



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DISSENTING OPINION

OF

COMMISSIONER SCOTT E. THOMAS

ADVISORY OPINION 2000-17

In voting against Advisory Opinion 2000-17, I continue to believe that under 2 U.S.C. § 441e, a wholly owned domestic subsidiary and its foreign national parent corporation should be treated as one entity. *See, e.g.*, Dissents in Advisory Opinions 1989-29, 1992-16, and 1999-28 at [1976-1990 Transfer Binder] Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5976, and 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶¶ 6059 and 6305, respectively; and Statement for the Record in Advisory Opinion Request 1996-6, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6994. Section 441e broadly prohibits a foreign national (which includes a foreign corporation) from making a political contribution “*through any other person.*” 2 U.S.C. § 441e (emphasis added). Just as a domestic corporation and its subsidiaries are seen as one entity in order to prevent a parent corporation from making excessive contributions through its subsidiaries’ political committees (*see, e.g.*, 2 U.S.C. § 441a(a)(5); 2 U.S.C. § 441b(b)(4)(A)(i); 11 C.F.R. § 114.5(g)(1)), so too a foreign national parent corporation and its subsidiaries should be seen as one entity to prevent the foreign national corporation from making prohibited contributions through its subsidiaries.

Extendicare is the wholly owned subsidiary of Extendicare, Inc., a Canadian corporation and thus a “foreign principal” as defined by 22 U.S.C. § 611(b). *See* 2 U.S.C. § 441e(b)(1). As the wholly owned subsidiary of a foreign national corporation, Extendicare should not be allowed to make contributions to candidates for political offices in the United States.

In addition, the facts of this case illustrate how easy it is for a foreign corporation to evade the §441e prohibition and why, as a matter of law, Extendicare and Extendicare, Inc. should be viewed as one entity. Extendicare has only three persons on its board of directors. Of these three directors only one is a United States citizen; the other two are foreign nationals. One of the foreign nationals is Chairman of the Extendicare board of directors and is also deputy chairman and CEO of the foreign national parent. The other foreign national director is both CEO of the domestic subsidiary and president of the foreign national parent corporation. Extendicare’s board proposed that it be allowed to establish a Special Committee, comprised only of individuals who are U.S. citizens or permanent resident aliens residing in the United States, to decide whether to establish a separate segregated fund (“SSF”). The Special Committee also would have the authority to determine who would administer the SSF.

Obviously, the management of the domestic subsidiary and the foreign national parent are inextricably intertwined and should be viewed as one entity. Moreover, as a practical matter, Extencicare's foreign national-controlled board of directors is able to exercise clear control over the SSF when it is able to appoint the committee which, in turn, is able to appoint the people who administer the SSF.

Recognizing this latter point, the Office of General Counsel originally stated that foreign nationals on the board of directors should not be able to participate in the appointment of members of the Special Committee. Agenda Document No. 00-72 at 7 (July 20, 2000). Under this approach, it would at least appear that non-foreign nationals were establishing and controlling the Special Committee designed to supervise the SSF.¹ In Advisory Opinion 2000-17, however, the Commission rejected even the minimal efforts at reducing foreign influence found in the original Office of General Counsel language described above. Indeed, in an alternative draft which was eventually adopted by the Commission, Commissioner Sandstrom went even further and specifically urged the Commission to adopt language permitting the foreign national board members to directly participate in the appointment of members of the Special Committee. Agenda Document No. 00-72-A at 7 (July 25, 2000).

In my view, Advisory Opinion 2000-17 is plainly inconsistent with the statutory ban on foreign nationals making contributions either directly "or through any other person" in connection with election to any political office. 2 U.S.C. §441e. Similarly, the Commission's Regulations provide:

A foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision-making 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 C.F.R. §110.4(a)(3)(emphasis added). Under Advisory Opinion 2000-17, foreign nationals may directly appoint the individuals who will select persons to determine the membership and operating policy of the SSF. These appointed individuals will be directly responsible to the foreign nationals who hired them and who also may fire them. Given the factual circumstances presented in Advisory Opinion 2000-17, it is difficult to believe that a foreign national will "directly or indirectly" participate in "decisions concerning the administration of a political committee."

A decade ago, the Commission considered a regulation which would treat United States corporations that are more than 50% owned by foreign nationals as foreign nationals for purposes of the Act. 55 Fed. Reg. 34280 (August 22, 1990). Emphasizing national security concerns, the Department of Justice "strongly support[ed]" the proposed regulation:

¹ Of course, the reality is that even in that situation, *all* the board directors serve at the pleasure of the foreign parent and are under foreign control.

Section 441e represents one of the main federal statutory defenses against efforts by foreign nationals and foreign interests to influence the domestic election processes of the United States through campaign contributions. The function of this statute is to safeguard a vital feature of the Nation's sovereignty. In our opinion, it deserves a broad construction in keeping with the vital national security interests which it was enacted to protect.

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The 50% ownership test which the Commission has proposed is fully consistent with the internal security objectives of the statute. In fact, the majority ownership approach which the FEC is proposing for access to domestic political activity is in fact more lenient than is the Federal Communication Commission's (FCC's) standard for foreign access to the domestic airwave. Accordingly, arguments that the test selected by the FEC is unfair to foreign nationals fall way short of the mark.


In the opinion of the Department of Justice, this is a good regulation which is badly needed, and which will advance the important national security goals that underlie 2 U.S.C. § 441e. The FEC should adopt this regulation without delay.

Letter from U.S. Department of Justice to FEC (Criminal Division November 15, 1990).²

Unfortunately, the FEC rejected the national security concerns of the Department of Justice and never adopted the proposed 50% rule. Instead, it continued to allow even wholly owned subsidiaries of foreign national parent companies such as Extencicare to set up separate segregated funds and make contributions in connection with United States elections. And now, in Advisory Opinion 2000-17, the Commission goes even further and allows foreign nationals to directly appoint what is in effect the governing board of the domestic subsidiary's SSF. Section 441e may still be on the books, but this opinion and other recent Commission decisions (*see, e.g.*, MUR 4250 where Commission failed to pursue a \$1.6 million foreign national loan guarantee provided to the National Policy Forum, an arm of the Republican National Committee), have clearly placed the provision on life support.

8/30/00

Date



Scott E. Thomas
Commissioner

² The Department of Justice also stated: "Nor will the proposed 50% ownership test unfairly impede the associational or speech rights of United States nationals who may be employed by foreign dominated business entities." *Id.* at 3 n2. Indeed, these non-foreign national employees may form a non-connected political action committee if they are so inclined. Among other things, these individuals may also 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)).