MEMORANDUM

TO: The Commission  
FROM: Commissioner Karl Sandstrom  
DATE: July 25, 2000  
SUBJECT: Advisory Opinion 2000-17 (Extendicare)

Dear Mr. Rieser:

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

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

Factual background

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

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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.
one of whom is a US citizen. The other two are Canadian citizens who are not lawfully admitted for permanent residence in the United States, although they are lawfully admitted to the United States for both residence and work purposes. One of the Canadian directors is chair of the Extendicare board and is also deputy chair and CEO of the parent Canadian corporation. The other Canadian director is CEO of Extendicare and president of the parent Canadian corporation. The US citizen director is also the chief finance officer of both Extendicare and the parent Canadian corporation. The Extendicare president (not a board member) is a Canadian citizen who is not lawfully admitted for permanent residence in the United States. 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), hereinafter referred to as the "senior management team." Presently, the overwhelming majority of Extendicare’s senior management team are U.S. citizens. One such official is Extendicare’s vice president of government relations who is a United States citizen.

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

Special Committee proposal

The request states and explains that 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. The Special Committee would be charged with the authority and responsibility to
determine whether it would be desirable and appropriate for Extendicare to establish an
SSF under 2 U.S.C. §441b(b)(2). If it should determine that it would be desirable and
appropriate for Extendicare to establish such an SSF, 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, the Special
Committee would expect to have the authority to approve and amend them.

The request further explains that the PAC Committee would have the complete
authority to administer the SSF, 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 such contributions; to whom to make contributions and when to
make them; and what expenditures to make from the fund and when to make them.

According to the request, 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
foreordained) that all or some of such individuals would be appointed to serve on the
Special Committee. 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.

Opinion format

Given this factual background and the described circumstances, Extendicare asks ten questions concerning the proposal to form and operate a PAC. Questions one through ten are set forth with some editing of the actual phrasing as used in the request. To facilitate the Commission’s response, the basic statutory and regulatory provisions are stated initially and then applied to answer each question.

Act and Commission regulations

The Act and Commission regulations prohibit a foreign national from making a contribution, directly or through any other person, or an expenditure in connection with an election to any political office. As defined in the Act, the term "person" includes a corporation. The term "foreign national" includes a "foreign principal" as defined by 22 U.S.C. §611(b), but does not include any citizen of the United States. Section 611(b) defines a "foreign principal" to include:

(1) a government of a foreign country and a foreign political party;
(2) a person outside of the United States, unless it is established that such person is an individual and a citizen of and domiciled within the United States, or that such person is not an individual and is organized under or created by the laws of the United States or of any State or other place.

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.”]
subject to the jurisdiction of the United States and has its principal place of
business within the United States; and

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

Accordingly, under §611(b)(2) and (3), a corporation organized under the laws of
any State within the United States that has its principal place of business in the United
States is not a foreign principal. Therefore, it follows that such a corporation would not
be a foreign national under 2 U.S.C. §441e. The term “foreign national” also includes an
individual who is not a citizen of the United States and who is not lawfully admitted for
§441e(b)(2).

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

(a) Contributions or expenditures by foreign nationals.

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

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

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

(4) For purposes of this section, foreign national means --
(i) A foreign principal, as defined in 22 U.S.C. 611(b); or
(ii) An individual who is not a citizen of the United States and who is not lawfully
admitted for permanent residence, as defined in 8 U.S.C. 1101(a)(20);
(iii) Except that foreign national shall not include any individual who is a citizen
of the United States.
The Commission has applied section 110.4(a)(3) in past advisory opinions that considered factual situations and circumstances similar to those presented here. For example, in Advisory Opinion 1995-15, the Commission approved a PAC’s operating structure where its sponsoring domestic corporation was about to be acquired by a foreign corporation. The attributes of the PAC’s future composition included that all its members and officers would be US citizens. Citing this fact among others, along with prior advisory opinions, the Commission concluded that: “after the company is acquired by a foreign corporation, foreign nationals will not direct, control, or otherwise participate directly or indirectly in the decision-making process of the PAC, including the administration of or contributions by the PAC.” Advisory Opinion 1995-15. In other opinions applying the cited regulations, the Commission has emphasized the requirement that foreign nationals, who are either on the corporate board or hold other positions with the corporation, may not vote on the selection of individuals who would operate the PAC or exercise decision-making authority with respect to contributions and expenditures by the PAC, or by the domestic corporation itself in non-federal elections. Advisory Opinions 1992-16, and 1990-8; see also Advisory Opinion 1989-29 [same emphasis in opinion issued prior to adoption of 11 CFR 110.4(a)(3) where non-federal PAC was funded with corporate treasury moneys and proposed to make contributions only in non-federal elections subject to State law]. Recently, in Advisory Opinion 1999-28, the Commission indicated that the conclusions and guidance within these opinions have continued relevance to the operations of an SSF established by the United States subsidiary of a foreign national parent corporation. Given the cited regulations as applied in the cited opinions, and subject to the responses to the questions set forth below, Extendicare may establish and function as the connected organization for a PAC.

Questions and responses

(1) Extendicare requests advice as to whether it is necessary to 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 (which may or may not include foreign nationals) to make that decision, provided that it delegates to the Special Committee the authority to select the members of the PAC Committee.
(2) As long as at least one member of Extendicare's board of directors is 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 Extendicare? May non-board elected officers be appointed? May non-officer employees be appointed?

The board itself may make the general corporate policy decision to establish an SSF, or it may delegate the authority to make this decision to the Special Committee. However, the board must delegate all decisions concerning the administration of the SSF to the Special Committee or to some other corporate personnel group comprised exclusively of United States citizens or individuals lawfully admitted for permanent residence in the United States. Such a delegation could also be made to any director, officer or other executive of Extendicare who is not a foreign national. Commission regulations would not bar the board’s appointment of non-directors, non-board elected officers or non-officer employees to the Special Committee.

(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?

Yes, this is merely a matter of internal corporate policy and practice.

(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 created by death, departure from Extendicare, etc., or may the members of the Special Committee serve at the pleasure of the board?

It would not matter whether the members of the Special Committee served for a fixed term or at the pleasure of the board. If desired, the Special Committee could be a self-perpetuating body.

(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 Extendicare, etc., or may members of the PAC Committee serve at the pleasure of the Special Committee?

It makes no difference whether the PAC Committee members are appointed for a fixed term or may serve at the pleasure of the Special Committee. The Commission emphasizes that, in addition to complying with §441e, the appointees to the PAC Committee would also have to qualify as executive or administrative personnel of Extendicare or one of its affiliated corporations. 2 U.S.C. §441b(b)(7), 11 CFR 114.1(c)."4

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

Otherwise eligible personnel within any of the stated personnel groups may be appointed by the Special Committee to the PAC Committee. They must themselves be US citizens or permanent resident aliens in the United States. See response to question six and footnote 4.

Questions eight through ten, set forth below, concern the extent to which, if at all, the directors or officers of Extendicare who are foreign nationals may exercise control and oversight authority over the PAC Committee (and the PAC) with respect to personnel and financial matters. With respect to personnel, the request explains that some members of the PAC Committee may be supervised by Extendicare officers and executives who are foreign nationals and who would, in the normal course of their supervisory functions, have authority to make performance evaluations, compensation reviews and other similar personnel decisions pertaining to these PAC personnel. The Extendicare job descriptions for such personnel would not specify duties for the PAC Committee, but those appointed thereto would assume PAC responsibilities as a part of their regular jobs. With respect to financial oversight, the request notes that personnel who will have PAC Committee duties hold positions in corporate departments of Extendicare whose budgets would be affected

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4 The Commission notes that if Extendicare forms an SSF, the contribution solicitation and other functions of the SSF (and Extendicare 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.
by the time and other corporate resources attributable to their PAC functions. The board
currently reviews and approves the budgets for these departments and would propose to
continue that function even if it represents a form of control over the direct or indirect
costs paid by Extendicare for the establishment and administration of its PAC.

(8) For purposes of performance evaluation, compensation review, and other similar
personnel decisions in relation to an employee’s PAC-related activities, may a
PAC Committee member be supervised by his or her superior for regular
Extendicare 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?

As was indicated in the response to questions one through three, the Extendicare
board may make a general corporate policy decision to establish an SSF; it may similarly
make a general corporate policy decision to terminate an SSF whose establishment it
previously authorized. Those core decisions represent a permissible exercise of corporate
control over an SSF by any corporation, including one that, like Extendicare, is owned by
a foreign parent corporation or by other foreign nationals.

Beyond this level of basic corporate control through its governing board, other
decisions of Extendicare and its personnel relating to the PAC, including its formation
and operating policies, come within the purview of the foreign national prohibition as set
forth in §110.4(a)(3). As already indicated in the responses above, this means that foreign
national directors of Extendicare must avoid any participation in the administration of the
PAC. For example, selecting and giving PAC work assignments to personnel who will
serve on the PAC Committee must be made only by US citizens or individuals lawfully
admitted for permanent residence in the United States.

With respect to the supervision by foreign nationals of personnel who have
functions on the PAC Committee, the Commission concludes that a reasonable approach
should be followed that would avert the possibility of arbitrary actions, favorable or
unfavorable, by a foreign national supervisor solely on the basis of a subordinate’s
performance of duties with respect to PAC Committee matters. One permissible policy
would be to require that all performance evaluations and compensation reviews (and
other similar personnel related actions), to the extent they entail consideration of the PAC
functions of personnel who are subordinates of foreign nationals, be based exclusively on
the input to the supervisor by the most senior person on the Special Committee or the
PAC Committee who has direct knowledge of the employee’s performance of PAC
functions. Other approaches may also be reasonable. The Commission would not require
that a separate system of supervision and evaluation be established outside the normal
structure of personnel administration within Extendicare.

(9) May the board of directors, if the Special Committee determines to establish
an SSF, be involved in the review and approval of any budget for the
establishment, administration and solicitation costs of the SSF? 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 SSF 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) If budgetary review of the board of direct, out-of-pocket costs and/or of the
indirect costs of the SSF is not permitted, 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? Would such delegation of
authority be permissible if it were subject to a “not to exceed” limit? If neither
the board nor the Special Committee may exercise such budget review
authority, would it be permissible that such budget authority of the PAC
Committee be subject to a “not to exceed” limit established from time to time
in advance by the board and/or Special Committee?

The Commission concludes that a reasonable approach, one which comports with
§110.4(a)(3)’s bar of foreign national participation in decisions concerning the
administration of a PAC, should be followed. With respect to direct costs, one such
approach would be to set a specific budget level for PAC direct costs at a “not to exceed”
amount. The board’s review power of direct costs (short of a decision to terminate the
PAC entirely), should be limited to ascertaining and enforcing compliance by the Special
Committee or the PAC Committee with the budget levels established by the board in
accord with the above described procedures. Other budget setting and review procedures
for the direct costs of PAC operations may also be reasonable if they assure compliance
with Commission regulations. With respect to the indirect costs to Extendicare for PAC
operations, the usual and normal corporate procedures for budget decisions and review
may be followed and would not be prohibited by Commission regulations.

This response constitutes an advisory opinion concerning the application of the
Act, or regulations prescribed by the Commission, to the specific transaction or activity

Sincerely,

Darryl R. Wold
Chairman