



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**STATEMENT OF VICE CHAIR CAROLINE C. HUNTER AND
COMMISSIONERS MATTHEW S. PETERSEN AND LEE E.
GOODMAN ON THE PROPOSAL “TO LAUNCH RULEMAKING
TO ENSURE THAT U.S. POLITICAL SPENDING IS FREE FROM
FOREIGN INFLUENCE”**

The Federal Election Campaign Act bans electoral spending by foreign nationals. 52 U.S.C. § 30121. The Commission’s regulations implement this ban, *see* 11 C.F.R. § 110.20, and the Commission may promulgate additional regulations only “as necessary.” 52 U.S.C. § 30107(a)(8). For decades, the Commission has enforced the foreign national ban,¹ and we will continue to do so. To this end, we have committed to expedite the enforcement matters pending before us that raise this issue. We also have twice proposed and voted for a Policy Statement that would have clarified the breadth of the foreign national prohibition and implemented a new certification mechanism to deter efforts at circumvention.²


Our colleague previously has argued that a change in the Commission’s current rules implementing the foreign national ban could be used to “blunt” a Supreme Court decision recognizing the First Amendment rights of American citizens and American companies to participate in U.S. elections.³ There is no evidence of a concerted effort on the part of foreign nationals to make contributions or expenditures within the purview of Commission jurisdiction, or that the current regulatory prohibition is inadequate to detect, enforce, and punish violations if and when people attempt to cheat.⁴ Opening a rulemaking on this subject, thus, is not necessary. If new evidence emerges that changes the factual predicate, we would, of course, reconsider whether to engage in a rulemaking.

¹ *See, e.g.*, MUR 4530 (DNC Services/DNC); MUR 4884 (Future Tech); MUR 6093 (Transurban); MUR 6184 (Skyway Concession); MUR 6203 (Itinere North America).

² *See* Proposed Statement of Policy: Application of the Foreign National Prohibition to Domestic Corporations Owned or Controlled by Foreign Nationals and Safe Harbor for Knowledge Standard (attached); *see also* FEC Issues Advisory Opinion (FEC Press Release) at 2 (June 12, 2017) (noting Commission considered but was unable to reach agreement by required four affirmative votes on proposed Statement of Policy: Application of the Foreign National Prohibition to Domestic Corporations Owned or Controlled by Foreign Nationals and Safe Harbor for Knowledge Standard); Minutes of an Open Meeting of the Federal Election Commission Held Thursday, Sept. 15, 2016 at 9 (approved Dec. 1, 2016) (noting motion to approve proposed Statement of Policy on Application of the Foreign National Prohibition to Domestic Corporations Owned or Controlled by Foreign Nationals failed by vote of 3-3, with Commissioners Goodman, Hunter, and Petersen voting in favor of motion and Commissioners Ravel, Walther, and Weintraub voting against).

³ Ellen L. Weintraub, Opinion, *Taking on Citizens United*, N.Y. TIMES, Mar. 30, 2016, https://www.nytimes.com/2016/03/30/opinion/taking-n-citizens-united.html?smid=tw-share&_r=0.

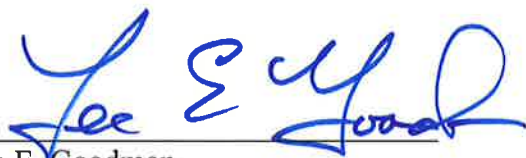
⁴ *See generally*, Assessing Russian Activities and Intentions in Recent U.S. Elections, ICA 2016-01D (Jan. 6, 2017).


Caroline C. Hunter
Vice Chair

Jan 12, 2017
Date


Matthew S. Petersen
Commissioner

Jan. 12, 2017
Date


Lee E. Goodman
Commissioner

Jan. 12, 2017
Date

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 110**

3 **[Notice 2016-XX]**

4 **Statement of Policy: Application of the Foreign National Prohibition to**
5 **Domestic Corporations Owned or Controlled by Foreign Nationals and**
6 **Safe Harbor for Knowledge Standard**

7 **AGENCY:** Federal Election Commission.

8 **ACTION:** Statement of Policy.

9 **SUMMARY:** The Federal Election Campaign Act of 1971, as amended, and Commission
10 regulations prohibit foreign nationals from, directly or indirectly, making contributions,
11 donations, expenditures, independent expenditures, and disbursements in connection with
12 Federal, State, or local elections. The Federal Election Commission is issuing a Statement of
13 Policy to: (1) clarify how the foreign national prohibition applies to U.S. domestic subsidiaries of
14 foreign nationals¹ that make independent expenditures, disbursements for electioneering
15 communications, contributions to political committees that make only independent expenditures,
16 or contributions to separate accounts maintained by political committees for making only
17 independent expenditures; and (2) create a safe harbor for political committees that may lawfully
18 accept corporate contributions or donations within which they will be deemed to have confirmed
19 that they do not come from foreign national sources.

20 **DATES:** [Insert date of publication in Federal Register]

21 **FOR FURTHER INFORMATION CONTACT:** Adav Noti, Associate General Counsel, 999
22 E Street NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

¹ The term “U.S. domestic subsidiary” as used in this Statement of Policy includes all U.S. corporations owned or controlled, in whole or in part, by foreign nationals.

1 **SUPPLEMENTARY INFORMATION:**

2 I. Background

3 The Federal Election Campaign Act of 1971, as amended by the Bipartisan Campaign
4 Reform Act of 2002 (“BCRA”) (collectively, the “Act”), prohibits “foreign nationals” from
5 making “a contribution or donation of money . . . in connection with a Federal, State, or local
6 election,” or “an expenditure, independent expenditure, or disbursement for an electioneering
7 communication.” 52 U.S.C. 30121(a)(1). This prohibition applies whether the contribution,
8 donation, expenditure, independent expenditure, or disbursement is made “directly or indirectly.”
9 Id. Likewise, Commission regulations prohibit foreign nationals from directing, dictating,
10 controlling, or directly or indirectly participating in the decision-making process of any person,
11 such as a corporation, with regard to such person’s Federal or non-Federal election-related
12 activities, including decisions concerning the making of contributions, donations, expenditures,
13 or disbursements in connection with elections for any Federal, State, or local office. 11 CFR
14 110.20(i).

15 The Act defines “foreign national” as follows:

- 16 (1) a foreign principal, as such term is defined by section 611(b)
17 of title 22, except that the term “foreign national” shall not include
18 any individual who is a citizen of the United States; or
19 (2) an individual who is not a citizen of the United States or a
20 national of the United States (as defined in section 1101(a)(22) of
21 title 8) and who is not lawfully admitted for permanent residence,
22 as defined by section 1101(a)(20) of title 8.
23 52 U.S.C. 30121(b).

1 The Foreign Agents Registration Act referenced in the Act defines “foreign principal” as:

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

3 (2) a person outside of the United States, unless it is established

4 that such person is an individual and a citizen of and domiciled

5 within the United States, or that such person is not an individual

6 and is organized under or created by the laws of the United States

7 or of any State or other place subject to the jurisdiction of the

8 United States, and has its principal place of business in the United

9 States; and

10 (3) a partnership, association, corporation, organization, or other

11 combination of persons organized under the laws of or having its

12 principal place of business in a foreign country.

13 22 U.S.C. 611(b).

14 Accordingly, the Act provides that a U.S. domestic corporation that is owned or
15 controlled by a foreign national is not itself a “foreign national” so long as the corporation is
16 organized under the laws of the United States and has its principal place of business within the
17 United States. See 52 U.S.C. 30121(b) (citing 22 U.S.C. 611(b)).

18 Consistent with Section 30121 of the Act, the Commission has concluded that U.S.
19 domestic corporations whose principal places of business are located in the United States are not
20 foreign nationals regardless of whether they are wholly or partially owned or controlled by
21 foreign nationals. See Advisory Opinions 1978-21 (Budd Citizenship Committee), 1980-100
22 (Revere Sugar), 1982-10 (Syntex), 1982-34 (Sonat), 1983-19 (AMAX), 1983-31 (Syntex), 1985-
23 3 (Diridon), 1989-20 (Kuilima), 1989-29 (GEM), 1990-08 (CIT), 1992-16 (Nansay Hawaii),

1 1995-15 (Allison Engine PAC), 1999-28 (Bacardi-Martin), 2000-17 (Extendicare), 2004-42 n.3
2 (Pharmavite), 2006-15 (TransCanada), 2009-14 (Mercedes-Benz USA/Sterling). Although
3 domestic subsidiaries of foreign nationals are not themselves “foreign nationals” as a matter of
4 law, the Commission has previously sought comment on whether foreign nationals—such as
5 parent companies, owners, directors, officers, and even employees—could “indirectly” make
6 prohibited contributions, donations, expenditures, independent expenditures, or disbursements
7 through domestic subsidiaries. To address this concern, Commission regulations prohibit foreign
8 nationals from directing, dictating, controlling, or directly or indirectly participating in the
9 decision-making of any person, such as a domestic subsidiary or political committee, with regard
10 to the person’s election-related activities. See 11 CFR 110.20(i).

11 The Commission has concluded, therefore, that a domestic subsidiary of a foreign
12 national is prohibited from establishing, administering, and soliciting contributions to a separate
13 segregated fund (“SSF”), unless: (1) no foreign nationals exercise decision-making authority
14 over the SSF; and (2) no foreign nationals are solicited for contributions to the SSF. See
15 Advisory Opinions 1978-21 (Budd Citizenship Committee), 1980-100 (Revere Sugar), 1982-34
16 (Sonat), 1983-19 (AMAX), 1990-08 (CIT), 1995-15 (Allison Engine PAC), 1999-28 (Bacardi-
17 Martin), 2000-07 n.4 (Alcatel USA), 2000-17 (Extendicare), 2000-34 n.5 (SAPPI PAC), 2002-4
18 n.1 (Pernod Ricard USA), 2004-42 n.3 (Pharmavite), 2007-12 n.3 (Tyco US), 2009-14
19 (Mercedes-Benz USA/Sterling). Similarly, the Commission has concluded that domestic
20 subsidiary corporations are prohibited from making non-Federal donations or disbursements,
21 unless: (1) no foreign nationals are involved in the domestic subsidiary’s decision-making with
22 respect to its election-related activities; and (2) the domestic subsidiary uses only U.S. net
23 earnings, with no replenishment, subsidization, or offsets from its foreign national parent, to

1 make the non-Federal donations or disbursements. See Advisory Opinions 1985-3 (Diridon),
2 1989-20 (Kuilima), 1989-29 (GEM), 1992-16 (Nansay Hawaii), 2006-15 (TransCanada).

3 The Commission has consistently enforced the foreign national ban against domestic
4 corporations that violated these restrictions. In MUR 4884, for example, the Commission
5 concluded that a Florida corporation violated the foreign national ban when the corporation made
6 contributions totaling \$110,000 to the Democratic National Committee’s (“DNC”) non-Federal
7 account under the direction of the corporation’s CEO and Chairman, because that individual was
8 a foreign national. See MUR 4884 (Future Tech), Conciliation Agreement (May 25, 1999).

9 Similarly, in MUR 4594, the Commission levied a \$75,000 civil penalty against a Hawaii
10 corporation for violating the foreign national ban because the corporation made in-kind
11 donations of office space to a local candidate by leasing the office space at less than fair market
12 value. Although the Hawaii corporation was not a foreign national, its board of directors—a
13 majority of which were foreign nationals—approved the lease while two foreign national office
14 managers negotiated the lease. Because foreign nationals participated in the company’s decision
15 to make the in-kind donations to the local candidate, the Commission enforced the foreign
16 national ban against the Hawaii corporation. See MUR 4594 (Longevity), Conciliation
17 Agreement (Jan. 4, 2000).

18 The Commission also has enforced the foreign national ban in the context of so-called
19 pass-through corporations that appear to be formed for the purpose of shielding the identities of
20 foreign nationals who established and funded the entities. In MUR 4530, the Commission
21 enforced the foreign national ban against a Delaware corporation, which was controlled and
22 funded by a Greek citizen, that made prohibited contributions to the DNC’s non-Federal account.
23 The Delaware corporation was formed on June 14, 1996, and made a \$10,000 contribution to the

1 DNC on the same day it was incorporated and another \$40,000 contribution to the DNC on July
2 22, 1996. The Delaware corporation had no U.S.-derived revenue at the time of these
3 contributions; it was solely funded and controlled by the Greek citizen. Although the Delaware
4 corporation itself was not a foreign national, the Commission found probable cause to believe
5 that it—along with the Greek citizen and others involved in the scheme—violated the foreign
6 national ban because the Greek citizen made the contributions from the Delaware corporation.
7 Specifically, the Greek citizen decided to make the corporate contributions, signed the
8 contribution checks, and transmitted the contribution checks. Moreover, the Delaware
9 corporation used funds provided by the Greek citizen to make the contributions. See MUR 4530
10 (Psaltis), Conciliation Agreement (June 18, 2002).

11 As explained below, the Commission’s application of the foreign national ban to
12 domestic subsidiaries of foreign nationals in these advisory opinions and enforcement actions
13 remains unchanged by the passage of BCRA in 2002 and the Supreme Court’s subsequent
14 decisions in Wisconsin Right to Life v. FEC, 551 U.S. 449 (2007), and Citizens United v. FEC,
15 558 U.S. 310 (2010).

16 The Commission promulgated its current foreign national regulation, 11 CFR 110.20, in
17 2002 as a part of the Commission’s regulations implementing BCRA, in which Congress
18 expanded and strengthened the ban on foreign national contributions and donations. Among
19 other changes, BCRA expressly banned foreign national contributions and donations that are
20 made “directly or indirectly.”² 52 U.S.C. 30121(a)(1)(A). During the 2002 rulemaking, the
21 Commission solicited comment on whether BCRA’s new “indirectly” language prohibited a
22 foreign-controlled U.S. corporation, including a U.S. subsidiary of a foreign corporation, from

² Prior to BCRA, the Act’s foreign national ban prohibited foreign nationals from making contributions “directly or through any other person” in connection with Federal, State, or local elections.

1 making non-federal donations of corporate treasury funds in states where they are permitted to
2 do so under state law, or from making federal contributions through a SSF, or both. See
3 Contribution Limitations and Prohibitions, 67 Fed. Reg. 69928, 69943 (Nov. 19, 2002). In
4 response, the Commission received numerous comments addressing the involvement of foreign-
5 owned U.S. subsidiaries in elections, all of which strongly urged the Commission not to extend
6 the foreign national ban to the activities of foreign-owned U.S. subsidiaries.³ See id. at 69943-
7 44. The Commission agreed with the commenters that BCRA’s “indirectly” language should not
8 be deemed to cover U.S. domestic subsidiaries of foreign corporations. The Commission based
9 its decision “upon the lack of evidence of Congressional intent to broaden the prohibition on
10 foreign national involvement in U.S. elections to cover such entities, and upon the substantial
11 policy reasons set forth in the long line of Commission advisory opinions that have permitted
12 U.S. subsidiaries to administer separate segregated funds and to make corporate donations for
13 State and local elections where they are allowed to do so by state law.” Id.

14 The Commission did, however, emphasize “that the activities of U.S. subsidiaries of
15 foreign corporations are governed by new section 110.20(i), which prohibits involvement of
16 foreign nationals in the decision-making of separate segregated funds, and of corporations that
17 plan to make donations in connection with State and local elections where they are permitted to

³ Indeed, one commenter expressed “surprise[] at this inquiry, as BCRA’s legislative history [did] not reveal any intent that the Commission visit this specific issue.” Trevor Potter, Campaign and Media Legal Center, at 4 (Sept. 13, 2002), <http://sers.fec.gov/fosers/showpdf.htm?docid=3190>; see also Senators Harry Reid and John Ensign (Sept. 13, 2002), <http://sers.fec.gov/fosers/showpdf.htm?docid=3205> (arguing no Congressional intent to extend the foreign national ban to contributions “otherwise legally made by U.S. subsidiaries of foreign corporations”); Senator McCain et al. at 3 (Sept. 13, 2002), <http://sers.fec.gov/fosers/showpdf.htm?docid=3199> (arguing that Congress did not intend to address “contributions by foreign-controlled U.S. corporations, including U.S. subsidiaries of foreign corporations.”); Donald J. Simon, Common Cause, at 5 (Sept. 13, 2002), <http://sers.fec.gov/fosers/showpdf.htm?docid=3193> (“Congress in the BCRA did not address the question raised in the NPRM of whether section 441e prohibits the U.S. subsidiary of a foreign corporation from establishing a [PAC], or from otherwise making non-federal donations.”); Robert F. Bauer, Perkins Coie LLP, at 3 (Sept. 13, 2002), <http://sers.fec.gov/fosers/showpdf.htm?docid=3195> (“To remove [the] distinction [between foreign principals and domestic subsidiaries] would serve no evident Congressional intent, unnecessarily confuse the regulated community, and deny many thousands of individual American citizens an opportunity to participate in the political process others enjoy.”).

1 do so.” Id. at 69944. The Commission viewed this “as the appropriate way to prevent foreign
2 nationals from engaging in election-related activities, particularly in the context of U.S.
3 subsidiaries of foreign-owned corporations.” Id. at 69946.

4 Consistent with these determinations, the Commission has continued since the
5 implementation of BCRA to permit U.S. domestic subsidiary corporations to establish,
6 administer, and solicit contributions to SSFs, as well as make donations and disbursements in
7 connection with non-Federal elections, subject to the restrictions against foreign national
8 involvement set forth in Commission regulations, rulemaking materials, and advisory opinions.
9 See Advisory Opinions 2004-42 n.3 (Pharmavite), 2006-15 (TransCanada), 2009-14 (Mercedes-
10 Benz USA/Sterling). And the Commission has continued to enforce the foreign national ban
11 against domestic corporations that violated the restrictions against foreign national participation
12 or foreign national funding. See MURs 6093 (Transurban) (finding reason to believe that a
13 foreign national parent corporation and its domestic subsidiary violated 52 U.S.C. 30121 because
14 the domestic subsidiary made non-Federal donations using funds from its foreign national parent,
15 and, moreover, because the foreign national parent’s board of directors directly participated in
16 determining whether to continue the political contributions policy of its U.S. subsidiaries); 6184
17 (Skyway Concession) (finding reason to believe that a domestic subsidiary of a foreign national
18 and its foreign national CEO violated 52 U.S.C. 30121 because the foreign national CEO
19 participated directly in the domestic corporation’s election-related activities by deciding to which
20 non-Federal committees the corporation should donate, authorizing the release of corporate funds
21 for the donations, and signing the corporation’s donation checks); 6203 (Itinere North America)
22 (finding reason to believe that a foreign national parent corporation and its domestic subsidiaries
23 violated 52 U.S.C. 30121 because a domestic subsidiary made non-Federal donations using

1 funds ultimately derived from its foreign national parent). Cf. MURs 6099 (Waverly Glen
2 Systems) (finding no reason to believe that a foreign national parent corporation and its domestic
3 subsidiary violated 52 U.S.C. 30121 because the domestic subsidiary used revenue from U.S.
4 operations to make the non-Federal donation and no foreign nationals were involved in the
5 decision-making process regarding the non-Federal donation); 6401/6432 (TransCanada
6 Keystone Pipeline) (same).

7 Prior to the passage of BCRA in 2002, corporations were permitted to pay for issue
8 advocacy communications that did not contain express advocacy. BCRA, however, extended the
9 Act’s prohibition against corporate contributions and expenditures to electioneering
10 communications, a new term which encompassed broadcast, cable, and satellite issue advocacy
11 communications referencing a federal candidate and disseminated within 30 days of a primary or
12 60 days of a general election. See 22 U.S.C. 30104(f), 30118. For the next five years, corporate-
13 funded issue advocacy communications referencing a federal candidate were only permitted
14 outside of the pre-election windows or via modes of communication other than broadcast, cable,
15 or satellite.

16 In 2007, the Supreme Court ruled in Wisconsin Right to Life (“WRTL”) that the Act’s
17 prohibition against corporate-funded electioneering communications was unconstitutional as
18 applied to communications that are not the functional equivalent of express advocacy.⁴ Three
19 years later in Citizens United, the Supreme Court struck down the Act’s prohibition on corporate
20 independent expenditures.⁵ Shortly thereafter, in SpeechNow.org v. FEC, 599 F.3d 686 (D.C.

⁴ Following WRTL, corporations were permitted to make electioneering communications that were genuine issue ads and did not contain the functional equivalent of express advocacy. The Commission countenanced this practice without re-visiting the definition of foreign national or rules for U.S. domestic subsidiaries.

⁵ In Citizens United, the Supreme Court did “not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process.” Citizens United, 558 U.S. at 362. The Court acknowledged that 52 U.S.C. 30121 (former 2 U.S.C. 441e)

1 Cir. 2010), the U.S. Court of Appeals for the District of Columbia Circuit held that the Act's
2 contribution limit as applied to individuals who seek to pool their resources to make independent
3 expenditures was unconstitutional. As a result of Citizens United and SpeechNow.org, the
4 Commission concluded in two advisory opinions that political committees that make only
5 independent expenditures may accept unlimited contributions from individuals and corporations.
6 See Advisory Opinions 2010-09 (Club for Growth) and 2010-11 (Commonsense Ten). The
7 following year, in Carey v. FEC, Civ. No. 11-259-RMC (D.D.C. 2011), the Commission agreed
8 to a stipulated order and consent judgment that permitted non-connected political committees to
9 maintain (1) an account funded by contributions subject to the Act's limits and prohibitions
10 which may be used to make contributions to candidates and other political committees, and (2) a
11 separate "non-contribution account," which may be funded by unlimited individual and corporate
12 contributions, to be used only to make independent expenditures. See also FEC Statement on
13 Carey v. FEC: Reporting Guidance for Political Committees that Maintain a Non-Contribution
14 Account (Oct. 5, 2011), <http://www.fec.gov/press/press2011/20111006postcarey.shtml>.

15 Because all U.S. corporations were prohibited from making contributions, expenditures,
16 independent expenditures, and electioneering communications in connection with *federal*
17 elections by 52 U.S.C. 30118 (former 2 U.S.C. 441b) prior to these developments, the
18 Commission did not have occasion to formally clarify how 52 U.S.C. 30121 would apply to such
19 activity by domestic corporations that are owned or controlled by foreign nationals. The
20 Commission also did not have occasion to apply 11 CFR 110.20(i), which the Commission
21 previously determined applied to the activities of U.S. subsidiaries and which prohibits the

provides an independent basis for prohibiting contributions and expenditures by foreign nationals, but limited its analysis to 52 U.S.C. 30118 (former 2 U.S.C. 441b). See id. The following year, however, the U.S. Court of Appeals for the District of Columbia Circuit explicitly upheld the foreign national ban at 52 U.S.C. 30121 (former 2 U.S.C. 441e) as constitutional. See Bluman v. FEC, 800 F.Supp.2d 281 (D.D.C. 2011), aff'd, 132 S.Ct. 1087 (2012). Accordingly, the foreign national ban remains the same today as it was before Citizens United.

1 involvement of foreign nationals in the decision-making of corporations’ and SSFs’ election-
2 related activities, to the making of independent expenditures, electioneering communications,
3 and the aforementioned contributions by domestic subsidiaries of foreign nationals.

4 However, at its first opportunity after the Citizens United decision, the Commission
5 affirmed that U.S. domestic subsidiaries of foreign corporations are permitted to make
6 contributions in U.S. elections. In MURs 6401 and 6432, the Commission found no reason to
7 believe that unlawful foreign national contributions were made to two Nebraska state candidates
8 by U.S. domestic subsidiary corporations wholly owned by a Canadian corporation,
9 TransCanada Corporation. The Commission found that (1) the donations were derived from U.S.
10 revenues and (2) all decisions concerning the donations were made by a U.S. citizen with no
11 foreign national participation. MURs 6401/6432 (TransCanada Keystone Pipeline), Factual &
12 Legal Analysis at 5-7. Thus, the definition of “foreign national” and the Commission’s rules for
13 contributions by “foreign nationals” that applied before Citizens United and related judicial
14 decisions have remained unchanged by those decisions. A formal clarification of the application
15 of the prohibition against “foreign national” participation in U.S. elections, including federal
16 elections, will provide important guidance.

17 II. Application of 52 U.S.C. 30121 and 11 CFR 110.20 to Domestic Subsidiaries of Foreign
18 Nationals Making Independent Expenditures, Disbursements for Electioneering
19 Communications, and Contributions to Certain Political Committees

20 In light of these developments, the Commission is issuing this notice to clarify how the
21 foreign national ban set forth in 52 U.S.C. 30121 and 11 CFR 110.20 applies to U.S. domestic
22 corporations that are owned or controlled by foreign nationals. The Commission hereby clarifies
23 that its rationale and restrictions against foreign national participation and funding set forth in

1 advisory opinions and enforcement matters addressing domestic subsidiaries making non-Federal
2 donations and disbursements also applies to domestic subsidiaries making Federal independent
3 expenditures, disbursements for electioneering communications, contributions to political
4 committees that make only independent expenditures, and contributions to separate accounts
5 maintained by political committees for making only independent expenditures. See, e.g.,
6 Advisory Opinions 1985-3 (Diridon), 1989-20 (Kuilima), 1989-29 (GEM), 1992-16 (Nansay
7 Hawaii), 2006-15 (TransCanada); MURs 4530 (Psaltis); 4594 (Longevity); 4884 (Future Tech);
8 6093 (Transurban); 6099 (Waverly Glen Systems); 6184 (Skyway Concession); 6203 (Itinere
9 North America); 6401/6432 (TransCanada Keystone Pipeline).

10 Specifically, a domestic subsidiary corporation is prohibited from making independent
11 expenditures or disbursements for electioneering communications, unless: (1) no foreign
12 nationals are involved in the domestic corporation’s decision-making with respect to its election-
13 related activities pursuant to 11 CFR 110.20(i); and (2) the domestic corporation uses only U.S.
14 net earnings, with no replenishment, subsidization, or offsets from its foreign national parent, to
15 make the independent expenditures or disbursements for electioneering communications. In
16 addition, a domestic subsidiary corporation is prohibited from making contributions to political
17 committees that make only independent expenditures (i.e., “independent expenditure-only
18 political committees” or “super PACs”) and contributions to separate accounts maintained by
19 political committees for making only independent expenditures (i.e., “non-contribution accounts”
20 of “Carey committees” or “hybrid PACs”), unless: (1) no foreign nationals are involved in the
21 domestic corporation’s decision-making with respect to its election-related activities pursuant to
22 11 CFR 110.20(i); and (2) the domestic corporation uses only U.S. net earnings, with no

1 replenishment, subsidization, or offsets from its foreign national parent, to make such
2 contributions.

3 The Commission believes that this interpretation of its regulations is consistent with the
4 Act’s “foreign national” definition and “indirectly” language, as well as the Commission’s
5 longstanding approach to U.S. domestic subsidiaries of foreign nationals. This approach also
6 heeds “the lack of evidence of Congressional intent to broaden the prohibition on foreign
7 national involvement in U.S. elections to cover such entities” in BCRA and respects Congress’s
8 prerogative to amend the Act’s foreign national ban, if it so chooses. See Contribution
9 Limitations and Prohibitions, 67 Fed. Reg. at 69943; Democracy is Strengthened by Casting
10 Light on Spending in Elections Act, S. 3628, 111th Cong. (2010) (proposed legislation to amend
11 the Act to extend the foreign national ban to foreign-controlled domestic subsidiaries).⁶

12 III. Prohibition Against Foreign National Participation in U.S. Corporation Decisions
13 Involving Election-Related Activities Under 11 C.F.R. § 110.20(i)

14 The Commission has recognized certain parameters and prohibitions against the
15 involvement of foreign nationals in the decision-making process of U.S. domestic corporations
16 when they make contributions, donations, expenditures, or disbursements. The rule is that U.S.
17 citizens must make all decisions with respect to federal, state, and local election contributions,
18 donations, expenditures, and disbursements. To clarify the independence of U.S. citizens, the
19 following prohibitions apply to foreign national involvement in all decisions of U.S. domestic
20 corporations concerning election-related activities, including when they make any federal or non-
21 federal contributions, donations, expenditures, or disbursements:

⁶ Subsequent Congresses have considered updated versions of the DISCLOSE Act, but these versions wholly abandoned amendments to the foreign national ban. See DISCLOSE Act of 2012, S. 2219 and S. 3369/H.R. 4010, 112th Cong. (2012); DISCLOSE 2013 Act, H.R. 148, 113th Cong. (2013), DISCLOSE Act of 2014, S. 2516, 113th Cong. (2014); DISCLOSE Act of 2015, S. 229/H.R. 430, 114th Cong. (2015); We the People Act of 2016, S. 6/H.R. 5494, 114th Cong. (2016).

- 1 (1) Foreign nationals cannot dictate, direct, influence or have any input into decisions
2 regarding contributions, donations, expenditures, electioneering communications,
3 or other election-related disbursements;⁷
- 4 (2) Foreign national directors or officers cannot vote on any matters concerning the
5 decisions of U.S. citizens to make contributions, donations, expenditures,
6 electioneering communications or other election-related disbursements;⁸
- 7 (3) Foreign nationals cannot select the U.S. citizens who will decide to make
8 contributions, donations, expenditures, electioneering contributions or other
9 election-related disbursements;⁹
- 10 (4) Foreign nationals cannot judge or review U.S. citizens for their performance in
11 making contributions, donations, expenditures, electioneering contributions or
12 other election-related disbursements.¹⁰

13 The only decision that foreign national directors and/or officers may participate in is the
14 establishment of an overall budget for the U.S. domestic corporation's political expenditures.

15 See Advisory Opinions 2000-17 (Extendicare); 2006-15 (TransCanada).

16 IV. Safe Harbor for Knowledge Standard at 11 CFR 110.20(a)(4)(iii)

17 When the Commission promulgated current 11 CFR 110.20 in 2002, it created a narrow
18 safe harbor within which a political committee is deemed to have satisfied its duty to investigate
19 the permissibility of a contribution or donation when certain facts that would lead a reasonable
20 person to inquire about the source of the funds are present (e.g., the contributor or donor

⁷ See, e.g., Advisory Opinions 1982-10 (Syntex USA); 1983-31 (Syntex); 1985-3 (Diridon Corp.); 1989-29 (GEM); 1992-16 (Nansay-Hawaii); 2006-15 (TransCanada).

⁸ Advisory Opinions 1983-31 (Syntex); 1990-8 (CIT).

⁹ Advisory Opinions 1990-8 (CIT); 1992-16 (Nansay Hawaii).

¹⁰ Advisory Opinion 2000-17 (Extendicare).

1 provides a foreign address, resides abroad, or makes the contribution or donation using a check
2 drawn on a foreign bank). A committee is considered to have made a “reasonable inquiry” and
3 thus discharged its duty to investigate if the committee obtains a copy of the contributor’s or
4 donor’s current and valid U.S. passport. See Contribution Limitations and Prohibitions, 67 Fed.
5 Reg. at 69941. The safe harbor set forth in 11 CFR 110.20(a)(7), however, does not contemplate
6 corporations making contributions or donations.

7 Accordingly, the Commission is announcing that it will establish a safe harbor for the
8 benefit of political committees that make only independent expenditures (i.e., “independent
9 expenditure-only political committees” or “super PACs”), political committees that maintain
10 separate accounts for making only independent expenditures (i.e., “Carey committees” or
11 “hybrid PACs”), as well as non-Federal political committees that are permitted to accept
12 corporate donations under State or local law. This policy does not impose new legal
13 requirements on political committees or corporate contributors or donors. If a political
14 committee that may lawfully accept corporate contributions or donations obtains a certification
15 from a corporate contributor or donor that satisfies the criteria below, the Commission will deem
16 the political committee to have conducted a reasonable inquiry for purposes of 11 CFR
17 110.20(a)(4)(iii). In order to satisfy the safe harbor, the certification must satisfy the following
18 criteria:

- 19 • The certification is a signed written statement by an authorized representative of
20 the corporation with knowledge of the corporation’s election-related activities;
- 21 • The certification states that the corporation is organized under or created by the
22 laws of the United States or of any State or other place subject to the jurisdiction

1 of the United States and has its principal place of business within the United
2 States;

- 3 • The certification states that no foreign nationals directed, dictated, controlled, or
4 directly or indirectly participated in the decision-making process of the corporation
5 with regard to the making of the corporation’s contribution or donation, pursuant
6 to 11 CFR 110.20(i); and
- 7 • The certification states that the corporation used only its net earnings generated
8 from U.S. operations to make the contribution or donation.

9 This safe harbor does not apply if the recipient political committee has actual knowledge that the
10 certification is false.

11 This notice represents a general statement of policy announcing the general course of
12 action that the Commission intends to follow. This policy statement does not constitute an
13 agency regulation requiring notice of proposed rulemaking, opportunities for public
14 participation, prior publication, and delay in effective date under 5 U.S.C. 553 of the
15 Administrative Procedures Act (“APA”). As such, it does not bind the Commission or any
16 member of the general public. The provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b),
17 which apply when notice and comment are required by the APA or another statute, are not
18 applicable.

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On behalf of the Commission,

Steven T. Walther
Chairman
Federal Election Commission

DATED: _____