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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
Ken Paxton;	)	
Ken Paxton Campaign;	)	MUR 7594
Scott Turner,	)	
in his official capacity as	)	
Treasurer.	)	

INTRODUCTION

Through counsel, Ken Paxton, the Ken Paxton Campaign, and Scott Turner, in his official capacity as Treasurer (collectively, "Respondents"), provide the following response to the complaint filed with the Federal Election Commission ("FEC" or "Commission") by Mr. Alexander Austin ("Complainant") and designated by the Commission as MUR 7594.

Along with many others, the Respondents are swept up by this broad yet wholly unsubstantiated complaint because of the passive receipt of a contribution made by Enbridge (U.S.) Inc. Political Action Committee ("Enbridge U.S. PAC"). The crux of the complaint rests entirely on the allegation that Enbridge (U.S.) Inc. is a wholly owned U.S. subsidiary of Enbridge Inc., a publicly traded Canadian corporation principally located in Calgary, Canada. While this allegation is presumably true, the FEC's public records nonetheless indicate that Enbridge U.S. PAC (ID# C00429662) is a separate segregated fund ("SSF") established by Enbridge (U.S.) Inc., a corporation with a principal office address of 5400 Westheimer Court, Houston, Texas 77056.

Despite the Complainant's suggestion that Enbridge U.S. PAC has made numerous contributions in violation of 52 U.S.C. § 30121, which prohibits foreign nationals from engaging in U.S. election activity, the Respondents have not received any persuasive evidence to support this allegation prior to receiving this complaint, including at the time the contribution was received by the Respondents, or within the complaint itself. Rather, the Respondents continue to presume that Enbridge U.S. PAC receives support from its solicitable class of U.S. employees in accordance with the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"), and Commission regulations.

Therefore, unless and until the Respondents receive information indicating that receipt of Enbridge U.S. PAC contributions actually violate 52 U.S.C § 30121 or any other provision of the Act, the Respondents believe the Commission should immediately dismiss this matter because the facts do not support a "Reason to Believe" finding.

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BACKGROUND

Texas Attorney General Ken Paxton won the 2018 general election for the office of Attorney General of Texas on November 6, 2018, and the Ken Paxton Campaign is his authorized candidate committee. The Ken Paxton Campaign has accepted contributions from many individuals and political committees, including a $1,500 contribution from Enbridge U.S. PAC (ID# C00429662) on November 1, 2018.

Throughout the 2018 election cycle, the Respondents used a vetting system and other analytical safeguards to scrutinize all contributions received to ensure they complied with all applicable campaign-finance laws. If the Respondents received a contribution that, on its face, did not conform with such laws, then the Respondents would return the contribution to the contributor.

LEGAL DISCUSSION AND ANALYSIS

I. All Wholly Owned U.S. Subsidiaries are Permitted to Establish an SSF.

The Act broadly prohibits foreign nationals, including both individuals and "foreign principals," from "directly or indirectly" engaging in activity in connection with U.S. elections.[1] This prohibition is somewhat unique in the fact that it bans activity in all U.S. elections, not just federal elections.[2] As a supplement to this prohibition, the Act also prohibits the receipt of any contribution restricted by the Act.[3]

The Commission has, in response to advisory opinion requests and complaints, confronted and interpreted the Act's foreign national restrictions on numerous occasions. Through Commission opinions, for example, the FEC has clarified that corporations formed under the laws of a non-U.S. jurisdiction, as well as any non-U.S. citizen executive personnel, are subject to the foreign national prohibition. Conversely, the Commission has concluded that a U.S. subsidiary wholly owned or otherwise controlled by a foreign national, including a foreign corporation, is not also a foreign national if (i) the corporation is formed under a jurisdiction of the United States and (ii) has a principal place of business in the United States.[4]

Therefore, a U.S. corporation's status as a wholly owned subsidiary of a foreign national is not the determining factor for whether that corporation may engage in U.S. election activity. Rather, the Commission has specifically held that a U.S. corporation wholly

[1] 52 U.S.C. § 30121(b).
[2] 52 U.S.C. § 30121(a)(1).
[3] 52 U.S.C. § 30121(a)(2).
[4] Statement of Policy: Application of the Foreign National Prohibition to Domestic Corporations Owned or Controlled by Foreign Nationals and Safe Harbor for Knowledge Standard, Federal Election Commission, (2016); *see also* Advisory Opinion 1978-21 (Budd Citizenship Committee).

owned by a foreign national may establish an SSF and contribute to federal candidates, or otherwise engage in election activity as permitted by the Act, if:

- The SSF does not use funds derived from the foreign national, including the foreign parent corporation's monies, or contributions provided by foreign national employees, officers, and directors; and

- Foreign nationals, including corporate employees, officers, and board members, do not control, or otherwise participate in, the SSF's U.S. election related decision-making.[5]

Despite the Complainant's assertion that Enbridge U.S. Inc. is entirely devoted to supporting the interests of Enbridge Inc., this is simply not the relevant legal standard used to evaluate the permissibility of Enbridge U.S. PAC's political contributions. Instead, the law focuses exclusively on whether (i) foreign money has been used by the SSF for political activity or (ii) foreign nationals have participated in the SSF's decision-making. The Commission has further explained that the decision to create an SSF may originate with a foreign national parent corporation and the foreign national parent corporation's board may generally authorize the operating budget and goals of the SSF. Beyond this, the SSF must be wholly funded, directed, and controlled by U.S. citizens.[6] Therefore, the key factor for determining the permissibility of Enbridge U.S. PAC's political contributions is whether the individuals appointed to oversee the SSF are U.S. citizens and the SSF uses U.S. funds.[7]

II. No Evidence Exists to Demonstrate a Violation of 52 U.S.C. § 30121.

A. There is no indication that the Respondents accepted a contribution of foreign funds.

Accepting a contribution from funds supplied by a foreign national would have been the most straight-forward way for the Respondents to have violated 52 U.S.C. § 30121(a); however, the Respondents are not aware of any facts suggesting such funds were used in this instance. Furthermore, a basic search of the FEC's publicly available committee data demonstrates that (i) Enbridge U.S. PAC's committee name indicates affiliation with a domestic U.S. corporation, (ii) Enbridge U.S. Inc. and its SSF have a U.S. address, and (iii) all contributors to Enbridge U.S. PAC appear, on their face, to be U.S. citizens.

The Complainant provides no evidence to demonstrate that Enbridge U.S. PAC's individual contributors were not U.S. citizens or that the funds used by Enbridge U.S. PAC to

[5] *See* Advisory Opinion 2006-15 (TransCanda).
[6] *See* Advisory Opinion 2000-17 (Extendicare).
[7] *Id.*

make the contribution were otherwise provided by a foreign national. As a result, the contribution accepted by the Respondents appears, on its face, to comply with the prohibitions, prescriptions, and limitations of the Act.

B. The Complainant does not allege that foreign nationals participated in the direction, management, or decision-making of Enbridge U.S. PAC.

In addition to the more obvious violations of 52 U.S.C. § 30121, an SSF can also violate the Act's prohibitions when the SSF's decision-making is controlled by foreign nationals; however, the Complainant has not made this allegation and the Respondents are not aware of any evidence indicating that Enbridge U.S. PAC is directed by foreign nationals. As discussed above, the fact that Enbridge U.S. PAC might support the goals of its parent corporation is immaterial for determining whether a foreign national has engaged in U.S. election activity in violation of the Act, and there is no FEC guidance indicating that the SSF's status as a lobbyist registrant PAC impacts this analysis. Once again, the contribution accepted by the Respondents appears, on its face, to comply with the prohibitions, prescriptions, and limitations of the Act.

C. The Respondents have not knowingly violated 52 U.S.C. § 30121.

The Respondents have not received any persuasive evidence to support the Complainant's allegation prior to receiving this complaint, including at the time the contribution was received by the Respondents, or within the complaint itself. Importantly, Commission guidance interprets the Act to require more than the Respondents' passive acceptance of potentially impermissible contributions. Specifically, the Respondents will be found to have violated the Act's foreign national prohibition only if the Respondents had actual knowledge of an impermissible contribution or were aware of facts that reasonably indicated this likelihood.[8]

As stated above, the Respondents had, and continue to have, no actual knowledge that the contribution provided by Enbridge U.S. PAC was funded by foreign nationals. To the contrary, the Respondents received a contribution from an SSF (i) affiliated with a corporation formed under the laws of a U.S. jurisdiction, (ii) with a principal operating address in the United States, and (iii) funded entirely by persons appearing to be U.S. citizens. Therefore, it was entirely appropriate for the Respondents to accept the contribution made by Enbridge U.S. PAC. If the Commission were to investigate Enbridge U.S. PAC and conclude otherwise, then such a determination would create a new opportunity for the Respondents

[8] *See* 11 C.F.R. 110.20(a)(4); *see also* Myles Martin, Foreign Nationals, FEC Records: Outreach (2017) available at https://www.fec.gov/updates/foreign-nationals/.

to disgorge the impermissible contribution in compliance with the Act.[9] Until that time, however, the Respondents will not take any further actions with respect to the matters referenced herein.

CONCLUSION

The information and analysis provided above reaffirm the fact that the Respondents conformed their conduct to the prescriptions and prohibitions of the Act, as well as the FEC's supplementary regulations, Commission guidance, and legal precedents. Therefore, unless and until the Respondents receive information indicating that receipt of Enbridge U.S. PAC contributions actually violate 52 U.S.C § 30121 or any other provision of the Act, the Respondents believe the Commission should immediately dismiss this matter because the facts do not support a "Reason to Believe" finding.

Sincerely,

Chris K. Gober
Counsel to Ken Paxton, Ken Paxton Campaign,
and Scott Turner, in his official capacity as Treasurer

[9] *See* 11 C.F.R. 103.3(b) (If a committee deposits a contribution that appears to be legal and later discovers the contribution is prohibited as a result of new information not available when the contribution was deposited, the committee will have 30 days to disgorge the contribution after learning this information.).

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