September 6, 2016

By Email (to PublicComment@FEC.gov)

Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Proposal to Rescind Advisory Opinion 2006-15 (TransCanada)

Dear Commissioners:

I write to comment on Commissioner Ravel's proposal to rescind advisory opinion 2006-15 (TransCanada). I write on the behalf of only myself as a citizen and an attorney interested in political law and the work of the Commission. The purpose of this comment is to provide an outside and educated perspective on the proposal.

Contrary to what some may opine, the purpose of this (or any other) public comment is not to "bludgeon" any Commissioner. It is to exercise one's right to free speech and respond to the Commission's *statutory obligation* to receive and distribute public comments about advisory opinions. *See* 52 U.S.C. § 30108(d). If any Commissioner takes offense to public comments or the solicitation of public comments, then he or she has the wrong job.

First, it is unclear to me whether this proposal to rescind an advisory opinion is procedurally appropriate. On the merits of the proposal, given the Commissioners' perpetual deadlock votes, it is also unclear to me that a rescission would solve the problems that Commissioner Ravel seeks to fix. Still, I agree with Commissioner Ravel's underlying concern that the Commission must do better to prevent unlawful and improper foreign influence.

1. The Proposal to Rescind May Be Procedurally Inappropriate.

As a preliminary matter, and without judgement on the merits of the proposal, it is unclear to me whether a proposal to rescind an advisory opinion is procedurally appropriate. Previously, the Commission has altered the weight of advisory opinions through rulemakings or further advisory opinions. I am not aware of any occasion in which the Commission has rescinded an advisory opinion. No statues or regulations explicitly describe the authority of the Commission to rescind advisory opinions.

One regulation does allow the Commission to reconsider an advisory opinion, but only within 30 calendar days of the issuance and on motion of a Commissioner

that had voted with the majority to approve the advisory opinion. 11 C.F.R. § 112.6. It is clearly not within the 30 calendar days, nor was Commissioner Ravel a member of the Commission when the Commission issued the advisory opinion.

Because clear authority or practice to rescind an advisory opinion is absent, the proposal may be inappropriate. First, I am a stickler for procedure out of respect for rule of law, procedural justice, and due process. Second, I fear someone might challenge and invalidate the proposal for procedural insufficiency. *See, e.g.*, Nat'l Conservative PAC v. FEC, 626 F.2d 953 (D.C. Cir. 1980) (finding both departure from standard practices and inadequate notice invalidated advisory opinion).

The Commission may wish to initiate true notice-and-comment rulemaking or await a relevant advisory opinion request before implementing changes to its analytical approach to domestic subsidiaries of foreign corporations.

2. The Commission's Current Framework on Domestic Subsidiaries of Foreign Parent Corporations Attempts to Prevent Foreign Nationals from Indirectly Making Campaign Payments.[1]

Despite my procedural concerns about the proposal, I think the issue is ripe for discussion. Since the opportunity arises, I would like to comment on the Commission's framework on domestic subsidiaries of foreign corporations and the ban on campaign payments by foreign nationals.

2.1 Foreign nationals may not make campaign payments, directly or indirectly, because such campaign payments are foreign influence on activities of democratic self-government.

Foreign nationals may not, directly or indirectly, make contributions or donations to a political party or in connection with a federal, state, or local election. 52 U.S.C. § 30121(a); 11 C.F.R. § 110.20. Nor may they make an expenditure, independent expenditure, or disbursement for any electioneering communication. *Id.* The term "foreign national" includes any individual who is neither a citizen of the United States nor a lawfully admitted permanent resident. 52 U.S.C. § 30121(b). "Foreign national" also means any "foreign principal," which includes any "corporation" or "other combination of persons organized under the laws or having its principal place of business in a foreign country." 22 U.S.C. § 611(b).

[1] This comment uses "campaign payments" to mean contributions, donations, expenditures, independent expenditures, and disbursements collectively.

The purpose of the ban on campaign payments by foreign nationals is to minimize foreign influence on American elections and policies. After the Watergate scandal, Congress banned contributions from foreign nationals. Senator Bentsen was clear in his reasoning for offering the provision: American elections should be for Americans, not for foreign nationals whose "loyalties lie elsewhere." 130 Cong. Rec. 8782–83. The BCRA amendments expanding the ban to other forms of campaign payments, including soft money, were about not only quid pro quo corruption but also foreign nationals who could "essentially buy access" to politicians. *Bluman v. FEC*, 800 F.Supp.2d 281 (D.D.C. 2011) (citing S. Rep. No. 105-167, at 781-2710, 4619-5925 (1998)), *aff'd*, 132 S.Ct. 1087 (2012) (mem.). The Supreme Court has rejected "buying access" as justification for most types of campaign finance prohibitions for being incongruent with the First Amendment. *Citizens United v. FEC*, 558 U.S. 310, 359–360 (2010). However, foreign nationals and campaign activities are a rare exception because "[i]t is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government." *Bluman*, 800 F.Supp.2d at 288. Because the government interest in preventing foreign influence in elections is so uniquely compelling, policymakers must take great care to ensure that foreign parent corporations do not intrude upon these principles of democratic self-government through their domestic subsidiaries.

2.2 Because Congress has not addressed whether foreign parent corporations indirectly make campaign payments through domestic subsidiaries, the Commission has developed an analytical framework through advisory opinions.

Congress intentionally has never addressed the issue of domestic subsidiaries with foreign parent corporations. *See Contribution Limitations and Prohibitions, Final Rules*, 67 Fed. Reg. 69928, at 69943 (Nov. 19, 2002). "The issue of whether foreign-controlled U.S. corporations should be barred from making non-federal donations of corporate treasury funds in states that permit such donations, or establishing a federal political action committee, is a controversial one that would have been addressed explicitly had BCRA intended to address it." Comments by Sens. McCain and Feingold and Reps. Shays and Meehan (Sept. 13, 2002); *see also* comments by Sens. Reid and Ensign (Sept. 13, 2002) ("If Congress had intended to make a change of this significance … it certainly would have done so explicitly or would have explained its intent in the voluminous legislative history of the BCRA…"). Thus, Congress left the

analysis of whether a foreign parent "indirectly" makes a campaign payment through a domestic subsidiary to the Commission in its role as an administrative agency.

The Commission has addressed domestic subsidiaries of foreign parent corporations on multiple occasions. If a domestic subsidiary is incorporated within and has its principal place of business within the United States, it is not a foreign national, despite a foreign principal wholly owning it. *See* 52 U.S.C. § 30121(b); *see also* Advisory Opinion 2006-15 (TransCanada); Advisory Opinion 2000-17 (Extendicare). The Commission has determined that such a relationship does not *automatically* make campaign payments from a subsidiary into indirect campaign payments from the foreign national parent. *Contribution Limitations and Prohibitions, Final Rules*, 67 Fed. Reg. 69928, at 69943 (Nov. 19, 2002); Advisory Opinion 2006-15 (TransCanada); Advisory Opinion 2000-17 (Extendicare). However, the Commission has recognized that the relationship does raise the question. To address this problem, the Commission issued a rule that domestic subsidiaries must ensure that no foreign national can "direct, dictate, control, or directly or indirectly participate in the decision-making process regarding any election-related activities," including campaign payments. 11 C.F.R. § 110.20(i). Over the years, the Commission has developed a framework, solely through advisory opinions, to analyze compliance with this rule.

For a domestic subsidiary of a foreign parent corporation to comply with the framework, the domestic subsidiary must tailor its accounting and corporate structure to meet with several conditions. First, the domestic subsidiary may only spend funds and that wholly derived from the net earnings generated domestically. Advisory Opinion 1981-36 (Japan Business Association of Southern California); Advisory Opinion 1989-20 (Kuilima); Advisory Opinion 1989-29 (GEM); Advisory Opinion 1985-03 (Diridon); Advisory Opinion 1992-16 (Nansay Hawaii); 2006-15 (TransCanada). The domestic subsidiary must demonstrate through reasonable accounting methods that the foreign parent corporation does not subsidize or otherwise indirectly provide the funds spent for campaign payments. Advisory Opinion 1992-16 (Nansay Hawaii); 2006-15 (TransCanada).

In addition to accounting conditions, the Commission requires certain corporate structure conditions. A board of directors of a domestic subsidiary, even if the board includes foreign nationals, has authority to establish or terminate a separate segregated fund. Advisory Opinion 2000-17 (Extendicare). It also has authority to set a "not to exceed" amount for budget purposes. Advisory Opinion 2006-15 (TransCanada). "Beyond this level of basic corporate control through its governing

board," however, all other election-related activities fall under the foreign national prohibition. Advisory Opinion 2000-17 (Extendicare).

To comply with the prohibition, the board of directors must delegate all decision-making authority over election-related activities to an election activities committee[2] on which no foreign national serves. However, the board may delegate this authority only if any foreign national serving on the board does not participate in the decision-making process in *any* way, including the discussion of the issue, and abstains from voting on appointments to that committee. Advisory Opinion 1990-08 (CIT); Advisory Opinion 1992-16 (Nansay Hawaii); Advisory Opinion 1995-15 (Allison Engine PAC). If the number board members who are U.S. citizens and lawful permanent residents does not meet quorum, the board may establish a special committee on which only U.S. citizens and lawful permanent residents serve. This special committee may then select an election activities committee. Advisory Opinion 2000-17 (Extendicare); *see also* Advisory Opinion 2006-16 (TransCanada). If any foreign national supervises any employee who serves on the election activities committee, the domestic subsidiary must take a reasonable approach to avert the possibility of arbitrary actions by the foreign national supervisor solely on the basis of the subordinate's performance of duties with respect to the election activities committee. Advisory Opinion 2000-17 (Extendicare).

This framework creates a "rigorous" and "exacting standard" that must be met for the domestic subsidiary to rely on the advisory opinions as protection for legal liability. Advisory Opinion 1992-16 (Nansay Hawaii) (Commissioner Potter, concurring). It attempts to remove influence of the foreign parent corporation over the election-related activities of the domestic subsidiary. Although I appreciate how stringent this framework is, I share Commissioner Ravel's concerns that it is inadequate after *Citizens United* and its progeny.

---

[2] This comment uses "election activities committee" rather than political committee. Such a committee could operate a separate segregated fund (a type of political committee), either for limited contributions to candidate committees or for unlimited independent expenditures. This committee could also be authorized to use corporate treasury funds for unlimited independent expenditures without the use of a separate political committee. *See Citizens United* at 365 (overturning prohibition on use of corporate treasury funds for independent expenditures). Thus, this comment uses "election activities committee" to designate a type of committee that might operate with both types of funds.

3. This Framework Is Now Inadequate, Particularly Because Risk of Foreign Influence Is Higher (and Likelihood of Enforcement Is Lower) Than Ever Before.

Several problems exist with the current framework. First, *Citizens United* and later cases have increased the risk of foreign influence and the success of that influence. Second, the underlying notion that a domestic subsidiary could remove influence from its foreign parent corporation through bureaucracy is inaccurate when viewed in light of the realities of how—and why—corporations operate. Finally, discovery and enforcement of violations of the framework are unlikely and unrealistic.

3.1 *Citizens United* and its progeny increase the temptation for foreign nationals to influence elections and the risk that they will be successful.

Before *Citizens United* and its progeny, the law limited the risk of improper influence of a foreign parent corporation on or through its domestic subsidiary. The law limited this risk through the ban on corporations making independent expenditures and the limits on contributions to independent expenditure-only political committees. But now that these limitations have fallen, the ability for a domestic corporation to participate directly in the political process is much greater. With that expansion of participation for the domestic subsidiary comes the greater opportunity and risk that the foreign corporation might exert influence. Because the risk is greater, it behooves the Commission to rethink whether the current framework is sufficient in preventing improper foreign influence in the sacred activities of democratic self-government.

In particular, these changes in the law enhance the risk at the non-federal levels because only 22 states bar corporate contributions, as Congress has done at the federal level. *See* National Conference of State Legislatures, State Limits on Contributions to Candidates 2015-2016 Election Cycle (2016), *available at* http://www.ncsl.org/Portals/1/documents/legismgt/elect/ContributionLimitstoCandidates2015-2016.pdf. Additionally, independent expenditures in non-federal elections are increasing at an extreme rate and hold more influence than ever before. Paul Blumenthal, *Your State and Local Elections Are Now a Super PAC Playground*, Huffington Post (Oct. 31, 2015, 9:01 AM ET), http://www.huffingtonpost.com/entry/2015-elections-super-pac_us_5633d165e4b0c66bae5c7bbb (updated Nov. 2, 2015). "[A] little bit of

money can go a long way in terms of affecting the outcome of a race, and that's especially true for a city council race or a school board race, where these races aren't that expensive." Patrick Madden, *Down-Ballot Dollars: $50,000 Reported in Super PAC Spending on Ward 8 Race*, WAMU 88.5 (Aug. 10, 2016), https://wamu.org/news/16/08/10/although_super_pacs_ward_8_money_didnt_get_results_its_hard_not_to_notice (quoting Josh Steward, Deputy Communications Director of the Sunlight Foundation).

Some Commissioners will find no harm in, and perhaps take delight in, the increased participation of independent expenditures in non-federal elections. Even so, they cannot deny that it presents a tempting opportunity for foreign parent corporations that wish to influence American policies.

3.2 That a domestic subsidiary can remove influence from its foreign parent corporation through bureaucracy was already far-fetched.

Even before *Citizens United*, the framework established by advisory opinions for analyzing control under 11 C.F.R. § 110.20(i) was implausible. No amount of bureaucracy, through either accounting or structure, can destroy the relationship that allows a foreign parent corporation to hold power over its domestic subsidiary. Commissioners themselves have been warning the Commission of this since the very first advisory opinions that allowed domestic subsidiaries of foreign parent corporations to participate in election-related activities. *E.g.*, Advisory Opinion 1985-03 (Diridon) ("It is our view that the parent-subsidiary relationship itself establishes such control." (Commissioners Harris and McDonald, dissenting)). And while a foreign parent corporation might not exert total and absolute control over every decision by a domestic subsidiary, the power dynamic provides enough influence to question whether the bureaucratic safeguards established by the advisory opinions' framework is enough to minimize that influence on election-related activities.

Even when foreign nationals have no role in the decision-making processes, the foreign ownership necessarily affects how the domestic subsidiary operates. Norms of shareholder maximization are contrary to the conceit that election-related activities by domestic subsidiaries will be without indirect influence. The domestic subsidiary will necessarily do what is best for the foreign owner, out of not only normative practice but also legal obligation. *See* Bernard S. Sharfman, *Shareholder Wealth Maximization and Its Implementation Under Corporate Law*, 66 Fla. L. Rev. 389 (January 2015), *available at* http://scholarship.law.ufl.edu/flr/vol66/iss1/7 (explaining shareholder wealth maximization as not only the norm for corporate governance but

also the objective of corporate law); *see also* Principles of Corporate Governance § 2.01 (1994) ("a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain"). Shareholder wealth maximization is particularly cogent when the corporation is a wholly owned subsidiary. That influence is stronger yet when the foreign parent corporation shares officers and directors with the domestic subsidiary. *E.g.*, Advisory Opinion 2000-17 (Extendicare) (domestic subsidiary board of directors consisted of three members: the board chair of the foreign parent corporation, the chief executive officer and president of the foreign parent corporation, and the chief financial officer of the foreign parent corporation). Senator Bentsen had this misalignment of loyalties in mind when he originally proposed the ban on foreign contributions. *See* 130 Cong. Rec. 8782–83.

The Commission attempts to address this issue by adding layers of bureaucracy to corporate decision-making structure, removing foreign nationals from any participation in the decision-making process, and moderately altering how foreign nationals supervise decision-makers who are not only employees but also on election activities committees. Advisory Opinion 2000-17 (Extendicare); Advisory Opinion 2006-15 (TransCanada). But this ignores the reality that even if no foreign national directly controls or supervises those individuals, the foreign parent corporation will always still dictate the overall performance and direction of corporate activities. Additionally, foreign nationals may supervise the individuals who, in turn, supervise persons on the election activities committees. That influence will inevitably trickle downward through the bureaucracy and affect even the election-related activities.

For example, even if foreign nationals comprise a majority of a board of directors of a domestic subsidiary, the board can choose to terminate a separate segregate fund. *Id.* If the election activities committee ever chooses to make an independent expenditure that the foreign nationals disagree with or to contribute to a candidate that the foreign nationals do not like, the foreign nationals may terminate the fund and prevent further campaign payments. In this way, foreign nationals have "indirectly" controlled those campaign payments. Any "do not exceed" amount set for independent expenditures from a corporate treasury works similarly. If an election activities committee makes an independent expenditure that the foreign nationals do not like, then the board of directors could eliminate the budget allowance for independent expenditures. The continued existence of campaign payments depends on the lack of disapproval—and tacit approval—of foreign nationals.

Additionally, CEOs of domestic subsidiaries, who a foreign parent corporation might influence directly or indirectly, affect the political contributions and habits of

their employees. Ilona Babenko, et al., Do CEOs Affect Employee Political Choices? (Aug. 23, 2016) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2814976 (finding that employees donate almost three times more money to candidates supported by their CEO). Thus, even if a foreign parent corporation does not directly influence employees of its domestic subsidiary, the foreign corporation might still indirectly influence employees' contributions and political habits by influencing the CEO.

3.3 Discovery of improper influence and enforcement by the Commission are unlikely and unrealistic.

Multiple barriers prevent discovery and enforcement against foreign influence on American elections through domestic subsidiaries. Foremost, the Commission is notorious for its dysfunction and lack of zeal for certain forms of enforcement. *See, e.g.*, Russ Choma, *The Nation's Election Watchdog Just Hit a New Level of Dysfunction*, Mother Jones (Mar. 7, 2016, 6:23 PM), http://www.motherjones.com/politics/2016/03/federal-election-commission-just-hit-new-low. The Commissioners are aware of these allegations. I will not beat a dead horse. Nevertheless, even if all six Commissioners were wholly committed to eliminating foreign influence on American elections through domestic subsidiaries of foreign parent corporations, significant obstacles make discovery and enforcement under the current framework unlikely and unrealistic.

In the period since Congress passed the BCRA, the Commission has taken only four enforcement actions for situations involving domestic subsidiaries of foreign parent corporations: ADR 458, MUR 6093, MUR 6099, and MUR 6184. Of those four, outside complainants discovered only two. The two others were *sua sponte*. The Commission has not discovered any potential noncompliance on its own. Either compliance with the analytical framework set forth by advisory opinions is incredibly high or the Commission is failing to discover and enforce compliance. Commissioner Ravel's proposal notes two recent failures of the Commission to discover foreign nationals funneling money into campaigns through domestic subsidiaries. These are only what have so far been exposed; there may be more yet undiscovered.

Then there is the question of whether the Commission will—or even has the resources to be able to—perform the investigatory measures required to discover noncompliance. As far as I am aware, the Commission does not proactively seek out verification from every domestic subsidiary the corporate records properly authorizing election activities committees. Past Commissioners have also warned the

Commission of this already as well: "[T]he Commission's caution that it will continually scrutinize the process and personnel involved in Committee decision-making is *totally unrealistic*." Advisory Opinion 1980-100 (Revere Sugar) (Commissioner Harris, dissenting) (emphasis added). The notion that the Commission will, or even can, ensure that foreign nationals do not participate in the decision-making process *in any way* is fanciful. An offhand comment here, a casual conversation there, or any unofficial conversation about politics might affect the election activities committees' decisions and turn into participation. There would be no record by which the Commission could discover the impropriety.

That a corporate treasury fund could be filtered through a "dark money" group to disguise the origination of the money further compounds these issues. Corporations have already used 501(c)4 and 501(c)6 organizations to fund election-related activities without disclosing their corporate identities to the Commission. Michael Bickel, *Top U.S. corporations funneled $173 million to political nonprofits*, The Center for Public Integrity (Jan. 16, 2014, 12:01 AM), https://www.publicintegrity.org/2014/01/16/14107/top-us-corporations-funneled-173-million-political-nonprofits (updated Sept. 23, 2014). These concerns grow because dark money groups continue to be an escalating source of funds and political activity. Wesleyan Media Project and Center for Responsive Politics, *Special Report: Outside Group Activity, 2000-2016*, Wesleyan Media Project (Aug. 26, 2016), http://mediaproject.wesleyan.edu/releases/disclosure-report/.

Finally, shrewd foreign nationals may be able to overcome the Commission's requirement that a foreign parent corporation does not fund or subsidize a domestic subsidiary's campaign payments in ways that will escape detection even if the Commission scrutinizes the domestic subsidiary's accounting. Imagine this scenario: foreign nationals set up a second foreign corporation that wholly owns and funds a second domestic subsidiary. The first domestic subsidiary sells some innocuous service or product to the second domestic subsidiary, such as "consulting services," in return for significant funds. On paper and from the perspective of the first domestic subsidiary, all of those funds are "domestically generated" within the meaning of the framework designed by the advisory opinions. In reality, however, the funds have still come from the foreign nationals.

Conclusion

While the proposal to rescind may be procedurally inappropriate, I still agree with Commissioner Ravel that the framework by which the Commission analyzes

domestic subsidiaries of foreign parents needs revisiting. The current framework attempts to prevent foreign nationals from indirectly making campaign payments. This is an appropriate goal given the inviolable nature of democratic self-government. But that framework is now inadequate. Citizens United has increased the ways corporations take part in the political process and so has increased the risk that foreign nationals may sneak their influence into our elections. The underlying assumption that the domestic subsidiary could remove the indirect control of the foreign parent corporation was already implausible. Discovery and enforcement are also unlikely due to several complicating factors.

I hope the Commission reconsiders its application of 52 U.S.C. § 30121, including 11 C.F.R. 110.20 and the framework established in Advisory Opinion 2006-15 (TransCanada), etc.

Sincerely,

Nick Harper

nharperesq@gmail.com

3023 Lyndale Ave. S.
Ste. B2
Minneapolis, MN 55408