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July 20, 2000

AGENDA ITEM
For Meeting of: 7-27-00

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon 
Staff Director

FROM: Lawrence M. Noble 
General Counsel

N. Bradley Litchfield 
Associate General Counsel

Subject: Draft AO 2000-17

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for July 27, 2000.

Attachment

1 ADVISORY OPINION 2000-17

2
3 Joseph A. Rieser, Jr.
4 Reed Smith Shaw & McClay LLP
5 1301 K Street, NW
6 Suite 1100--East Tower
7 Washington, DC 20005-3317

DRAFT

8
9 Dear Mr. Rieser:

10
11 This responds to your letter dated June 9, 2000, on behalf of Extendicare Health
12 Services, Inc. ("Extendicare"), requesting an advisory opinion concerning the application
13 of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission
14 regulations to the formation and administration of a separate segregated fund ("SSF" or
15 "PAC") by a domestic subsidiary corporation that is wholly-owned by a foreign parent
16 corporation.

17 Extendicare is a Delaware corporation with its principal place of business in
18 Milwaukee, Wisconsin, and it is wholly owned by Extendicare, Inc., a Canadian
19 corporation with its principal place of business in Ontario, Canada.¹ Through its wholly-
20 owned subsidiaries, which are all United States entities, Extendicare operates 237 nursing
21 and assisted living and retirement centers in 14 States with more than 25,000 people
22 employed by either Extendicare or its domestic subsidiaries.² Extendicare provides home
23 office management and administrative services for its operating subsidiaries that operate
24 the cited nursing and retirement centers.

25 ***Factual background***

26 Extendicare's board of directors has changed from time to time in both size and
27 composition over the years. Currently the board is comprised of three individuals, only

¹ Extendicare is a wholly-owned subsidiary of Extendicare Holdings, Inc. ("Holdings"), a Wisconsin corporation with its principal place of business in Milwaukee. 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 is a wholly-owned subsidiary of Extendicare International, Inc., a Canadian corporation, which, in turn, is a wholly-owned subsidiary of Extendicare, Inc., the top level parent corporation. The stock of this parent Canadian corporation is traded on the Toronto and New York Stock Exchanges.

² Extendicare's 1999 consolidated revenues from USA operations were over \$967 million, although its consolidated positive cash flow from operations that year was less than \$19 million. It had a consolidated loss for 1999, but had earnings in each of the preceding four years exceeding \$25.5 million.

1 one of whom is a US citizen. The other two are Canadian citizens who are not lawfully
2 admitted for permanent residence in the United States, although they are lawfully
3 admitted to the United States for both residence and work purposes. One of the Canadian
4 directors is chair of the Extencicare board and is also deputy chair and CEO of the parent
5 Canadian corporation. The other Canadian director is CEO of Extencicare and president
6 of the parent Canadian corporation. The US citizen director is also the chief finance
7 officer of both Extencicare and the parent Canadian corporation. The Extencicare
8 president (not a board member) is a Canadian citizen who is not lawfully admitted for
9 permanent residence in the United States. Of the remaining officers, a number are foreign
10 nationals who do not have permanent resident alien status, and a number are U.S.
11 citizens. In Extencicare's top management structure, there are board-elected officers,
12 vice presidents who are not board-elected, and senior managers (with various titles and
13 designations), hereinafter referred to as the "senior management team." Presently, the
14 overwhelming majority of Extencicare's senior management team are U.S. citizens. One
15 such official is Extencicare's vice president of government relations who is a United
16 States citizen.

17 This vice president seeks Commission advice regarding whether Extencicare may
18 establish and administer an SSF under the Act and Commission regulations that would
19 solicit contributions from the eligible personnel of Extencicare and its subsidiaries who
20 may lawfully make such contributions. The proposed SSF would make contributions to
21 candidates for Federal and, perhaps (to the extent permitted under applicable State laws),
22 State and local offices. In view of the foreign national status of two (out of three)
23 members of Extencicare's board and given that its parent corporation is a foreign
24 national, an approach for determining whether to establish an SSF is described. A plan of
25 operation for an SSF is also described in the event that one is formed.

26 ***Special Committee proposal***

27 The request states and explains that Extencicare's board would establish a special
28 committee (the "Special Committee"). This Special Committee would be comprised only
29 of individuals who are U.S. citizens or permanent resident aliens residing in the United
30 States. The Special Committee would be charged with the authority and responsibility to

1 determine whether it would be desirable and appropriate for Extendicare to establish an
2 SSF under 2 U.S.C. §441b(b)(2). If it should determine that it would be desirable and
3 appropriate for Extendicare to establish such an SSF, the Special Committee would also
4 have the authority and responsibility to determine what individual or individuals (the
5 “PAC Committee”) would administer the fund. Subject to the requirement that the
6 members of the PAC Committee both be employees of Extendicare or its subsidiaries and
7 be U.S. citizens or permanent resident aliens residing in the United States, the Special
8 Committee would have complete discretion in determining the size and composition of
9 the PAC Committee. In particular, the Special Committee would not be required to
10 appoint to the PAC Committee only those individuals who were members of the Special
11 Committee; it would have the authority to appoint those individuals whom it deemed
12 best, regardless of whether or not they were members of the Special Committee. To the
13 extent that the PAC Committee needs by-laws by which to govern itself, the Special
14 Committee would expect to have the authority to approve and amend them.

15 The request further explains that the PAC Committee would have the complete
16 authority to administer the SSF, without review or approval by the Special Committee or
17 by Extendicare’s board of directors. That is, it would decide: what individuals among
18 Extendicare’s (and its subsidiaries’) work force would be solicited for contributions to the
19 fund and when to solicit such contributions; to whom to make contributions and when to
20 make them; and what expenditures to make from the fund and when to make them.

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

28 To the extent that Extendicare’s board includes U.S. citizens or permanent
29 resident aliens residing in the United States, it would be anticipated (but not necessarily
30 foreordained) that all or some of such individuals would be appointed to serve on the

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

9 ***Opinion format***

10 Given this factual background and the described circumstances, Extendicare asks
11 ten questions concerning the proposal to form and operate a PAC. Questions one through
12 seven are set forth with some editing of the actual phrasing as used in the request.
13 Questions eight through ten are substantially revised and consolidated since they present
14 the same legal issue. To facilitate the Commission's response, the basic statutory and
15 regulatory provisions are stated initially and then applied to answer each question.

16 ***Act and Commission regulations***

17 The Act and Commission regulations prohibit a foreign national from making a
18 contribution, directly or through any other person, or an expenditure in connection with
19 an election to any political office.³ In addition, it is unlawful to solicit, accept, or receive
20 a contribution from a foreign national. 2 U.S.C. §441e(a); 11 CFR 110.4(a)(1) and (2).
21 As defined in the Act, the term "person" includes a corporation. 2 U.S.C. §431(11).

22 The term "foreign national" includes a "foreign principal" as defined by 22 U.S.C.
23 §611(b), but does not include any citizen of the United States. 2 U.S.C. §441e(b)(1).
24 Section 611(b) defines a "foreign principal" to include:

25 (1) a government of a foreign country and a foreign political party;

26

27 (2) a person outside of the United States, unless it is established that such
28 person is an individual and a citizen of and domiciled within the United

³ Unlike most of the other provisions of the Act, section 441e applies to any election for any political office, including state and local as well as Federal offices. *United States v. Kanchanalak*, 192 F.3d 1037, 1044 (D.C. Cir. 1999) [concluding that Commission interpretations of 2 U.S.C. §441e in both its regulations and an advisory opinion have "consistently interpreted §441e as applicable to federal, state, and local elections since 1976."]

1 States, or that such person is not an individual and is organized under or
2 created by the laws of the United States or of any State or other place
3 subject to the jurisdiction of the United States and has its principal place of
4 business within the United States; and

5
6 (3) a partnership, association, corporation, organization, or other combi-
7 nation of persons organized under the laws of or having its principal place
8 of business in a foreign country.

9
10 Accordingly, under §611(b)(2) and (3), a corporation organized under the laws of
11 any State within the United States that has its principal place of business in the United
12 States is not a foreign principal. Therefore, it follows that such a corporation would not
13 be a foreign national under 2 U.S.C. §441e. The term “foreign national” also includes an
14 individual who is not a citizen of the United States and who is not lawfully admitted for
15 permanent residence in the U.S. as defined by 8 U.S.C. §1101(a)(20). 2 U.S.C.
16 §441e(b)(2).

17 Commission regulations, at 11 CFR 110.4(a)(1)--(4), implement the foreign
18 national prohibition, explaining its broad scope and barring foreign national participation
19 in certain election-related activities:

20 (a) *Contributions or expenditures by foreign nationals.*

21 (1) A foreign national shall not directly or through any other person make a
22 contribution, or an expenditure, or expressly or impliedly promise to make a
23 contribution, or an expenditure, in connection with a convention, a caucus, or a
24 primary, general, special, or runoff election in connection with any local, State, or
25 Federal public office.

26 (2) No person shall solicit, accept, or receive a contribution as set out above from
27 a foreign national.

28 (3) A foreign national shall not direct, dictate, control, or directly or indirectly
29 participate in the decision-making process of any person, such as a corporation,
30 labor organization, or political committee, with regard to such person's Federal or
31 nonfederal election-related activities, such as decisions concerning the making of
32 contributions or expenditures in connection with elections for any local, State, or
33 Federal office or decisions concerning the administration of a political committee.

34 (4) For purposes of this section, *foreign national* means --

35 (i) A foreign principal, as defined in 22 U.S.C. 611(b); or

36 (ii) An individual who is not a citizen of the United States and who is not lawfully
37 admitted for permanent residence, as defined in 8 U.S.C. 1101(a)(20);

38 (iii) Except that *foreign national* shall not include any individual who is a citizen
39 of the United States.

1 The Commission has applied section 110.4(a)(3) in past advisory opinions that
2 considered factual situations and circumstances similar to those presented here. For
3 example, in Advisory Opinion 1995-15, the Commission approved a PAC's operating
4 structure where its sponsoring domestic corporation was about to be acquired by a foreign
5 corporation. The attributes of the PAC's future composition included that all its members
6 and officers would be US citizens. Citing this fact among others, along with prior
7 advisory opinions, the Commission concluded that: "after the company is acquired by a
8 foreign corporation, foreign nationals will not direct, control, or otherwise participate
9 directly or indirectly in the decision-making process of the PAC, including the
10 administration of or contributions by the PAC." Advisory Opinion 1995-15. In other
11 opinions applying the cited regulations, the Commission has emphasized the requirement
12 that foreign nationals, who are either on the corporate board or hold other positions with
13 the corporation, may not vote on the selection of individuals who would operate the PAC
14 or exercise decision-making authority with respect to contributions and expenditures by
15 the PAC, or by the domestic corporation itself in non-federal elections. Advisory
16 Opinions 1992-16, and 1990-8; *see also* Advisory Opinion 1989-29 [same emphasis in
17 opinion issued prior to adoption of 11 CFR 110.4(a)(3) where non-federal PAC was
18 funded with corporate treasury moneys and proposed to make contributions only in non-
19 federal elections subject to State law]. Recently, in Advisory Opinion 1999-28, the
20 Commission indicated that the conclusions and guidance within these opinions have
21 continued relevance to the operations of an SSF established by the United States
22 subsidiary of a foreign national parent corporation. Given the cited regulations as applied
23 in the cited opinions, and subject to the responses to the questions set forth below,
24 Extencicare may establish and function as the connected organization for a PAC.

25 ***Questions and responses***

- 26 (1) Extencicare requests advice as to whether it is necessary to delegate to the Special
27 Committee the decision whether or not to establish a separate segregated fund,
28 and whether it is permissible under the Act for the board to make that decision,
29 provided that it delegates to the Special Committee the authority to select the
30 members of the PAC Committee.
31
- 32 (2) As long as at least one member of Extencicare's board of directors is a U.S.
33 citizen or a permanent resident alien residing in the United States, would it be

1 permissible if the Special Committee established by the board consisted only of
2 such director or directors?

3
4 (3) May the board also appoint non-directors to the Special Committee? If so, must
5 any other members of the Special Committee be board elected officers of
6 Extendicare? May non-board elected officers be appointed? May non-officer
7 employees be appointed?

8
9 The board itself may make the general corporate policy decision to establish an
10 SSF. However, it must delegate all other decisions, such as personnel selection and
11 administration of the SSF, to the Special Committee or to some other corporate personnel
12 group comprised exclusively of United States citizens or individuals lawfully admitted for
13 permanent residence in the United States. Such a delegation could also be made to one
14 director, officer or other executive of Extendicare who is not a foreign national. If the
15 board itself was comprised solely of foreign nationals, this required delegation must give
16 exclusive power to the delegatee to select the personnel who will be members of the
17 Special Committee or other similar group.

18 Commission regulations would not bar the board's appointment of non-directors,
19 non-board elected officers or non-officer employees to the Special Committee, but such
20 appointments may only be made by those board members who are not foreign nationals.
21 If, at some future time, there are no US citizen (or permanent resident alien) board
22 members then an executive officer of Extendicare (who is not a foreign national) would
23 have to be granted this appointing authority. All such appointees to the Special
24 Committee are required to be either US citizens or permanent resident aliens in the
25 United States.

26
27 (4) Regardless of whether or not any members of the board of directors are U.S.
28 citizens or permanent resident aliens residing in the United States, may the
29 Special Committee be comprised solely of non-directors?

30
31 Yes, this is merely a matter of internal corporate policy and practice. As indicated
32 above, the membership of the Special Committee may not include foreign nationals, and
33 foreign nationals at the board level or otherwise may not appoint the members of the
34 Special Committee.

1 **(5) Must members of the Special Committee be appointed for a fixed term, to be**
2 **replaced by the board only upon the expiration of such term or in the event of a**
3 **vacancy created by death, departure from Extencicare, etc., or may the members**
4 **of the Special Committee serve at the pleasure of the board?**

5

6 Subject to the responses to questions (1) through (4) above, it would not matter
7 whether the members of the Special Committee served for a fixed term or at the pleasure
8 of the board. If desired, the Special Committee could be a self-perpetuating body, subject
9 to the responses above.

10

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

15

16 It makes no difference whether the PAC Committee members are appointed for a
17 fixed term or may serve at the pleasure of the Special Committee. What matters is the
18 foreign national status of any person or body that appoints these personnel and the
19 appointees own status as either US citizens or permanent resident aliens in the United
20 States. The Commission emphasizes that, in addition to complying with §441e, the
21 appointees to the PAC Committee would also have to qualify as executive or
22 administrative personnel of Extencicare or one of its affiliated corporations. 2 U.S.C.
23 §441b(b)(7), 11 CFR 114.1(c).⁴

24

25 **(7) Must members of the PAC Committee be board-elected officers of Extencicare,**
26 **or may non-board elected officers, or non-officer employees, be appointed by the**
27 **Special Committee to the PAC Committee?**

28

29 Otherwise eligible personnel within any of the stated personnel groups may be
30 appointed to the PAC Committee. They must themselves be US citizens or permanent
31 resident aliens in the United States and may be appointed only by personnel with that
32 same status. See response to question six and footnote 4.

⁴ The Commission notes that if Extencicare forms an SSF, the contribution solicitation and other functions of the SSF (and Extencicare to support the SSF) shall comply with 2 U.S.C. §441b(b)(1)-(7) and Commission regulations at 11 CFR Part 114. See, in particular, 11 CFR 114.5; see also Advisory Opinion 1999-28 which discusses the application of the cited SSF regulations in the same context as presented here, the PAC of a USA subsidiary of a foreign parent corporation.

1 Questions eight through ten generally pose the issue of the extent to which, if at
2 all, the directors or officers of Extendicare who are foreign nationals may exercise control
3 and oversight authority over the PAC Committee (and the PAC) with respect to
4 personnel and financial matters. With respect to personnel, the request explains that
5 some members of the PAC Committee may be supervised by Extendicare officers and
6 executives who are foreign nationals and who would, in the normal course of their
7 supervisory functions, have authority to make performance evaluations, compensation
8 reviews and other similar personnel decisions pertaining to these PAC personnel. The
9 Extendicare job descriptions for such personnel would not specify duties for the PAC
10 Committee, but those appointed thereto would assume PAC responsibilities as a part of
11 their regular jobs. With respect to financial oversight, the request notes that personnel
12 who will have PAC Committee duties hold positions in corporate departments of
13 Extendicare whose budgets would be affected by the time and other corporate resources
14 attributable to their PAC functions. The board currently reviews and approves the
15 budgets for these departments and would propose to continue that function even if it
16 represents a form of control over the direct or indirect costs paid by Extendicare for the
17 establishment and administration of its PAC.

18 The Commission responds to questions eight through ten, as summarized above,
19 by applying two discrete sections of its regulations. Namely, §114.5(d) allowing a
20 corporation to exercise control over its SSF, and §110.4(a)(3) barring any foreign national
21 from direction, control or participation in the decision-making process of any person,
22 such as a corporation or political committee with respect to the person's Federal election-
23 related, such as decisions concerning the administration of a political committee.⁵ As was
24 indicated in the response to questions one through three, the Extendicare board may make
25 a general corporate policy decision to establish an SSF; it may similarly make a general
26 corporate policy decision to terminate an SSF whose establishment it previously
27 authorized. Those core decisions represent a permissible exercise of corporate control
28 over an SSF by any corporation, including one that, like Extendicare, is owned by a
29 foreign parent corporation or by other foreign nationals.

⁵ An SSF is one type of political committee under Commission regulations. 11 CFR 100.5(b).

1 Beyond this level of basic corporate control through its governing board, other
2 decisions of Extendicare and its personnel relating to the PAC, including its formation
3 and operating policies, come within the purview of the foreign national prohibition as set
4 forth in §110.4(a)(3). In the context of the circumstances posed in this request, the dual
5 focus of the regulation is significant; it prohibits foreign national participation in the
6 decision-making process concerning a corporation's election-related activities (such as
7 the formation of a PAC) and concerning the administration of a PAC once established.
8 As already indicated in the responses above, this means that foreign national directors of
9 Extendicare must avoid any participation in the formation of the PAC beyond making the
10 basic decision at the corporate board level to authorize the PAC's establishment. Board
11 members and other Extendicare officers or executives who are not foreign nationals must
12 be the only personnel group who take the PAC formation and operating policy
13 development and implementation processes to the next levels. For example, selecting
14 and giving PAC work assignments to personnel who will serve on the Special Committee
15 or PAC Committee must be made only by US citizens or individuals lawfully admitted
16 for permanent residence in the United States. If there is no board member who qualifies
17 as such a person, the board's decision must be limited to only a general delegation of
18 authority to one or more individuals at the officer or executive level, none of whom are
19 foreign nationals. Such persons would then proceed, without oversight or control by the
20 board, with the selection of eligible and qualified personnel to serve on the Special
21 Committee or the PAC Committee.

22 With respect to the supervision by foreign nationals of other personnel (not
23 foreign nationals) who have functions on the PAC Committee, the Commission
24 concludes that a reasonable approach should be followed that would avert the possibility
25 of arbitrary actions, favorable or unfavorable, by a foreign national supervisor solely on
26 the basis of a subordinate's performance of duties with respect to PAC Committee
27 matters. One permissible policy would be to require that all performance evaluations and
28 compensation reviews (and other similar personnel related actions), to the extent they
29 entail consideration of the PAC functions of personnel who are subordinates of foreign
30 nationals, be based exclusively on the input to the supervisor by the most senior person

1 on the PAC Committee who has direct knowledge of the employee's performance of PAC
2 functions. Other approaches may also be reasonable. The Commission would not require
3 that a separate system of supervision and evaluation be established outside the normal
4 structure of personnel administration within Extencicare.

5 With respect to the board's normal and usual power to review and approve
6 departmental budgets, the Commission recognizes that the "power of the purse" may
7 inevitably be asserted in a manner that could curtail, maintain or enhance the level of
8 corporate support for the PAC; either in terms of personnel using official "company time"
9 for PAC duties, covering direct or indirect administrative costs associated with PAC
10 operations, or providing use of corporate equipment and facilities for PAC matters.

11 (Such support must, of course, comply with 11 CFR 114.1(b) of Commission
12 regulations.) As indicated above, the Commission also recognizes that the board, having
13 itself authorized the formation of a PAC or authorized a Special Committee to determine
14 whether it should establish a PAC, may also make a decision to terminate a PAC at any
15 time after its formation. Accordingly, the Commission concludes that a reasonable
16 approach, one which comports with the cited regulation barring foreign national
17 participation in decisions concerning the administration of a PAC, should be followed.

18 One reasonable approach would be for the board to approve budget levels for the direct
19 costs of PAC support merely as a formality, in reliance solely on financial data and other
20 information provided by the Special Committee or the PAC Committee. Another would
21 be to set a specific budget level for PAC direct costs at a "not to exceed" amount. The
22 board's review power (short of a decision to terminate the PAC entirely), should be
23 limited to ascertaining and enforcing compliance by the Special Committee or the PAC
24 Committee with the budget levels established by the board in accord with the above
25 described procedures. Other budget setting and review procedures for the direct costs of
26 PAC operations may also be reasonable if they assure compliance with Commission
27 regulations. With respect to the indirect costs to Extencicare for PAC operations, the
28 usual and normal corporate procedures for budget decisions and review may be followed
29 and would not be prohibited by Commission regulations.

