AGENDA DOCUMENT NO. 16-15-A

2016 MAR 29 PM 4:00

FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM

For Meeting of 3-31-16

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Steven T. Walther
Vice Chairman STW

RE: Motion Regarding Foreign National Rulemaking

DATE: March 29, 2016

Attached is a Motion Regarding Foreign National Rulemaking. I have asked to place this document on the agenda for the Open Meeting scheduled for March 31, 2016.

Attachment

FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Steven T. Walther
Vice Chairman

RE: Motion Regarding Foreign National Rulemaking

DATE: March 29, 2016

Agenda Document 16-14-A contains a motion by my colleague, Commissioner Weintraub, to direct the Office of the General Counsel (OGC) "to draft for Commission consideration an appropriate rulemaking document that would require those making independent expenditures and electioneering communications to certify that any individual or corporate resources used are not owned or controlled by foreign nationals."

More than five years ago, on January 20, 2011, the Commission considered and voted on a draft notice of proposed rulemaking (NPRM) in response to the Supreme Court's *Citizens United* decision.[1] The NPRM draft addressed, among other things, contributions by foreign nationals and issues involving ownership and control of sources of funds by foreign nationals. Attached to this motion is the portion of the NPRM that directly addressed foreign national issues (the "Foreign National Proposed Provisions"). The Foreign National Proposed Provisions are akin in many respects to Agenda Document 16-14-A.

The Foreign National Proposed Provisions in REG 2010-01 (Citizens United) included three alternative approaches, described alphabetically, addressing the issue of foreign national resources used in making independent expenditures and electioneering communications. The draft containing those provisions was considered and voted on (but not approved) by the Commission on January 20, 2011. Those provisions are summarized as follows:

- The first proposal (Alternative A) would treat domestic subsidiaries as foreign nationals if (1) at least 20 percent of the domestic corporation's shares are owned or controlled by foreign nationals; (2) a third or more of the corporation's board

[1] 558 U.S. 310 (2010).

of directors are foreign nationals; or (3) one or more foreign nationals has the power to direct, dictate, or control the corporation's decision-making process. Under Alternative A, domestic subsidiaries of foreign nationals would be treated just like foreign corporations. Thus, under Alternative A, domestic subsidiaries would be prohibited from making contributions or expenditures in federal, state and local elections and from establishing and operating SSFs.

- The second proposal (Alternative B) would treat domestic subsidiaries as controlled or owned by foreign nationals if (1) more than 50 percent of the corporation's shares are owned by foreign nationals; (2) a majority of the corporation's board of directors are foreign nationals; or (3) as in Alternative A, one or more foreign nationals has the power to direct, dictate, or control the corporation's decision-making process. Furthermore, Alternative B would not revise the definition of "foreign national," but instead would prohibit domestic subsidiaries of foreign corporations from using treasury funds for independent expenditures or electioneering communications beyond the restricted class. Alternative B would therefore not prohibit domestic subsidiaries from establishing and operating SSFs.

- The third proposal (Alternative C) would apply the Commission's prior approach with respect to domestic subsidiaries of foreign corporations to the new issue of independent expenditures and electioneering communications. Alternative C would permit U.S. subsidiaries owned or controlled by foreign nationals to establish SSFs and fund independent expenditures and electioneering communications if they meet certain standards.

The full NPRM from which these excerpts were taken may be found on the Commission's website at http://sers.fec.gov/fosers/.

If the Commission approves Commissioner Weintraub's motion in Agenda Document 16-14-A, I move that the Commission direct OGC to include the relevant portion of the draft NPRM in their consideration when drafting a new version of an NPRM that addresses the issues raised in both documents.

Attachment

AGENDA DOCUMENT NO. 11-02

FEDERAL ELECTION COMMISSION
Washington, DC 20463

RECEIVED
FEDERAL ELECTION COMMISSION
SECRETARIAT

2011 JAN 18 P 3: 10

AGENDA ITEM

For Meeting of 1-20-11

MEMORANDUM

SUBMITTED LATE

TO: The Commission

FROM: Christopher Hughey pch
Acting General Counsel

Rosemary C. Smith RCS/pch
Associate General Counsel

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Esther D. Heiden EDH
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Phillip A. Olaya PAO
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Joanna S. Waldstreicher JSW
Attorney

SUBJECT: Draft Notice of Proposed Rulemaking on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations (Draft A)

Attached is a draft Notice of Proposed Rulemaking to implement the decision in Citizens United v. Federal Election Commission, 558 U.S. __, 130 S. Ct. 876 (2010).

We have been asked to place this draft on the agenda for January 20,2011.

Attachment

FEDERAL ELECTION COMMISSION

11 CFR Parts 104, 109, 110, and 114

[Notice 2011 – XX]

Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations

AGENCY: Federal Election Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Election Commission seeks comment on proposed changes to its rules regarding corporate and labor organization funding and reporting of expenditures, independent expenditures and electioneering communications. These and other proposed changes are in response to the decision of the Supreme Court in Citizens United v. FEC. The Commission has made no final decision on the issues presented in this rulemaking.

DATES: Comments must be received on or before March 21, 2011. Reply comments must be limited to the issues raised in the initial comments and must be received on or before April 11, 2011. The Commission will hold a hearing on these proposed rules and any modifications or amendments thereto that may be proposed, and will announce the date of the hearing at a later date. Anyone wishing to testify at the

X. 11 CFR 110.20 – Foreign nationals

The Commission also seeks comment on whether, or to what extent, Citizens United has any implications for the prohibition on contributions, expenditures, and other activities by foreign nationals at 11 CFR 110.20, and on three proposed alternative amendments to this regulation.

A. Background

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, 130 S. Ct. at 911. The Court thus did not specifically address the current statutory provision regarding "corporations or associations that were created in foreign countries or funded predominately by foreign shareholders." Id. While acknowledging that 2 U.S.C. 441e provides an independent basis for prohibiting contributions, expenditures, and independent expenditures by foreign nationals, the Court limited its analysis to 2 U.S.C. 441b. Section 441e prohibits foreign nationals from making "a contribution or donation of money . . . in connection with a Federal, State or local election," or "an expenditure, independent expenditure, or disbursement for an electioneering communication." 2 U.S.C. 441e(a)(1). This prohibition applies whether the contribution, donation, expenditure, independent expenditure or disbursement is made "directly or indirectly." Id.

A domestic corporation that is owned or controlled by a foreign national is not itself a "foreign national" under 2 U.S.C. 441e so long as the domestic corporation is "organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States" ("U.S. subsidiary" or "U.S. corporation").[19] However, because the foreign national parent of a U.S. subsidiary is prohibited by 2 U.S.C. 441e(a)(1)(C) from directly or indirectly making expenditures, independent expenditures, and disbursements for electioneering communications, the prohibitions in 2 U.S.C. 441e could apply to actions by a U.S. subsidiary that is owned or controlled by a foreign national. The Commission's regulations do not specifically address whether or when U.S. subsidiaries of foreign parent corporations are subject to the prohibitions on foreign national expenditures and disbursements for electioneering communications, because, before Citizens United, all corporations, foreign and domestic, were prohibited from

[19] See 2 U.S.C. 441e(b)(1); 22 U.S.C. 611(b)(2).

making these types of disbursements. Because U.S. corporations, as a result of the Citizens United holding, may use their own treasury funds to make independent expenditures and disbursements for electioneering communications, the Commission must now examine for the first time the restrictions in 2 U.S.C. 441e and their potential application to political activities paid for by U.S. subsidiaries of foreign nationals or corporations.

Section 441e of the Act and current 11 CFR 110.20 provide in relevant part that foreign nationals may not, "directly or indirectly," make expenditures or independent expenditures, or disbursements for electioneering communications. 2 U.S.C. 441e(a)(1)(C); 11 CFR 110.20(e) and (f). The regulation also follows the statute in defining a "foreign national," in part, by reference to 22 U.S.C. 611(b), a provision of the Foreign Agents Registration Act ("FARA"), which in turn provides that the term "foreign principal" includes "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." See 2 U.S.C. 441e(b)(1); 11 CFR 110.20(a)(3)(i).[20]

Current 11 CFR 110.20(e) and (f) prohibit foreign corporations from making independent expenditures and disbursements for electioneering communications. Current 11 CFR 110.20(i), in turn, prohibits foreign nationals from directing, dictating, controlling, or directly or indirectly participating in the decision-making process of any person, including a corporation or labor organization, with regard to such person's Federal or non-Federal election-related activities. These regulations implement the specific ban on expenditures, independent expenditures, and disbursements for

[20] FARA is a disclosure statute requiring those acting as agents of foreign principals in a political or related representational capacity (such as a public relations counsel or publicity agent) to make public disclosure of their relationship with the foreign principal, as well as financial activity in support of those activities.

electioneering communications by foreign nationals at 2 U.S.C. 441e; they do not relate to the ban on corporate-funded expenditures, independent expenditures and disbursements for electioneering communications in 2 U.S.C. 441b that was at issue in Citizens United.

Current 11 CFR 110.20 was promulgated in 2002 as a part of the Commission's regulations implementing BCRA, in which Congress expanded and strengthened the then-existing ban on foreign contributions and expenditures in connection with Federal elections, and added a prohibition on soliciting, accepting, or receiving contributions and donations from foreign nationals. In the 2002 rulemaking, the Commission proposed a definition of "foreign national" that generally followed the previous definition at former 11 CFR 110.4(a)(4) and incorporated the definition at 22 U.S.C. 611(b). The Commission did not receive any comments on this proposal, and it adopted the proposed definition as the final rule. See Explanation and Justification for Final Rules on Contribution Limitations and Prohibitions ("Contribution E&J"), 67 FR 69928, 69940 (Nov. 19, 2002), available at http://www.fec.gov/pdf/nprm/contribution_lim_pro/fr67n223p69927.pdf.

BCRA also amended the ban on foreign contributions and expenditures to prohibit them from being made "directly or indirectly." See 2 U.S.C. 441e. During the 2002 rulemaking, the Commission solicited comment as to whether BCRA's statutory language prohibited a foreign-controlled U.S. corporation, including a U.S. subsidiary of a foreign corporation, from making corporate donations in States where they are permitted to do so under State law, or from making contributions in connection with a Federal election from an SSF, or both. In the Contribution E&J, the Commission stated that the absence of express Congressional intent to restrict such spending meant that these U.S. subsidiaries should not be prohibited from making donations in non-Federal elections, and their SSFs should not be barred from making Federal contributions. Contribution E&J at 69943.

The Commission also amended 11 CFR 110.20(i) in the 2002 rulemaking, expanding its reach slightly but retaining the existing prohibition on direct or indirect foreign national participation in decisions about expenditures and disbursements made in support of, or in opposition to, Federal, State, or local candidates, political committees, or political organizations, or about the management of political committees, among other things. Id. at 69946.

Consistent with Section 441e(b)(1) of the Act, the Commission has previously concluded that domestic corporations whose principal places of business are located in the United States are not foreign nationals even if they are wholly or partially owned by foreign entities. It also concluded that such domestic corporations may establish, administer, and control SSFs so long as the individuals who exercise decision-making authority over the activities of those funds are U.S. citizens or legal residents, and decisions made by those persons are not dictated or directed by any foreign nationals. Finally, the Commission has concluded that no foreign parent corporation may contribute to its domestic subsidiary's SSF, directly or through subsidies to the subsidiary. See Advisory Opinions 1978-21 (Budd Citizenship Committee), 1980-100 (Revere Sugar), 1981-36 (Japan Business Association of Southern California), 1989-20 (Kuilima), 1989-29 (GEM), 1990-08 (CIT), 1992-16 (Nansay Hawaii), 1995-15 (Allison Engine PAC), 1999-28 (Bacardi-Martini), 2000-17 (Extendicare), 2006-15 (TransCanada), and 2009-14

(Mercedes-Benz USA/Sterling). Because U.S. subsidiaries were already prohibited from making expenditures, independent expenditures or electioneering communications by 2 U.S.C. 441b, the Commission has never formally addressed or determined whether 2 U.S.C. 441e separately prohibits such activity by corporations that are owned or controlled by foreign nationals.

The Commission seeks comment on three alternatives. Alternative A proposes treating domestic subsidiaries as foreign nationals if (1) at least 20 percent of the domestic corporation's shares are owned or controlled by foreign nationals; (2) if a third or more of the corporation's board of directors are foreign nationals; or (3) if one or more foreign nationals has the power to direct, dictate, or control the corporation's decision-making process. Under Alternative A, domestic subsidiaries of foreign nationals are treated just like foreign corporations. Thus, under Alternative A, domestic subsidiaries are prohibited from making contributions or expenditures in Federal, state and local elections and from establishing and operating SSFs.

In contrast to Alternative A, Alternative B provides that domestic subsidiaries are controlled or owned by foreign nationals if (1) more than 50 percent of the corporation's shares are owned by foreign nationals; (2) a majority of the corporation's board of directors are foreign nationals; or (3) as in Alternative A, one or more foreign nationals has the power to direct, dictate, or control the corporation's decision-making process. Furthermore, Alternative B does not revise the definition of "foreign national," but instead prohibits domestic subsidiaries of foreign corporations from using treasury funds for independent expenditures or electioneering communications beyond the restricted class. Alternative B would therefore not prohibit domestic subsidiaries from establishing and operating SSFs.

Alternative C seeks to apply the Commission's prior approach with respect to domestic subsidiaries of foreign corporations to the new issue of independent expenditures and electioneering communications. Alternative C permits U.S. subsidiaries owned or controlled by foreign nationals to establish SSFs and fund independent expenditures and electioneering communications if they meet certain standards.

B. General Questions

Before the discussion of these alternatives in greater detail below, the Commission seeks comment on general questions that may influence its approach. Do the existing Commission regulations sufficiently define "foreign national"? Does the Commission have statutory authority to revise the definition of foreign national at 11 CFR 110.20(a)(3), given that the Act defines "foreign national" by reference to 22 U.S.C. 611(b)? Alternatively, are revisions to 11 CFR 110.20 appropriate in light of the Supreme Court's decision in Citizens United, which substantially changed the law concerning the participation of corporations in U.S. elections? Additionally, should the Commission provide guidance as to what factors should be considered in making a determination as to where a corporation has its "principal place of business"?

Are there material distinctions between the making of independent expenditures or disbursements for electioneering communications and the establishment or administration of an SSF (such as the source of funds used) that would support the adoption of any one of the three proposed alternatives? In this context, the Commission notes that under current law only U.S. citizens may contribute to an SSF established, administered and controlled by a domestic corporation owned or controlled by a foreign corporation. See, e.g. Advisory Opinion 1978-21 (Budd Citizenship Committee). Thus, the pool of money available to such an SSF consists of funds voluntarily provided by U.S. citizens, with full knowledge that the funds are to be used for political purposes. See Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 414-15 (1972). Does this voluntariness requirement suggest that an SSF advances the speech interests of the individuals in an organization's restricted class who have contributed to the SSF and without whose contributions the SSF could not make a contribution or expenditure? Or do SSFs speak on behalf of the connected organizations that administer, maintain and control them?

Are the general treasury funds of a domestic subsidiary that is owned or controlled by a foreign corporation subject to the ultimate control, or at least the indirect control, of the parent foreign corporation? If the profits generated by a domestic subsidiary flow to the parent, does the subsidiary's decision to spend corporate money on political activity have direct financial or other implications for the parent's interests?

The foreign corporation may delegate authority to U.S. nationals to oversee domestic political activities, including the making of independent expenditures and electioneering communications. Are such U.S. nationals agents of the foreign corporation, and, if so, are they obligated by their fiduciary duties to their employer to act in a manner consistent with the foreign employer's interests? Can U.S. national employees be expected to make decisions independently, without regard to the interests of their employer? Do they have authority to do so? Does the relationship between foreign principals and their U.S. national employees support any of the three alternative approaches proposed by the Commission? Do the Commission's existing regulations prohibiting expenditures and disbursements for electioneering communications by foreign nationals adequately implement the prohibition on foreign nationals making contributions or donations in connection with Federal, State or local elections, 2 U.S.C. 441e(a)(1)(A), in light of the holding in Citizens United?

The Commission also seeks comment on how its regulations should address different corporate structures, and specifically how different forms of stock ownership may result in control over a decision to use corporate treasury funds to make an independent expenditure or electioneering communication. Similarly, the Commission seeks comment on how corporate officers, directors, and executives may exercise control over a decision to use corporate treasury funds for political speech.

For instance, with respect to stock ownership, should the Commission's analysis of corporate control be limited to ownership of voting stock or are there instances in which owners of non-voting stock or significant debt-holders may be able to exercise de facto control, such as (1) when the preponderance of a corporation's issued shares are non-voting or (2) when a corporation has sufficient debt such that one or more debt-holders may be in a position to exercise de facto control over the corporation?

Regardless of whether the Commission looks only to voting shares, or also considers non-voting shares and debt, at what level of foreign ownership should the Commission conclude that a domestic corporation is "owned or controlled" by a foreign national? Would 5 percent foreign ownership be sufficient for such a determination? Alternatively, is a threshold of 20 percent, or 50 percent, more appropriate? Should different thresholds be applicable for different ownership structures? For instance, should the Commission apply different thresholds to privately held and publicly held corporations? If a corporation is controlled by a single majority shareholder who owns more than 50 percent of the corporation's shares, would it be appropriate for the Commission to disregard all other minority shareholders? How should the Commission analyze ownership interests in a non-stock corporation such as a nonprofit entity or a foundation? In such instances should the Commission look to who has provided funding, or pledged funding, for a non-stock corporation?

With respect to corporate officers, directors and executives, should the Commission's analysis of corporate control be limited to members of a corporation's President and board of directors or are there other corporate officers or employees, such as a Chief Executive Officer, Chief Operating Officer, Chief Financial Officer or Executive Director, or members of any committee to which such authority has been delegated, who might be capable of exercising control over decisions to use corporate treasury funds for political speech? Should the Commission's analysis also include consideration of persons who have the legal capacity to select or elect either board members or corporate executives? With respect to the board of directors, is it only a majority of a corporation's board members that is able to exercise control over the corporation or are there instances where the Commission should conclude that something less than a numerical majority is able to exercise de facto control over a corporation?

Are there different structures of corporate boards that the Commission should consider in determining who is capable of exercising corporate control, such as board size, composition or decision-making procedures (e.g., whether a simple majority, supermajority, or consensus is needed to make a decision)?

Additionally, because corporations, including foreign corporations, often create partnerships or joint ventures through which they operate in the U.S., to what extent should the Commission's regulations address political spending on independent expenditures and disbursements for electioneering communications by such partnerships?

In light of the discussion above, and in view of Citizens United, the Commission also seeks comment on the relevance of the Commission's prior advisory opinions concerning the activities of domestic subsidiaries of foreign corporations for the present rulemaking. For example, one advisory opinion allowed a domestic corporation in which the majority of the board of directors was foreign nationals to create an SSF, through the use of a committee comprised only of U.S. citizens or permanent resident aliens residing in the United States. See AO 2000-17 (Extendicare). Additionally, one advisory opinion permitted the board of directors, which included foreign nationals, of a domestic corporation owned by a foreign corporation to set the budget for political donations and disbursements made by the domestic corporation in connection with State and local elections. See AO 2006-15 (TransCanada). Should the Commission explicitly supersede either or both of these advisory opinions? Would this have consequences for any other advisory opinions and, if so, which ones?

C. Proposed Alternatives

Alternative A

Alternative A revises the definition of "foreign national" at 11 CFR 110.20(a)(3) to include domestic subsidiaries that are owned or controlled by foreign parent corporations or foreign nationals. Specifically, Alternative A provides that domestic subsidiaries will be treated as "foreign nationals" if any of the following is present:

(a) at least 20 percent of the domestic corporation's outstanding voting or non-voting shares are directly or indirectly owned or controlled by foreign nationals;

(b) one third or more of the members of the corporation's board of directors are foreign nationals;

(c) one or more foreign nationals has the power, individually or in concert with other foreign nationals, to direct, dictate or control, directly or indirectly, the corporation's decision-making process with respect to its interests in the United States; or

(d) one or more foreign nationals has the power, individually or in concert with other foreign nationals, to direct, dictate or control, directly or indirectly, the corporation's decision-making process with respect to the corporation's political activities.

This alternative seeks to implement the prohibition on foreign nationals making contributions, expenditures, independent expenditures or disbursements for electioneering communications, directly or indirectly, set forth at 2 U.S.C. 441e.

In essence, Alternative A is based on the proposition that when a foreign person[21] owns or controls a substantial block of voting or non-voting shares of a domestic corporation, even if less than a majority, that person may has the power to assert effective control over the decisions made by the entity, and the actions of the domestic corporation may be "indirectly" attributable to the foreign person.[22] Because it would revise the

[21] The Act defines "person" to include corporations and labor organizations. 2 U.S.C. 431(11).

[22] In some states, corporate law provides that ownership of more than 50% of a corporation's voting shares represents literal control over the corporation, while ownership of as little as 20% of the voting shares has been considered to represent effective control over the corporation, especially for publicly held corporations. See Construction and Application of State Antitakeover Statutes, 37 A.L.R. 6th 1 (2008); see also, e.g., Denver & R. G. W. R. Co. v. United States, 387 U.S. 485, 499 (1967) ("[Seller's] proposed issuance of a 20% stock interest to [buyer] undoubtedly raised a serious question whether control of its operations might pass to [buyer]."); 8 Del. C. § 203(c)(4) ("A person who is the owner of 20% or more of the outstanding voting stock of any corporation, partnership, unincorporated association or other entity

definition of foreign national, Alternative A would, under 11 CFR 110.20(f) and the Commission's precedents, prohibit a domestic corporation that is controlled by a foreign parent from making contributions or expenditures in Federal, State and local elections, and also from establishing, maintaining or controlling a SSF.

Is the proposed definition of "foreign national" in Alternative A consistent with 2 U.S.C. 441e, which defines "foreign national," in part, by reference to 22 U.S.C. 611(b)? If so, does Alternative A appropriately restrict foreign national participation in the U.S. electoral process? Is Alternative A consistent with the First Amendment rights of domestic subsidiaries controlled by foreign parent corporations or foreign governments? Would Alternative A be justified by the government's "interest in preventing foreign individuals or associations from influencing our Nation's political process"? Citizens United, 130 S. Ct. at 911 (declining to reach the question of whether this interest is "compelling").

If the Commission adopts Alternative A, should the Commission also adopt a definition for "owns or controls" or do general principles of corporate law provide adequate guidance for determining who "owns or controls" voting stock? Should the Commission separately address what constitutes "the power to direct, dictate, or control the decision-making process of the corporation with respect to its interests in the United States?" See Proposed Alternative A. If such definitions are preferable, what should those definitions be?

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shall be presumed to have control of such entity[.]"); Ind. Code § 23-1-42-1 (2010) cmt. ("One-fifth (or 20%) is the level of ownership . . . [that] represents a significant level of dominance that, in a public corporation in which other shareholdings are generally dispersed, can amount to effective control for many purposes.").

Does Alternative A strike an appropriate balance between permitted and prohibited activity? Is a 20 percent bright line threshold for ownership of voting stock appropriate? Should the threshold be lower or higher? Would it be advisable to establish a bright line threshold for publicly held corporations that is different from the threshold for privately held corporations? Is it appropriate to focus on ownership of voting stock, on board composition, or on some other factor, when evaluating whether a corporation is owned or controlled by foreign nationals? If there are other factors that should be considered, what should they be? Does Alternative A provide adequate guidance as to which domestic corporations are owned or controlled by foreign nationals?

Alternative A sets forth four possible conditions, paragraphs (A)-(D), which cause a corporation to be considered a foreign national; do these four conditions adequately capture all of the ways in which a domestic corporation may be directed or controlled by a foreign parent corporation? Are these conditions too narrow or overbroad? Should any of the four paragraphs be omitted? Should any be added?

The language of proposed paragraphs (C) and (D) raises several additional questions. They refer to one or more foreign nationals having "the power, individually or in concert with other foreign nationals, to direct, dictate, or control the corporation's decision-making process." Should this include only decision-making power that is set forth in the corporate by-laws, or should it also include de facto control of the corporation's decision-making? Should it explicitly include control that might be achieved through control structures, collateral agreements, indebtedness, market share, or otherwise? Should it include power to control corporate decision-making that is granted by the law of the State under whose laws the corporation is incorporated, even if such control is not formally granted by the corporation's by-laws? Should paragraphs (C) and (D) instead refer to a corporation in which one or more foreign nationals "directs, dictates, or controls the decision-making process of the corporation"?

Paragraph (C) also refers to a foreign national's power to control decision-making "with respect to [the corporation's] interests in the United States." Is this necessary to capture all relevant forms of foreign control of political spending? Is it overbroad? What kinds of interests should it include, if any?

<u>Alternative B</u>

Alternative B prohibits domestic subsidiaries that are owned or controlled by foreign nationals from using treasury funds for independent expenditures or electioneering communications other than communications to the restricted class. Alternative B also sets forth the conditions that constitute ownership or control by a foreign national. Specifically, Alternative B provides that domestic subsidiaries are controlled or owned by foreign nationals if any of the following conditions is present:

(a) more than 50 percent of the corporation's outstanding voting shares are directly or indirectly owned by foreign nationals;

(b) a majority of members of the corporation's board of directors are foreign nationals;

(c) one or more foreign nationals has the power, individually or in concert with other foreign nationals, to direct, dictate or control, directly or indirectly, the corporation's decision-making process with respect to its interests in the United States; or

(d) one or more foreign nationals has the power, individually or in concert with other foreign nationals, to direct, dictate or control, directly or indirectly, the corporation's decision-making process with respect to the corporation's political activities.

Unlike Alternative A, Alternative B does not propose to amend the definition of the term "foreign national" and therefore would not result in prohibiting a domestic corporation that is controlled by a foreign parent from establishing, maintaining or controlling a SSF. Alternative B also differs from Alternative A in providing that a foreign national owns or controls a domestic corporation when the foreign national owns or controls over 50 percent of the corporation's voting stock, as opposed to the 20 percent in Alternative A. Is a 50 percent bright line for ownership of voting stock appropriate? Should it be lower or higher? Again, would it be more appropriate to have a bright line threshold for publicly held corporations that is different from the threshold for privately held corporations? The different thresholds in Alternative A and B are intended to provide contrasts in approach. There is nothing inherent to Alternative A that would require a threshold of 20 percent, nor is there anything inherent to Alternative B that would require a threshold of 50 percent. Should the Commission adopt Alternative A with a 50 percent threshold or Alternative B with a 20 percent threshold?

Likewise, Alternative B differs from Alternative A in providing that a foreign national owns or controls a domestic corporation when a majority of the members of the domestic corporation's board of directors are foreign nationals, as opposed to the one-third of the members threshold in Alternative A. Is a "majority of the members" bright line for the board of directors appropriate? Would it be more appropriate to have a bright line threshold for publicly held corporations that is different from the threshold for privately held corporations? The different thresholds in Alternative A and Alternative B are intended to provide contrasts in approach.

Does Alternative B strike an appropriate balance between permitted and prohibited activity? In evaluating whether a corporation is owned by foreign nationals, Alternative A and B focus on ownership of voting stock. Is this appropriate, or should the Commission adopt an approach to ownership that takes into account other financial instruments such as warrants, options, debt, or non-voting stock? Alternatively, should the Commission defer to general principles of corporate law, including State law, to determine when a domestic corporation is owned or controlled by a foreign national and therefore not adopt a bright line threshold at all? Could the Commission develop a rule that provides clear guidance in this area of the law?

Alternative B also includes a requirement that whenever a corporation reports disbursements for electioneering communications pursuant to 11 CFR 104.20 or reports disbursements for independent expenditures pursuant to 11 CFR 109.10, the report must include a statement that the corporation is in compliance with the prohibitions on foreign nationals making payments for electioneering communications and independent expenditures. Should corporations be required to certify that they are not owned or controlled by foreign nationals on any reports filed with the Commission and therefore are in compliance with 11 CFR 110.20? If so, should the Commission require corporations to provide an explanation of how they determined their ownership status? Does the Commission have authority to require such certifications?

Alternative C

Alternative C seeks to adapt the Commission's prior approach with respect to domestic corporations owned or controlled by foreign nationals to the new issue of independent expenditures and electioneering communications made by such corporations. First, the proposal provides that a domestic subsidiary of a foreign corporation may establish an SSF if the subsidiary is a separate legal entity whose principal place of business is the United States (and thus, under this alternative, is not considered to be a "foreign national") and if those exercising decision-making authority over the subsidiary's SSF are not foreign nationals. See Advisory Opinions 1980-100 (Revere Sugar), 1980-111 (Portland Cement).

Second, Alternative C provides the conditions under which a U.S. subsidiary may make independent expenditures or electioneering communications, so long as no foreign national controls the corporation's decision-making with respect to its election-related activities and the domestic corporation uses only U.S. net earnings, with no replenishment, subsidization, offsets or other financial consequences from its foreign parent. As noted above, the Commission has previously determined that the activities of U.S. subsidiaries are to be governed by 11 CFR 110.20(i), which prohibits the involvement of foreign nationals in the decision-making of SSFs and of corporations. However, the Commission has never had occasion to apply 11 CFR 110.20(i) to the making of independent expenditures and electioneering communications by domestic subsidiaries of foreign nationals, because such activity was independently prohibited by 2 U.S.C. 441b.

The Commission seeks comment on whether 11 CFR 110.20 should also apply to corporations' electioneering communications and independent expenditures. Would Alternative C, which is based on the Commission's approach to domestic subsidiaries of foreign corporations prior to Citizens United when corporations were prohibited by the Act from making independent expenditures or electioneering communication, define with sufficient clarity and thoroughness when a domestic subsidiary is funded or subsidized by a corporate parent? See Advisory Opinion 1989-20 (Kuilima) (concluding that a domestic subsidiary "funded predominantly by a foreign national corporation" is prohibited by 2 U.S.C. 441e from making State and local contributions). In Advisory Opinion 2006-15 (TransCanada), the Commission concluded that "in order for a domestic subsidiary of a foreign national to make donations or disbursements in connection with a State or local election, the donations or disbursements may not be derived from the foreign national's funds and no foreign national may have any decision-making authority concerning the making of donations or disbursements." Similarly, Alternative C applies these two conditions to domestic subsidiaries of foreign corporations making electioneering communications and independent expenditures, which corporations and labor organizations may now make after Citizens United.

Proposed Alternative C incorporates language from Commission advisory opinions addressing the activities of domestic subsidiaries of foreign corporations. The regulation sets forth two conditions on the establishment of an SSF that were first articulated by the Commission in 1980. Advisory Opinion 1980-111 (Portland Cement). The first condition prohibits foreign nationals from participating in decision-making related to the SSF's activities, pursuant to 11 CFR 110.20(i). The second condition prohibits the solicitation of foreign nationals for donations to the SSF, pursuant to 11 CFR 110.20(g). See Advisory Opinion 1980-111 (Portland Cement); Advisory Opinion 2004-42 (Pharmavite). Does the proposed regulation satisfactorily implement the policies intended by the Act with respect to the limiting the capacity of foreign nationals to influence the U.S. election process? Given that both of the referenced provisions already exist in the Commission regulations, is this first part of Alternative C necessary? Is it useful to reiterate these two previously separate conditions together in one paragraph to make clear that they apply in tandem to SSFs of domestic subsidiaries owned by foreign nationals? Could proposed paragraph (k) state simply that a domestic subsidiary of a foreign national corporation may establish an SSF provided it complies with 11 CFR 110.20(g) and (i), or that it may establish an SSF provided it complies with all other existing regulations? Should the Commission adopt any additional conditions on the establishment of an SSF by a domestic subsidiary and, if so, what conditions should be considered and why?

Next, proposed Alternative C sets forth two conditions on the making of disbursements for electioneering communications and communications containing express advocacy beyond the restricted class. The first condition prohibits foreign nationals from participating in decision-making related to contributions, donations, expenditures, or disbursements in connection with any election, pursuant to 11 CFR 110.20(i). See Advisory Opinion 2006-16 (TransCanada). The second condition, which is based on prior Commission advisory opinions on the topic of domestic subsidiaries' donations to State and local candidates, provides that the funds used to finance electioneering communications and express advocacy communications beyond the restricted class must be solely from U.S. net earnings, and must not be subsidized or replenished by the foreign national parent. Id.; see also MUR 4594 (Longevity Int'l Enterprises Corp.) (providing that a domestic subsidiary may not make donations to State and local candidates using funds originating from a foreign parent). The Commission seeks comment on this proposal.

Should the Commission define any of the terms used in Alternative C? Should the Commission craft a regulation to govern the full panoply of commonly used corporate arrangements, structures and combinations that may exist between and among subsidiaries and their parent corporations? Does Alternative C cover the full range of possible corporate arrangements? Unlike Alternative A, both Alternatives B and C continue to permit U.S. subsidiaries to maintain SSFs. Would continuing to allow domestic subsidiaries to maintain SSFs avoid constitutional issues that might by presented by Alternative A?

Alternative C permits U.S. subsidiaries of foreign nationals, including foreign governments,[23] to pay for communications that expressly advocate the election of Federal candidates. Would allowing these communications be consistent with the prohibition on foreign national participation in U.S. elections in 2 U.S.C. 441e, as long as no foreign national participates in the decision-making process with respect to the activity and the activity is not funded by foreign nationals?

Would it be appropriate for the Commission to adopt more restrictive rules for domestic subsidiaries that are owned or controlled by a foreign government or by a foreign corporation that is, in turn, owned or controlled by a foreign government? Are

[23] The term "foreign principal" in Section 611(b) of FARA includes "a government of a foreign country." 22 U.S.C. 611(b)(1).

the concerns about foreign involvement in U.S. elections discussed above more significant when a foreign government is involved? If a foreign government acquires direct or indirect ownership or control over a domestic corporation, should that corporation be permitted to spend unlimited amounts on independent expenditures and electioneering communications that are intended to influence U.S. elections? Is it reasonable to expect that a domestic corporation's involvement in U.S. elections will not be influenced by the interests of a foreign government that owns or controls the domestic corporation, directly or indirectly, and that may hire and supervise the corporation's board members, officers and executives?

The Commission also seeks comment on the extent to which the Commission's regulations should specifically address different ways that foreign national influence could result in "direct[ing], dictat[ing], control[ling], or directly or indirectly participat[ing] in the decision-making process of" a domestic corporation, as prohibited by 11 CFR 110.20(i), where such corporations are (a) <u>created</u> by one or more foreign nationals, (b) <u>owned</u> by one or more foreign nationals, (c) <u>funded</u> by one or more foreign nationals, irrespective of ownership (including loans), or (d) <u>controlled</u> by one or more foreign nationals, irrespective of ownership or funding. Do Alternatives A, B and C provide adequate guidance as to which domestic corporations are owned or controlled by foreign nationals?

If the Commission does not adopt Alternative A, B or C, should the Commission adopt some other regulation specifically addressing the relationships between foreign parent corporations and domestic subsidiaries, or between foreign and domestic partners, limiting how much control or influence the foreign national may exert over its domestic subsidiary or partner before the latter is also subject to the prohibitions on foreign national expenditures and electioneering communications? Put another way, should the Commission adopt a rule other than those proposed in this NPRM setting forth when a foreign parent corporation's control or influence over its domestic subsidiary is so great as to justify a restriction on the subsidiary's speech? If the Commission did adopt such a rule, what information, criteria or factors would be relevant in gauging the level of foreign control or influence? Alternatively, since the making of independent expenditures and electioneering communications is distinct from activities sanctioned under prior Commission precedent, should the Commission instead handle the Court's concern about expenditures by foreign-controlled corporations on a case-by-case basis in enforcement and Advisory Opinions? Would this approach be preferable to adopting a new regulation?

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

The Commission certifies that the attached proposed rules, if adopted, would not have a significant economic impact on a substantial number of small entities. There are two bases for this certification. First, there are few small entities that would be affected by these proposed rules. The Commission's proposed revisions may affect some for-profit corporations, labor organizations, individuals, and some non-profit organizations. Individuals and labor organizations are not "small entities" under 5 U.S.C. 601(6). Many non-profit organizations that might use general treasury funds to make independent expenditures or electioneering communications are not "small organizations" under 5 U.S.C. 601(4) because they are not financed by a small identifiable group of individuals, but rather rely on contributions from a large number of individuals to fund operations and activities.

Second, the proposed rules would not have a significant economic impact on the small entities affected by this rulemaking. Overall, the proposed rules would relieve a funding restriction that the current rules place on some corporations and labor organizations. The proposed rules would allow small entities to engage in activity they were previously prohibited from funding with corporation or labor organization funds. Thus, while one effect of the proposed rule would be to increase substantially the number of corporations and labor organizations that use general treasury funds to make independent expenditures or electioneering communications, these entities will do so voluntarily and not because of any new Federal requirement to do so. Although they would incur some costs in complying with the obligation to report independent expenditures and electioneering communications, these costs would not be very great and thus would not have a significant economic impact on the small entities affected by this rulemaking. In fact, the obligation for corporations and labor organizations to report electioneering communications should not be burdensome because the trigger to report electioneering communications remains high. Further, because qualified non-profit corporations would continue to be able to make independent expenditures and electioneering communications just as they have done before, their reporting obligations will not change or become more burdensome because of this rulemaking. Therefore, the attached rule would not have a significant economic impact on a substantial number of small entities.

List of Subjects

11 CFR Part 110

Campaign funds, political committees and parties.

PART 110 – CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS (2 U.S.C 431(8), 431(9), 432(c)(2), 434(i)(3), 438(a)(8), 441a, 441b, 441d, 441e, 441f, 441g, 441h and 36 U.S.C. 510)

5. The authority citation for part 110 would continue to read as follows:

Authority: 2 U.S.C 431(8), 431(9), 432(c)(2), 434(i)(3), 438(a)(8), 441a, 441b, 441d, 441e, 441f, 441g, 441h and 36 U.S.C. 510.

ALTERNATIVE A for 110.20

6. In section 110.20, paragraph (a)(3)(iv) would be added to read as follows:

§ 110.20 Prohibition on contributions, donations, expenditures, independent expenditures, and disbursements by foreign nationals (2 U.S.C. 441e, 36 U.S.C. 510).

(a) * * *

(3) Foreign national means –

* * *

(iv) Any corporation

(A) In which one or more foreign nationals described in paragraph (a)(3)(i) or (ii) of this section directly or indirectly own or control at least twenty percent of the voting or non-voting shares;

(B) With respect to which one third or more of the members of the board of directors are foreign nationals described in paragraph (a)(3)(i) or (ii) of this section;

(C) Over which one or more foreign nationals described in paragraph (a)(3)(i) or (ii) of this section has the power, individually or in concert with other foreign nationals, to direct, dictate, or control, directly or indirectly, the decision-making process of the corporation with respect to its interests in the United States; or

(D) Over which one or more foreign nationals described in paragraph (a)(3)(i) or (ii) of this section has the power, individually or in concert with other foreign nationals, to direct, dictate, or control, directly or indirectly, the decision-making process of the corporation with respect to activities in connection with any Federal, State, or local election, including :

(i) The making of a contribution, donation, expenditure, independent expenditure, or disbursement for an electioneering communication; or

(ii) The administration of a separate segregated fund established or maintained by the corporation.

ALTERNATIVE B for 110.20

7. In section 110.20, paragraph (k) would be added to read as follows:

§ 110.20 Prohibition on contributions, donations, expenditures, independent expenditures, and disbursements by foreign nationals (2 U.S.C. 441e, 36 U.S.C. 510).

* * * * *

(k) Domestic corporation owned or controlled by foreign national

(1) Notwithstanding any other provision of this title, a domestic corporation that is owned or controlled by a foreign national is prohibited from:

(i) Making expenditures in connection with a Federal election (as defined in 11 CFR 114.1(a)), for communications to those outside the restricted class that expressly advocate the election or defeat of one or more clearly identified candidate(s) or the candidates of a clearly identified political party; and

(ii) Making payments for an electioneering communication to those outside the restricted class.

(2) Domestic corporation that is owned or controlled by a foreign national means any corporation:

(i) In which one or more foreign nationals described in paragraph (a)(1) or (2) of this section directly or indirectly own or control more than 50 percent of the voting shares;

(ii) With respect to which the majority of the members of the board of directors are foreign nationals described in paragraph (a)(1) or (2) of this section;

(iii) Over which one or more foreign nationals described in paragraph (a)(1) or (2) of this section has the power, individually or in concert with other foreign nationals, to direct, dictate or control, directly or indirectly, the decision-making process of the corporation with respect to its interests in the United States; or

(iv) Over which one or more foreign nationals described in paragraph (a)(1) or (2) of this section has the power, individually or in concert with other foreign nationals, to direct, dictate or control, directly or indirectly, the decision-making process of the corporation with respect to activities in connection with any Federal, State, or local election, including –

(A) The making of a contribution, donation, expenditure, independent expenditure, or disbursement for an electioneering communication; or

(B) the administration of a separate segregated fund established or maintained by the corporation.

(3) Any corporation that reports disbursements for electioneering communications pursuant to 11 CFR 104.20 or that reports expenditures for independent expenditures pursuant to 11 CFR 109.10 must include in each report a statement that the corporation is in compliance with the prohibitions described in paragraphs (e), (f), and (k) of this section.

ALTERNATIVE C for 110.20

8. In section 110.20, paragraph (k) would be added to read as follows:

§ 110.20 Prohibition on contributions, donations, expenditures, independent expenditures, and disbursements by foreign nationals (2 U.S.C. 441e, 36 U.S.C. 510).

* * * * *

(k) Domestic corporation owned or controlled by foreign national

(1) A domestic corporation owned or controlled by one or more foreign nationals may establish and operate a separate segregated fund provided that:

(i) No foreign national shall direct, dictate, control, or directly or indirectly participate in the decision-making process of such a corporation or separate segregated fund, with regard to such corporation or fund's Federal or non-Federal election-related activities, including decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with elections for any Federal, State, or local office or decisions concerning the administration of a political committee pursuant to paragraph (i) of this section; and

(ii) No foreign nationals are solicited to contribute to the separate segregated fund pursuant to paragraph (g) of this section.

(2) A domestic corporation owned or controlled by one or more foreign nationals may make expenditures in connection with a Federal election for communications to those outside the restricted class that expressly advocate the election or defeat of one or more clearly identified candidate(s) and may make payments for an electioneering communication to those outside the restricted class provided that:

(i) No foreign national shall direct, dictate, control, or directly or indirectly participate in the decision-making process of such as a corporation or separate segregated fund, with regard to such corporation or fund's Federal or non-Federal election-related activities, including decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with elections for any Federal, State, or local office or decisions concerning the administration of a separate segregated fund pursuant to paragraph (i) of this section; and

(ii) The domestic corporation uses only its U.S. net earnings, not subsidized or replenished by the foreign national parent, to fund election-related activity;

(iii) The expenditure or payment is not coordinated with a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing.

* * * * *

On behalf of the Commission,

____
Cynthia L. Bauerly
Chair
Federal Election Commission

DATED: ________________
BILLING CODE: 6715-01-P