FEDERAL ELECTION COMMISSION
Washington, DC 20463

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ADVISORY OPINION 2006-15

Jonathan D. Simon, Esq.
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1050 Thomas Jefferson Street, N.W.
Washington, D.C. 20007-3877

Dear Mr. Simon:

We are responding to your advisory opinion request on behalf of TransCanada Corporation ("TransCanada"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to political donations and disbursements from two of TransCanada's wholly owned domestic subsidiaries in connection with State and local elections. The Commission concludes that the Act and Commission regulations do not prohibit these political donations or disbursements because the funds used for such donations and disbursements would not come from a foreign national and because the domestic subsidiaries would ensure that no foreign national participates in making decisions concerning non-Federal election-related activities.

Background

The facts presented in this advisory opinion are based on your letter received March 28, 2006.

TransCanada, a Canadian corporation, maintains its principal place of business in Calgary, Alberta, Canada. TransCanada wholly owns two U.S. corporations, Gas Transmission Northwest Corporation ("GTN") and TransCanada Hydro Northeast Inc. ("TC Hydro").

GTN, a California corporation, has its principal place of business in Portland, Oregon. GTN's Board of Directors currently includes three directors, two of whom are U.S. citizens.

TC Hydro is a Delaware corporation, with its principal place of business in Westborough, Massachusetts. Three directors comprise TC Hydro's Board of Directors; one of whom is a U.S. citizen, and one of whom has permanent resident status in the United States.

Both GTN and TC Hydro (collectively, "the Subsidiaries") propose to make direct corporate political donations and disbursements in connection with State and local elections to the extent permissible under applicable State and local law. The donations and disbursements would be made from funds generated by the Subsidiaries' domestic U.S. operations. Each Subsidiary's Board and officers, including foreign national Board members and officers, would set an overall budget level for political donations and disbursements in connection with State and local elections. Other than setting the overall budget amount, all decisions concerning the making of political donations or disbursements will be made by individuals who are U.S. citizens or permanent residents to whom such responsibilities will be delegated.

Question Presented

May GTN and TC Hydro make donations and disbursements of corporate funds in connection with State and local elections, to the extent permitted by State and local law, from funds generated by their U.S. operations?

Legal Analysis and Conclusions

Yes, GTN and TC Hydro may make corporate donations and disbursements in connection with State and local elections to the extent permitted by State and local law, provided that: (1) the donations and disbursements derive entirely from funds generated by the Subsidiaries' U.S. operations; and (2) all decisions concerning the donations and disbursements will be made by individuals who are U.S. citizens or permanent residents, except for setting overall budget amounts.

The Act and Commission regulations prohibit a foreign national from directly or indirectly making a contribution or donation of money in connection with a Federal, State, or local election. 2 U.S.C. 441e(a)(1)(A);[1] 11 CFR 110.20(b). In addition, the Act and Commission regulations prohibit a foreign national from directly or indirectly making an expenditure, an independent expenditure, or a disbursement in connection with a Federal, State, or local election. 2 U.S.C. 441e(a)(1)(C); 11 CFR 110.20(f). Commission regulations provide that foreign nationals shall not direct, dictate, control, or directly or indirectly participate in the decision-making process of any person, such as a corporation, with regard to such person's Federal or non-Federal election-related activities, including decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with elections for any Federal, State, or local office. 11 CFR 110.20(i). Thus, in order for a domestic subsidiary of a

[1] Unlike many of the other provisions of the Act, section 441e applies to elections for State and local offices.

foreign national to make donations or disbursements in connection with a State or local election, the donations or disbursements may not be derived from the foreign national's funds and no foreign national may have any decision-making authority concerning the making of donations or disbursements.

In the Bipartisan Campaign Reform Act of 2002, Pub. Law No. 107-155, 116 Stat. 81 (2002) ("BCRA"), Congress amended the Act to strengthen and expand the ban on campaign contributions and donations by foreign nationals. *See* BCRA, § 303, 116 Stat. at 96. Among other changes, BCRA amended 2 U.S.C. 441e to prohibit foreign national contributions and donations that are made "directly or indirectly." Previously, 2 U.S.C. 441e(a) banned foreign national contributions made directly "or through any other person." In promulgating regulations to implement this statutory amendment, the Commission sought comment on whether BCRA's new statutory language should be interpreted to prohibit U.S. subsidiaries of foreign corporations from making donations in connection with State and local elections, or from making contributions in connection with Federal elections from a separate segregated fund, or both. *See Contribution Limitations and Prohibitions, Final Rules*, 67 Fed. Reg. 69928, at 69943 (Nov. 19, 2002).

When promulgating the Final Rules, the Commission indicated that it found no evidence of Congressional intent to broaden the prohibition on foreign national involvement in U.S. elections to cover U.S. subsidiaries of foreign corporations. Consequently, the Commission determined that "indirectly" did not apply to donations made by such entities. *Id*. The Commission based its determination on the lack of Congressional intent and on substantial policy reasons set forth in the long line of "advisory opinions over more than two decades that have affirmed the participation of such subsidiaries in elections in the United States, either directly in states where state law permits, or through separate segregated funds with regard to Federal elections, so long as there is no involvement of foreign nationals in decisions regarding such participation." *See id*. at 69943 (citing Advisory Opinions 2000-17 (Extendicare Health Services, Inc.), 1999-28 (Bacardi-Martini, USA, Inc.), 1995-15 (Allison Engine Company Political Action Committee), 1992-16 (Nansay Hawaii, Inc.), 1992-07 (H&R Block, Inc.), 1990-08 (The CIT Group Holdings, Inc.), 1989-29 (GEM of Hawaii, Inc.), 1982-34 (Sonat Inc. Political Action Committee), 1981-36 (Japan Business Association of Southern California), 1980-100 (Revere Sugar Corp.), and 1978-21 (Budd Citizenship Committee)). Consistent with this determination, the Commission has continued to permit domestic subsidiaries of foreign corporations to make contributions and donations in connection with U.S. elections after BCRA and the Commission's implementing regulations became effective, provided that the conditions set forth in Commission regulations and the advisory opinions cited above were satisfied. *See, e.g.*, Advisory Opinion 2004-42 n.3 (Pharmavite LLC).

1. Foreign Nationals

The Act and Commission regulations define "foreign national" to include "foreign principals," as defined in 22 U.S.C. 611(b), and individuals who are not citizens or nationals of

the United States and who are not lawfully admitted to the United States for permanent residence. 2 U.S.C. 441e(b); 11 CFR 110.20(a)(3).[2] Under 22 U.S.C. 611(b)(3), "foreign principal" includes corporations organized under the laws of or having its principal place of business in a foreign country.

TransCanada is organized under Canadian law and has its principal place of business in Canada. Therefore, TransCanada is a foreign national for purposes of 2 U.S.C. 441e.

Both GTN and TC Hydro are corporations organized under the laws of California and Delaware, respectively, and both GTN and TC Hydro have principal places of business in the United States. Therefore, both Subsidiaries are not foreign nationals for purposes of 2 U.S.C. 441e.

One director on each of the Subsidiaries' Boards is not a U.S. citizen and is not a permanent resident, so both of these directors are foreign nationals for purposes of 2 U.S.C. 441e.

2. Funds Used for Donations and Disbursements in Connection with State and Local Elections

As noted above, the Commission has applied these provisions of the Act and regulations in past advisory opinions that considered factual situations and circumstances similar to those presented here.[3] In Advisory Opinion 1992-16 (Nansay Hawaii), the Commission considered the same question at issue in this request—*i.e.*, which funds a domestic subsidiary of a foreign corporation may use to make political donations to State and local candidates. In that advisory opinion, the foreign parent corporation wholly owned the subsidiary, and it provided regular subsidies in the form of loans or capital contributions to the subsidiary. However, the domestic subsidiary proposed to use net earnings generated by the subsidiary in the United States and from segregated accounts that were not subsidized by the foreign corporate parent to make political donations. The Commission opined that such donations were permissible, provided the subsidiary could demonstrate through a reasonable accounting method that it had sufficient funds in its accounts, other than funds given or loaned by its foreign national parent corporation, from which the donations were made.[4]

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[2] *See also* 8 U.S.C. 1101(a)(22) (defining "national") and 8 U.S.C. 1101(a)(20) (defining "an individual lawfully admitted for permanent residence").

[3] Section 110.20 was promulgated by the Commission in 2002. It recodified provisions that previously appeared in section 110.4(a), which were considered in the earlier advisory opinions.

[4] The foreign national parent corporation and the domestic subsidiary were also required to monitor future subsidies to ensure that the parent corporation did not replenish all or any portion of the subsidiary's political contributions.

GTN and TC Hydro propose to use funds generated by their domestic operations for the political donations and disbursements. Like the subsidiary in Advisory Opinion 1992-16 (Nansay Hawaii), both Subsidiaries generate substantial net earnings from their operations within the United States (*i.e.*, income exceeding expenses after debt service).[5] Neither Subsidiary receives any subsidies from TransCanada or any other foreign national. Both GTN and TC Hydro maintain separate bank accounts located in the United States, into which they deposit the receipts from their domestic operations and from which they pay the expenses of these operations. Both Subsidiaries would use these accounts for the political donations and disbursements. Using funds that meet these conditions ensures that the foreign parent corporation is not indirectly making or subsidizing the domestic subsidiary's donations and disbursements in connection with State or local elections. Under these circumstances, the Commission concludes that the Act and Commission regulations do not prohibit GTN and TC Hydro from using the funds in their separate bank accounts to make donations or disbursements in connection with State or local elections.

3. Decision Makers for Donations and Disbursements in Connection with State and Local Elections

The Commission has also considered in past advisory opinions how a domestic subsidiary of a foreign national parent corporation can ensure compliance with the prohibition in 11 CFR 110.20(i) on foreign nationals participating in decision-making related to political donations and disbursements. In Advisory Opinion 2000-17 (Extendicare Health Services, Inc.), the domestic subsidiary had a Board of Directors that included one U.S. citizen and two foreign nationals and which was wholly owned by a foreign national corporation. The Commission concluded that the Board was permitted to make "general corporate policy decisions" to establish or terminate a separate segregated fund ("SSF"), or to establish a Special Committee or "other corporate personnel group" limited to U.S. citizens or lawfully admitted permanent residents that would administer the SSF. The Board was also permitted to set a specific budget level for the direct costs of the SSF at a "not to exceed" amount, and it could enforce compliance with this overall budget level. The Commission determined that all other decisions concerning the administration of the SSF must be made by the Special Committee or other group limited to U.S. citizens or lawfully admitted permanent residents in order to comply with 11 CFR 110.20(i).

GTN and TC Hydro propose similar arrangements to ensure compliance with the prohibition on foreign national participation in decision-making regarding political donations and disbursements. The Boards of Directors of the Subsidiaries, which include foreign nationals, would set an overall budget for political donations and disbursements on an annual basis at a "not to exceed" amount. The Subsidiaries' Boards would review and enforce compliance with these overall budget amounts. Each Board would delegate to a subset of its Board members, comprised exclusively of U.S. citizens or permanent residents, the authority to select the individual or individuals who will exercise all other decision-making authority over political donations and disbursements. These arrangements ensure that foreign nationals do not

[5] In 2005, GTN's operations generated $169 million in revenue, with a net income of $58 million, and TC Hydro's operations generated $48 million in revenue, with a net income of $36 million.

directly or indirectly participate in the decision-making process of GTN or TC Hydro with regard to their non-Federal election-related activities.

Consequently, under these circumstances, the Commission concludes that the Subsidiaries' donations and disbursements made in the proposed manner would not be donations or disbursements by a foreign national that are prohibited by the Act. Therefore, GTN and TC Hydro may make donations and disbursements in connection with State or local elections in the proposed manner to the extent permitted by State and local law.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

Michael E. Toner
Chairman

Enclosures (AOs 2004-42, 2000-17, 1999-28, 1995-15, 1992-16, 1992-07, 1990-08, 1989-29, 1982-34, 1981-36, 1980-100, and 1978-21)