administrative personnel of the corporation's subsidiaries. 11 C.F.R. §114.5(g)(1); see Advisory Opinion 1978-75, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5368. Similarly, the Commission has ruled that a wholly-owned subsidiary may solicit not only the permissible class of the parent corporation but also the permissible class of the other subsidiaries of the parent corporation and the permissible class of the subsidiaries of those fellow subsidiaries. Advisory Opinion 1982-18, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5664.

If GEM's parent corporation were a domestic corporation, there is no doubt that the majority would view GEM and its parent as automatically affiliated. In so finding, the majority would view the parent corporation and its subsidiaries as one entity when applying the contribution limits and solicitation rules. However, simply because GEM's parent corporation is a foreign national corporation, the majority considers the subsidiary (GEM) and its parent as separate and distinct entities when applying the §441e prohibitions. We do not agree with the majority that the parent corporation's country of incorporation should determine whether the parent corporation and its subsidiaries are viewed as one entity for election law purposes.

In applying §441e, we believe that GEM and its foreign national parent corporation should be treated as one entity.

Section 441e squarely prohibits a foreign national (which includes a foreign corporation) from making a political contribution "through any person." 2 U.S.C. §441e (emphasis added). Just as a domestic parent corporation and its subsidiaries are seen as one entity to prevent a parent corporation from making excessive contributions through its subsidiaries' political committees, so too a foreign national parent corporation and its subsidiaries should be seen as one entity to prevent the foreign national parent corporation from making prohibited contributions through its subsidiaries. As the wholly-owned subsidiary of a foreign national parent corporation, GEM should not be allowed to make contributions to candidates for political office.[4]

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4. We appreciate the argument made by some in the majority that United States citizens should not be denied the opportunity to contribute to their corporation's separate segregated fund. That opportunity, however, is not absolute. For example, since a foreign national corporation clearly may not establish a separate segregated fund and make contributions in connection with a United States election, its American employees are "denied" the opportunity to contribute to their employer's separate segregated fund. Similarly, in Advisory Opinion 1989-20, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5970, a unanimous Commission found that the domestic subsidiary of a foreign national parent could not make political contributions even though "most of [the subsidiary's] employees and consultants are citizens of the United States."

We also note that although these American employees may not contribute to the corporate subsidiary's separate segregated fund, the FECA provides significant avenues of political expression. Among other things, individuals may contribute up to $1,000 per election to federal candidates (§441a), may make unlimited independent expenditures in support of or in opposition to federal candidates (Buckley v. Valeo, 424 U.S. 1, 44-48 (1976)), or may volunteer their services on behalf of a candidate (§431(8)(B)(i)).

II.

Even if we accepted the majority's test for determining whether the subsidiary of a foreign national parent corporation may make contributions in connection with state and local elections, we would disagree with the result reached by the majority in this advisory opinion. In light of recent precedent, we think the majority has applied its test improperly to the facts of this case.

In Advisory Opinion 1989-20, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5970, Kuilima, a wholly-owned subsidiary of a foreign national parent corporation, sought to make contributions in state and local elections through a committee to be set up by the subsidiary. "All of the directors and officers" of the subsidiary were foreign nationals. Id. The subsidiary represented that its committee would "be governed by three persons, each of whom will be a United States citizen. These persons will exercise all decision-making authority with respect to the committee." Id. The subsidiary asserted that the committee's decisions would be made "independently" of the foreign national parent and, as such, the committee's decisions "will not be dictated or directed by [the foreign national parent and Kuilima] or any of their officers or directors." Id. The subsidiary indicated that the committee would "obtain most, and perhaps all, of its funding through corporate contributions from Kuilima." Id.

In Advisory Opinion 1989-20, the Commission stated that in order for the subsidiary to make the proposed contributions, "no director or officer of the company or its parent who is a foreign national may participate in any way in the decision-making process with regard to making the proposed contributions." Id. (emphasis added). Applying this test, the Commission concluded that "[s]ince all of the directors and officers of Kuilima are foreign nationals, it appears that the company will not be able to satisfy this condition." Id. In so finding, the Commission implicitly rejected the idea that foreign national influence in the committee's decision-making process would be eliminated by the presence of three United States citizens on the political committee's governing board.

Like Kuilima in Advisory Opinion 1989-20, requestor GEM is a "wholly-owned subsidiary" of a foreign national parent corporation. See Advisory Opinion 1989-29 at 1. Like Kuilima, "GEM is the source of the funds for [its] committee for administration and solicitation expenses and for contributions made by the committee to candidates or political party committees." Id. at 1-2. Like Kuilima, GEM asserts that its political committee "is comprised of and administered solely by non-foreign nationals." Id. at 4. Unlike Kuilima, however, the majority found that GEM could make contributions through its political committee to state and local candidates.

There is one difference between these cases. In Kuilima, all of the directors of the subsidiary were foreign nationals. In GEM, all of the directors of the subsidiary are foreign

nationals, save for one United States citizen who sits on the board of directors and is also a corporate officer. Advisory Opinion 1989-29 at 1. Apparently, that makes all the difference to the majority in deciding whether foreign nationals exercise any influence on the political committee.[5]

This makes little sense in our opinion. Under the majority's test, foreign nationals must not "participate in any way in the decision-making process with regard to making the proposed contributions." Advisory Opinion 1989-20. We fail to see how a subsidiary can meet this test when, as here, foreign nationals comprise 66% of the subsidiary's board of directors. In both Kuilima and GEM, foreign nationals dominate the board of directors. In the former, foreign nationals hold 100% of the board positions; in the latter, foreign nationals hold 66% of the board seats. In either case, foreign national control of the

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5. The majority distinguishes Advisory Opinion 1989-20 by saying that the domestic subsidiary there was "predominantly funded by a foreign national parent." Advisory Opinion 1989-29 at 3. Yet, that finding was not the sole basis for the Commission's conclusion in that opinion. As Advisory Opinion 1989-20 points out, "even if Kuilima were not funded predominantly by a foreign national corporation, it still would not be able to contribute to the proposed committee," because of the foreign national presence on the board of directors.

Moreover, even if funding is the determinative issue, it is difficult to conclude that GEM, as a wholly-owned subsidiary, is not by definition "predominantly funded" by its foreign national parent. In addition to the funds which it has provided directly, the foreign national parent has also aided its subsidiary in raising funds from outside sources. According to the record, the "Japan Parent - the Seiyu Ltd. has furnished a guaranty agreement for certain of Gem of Hawaii bank borrowings." Supplement to AO 1989-29 dated November 27, 1989. Indeed, the financial relationship between the subsidiary and the parent is such that "Operations of the Company [GEM] are included in consolidated Federal and State income tax returns filed by its parent company." Coopers and Lybrand Report at 12.

board of directors and their participation in all of the subsidiary's substantive decisions seems both clear and inevitable.

If, on the other hand, the majority is suggesting that the mere presence of one non-foreign national on a subsidiary's board of directors will ensure that the subsidiary's political committee is free from any foreign national participation, we think the limited facts found in this request illustrate the shortcomings of that approach. Even a cursory review of GEM's corporate by-laws reveals that under the majority's own test, foreign national participation in the operation of the political committee appears unavoidable. Article III, section 4 of GEM's by-laws requires that "[t]he majority of the directors shall constitute a quorum for the transaction of business...[n]o action...shall bind the corporation unless it receives the concurring vote of a majority of all directors present." (emphasis added). Moreover, Article III, section 5 of the by-laws states that "[t]he property, affairs, and business of the corporation shall be managed by the Board of Directors." Presumably, decisions to expend corporate treasury monies to establish and administer a political committee, the appointment of committee personnel as well as a variety of other matters are all decisions required to be made by the board of directors. Since two votes are required to conduct business, these decisions

could not be made without the participation of the foreign national board members. Certainly, one board member alone could not make these decisions under existing by-laws.

Even if a single, non-foreign national board member of GEM were somehow able to make the necessary PAC decisions under the corporate by-laws, we note that such a board member would be directly accountable for those decisions to the foreign national parent corporation. Members of the board of directors are elected at the annual meeting of the stockholders. By-laws of GEM, Art. II, §1 and Art. III, §1. Similarly, the by-laws provide that "Any director may be removed from office at any time and another person may be elected in his place to serve for the remainder of his term at any special meeting of [the] stockholders." By-laws of GEM, Art. III, §2 (emphasis added). As a wholly-owned subsidiary of a foreign national parent corporation, the subsidiary's stockholder is, as a practical matter, the foreign national parent corporation. Given the appointment and removal authority of the foreign national parent corporation, we question whether the presence of a single non-foreign national on a subsidiary's board of directors will effectively insulate that subsidiary's political committee from foreign national participation.

For these reasons, we think that even under the majority's own test, GEM may not make political contributions through its political committee.

III.

When the Commission considers legal issues in an advisory opinion setting, it must be especially careful to ground its analysis firmly in the facts of the matter before it. The Act authorizes the Commission to issue an advisory opinion in response to a "complete written request" with respect to a specific transaction by the requesting person. 2 U.S.C. §437f(a)(1). Commission regulations explain that such a request "shall include a complete description of all facts relevant to the specific transaction or activity with respect to which the request is made." 11 C.F.R. §112.1(c).

In this significant case, we are hindered by an incomplete record. The majority's test centers on whether foreign nationals participate <u>in any way</u> in the decision-making process with regard to making the proposed contributions. Yet, we don't know whether

the two directors who are foreign nationals participated in the establishment of the committee. Nor do we know whether the two foreign nationals participate in the decision to provide administrative support to the committee. Nor do we know the extent to which the domestic subsidiary sends money to or receives money from the foreign parent. Indeed, neither GEM's nor its parent's most recent corporate annual reports are even a part of the administrative record.

If the Commission is going to take the approach that there can be no participation by a foreign national with respect to a subsidiary's political committee, it should at least require the requestor to come forward with sufficient facts for the Commission to make an informed and definitive determination. See Advisory Opinion 1986-26, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5866 (Commission concludes that "request lacks sufficient factual specificity...to give advance approval" to requestor's proposed activity). It seems to us that this approach is far more preferable than the generalized, conditional answer contained in the majority's opinion.

For the above-stated reasons, we dissent.

3-16-90
Date

Danny L. McDonald
Commissioner

Mar. 16, 1990
Date

Scott E. Thomas
Commissioner