

FEDERAL ELECTION COMMISSION

FIRST GENERAL COUNSEL'S REPORT

MUR: 7243

DATE FILED: April 26, 2017

DATE OF NOTIFICATION: June 23, 2017

LAST RESPONSE RECEIVED: June 30, 2017

DATE ACTIVATED: August 2, 2017

STATUTE OF LIMITATIONS: December 22, 2021

ELECTION CYCLE: 2018

COMPLAINANT:

Free Speech for People

RESPONDENTS:

58th Presidential Inaugural Committee

Doug Ammerman, in his official capacity as

Designated Officer

Sara Armstrong, in her official capacity as

Chief Executive Officer

Petroléos de Venezuela, S.A.

CITGO Petroleum Corporation

CITGO Holding, Inc.

RELEVANT STATUTES

36 U.S.C. § 510(c)

AND REGULATIONS:

52 U.S.C. § 30121(b)

11 C.F.R. § 110.20(j)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

CITGO Petroleum Corporation ("CITGO"), a domestic subsidiary of a domestic holding company wholly owned by a foreign corporation, donated \$500,000 to the 58th Presidential Inaugural Committee ("Inaugural Committee") on December 22, 2016. The Complaint in this matter alleges that foreign nationals were involved in the decision to make the donation and that CITGO and its parent corporations violated the Commission's regulations by making a donation from a foreign national. The Complaint further alleges that the Inaugural Committee knowingly

1 accepted a foreign national donation in violation of section 308 of the Bipartisan Campaign
2 Reform Act of 2002 (“BCRA”),¹ and Commission regulations.²

3 CITGO and its parent company, CITGO Holding, Inc., assert in a joint response that
4 CITGO, a domestic corporation, permissibly made the donation with funds generated in the
5 United States and that the nationality status of individuals involved in the decision-making is
6 irrelevant in the context of donations to inaugural committees.³ Petroléos de Venezuela, S.A.
7 (“PDVSA”), the foreign parent of CITGO Holding, Inc., did not respond to the Complaint.

8 The Inaugural Committee maintains that the Complaint fails to offer any credible
9 evidence that it “knowingly” accepted a foreign national donation, and that its practice of
10 carefully screening potential corporate donations for legal compliance purposes confirmed in this
11 case that CITGO was not a foreign national.⁴

12 As set forth below, because it appears reasonably likely that foreign nationals participated
13 in the decision to make CITGO’s donation to the Inaugural Committee, we recommend that the
14 Commission find reason to believe that CITGO, CITGO Holding, Inc., and PDVSA violated
15 11 C.F.R. § 110.20(j). We further recommend that the Commission take no action at this time as
16 to the Inaugural Committee.⁵

¹ Pub. Law 107-155 § 308, 116 Stat. 81, 103-04 (Mar. 27, 2002), *codified at* 36 U.S.C. § 510.

² Compl. at 9-10 (Apr. 26, 2017).

³ Response of CITGO and CITGO Holding, Inc. (“CITGO Resp.”) at 3-4 (June 23, 2017).

⁴ Response of Inaugural Committee (“Inaugural Committee Resp.”) at 1, 9-10 (June 30, 2017).

⁵ The recommendation as to the Inaugural Committee includes Doug Ammerman and Sara Armstrong, notified in their official capacities as the Inaugural Committee’s Designated Officer and Chief Executive Officer, respectively. *See* 11 C.F.R. § 104.21(b) (regarding an inaugural committee’s naming of a chairperson or other officer who will serve as point of contact).

II. BACKGROUND

The President-elect appoints a Presidential Inaugural Committee to be in charge of the Presidential inaugural ceremony and the functions and activities connected with the ceremony.⁶ Here, the Inaugural Committee was formed after the 2016 election to plan activities associated with President Donald J. Trump's inauguration. The Inaugural Committee filed a post-inaugural report on April 18, 2017, disclosing its receipt of a \$500,000 donation from CITGO on December 22, 2016.⁷ CITGO made this donation via wire transfer from its account with the Bank of Texas.⁸ The Inaugural Committee donation page of its website stated that "contributions from foreign nationals, including foreign corporations, are prohibited."⁹

CITGO is an energy company incorporated in Delaware¹⁰ and headquartered in Houston, Texas.¹¹ It focuses on the "refining, marketing, and transportation of petroleum products, including gasoline, diesel fuel, jet fuel, petrochemicals and lubricants."¹² As noted in CITGO's

⁶ See 36 U.S.C. § 501(1) (defining "inaugural committee"); 11 C.F.R. § 104.21(a)(1) (same).

⁷ See Inaugural Committee Amended 2017 90 Day Post-Inaugural Report (June 28, 2017) at 21, *available at* <http://docquery.fec.gov/pdf/700/201706290300159700/201706290300159700.pdf> (amending report filed on April 18, 2017). The available information, which includes the FEC contributor database, does not indicate that CITGO has made any other contributions or donations.

⁸ CITGO Resp., Gina Renee Coon Decl. ¶ 3 (June 20, 2017).

⁹ Inaugural Committee Resp., Exs. A, B, C.

¹⁰ See State of Delaware Department of State: Division of Corporations, Entity Details, *available at* <https://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx>.

¹¹ See <https://web.archive.org/web/20180116041427/http://citgo.com/Home.jsp/> (snapshot of Jan. 16, 2018). The Inaugural Committee's disclosure report includes CITGO's Houston, Texas address with respect to the donation at issue. See Inaugural Committee Amended 2017 90 Day Post-Inaugural Report (June 28, 2017) at 21.

¹² CITGO Resp. at 1.

Response, CITGO is wholly owned by CITGO Holding, Inc., a Delaware corporation, “which is an indirect, wholly owned subsidiary of a foreign corporation,” PDVSA.¹³ PDVSA is the Venezuelan state-owned oil and natural gas company.¹⁴

CITGO's Response and the attached Declaration of CITGO Assistant Treasurer Gina Renee Coon assert that throughout the month of December 2016, CITGO's account held an average daily balance of over \$89.5 million, with a minimum balance of over \$24.6 million.¹⁵ Additionally, the Response and Declaration note that on December 22, 2016, the date of the donation to the Inaugural Committee, the CITGO account had a balance of nearly \$120 million, with all of it generated from CITGO's U.S. operations.¹⁶

CITGO's Response does not describe the circumstances of the donation to the Inaugural Committee or rebut the Complaint's allegation that CITGO's Board of Directors at the time of the donation consisted entirely of foreign nationals. According to publicly available information, much of which comes from CITGO itself, CITGO's Board of Directors at the time of the

¹³ *Id.* It is unclear what CITGO means by “indirect” when it refers to an “indirect, wholly-owned subsidiary of a foreign corporation.” An “indirect” subsidiary has been defined in another context as a “company that is controlled by a subsidiary of a company.” *See* 12 C.F.R. § 243.2(p) (defining indirect subsidiary with respect to banks and the Federal Reserve System).

¹⁴ *See* <https://web.archive.org/web/20180116041427/http://citgo.com/Home.jsp/> (snapshot from Jan. 16, 2018). In 1986, PDVSA purchased a 50 percent interest in CITGO. *Id.* PDVSA acquired the remaining half of CITGO in 1990. *Id.* PDVSA describes itself as a “corporation property of the Bolivarian Republic of Venezuela, and subordinated to the Venezuelan state.” *See* PDVSA.com, *available at* http://www.pdvs.com/index.php?option=com_content&view=article&id=6541&Itemid=888&lang=en (last visited Mar. 18, 2019); *see also* Exec. Order No. 13,827 at § 3(d), 83 Fed. Reg. 12,469 (Mar. 21, 2018) (defining “Government of Venezuela” as including “any political subdivision, agency, or instrumentality thereof, including . . . Petroleos de Venezuela, S.A. (PDVSA)”).

¹⁵ CITGO Resp. at 2, Coon Decl. ¶ 5.

¹⁶ *Id.*

1 \$500,000 donation consisted of Chairman Nelson Martinez,¹⁷ Sergio Antonio Tovar, Jesús
 2 Luongo, and Antón Castillo, all of whom are allegedly nationals of Venezuela.¹⁸ Further,
 3 Martinez simultaneously served as CITGO's President and Chief Executive Officer at the time of
 4 CITGO's donation.¹⁹

5 Additionally, at least some of the CITGO board members at the time of the donation
 6 apparently held concurrent positions within PDVSA, the foreign parent that the Venezuelan
 7 government owns.²⁰ Jesús Luongo, for example, served on two PDVSA boards concurrently.²¹
 8 Although CITGO Holding, Inc., and the CITGO Board of Directors were purportedly
 9 responsible for appointing CITGO's board members and executive officers, respectively,²² the
 10 Venezuelan government apparently had considerable influence over key personnel decisions at
 11 CITGO. For example, Venezuela's President on November 22, 2017, reportedly named

¹⁷ In January 2017, approximately one month after the donation was made, Martinez was reportedly named as Venezuela's Minister of Petroleum. *See* Reuters Staff, *Venezuela Names Pereira Interim President of U.S. Refiner CITGO*, REUTERS (Apr. 28, 2017), *available at* <http://www.businessinsider.com/r-venezuela-names-pereira-interim-president-of-us-refiner-citgo-2017-4>. Martinez served in that post until August 2017 when he was appointed as the president of PDVSA. *See* Jose Orozco, *Venezuela's Oil Minister and State Oil Firm Chief to Switch Roles, Maduro Says*, BLOOMBERG (Aug. 24, 2017), *available at* <https://www.bloomberg.com/news/articles/2017-08-25/venezuela-oil-minister-pdvsa-head-to-switch-roles-maduro-says>. As reported on December 13, 2018, Martinez is now deceased. *See* Fabiola Zerpa, *Ex-Venezuelan Oil Minister Nelson Dies While in Custody*, BLOOMBERG (Dec. 13, 2018), *available at* <https://www.bloomberg.com/news/articles/2018-12-13/ex-citgo-head-nelson-martinez-dies-under-custody-in-venezuela>.

¹⁸ *See* Compl. at 9-10; CITGO Operations – CITGO Board of Directors, *available at* <https://web.archive.org/web/20160706205456/http://www.citgo.com:80/AboutCITGO/Operations/BoardOfDirectors.jsp> (snapshot from July 6, 2016).

¹⁹ *See* CITGO Operations – CITGO Officer Profiles, *available at* <https://web.archive.org/web/20170109041950/https://www.citgo.com/AboutCITGO/Operations/OfficerProfiles.jsp> (snapshot from Jan. 9, 2017).

²⁰ *See* CITGO Operations – CITGO Board of Directors, <https://web.archive.org/web/20161221195224/http://www.citgo.com/AboutCITGO/Operations/BoardOfDirectors.jsp> (snapshot from Dec. 21, 2016).

²¹ *Id.* Specifically, Luongo served on the PDV Maintenance and PDVSA Engineering and Construction boards.

²² *Id.*; *see also* Press Release, CITGO Announces Senior Staff Changes, [www.citgo.com](http://media.citgo.com/2006-03-31-CITGO-Announces-Senior-Staff-Changes) (May 31, 2006); *available at* <http://media.citgo.com/2006-03-31-CITGO-Announces-Senior-Staff-Changes>.

Asdrúbal Chávez, a cousin of former President Hugo Chávez, as the new president of CITGO in an event broadcast on state television.²³ The CITGO Board of Directors confirmed Chávez a week later as the acting president and CEO of CITGO.²⁴

III. LEGAL ANALYSIS

The Federal Election Campaign Act of 1971, as amended (the “Act”), has long prohibited the making and receipt of foreign national contributions in connection with elections in the United States.²⁵ “Foreign national” is defined as including a foreign government; an individual who is not a citizen of the United States and is not lawfully admitted for permanent residence; and a corporation, organization, or other group of persons organized under the laws of or having its principal place of business in a foreign country.²⁶ In BCRA, Congress expanded the foreign national prohibition to expressly prohibit “donations” in addition to “contributions.” It also codified the Commission’s longstanding interpretation of the prohibition, expressly applying it to state and local elections as well as federal elections.²⁷ Further, BCRA broadened the foreign

²³ See Rachele Krygier and Anthony Faiola, *Top Executives of U.S.-based Citgo Detained in Venezuela Corruption Probe*, WASHINGTONPOST (Nov. 22, 2017), available at https://www.washingtonpost.com/world/the_americas/top-executives-of-citgo-detained-in-venezuela-corruption-probe/2017/11/22/d3eeb8e2-cfa2-11e7-a87b-47f14b73162a_story.html?utm_term=.a563190fd203. During 2017, CITGO’s acting president and chief executive and five vice presidents were arrested in Venezuela on corruption charges. *Id.*

²⁴ See CITGO Newsroom - *Asdrúbal Chávez Appointed Acting President and CEO of CITGO Petroleum Corporation* (Nov. 29, 2017), available at <http://media.citgo.com/2017-11-29-Asdrubal-Chavez-Appointed-Acting-President-and-CEO-of-CITGO-Petroleum-Corporation>.

²⁵ See 52 U.S.C. § 30121(a) (formerly 2 U.S.C. § 441e, added to the Act in 1976, Pub. L. 94-283, 90 Stat. 493); see also Advisory Opinion 1999-28 (Bacardi-Martini USA) at 2 (quoting *United States v. Kanchanalak*, 192 F.3d 1037 (D.C. Cir. 1999), as recognizing that Commission had “consistently interpreted . . . since 1976” foreign national prohibition to extend to state and local elections).

²⁶ 52 U.S.C. § 30121(b) (defining “foreign national” for purposes of the Act, including by reference to 22 U.S.C. § 611(b)); see also 36 U.S.C. § 510(c) (incorporating the Act’s definition of “foreign national” in inaugural committee foreign national provision).

²⁷ See Contribution Limits and Prohibitions, 67 Fed. Reg. 69,928, 69,940 (Nov. 19, 2002) (“Prohibitions E&J”).

1 national prohibition to address presidential inaugural committee donations, providing that an
2 inaugural committee shall not accept any donation from a foreign national, as that term is defined
3 in the Act.²⁸ The Commission's implementing regulation at 11 C.F.R. § 110.20(j) states that no
4 person shall knowingly accept from a foreign national any donation to an inaugural committee
5 and that a foreign national shall not "directly or indirectly" make a donation to an inaugural
6 committee.

7 The Commission incorporated some aspects of existing Commission regulations in its
8 implementation of BCRA's inaugural committee foreign national prohibition. For example, the
9 Commission explained that it interpreted the statutory prohibition of an inaugural committee's
10 acceptance of a foreign national's donation to require a "knowing[]" standard to be consistent
11 with the treatment of other committees' acceptance of foreign national contributions and to
12 provide the protection afforded to those other committees.²⁹ Similarly, the Commission extended
13 the prohibition on the making of foreign national donations to inaugural committees, including
14 the existing "directly or indirectly" language, to effectuate the prohibition on the acceptance of
15 such donations and to be consistent with the structure of current section 110.20, which

²⁸ 36 U.S.C. § 510(c) (referencing 52 U.S.C. § 30121(b)); BCRA Section 308(a), 116 Stat. 104 (referencing the provision now codified at 52 U.S.C. § 30121(b)). BCRA also added a requirement that inaugural committees disclose, in a report filed with the Commission within 90 days after the inaugural ceremony, certain donations made to the committee. *See* 36 U.S.C. § 510(b); 52 U.S.C. § 30104(h).

²⁹ *See* Presidential Inaugural Committee Reporting and Prohibition on Accepting Donations from Foreign Nationals, 69 Fed. Reg. 59,775, 59,778 (Oct. 6, 2004) ("Inaugural Committee E&J"); *see also* 11 C.F.R. § 110.20(a)(4); Prohibitions E&J, 67 Fed. Reg. at 69,940.

implements BCRA's other prohibitions on foreign national contributions and donations.³⁰

The "directly or indirectly" language was incorporated by Congress in BCRA in the Act's prohibition on foreign nationals making a contribution or donation.³¹ The Commission has consistently interpreted the "directly or indirectly" prohibition in the context of contributions from domestic subsidiaries of foreign companies as subject to two requirements: (1) the funds used to make the contributions must be generated solely by domestic operations, and (2) no foreign national may participate in decisions concerning the making of contributions.³² The regulation at 11 C.F.R. § 110.20(i) provides further post-BCRA guidance regarding this second requirement. Specifically, it prohibits foreign nationals from directing, dictating, controlling, or directly or indirectly participating in the decision-making process of any person, such as a

³⁰ See Inaugural Committee E&J, 69 Fed. Reg. at 59,778 (recognizing that BCRA did not expressly forbid foreign nationals from making donations to inaugural committees but adopting regulation because, "in order to effectuate BCRA's ban on acceptance of donations from foreign nationals, it was also necessary to impose a ban on the direct or indirect making of donations by foreign nationals to an inaugural committee"). The Commission further concluded that it has enforcement authority with respect to BCRA's amendment to 36 U.S.C. § 510, which pertains to inaugural committees. *Id.*

³¹ 52 U.S.C. § 30121(a)(1). The Act had previously prohibited foreign national contributions made "directly or through any other person." See Prohibitions E&J, 67 Fed. Reg. at 69,943. Commission regulations had used the "directly or indirectly" language in its pre-BCRA regulations in implementing the earlier statutory language. See *id.*

³² See 11 C.F.R. §§ 110.20(b), (i); see also Advisory Op. 2006-15 (TransCanada); MUR 6093 (Transurban Grp.). In Advisory Opinion 2006-15 (TransCanada), the Commission determined that the prohibition on foreign national contributions did not generally prohibit donations made by U.S. subsidiaries of foreign corporations, so long as the funds used to make the donations are generated solely by domestic operations and there is no involvement of foreign nationals in decisions regarding such donations. Advisory Op. 2006-15 (TransCanada). In MUR 6093 (Transurban Grp.), the Commission found that the Act was violated where the foreign parent company's board of directors directly participated in determining whether to continue the political contributions policy of its U.S. subsidiaries. See MUR 6093 Factual and Legal Analysis ("F&LA") at 3-4. See also MUR 6184, F&LA at 6-7 (Skyway Concession Company, LLC) (concluding that the Act was violated where a foreign national CEO participated in the subsidiary's election-related activities by vetting the campaign solicitations forwarded to him by the company's government relations consultant or deciding which nonfederal committees would receive contributions from the company); MUR 7122 (American Pacific International Capital, Inc. ("APIC")) (Commission found reason to believe that APIC, a domestic corporation owned by a foreign company, violated 52 U.S.C. § 30121(a)(1)(A) where the available information showed that foreign nationals may have been involved in making the contributions at issue because the APIC board of directors, which included foreign national directors, apparently approved a proposal by an APIC corporate officer, a U.S. citizen, to contribute).

1 corporation, with respect to such corporation's federal or non-federal election-related activities.³³
 2 This activity includes "decisions concerning the making of contributions, donations, expenditures,
 3 or disbursements in connection with elections for any Federal, State, or local office."³⁴ The
 4 Commission began applying these two requirements prior to BCRA, when the Act prohibited
 5 foreign national contributions made "directly or through any other person,"³⁵ and it continues to
 6 do so in post-BCRA enforcement matters.³⁶

³³ 11 C.F.R. § 110.20(i).

³⁴ *Id.*

³⁵ *See* 2 U.S.C. § 441e(a) (2000). Pre-BCRA Advisory Opinions dating back to 1978 determined that "directly or through any another person" required that the funds used for domestic subsidiary contributions were domestically generated and that no foreign nationals participated in the contribution decision-making. For example, in Advisory Opinion 1985-3 (Diridon), the Commission determined that:

Since, however, 441e prohibits contributions by a foreign national through any other person, and since the parent Canadian corporation is both a person, 2 U.S.C. 431(11), and a foreign national by application of 22 U.S.C. 611(b)(3), it follows that a contribution by [the domestic subsidiary] may only be made or accepted under certain conditions. Specifically, the parent Canadian corporation may not directly or indirectly provide the funds for such a political contribution. Nor may that corporation or any other person who is a foreign national under 2 U.S.C. 441e have any decision-making role or control with respect to the making of any political contribution by [the domestic subsidiary].

(citation omitted). *See also* Advisory Op. 1989-20 (Kuilima) (concluding that domestic subsidiary failed both the funding and decision-making requirements); Advisory Op. 1992-16 (Nansay) ("When considering political contributions by domestic subsidiaries of foreign corporations, the Commission has consistently interpreted 441e to prohibit any director or officer of the company or its parent who is a foreign national, or any other foreign national, from participating in any way in the decision-making process with regard to making contributions to candidates."); Advisory Op. 1978-21 (Budd Citizenship Committee) (concluding that the political action committee of a domestic corporation may continue to operate after the corporation is acquired by a subsidiary of a foreign corporation, so long as the individuals who exercise decision-making authority with respect to PAC activities are citizens of the U.S. or lawfully admitted for permanent residence in the U.S.). The Commission applied the two requirements in pre-BCRA enforcement matters as well. *See, e.g.,* MUR 3460 (Sports Shinko Co., Ltd.) F&LA.

³⁶ *See supra* n.32; MUR 6093 (Transurban Grp.); MUR 7122 (APIC); *see also* MUR 6099 (Waverley Glen Systems Ltd.) F&LA at 4 (looking to two factors in addressing the issue of whether a domestic subsidiary of a foreign national may make contributions in connection with local, state, or federal campaigns for political office: "the source of the funds used to make the contributions and the nationality status of the decision makers"); Certification ¶ 4, MUR 6099 (May 7, 2009).

A. CITGO Respondents

As noted above, CITGO is wholly owned by Respondent CITGO Holding, Inc., which in turn is wholly owned by Respondent PDVSA, a corporation owned by the Bolivarian Republic of Venezuela and thus a foreign national under the Act.³⁷ The Complaint alleges that all the members of CITGO's board were foreign nationals at the time that the donation was made.³⁸ The Complaint further asserts that CITGO may not rely on protections afforded to domestic subsidiaries of a foreign national corporation because the leadership of CITGO consisted of foreign members who made at least some decisions regarding the donation.³⁹

CITGO and CITGO Holding, Inc., argue that the donation to the Inaugural Committee was permissible because CITGO is not a foreign national and "donated its own funds, derived

³⁷ See Compl. at 3. With respect to PDVSA's status as an instrumentality of the Venezuelan government, it does not appear that PDVSA is entitled to sovereign immunity under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602-1611, for actions relating to the making of a donation. As in previous Commission matters involving foreign state respondents where the Commission has asserted jurisdiction, the "commercial activity" exception to FSIA should apply here. See *id.* § 1605(a)(2). In MUR 2892 (Coordination Council of North American Affairs ("CCNAA")), the Commission determined that the Act conferred jurisdiction over an instrumentality of Taiwan, that the FSIA commercial activity exception appeared to apply, and that Congress "explicitly prohibited" foreign states from making contributions and "granted the Commission exclusive jurisdiction with respect to civil enforcement of [the Act]" over such persons. MUR 2892 (CCNAA) F&LA at 7-11. In MUR 4583 (Embassy of India), the Commission found reason to believe and probable cause to believe that the Embassy violated 2 U.S.C. §§ 441e and 441f (now 52 U.S.C. §§ 30121 and 30122) and referred the matter to the Department of Justice for criminal prosecution but elected to admonish the Embassy and take no further action after DOJ did not pursue the matter. See Certifications, MUR 4583 (Nov. 12, 1996, Nov. 10, 1998, Sept. 7, 1999); Gen. Counsel's Rpt. at 1, MUR 4583 (Aug. 19, 1999); see also Letter from Lawrence M. Noble, General Counsel, FEC, to The Honorable Wajahat Habibullah, Embassy of India (Jan. 16, 1997) (stating that Commission has "exclusive jurisdiction with respect to the civil enforcement of [the Act], the U.S. law that in relevant part prohibits foreign nationals and foreign governments from making direct or indirect contributions to U.S. elections"). In MUR 3801 (Royal Embassy of Saudi Arabia), the Commission found reason to believe the foreign sovereign had violated the Act but closed the file for reasons apparently unrelated to jurisdiction. Gen. Counsel's Rpt at 7-8, MUR 3801 (Apr. 24, 1995); Certification, MUR 3801 (May 25, 1995); Inaugural Committee E&J, 69 Fed. Reg. at 59,778 (recognizing Commission's exclusive enforcement authority of BCRA's inaugural committee foreign national provisions).

³⁸ Compl. at 9-10.

³⁹ *Id.* (citing Advisory Op. 2006-15 (TransCanada)).

1 entirely from its domestic operations.”⁴⁰ These Respondents are silent as to the nationality status
2 of the individuals involved in making the donation and provide no information at all regarding
3 the circumstances of the donation. Instead, these Respondents maintain that the requirement that
4 no individual foreign national can be involved in decisions regarding the making of donations
5 only applies to election-related activities as specified in 11 C.F.R. § 110.20(i), not inaugural
6 donations addressed under 11 C.F.R. § 110.20(j).⁴¹ Respondents argue that since inaugural
7 committees are not recognized as engaging in election-related activities, and since the
8 Commission did not broaden section 110.20(i) through rulemaking when enacting § 110.20(j)
9 more than two years later, section 110.20(i) does not apply to inaugural committee donations
10 made by United States corporations.⁴²

11 We agree that the CITGO Respondents’ liability does not depend on the application of
12 section 110.20(i), which explicitly applies to “election-related activities.”⁴³ The proper test of
13 the CITGO Respondents’ liability is section 110.20(j), which addresses the only non-election
14 context to which Congress has applied the foreign national prohibition. For purposes of this
15 matter, that regulation concerns whether a foreign national “directly or indirectly” made
16 CITGO’s \$500,000 donation to the Inaugural Committee. The Commission has not explained
17 the meaning of “indirectly” in 11 C.F.R. § 110.20(j) since its adoption in 2004. But, the
18 Commission expressly stated at the time it adopted that regulation that the inaugural committee

⁴⁰ CITGO Resp. at 2-3.

⁴¹ *Id.* at 5-6.

⁴² *Id.*; *see also* Advisory Opinion 1980-144 (Presidential Inaugural Committee – 1981) (concluding that funds received and expended by inaugural committee are neither “contributions” nor “expenditures” because they “are used to finance inaugural activities rather than any Federal election”).

⁴³ 11 C.F.R. § 110.20(i).

provisions were intended to be consistent with the structure of the rest of 11 C.F.R. § 110.20.⁴⁴

Hence, these circumstances indicate that the Commission's longstanding interpretation of the phrase "directly or indirectly" with respect to making contributions and donations in elections, both pre- and post-BCRA, is applicable to the same phrase with respect to the making of donations to inaugural committees now subject to the foreign national prohibition. Under the longstanding interpretation of "directly or indirectly," as explained above, a domestic subsidiary of a foreign corporation is deemed to be a foreign national making a direct or indirect contribution or donation when the funds used for the donation are not domestically generated *or* when any foreign nationals have participated in the decision to make the contribution or donation.⁴⁵

The available information indicates that CITGO had ample domestic funds to make the \$500,000 donation to the Inaugural Committee. However, the factual record here raises the inference that foreign nationals participated in the decision to make the \$500,000 donation. The CITGO and CITGO Holding, Inc., Response does not answer the Complaint's allegation that CITGO's entire board at the time of the donation consisted of foreign nationals, including a board member who served as CITGO's president and CEO. Neither does the Response explain the circumstances of the donation, such as whether a U.S. citizen or foreign national made the

⁴⁴ See Inaugural Committee E&J, 69 Fed. Reg. at 59,778.

⁴⁵ See Advisory Opinion 1981-36 (Japan Business Assoc. of Southern California) (analyzing foreign national direction of domestic subsidiary activities under directly or "through any other person" statutory language); *see also supra* nn.27-28; Prohibitions E&J, 67 Fed. Reg. at 69,943-69,944 (rejecting suggestion that BCRA's use of "indirectly" required prohibition on all contributions and donations from domestic subsidiaries of foreign corporations for several reasons, including policy reasons set forth in "series of Commission advisory opinions over more than two decades that have affirmed the participation of [domestic] subsidiaries in elections in the United States . . . so long as there is no involvement of foreign nationals in decisions regarding such participation and so long as foreign nationals are not solicited for the funds to be used").

1 decision to donate or authorized the wire transfer. Additionally, according to the Complaint,
 2 CITGO is closely intertwined with Venezuela, as “[s]enior managers from the parent [PDVSA]
 3 are cycled in and out of U.S. offices.”⁴⁶ These circumstances, coupled with the considerable
 4 control that the Venezuelan government apparently had in CITGO operations and in the absence
 5 of any explanation by Respondents, raise a sufficient inference that foreign nationals on
 6 CITGO’s board and in its holding companies may have indirectly made the donation to the
 7 Inaugural Committee, which the regulation prohibits.⁴⁷ Accordingly, we recommend that the
 8 Commission find reason to believe that Petrol os de Venezuela, S.A, CITGO Petroleum
 9 Corporation, and CITGO Holding, Inc., violated 11 C.F.R.   110.20(j) by making a foreign
 10 national donation.

11 **B. Inaugural Committee**

12 The Complaint further alleges that the Inaugural Committee violated the Act and
 13 Commission regulations by knowingly accepting a foreign national donation from CITGO.⁴⁸ As
 14 noted above, the statutory prohibition was interpreted to require a “knowing[]” standard for
 15 inaugural committees’ acceptance of donations from foreign nationals because the Commission

⁴⁶ Compl. at 4 (quoting Joe Carroll, *Venezuela Is Pawning Pieces of Iconic American Brand Citgo to Survive*, BLOOMBERG (Oct. 6, 2016), available at <https://bloom.bg/2oF8MVe>).

⁴⁷ The Commission has recognized circumstances where contributions would be permissible even if foreign nationals were part of the domestic subsidiary’s board of directors. For example, in Advisory Opinion 2000-17 (Extendicare Health Services, Inc.), the Commission allowed the domestic subsidiary of a foreign company to form a “special committee” with the authority to establish and administer a separate segregated fund because that committee was comprised only of U.S. citizens or permanent resident aliens residing in the United States. Advisory Op. 2000-17 at 2-6. Where decision-making authority is vested with U.S. citizens or permanent resident aliens, foreign national corporate board members must not determine who will exercise decision-making authority. *See id.*; *see also* Advisory Op. 1990-8 (CIT Group Holdings, Inc.); MUR 3460 (Sports Shinko Co., Ltd.) F&LA at 11. This ensures the exclusion of foreign nationals from direct or indirect participation in the decision-making process related to activities prohibited under the Act. *See* MUR 3460, F&LA at 11. The available information in this matter, however, does not indicate whether CITGO had any such arrangement.

⁴⁸ Compl. at 10.

1 “ha[d] previously read a knowingly standard into other statutory provisions banning acceptance
2 of foreign national contributions and donations by other persons,” and chose “to provide
3 inaugural committees with the same protection.”⁴⁹ Consistent with that approach, a person
4 “knowingly” accepts a foreign national donation if one of three knowledge standards is satisfied:
5 (1) actual knowledge that the source of the funds solicited, accepted, or received is a foreign
6 national; (2) awareness of facts that would lead a reasonable person to conclude that there is a
7 substantial probability that the source of the funds solicited, accepted, or received is a foreign
8 national; or (3) awareness of facts that would lead a reasonable person to inquire whether the
9 source of the funds solicited, accepted, or received is a foreign national, but the person failed to
10 conduct a reasonable inquiry.⁵⁰ The Complaint argues that the Inaugural Committee unlawfully
11 accepted the donation, noting that it was “widely understood by the mid-2000s (including by Mr.
12 Trump himself) that CITGO’s corporate political activity is directed by the Venezuelan
13 government.”⁵¹ As such, key personnel of the Inaugural Committee allegedly understood that
14 CITGO was generally known to be controlled by the Venezuelan government in political
15 matters.⁵²

16 The Inaugural Committee contends that it carefully screened CITGO’s donation in
17 compliance with FEC regulations and found no indication that CITGO’s donation originated from

⁴⁹ See Inaugural Committee E&J at 59,778; *supra* n.30.

⁵⁰ See 11 C.F.R. § 110.20(a)(4); *supra* n.29.

⁵¹ Compl. at 10; *see also id.* at 7 (quoting Trump tweet about Venezuelan government with respect to an oil advertisement featuring Joseph Kennedy).

⁵² *Id.* at 10.

1 a foreign national.⁵³ The Inaugural Committee's response includes the Declaration of Heather
2 Martin, the Inaugural Committee's Director of Budget & Treasury, who avers that it was the
3 Inaugural Committee's practice to screen corporate donations for legal compliance purposes by
4 confirming that: the corporation was incorporated in the United States; the corporation
5 maintained its principal place of business in the United States; the corporation provided a United
6 States address with the donation; and the donation was drawn on a United States bank account.⁵⁴
7 She further states that after the Inaugural Committee received a wire transfer in the amount of
8 \$500,000 from CITGO on December 22, 2016, the Inaugural Committee's screening process
9 confirmed that CITGO met its criteria.⁵⁵ Following the Inaugural Committee's purported internal
10 due diligence, it asserts there was no indication that CITGO's donation originated from a foreign
11 national, and the Inaugural Committee, therefore, appropriately accepted the donation.⁵⁶ The
12 Inaugural Committee also notes that it followed the practices of prior inaugural committees,
13 which accepted donations from United States subsidiaries of foreign parent companies.⁵⁷
14 Accordingly, Respondent argues that there is no evidence that the Inaugural Committee
15 "knowingly" accepted a donation from a foreign national, and the Complaint should be
16 dismissed.⁵⁸

⁵³ Inaugural Committee Resp. at 6.

⁵⁴ *Id.*; Martin Decl. ¶¶ 4-5.

⁵⁵ *Id.*

⁵⁶ Inaugural Committee Resp. at 6.

⁵⁷ *Id.*

⁵⁸ *Id.*

1 We do not believe that the available information provides the Commission with a
2 sufficient reason to believe, at this time, that the Inaugural Committee knowingly accepted a
3 foreign national donation. However, we recommend taking no action at this time with regard to the
4 Inaugural Committee, its Designated Officer, Doug Ammerman, and its Chief Executive Officer,
5 Sara Armstrong, pending our investigation into the alleged foreign national involvement in the
6 making of CITGO's donation.

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15 **V. RECOMMENDATIONS**

- 16 1. Find reason to believe CITGO Petroleum Corporation violated 11 C.F.R.
17 § 110.20(j);
18
19 2. Find reason to believe that CITGO Holding, Inc., violated 11 C.F.R. § 110.20(j);
20
21 3. Find reason to believe that Petroléos de Venezuela, S.A. violated 11 C.F.R.
22 § 110.20(j);
23
24 4. Take no action at this time with respect to the 58th Presidential Inaugural
25 Committee, Doug Ammerman in his official capacity as Designated Officer, and
26 Sara Armstrong in her official capacity as Chief Executive Officer;
27
28 5. Approve the attached Factual and Legal Analyses;
29
30 6. Authorize the use of compulsory process, as necessary; and

MUR 7243 (CITGO Petroleum Corporation, *et al.*)

First General Counsel's Report

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7. Approve the appropriate letters.

Lisa J. Stevenson
Acting General Counsel

April 2, 2019

Date

Charles Kitcher

Charles Kitcher
Acting Associate General Counsel
for Enforcement

Mark Allen

Mark Allen
Assistant General Counsel

Roy Q. Lockett

Roy Q. Lockett
Attorney

Attachments

1. Factual and Legal Analysis of CITGO Petroleum Corporation and CITGO Holding, Inc.
2. Factual and Legal Analysis of Petrol os de Venezuela, S.A.

FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: CITGO Petroleum Corporation MUR 7243
CITGO Holding, Inc.

I. INTRODUCTION

CITGO Petroleum Corporation (“CITGO”), a domestic subsidiary of a domestic holding company wholly owned by a foreign corporation, donated \$500,000 to the 58th Presidential Inaugural Committee (“Inaugural Committee”) on December 22, 2016. The Complaint in this matter alleges that foreign nationals were involved in the decision to make the donation and that CITGO and its parent corporations violated the Commission’s regulations by making a donation from a foreign national.

CITGO and its parent company, CITGO Holding, Inc., assert in a joint response that CITGO, a domestic corporation, permissibly made the donation with funds generated in the United States and that the nationality status of individuals involved in the decision-making is irrelevant in the context of donations to inaugural committees.¹

As set forth below, because it appears reasonably likely that foreign nationals participated in the decision to make CITGO’s donation to the Inaugural Committee, the Commission has determined to find reason to believe that CITGO and CITGO Holding, Inc. violated 11 C.F.R. § 110.20(j).

¹ Response of CITGO and CITGO Holding, Inc. (“CITGO Resp.”) at 3-4 (June 23, 2017).

1 **II. FACTUAL AND LEGAL ANALYSIS**

2 **A. Factual Background**

3 The President-elect appoints a Presidential Inaugural Committee to be in charge of the
 4 Presidential inaugural ceremony and the functions and activities connected with the ceremony.²
 5 Here, the Inaugural Committee was formed after the 2016 election to plan activities associated
 6 with President Donald J. Trump’s inauguration. The Inaugural Committee filed a post-inaugural
 7 report on April 18, 2017, disclosing its receipt of a \$500,000 donation from CITGO on
 8 December 22, 2016.³ CITGO made this donation via wire transfer from its account with the
 9 Bank of Texas.⁴ The Inaugural Committee donation page of its website stated that
 10 “contributions from foreign nationals, including foreign corporations, are prohibited.”

11 CITGO is an energy company incorporated in Delaware⁵ and headquartered in Houston,
 12 Texas.⁶ It focuses on the “refining, marketing, and transportation of petroleum products,
 13 including gasoline, diesel fuel, jet fuel, petrochemicals and lubricants.”⁷ As noted in CITGO’s
 14 Response, CITGO is wholly owned by CITGO Holding, Inc., a Delaware corporation, “which is

² See 36 U.S.C. § 501(1) (defining “inaugural committee”); 11 C.F.R. § 104.21(a)(1) (same).

³ See Inaugural Committee Amended 2017 90 Day Post-Inaugural Report (June 28, 2017) at 21, *available at* [http://docquery.fec.gov/pdf/700/2 01706290300159700/201706290300159700.pdf](http://docquery.fec.gov/pdf/700/2%201706290300159700/201706290300159700.pdf) (amending report filed on April 18, 2017). The available information, which includes the FEC contributor database, does not indicate that CITGO has made any other contributions or donations.

⁴ CITGO Resp., Gina Renee Coon Decl. ¶ 3 (June 20, 2017).

⁵ See State of Delaware Department of State: Division of Corporations, Entity Details, *available at* <https://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx>.

⁶ See <https://web.archive.org/web/20180116041427/http://citgo.com/Home.jsp/> (snapshot of Jan. 16, 2018). The Inaugural Committee’s disclosure report includes CITGO’s Houston, Texas address with respect to the donation at issue. See Inaugural Committee Amended 2017 90 Day Post-Inaugural Report (June 28, 2017) at 21.

⁷ CITGO Resp. at 1.

an indirect, wholly owned subsidiary of a foreign corporation,” Petroléos de Venezuela, S.A. (“PDVSA”).⁸ PDVSA is the Venezuelan state-owned oil and natural gas company.⁹

CITGO’s Response and the attached Declaration of CITGO Assistant Treasurer Gina Renee Coon assert that throughout the month of December 2016, CITGO’s account held an average daily balance of over \$89.5 million, with a minimum balance of over \$24.6 million.¹⁰ Additionally, the Response and Declaration note that on December 22, 2016, the date of the donation to the Inaugural Committee, the CITGO account had a balance of nearly \$120 million, with all of it generated from CITGO’s U.S. operations.¹¹

CITGO’s Response does not describe the circumstances of the donation to the Inaugural Committee or rebut the Complaint’s allegation that CITGO’s Board of Directors at the time of the donation consisted entirely of foreign nationals. According to publicly available information, much of which comes from CITGO itself, CITGO’s Board of Directors at the time of the

⁸ *Id.* It is unclear what CITGO means by “indirect” when it refers to an “indirect, wholly-owned subsidiary of a foreign corporation.” An “indirect” subsidiary has been defined in another context as a “company that is controlled by a subsidiary of a company.” See 12 C.F.R. § 243.2(p) (defining indirect subsidiary with respect to banks and the Federal Reserve System).

⁹ See <https://web.archive.org/web/20180116041427/http://citgo.com/Home.jsp/> (snapshot from Jan. 16, 2018). In 1986, PDVSA purchased a 50 percent interest in CITGO. *Id.* PDVSA acquired the remaining half of CITGO in 1990. *Id.* PDVSA describes itself as a “corporation property of the Bolivarian Republic of Venezuela, and subordinated to the Venezuelan state.” See PDVSA.com, available at http://www.pdvs.com/index.php?option=com_content&view=article&id=6541&Itemid=888&lang=en (last visited Mar. 18, 2019); see also Exec. Order No. 13,827 at § 3(d), 83 Fed. Reg. 12,469 (Mar. 21, 2018) (defining “Government of Venezuela” as including “any political subdivision, agency, or instrumentality thereof, including . . . Petroleos de Venezuela, S.A. (PDVSA)”).

¹⁰ CITGO Resp. at 2; Coon Decl. ¶ 5.

¹¹ *Id.*

\$500,000 donation consisted of Chairman Nelson Martinez,¹² Sergio Antonio Tovar, Jesús Luongo, and Antón Castillo, all of whom are allegedly nationals of Venezuela.¹³ Further, Martinez simultaneously served as CITGO's President and Chief Executive Officer at the time of CITGO's donation.¹⁴

Additionally, at least some of the CITGO board members at the time of the donation apparently held concurrent positions within PDVSA, the foreign parent that the Venezuelan government owns.¹⁵ Jesús Luongo, for example, served on two PDVSA boards concurrently.¹⁶ Although CITGO Holding, Inc., and the CITGO Board of Directors were purportedly responsible for appointing CITGO's board members and executive officers, respectively,¹⁷ the Venezuelan government apparently had considerable influence over key personnel decisions at CITGO. For example, Venezuela's President on November 22, 2017, reportedly named

¹² In January 2017, approximately one month after the donation was made, Martinez was reportedly named as Venezuela's Minister of Petroleum. *See* Reuters Staff, *Venezuela Names Pereira Interim President of U.S. Refiner CITGO*, REUTERS (Apr. 28, 2017), available at <http://www.businessinsider.com/r-venezuela-names-pereira-interim-president-of-us-refiner-citgo-2017-4>. Martinez served in that post until August 2017 when he was appointed as the president of PDVSA. *See* Jose Orozco, *Venezuela's Oil Minister and State Oil Firm Chief to Switch Roles, Maduro Says*, BLOOMBERG (Aug. 24, 2017), available at <https://www.bloomberg.com/news/articles/2017-08-25/venezuela-oil-minister-pdvsa-head-to-switch-roles-maduro-says>. As reported on December 13, 2018, Martinez is now deceased. *See* Fabiola Zerpa, *Ex-Venezuelan Oil Minister Nelson Dies While in Custody*, BLOOMBERG (Dec. 13, 2018), available at <https://www.bloomberg.com/news/articles/2018-12-13/ex-citgo-head-nelson-martinez-dies-under-custody-in-venezuela>.

¹³ *See* Compl. at 9-10; CITGO Operations – CITGO Board of Directors, available at <https://web.archive.org/web/20160706205456/http://www.citgo.com:80/AboutCITGO/Operations/BoardOfDirectors.jsp> (snapshot from July 6, 2016).

¹⁴ *See* CITGO Operations – CITGO Officer Profiles, available at <https://web.archive.org/web/20170109041950/https://www.citgo.com/AboutCITGO/Operations/OfficerProfiles.jsp> (snapshot from Jan. 9, 2017).

¹⁵ *See* CITGO Operations – CITGO Board of Directors, <https://web.archive.org/web/20161221195224/http://www.citgo.com/AboutCITGO/Operations/BoardOfDirectors.jsp> (snapshot from Dec. 21, 2016).

¹⁶ *Id.* Specifically, Luongo served on the PDV Maintenance and PDVSA Engineering and Construction boards.

¹⁷ *Id.*; *see also* Press Release, CITGO Announces Senior Staff Changes, [www.citgo.com](http://media.citgo.com/2006-03-31-CITGO-Announces-Senior-Staff-Changes) (May 31, 2006); available at <http://media.citgo.com/2006-03-31-CITGO-Announces-Senior-Staff-Changes>.

Asdrúbal Chávez, a cousin of former President Hugo Chávez, as the new president of CITGO in an event broadcast on state television.¹⁸ The CITGO Board of Directors confirmed Chávez a week later as the acting president and CEO of CITGO.¹⁹

B. Legal Analysis

The Federal Election Campaign Act of 1971, as amended (the “Act”) has long prohibited the making and receipt of foreign national contributions in connection with elections in the United States.²⁰ “Foreign national” is defined as including a foreign government; an individual who is not a citizen of the United States and is not lawfully admitted for permanent residence; and a corporation, organization, or other group of persons organized under the laws of or having its principal place of business in a foreign country.²¹ In the Bipartisan Campaign Reform Act of 2002 (“BCRA”),²² Congress expanded the foreign national prohibition to expressly prohibit “donations” in addition to “contributions.” It also codified the Commission’s longstanding interpretation of the prohibition, expressly applying it to state and local elections as well as

¹⁸ See Rachelle Krygier and Anthony Faiola, *Top Executives of U.S.-based Citgo Detained in Venezuela Corruption Probe*, WASHINGTONPOST (Nov. 22, 2017), available at https://www.washingtonpost.com/world/the_americas/top-executives-of-citgo-detained-in-venezuela-corruption-probe/2017/11/22/d3eeb8e2-cfa2-11e7-a87b-47f14b73162a_story.html?utm_term=.a563190fd203. During 2017, CITGO’s acting president and chief executive and five vice presidents were arrested in Venezuela on corruption charges. *Id.*

¹⁹ See CITGO Newsroom - *Asdrúbal Chávez Appointed Acting President and CEO of CITGO Petroleum Corporation* (Nov. 29, 2017), available at <http://media.citgo.com/2017-11-29-Asdrubal-Chavez-Appointed-Acting-President-and-CEO-of-CITGO-Petroleum-Corporation>.

²⁰ See 52 U.S.C. § 30121(a) (formerly 2 U.S.C. § 441e, added to the Act in 1976, Pub. L. 94-283, 90 Stat. 493); see also Advisory Opinion 1999-28 (Bacardi-Martini USA) at 2 (quoting *United States v. Kanchanalak*, 192 F.3d 1037 (D.C. Cir. 1999), as recognizing that Commission had “consistently interpreted . . . since 1976” foreign national prohibition to extend to state and local elections).

²¹ 52 U.S.C. § 30121(b) (defining “foreign national” for purposes of the Act, including by reference to 22 U.S.C. § 611(b)); see also 36 U.S.C. § 510(c) (incorporating the Act’s definition of “foreign national” in inaugural committee foreign national provision).

²² Pub. Law 107-155 § 308, 116 Stat. 81, 103-04 (Mar. 27, 2002), codified at 36 U.S.C. § 510.

1 federal elections.²³ Further, BCRA broadened the foreign national prohibition to address
 2 presidential inaugural committee donations, providing that an inaugural committee shall not
 3 accept any donation from a foreign national, as that term is defined in the Act.²⁴ The
 4 Commission’s implementing regulation at 11 C.F.R. § 110.20(j) states that no person shall
 5 knowingly accept from a foreign national any donation to an inaugural committee and that a
 6 foreign national shall not “directly or indirectly” make a donation to an inaugural committee.

7 The Commission incorporated some aspects of existing Commission regulations in its
 8 implementation of BCRA’s inaugural committee foreign national prohibition. For example, the
 9 Commission explained that it interpreted the statutory prohibition of an inaugural committee’s
 10 acceptance of a foreign national’s donation to require a “knowing[]” standard to be consistent
 11 with the treatment of other committees’ acceptance of foreign national contributions and to
 12 provide the protection afforded to those other committees.²⁵ Similarly, the Commission
 13 extended the prohibition on the making of foreign national donations to inaugural committees,
 14 including the existing “directly or indirectly” language, to effectuate the prohibition on the
 15 acceptance of such donations and to be consistent with the structure of current section 110.20,

²³ See Contribution Limits and Prohibitions, 67 Fed. Reg. 69,928, 69,940 (Nov. 19, 2002) (“Prohibitions E&J”).

²⁴ 36 U.S.C. § 510(c) (referencing 52 U.S.C. § 30121(b)); BCRA Section 308(a), 116 Stat. 104 (referencing the provision now codified at 52 U.S.C. § 30121(b)). BCRA also added a requirement that inaugural committees disclose, in a report filed with the Commission within 90 days after the inaugural ceremony, certain donations made to the committee. See 36 U.S.C. § 510(b); 52 U.S.C. § 30104(h).

²⁵ See Presidential Inaugural Committee Reporting and Prohibition on Accepting Donations from Foreign Nationals, 69 Fed. Reg. 59,775, 59,778 (Oct. 6, 2004) (“Inaugural Committee E&J”); see also 11 C.F.R. § 110.20(a)(4); Prohibitions E&J, 67 Fed. Reg. at 69,940.

which implements BCRA's other prohibitions on foreign national contributions and donations.²⁶

The "directly or indirectly" language was incorporated by Congress in BCRA in the Act's prohibition on foreign nationals making a contribution or donation.²⁷ The Commission has consistently interpreted the "directly or indirectly" prohibition in the context of contributions from domestic subsidiaries of foreign companies as subject to two requirements: (1) the funds used to make the contributions must be generated solely by domestic operations, and (2) no foreign national may participate in decisions concerning the making of contributions.²⁸ The regulation at 11 C.F.R. § 110.20(i) provides further post-BCRA guidance regarding this second requirement. Specifically, it prohibits foreign nationals from directing, dictating, controlling, or directly or indirectly participating in the decision-making process of any person, such as a

²⁶ See Inaugural Committee E&J, 69 Fed. Reg. at 59,778 (recognizing that BCRA did not expressly forbid foreign nationals from making donations to inaugural committees but adopting regulation because, "in order to effectuate BCRA's ban on acceptance of donations from foreign nationals, it was also necessary to impose a ban on the direct or indirect making of donations by foreign nationals to an inaugural committee"). The Commission further concluded that it has enforcement authority with respect to BCRA's amendment to 36 U.S.C. § 510, which pertains to inaugural committees. *Id.*

²⁷ 52 U.S.C. § 30121(a)(1). The Act had previously prohibited foreign national contributions made "directly or through any other person." See Prohibitions E&J, 67 Fed. Reg. at 69,943. Commission regulations had used the "directly or indirectly" language in its pre-BCRA regulations in implementing the earlier statutory language. See *id.*

²⁸ See 11 C.F.R. §§ 110.20(b), (i); see also Advisory Op. 2006-15 (TransCanada); MUR 6093 (Transurban Grp.). In Advisory Opinion 2006-15 (TransCanada), the Commission determined that the prohibition on foreign national contributions did not generally prohibit donations made by U.S. subsidiaries of foreign corporations, so long as the funds used to make the donations are generated solely by domestic operations and there is no involvement of foreign nationals in decisions regarding such donations. Advisory Op. 2006-15 (TransCanada). In MUR 6093 (Transurban Grp.), the Commission found that the Act was violated where the foreign parent company's board of directors directly participated in determining whether to continue the political contributions policy of its U.S. subsidiaries. See MUR 6093 Factual and Legal Analysis ("F&LA") at 3-4. See also MUR 6184, F&LA at 6-7 (Skyway Concession Company, LLC) (concluding that the Act was violated where a foreign national CEO participated in the subsidiary's election-related activities by vetting the campaign solicitations forwarded to him by the company's government relations consultant or deciding which nonfederal committees would receive contributions from the company); MUR 7122 (American Pacific International Capital, Inc. ("APIC")) (Commission found reason to believe that APIC, a domestic corporation owned by a foreign company, violated 52 U.S.C. § 30121(a)(1)(A) where the available information showed that foreign nationals may have been involved in making the contributions at issue because the APIC board of directors, which included foreign national directors, apparently approved a proposal by an APIC corporate officer, a U.S. citizen, to contribute).

corporation, with respect to such corporation's federal or non-federal election-related activities.²⁹
 This activity includes "decisions concerning the making of contributions, donations,
 expenditures, or disbursements in connection with elections for any Federal, State, or local
 office."³⁰ The Commission began applying these two requirements prior to BCRA, when the
 Act prohibited foreign national contributions made "directly or through any other person,"³¹ and
 it continues to do so in post-BCRA enforcement matters.³²

As noted above, CITGO is wholly owned by Respondent CITGO Holding, Inc., which in
 turn is wholly owned by PDVSA, a corporation owned by the Bolivarian Republic of Venezuela

²⁹ 11 C.F.R. § 110.20(i).

³⁰ *Id.*

³¹ See 2 U.S.C. § 441e(a) (2000). Pre-BCRA Advisory Opinions dating back to 1978 determined that "directly or through any another person" required that the funds used for domestic subsidiary contributions were domestically generated and that no foreign nationals participated in the contribution decision-making. For example, in Advisory Opinion 1985-3 (Diridon), the Commission determined that:

Since, however, 441e prohibits contributions by a foreign national through any other person, and since the parent Canadian corporation is both a person, 2 U.S.C. 431(11), and a foreign national by application of 22 U.S.C. 611(b)(3), it follows that a contribution by [the domestic subsidiary] may only be made or accepted under certain conditions. Specifically, the parent Canadian corporation may not directly or indirectly provide the funds for such a political contribution. Nor may that corporation or any other person who is a foreign national under 2 U.S.C. 441e have any decision-making role or control with respect to the making of any political contribution by [the domestic subsidiary].

(citation omitted). See also Advisory Op. 1989-20 (Kuilima) (concluding that domestic subsidiary failed both the funding and decision-making requirements); Advisory Op. 1992-16 (Nansay) ("When considering political contributions by domestic subsidiaries of foreign corporations, the Commission has consistently interpreted 441e to prohibit any director or officer of the company or its parent who is a foreign national, or any other foreign national, from participating in any way in the decision-making process with regard to making contributions to candidates"); Advisory Op. 1978-21 (Budd Citizenship Committee) (concluding that the political action committee of a domestic corporation may continue to operate after the corporation is acquired by a subsidiary of a foreign corporation, so long as the individuals who exercise decision-making authority with respect to PAC activities are citizens of the U.S. or lawfully admitted for permanent residence in the U.S.). The Commission applied the two requirements in pre-BCRA enforcement matters as well. See, e.g., MUR 3460 (Sports Shinko Co., Ltd.) F&LA.

³² See *supra* n.28; MUR 6093 (Transurban Grp.); MUR 7122 (APIC); see also MUR 6099 (Waverley Glen Systems Ltd.) F&LA at 4 (looking to two factors in addressing the issue of whether a domestic subsidiary of a foreign national may make contributions in connection with local, state, or federal campaigns for political office: "the source of the funds used to make the contributions and the nationality status of the decision makers"); Certification ¶ 4, MUR 6099 (May 7, 2009).

1 and thus a foreign national under the Act.³³ The Complaint alleges that all the members of
 2 CITGO's board were foreign nationals at the time that the donation was made.³⁴ The Complaint
 3 further asserts that CITGO may not rely on protections afforded to domestic subsidiaries of a
 4 foreign national corporation because the leadership of CITGO consisted of foreign members who
 5 made at least some decisions regarding the donation.³⁵

6 CITGO and CITGO Holding, Inc., argue that the donation to the Inaugural Committee
 7 was permissible because CITGO is not a foreign national and "donated its own funds, derived
 8 entirely from its domestic operations."³⁶ These Respondents are silent as to the nationality status
 9 of the individuals involved in making the donation and provide no information at all regarding
 10 the circumstances of the donation. Instead, these Respondents maintain that the requirement that

³³ See Compl. at 3. With respect to PDVSA's status as an instrumentality of the Venezuelan government, it does not appear that PDVSA is entitled to sovereign immunity under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602-1611, for actions relating to the making of a donation. As in previous Commission matters involving foreign state respondents where the Commission has asserted jurisdiction, the "commercial activity" exception to FSIA should apply here. See *id.* § 1605(a)(2). In MUR 2892 (Coordination Council of North American Affairs ("CCNAA")), the Commission determined that the Act conferred jurisdiction over an instrumentality of Taiwan, that the FSIA commercial activity exception appeared to apply, and that Congress "explicitly prohibited" foreign states from making contributions and "granted the Commission exclusive jurisdiction with respect to civil enforcement of [the Act]" over such persons. MUR 2892 (CCNAA) F&LA at 7-11. In MUR 4583 (Embassy of India), the Commission found reason to believe and probable cause to believe that the Embassy violated 2 U.S.C. §§ 441e and 441f (now 52 U.S.C. §§ 30121 and 30122) and referred the matter to the Department of Justice for criminal prosecution but elected to admonish the Embassy and take no further action after DOJ did not pursue the matter. See Certifications, MUR 4583 (Nov. 12, 1996, Nov. 10, 1998, Sept. 7, 1999); Gen. Counsel's Rpt. at 1, MUR 4583 (Aug. 19, 1999); see also Letter from Lawrence M. Noble, General Counsel, FEC, to The Honorable Wajahat Habibullah, Embassy of India (Jan. 16, 1997) (stating that Commission has "exclusive jurisdiction with respect to the civil enforcement of [the Act], the U.S. law that in relevant part prohibits foreign nationals and foreign governments from making direct or indirect contributions to U.S. elections"). In MUR 3801 (Royal Embassy of Saudi Arabia), the Commission found reason to believe the foreign sovereign had violated the Act but closed the file for reasons apparently unrelated to jurisdiction. Gen. Counsel's Rpt at 7-8, MUR 3801 (Apr. 24, 1995); Certification, MUR 3801 (May 25, 1995); Inaugural Committee E&J, 69 Fed. Reg. at 59,778 (recognizing Commission's exclusive enforcement authority of BCRA's inaugural committee foreign national provisions).

³⁴ Compl. at 9-10.

³⁵ *Id.* (citing Advisory Op. 2006-15 (TransCanada)).

³⁶ CITGO Resp. at 2-3.

no individual foreign national can be involved in decisions regarding the making of donations only applies to election-related activities as specified in 11 C.F.R. § 110.20(i), not inaugural donations addressed under 11 C.F.R. § 110.20(j).³⁷ Respondents argue that since inaugural committees are not recognized as engaging in election-related activities, and since the Commission did not broaden section 110.20(i) through rulemaking when enacting § 110.20(j) more than two years later, section 110.20(i) does not apply to inaugural committee donations made by United States corporations.³⁸

The Commission agrees that the CITGO Respondents' liability does not depend on the application of section 110.20(i), which explicitly applies to "election-related activities."³⁹ The proper test of the CITGO Respondents' liability is section 110.20(j), which addresses the only non-election context to which Congress has applied the foreign national prohibition. For purposes of this matter, that regulation concerns whether a foreign national "directly or indirectly" made CITGO's \$500,000 donation to the Inaugural Committee. The Commission has not explained the meaning of "indirectly" in 11 C.F.R. § 110.20(j) since its adoption in 2004. But, the Commission expressly stated at the time it adopted that regulation that the inaugural committee provisions were intended to be consistent with the structure of the rest of 11 C.F.R. § 110.20.⁴⁰ Hence, these circumstances indicate that the Commission's longstanding interpretation of the phrase "directly or indirectly" with respect to making contributions and

³⁷ *Id.* at 5-6.

³⁸ *Id.*; see also Advisory Opinion 1980-144 (Presidential Inaugural Committee – 1981) (concluding that funds received and expended by inaugural committee are neither "contributions" nor "expenditures" because they "are used to finance inaugural activities rather than any Federal election").

³⁹ 11 C.F.R. § 110.20(i).

⁴⁰ See Inaugural Committee E&J, 69 Fed. Reg. at 59,778.

1 donations in elections, both pre- and post-BCRA, is applicable to the same phrase with respect to
 2 the making of donations to inaugural committees now subject to the foreign national prohibition.
 3 Under the longstanding interpretation of “directly or indirectly,” as explained above, a domestic
 4 subsidiary of a foreign corporation is deemed to be a foreign national making a direct or indirect
 5 contribution or donation when the funds used for the donation are not domestically generated *or*
 6 when any foreign nationals have participated in the decision to make the contribution or
 7 donation.⁴¹

8 The available information indicates that CITGO had ample domestic funds to make the
 9 \$500,000 donation to the Inaugural Committee. However, the factual record here raises the
 10 inference that foreign nationals participated in the decision to make the \$500,000 donation. The
 11 CITGO and CITGO Holding, Inc., Response does not answer the Complaint’s allegation that
 12 CITGO’s entire board at the time of the donation consisted of foreign nationals, including a
 13 board member who served as CITGO’s president and CEO. Neither does the Response explain
 14 the circumstances of the donation, such as whether a U.S. citizen or foreign national made the
 15 decision to donate or authorized the wire transfer. Additionally, according to the Complaint,
 16 CITGO is closely intertwined with Venezuela, as “[s]enior managers from the parent [PDVSA]
 17 are cycled in and out of U.S. offices.”⁴² These circumstances, coupled with the considerable

⁴¹ See Advisory Opinion 1981-36 (Japan Business Assoc. of Southern California) (analyzing foreign national direction of domestic subsidiary activities under directly or “through any other person” statutory language); *see also supra* nn.23-24; Prohibitions E&J, 67 Fed. Reg. at 69,943-69,944 (rejecting suggestion that BCRA’s use of “indirectly” required prohibition on all contributions and donations from domestic subsidiaries of foreign corporations for several reasons, including policy reasons set forth in “series of Commission advisory opinions over more than two decades that have affirmed the participation of [domestic] subsidiaries in elections in the United States . . . so long as there is no involvement of foreign nationals in decisions regarding such participation and so long as foreign nationals are not solicited for the funds to be used”).

⁴² Compl. at 4 (quoting Joe Carroll, *Venezuela Is Pawning Pieces of Iconic American Brand Citgo to Survive*, BLOOMBERG (Oct. 6, 2016), *available at* <https://bloom.bg/2oF8MVe>).

1 control that the Venezuelan government apparently had in CITGO operations and in the absence
2 of any explanation by Respondents, raise a sufficient inference that foreign nationals on
3 CITGO's board and in its holding companies may have indirectly made the donation to the
4 Inaugural Committee, which the regulation prohibits.⁴³ Accordingly, the Commission has
5 determined to find reason to believe that CITGO Petroleum Corporation and CITGO Holding,
6 Inc., violated 11 C.F.R. § 110.20(j) by making a foreign national donation.

⁴³ The Commission has recognized circumstances where contributions would be permissible even if foreign nationals were part of the domestic subsidiary's board of directors. For example, in Advisory Opinion 2000-17 (Extendicare Health Services, Inc.), the Commission allowed the domestic subsidiary of a foreign company to form a "special committee" with the authority to establish and administer a separate segregated fund because that committee was comprised only of U.S. citizens or permanent resident aliens residing in the United States. Advisory Op. 2000-17 at 2-6. Where decision-making authority is vested with U.S. citizens or permanent resident aliens, foreign national corporate board members must not determine who will exercise decision-making authority. *See id.*; *see also* Advisory Op. 1990-8 (CIT Group Holdings, Inc.); MUR 3460 (Sports Shinko Co., Ltd.) F&LA at 11. This ensures the exclusion of foreign nationals from direct or indirect participation in the decision-making process related to activities prohibited under the Act. *See* MUR 3460, F&LA at 11. The available information in this matter, however, does not indicate whether CITGO had any such arrangement.

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4 RESPONDENT: Petroléos de Venezuela, S.A. MUR 7243

5
6 **I. INTRODUCTION**

7 CITGO Petroleum Corporation (“CITGO”) is an energy company incorporated in
8 Delaware¹ and headquartered in Houston, Texas.² It focuses on the “refining, marketing, and
9 transportation of petroleum products, including gasoline, diesel fuel, jet fuel, petrochemicals and
10 lubricants.” CITGO is wholly owned by CITGO Holding, Inc., a Delaware corporation, which
11 describes itself as an “indirect, wholly owned subsidiary of a foreign corporation,” Petroléos de
12 Venezuela, S.A. (“PDVSA”).³ PDVSA is the Venezuelan state-owned oil and natural gas
13 company.⁴

14 CITGO donated \$500,000 to the 58th Presidential Inaugural Committee (“Inaugural
15 Committee”) on December 22, 2016. The Complaint in this matter alleges that foreign nationals

¹ See State of Delaware Department of State: Division of Corporations, Entity Details, *available at* <https://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx>.

² See <https://web.archive.org/web/20180116041427/http://citgo.com/Home.jsp/> (snapshot of Jan. 16, 2018). The Inaugural Committee’s disclosure report includes CITGO’s Houston, Texas address with respect to the donation at issue. See Inaugural Committee Amended 2017 90 Day Post-Inaugural Report (June 28, 2017) at 21.

³ See <https://web.archive.org/web/20180116041427/http://citgo.com/Home.jsp/> (snapshot of Jan. 16, 2018). It is unclear what CITGO means by “indirect” when it refers to an “indirect wholly owned subsidiary of a foreign corporation.” An “indirect” subsidiary has been defined in another context as a “company that is controlled by a subsidiary of a company.” See 12 C.F.R. § 243.2(p) (defining indirect subsidiary with respect to banks and the Federal Reserve System).

⁴ See <https://web.archive.org/web/20180116041427/http://citgo.com/Home.jsp/> (snapshot from Jan. 16, 2018). In 1986, PDVSA purchased a 50 percent interest in CITGO. *Id.* PDVSA acquired the remaining half of CITGO in 1990. *Id.* PDVSA describes itself as a “corporation property of the Bolivarian Republic of Venezuela, and subordinated to the Venezuelan state.” See PDVSA.com, *available at* http://www.pdvs.com/index.php?option=com_content&view=article&id=6541&Itemid=888&lang=en (last visited Mar. 18, 2019); *see also* Exec. Order No. 13,827 at § 3(d), 83 Fed. Reg. 12,469 (Mar. 21, 2018) (defining “Government of Venezuela” as including “any political subdivision, agency, or instrumentality thereof, including . . . Petroleos de Venezuela, S.A. (PDVSA)”).

were involved in the decision to make the donation, and that CITGO and its parent corporations violated the Commission's regulations by making a donation from a foreign national. PDVSA, the foreign parent of CITGO Holding, Inc., did not respond to the Complaint.

As set forth below, because it appears reasonably likely that foreign nationals participated in the decision to make CITGO's donation to the Inaugural Committee, the Commission has determined to find reason to believe that PDVSA violated 11 C.F.R. § 110.20(j).

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

The President-elect appoints a Presidential Inaugural Committee to be in charge of the Presidential inaugural ceremony and the functions and activities connected with the ceremony.⁵ Here, the Inaugural Committee was formed after the 2016 election to plan activities associated with President Donald J. Trump's inauguration. The Inaugural Committee filed a post-inaugural report on April 18, 2017, disclosing its receipt of a \$500,000 donation from CITGO on December 22, 2016.⁶ CITGO made this donation via wire transfer from its account with the Bank of Texas. The Inaugural Committee's donation page of its website stated that "contributions from foreign nationals, including foreign corporations, are prohibited."

The available information indicates that throughout the month of December 2016, CITGO's account held an average daily balance of over \$89.5 million, with a minimum balance of over \$24.6 million. Additionally, on December 22, 2016, the date of the donation to the

⁵ See 36 U.S.C. § 501(1) (defining "inaugural committee"); 11 C.F.R. § 104.21(a)(1) (same).

⁶ See Inaugural Committee Amended 2017 90 Day Post-Inaugural Report (June 28, 2017) at 21, *available at* [http://docquery.fec.gov/pdf/700/2 01706290300159700/201706290300159700.pdf](http://docquery.fec.gov/pdf/700/2%201706290300159700/201706290300159700.pdf) (amending report filed on April 18, 2017). The available information, which includes the FEC contributor database, does not indicate that CITGO has made any other contributions or donations.

Inaugural Committee, the CITGO account had a balance of nearly \$120 million, with all of it generated from CITGO's U.S. operations.

The available information does not describe the circumstances of the donation to the Inaugural Committee or rebut the Complaint's allegation that CITGO's Board of Directors at the time of the donation consisted entirely of foreign nationals. According to publicly available information, much of which comes from CITGO itself, CITGO's Board of Directors at the time of the \$500,000 donation consisted of Chairman Nelson Martinez,⁷ Sergio Antonio Tovar, Jesús Luongo, and Antón Castillo, all of whom are allegedly nationals of Venezuela.⁸ Further, Martinez simultaneously served as CITGO's President and Chief Executive Officer at the time of CITGO's donation.⁹

Additionally, at least some of the CITGO board members at the time of the donation apparently held concurrent positions within PDVSA, the foreign parent that the Venezuelan

⁷ In January 2017, approximately one month after the donation was made, Martinez was reportedly named as Venezuela's Minister of Petroleum. See Reuters Staff, *Venezuela Names Pereira Interim President of U.S. Refiner CITGO*, REUTERS (Apr. 28, 2017), available at <http://www.businessinsider.com/r-venezuela-names-pereira-interim-president-of-us-refiner-citgo-2017-4>. Martinez served in that post until August 2017 when he was appointed as the president of PDVSA. See Jose Orozco, *Venezuela's Oil Minister and State Oil Firm Chief to Switch Roles, Maduro Says*, BLOOMBERG (Aug. 24, 2017), available at <https://www.bloomberg.com/news/articles/2017-08-25/venezuela-oil-minister-pdvsa-head-to-switch-roles-maduro-says>. As reported on December 13, 2018, Martinez is now deceased. See Fabiola Zerpa, *Ex-Venezuelan Oil Minister Nelson Dies While in Custody*, BLOOMBERG (Dec. 13, 2018), available at <https://www.bloomberg.com/news/articles/2018-12-13/ex-citgo-head-nelson-martinez-dies-under-custody-in-venezuela>.

⁸ See Compl. at 9-10; CITGO Operations – CITGO Board of Directors, available at <https://web.archive.org/web/20160706205456/http://www.citgo.com:80/AboutCITGO/Operations/BoardOfDirectors.jsp> (snapshot from July 6, 2016).

⁹ See CITGO Operations – CITGO Officer Profiles, available at <https://web.archive.org/web/20170109041950/https://www.citgo.com/AboutCITGO/Operations/OfficerProfiles.jsp> (snapshot from Jan. 9, 2017).

government owns.¹⁰ Jesús Luongo, for example, served on two PDVSA boards concurrently.¹¹ Although CITGO Holding, Inc., and the CITGO Board of Directors were purportedly responsible for appointing CITGO's board members and executive officers, respectively,¹² the Venezuelan government apparently had considerable influence over key personnel decisions at CITGO. For example, Venezuela's President on November 22, 2017, reportedly named Asdrúbal Chávez, a cousin of former President Hugo Chávez, as the new president of CITGO in an event broadcast on state television.¹³ The CITGO Board of Directors confirmed Chávez a week later as the acting president and CEO of CITGO.¹⁴

B. Legal Analysis

The Federal Election Campaign Act of 1971, as amended (the "Act"), has long prohibited the making and receipt of foreign national contributions in connection with elections in the United States.¹⁵ "Foreign national" is defined as including a foreign government; an individual who is

¹⁰ See CITGO Operations – CITGO Board of Directors, <https://web.archive.org/web/20161221195224/http://www.citgo.com/AboutCITGO/Operations/BoardOfDirectors.jsp> (snapshot from Dec. 21, 2016).

¹¹ *Id.* Specifically, Luongo served on the PDV Maintenance and PDVSA Engineering and Construction boards.

¹² *Id.*; see also Press Release, CITGO Announces Senior Staff Changes, [www.citgo.com](http://media.citgo.com/2006-03-31-CITGO-Announces-Senior-Staff-Changes) (May 31, 2006); available at <http://media.citgo.com/2006-03-31-CITGO-Announces-Senior-Staff-Changes>.

¹³ See Rachele Krygier and Anthony Faiola, *Top Executives of U.S.-based Citgo Detained in Venezuela Corruption Probe*, WASHINGTONPOST (Nov. 22, 2017), available at https://www.washingtonpost.com/world/the_americas/top-executives-of-citgo-detained-in-venezuela-corruption-probe/2017/11/22/d3eeb8e2-cfa2-11e7-a87b-47f14b73162a_story.html?utm_term=.a563190fd203. During 2017, CITGO's acting president and chief executive and five vice presidents were arrested in Venezuela on corruption charges. *Id.*

¹⁴ See CITGO Newsroom - Asdrúbal Chávez Appointed Acting President and CEO of CITGO Petroleum Corporation (Nov. 29, 2017), available at <http://media.citgo.com/2017-11-29-Asdrubal-Chavez-Appointed-Acting-President-and-CEO-of-CITGO-Petroleum-Corporation>.

¹⁵ See 52 U.S.C. § 30121(a) (formerly 2 U.S.C. § 441e, added to the Act in 1976, Pub. L. 94-283, 90 Stat. 493); see also Advisory Opinion 1999-28 (Bacardi-Martini USA) at 2 (quoting *United States v. Kanchanalak*, 192 F.3d 1037 (D.C. Cir. 1999), as recognizing that Commission had "consistently interpreted . . . since 1976" foreign national prohibition to extend to state and local elections).

not a citizen of the United States and is not lawfully admitted for permanent residence; and a corporation, organization, or other group of persons organized under the laws of or having its principal place of business in a foreign country.¹⁶ In the Bipartisan Campaign Reform Act of 2002 (“BCRA”), Congress expanded the foreign national prohibition to expressly prohibit “donations” in addition to “contributions.”¹⁷ It also codified the Commission’s longstanding interpretation of the prohibition, expressly applying it to state and local elections as well as federal elections.¹⁸ Further, BCRA broadened the foreign national prohibition to address presidential inaugural committee donations, providing that an inaugural committee shall not accept any donation from a foreign national, as that term is defined in the Act.¹⁹ The Commission’s implementing regulation at 11 C.F.R. § 110.20(j) states that no person shall knowingly accept from a foreign national any donation to an inaugural committee and that a foreign national shall not “directly or indirectly” make a donation to an inaugural committee.

The Commission incorporated some aspects of existing Commission regulations in its implementation of BCRA’s inaugural committee foreign national prohibition. For example, the Commission explained that it interpreted the statutory prohibition of an inaugural committee’s acceptance of a foreign national’s donation to require a “knowing[]” standard to be consistent

¹⁶ 52 U.S.C. § 30121(b) (defining “foreign national” for purposes of the Act, including by reference to 22 U.S.C. § 611(b)); *see also* 36 U.S.C. § 510(c) (incorporating the Act’s definition of “foreign national” in inaugural committee foreign national provision).

¹⁷ Pub. Law 107-155 § 308, 116 Stat. 81, 103-04 (Mar. 27, 2002), *codified at* 36 U.S.C. § 510.

¹⁸ *See* Contribution Limits and Prohibitions, 67 Fed. Reg. 69,928, 69,940 (Nov. 19, 2002) (“Prohibitions E&J”).

¹⁹ 36 U.S.C. § 510(c) (referencing 52 U.S.C. § 30121(b)); BCRA Section 308(a), 116 Stat. 104 (referencing the provision now codified at 52 U.S.C. § 30121(b)). BCRA also added a requirement that inaugural committees disclose, in a report filed with the Commission within 90 days after the inaugural ceremony, certain donations made to the committee. *See* 36 U.S.C. § 510(b); 52 U.S.C. § 30104(h).

with the treatment of other committees' acceptance of foreign national contributions and to provide the protection afforded to those other committees.²⁰ Similarly, the Commission extended the prohibition on the making of foreign national donations to inaugural committees, including the existing "directly or indirectly" language, to effectuate the prohibition on the acceptance of such donations and to be consistent with the structure of current section 110.20, which implements BCRA's other prohibitions on foreign national contributions and donations.²¹

The "directly or indirectly" language was incorporated by Congress in BCRA in the Act's prohibition on foreign nationals making a contribution or donation.²² The Commission has consistently interpreted the "directly or indirectly" prohibition in the context of contributions from domestic subsidiaries of foreign companies as subject to two requirements: (1) the funds used to make the contributions must be generated solely by domestic operations, and (2) no

²⁰ See Presidential Inaugural Committee Reporting and Prohibition on Accepting Donations from Foreign Nationals, 69 Fed. Reg. 59,775, 59,778 (Oct. 6, 2004) ("Inaugural Committee E&J"); see also 11 C.F.R. § 110.20(a)(4); Prohibitions E&J, 67 Fed. Reg. at 69,940.

²¹ See Inaugural Committee E&J, 69 Fed. Reg. at 59,778 (recognizing that BCRA did not expressly forbid foreign nationals from making donations to inaugural committees but adopting regulation because, "in order to effectuate BCRA's ban on acceptance of donations from foreign nationals, it was also necessary to impose a ban on the direct or indirect making of donations by foreign nationals to an inaugural committee"). The Commission further concluded that it has enforcement authority with respect to BCRA's amendment to 36 U.S.C. § 510, which pertains to inaugural committees. *Id.*

²² 52 U.S.C. § 30121(a)(1). The Act had previously prohibited foreign national contributions made "directly or through any other person." See Prohibitions E&J, 67 Fed. Reg. at 69,943. Commission regulations had used the "directly or indirectly" language in its pre-BCRA regulations in implementing the earlier statutory language. See *id.*

foreign national may participate in decisions concerning the making of contributions.²³ The regulation at 11 C.F.R. § 110.20(i) provides further post-BCRA guidance regarding this second requirement. Specifically, it prohibits foreign nationals from directing, dictating, controlling, or directly or indirectly participating in the decision-making process of any person, such as a corporation, with respect to such corporation's federal or non-federal election-related activities.²⁴ This activity includes "decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with elections for any Federal, State, or local office."²⁵ The Commission began applying these two requirements prior to BCRA, when the

²³ See 11 C.F.R. §§ 110.20(b), (i); *see also* Advisory Op. 2006-15 (TransCanada); MUR 6093 (Transurban Grp.). In Advisory Opinion 2006-15 (TransCanada), the Commission determined that the prohibition on foreign national contributions did not generally prohibit donations made by U.S. subsidiaries of foreign corporations, so long as the funds used to make the donations are generated solely by domestic operations and there is no involvement of foreign nationals in decisions regarding such donations. Advisory Op. 2006-15 (TransCanada). In MUR 6093 (Transurban Grp.), the Commission found that the Act was violated where the foreign parent company's board of directors directly participated in determining whether to continue the political contributions policy of its U.S. subsidiaries. *See* MUR 6093 Factual and Legal Analysis ("F&LA") at 3-4. *See also* MUR 6184, F&LA at 6-7 (Skyway Concession Company, LLC) (concluding that the Act was violated where a foreign national CEO participated in the subsidiary's election-related activities by vetting the campaign solicitations forwarded to him by the company's government relations consultant or deciding which nonfederal committees would receive contributions from the company); MUR 7122 (American Pacific International Capital, Inc. ("APIC")) (Commission found reason to believe that APIC, a domestic corporation owned by a foreign company, violated 52 U.S.C. § 30121(a)(1)(A) where the available information showed that foreign nationals may have been involved in making the contributions at issue because the APIC board of directors, which included foreign national directors, apparently approved a proposal by an APIC corporate officer, a U.S. citizen, to contribute).

²⁴ 11 C.F.R. § 110.20(i).

²⁵ *Id.*

1 Act prohibited foreign national contributions made “directly or through any other person,”²⁶ and
 2 it continues to do so in post-BCRA enforcement matters.²⁷

3 As noted above, CITGO is wholly owned by CITGO Holding, Inc., which in turn is
 4 wholly owned by Respondent PDVSA, a corporation owned by the Bolivarian Republic of

²⁶ See 2 U.S.C. § 441e(a) (2000). Pre-BCRA Advisory Opinions dating back to 1978 determined that “directly or through any another person” required that the funds used for domestic subsidiary contributions were domestically generated and that no foreign nationals participated in the contribution decision-making. For example, in Advisory Opinion 1985-3 (Diridon), the Commission determined that:

Since, however, 441e prohibits contributions by a foreign national through any other person, and since the parent Canadian corporation is both a person, 2 U.S.C. 431(11), and a foreign national by application of 22 U.S.C. 611(b)(3), it follows that a contribution by [the domestic subsidiary] may only be made or accepted under certain conditions. Specifically, the parent Canadian corporation may not directly or indirectly provide the funds for such a political contribution. Nor may that corporation or any other person who is a foreign national under 2 U.S.C. 441e have any decision-making role or control with respect to the making of any political contribution by [the domestic subsidiary].

(citation omitted). See also Advisory Op. 1989-20 (Kuilima) (concluding that domestic subsidiary failed both the funding and decision-making requirements); Advisory Op. 1992-16 (Nansay) (“When considering political contributions by domestic subsidiaries of foreign corporations, the Commission has consistently interpreted 441e to prohibit any director or officer of the company or its parent who is a foreign national, or any other foreign national, from participating in any way in the decision-making process with regard to making contributions to candidates.”); Advisory Op. 1978-21 (Budd Citizenship Committee) (concluding that the political action committee of a domestic corporation may continue to operate after the corporation is acquired by a subsidiary of a foreign corporation, so long as the individuals who exercise decision-making authority with respect to PAC activities are citizens of the U.S. or lawfully admitted for permanent residence in the U.S.). The Commission applied the two requirements in pre-BCRA enforcement matters as well. See, e.g., MUR 3460 (Sports Shinko Co., Ltd.) F&LA.

²⁷ See *supra* n.23; MUR 6093 (Transurban Grp.); MUR 7122 (APIC); see also MUR 6099 (Waverley Glen Systems Ltd.) F&LA at 4 (looking to two factors in addressing the issue of whether a domestic subsidiary of a foreign national may make contributions in connection with local, state, or federal campaigns for political office: “the source of the funds used to make the contributions and the nationality status of the decision makers”); Certification ¶ 4, MUR 6099 (May 7, 2009).

Venezuela and thus a foreign national under the Act.²⁸ The Complaint alleges that all the members of CITGO's board were foreign nationals at the time that the donation was made.²⁹ The Complaint further asserts that CITGO may not rely on protections afforded to domestic subsidiaries of a foreign national corporation because the leadership of CITGO consisted of foreign members who made at least some decisions regarding the donation.³⁰

The available record is silent as to the nationality status of the individuals involved in making the donation as well as the circumstances of the donation.

The Commission has determined that the test of PDVSA's liability is section 110.20(j), which addresses the only non-election context to which Congress has applied the foreign national prohibition. For purposes of this matter, that regulation concerns whether a foreign national "directly or indirectly" made CITGO's \$500,000 donation to the Inaugural Committee.

²⁸ See Compl. at 3. With respect to PDVSA's status as an instrumentality of the Venezuelan government, it does not appear that PDVSA is entitled to sovereign immunity under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602-1611, for actions relating to the making of a donation. As in previous Commission matters involving foreign state respondents where the Commission has asserted jurisdiction, the "commercial activity" exception to FSIA should apply here. See *id.* § 1605(a)(2). In MUR 2892 (Coordination Council of North American Affairs ("CCNAA")), the Commission determined that the Act conferred jurisdiction over an instrumentality of Taiwan, that the FSIA commercial activity exception appeared to apply, and that Congress "explicitly prohibited" foreign states from making contributions and "granted the Commission exclusive jurisdiction with respect to civil enforcement of [the Act]" over such persons. MUR 2892 (CCNAA) F&LA at 7-11. In MUR 4583 (Embassy of India), the Commission found reason to believe and probable cause to believe that the Embassy violated 2 U.S.C. §§ 441e and 441f (now 52 U.S.C. §§ 30121 and 30122) and referred the matter to the Department of Justice for criminal prosecution but elected to admonish the Embassy and take no further action after DOJ did not pursue the matter. See Certifications, MUR 4583 (Nov. 12, 1996, Nov. 10, 1998, Sept. 7, 1999); Gen. Counsel's Rpt. at 1, MUR 4583 (Aug. 19, 1999); see also Letter from Lawrence M. Noble, General Counsel, FEC, to The Honorable Wajahat Habibullah, Embassy of India (Jan. 16, 1997) (stating that Commission has "exclusive jurisdiction with respect to the civil enforcement of [the Act], the U.S. law that in relevant part prohibits foreign nationals and foreign governments from making direct or indirect contributions to U.S. elections"). In MUR 3801 (Royal Embassy of Saudi Arabia), the Commission found reason to believe the foreign sovereign had violated the Act but closed the file for reasons apparently unrelated to jurisdiction. Gen. Counsel's Rpt at 7-8, MUR 3801 (Apr. 24, 1995); Certification, MUR 3801 (May 25, 1995); Inaugural Committee E&J, 69 Fed. Reg. at 59,778 (recognizing Commission's exclusive enforcement authority of BCRA's inaugural committee foreign national provisions).

²⁹ Compl. at 9-10.

³⁰ *Id.* (citing Advisory Op. 2006-15 (TransCanada)).

1 The Commission has not explained the meaning of “indirectly” in 11 C.F.R. § 110.20(j) since its
 2 adoption in 2004. But, the Commission expressly stated at the time it adopted that regulation
 3 that the inaugural committee provisions were intended to be consistent with the structure of the
 4 rest of 11 C.F.R. § 110.20.³¹ Hence, these circumstances indicate that the Commission’s
 5 longstanding interpretation of the phrase “directly or indirectly” with respect to making
 6 contributions and donations in elections, both pre- and post-BCRA, is applicable to the same
 7 phrase with respect to the making of donations to inaugural committees now subject to the
 8 foreign national prohibition. Under the longstanding interpretation of “directly or indirectly,” as
 9 explained above, a domestic subsidiary of a foreign corporation is deemed to be a foreign
 10 national making a direct or indirect contribution or donation when the funds used for the
 11 donation are not domestically generated *or* when any foreign nationals have participated in the
 12 decision to make the contribution or donation.³²

13 The available information indicates that CITGO had ample domestic funds to make the
 14 \$500,000 donation to the Inaugural Committee. However, the factual record here raises the
 15 inference that foreign nationals participated in the decision to make the \$500,000 donation. And
 16 the available information does not answer the Complaint’s allegation that CITGO’s entire board
 17 at the time of the donation consisted of foreign nationals, including a board member who served

³¹ See Inaugural Committee E&J, 69 Fed. Reg. at 59,778.

³² See Advisory Opinion 1981-36 (Japan Business Assoc. of Southern California) (analyzing foreign national direction of domestic subsidiary activities under directly or “through any other person” statutory language); *see also supra* nn.18-19; Prohibitions E&J, 67 Fed. Reg. at 69,943-69,944 (rejecting suggestion that BCRA’s use of “indirectly” required prohibition on all contributions and donations from domestic subsidiaries of foreign corporations for several reasons, including policy reasons set forth in “series of Commission advisory opinions over more than two decades that have affirmed the participation of [domestic] subsidiaries in elections in the United States . . . so long as there is no involvement of foreign nationals in decisions regarding such participation and so long as foreign nationals are not solicited for the funds to be used”).

1 as CITGO's president and CEO. Neither does it explain the circumstances of the donation, such
 2 as whether a U.S. citizen or foreign national made the decision to donate or authorized the wire
 3 transfer. Additionally, according to the Complaint, CITGO is closely intertwined with
 4 Venezuela, as "[s]enior managers from the parent [PDVSA] are cycled in and out of U.S.
 5 offices."³³ These circumstances, coupled with the considerable control that the Venezuelan
 6 government apparently had in CITGO operations and in the absence of any explanation by
 7 Respondent, raise a sufficient inference that foreign nationals on CITGO's board and in its
 8 holding companies may have indirectly made the donation to the Inaugural Committee, which
 9 the regulation prohibits.³⁴ Accordingly, the Commission has determined to find reason to
 10 believe that Petróléos de Venezuela, S.A. violated 11 C.F.R. § 110.20(j) by making a foreign
 11 national donation.

³³ Compl. at 4 (quoting Joe Carroll, *Venezuela Is Pawning Pieces of Iconic American Brand Citgo to Survive*, BLOOMBERG (Oct. 6, 2016), available at <https://bloom.bg/2oF8MVe>).

³⁴ The Commission has recognized circumstances where contributions would be permissible even if foreign nationals were part of the domestic subsidiary's board of directors. For example, in Advisory Opinion 2000-17 (Extendicare Health Services, Inc.), the Commission allowed the domestic subsidiary of a foreign company to form a "special committee" with the authority to establish and administer a separate segregated fund because that committee was comprised only of U.S. citizens or permanent resident aliens residing in the United States. Advisory Op. 2000-17 at 2-6. Where decision-making authority is vested with U.S. citizens or permanent resident aliens, foreign national corporate board members must not determine who will exercise decision-making authority. *See id.*; *see also* Advisory Op. 1990-8 (CIT Group Holdings, Inc.); MUR 3460 (Sports Shinko Co., Ltd.) F&LA at 11. This ensures the exclusion of foreign nationals from direct or indirect participation in the decision-making process related to activities prohibited under the Act. *See* MUR 3460, F&LA at 11. The available information in this matter, however, does not indicate whether CITGO had any such arrangement.

ELW Edits

FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

RESPONDENTS: CITGO Petroleum Corporation MUR 7243
CITGO Holding, Inc.

I. INTRODUCTION

CITGO Petroleum Corporation (“CITGO”), a domestic subsidiary of a domestic holding company wholly owned by a foreign corporation, donated \$500,000 to the 58th Presidential Inaugural Committee (“Inaugural Committee”) on December 22, 2016. The Complaint in this matter alleges that foreign nationals participated in CITGO’s decision to make the donation and that CITGO and its parent corporations violated the Commission’s regulations by making a donation from a foreign national.

CITGO and its parent company, CITGO Holding, Inc., assert in a joint response that CITGO, a domestic corporation, permissibly made the donation with funds generated in the United States and that the nationality status of individuals involved in the decision-making is irrelevant in the context of donations to inaugural committees.¹

As set forth below, because it appears that foreign nationals participated in CITGO’s decision-making process to make the donation to the Inaugural Committee, the Commission finds reason to believe that CITGO and CITGO Holding, Inc. violated 11 C.F.R. § 110.20(j).

¹ Response of CITGO and CITGO Holding, Inc. (“CITGO Resp.”) at 3-4 (June 23, 2017).

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

The President-elect appoints a Presidential Inaugural Committee to be in charge of the Presidential inaugural ceremony and the functions and activities connected with the ceremony.² Here, the Inaugural Committee was formed after the 2016 election to plan activities associated with President Donald J. Trump’s inauguration. The Inaugural Committee filed a post-inaugural report on April 18, 2017, disclosing its receipt of a \$500,000 donation from CITGO on December 22, 2016.³ CITGO made this donation via wire transfer from its account with the Bank of Texas.⁴ The Inaugural Committee donation page of its website stated that “contributions from foreign nationals, including foreign corporations, are prohibited.”

CITGO is an energy company incorporated in Delaware⁵ and headquartered in Houston, Texas.⁶ It focuses on the “refining, marketing, and transportation of petroleum products, including gasoline, diesel fuel, jet fuel, petrochemicals and lubricants.”⁷ As noted in CITGO’s Response, CITGO is wholly owned by CITGO Holding, Inc., a Delaware corporation, “which is

² See 36 U.S.C. § 501(1) (defining “inaugural committee”); 11 C.F.R. § 104.21(a)(1) (same).

³ See Inaugural Committee Amended 2017 90 Day Post-Inaugural Report (June 28, 2017) at 21, *available at* [http://docquery.fec.gov/pdf/700/2 01706290300159700/201706290300159700.pdf](http://docquery.fec.gov/pdf/700/2%201706290300159700/201706290300159700.pdf) (amending report filed on April 18, 2017). The available information, which includes the FEC contributor database, does not indicate that CITGO has made any other contributions or donations.

⁴ CITGO Resp., Gina Renee Coon Decl. ¶ 3 (June 20, 2017).

⁵ See State of Delaware Department of State: Division of Corporations, Entity Details, *available at* <https://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx>.

⁶ See <https://web.archive.org/web/20180116041427/http://citgo.com/Home.jsp/> (snapshot of Jan. 16, 2018). The Inaugural Committee’s disclosure report includes CITGO’s Houston, Texas address with respect to the donation at issue. See Inaugural Committee Amended 2017 90 Day Post-Inaugural Report (June 28, 2017) at 21.

⁷ CITGO Resp. at 1.

an indirect, wholly owned subsidiary of a foreign corporation,” Petroléos de Venezuela, S.A. (“PDVSA”).⁸ PDVSA is the Venezuelan state-owned oil and natural gas company.⁹

CITGO’s Response and the attached Declaration of CITGO Assistant Treasurer Gina Renee Coon assert that throughout the month of December 2016, CITGO’s account held an average daily balance of over \$89.5 million, with a minimum balance of over \$24.6 million.¹⁰ Additionally, the Response and Declaration note that on December 22, 2016, the date of the donation to the Inaugural Committee, the CITGO account had a balance of nearly \$120 million, with all of it generated from CITGO’s U.S. operations.¹¹

CITGO’s Response does not describe the circumstances of the donation to the Inaugural Committee or rebut the Complaint’s allegation that CITGO’s Board of Directors at the time of the donation consisted entirely of foreign nationals. According to publicly available information, much of which comes from CITGO itself, CITGO’s Board of Directors at the time of the

⁸ *Id.* It is unclear what CITGO means by “indirect” when it refers to an “indirect, wholly-owned subsidiary of a foreign corporation.” An “indirect” subsidiary has been defined in another context as a “company that is controlled by a subsidiary of a company.” *See* 12 C.F.R. § 243.2(p) (defining indirect subsidiary with respect to banks and the Federal Reserve System).

⁹ *See* <https://web.archive.org/web/20180116041427/http://citgo.com/Home.jsp/> (snapshot from Jan. 16, 2018). In 1986, PDVSA purchased a 50 percent interest in CITGO. *Id.* PDVSA acquired the remaining half of CITGO in 1990. *Id.* PDVSA describes itself as a “corporation property of the Bolivarian Republic of Venezuela, and subordinated to the Venezuelan state.” *See* PDVSA.com, *available at* http://www.pdvs.com/index.php?option=com_content&view=article&id=6541&Itemid=888&lang=en (last visited Mar. 18, 2019); *see also* Exec. Order No. 13,827 at § 3(d), 83 Fed. Reg. 12,469 (Mar. 21, 2018) (defining “Government of Venezuela” as including “any political subdivision, agency, or instrumentality thereof, including . . . Petroleos de Venezuela, S.A. (PDVSA)”).

¹⁰ CITGO Resp. at 2; Coon Decl. ¶ 5.

¹¹ *Id.*

\$500,000 donation consisted of Chairman Nelson Martinez,¹² Sergio Antonio Tovar, Jesús Luongo, and Antón Castillo, all of whom are allegedly nationals of Venezuela.¹³ Further, Martinez simultaneously served as CITGO's President and Chief Executive Officer at the time of CITGO's donation.¹⁴

Additionally, at least some of the CITGO board members at the time of the donation apparently held concurrent positions within PDVSA, the foreign parent that the Venezuelan government owns.¹⁵ Jesús Luongo, for example, served on two PDVSA boards concurrently.¹⁶ Although CITGO Holding, Inc., and the CITGO Board of Directors were purportedly responsible for appointing CITGO's board members and executive officers, respectively,¹⁷ the Venezuelan government apparently had considerable influence over key personnel decisions at CITGO. For example, Venezuela's President on November 22, 2017, reportedly named

¹² In January 2017, approximately one month after the donation was made, Martinez was reportedly named as Venezuela's Minister of Petroleum. *See* Reuters Staff, *Venezuela Names Pereira Interim President of U.S. Refiner CITGO*, REUTERS (Apr. 28, 2017), *available at* <http://www.businessinsider.com/r-venezuela-names-pereira-interim-president-of-us-refiner-citgo-2017-4>. Martinez served in that post until August 2017 when he was appointed as the president of PDVSA. *See* Jose Orozco, *Venezuela's Oil Minister and State Oil Firm Chief to Switch Roles, Maduro Says*, BLOOMBERG (Aug. 24, 2017), *available at* <https://www.bloomberg.com/news/articles/2017-08-25/venezuela-oil-minister-pdvs-head-to-switch-roles-maduro-says>. As reported on December 13, 2018, Martinez is now deceased. *See* Fabiola Zerpa, *Ex-Venezuelan Oil Minister Nelson Dies While in Custody*, BLOOMBERG (Dec. 13, 2018), *available at* <https://www.bloomberg.com/news/articles/2018-12-13/ex-citgo-head-nelson-martinez-dies-under-custody-in-venezuela>.

¹³ *See* Compl. at 9-10; CITGO Operations – CITGO Board of Directors, *available at* <https://web.archive.org/web/20160706205456/http://www.citgo.com:80/AboutCITGO/Operations/BoardOfDirectors.jsp> (snapshot from July 6, 2016).

¹⁴ *See* CITGO Operations – CITGO Officer Profiles, *available at* <https://web.archive.org/web/20170109041950/https://www.citgo.com/AboutCITGO/Operations/OfficerProfiles.jsp> (snapshot from Jan. 9, 2017).

¹⁵ *See* CITGO Operations – CITGO Board of Directors, <https://web.archive.org/web/20161221195224/http://www.citgo.com/AboutCITGO/Operations/BoardOfDirectors.jsp> (snapshot from Dec. 21, 2016).

¹⁶ *Id.* Specifically, Luongo served on the PDV Maintenance and PDVSA Engineering and Construction boards.

¹⁷ *Id.*; *see also* Press Release, CITGO Announces Senior Staff Changes, [www.citgo.com](http://media.citgo.com/2006-03-31-CITGO-Announces-Senior-Staff-Changes) (May 31, 2006); *available at* <http://media.citgo.com/2006-03-31-CITGO-Announces-Senior-Staff-Changes>.

Asdrúbal Chávez, a cousin of former President Hugo Chávez, as the new president of CITGO in an event broadcast on state television.¹⁸ The CITGO Board of Directors confirmed Chávez a week later as the acting president and CEO of CITGO.¹⁹

B. Legal Analysis

The Federal Election Campaign Act of 1971, as amended (the “Act”) has long prohibited the making and receipt of foreign national contributions in connection with elections in the United States.²⁰ The Act’s definition of “foreign national” includes an individual who is not a citizen or national of the United States and who is not lawfully admitted for permanent residence, as well as a “foreign principal” as defined at 22 U.S.C. § 611(b), which, in turn, includes a “government of a foreign country” as well as a “partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.”²¹ In the Bipartisan Campaign Reform Act of 2002 (“BCRA”),²² Congress expanded the foreign national prohibition to expressly prohibit “donations” in addition to “contributions.” It also codified the Commission’s longstanding interpretation of the prohibition,

¹⁸ See Rachele Krygier and Anthony Faiola, *Top Executives of U.S.-based Citgo Detained in Venezuela Corruption Probe*, WASHINGTON POST (Nov. 22, 2017), available at https://www.washingtonpost.com/world/the_americas/top-executives-of-citgo-detained-in-venezuela-corruption-probe/2017/11/22/d3eeb8e2-cfa2-11e7-a87b-47f14b73162a_story.html?utm_term=.a563190fd203. During 2017, CITGO’s acting president and chief executive and five vice presidents were arrested in Venezuela on corruption charges. *Id.*

¹⁹ See CITGO Newsroom - *Asdrúbal Chávez Appointed Acting President and CEO of CITGO Petroleum Corporation* (Nov. 29, 2017), available at <http://media.citgo.com/2017-11-29-Asdrubal-Chavez-Appointed-Acting-President-and-CEO-of-CITGO-Petroleum-Corporation>.

²⁰ See 52 U.S.C. § 30121(a) (formerly 2 U.S.C. § 441e, added to the Act in 1976, Pub. L. 94-283, 90 Stat. 493); see also Advisory Opinion 1999-28 (Bacardi-Martini USA) at 2 (quoting *United States v. Kanchanalak*, 192 F.3d 1037 (D.C. Cir. 1999), as recognizing that Commission had “consistently interpreted . . . since 1976” foreign national prohibition to extend to state and local elections).

²¹ 52 U.S.C. § 30121(b); 22 U.S.C. § 611(b)(1), (3); see also 36 U.S.C. § 510(c) (incorporating the Act’s definition of “foreign national” in inaugural committee foreign national provision).

²² Pub. Law 107-155 § 308, 116 Stat. 81, 103-04 (Mar. 27, 2002), codified at 36 U.S.C. § 510.

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Factual and Legal Analysis

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1 expressly applying it to state and local elections as well as federal elections.²³ Further, BCRA
2 broadened the foreign national prohibition to address presidential inaugural committee donations,
3 providing that an inaugural committee shall not accept any donation from a foreign national, as
4 that term is defined in the Act.²⁴ The Commission's implementing regulation at 11 C.F.R.
5 § 110.20(j) states that no person shall knowingly accept from a foreign national any donation to
6 an inaugural committee and that a foreign national shall not "directly or indirectly" make a
7 donation to an inaugural committee.

8 The Commission incorporated some aspects of existing Commission regulations in its
9 implementation of BCRA's inaugural committee foreign national prohibition. For example, the
10 Commission explained that it interpreted the statutory prohibition of an inaugural committee's
11 acceptance of a foreign national's donation to require a "knowing[]" standard to be consistent
12 with the treatment of other committees' acceptance of foreign national contributions and to
13 provide the protection afforded to those other committees.²⁵ Similarly, the Commission
14 extended the prohibition to the making of foreign national donations to inaugural committees,

²³ See Contribution Limits and Prohibitions, 67 Fed. Reg. 69,928, 69,940 (Nov. 19, 2002) ("Prohibitions E&J").

²⁴ 36 U.S.C. § 510(c) (referencing 52 U.S.C. § 30121(b)); BCRA Section 308(a), 116 Stat. 104 (referencing the provision now codified at 52 U.S.C. § 30121(b)). BCRA also added a requirement that inaugural committees disclose, in a report filed with the Commission within 90 days after the inaugural ceremony, certain donations made to the committee. See 36 U.S.C. § 510(b); 52 U.S.C. § 30104(h).

²⁵ See Presidential Inaugural Committee Reporting and Prohibition on Accepting Donations from Foreign Nationals, 69 Fed. Reg. 59,775, 59,778 (Oct. 6, 2004) ("Inaugural Committee E&J"); see also 11 C.F.R. § 110.20(a)(4); Prohibitions E&J, 67 Fed. Reg. at 69,940.

1 including the existing “directly or indirectly” language, to effectuate the prohibition on the
 2 acceptance of such donations and to be consistent with the structure of current section 110.20,
 3 which implements BCRA’s other prohibitions on foreign national contributions and donations.²⁶

4 The “directly or indirectly” language was incorporated by Congress in BCRA in the
 5 Act’s prohibition on foreign nationals making a contribution or donation.²⁷ The Commission’s
 6 post-BCRA regulation at 11 C.F.R. § 110.20(i), for example, provides that a foreign national
 7 shall not direct, dictate, control, or “directly or indirectly” participate in the decision-making
 8 process of any person, such as a corporation, with regard to such person’s federal or non-federal
 9 election-related activities, such as decisions concerning the making of contributions, donations,
 10 expenditures, or disbursements.²⁸ The Commission has consistently interpreted the “directly or
 11 indirectly” prohibition, both prior to and since BCRA, to find a violation where foreign national

²⁶ See Inaugural Committee E&J, 69 Fed. Reg. at 59,778 (recognizing that BCRA did not expressly forbid foreign nationals from making donations to inaugural committees but adopting regulation because, “in order to effectuate BCRA’s ban on acceptance of donations from foreign nationals, it was also necessary to impose a ban on the direct or indirect making of donations by foreign nationals to an inaugural committee”). The Commission further concluded that it has enforcement authority with respect to BCRA’s amendment to 36 U.S.C. § 510, which pertains to inaugural committees. *Id.*

²⁷ 52 U.S.C. § 30121(a)(1). The Act had previously prohibited foreign national contributions made “directly or through any other person.” See Prohibitions E&J, 67 Fed. Reg. at 69,943. Commission regulations had used both the “directly or through any other person” and “directly or indirectly” language in its pre-BCRA regulations in implementing the earlier statutory language. See *id.* at 69,943-44 (explaining decision to use only “directly or indirectly” in several regulations implementing BCRA’s foreign national prohibition).

²⁸ 11 C.F.R. § 110.20(i); see also 11 C.F.R. § 110.20(b), (c), (d), (e), and (f) (also incorporating the “directly or indirectly” language). The Commission has explained that this provision also bars foreign nationals from “involvement in the management of a political committee.” Contribution Limits and Prohibitions, 67 Fed. Reg. 69928, 69946 (Nov. 19, 2002); see also Advisory Op. 2004-26 at 2-3 (Weller) (noting that foreign national prohibition at section 110.20(i) is broad and concluding that, while a foreign national fiancé of the candidate could participate in committees’ activities as a volunteer without making a prohibited contribution, she “must not participate in [the candidate’s] decisions regarding his campaign activities” and “must refrain from managing or participating in the decisions of the Committees.”).

1 officers or directors of a U.S. company participated in the company's decisions to make
 2 contributions or in the management of its separate segregated fund.²⁹

3 As noted above, CITGO is wholly owned by Respondent CITGO Holding, Inc., which in
 4 turn is wholly owned by PDVSA, a corporation owned by the Bolivarian Republic of Venezuela
 5 and thus a foreign national under the Act.³⁰ The Complaint alleges that all the members of

²⁹ See 11 C.F.R. § 110.20(b), (i); *see also* Conciliation Agreement, MUR 6093 (Transurban Grp.) (U.S. subsidiary violated Act by making contributions after its foreign parent company's board of directors directly participated in determining whether to continue political contributions policy of its U.S. subsidiaries); Conciliation Agreement, MUR 6184 (Skyway Concession Company, LLC) (U.S. company violated Act by making contributions after its foreign national CEO participated in company's election-related activities by vetting campaign solicitations or deciding which nonfederal committees would receive company contributions, authorizing release of company funds to make contributions, and signing contribution checks); Conciliation Agreement, MUR 7122 (American Pacific International Capital, Inc.) (U.S. corporation owned by foreign company violated Act by making contribution after its board of directors, which included foreign nationals, approved proposal by U.S. citizen corporate officer to contribute). Pre-BCRA Advisory Opinions dating back to 1978 determined that "directly or through any another person" required, among other factors, that no foreign nationals participated in the contribution decision-making. *See, e.g.*, Advisory Opinion 1985-3 (Diridon); Advisory Op. 1992-16 (Nansay) ("When considering political contributions by domestic subsidiaries of foreign corporations, the Commission has consistently interpreted 441e to prohibit any director or officer of the company or its parent who is a foreign national, or any other foreign national, from participating in any way in the decision-making process with regard to making contributions to candidates."); *and see* 2 U.S.C. § 441e(a) (2000).

³⁰ *See* Compl. at 3. With respect to PDVSA's status as an instrumentality of the Venezuelan government, it does not appear that PDVSA is entitled to sovereign immunity under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602-1611, for actions relating to the making of a donation. As in previous Commission matters involving foreign state respondents where the Commission has asserted jurisdiction, the "commercial activity" exception to FSIA should apply here. *See id.* § 1605(a)(2). In MUR 2892 (Coordination Council of North American Affairs ("CCNAA")), the Commission determined that the Act conferred jurisdiction over an instrumentality of Taiwan, that the FSIA commercial activity exception appeared to apply, and that Congress "explicitly prohibited" foreign states from making contributions and "granted the Commission exclusive jurisdiction with respect to civil enforcement of [the Act]" over such persons. MUR 2892 (CCNAA) F&LA at 7-11. In MUR 4583 (Embassy of India), the Commission found reason to believe and probable cause to believe that the Embassy violated 2 U.S.C. §§ 441e and 441f (now 52 U.S.C. §§ 30121 and 30122) and referred the matter to the Department of Justice for criminal prosecution but elected to admonish the Embassy and take no further action after DOJ did not pursue the matter. *See* Certifications, MUR 4583 (Nov. 12, 1996, Nov. 10., 1998, Sept. 7, 1999); Gen. Counsel's Rpt. at 1, MUR 4583 (Aug. 19, 1999); *see also* Letter from Lawrence M. Noble, General Counsel, FEC, to The Honorable Wajahat Habibullah, Embassy of India (Jan. 16, 1997) (stating that Commission has "exclusive jurisdiction with respect to the civil enforcement of [the Act], the U.S. law that in relevant part prohibits foreign nationals and foreign governments from making direct or indirect contributions to U.S. elections"). In MUR 3801 (Royal Embassy of Saudi Arabia), the Commission found reason to believe the foreign sovereign had violated the Act but closed the file for reasons apparently unrelated to jurisdiction. Gen. Counsel's Rpt. at 7-8, MUR 3801 (Apr. 24, 1995); Certification, MUR 3801 (May 25, 1995); Inaugural Committee E&J, 69 Fed. Reg. at 59,778 (recognizing Commission's exclusive enforcement authority of BCRA's inaugural committee foreign national provisions).

CITGO's board were foreign nationals at the time that the donation was made.³¹ The Complaint further asserts that CITGO may not rely on protections afforded to domestic subsidiaries of a foreign national corporation because the leadership of CITGO consisted of foreign members who made at least some decisions regarding the donation.³²

CITGO and CITGO Holding, Inc., argue that the donation to the Inaugural Committee was permissible because CITGO is not a foreign national and "donated its own funds, derived entirely from its domestic operations."³³ Respondents are silent as to the nationality status of the individuals involved in making the donation and provide no information at all regarding the circumstances of the donation. Instead, Respondents maintain that the requirement that no individual foreign national can be involved in decisions regarding the making of donations only applies to election-related activities as specified in 11 C.F.R. § 110.20(i), not inaugural donations addressed under 11 C.F.R. § 110.20(j).³⁴ Respondents argue that since inaugural committees are not recognized as engaging in election-related activities, and since the Commission did not broaden section 110.20(i) through rulemaking when enacting § 110.20(j) more than two years

³¹ Compl. at 9-10.

³² *Id.*

³³ CITGO Resp. at 2-3.

³⁴ *Id.* at 5-6.

1 later, section 110.20(i) does not apply to inaugural committee donations made by United States
 2 corporations.³⁵

3 The Commission agrees that Respondents' liability does not depend on the application of
 4 section 110.20(i), which explicitly applies to "election-related activities."³⁶ The proper test of
 5 Respondents' liability is section 110.20(j), which addresses the only non-election context to
 6 which Congress has applied the foreign national prohibition. For purposes of this matter, that
 7 regulation concerns whether a foreign national "directly or indirectly" made CITGO's \$500,000
 8 donation to the Inaugural Committee. The Commission has not explained the meaning of
 9 "indirectly" in 11 C.F.R. § 110.20(j) since its adoption in 2004. But, the Commission expressly
 10 stated at the time it adopted that regulation that the inaugural committee provisions were
 11 intended to be consistent with the structure of the rest of 11 C.F.R. § 110.20.³⁷ Hence, these
 12 circumstances indicate that the Commission's longstanding interpretation of the phrase "directly
 13 or indirectly" with respect to making contributions and donations in elections, both pre- and
 14 post-BCRA, is applicable to the same phrase with respect to the making of donations to
 15 inaugural committees now subject to the foreign national prohibition. Under the longstanding
 16 interpretation of "directly or indirectly," as explained above, a domestic subsidiary of a foreign
 17 corporation is deemed to be a foreign national making a direct or indirect contribution or

³⁵ *Id.*; see also Advisory Opinion 1980-144 (Presidential Inaugural Committee – 1981) (concluding that funds received and expended by inaugural committee are neither "contributions" nor "expenditures" because they "are used to finance inaugural activities rather than any Federal election").

³⁶ 11 C.F.R. § 110.20(i).

³⁷ See Inaugural Committee E&J, 69 Fed. Reg. at 59,778.

1 donation when, among other factors, any foreign nationals have participated in the decision to
 2 make the contribution or donation.³⁸

3 The factual record here indicates that foreign nationals participated in the decision-
 4 making process with regard to the making of the \$500,000 donation. The CITGO and CITGO
 5 Holding, Inc., Response does not answer the Complaint’s allegation that CITGO’s entire board at
 6 the time of the donation consisted of foreign nationals, including a board member who served as
 7 CITGO’s president and CEO. Nor does the Response explain the circumstances of the donation,
 8 such as whether a U.S. citizen or foreign national made the decision to donate or authorized the
 9 wire transfer or participated in either of those decision-making processes. Additionally,
 10 according to the Complaint, CITGO is closely intertwined with Venezuela, as “[s]enior managers
 11 from the parent [PDVSA] are cycled in and out of U.S. offices.”³⁹ These circumstances, coupled
 12 with the considerable control that the Venezuelan government apparently had in CITGO
 13 operations and in the absence of any explanation by Respondents, raise a sufficient inference that
 14 foreign nationals on CITGO’s board and in its holding companies may have indirectly made the
 15 donation to the Inaugural Committee, which the regulation prohibits.⁴⁰ Accordingly, the
 16 Commission finds reason to believe that CITGO Petroleum Corporation and CITGO Holding,
 17 Inc., violated 11 C.F.R. § 110.20(j) by making a foreign national donation.

³⁸ See Advisory Opinion 1981-36 (Japan Business Assoc. of Southern California) (analyzing foreign national direction of domestic subsidiary activities under directly or “through any other person” statutory language); *see also supra* nn.23-24.

³⁹ Compl. at 4 (quoting Joe Carroll, *Venezuela Is Pawning Pieces of Iconic American Brand Citgo to Survive*, BLOOMBERG (Oct. 6, 2016), *available at* <https://bloom.bg/2oF8MVe>).

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4 RESPONDENT: Petroléos de Venezuela, S.A. MUR 7243

5
6 **I. INTRODUCTION**

7 CITGO Petroleum Corporation (“CITGO”) is an energy company incorporated in
8 Delaware¹ and headquartered in Houston, Texas.² It focuses on the “refining, marketing, and
9 transportation of petroleum products, including gasoline, diesel fuel, jet fuel, petrochemicals and
10 lubricants.” CITGO is wholly owned by CITGO Holding, Inc., a Delaware corporation, which
11 describes itself as an “indirect, wholly owned subsidiary of a foreign corporation,” Petroléos de
12 Venezuela, S.A. (“PDVSA”).³ PDVSA is the Venezuelan state-owned oil and natural gas
13 company.⁴

14 CITGO donated \$500,000 to the 58th Presidential Inaugural Committee (“Inaugural
15 Committee”) on December 22, 2016. The Complaint in this matter alleges that foreign nationals

¹ See State of Delaware Department of State: Division of Corporations, Entity Details, *available at* <https://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx>.

² See [https://web.archive.org/web/20180116041427/http://citgo.com/Home.jsp/\(snapshot of Jan. 16, 2018\)](https://web.archive.org/web/20180116041427/http://citgo.com/Home.jsp/(snapshot%20of%20Jan.%2016,%202018)). The Inaugural Committee’s disclosure report includes CITGO’s Houston, Texas address with respect to the donation at issue. See Inaugural Committee Amended 2017 90 Day Post-Inaugural Report (June 28, 2017) at 21.

³ See [https://web.archive.org/web/20180116041427/http://citgo.com/Home.jsp/\(snapshot of Jan. 16, 2018\)](https://web.archive.org/web/20180116041427/http://citgo.com/Home.jsp/(snapshot%20of%20Jan.%2016,%202018)). It is unclear what CITGO means by “indirect” when it refers to an “indirect wholly owned subsidiary of a foreign corporation.” An “indirect” subsidiary has been defined in another context as a “company that is controlled by a subsidiary of a company.” See 12 C.F.R. § 243.2(p) (defining indirect subsidiary with respect to banks and the Federal Reserve System).

⁴ See [https://web.archive.org/web/20180116041427/http://citgo.com/Home.jsp/\(snapshot from Jan. 16, 2018\)](https://web.archive.org/web/20180116041427/http://citgo.com/Home.jsp/(snapshot%20from%20Jan.%2016,%202018)). In 1986, PDVSA purchased a 50 percent interest in CITGO. *Id.* PDVSA acquired the remaining half of CITGO in 1990. *Id.* PDVSA describes itself as a “corporation property of the Bolivarian Republic of Venezuela, and subordinated to the Venezuelan state.” See PDVSA.com, *available at* http://www.pdvs.com/index.php?option=com_content&view=article&id=6541&Itemid=888&lang=en (last visited Mar. 18, 2019); *see also* Exec. Order No. 13,827 at § 3(d), 83 Fed. Reg. 12,469 (Mar. 21, 2018) (defining “Government of Venezuela” as including “any political subdivision, agency, or instrumentality thereof, including . . . Petroleos de Venezuela, S.A. (PDVSA)”).

participated in CITGO's decision to make the donation, and that CITGO and its parent corporations violated the Commission's regulations by making a donation from a foreign national. PDVSA, the foreign parent of CITGO Holding, Inc., did not respond to the Complaint.

As set forth below, because it appears that foreign nationals participated in CITGO's decision-making process to make the donation to the Inaugural Committee, the Commission finds reason to believe that PDVSA violated 11 C.F.R. § 110.20(j).

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

The President-elect appoints a Presidential Inaugural Committee to be in charge of the Presidential inaugural ceremony and the functions and activities connected with the ceremony.⁵ Here, the Inaugural Committee was formed after the 2016 election to plan activities associated with President Donald J. Trump's inauguration. The Inaugural Committee filed a post-inaugural report on April 18, 2017, disclosing its receipt of a \$500,000 donation from CITGO on December 22, 2016.⁶ CITGO made this donation via wire transfer from its account with the Bank of Texas. The Inaugural Committee's donation page of its website stated that "contributions from foreign nationals, including foreign corporations, are prohibited."

The available information indicates that throughout the month of December 2016, CITGO's account held an average daily balance of over \$89.5 million, with a minimum balance of over \$24.6 million. Additionally, on December 22, 2016, the date of the donation to the

⁵ See 36 U.S.C. § 501(1) (defining "inaugural committee"); 11 C.F.R. § 104.21(a)(1) (same).

⁶ See Inaugural Committee Amended 2017 90 Day Post-Inaugural Report (June 28, 2017) at 21, *available at* [http://docquery.fec.gov/pdf/700/2 01706290300159700/201706290300159700.pdf](http://docquery.fec.gov/pdf/700/2%201706290300159700/201706290300159700.pdf) (amending report filed on April 18, 2017). The available information, which includes the FEC contributor database, does not indicate that CITGO has made any other contributions or donations.

Inaugural Committee, the CITGO account had a balance of nearly \$120 million, with all of it generated from CITGO's U.S. operations.

The available information does not describe the circumstances of the donation to the Inaugural Committee or rebut the Complaint's allegation that CITGO's Board of Directors at the time of the donation consisted entirely of foreign nationals. According to publicly available information, much of which comes from CITGO itself, CITGO's Board of Directors at the time of the \$500,000 donation consisted of Chairman Nelson Martinez,⁷ Sergio Antonio Tovar, Jesús Luongo, and Antón Castillo, all of whom are allegedly nationals of Venezuela.⁸ Further, Martinez simultaneously served as CITGO's President and Chief Executive Officer at the time of CITGO's donation.⁹

Additionally, at least some of the CITGO board members at the time of the donation apparently held concurrent positions within PDVSA, the foreign parent that the Venezuelan

⁷ In January 2017, approximately one month after the donation was made, Martinez was reportedly named as Venezuela's Minister of Petroleum. See Reuters Staff, *Venezuela Names Pereira Interim President of U.S. Refiner CITGO*, REUTERS (Apr. 28, 2017), available at <http://www.businessinsider.com/r-venezuela-names-pereira-interim-president-of-us-refiner-citgo-2017-4>. Martinez served in that post until August 2017 when he was appointed as the president of PDVSA. See Jose Orozco, *Venezuela's Oil Minister and State Oil Firm Chief to Switch Roles, Maduro Says*, BLOOMBERG (Aug. 24, 2017), available at <https://www.bloomberg.com/news/articles/2017-08-25/venezuela-oil-minister-pdvsa-head-to-switch-roles-maduro-says>. As reported on December 13, 2018, Martinez is now deceased. See Fabiola Zerpa, *Ex-Venezuelan Oil Minister Nelson Dies While in Custody*, BLOOMBERG (Dec. 13, 2018), available at <https://www.bloomberg.com/news/articles/2018-12-13/ex-citgo-head-nelson-martinez-dies-under-custody-in-venezuela>.

⁸ See Compl. at 9-10; CITGO Operations – CITGO Board of Directors, available at <https://web.archive.org/web/20160706205456/http://www.citgo.com:80/AboutCITGO/Operations/BoardOfDirectors.jsp> (snapshot from July 6, 2016).

⁹ See CITGO Operations – CITGO Officer Profiles, available at <https://web.archive.org/web/20170109041950/https://www.citgo.com/AboutCITGO/Operations/OfficerProfiles.jsp> (snapshot from Jan. 9, 2017).

government owns.¹⁰ Jesús Luongo, for example, served on two PDVSA boards concurrently.¹¹ Although CITGO Holding, Inc., and the CITGO Board of Directors were purportedly responsible for appointing CITGO's board members and executive officers, respectively,¹² the Venezuelan government apparently had considerable influence over key personnel decisions at CITGO. For example, Venezuela's President on November 22, 2017, reportedly named Asdrúbal Chávez, a cousin of former President Hugo Chávez, as the new president of CITGO in an event broadcast on state television.¹³ The CITGO Board of Directors confirmed Chávez a week later as the acting president and CEO of CITGO.¹⁴

B. Legal Analysis

The Federal Election Campaign Act of 1971, as amended (the "Act") has long prohibited the making and receipt of foreign national contributions in connection with elections in the United States.¹⁵ The Act's definition of "foreign national" includes an individual who is not a citizen or

¹⁰ See CITGO Operations – CITGO Board of Directors, <https://web.archive.org/web/20161221195224/http://www.citgo.com/AboutCITGO/Operations/BoardOfDirectors.jsp> (snapshot from Dec. 21, 2016).

¹¹ *Id.* Specifically, Luongo served on the PDV Maintenance and PDVSA Engineering and Construction boards.

¹² *Id.*; see also Press Release, CITGO Announces Senior Staff Changes, [www.citgo.com](http://media.citgo.com/2006-03-31-CITGO-Announces-Senior-Staff-Changes) (May 31, 2006); available at <http://media.citgo.com/2006-03-31-CITGO-Announces-Senior-Staff-Changes>.

¹³ See Rachelle Krygier and Anthony Faiola, *Top Executives of U.S.-based Citgo Detained in Venezuela Corruption Probe*, WASHINGTON POST (Nov. 22, 2017), available at https://www.washingtonpost.com/world/the_americas/top-executives-of-citgo-detained-in-venezuela-corruption-probe/2017/11/22/d3eeb8e2-cfa2-11e7-a87b-47f14b73162a_story.html?utm_term=.a563190fd203. During 2017, CITGO's acting president and chief executive and five vice presidents were arrested in Venezuela on corruption charges. *Id.*

¹⁴ See CITGO Newsroom - Asdrúbal Chávez Appointed Acting President and CEO of CITGO Petroleum Corporation (Nov. 29, 2017), available at <http://media.citgo.com/2017-11-29-Asdrubal-Chavez-Appointed-Acting-President-and-CEO-of-CITGO-Petroleum-Corporation>.

¹⁵ See 52 U.S.C. § 30121(a) (formerly 2 U.S.C. § 441e, added to the Act in 1976, Pub. L. 94-283, 90 Stat. 493); see also Advisory Opinion 1999-28 (Bacardi-Martini USA) at 2 (quoting *United States v. Kanchanalak*, 192 F.3d 1037 (D.C. Cir. 1999), as recognizing that Commission had "consistently interpreted . . . since 1976" foreign national prohibition to extend to state and local elections).

national of the United States and who is not lawfully admitted for permanent residence, as well as a “foreign principal” as defined at 22 U.S.C. § 611(b), which, in turn, includes a “government of a foreign country” as well as a “partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.”¹⁶ In the Bipartisan Campaign Reform Act of 2002 (“BCRA”),¹⁷ Congress expanded the foreign national prohibition to expressly prohibit “donations” in addition to “contributions.” It also codified the Commission’s longstanding interpretation of the prohibition, expressly applying it to state and local elections as well as federal elections.¹⁸ Further, BCRA broadened the foreign national prohibition to address presidential inaugural committee donations, providing that an inaugural committee shall not accept any donation from a foreign national, as that term is defined in the Act.¹⁹ The Commission’s implementing regulation at 11 C.F.R. § 110.20(j) states that no person shall knowingly accept from a foreign national any donation to an inaugural committee and that a foreign national shall not “directly or indirectly” make a donation to an inaugural committee.

The Commission incorporated some aspects of existing Commission regulations in its implementation of BCRA’s inaugural committee foreign national prohibition. For example, the

¹⁶ 52 U.S.C. § 30121(b); 22 U.S.C. § 611(b)(1), (3); *see also* 36 U.S.C. § 510(c) (incorporating the Act’s definition of “foreign national” in inaugural committee foreign national provision).

¹⁷ Pub. Law 107-155 § 308, 116 Stat. 81, 103-04 (Mar. 27, 2002), *codified at* 36 U.S.C. § 510.

¹⁸ *See* Contribution Limits and Prohibitions, 67 Fed. Reg. 69,928, 69,940 (Nov. 19, 2002) (“Prohibitions E&J”).

¹⁹ 36 U.S.C. § 510(c) (referencing 52 U.S.C. § 30121(b)); BCRA Section 308(a), 116 Stat. 104 (referencing the provision now codified at 52 U.S.C. § 30121(b)). BCRA also added a requirement that inaugural committees disclose, in a report filed with the Commission within 90 days after the inaugural ceremony, certain donations made to the committee. *See* 36 U.S.C. § 510(b); 52 U.S.C. § 30104(h).

Commission explained that it interpreted the statutory prohibition of an inaugural committee's acceptance of a foreign national's donation to require a "knowing[]" standard to be consistent with the treatment of other committees' acceptance of foreign national contributions and to provide the protection afforded to those other committees.²⁰ Similarly, the Commission extended the prohibition on the making of foreign national donations to inaugural committees, including the existing "directly or indirectly" language, to effectuate the prohibition on the acceptance of such donations and to be consistent with the structure of current section 110.20, which implements BCRA's other prohibitions on foreign national contributions and donations.²¹ The "directly or indirectly" language was incorporated by Congress in BCRA in the Act's prohibition on foreign nationals making a contribution or donation.²² The Commission's post-BCRA regulation at 11 C.F.R. § 110.20(i), for example, provides that 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, with regard to such person's federal or non-federal election-related activities, such as decisions concerning the making of contributions, donations,

²⁰ See Presidential Inaugural Committee Reporting and Prohibition on Accepting Donations from Foreign Nationals, 69 Fed. Reg. 59,775, 59,778 (Oct. 6, 2004) ("Inaugural Committee E&J"); see also 11 C.F.R. § 110.20(a)(4); Prohibitions E&J, 67 Fed. Reg. at 69,940.

²¹ See Inaugural Committee E&J, 69 Fed. Reg. at 59,778 (recognizing that BCRA did not expressly forbid foreign nationals from making donations to inaugural committees but adopting regulation because, "in order to effectuate BCRA's ban on acceptance of donations from foreign nationals, it was also necessary to impose a ban on the direct or indirect making of donations by foreign nationals to an inaugural committee"). The Commission further concluded that it has enforcement authority with respect to BCRA's amendment to 36 U.S.C. § 510, which pertains to inaugural committees. *Id.*

²² 52 U.S.C. § 30121(a)(1). The Act had previously prohibited foreign national contributions made "directly or through any other person." See Prohibitions E&J, 67 Fed. Reg. at 69,943. Commission regulations had used both the "directly or through any other person" and "directly or indirectly" language in its pre-BCRA regulations in implementing the earlier statutory language. See *id.* at 69,943-44 (explaining decision to use only "directly or indirectly" in several regulations implementing BCRA's foreign national prohibition).

expenditures, or disbursements.²³ The Commission has consistently interpreted the “directly or indirectly” prohibition, both prior to and since BCRA, to find a violation where foreign national officers or directors of a U.S. company participated in the company’s decisions to make contributions or in the management of its separate segregated fund.²⁴

As noted above, CITGO is wholly owned by CITGO Holding, Inc., which in turn is wholly owned by Respondent PDVSA, a corporation owned by the Bolivarian Republic of Venezuela and thus a foreign national under the Act.²⁵ The Complaint alleges that all the

²³ 11 C.F.R. § 110.20(i); *see also* 11 C.F.R. § 110.20(b), (c), (d), (e), and (f) (also incorporating the “directly or indirectly” language). The Commission has explained that this provision also bars foreign nationals from “involvement in the management of a political committee.” Contribution Limits and Prohibitions, 67 Fed. Reg. 69928, 69946 (Nov. 19, 2002); *see also* Advisory Op. 2004-26 at 2-3 (Weller) (noting that foreign national prohibition at section 110.20(i) is broad and concluding that, while a foreign national fiancé of the candidate could participate in committees’ activities as a volunteer without making a prohibited contribution, she “must not participate in [the candidate’s] decisions regarding his campaign activities” and “must refrain from managing or participating in the decisions of the Committees.”).

²⁴ *See* 11 C.F.R. § 110.20(b), (i); *see also* Conciliation Agreement, MUR 6093 (Transurban Grp.) (U.S. subsidiary violated Act by making contributions after its foreign parent company’s board of directors directly participated in determining whether to continue political contributions policy of its U.S. subsidiaries); Conciliation Agreement, MUR 6184 (Skyway Concession Company, LLC) (U.S. company violated Act by making contributions after its foreign national CEO participated in company’s election-related activities by vetting campaign solicitations or deciding which nonfederal committees would receive company contributions, authorizing release of company funds to make contributions, and signing contribution checks); Conciliation Agreement, MUR 7122 (American Pacific International Capital, Inc.) (U.S. corporation owned by foreign company violated Act by making contribution after its board of directors, which included foreign nationals, approved proposal by U.S. citizen corporate officer to contribute). Pre-BCRA Advisory Opinions dating back to 1978 determined that “directly or through any another person” required, among other factors, that no foreign nationals participated in the contribution decision-making. *See, e.g.*, Advisory Opinion 1985-3 (Diridon); Advisory Op. 1992-16 (Nansay) (“When considering political contributions by domestic subsidiaries of foreign corporations, the Commission has consistently interpreted 441e to prohibit any director or officer of the company or its parent who is a foreign national, or any other foreign national, from participating in any way in the decision-making process with regard to making contributions to candidates.”); *and see* 2 U.S.C. § 441e(a) (2000).

²⁵ *See* Compl. at 3. With respect to PDVSA’s status as an instrumentality of the Venezuelan government, it does not appear that PDVSA is entitled to sovereign immunity under the Foreign Sovereign Immunities Act of 1976 (“FSIA”), 28 U.S.C. §§ 1602-1611, for actions relating to the making of a donation. As in previous Commission matters involving foreign state respondents where the Commission has asserted jurisdiction, the “commercial activity” exception to FSIA should apply here. *See id.* § 1605(a)(2). In MUR 2892 (Coordination Council of North American Affairs (“CCNAA”)), the Commission determined that the Act conferred jurisdiction over an instrumentality of Taiwan, that the FSIA commercial activity exception appeared to apply, and that Congress “explicitly prohibited” foreign states from making contributions and “granted the Commission exclusive jurisdiction with respect to civil enforcement of [the Act]” over such persons. MUR 2892 (CCNAA) F&LA at 7-11. In MUR 4583 (Embassy of India), the Commission found reason to believe and probable cause to believe that the Embassy

members of CITGO's board were foreign nationals at the time that the donation was made.²⁶

The Complaint further asserts that CITGO may not rely on protections afforded to domestic subsidiaries of a foreign national corporation because the leadership of CITGO consisted of foreign members who made at least some decisions regarding the donation.²⁷

The available information does not describe the specific circumstances of the donation to the Inaugural Committee or rebut the Complaint's allegation that CITGO's Board of Directors at the time of the donation consisted entirely of foreign nationals.

The test of PDVSA's liability is section 110.20(j), which addresses the only non-election context to which Congress has applied the foreign national prohibition. For purposes of this matter, that regulation concerns whether a foreign national "directly or indirectly" made CITGO's \$500,000 donation to the Inaugural Committee. The Commission has not explained the meaning of "indirectly" in 11 C.F.R. § 110.20(j) since its adoption in 2004. But, the Commission expressly stated at the time it adopted that regulation that the inaugural committee provisions were intended to be consistent with the structure of the rest of 11 C.F.R. § 110.20.²⁸

violated 2 U.S.C. §§ 441e and 441f (now 52 U.S.C. §§ 30121 and 30122) and referred the matter to the Department of Justice for criminal prosecution but elected to admonish the Embassy and take no further action after DOJ did not pursue the matter. *See* Certifications, MUR 4583 (Nov. 12, 1996, Nov. 10., 1998, Sept. 7, 1999); Gen. Counsel's Rpt. at 1, MUR 4583 (Aug. 19, 1999); *see also* Letter from Lawrence M. Noble, General Counsel, FEC, to The Honorable Wajahat Habibullah, Embassy of India (Jan. 16, 1997) (stating that Commission has "exclusive jurisdiction with respect to the civil enforcement of [the Act], the U.S. law that in relevant part prohibits foreign nationals and foreign governments from making direct or indirect contributions to U.S. elections"). In MUR 3801 (Royal Embassy of Saudi Arabia), the Commission found reason to believe the foreign sovereign had violated the Act but closed the file for reasons apparently unrelated to jurisdiction. Gen. Counsel's Rpt. at 7-8, MUR 3801 (Apr. 24, 1995); Certification, MUR 3801 (May 25, 1995); Inaugural Committee E&J, 69 Fed. Reg. at 59,778 (recognizing Commission's exclusive enforcement authority of BCRA's inaugural committee foreign national provisions).

²⁶ Compl. at 9-10.

²⁷ *Id.*

²⁸ *See* Inaugural Committee E&J, 69 Fed. Reg. at 59,778.

Hence, these circumstances indicate that the Commission’s longstanding interpretation of the phrase “directly or indirectly” with respect to making contributions and donations in elections, both pre- and post-BCRA, is applicable to the same phrase with respect to the making of donations to inaugural committees now subject to the foreign national prohibition. Under the longstanding interpretation of “directly or indirectly,” as explained above, a domestic subsidiary of a foreign corporation is deemed to be a foreign national making a direct or indirect contribution or donation when, among other factors, any foreign nationals have participated in the decision to make the contribution or donation.²⁹

The factual record here indicates that foreign nationals participated in the decision-making process with regard to the making of the \$500,000 donation. And the available information does not answer the Complaint’s allegation that CITGO’s entire board at the time of the donation consisted of foreign nationals, including a board member who served as CITGO’s president and CEO. Nor does it explain the circumstances of the donation, such as whether a U.S. citizen or foreign national, including a foreign national CITGO board member holding concurrent positions within PDVSA, made the decision to donate or authorized the wire transfer or participated in either of those decision-making processes. Additionally, according to the Complaint, CITGO is closely intertwined with Venezuela, as “[s]enior managers from the parent [PDVSA] are cycled in and out of U.S. offices.”³⁰ These circumstances, coupled with the considerable control that the Venezuelan government apparently had in CITGO operations and in

²⁹ See Advisory Opinion 1981-36 (Japan Business Assoc. of Southern California) (analyzing foreign national direction of domestic subsidiary activities under directly or “through any other person” statutory language); *see also supra* nn.18-19.

³⁰ Compl. at 4 (quoting Joe Carroll, *Venezuela Is Pawning Pieces of Iconic American Brand Citgo to Survive*, BLOOMBERG (Oct. 6, 2016), *available at* <https://bloom.bg/2oF8MVe>).

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Factual and Legal Analysis

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1 the absence of any explanation by Respondent, raise a sufficient inference that foreign nationals
2 on CITGO's board and in its holding companies may have indirectly made the donation to the
3 Inaugural Committee, which the regulation prohibits.³¹ Accordingly, the Commission finds
4 reason to believe that Petróléos de Venezuela, S.A. violated 11 C.F.R. § 110.20(j) by making a
5 foreign national donation.

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FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: CITGO Petroleum Corporation MUR 7243
CITGO Holding, Inc.

I. INTRODUCTION

CITGO Petroleum Corporation (“CITGO”), a domestic subsidiary of a domestic holding company wholly owned by a foreign corporation, donated \$500,000 to the 58th Presidential Inaugural Committee (“Inaugural Committee”) on December 22, 2016. The Complaint in this matter alleges that foreign nationals were involved in the decision to make the donation and that CITGO and its parent corporations violated the Commission’s regulations by making a donation from a foreign national.

CITGO and its parent company, CITGO Holding, Inc., assert in a joint response that CITGO, a domestic corporation, permissibly made the donation with funds generated in the United States and that the nationality status of individuals involved in the decision-making is irrelevant in the context of donations to inaugural committees.¹

As set forth below, because the uncontroverted evidence indicates CITGO’s donation to the Inaugural Committee was made using funds generated from its domestic operations, the Commission finds no reason to believe that CITGO and CITGO Holding, Inc. violated 11 C.F.R. § 110.20(j).

¹ Response of CITGO and CITGO Holding, Inc. (“CITGO Resp.”) at 3-4 (June 23, 2017).

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

The President-elect appoints a Presidential Inaugural Committee to be in charge of the Presidential inaugural ceremony and the functions and activities connected with the ceremony.² Here, the Inaugural Committee was formed after the 2016 election to plan activities associated with President Donald J. Trump’s inauguration. The Inaugural Committee filed a post-inaugural report on April 18, 2017, disclosing its receipt of a \$500,000 donation from CITGO on December 22, 2016.³ CITGO made this donation via wire transfer from its account with the Bank of Texas.⁴ The Inaugural Committee donation page of its website stated that “contributions from foreign nationals, including foreign corporations, are prohibited.”

CITGO is an energy company incorporated in Delaware⁵ and headquartered in Houston, Texas.⁶ It focuses on the “refining, marketing, and transportation of petroleum products, including gasoline, diesel fuel, jet fuel, petrochemicals and lubricants.”⁷ As stated in CITGO’s Response, CITGO is wholly owned by CITGO Holding, Inc., a Delaware corporation, “which is

² See 36 U.S.C. § 501(1) (defining “inaugural committee”); 11 C.F.R. § 104.21(a)(1) (same).

³ See Inaugural Committee Amended 2017 90 Day Post-Inaugural Report (June 28, 2017) at 21, *available at* [http://docquery.fec.gov/pdf/700/2 01706290300159700/201706290300159700.pdf](http://docquery.fec.gov/pdf/700/2%201706290300159700/201706290300159700.pdf) (amending report filed on April 18, 2017). The available information, which includes the FEC contributor database, does not indicate that CITGO has made any other contributions or donations.

⁴ CITGO Resp., Gina Renee Coon Decl. ¶ 3 (June 20, 2017).

⁵ See State of Delaware Department of State: Division of Corporations, Entity Details, *available at* <https://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx>.

⁶ See <https://web.archive.org/web/20180116041427/http://citgo.com/Home.jsp/> (snapshot of Jan. 16, 2018). The Inaugural Committee’s disclosure report includes CITGO’s Houston, Texas address with respect to the donation at issue. See Inaugural Committee Amended 2017 90 Day Post-Inaugural Report (June 28, 2017) at 21.

⁷ CITGO Resp. at 1.

an indirect, wholly owned subsidiary of a foreign corporation,” Petroléos de Venezuela, S.A. (“PDVSA”).⁸ PDVSA is the Venezuelan state-owned oil and natural gas company.⁹

CITGO’s Response and the attached Declaration of CITGO Assistant Treasurer Gina Renee Coon assert that throughout the month of December 2016, CITGO’s account held an average daily balance of over \$89.5 million, with a minimum balance of over \$24.6 million.¹⁰ Additionally, the Response and Declaration note that on December 22, 2016, the date of the donation to the Inaugural Committee, the CITGO account had a balance of nearly \$120 million, all of which was generated from CITGO’s U.S. operations.¹¹

Legal Analysis

The Federal Election Campaign Act of 1971, as amended (the “Act”) has long prohibited the making and receipt of foreign national contributions in connection with elections in the United States.¹² “Foreign national” is defined as including a foreign government; an individual who is not a citizen of the United States and is not lawfully admitted for permanent residence; and a corporation, organization, or other group of persons organized under the laws of or having its

⁸ *Id.*

⁹ See <https://web.archive.org/web/20180116041427/http://citgo.com/Home.jsp/> (snapshot from Jan. 16, 2018). In 1986, PDVSA purchased a 50 percent interest in CITGO. *Id.* PDVSA acquired the remaining half of CITGO in 1990. *Id.* PDVSA describes itself as a “corporation property of the Bolivarian Republic of Venezuela, and subordinated to the Venezuelan state.” See PDVSA.com, available at http://www.pdvs.com/index.php?option=com_content&view=article&id=6541&Itemid=888&lang=en (last visited Mar. 18, 2019); see also Exec. Order No. 13,827 at § 3(d), 83 Fed. Reg. 12,469 (Mar. 21, 2018) (defining “Government of Venezuela” as including “any political subdivision, agency, or instrumentality thereof, including . . . Petroleos de Venezuela, S.A. (PDVSA)”).

¹⁰ CITGO Resp. at 2; Coon Decl. ¶ 5.

¹¹ *Id.*

¹² See 52 U.S.C. § 30121(a) (formerly 2 U.S.C. § 441e, added to the Act in 1976, Pub. L. 94-283, 90 Stat. 493); see also Advisory Opinion 1999-28 (Bacardi-Martini USA) at 2 (quoting *United States v. Kanchanalak*, 192 F.3d 1037 (D.C. Cir. 1999), as recognizing that Commission had “consistently interpreted . . . since 1976” foreign national prohibition to extend to state and local elections).

principal place of business in a foreign country.¹³ In the Bipartisan Campaign Reform Act of 2002 (“BCRA”),¹⁴ Congress expanded the foreign national prohibition to expressly prohibit “donations” in addition to “contributions.” It also expressly applied it to state and local elections as well as federal elections.¹⁵ Further, BCRA broadened the foreign national prohibition to address presidential inaugural committee donations, providing that an inaugural committee shall not accept any donation from a foreign national, as that term is defined in the Act.¹⁶ The Commission’s implementing regulation at 11 C.F.R. § 110.20(j) states that no person shall knowingly accept from a foreign national any donation to an inaugural committee and that a foreign national “shall not, directly or indirectly, make a donation to an inaugural committee.”¹⁷

The Commission incorporated some aspects of existing Commission regulations in its implementation of BCRA’s inaugural committee foreign national prohibition. For example, the Commission explained that it interpreted the statutory prohibition of an inaugural committee’s acceptance of a foreign national’s donation to require a “knowing[]” standard to be consistent with the treatment of other committees’ acceptance of foreign national contributions and to

¹³ 52 U.S.C. § 30121(b) (defining “foreign national” for purposes of the Act, including by reference to 22 U.S.C. § 611(b)); *see also* 36 U.S.C. § 510(c) (incorporating the Act’s definition of “foreign national” in inaugural committee foreign national provision).

¹⁴ Pub. Law 107-155 § 308, 116 Stat. 81, 103-04 (Mar. 27, 2002), *codified at* 36 U.S.C. § 510.

¹⁵ *See* Contribution Limits and Prohibitions, 67 Fed. Reg. 69,928, 69,940 (Nov. 19, 2002) (“Prohibitions E&J”).

¹⁶ 36 U.S.C. § 510(c) (referencing 52 U.S.C. § 30121(b)); BCRA Section 308(a), 116 Stat. 104 (referencing the provision now codified at 52 U.S.C. § 30121(b)). BCRA also added a requirement that inaugural committees disclose, in a report filed with the Commission within 90 days after the inaugural ceremony, certain donations made to the committee. *See* 36 U.S.C. § 510(b); 52 U.S.C. § 30104(h).

¹⁷ Respondents do not challenge, and this Factual and Legal Analysis does not consider, the Commission’s authority to issue and enforce this regulation pursuant to the underlying statute.

1 provide the protection afforded to those other committees.¹⁸ Similarly, the Commission
 2 extended the prohibition on the making of foreign national donations to inaugural committees,
 3 including the existing “directly or indirectly” language, to effectuate the prohibition on the
 4 acceptance of such donations and to be consistent with the structure of other subsections within
 5 11 C.F.R. § 110.20.¹⁹

6 The “directly or indirectly” language was incorporated by Congress in BCRA in the
 7 Act’s prohibition on foreign nationals making a contribution or donation.²⁰ The Commission has
 8 generally interpreted the prohibition on “directly or indirectly” making a contribution,
 9 expenditure, or donation to demand that no foreign national provide, subsidize, or reimburse the
 10 funds that make up the contribution, expenditure, or donation.²¹ For a domestic subsidiary of a
 11 foreign parent company, this requires that the funds used to make the contribution, expenditure,
 12 or donation be generated solely by domestic operations and not originate from or be reimbursed
 13 by the foreign parent company.²²

¹⁸ See Presidential Inaugural Committee Reporting and Prohibition on Accepting Donations from Foreign Nationals, 69 Fed. Reg. 59,775, 59,778 (Oct. 6, 2004) (“Inaugural Committee E&J”); see also 11 C.F.R. § 110.20(a)(4); Prohibitions E&J, 67 Fed. Reg. at 69,940.

¹⁹ See Inaugural Committee E&J, 69 Fed. Reg. at 59,778 (recognizing that BCRA did not expressly forbid foreign nationals from making donations to inaugural committees but adopting regulation because, “in order to effectuate BCRA’s ban on acceptance of donations from foreign nationals, it was also necessary to impose a ban on the direct or indirect making of donations by foreign nationals to an inaugural committee”).

²⁰ 52 U.S.C. § 30121(a)(1). The Act had previously prohibited foreign national contributions made “directly or through any other person.” See Prohibitions E&J, 67 Fed. Reg. at 69,943. Commission regulations had used the “directly or indirectly” language in its pre-BCRA regulations in implementing the earlier statutory language. See *id.*

²¹ See, e.g., Factual & Legal Analysis at 6, MUR 6946 (Clinton) (finding no reason to believe Respondent violated 11 C.F.R. § 110.20(b),(c) by bringing a foreign national as a guest to an event where a U.S. citizen made the contribution with his own funds, without reimbursement, and not on behalf of a foreign national).

²² See Advisory Opinion 1992-16 (Nansay Hawaii) (advising that the domestic subsidiary of a foreign parent could use net earnings generated by the subsidiary in the United States and from segregated accounts that were not subsidized by the foreign corporate parent to make political donations, provided the subsidiary could demonstrate through a reasonable accounting method that it had sufficient funds in its accounts, other than funds given or loaned by its foreign national parent corporation, from which the donations were made); Advisory Opinion 2006-15 (TransCanada) at 4–5 (similar).

1 Importantly, the Commission in drafting 11 C.F.R. § 110.20(j) did not extend the
 2 prohibitions on foreign nationals directly or indirectly participating in the decision-making
 3 process of a donation to inaugural committee donations by including language similar to
 4 11 C.F.R. § 110.20(i). The regulation at 11 C.F.R. § 110.20(i) prohibits foreign nationals from
 5 directing, dictating, controlling, or directly or indirectly participating in “the decision-making
 6 process of any person, such as a corporation, labor organization political committee, or political
 7 organization with regard to such person’s *Federal or non-Federal election-related activities*.”²³
 8 This includes “decisions concerning the making of contributions, donations, expenditures, or
 9 disbursements in connection with elections for any Federal, State, or local office.”²⁴ In the
 10 context of a domestic corporate subsidiary with a foreign parent company, the Commission has
 11 required under 11 C.F.R. § 110.20(i) that no director or officer of the subsidiary or its parent, or
 12 any other person who is a foreign national, participate in any way in the decision-making process
 13 regarding the covered contributions, donations, or expenditures.²⁵ That prohibition on
 14 participation in election-related decision making is distinct from the prohibitions contained in
 15 other subsections of 11 C.F.R. § 110.20 against foreign nationals making contributions,
 16 donations, or expenditures themselves.²⁶

²³ 11 C.F.R. § 110.20(i) (emphasis added).

²⁴ *Id.*

²⁵ *Id.* See also Advisory Opinion 2004-32 (Spirit Airlines) (“Additionally [to 11 C.F.R. § 110.20(b)], no foreign national may be involved with the decisions of Spirit PAC, Spirit, or its affiliates regarding solicitation of contributions. Commission regulations prohibit a foreign national from directing, dictating, controlling, or directly or indirectly participating in the decision-making process of a corporation or political committee with regard to Federal or non-Federal election-related activities, such as the making of contributions [under 11 C.F.R. § 110.20(i)].”).

²⁶ Compare 11 C.F.R. § 110.20(b), (f), with 11 C.F.R. § 110.20(i). See also Advisory Opinion 2004-32 (Spirit Airlines) at 4 fn.3 (describing the distinct prohibitions against making a contribution and participating in the decision making as residing in two different subsections of 11 C.F.R. § 110.20).

But as the Commission has expressly recognized, inaugural committees (which are typically organized as tax-exempt organizations under section 501(c) of the Internal Revenue Code) do not engage in “election-related activities.”²⁷ Therefore, donations to inaugural committees are not subject to the foreign-national decision-making prohibition for election-related activities contained in 11 C.F.R. § 110.20(i), but only to the prohibition on foreign nationals *making* such donations directly or indirectly.

As noted above, CITGO is incorporated in Delaware and maintains its headquarters in Texas, and it is therefore a U.S. corporation. The company generates substantial revenues and net earnings from its domestic operations.²⁸ CITGO is wholly owned by Respondent CITGO Holding, Inc., which in turn is wholly owned by PDVSA, a corporation owned by the Bolivarian Republic of Venezuela and thus a foreign national under the Act. Consequently, to comply with 11 C.F.R. § 110.20(j), the funds for CITGO’s donation to the inaugural committee must not have originated directly or indirectly from its foreign parent company, but have derived from CITGO’s domestic operations.

CITGO and CITGO Holding, Inc., maintain that the donation to the Inaugural Committee complied with 11 C.F.R. § 110.20(j) because CITGO “donated its own funds, derived entirely from its domestic operations.”²⁹ The available information indicates that CITGO had ample funds from its domestic operations to make the \$500,000 donation to the Inaugural Committee, as supported by the Declaration of CITGO Assistant Treasurer Gina Renee Coon. According to

²⁷ See Advisory Op. 1980-144 (Presidential Inaugural Committee) at 2 (“Funds received and expended by the [Presidential Inaugural] Committee are used to finance inaugural activities rather than any Federal election.”).

²⁸ CITGO Resp. at 1.

²⁹ CITGO Resp. at 2-3.

1 that declaration, CITGO's account in question is made up solely of funds from CITGO's
2 operations, receives no subsidies from PDVSA, and at all times had a balance well in excess of
3 that needed to complete the donation.³⁰ That foreign nationals may have been members of
4 CITGO's board or participated in the decision to make the \$500,000 donation or authorized the
5 wire transfer is irrelevant to whether CITGO violated 11 C.F.R. § 110.20(j), as the Complaint
6 maintains, because that regulation does not prohibit such conduct.

7 Accordingly, the Commission finds no reason to believe that CITGO Petroleum
8 Corporation and CITGO Holding, Inc. violated 11 C.F.R. § 110.20(j) by making a foreign-
9 national donation to an inaugural committee.

³⁰ CITGO Resp., Gina Renee Coon Decl. ¶¶ 3–5.

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4 RESPONDENT: Petroléos de Venezuela, S.A. MUR 7243

5
6 **I. INTRODUCTION**

7 CITGO Petroleum Corporation (“CITGO”) is an energy company incorporated in
8 Delaware¹ and headquartered in Houston, Texas.² It focuses on the “refining, marketing, and
9 transportation of petroleum products, including gasoline, diesel fuel, jet fuel, petrochemicals and
10 lubricants.” CITGO is wholly owned by CITGO Holding, Inc., a Delaware corporation, which
11 describes itself as an “indirect, wholly owned subsidiary of a foreign corporation,” Petroléos de
12 Venezuela, S.A. (“PDVSA”).³ PDVSA is the Venezuelan state-owned oil and natural gas
13 company.⁴

14 CITGO donated \$500,000 to the 58th Presidential Inaugural Committee (“Inaugural
15 Committee”) on December 22, 2016. The Complaint in this matter alleges that foreign nationals

¹ See State of Delaware Department of State: Division of Corporations, Entity Details, *available at* <https://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx>.

² See <https://web.archive.org/web/20180116041427/http://citgo.com/Home.jsp/> (snapshot of Jan. 16, 2018). The Inaugural Committee’s disclosure report includes CITGO’s Houston, Texas address with respect to the donation at issue. See Inaugural Committee Amended 2017 90 Day Post-Inaugural Report (June 28, 2017) at 21.

³ See <https://web.archive.org/web/20180116041427/http://citgo.com/Home.jsp/> (snapshot of Jan. 16, 2018). It is unclear what CITGO means by “indirect” when it refers to an “indirect wholly owned subsidiary of a foreign corporation.” An “indirect” subsidiary has been defined in another context as a “company that is controlled by a subsidiary of a company.” See 12 C.F.R. § 243.2(p) (defining indirect subsidiary with respect to banks and the Federal Reserve System).

⁴ See <https://web.archive.org/web/20180116041427/http://citgo.com/Home.jsp/> (snapshot from Jan. 16, 2018). In 1986, PDVSA purchased a 50 percent interest in CITGO. *Id.* PDVSA acquired the remaining half of CITGO in 1990. *Id.* PDVSA describes itself as a “corporation property of the Bolivarian Republic of Venezuela, and subordinated to the Venezuelan state.” See PDVSA.com, *available at* http://www.pdvs.com/index.php?option=com_content&view=article&id=6541&Itemid=888&lang=en (last visited Mar. 18, 2019); *see also* Exec. Order No. 13,827 at § 3(d), 83 Fed. Reg. 12,469 (Mar. 21, 2018) (defining “Government of Venezuela” as including “any political subdivision, agency, or instrumentality thereof, including . . . Petroleos de Venezuela, S.A. (PDVSA)”).

were involved in the decision to make the donation, and that CITGO and its parent corporations violated the Commission’s regulations by making a donation from a foreign national. PDVSA, the foreign parent of CITGO Holding, Inc., did not respond to the Complaint.

As set forth below, because the evidence indicates CITGO’s donation to the Inaugural Committee was made using funds generated from its domestic operations, the Commission finds no reason to believe that PDVSA violated 11 C.F.R. § 110.20(j).

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

CITGO is an energy company incorporated in Delaware⁵ and headquartered in Houston, Texas.⁶ It focuses on the “refining, marketing, and transportation of petroleum products, including gasoline, diesel fuel, jet fuel, petrochemicals and lubricants.”⁷ As stated in CITGO’s Response, CITGO is wholly owned by CITGO Holding, Inc., a Delaware corporation, “which is an indirect, wholly owned subsidiary of a foreign corporation,” Petróleos de Venezuela, S.A. (“PDVSA”).⁸ PDVSA is the Venezuelan state-owned oil and natural gas company.⁹

⁵ See State of Delaware Department of State: Division of Corporations, Entity Details, *available at* <https://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx>.

⁶ See <https://web.archive.org/web/20180116041427/http://citgo.com/Home.jsp/> (snapshot of Jan. 16, 2018). The Inaugural Committee’s disclosure report includes CITGO’s Houston, Texas address with respect to the donation at issue. See Inaugural Committee Amended 2017 90 Day Post-Inaugural Report (June 28, 2017) at 21.

⁷ CITGO Resp. at 1.

⁸ *Id.*

⁹ See <https://web.archive.org/web/20180116041427/http://citgo.com/Home.jsp/> (snapshot from Jan. 16, 2018). In 1986, PDVSA purchased a 50 percent interest in CITGO. *Id.* PDVSA acquired the remaining half of CITGO in 1990. *Id.* PDVSA describes itself as a “corporation property of the Bolivarian Republic of Venezuela, and subordinated to the Venezuelan state.” See PDVSA.com, *available at* http://www.pdvs.com/index.php?option=com_content&view=article&id=6541&Itemid=888&lang=en (last visited Mar. 18, 2019); see also Exec. Order No. 13,827 at § 3(d), 83 Fed. Reg. 12,469 (Mar. 21, 2018) (defining “Government of Venezuela” as including “any political subdivision, agency, or instrumentality thereof, including . . . Petroleos de Venezuela, S.A. (PDVSA)”).

The President-elect appoints a Presidential Inaugural Committee to be in charge of the Presidential inaugural ceremony and the functions and activities connected with the ceremony.¹⁰ Here, the Inaugural Committee was formed after the 2016 election to plan activities associated with President Donald J. Trump's inauguration. The Inaugural Committee filed a post-inaugural report on April 18, 2017, disclosing its receipt of a \$500,000 donation from CITGO on December 22, 2016.¹¹ CITGO made this donation via wire transfer from its account with the Bank of Texas. The Inaugural Committee's donation page of its website stated that "contributions from foreign nationals, including foreign corporations, are prohibited."

The available information indicates that throughout the month of December 2016, CITGO's account held an average daily balance of over \$89.5 million, with a minimum balance of over \$24.6 million. Additionally, on December 22, 2016, the date of the donation to the Inaugural Committee, the CITGO account had a balance of nearly \$120 million, all of which was generated from CITGO's U.S. operations.

B. Legal Analysis

The Federal Election Campaign Act of 1971, as amended (the "Act"), has long prohibited the making and receipt of foreign national contributions in connection with elections in the United States.¹² "Foreign national" is defined as including a foreign government; an individual who is

¹⁰ See 36 U.S.C. § 501(1) (defining "inaugural committee"); 11 C.F.R. § 104.21(a)(1) (same).

¹¹ See Inaugural Committee Amended 2017 90 Day Post-Inaugural Report (June 28, 2017) at 21, *available at* http://docquery.fec.gov/pdf/700/2_01706290300159700/201706290300159700.pdf (amending report filed on April 18, 2017). The available information, which includes the FEC contributor database, does not indicate that CITGO has made any other contributions or donations.

¹² See 52 U.S.C. § 30121(a) (formerly 2 U.S.C. § 441e, added to the Act in 1976, Pub. L. 94-283, 90 Stat. 493); *see also* Advisory Opinion 1999-28 (Bacardi-Martini USA) at 2 (quoting *United States v. Kanchanalak*, 192 F.3d 1037 (D.C. Cir. 1999), as recognizing that Commission had "consistently interpreted . . . since 1976" foreign national prohibition to extend to state and local elections).

not a citizen of the United States and is not lawfully admitted for permanent residence; and a corporation, organization, or other group of persons organized under the laws of or having its principal place of business in a foreign country.¹³ In the Bipartisan Campaign Reform Act of 2002 (“BCRA”), Congress expanded the foreign national prohibition to expressly prohibit “donations” in addition to “contributions.”¹⁴ It also expressly applied it to state and local elections as well as federal elections.¹⁵ Further, BCRA broadened the foreign national prohibition to address presidential inaugural committee donations, providing that an inaugural committee shall not accept any donation from a foreign national, as that term is defined in the Act.¹⁶ The Commission’s implementing regulation at 11 C.F.R. § 110.20(j) states that no person shall knowingly accept from a foreign national any donation to an inaugural committee and that a foreign national “shall not, directly or indirectly, make a donation to an inaugural committee.”¹⁷

The Commission incorporated some aspects of existing Commission regulations in its implementation of BCRA’s inaugural committee foreign national prohibition. For example, the Commission explained that it interpreted the statutory prohibition of an inaugural committee’s acceptance of a foreign national’s donation to require a “knowing[]” standard to be consistent with the treatment of other committees’ acceptance of foreign national contributions and to

¹³ 52 U.S.C. § 30121(b) (defining “foreign national” for purposes of the Act, including by reference to 22 U.S.C. § 611(b)); *see also* 36 U.S.C. § 510(c) (incorporating the Act’s definition of “foreign national” in inaugural committee foreign national provision).

¹⁴ Pub. Law 107-155 § 308, 116 Stat. 81, 103-04 (Mar. 27, 2002), *codified at* 36 U.S.C. § 510.

¹⁵ *See* Contribution Limits and Prohibitions, 67 Fed. Reg. 69,928, 69,940 (Nov. 19, 2002) (“Prohibitions E&J”).

¹⁶ 36 U.S.C. § 510(c) (referencing 52 U.S.C. § 30121(b)); BCRA Section 308(a), 116 Stat. 104 (referencing the provision now codified at 52 U.S.C. § 30121(b)). BCRA also added a requirement that inaugural committees disclose, in a report filed with the Commission within 90 days after the inaugural ceremony, certain donations made to the committee. *See* 36 U.S.C. § 510(b); 52 U.S.C. § 30104(h).

¹⁷ Respondents do not challenge, and this Factual and Legal Analysis does not consider, the Commission’s authority to issue and enforce this regulation pursuant to the underlying statute.

1 provide the protection afforded to those other committees.¹⁸ Similarly, the Commission
 2 extended the prohibition on the making of foreign national donations to inaugural committees,
 3 including the existing “directly or indirectly” language, to effectuate the prohibition on the
 4 acceptance of such donations and to be consistent with the structure of other subsections within
 5 11 C.F.R. § 110.20.¹⁹

6 The “directly or indirectly” language was incorporated by Congress in BCRA in the
 7 Act’s prohibition on foreign nationals making a contribution or donation.²⁰ The Commission has
 8 generally interpreted the prohibition on “directly or indirectly” making a contribution,
 9 expenditure, or donation to demand that no foreign national provide, subsidize, or reimburse the
 10 funds that make up the contribution, expenditure, or donation.²¹ For a domestic subsidiary of a
 11 foreign parent company, this requires that the funds used to make the contribution, expenditure,
 12 or donation be generated solely by domestic operations and not originate from or be reimbursed
 13 by the foreign parent company.²²

¹⁸ See Presidential Inaugural Committee Reporting and Prohibition on Accepting Donations from Foreign Nationals, 69 Fed. Reg. 59,775, 59,778 (Oct. 6, 2004) (“Inaugural Committee E&J”); see also 11 C.F.R. § 110.20(a)(4); Prohibitions E&J, 67 Fed. Reg. at 69,940.

¹⁹ See Inaugural Committee E&J, 69 Fed. Reg. at 59,778 (recognizing that BCRA did not expressly forbid foreign nationals from making donations to inaugural committees but adopting regulation because, “in order to effectuate BCRA’s ban on acceptance of donations from foreign nationals, it was also necessary to impose a ban on the direct or indirect making of donations by foreign nationals to an inaugural committee”).

²⁰ 52 U.S.C. § 30121(a)(1). The Act had previously prohibited foreign national contributions made “directly or through any other person.” See Prohibitions E&J, 67 Fed. Reg. at 69,943. Commission regulations had used the “directly or indirectly” language in its pre-BCRA regulations in implementing the earlier statutory language. See *id.*

²¹ See, e.g., Factual & Legal Analysis at 6, MUR 6946 (Clinton) (finding no reason to believe Respondent violated 11 C.F.R. § 110.20(b),(c) by bringing a foreign national as a guest to an event where a U.S. citizen made the contribution with his own funds, without reimbursement, and not on behalf of a foreign national).

²² See Advisory Opinion 1992-16 (Nansay Hawaii) (advising that the domestic subsidiary of a foreign parent could use net earnings generated by the subsidiary in the United States and from segregated accounts that were not subsidized by the foreign corporate parent to make political donations, provided the subsidiary could demonstrate through a reasonable accounting method that it had sufficient funds in its accounts, other than funds given or loaned by its foreign national parent corporation, from which the donations were made); Advisory Opinion 2006-15 (TransCanada) at 4–5 (similar).

1 Importantly, the Commission in drafting 11 C.F.R. § 110.20(j) did not extend the
 2 prohibitions on foreign nationals directly or indirectly participating in the decision-making
 3 process of a donation to inaugural committee donations by including language similar to
 4 11 C.F.R. § 110.20(i). The regulation at 11 C.F.R. § 110.20(i) prohibits foreign nationals from
 5 directing, dictating, controlling, or directly or indirectly participating in “the decision-making
 6 process of any person, such as a corporation, labor organization political committee, or political
 7 organization with regard to such person’s *Federal or non-Federal election-related activities*.”²³
 8 This includes “decisions concerning the making of contributions, donations, expenditures, or
 9 disbursements in connection with elections for any Federal, State, or local office.”²⁴ In the
 10 context of a domestic corporate subsidiary with a foreign parent company, the Commission has
 11 required under 11 C.F.R. § 110.20(i) that no director or officer of the subsidiary or its parent, or
 12 any other person who is a foreign national, participate in any way in the decision-making process
 13 regarding the covered contributions, donations, or expenditures.²⁵ That prohibition on
 14 participation in election-related decision making is distinct from the prohibitions contained in
 15 other subsections of 11 C.F.R. § 110.20 against foreign nationals making contributions,
 16 donations, or expenditures themselves.²⁶

²³ 11 C.F.R. § 110.20(i) (emphasis added).

²⁴ *Id.*

²⁵ *Id.* See also Advisory Opinion 2004-32 (Spirit Airlines) (“Additionally [to 11 C.F.R. § 110.20(b)], no foreign national may be involved with the decisions of Spirit PAC, Spirit, or its affiliates regarding solicitation of contributions. Commission regulations prohibit a foreign national from directing, dictating, controlling, or directly or indirectly participating in the decision-making process of a corporation or political committee with regard to Federal or non-Federal election-related activities, such as the making of contributions [under 11 C.F.R. § 110.20(i)].”).

²⁶ Compare 11 C.F.R. § 110.20(b), (f), with 11 C.F.R. § 110.20(i). See also Advisory Opinion 2004-32 (Spirit Airlines) at 4 fn.3 (describing the distinct prohibitions against making a contribution and participating in the decision making as residing in two different subsections of 11 C.F.R. § 110.20).

But as the Commission has expressly recognized, inaugural committees (which are typically organized as tax-exempt organizations under section 501(c) of the Internal Revenue Code) do not engage in “election-related activities.”²⁷ Therefore, donations to inaugural committees are not subject to the foreign-national decision-making prohibition for election-related activities contained in 11 C.F.R. § 110.20(i), but only to the prohibition on foreign nationals *making* such donations directly or indirectly.

As noted above, CITGO is incorporated in Delaware and maintains its headquarters in Texas, and it is therefore a U.S. corporation. The company generates substantial revenues and net earnings from its domestic operations.²⁸ CITGO is wholly owned by CITGO Holding, Inc., which in turn is wholly owned by Respondent PDVSA, a corporation owned by the Bolivarian Republic of Venezuela and thus a foreign national under the Act. Consequently, to comply with 11 C.F.R. § 110.20(j), the funds for CITGO’s donation to the inaugural committee must not have originated directly or indirectly from PDVSA, but have derived from the domestic subsidiary’s operations.

The available information indicates that CITGO had ample domestic funds to make the \$500,000 donation to the Inaugural Committee. According to evidence submitted by CITGO, the account from which the donation was given is made up solely of funds from CITGO’s domestic operations, receives no subsidies from PDVSA, and at all times had a balance well in excess of that needed to complete the donation.²⁹ That foreign nationals affiliated with PDVSA may have been members of CITGO’s board, participated in the decision to make the \$500,000

²⁷ See Advisory Op. 1980-144 (Presidential Inaugural Committee) at 2 (“Funds received and expended by the [Presidential Inaugural] Committee are used to finance inaugural activities rather than any Federal election.”).

²⁸ CITGO Resp. at 1.

²⁹ CITGO Resp., Gina Renee Coon Decl. ¶¶ 3–5.

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Factual and Legal Analysis

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- 1 donation, or authorized the wire transfer is irrelevant to whether CITGO violated 11 C.F.R.
- 2 § 110.20(j), as the Complaint maintains, because that regulation does not prohibit such conduct.
- 3 Accordingly, the Commission finds no reason to believe that PDVSA violated 11 C.F.R.
- 4 § 110.20(j) by making a foreign national-donation to an inaugural committee.