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June 9, 2000

**BY HAND**

Office of General Counsel  
Attn: N. Bradley Litchfield, Esq.  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

AOR 2000-17

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FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL

Re: Request for Advisory Opinion

Dear Commissioners:

On behalf of Extencicare Health Services, Inc. ("Extencicare"), a Delaware corporation with its principal place of business at 111 W. Michigan Street, Milwaukee, Wisconsin, I write pursuant to 11 C.F.R. § 112.1 to request an advisory opinion from the Federal Election Commission (the "Commission") under the Federal Election Campaign Act of 1971, as amended (the "Act"), regarding the application of the Act to (i) the process which Extencicare proposes to follow in determining whether to establish a separate segregated fund under 2 U.S.C. § 441b(b)(2) and (ii) if a decision is made to establish such a fund, the process by which Extencicare would propose that it be administered. In particular, because Extencicare is foreign-owned and because a majority of its Board of Directors currently are foreign nationals, it requests advice regarding the application of section 319 of the Act, codified at 2 U.S.C. § 441e, to such processes.

Extencicare, through its wholly-owned subsidiaries, is one of the largest operators of long-term care facilities in the United States. As of December 31, 1999, it operated, through its subsidiaries, 237 nursing and/or assisted living and retirement centers in the United States. These centers were located in 14 states and could serve up to 22,055 residents. It and its subsidiaries employed more than 25,000 people in the U.S. and had consolidated revenues in 1999 from U.S. operations of more than \$967,500,000. After write-downs and losses on sales of assets, it experienced a consolidated loss for 1999 but had a consolidated positive cash flow from operations for that year in excess of \$18,000,000. It was profitable for each of the preceding four years, with consolidated earnings in each of those years exceeding \$25.5 million. At December 31, 1999, its total book assets on a consolidated basis exceeded \$974 million, and its consolidated shareholders' book equity exceeded \$237 million. All of Extencicare's subsidiaries are U.S. entities. Although it does not operate any nursing and/or

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assisted living and retirement centers itself, Extendicare provides home office management and administrative services for its operating subsidiaries.

Extendicare is a wholly-owned subsidiary of Extendicare Holdings, Inc. ("Holdings"), a Wisconsin corporation with its principal place of business at 111 W. Michigan Street, Milwaukee, Wisconsin. Holdings serves as the ultimate U.S. parent corporation, but its role is limited to that of a holding company: it has no operating assets and performs no management or administrative services. Holdings, in turn, is a wholly-owned subsidiary of Extendicare International, Inc., a Canadian corporation. Extendicare International, Inc. is a wholly-owned subsidiary of Extendicare, Inc. ("Parent"). Parent is a Canadian corporation with its principal place of business in Markham, Ontario, Canada. Its stock is traded on both The Toronto Stock Exchange and the New York Stock Exchange.

Extendicare's Board of Directors has changed from time to time in both size and composition over the years. It currently has a board of three people, two of whom are Canadian citizens and one of whom is a U.S. citizen. The Canadian board members are lawfully admitted to the U.S. and live and work there, but they are not permanent resident aliens.

One of Extendicare's Canadian directors is Chair of its Board of Directors as well as Deputy Chair and CEO of Parent. The other Canadian director is CEO of Extendicare and President and COO of Parent. The U.S. director is CFO and Treasurer of Extendicare and CFO of Parent. The President and COO of Extendicare is a Canadian citizen who is lawfully admitted to the U.S. but who does not have permanent resident alien status. Of the remaining officers, a number are foreign nationals who do not have permanent resident alien status and a number are U.S. citizens. In Extendicare's top management structure, there are Board-elected officers, Vice Presidents who are not Board-elected, and Senior Managers (with various titles and designations) ["Senior Management Team"]. Presently, the overwhelming majority of Extendicare's Senior Management Team are U.S. citizens.

Extendicare's Vice President of Government Relations, a U.S. citizen, would like to receive advice from the Commission regarding whether Extendicare may, should it wish and decide to do so, establish a separate segregated fund under 2 U.S.C. § 441b(b)(2) which would solicit for contributions those of its and its subsidiaries' employees who are eligible under the Act to make contributions and from which contributions would be made to candidates for federal and, possibly (to the extent permitted under applicable state laws), state and local office. In connection therewith, and in view of the facts that Parent is a foreign corporation and that two of the three current members of Extendicare's Board of Directors are foreign nationals who are not permanent resident aliens, the following approach has been

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suggested in determining whether a separate segregated fund will be established and, if so, how it will be administered.

Extendicare's Board would establish a special committee (the "Special Committee"). This Special Committee would be comprised only of individuals who are U.S. citizens or permanent resident aliens residing in the United States. This Special Committee would be charged with the authority and responsibility to determine whether it would be desirable and appropriate for Extendicare to establish a separate segregated fund under 2 U.S.C. § 441b(b)(2). If it should determine that it would be desirable and appropriate for Extendicare to establish such a separate segregated fund, the Special Committee would also have the authority and responsibility to determine what individual or individuals (the "PAC Committee") would administer the fund. Subject to the requirement that the members of the PAC Committee both be employees of Extendicare or its subsidiaries and be U.S. citizens or permanent resident aliens residing in the United States, the Special Committee would have complete discretion in determining the size and composition of the PAC Committee. In particular, the Special Committee would not be required to appoint to the PAC Committee only those individuals who were members of the Special Committee; it would have the authority to appoint those individuals whom it deemed best, regardless of whether or not they were members of the Special Committee. To the extent that the PAC Committee needs by-laws by which to govern itself, presumably the Special Committee would (unless the Commission were to advise that it is not permissible) have the authority to approve and amend them.

The PAC Committee would have the complete authority to administer the separate segregated fund, without review or approval by the Special Committee or by Extendicare's Board of Directors. That is, it would decide what individuals among Extendicare's (and its subsidiaries') work force would be solicited for contributions to the fund and when to solicit them. It would decide to whom to make contributions and when to make such contributions. It would decide what expenditures to make from the fund and when to make them.

Extendicare's by-laws presently allow the Board to designate committees, to be comprised of one or more directors. The by-laws provide that, to the extent permitted by law and provided by the resolution establishing the committee, the committee shall have and may exercise all of the powers of the Board in the management of the business and affairs of the corporation. The by-laws currently are silent with respect to whether individuals who are not directors may serve on such committees.

To the extent that Extendicare's Board includes U.S. citizens or permanent resident aliens residing in the United States, it would be anticipated (but not necessarily fore-ordained) that all or some of such individuals would be appointed to serve on the Special Committee.

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However, because the size and composition of the Board changes from time-to-time, it cannot be predicted in advance whether the Board would always have at least one such individual on it. As a result, in order to assure that a Special Committee could always be constituted, it is proposed that Extendicare's by-laws would be specifically amended both to permit the Board of Directors to appoint the Special Committee and to provide that such Special Committee may or may not include members of the Board of Directors, as the Board sees fit. Such an amendment to the by-laws will require the approval of either Extendicare's Board or its shareholders.

Extendicare requests advice concerning whether, in view of 2 U.S.C. § 441e and the regulations promulgated thereunder, a separate segregated fund would be permissible under the Act if it were established and administered as described above. 2 U.S.C. § 441e(a) provides that:

"it shall be unlawful for a foreign national directly or through any other person to make any contribution of money or other thing of value. . . in connection with an election to any political office or in connection with any primary election, convention or caucus held to select candidates for political office."

And 11 C.F.R. § 110.4(a)(3) provides that:

"a foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision making process of any person. . . 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."

Extendicare believes that a separate segregated fund established and administered as described above would not violate these restrictions.

The Commission has considered the application of these provisions to political activities of United States corporations owned by foreign shareholders in a number of Advisory Opinions, most recently Advisory Opinions 1995-15, 1992-16, 1990-8, 1989-29 and 1989-20 and, indirectly, in Advisory Opinion 1999-28. Of those Advisory Opinions, Advisory Opinion 1990-8 is perhaps the most relevant because it involved the establishment of a separate segregated fund by a foreign-owned U.S. corporation with foreign nationals on its board of directors. In contrast, Advisory Opinions 1992-16, 1989-29 and 1989-20

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involved foreign-owned, U.S. corporations which wished to make contributions from corporate treasury funds to candidates for state and local office, an issue which is not presented by this request. The composition of the board was not a factor in Advisory Opinion 1995-15. The focus of Advisory Opinion 1999-28 was on issues not raised by this request.

In Advisory Opinion 1990-8, the Commission permitted a foreign-owned, U.S. corporation to establish and administer a separate segregated fund provided that members of the corporation's board of directors who were foreign nationals (i) abstained from voting on matters concerning the separate segregated fund and its activities and (ii) abstained from voting on the selection of individuals to operate the fund and exercise decision-making authority with respect to political contributions and expenditures by the fund. Extencicare believes that the process described above will satisfy these requirements and that the fact that the Board of Directors will appoint the Special Committee should not violate 2 U.S.C. § 441e and the standards set forth in the Advisory Opinion, for at least three reasons:

First, it will be the Special Committee, not the Board, which decides whether to establish a separate segregated fund.

Second, if a decision is made to establish a separate segregated fund, it will be the Special Committee, not the Board, which will select the members of the PAC Committee.

Third, it will be the PAC Committee (appointed by the Special Committee), and not the Special Committee (appointed by the Board), which will operate the separate segregated fund and exercise decision-making authority with respect to its political contributions and expenditures.

Accordingly, no foreign national will have been involved in the decision to establish the fund, in the selection of who will exercise decision-making authority with respect to the fund's contributions or expenditures, or in the exercise of such decision-making authority.

Extencicare believes that, if a separate segregated fund is established and administered pursuant to the process described above, such fund will be permissible under the Act and consistent with the Commission's Advisory Opinions. However, the standards set forth in those Advisory Opinions are somewhat general in certain respects, particularly with respect to the admonition under 11 C.F.R. § 110.4(a)(3) that no foreign national shall be involved in "decisions concerning the administration" of a political committee. That admonition can be relatively easily understood in the context of the requests which were the subject of Advisory Opinions 1989-20, 1989-29 and 1992-16, since the subject of those Opinions were PACs

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established for state and local purposes which would be funded with contributions of corporate treasury funds. However, the scope of its application to separate segregated funds - whose receipts will come from contributions from eligible employees rather than from the corporate treasury -- is less clear. Therefore, Extencicare also respectfully requests that the Commission, in considering the advice requested above, also advise on the application of the Act to the following related questions:

1. As discussed above, it is proposed that the Special Committee not just decide who will serve on the PAC Committee but also whether a separate segregated fund will be established in the first place. Extencicare request advice as to whether it is necessary to so delegate to the Special Committee the decision whether or not to establish a separate segregated fund and whether it is permissible under the Act for the Board to make that decision provided that it delegates to the Special Committee the authority to select the members of the PAC Committee. The regulations proscribe foreign nationals from participating in decisions concerning the "administration" of a political committee. However, the concern underlying that admonition in the regulations, at least as reflected in the Commission's Advisory Opinions, seems to be to assure that there is no involvement by foreign nationals in soliciting political contributions and determining to whom such funds will be given, or in determining who could make such decisions. Even if the Board of Directors were to approve the creation of a separate segregated fund, it would be insulated from these areas of concern by virtue of the authority delegated to the Special Committee. Therefore, it should be permissible for the Board to decide whether a separate segregated fund will be established. Such a decision does not appear to concern the "administration" of the fund as referenced in the regulation: it, standing alone, does not involve any determination regarding the activities of the fund, such as raising money or determining to whom to contribute.

2. As long as at least one member of Extencicare's Board of Directors was a U.S. citizen or a permanent resident alien residing in the United States, would it be permissible if the Special Committee established by the Board consisted only of such director or directors?

3. May the Board also appoint non-directors to the Special Committee? If so, must any other members of the Special Committee be Board-elected officers of Extencicare? May non-Board-elected officers be appointed? May non-officer employees be appointed?

4. Regardless of whether or not any members of the Board of Directors are U.S. citizens or permanent resident aliens residing in the United States, may the Special Committee be comprised solely of non-directors?

5. Must members of the Special Committee be appointed for a fixed term, to be replaced by the Board only upon the expiration of such term or in the event of a vacancy

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created by death, departure from Extencicare, etc., or may the members of the Special Committee serve at the pleasure of the Board?

6. Must members of the PAC Committee be appointed for a fixed term, to be replaced by the Special Committee only upon the expiration of such term or in the event of a vacancy created by death, departure from Extencicare, etc., or may members of the PAC Committee serve at the pleasure of the Special Committee?

7. Must members of the PAC Committee be Board-elected officers of Extencicare, or may non-Board-elected officers, or non-officer employees, be appointed by the Special Committee to the PAC Committee?

8. Because of the multinational composition of Extencicare's officers and executives, it is entirely possible that one or more members of the PAC Committee will be reporting to a foreign national with respect to that person's regular duties. Even if such line of reporting did not exist at the time such person was appointed to the PAC Committee, it could arise thereafter as a result of promotions or other changes in job assignments. PAC Committee duties would not be a specified part of any particular regular Extencicare position description. Rather, upon appointment to the PAC Committee, an appointee's PAC Committee responsibilities would include such duties on the PAC Committee as assigned to him or her by the Special Committee. For purposes of performance evaluation, compensation review, and other similar personnel decisions in relation to such employee's PAC-related activities, may a PAC Committee member be supervised by his or her superior for regular Extencicare duties or must such person be supervised and evaluated with respect to the quality of his or her services for the PAC Committee only by the Special Committee or a subcommittee thereof.

9. Per 2 U.S.C. § 441b(b)(2), the terms "contribution" and "expenditure" do not include the expenses of establishing, administering and soliciting contributions to a separate segregated fund to be utilized by a corporation for political purposes. Although the Commission has held that a foreign corporation may not establish a separate segregated fund, the Commission has also held, in Advisory Opinion 1982-34, that, based on that exclusion from the definition of a "contribution" and "expenditure," a foreign corporation may pay for administration costs (a payroll deduction plan) of a separate segregated fund otherwise lawfully established. Accordingly, since such expenditures do not constitute political contributions, may the Board of Directors, if the Special Committee (or the Board, if permitted pursuant to the request made in paragraph 1 above) determines to establish a separate segregated fund, be involved in the review and approval of any budget for the establishment, administration and solicitation costs thereof? For example, if it is decided that a separate segregated fund should be established, staff time and out-of-pocket expenses will

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necessarily be incurred in establishing, administering, and soliciting contributions to the fund. Staff time for PAC Committee members spent on fund activities will necessarily be included in the annual salary paid to such employees. Since such employees' salaries are included in their regular departmental budgets, the time attributable to PAC Committee activities will necessarily affect the budgets of the corporate departments in which PAC Committee members otherwise regularly work. Is there a problem if the Board, as it currently does, reviews and approves the budgets for such departments, even if they reflect, in part, the costs of establishing, administering and soliciting contributions to the separate segregated fund or in making permitted contributions and expenditures, even if such costs are indirect costs? Should the budget of the PAC Committee for direct, out-of-pocket expenses incurred in establishing, administering and soliciting contributions to the fund or in making permitted contributions or expenditures be viewed similarly or differently? Does it matter whether the Board reviews and approves a separate budget for such direct and/or indirect costs?

10. The Commission's silence on such matters in Advisory Opinion 1990-8 suggests that the type of Board review described in paragraph 9 above must not present a problem under the Act. Otherwise, it is difficult to see how the separate segregated fund permitted there could have been able to operate since there was no indication in that Opinion that the separate segregated fund would pay for such expenses out of its own receipts. And the Commission's ruling in Advisory Opinion 1982-34 also supports such a conclusion, since a foreign corporation was expressly allowed to incur such administrative expenses with no consideration of whether foreign national directors or officers had to approve them. If, however, such budgetary review by the Board of the establishment, administration, and solicitation costs of the fund -- of the direct, out-of-pocket costs and/or of the indirect costs -- is not permitted under the Act, would it be permissible if the Special Committee, either by by-law or by Board resolution, was accorded the authority to review and approve such budget? (In this regard, it should be noted that, although foreign nationals on the Board of Directors may have been involved in the selection of the members of the Special Committee, the budgetary authority discussed here would not involve decision-making regarding contributions and expenditures by the fund. Therefore, letting the Special Committee exercise such budget authority would not violate the requirement in Advisory Opinion 1990-8 that foreign nationals not be involved in the selection of those individuals who have decision-making authority regarding such contributions and expenditures.) If the Board may not exercise such budget review authority and it must be delegated to the Special Committee, would it be permissible if the delegation of such authority to the Special Committee was subject to a "not to exceed" limit, i.e., the Special Committee could review and approve such budgets provided they did not exceed, in the aggregate, an annual, biannual or other periodical limit from time to time established in advance by the Board? If neither the Board nor the Special Committee may, under the Act, exercise such budget review authority, such budget decisions would, preforce, be made by the PAC Committee. In such circumstances, would it

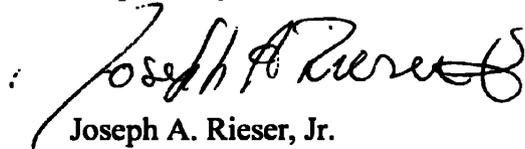
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be permissible that such budget authority of the PAC Committee be subject to an annual, biannual or other periodical "not-to-exceed" limit established from time to time in advance by the Board and/or Special Committee?

If the Commission requires any further information in considering this request, Extencicare would be pleased to provide it.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Joseph A. Rieser, Jr.", written in black ink.

Joseph A. Rieser, Jr.