

AGENDA DOCUMENT NO. 16-44-A



FEDERAL ELECTION COMMISSION
Washington, DC 20463

2016 SEP 15 AM 9:23

AGENDA ITEM

For Meeting of 9-15-16

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Steven T. Walther
Vice Chairman

RE: Statement Of Vice Chairman Steven T. Walther Regarding Proposal to Rescind Advisory Opinion 2006-15 (TransCanada) and to Open a Rulemaking to Ensure that U.S. Political Spending is Free from Foreign Influence

DATE: September 15, 2016

Attached for discussion in open session is my statement regarding proposals (1) to rescind Advisory Opinion 2006-15 (TransCanada) and (2) to open a rulemaking to ensure that U.S. political spending is free from foreign influence. I have asked this document to be made public for the Open Session of September 15, 2016.

Attachment



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**Statement Of Vice Chair Steven T. Walther
Regarding Proposal to Rescind Advisory Opinion 2006-15 (TransCanada) and to
Open a Rulemaking to Ensure that U.S. Political Spending is Free from Foreign Influence**

Before the Commission for consideration is (1) a proposal to rescind an advisory opinion issued by the Federal Election Commission on May 19, 2006,¹ and (2) a proposal to direct our counsel to draft a notice of proposed rulemaking to reduce the potential for foreign spending in our elections.²

The advisory opinion at issue – Advisory Opinion (AO) 2006-15 (TransCanada) – was a mistake from the outset. The request came before me for consideration and was subject to a vote just 127 days after I first started serving as a Commissioner. The AO was approved by five Commissioners; I was the lone Commissioner who opposed the decision.³ Although I did not issue a written statement at the time explaining my vote, my comments are available on a recording of that meeting on the Commission’s website, and an unofficial transcript is attached to this statement.⁴

I have long been concerned about the Commission’s general approach – based primarily on a string of advisory opinions reaching back almost four decades – concerning political contributions made by U.S. subsidiaries that are owned by foreign corporations.⁵ These

¹ *Proposal to Rescind Advisory Opinion 2006-15 (TransCanada)*, Memorandum from Commissioner Ann M. Ravel dated August 9, 2016, Agenda Document No. 16-32-A, *available at* http://www.fec.gov/agenda/2016/documents/mtgdoc_16-32-a.pdf.

² *Proposal To Launch Rulemaking To Ensure That U.S. Political Spending Is Free From Foreign Influence*, Memorandum from Commissioner Ellen L. Weintraub dated September 9, 2016, Agenda Document No. 16-40-A, *available at* http://www.fec.gov/agenda/2016/documents/mtgdoc_16-40-a.pdf.

³ Commissioners Lenhard, Mason, Toner, von Spakovsky and Weintraub voted affirmatively for the decision. *See* Certification dated May 18, 2006, *available at* http://saos.fec.gov/saos/searchao?SUBMIT=continue&PAGE_NO=0.

⁴ *See* Recording of Commission Open Meeting of May 18, 2006, *available at* <http://www.fec.gov/agenda/2006/agenda20060518.shtml>.

⁵ *See Contribution Limitations and Prohibitions, Final Rules*, 67 Fed. Reg. 69928, at 69943 (Nov. 19, 2002) (citing Advisory Opinions 2000-17 (Extendicare Health Services, Inc.), 1999-28 (Bacardi-Martini, USA, Inc.), 1995-15 (Allison Engine Company Political Action Committee), 1992-16 (Nansay Hawaii, Inc.), 1992-07 (H&R Block, Inc.), 1990-08 (The CIT Group Holdings, Inc.), 1989-29 (GEM of Hawaii, Inc.), 1982-34 (Sonat Inc. Political Action Committee), 1981-36 (Japan Business Association of Southern California), 1980-100 (Revere Sugar Corp.), and 1978-21 (Budd Citizenship Committee)).

concerns pre-dated the Supreme Court's 2010 decision in *Citizens United*,⁶ but that decision, in my view, dramatically increased the potential for foreign influence in our elections and highlighted the need for the Commission to take a closer look at this area of the law.

In AO 2006-15 (TransCanada), the requestor requested permission to make political donations and disbursements from two of TransCanada's wholly owned domestic subsidiaries in connection with State and local elections. The Commission concluded that the Act and Commission regulations did not prohibit these political donations or disbursements "because the funds used for such donations and disbursements would not come from a foreign national and because the domestic subsidiaries would ensure that no foreign national participates in making decisions concerning non-Federal election-related activities."⁷

I voted against granting the request due to my concern about the composition of the boards of directors of the two subsidiaries, each of which included a foreign national.⁸ Given this structure, it seemed that the foreign national could potentially have inordinate influence over spending decisions being made by the subsidiary. Even though a number of precautions had been taken,⁹ I still believed that the foreign parent should not be involved, even if indirectly, in contribution decisions regarding U.S. elections.

Unsuccessful efforts have been made to at least open a rulemaking to formalize a rule which would provide reasonable guidance to the public and those directly involved in U.S. elections to have reasonable assurances that foreign money will not find its way into American politics. As stated in 2003 by Justice Stevens and Justice O'Connor in the main ruling in *FEC v.*

The Commission noted that the BCRA sponsors, in commenting during the BCRA rulemaking process, referred to:

the series of Commission advisory opinions over more than two decades that have affirmed the participation of such subsidiaries in elections in the United States, either directly in states where state law permits, or through separate segregated funds with regard to Federal elections, so long as there is no involvement of foreign nationals in decisions regarding such participation and so long as foreign nationals are not solicited for the funds to be used.

Id.

⁶ *Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876 (Jan. 21, 2010).

⁷ AO 2006-15 (TransCanada) at 5-6.

⁸ Of the three board members of one subsidiary, two members were U.S. citizens and one was a foreign national. Of the three board members of the other subsidiary, one was a foreign national, and one had permanent resident status.

⁹ The Advisory Opinion noted that:

The Boards of Directors of the Subsidiaries, which include foreign nationals, would set an overall budget for political donations and disbursements on an annual basis at a "not to exceed" amount. The Subsidiaries' Boards would review and enforce compliance with these overall budget amounts. Each Board would delegate to a subset of its Board members, comprised exclusively of U.S. citizens or permanent residents, the authority to select the individual or individuals who will exercise all other decision-making authority over political donations and disbursements. These arrangements ensure that foreign nationals do not directly or indirectly participate in the decision-making process of GTN or TC Hydro with regard to their non-Federal election-related activities.

McConnell, in the absence of reasonable measures taken by the government to prevent schemes to evade contribution prohibitions and limitations, “Money, like water, will always find an outlet.”¹⁰

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 *Citizens United*. Attached to this memorandum is the portion of the NPRM that directly addressed foreign national issues (the “Foreign National Proposed Provisions”), dated March 29, 2016, which I made public for discussion at a recent Open Meeting of the Commission.¹¹ The NPRM draft addressed, among other things, contributions by foreign nationals and issues involving ownership and control of sources of funds by foreign nationals. The NPRM draft would have sought public comment, consistent with the Supreme Court’s endorsement of transparency and the potential impact of its decision on our restrictions on foreign nationals, by (1) revising certain reporting requirements related to independent expenditures and electioneering communications to provide more comprehensive disclosure of such spending; and (2) revising the regulations addressing financial participation by foreign nationals in our election process.

The NPRM draft would have also sought comment on crucial questions as to what impact the *Citizens United* decision may potentially have on the Federal Election Campaign Act’s (“FECA”) longstanding prohibition on the involvement of foreign nationals in U.S. elections – an issue that was completely ignored in the bare-bones rule ultimately approved by the Commission on a 4-2 vote.¹² Because for-profit corporations were already prohibited by the FECA from spending their funds on political speech, the Commission never needed separate rules to specifically prohibit foreign national corporations from spending money. However, as a direct result of *Citizens United*, the Commission is still faced with the issue of when a corporation is a “foreign national” and therefore still subject to the specific prohibition on all foreign nationals. For example, the public should have had the opportunity to comment on what level of foreign ownership should exist in order for the Commission to conclude that a domestic corporation is “owned or controlled” by a foreign national, and whether the Commission should apply different thresholds to privately held and publicly held corporations.

With respect to corporate officers, directors and executives, as provided in the NPRM draft, the Commission should have obtained public comment on whether the Commission’s analysis of corporate control should be limited to members of a corporation’s board of directors, or whether there are other corporate employees who might be capable of exercising corporate control. Additionally, because corporations, including foreign corporations, often create partnerships and other business combinations through which they operate in the United States,

¹⁰ *FEC v. McConnell*, 540 U.S. 93 (2003).

¹¹ *See Motion Regarding Foreign National Rulemaking*, Memorandum from Vice Chairman Steven T. Walther dated March 29, 2016, Agenda Document No. 16-15-A, available at http://www.fec.gov/agenda/2016/documents/mtgdoc_16-15-a.pdf. The full NPRM from which these excerpts were taken may be found on the Commission’s website at <http://sers.fec.gov/fosers/>.

¹² *See Certification* dated October 29, 2014, available at <http://sers.fec.gov/fosers/?jsessionid=06E1EB37A3960CDBDA66993F68847618>.

we should have asked for public comment on what extent the rules should address potential political spending by such partnerships and business combinations.

In the aftermath of *Citizens United* and its progeny, we are faced with an election in which so much money has been spent that concern is now realistically raised that corporate funding may ultimately weaken the parties to an extent that the salient political forces that traditionally resided within the political parties may instead reside within entities that have far different electoral goals that they wish to achieve with their funds, which cannot be matched by political parties. In this current climate, it is not inconceivable that money from foreign sources could increasingly find its way into our political system. The potential influx of foreign money into the American political system has the potential to shake the foundations of the electoral process, and this new reality awakens the need to adopt regulations, consistent with the NPRM draft, that will stanch the flow of such money.

For the foregoing reasons, I support the proposed motions to rescind AO 2006-15 (TransCanada) and to direct our counsel to draft a notice of proposed rulemaking that would allow the Commission to consider all options for reducing the potential for foreign spending in our elections (taking into account the views of all Commissioners), including a rulemaking consistent with the rules envisioned in the NPRM draft attached to and made part of this document, as well as possible rules or a policy – which I do not support at this juncture but believe deserve a hearing – relating to a “safe harbor” certification in certain instances.

Steven T. Walther
Vice Chairman

Attachments (2)

Excerpts of Oral Comments of
Commissioner Steven T. Walther
at FEC Open Session of May 18, 2006 During a
Discussion of Advisory Opinion 2006-15 (TransCanada)¹

I did have some concerns in connection with this, and granted, I didn't participate in some of the previous advisory [opinion] decisions, so I know that there's been somewhat of a history in this case. But I think what concerns me is we have a situation where we have no information regarding who consists of the parent, of what the parent is comprised and the individuals, so I'm assuming they'd be foreign nationals, and here they would be selecting – and this would be quite unusual – they will select all of the people on the board of the subsidiaries, and then in this case they have taken the decision to have at least one foreign national on a three-person board so that they've selected all the board members of the subsidiary – one of which is a foreign national – and then the foreign national at least – in a case like this – would participate in how much money the subsidiary spends. And the parent may well participate as well – it isn't clear whether they would participate, say, in a round table discussion or not in how much money is being spent.

And to me, first of all when you select the people who are making those decisions, and then secondly, one of them is . . . a foreign national, I think we break down the independent aspect of it to the point where it is very hard for me to say that there's not some indirect influence in this participation. If they made all the decisions, it was totally a U.S. subsidiary or there was a parent that had a significant number of people who are U.S. citizens, for example, when some of these larger corporations are merging and they find themselves in these joint ventures and they have equal people on the board from two major entities whether there's Daimler Chrysler or others, they have their own business reasons for setting up independent structures, so I think there's a way to do this, but in this particular case I'm reluctant to support it.

I know this has been part of some history going back to some degree, but I think what I'd like to see is that the Commission consider some rules that might set up a structure that could work. In this particular case we're looking to corporate money, not PAC money, spent on state and local elections. While my general thought has been that BCRA does go into state and local elections to a degree that maybe is what I would normally otherwise choose if I were a legislator, we clearly say that there can be no indirect use of foreign money or foreigners in making these decisions. If it were a PAC, for example, I could see it differently. That has a different type of a structure, there's voluntary aspects to who puts the money in but here we're talking about pure corporate money.

I'm not nearly persuaded by the fact that they would set up a separate fund because as we all know, it seems clear here that the subsidiary will also be deriving money from foreign sources, not just the local sources as well, and maybe we're robbing Peter to pay Paul. Commissioner Weintraub said maybe the thing to be worried about is maybe the structure should

¹ This is an unofficial transcript prepared by the office of Vice Chairman Walther, who is solely responsible for the accuracy of its contents. The actual recording is available on the Commission's website at <http://www.fec.gov/agenda/2006/agenda20060518.shtml>.

be set up so that it would be handled in a way that ensures compliance and to a large degree I think that's true, and it's not to say in a given case it couldn't be done. I think the structure here is so loose that I don't have the confidence that it couldn't be avoided quite easily also.

As a practical matter people select people on their boards who are going to do just what the parent wants. That's what they do. And I think in that case you've got to be especially careful before you release the authority just to a board that is selected by their foreign nationals that say okay "You can spend \$2 million" without knowing pretty much exactly where that money's gonna go. It's just not in real life likely to happen. I notice that some previous Commissioners took the same position and according to a dissent in FEC Advisory Opinion 1999-28 they pointed out that "Just as a domestic corporation and its subsidiaries are seen as one entity in order to prevent a parent corporation from making excessive contributions through its subsidiaries' political committees . . . so too a foreign national parent corporation and its subsidiaries should be seen as one entity to prevent the foreign national corporation from making prohibited contributions through its subsidiaries." And it seems to a large degree that the same way, unless we take it upon ourselves to really build a structure that would, in my own mind, give me comfort that we wouldn't be allowing indirect contributions to be made. So those are my concerns.

.....

Well, I think those are factors that are important but I don't think . . . To me, if we had a rule that had some structure to it, that we could all feel, if applied, would ensure – a word we use – that there would be complete independence in all respects and that the money was truly generated and not on the balance sheet. There are ways I see it could be done, and also with the PAC. I mean these companies could do that. But they don't, and so what you are talking about is pure corporate money from a foreign corporation who is there to make money, whether it's American or not, and they don't see it any different from the balance sheet or when dividends are declared. I still think there's a lack of independence, especially when they insist that a foreign national has to be on the board, on a three-person board. If it was one foreign national on a 15-person board, there may be some difference there. But here, one third of the decisionmaking process occurs, and if one U.S. citizen and the foreign national decide that they're going to make a decision on a number of aspects, then that's basically going to be what's going to happen. And that decision would also include how much money is going to be spent. And everyone knows that on a three-person board, they're all going to really know how that money is spent.

So in a given case, the foreign national could make the difference in the vote in determining whether they're going to give any money this year or not, if in their own mind they didn't think that it was going to be spent in a way that they considered was consistent with their own philosophy. So that's my concern – the one case where that foreign national could make all the difference in determining whether or not they're going to spend money. So you have a situation where the parent selects the board and then one foreign national could make the difference on the subsidiary and I think we really water down the independence structure to the point where it's truly potentially indirect. That's my concern.

.....

Two things, the foreign nationals are ultimately making the decisions on who's making the decision because the parents are going to decide that, unless the parent structure is different than what I anticipated, and probably isn't in this case. So you do have the decision made by foreign nationals – if I'm correct in my assumption – deciding who's going to be on the subsidiary board. They then in turn have one person who can decide, make the difference between how much money is even spent, and then in theory, they could then decide how it's going to be parceled out among U.S. citizens but you still don't eliminate (a) the selection of the people who will ultimately deciding ... where the money goes or how much money or how money is going to be made. A foreign national could make that decision on her own in a case like this. It might be a little different if you had – there are different ways to structure this. The PAC doesn't bother me. But here, of the three, the foreign national could in any case be the deciding vote.

....

Well I understand your point. We've probably been through the iterations so we all understand how that works, but in my view, you still have an overriding structure that's been imposed upon the subsidiary of a three-person board – one of whom must be a foreign national – so that keeps the other two pretty much in line. If one isn't consistent with the parent's philosophy, the foreign national can vote with the other to make sure it gets done. And when you control the purse strings, everything else is kind of secondary because that decision can decide whether any money is being spent or not. And there's no assurance here as to how they set this budget. Is it for each election? Is it for each campaign? Is it annually? So I do think that these political budgets can be set in a variety of different ways that may or may not really provide any indirect influence. With the lack of the structure I'm concerned about watering down, which I consider to be watering down one more step this particular potential for contributions unintended by the Act.

....

There's a reason why they're there, too. They structure two subsidiaries and each one has a foreign national on it, and it could potentially be a person who's on the parent board as well. They don't say that it isn't or how that person's selected. It's not selected – at least they say -- by another person on the board or nominated by the two other U.S. citizens – it comes from the parent. They hold all the shares of stock, they get all the distributions and dividends. So realistically, there won't be any contributions made to politics that the parent doesn't pretty much agree with.

....

...[W]e are here because there's a lot of ... foreign money or foreign nationals participa[ting] indirectly or directly in providing money for a campaign... I know there's the argument that it's all generated in the United States but it all belongs to foreign nationals because they own the money, they own the asset. So really that issue in other contexts can be said to be a factor but not a persuasive one. In this particular case, I think a structure is possible but they

chose not to have a PAC, for example. I see that differently where you have voluntary contributions made by employees to participate in the political process, just like we do for domestic corporations, so to me the question has to be whether we really have indirect participation, and in this particular case, I think, it seems to me that it's kind of a built-in methodology to participate indirectly but in a more subtle way.

So I'm concerned about that by having us participate in preparing some regulations that would apply across the board. Your experience with one corporation may well be the same, but I practiced law for 30 years and I know that most of the time when people come in and they form some subsidiaries, they do so for a very specific reason, whether it's a local bank, for example, or somebody coming in from Canada, and they are there for a particular reason, they want to know where their money is spent and by golly that's the way they make sure it gets spent. They may have American citizens on there because state law requires it or because they want some local color, but when it comes right down to how the money is spent, it's made somewhere else, generally. So those are my concerns. I recognize that they don't have the support of the majority of the board but I just wanted to lay that out so hopefully in the [future] we could come back and look at this and set up some structure that wouldn't require advisory opinions all the time on this.

AGENDA DOCUMENT NO. 16-15-A



FEDERAL ELECTION COMMISSION
Washington, DC 20463

2016 MAR 29 PM 4:00

AGENDA ITEM

For Meeting of 3-31-16

MEMORANDUM

TO: The Commission
FROM: Steven T. Walther
Vice Chairman *STW*
RE: Motion Regarding Foreign National Rulemaking
DATE: March 29, 2016

SUBMITTED LATE

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
Acting General Counsel

Rosemary C. Smith
Associate General Counsel

Robert M. Knop
Assistant General Counsel

Esther D. Heiden
Attorney

Cheryl A. F. Hemsley
Attorney

Phillip A. Olaya
Attorney

Joanna S. Waldstreicher
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

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Parts 104, 109, 110, and 114**

3 **[Notice 2011 – XX]**

4 **Independent Expenditures and Electioneering Communications**
5 **by Corporations and Labor Organizations**

6 **AGENCY:** Federal Election Commission.

7 **ACTION:** Notice of Proposed Rulemaking.

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

16 **DATES:** Comments must be received on or before March 21, 2011.
17 Reply comments must be limited to the issues raised in the
18 initial comments and must be received on or before April
19 11, 2011. The Commission will hold a hearing on these
20 proposed rules and any modifications or amendments
21 thereto that may be proposed, and will announce the date of
22 the hearing at a later date. Anyone wishing to testify at the

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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

Draft A

1 “corporations or associations that were created in foreign countries or funded
2 predominately by foreign shareholders.” Id. While acknowledging that 2 U.S.C. 441e
3 provides an independent basis for prohibiting contributions, expenditures, and
4 independent expenditures by foreign nationals, the Court limited its analysis to 2 U.S.C.
5 441b. Section 441e prohibits foreign nationals from making “a contribution or donation
6 of money . . . in connection with a Federal, State or local election,” or “an expenditure,
7 independent expenditure, or disbursement for an electioneering communication.”
8 2 U.S.C. 441e(a)(1). This prohibition applies whether the contribution, donation,
9 expenditure, independent expenditure or disbursement is made “directly or indirectly.”
10 Id.

11 A domestic corporation that is owned or controlled by a foreign national is not
12 itself a “foreign national” under 2 U.S.C. 441e so long as the domestic corporation is
13 “organized under or created by the laws of the United States or of any State or other place
14 subject to the jurisdiction of the United States and has its principal place of business
15 within the United States” (“U.S. subsidiary” or “U.S. corporation”).¹⁹ However, because
16 the foreign national parent of a U.S. subsidiary is prohibited by 2 U.S.C. 441e(a)(1)(C)
17 from directly or indirectly making expenditures, independent expenditures, and
18 disbursements for electioneering communications, the prohibitions in 2 U.S.C. 441e
19 could apply to actions by a U.S. subsidiary that is owned or controlled by a foreign
20 national. The Commission’s regulations do not specifically address whether or when
21 U.S. subsidiaries of foreign parent corporations are subject to the prohibitions on foreign
22 national expenditures and disbursements for electioneering communications, because,
23 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).

Draft A

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

7 Section 441e of the Act and current 11 CFR 110.20 provide in relevant part that
8 foreign nationals may not, “directly or indirectly,” make expenditures or independent
9 expenditures, or disbursements for electioneering communications. 2 U.S.C.
10 441e(a)(1)(C); 11 CFR 110.20(e) and (f). The regulation also follows the statute in
11 defining a “foreign national,” in part, by reference to 22 U.S.C. 611(b), a provision of the
12 Foreign Agents Registration Act (“FARA”), which in turn provides that the term “foreign
13 principal” includes “a partnership, association, corporation, organization, or other
14 combination of persons organized under the laws of or having its principal place of
15 business in a foreign country.” See 2 U.S.C. 441e(b)(1); 11 CFR 110.20(a)(3)(i).²⁰

16 Current 11 CFR 110.20(e) and (f) prohibit foreign corporations from making
17 independent expenditures and disbursements for electioneering communications. Current
18 11 CFR 110.20(i), in turn, prohibits foreign nationals from directing, dictating,
19 controlling, or directly or indirectly participating in the decision-making process of any
20 person, including a corporation or labor organization, with regard to such person’s
21 federal or non-Federal election-related activities. These regulations implement the
22 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.

Draft A

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

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

17 BCRA also amended the ban on foreign contributions and expenditures to
18 prohibit them from being made "directly or indirectly." See 2 U.S.C. 441e. During the
19 2002 rulemaking, the Commission solicited comment as to whether BCRA's statutory
20 language prohibited a foreign-controlled U.S. corporation, including a U.S. subsidiary of
21 a foreign corporation, from making corporate donations in States where they are
22 permitted to do so under State law, or from making contributions in connection with a
23 Federal election from an SSF, or both. In the Contribution E&J, the Commission stated

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1 that the absence of express Congressional intent to restrict such spending meant that these
2 U.S. subsidiaries should not be prohibited from making donations in non-Federal
3 elections, and their SSFs should not be barred from making Federal contributions.
4 Contribution E&J at 69943.

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

11 Consistent with Section 441e(b)(1) of the Act, the Commission has previously
12 concluded that domestic corporations whose principal places of business are located in
13 the United States are not foreign nationals even if they are wholly or partially owned by
14 foreign entities. It also concluded that such domestic corporations may establish,
15 administer, and control SSFs so long as the individuals who exercise decision-making
16 authority over the activities of those funds are U.S. citizens or legal residents, and
17 decisions made by those persons are not dictated or directed by any foreign nationals.
18 Finally, the Commission has concluded that no foreign parent corporation may contribute
19 to its domestic subsidiary's SSF, directly or through subsidies to the subsidiary. See
20 Advisory Opinions 1978-21 (Budd Citizenship Committee), 1980-100 (Revere Sugar),
21 1981-36 (Japan Business Association of Southern California), 1989-20 (Kuilima), 1989-
22 29 (GEM), 1990-08 (CIT), 1992-16 (Nansay Hawaii), 1995-15 (Allison Engine PAC),
23 1999-28 (Bacardi-Martini), 2000-17 (Extendicare), 2006-15 (TransCanada), and 2009-14

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1 (Mercedes-Benz USA/Sterling). Because U.S. subsidiaries were already prohibited from
2 making expenditures, independent expenditures or electioneering communications by
3 2 U.S.C. 441b, the Commission has never formally addressed or determined whether
4 2 U.S.C. 441e separately prohibits such activity by corporations that are owned or
5 controlled by foreign nationals.

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

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

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1 class. Alternative B would therefore not prohibit domestic subsidiaries from establishing
2 and operating SSFs.

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

8 B. General Questions

9 Before the discussion of these alternatives in greater detail below, the
10 Commission seeks comment on general questions that may influence its approach. Do
11 the existing Commission regulations sufficiently define “foreign national”? Does the
12 Commission have statutory authority to revise the definition of foreign national at
13 11 CFR 110.20(a)(3), given that the Act defines “foreign national” by reference to
14 22 U.S.C. 611(b)? Alternatively, are revisions to 11 CFR 110.20 appropriate in light of
15 the Supreme Court’s decision in Citizens United, which substantially changed the law
16 concerning the participation of corporations in U.S. elections? Additionally, should the
17 Commission provide guidance as to what factors should be considered in making a
18 determination as to where a corporation has its “principal place of business”?

19 Are there material distinctions between the making of independent expenditures
20 or disbursements for electioneering communications and the establishment or
21 administration of an SSF (such as the source of funds used) that would support the
22 adoption of any one of the three proposed alternatives? In this context, the Commission
23 notes that under current law only U.S. citizens may contribute to an SSF established,

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1 administered and controlled by a domestic corporation owned or controlled by a foreign
2 corporation. See, e.g. Advisory Opinion 1978-21 (Budd Citizenship Committee). Thus,
3 the pool of money available to such an SSF consists of funds voluntarily provided by
4 U.S. citizens, with full knowledge that the funds are to be used for political purposes.
5 See Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 414-15 (1972). Does
6 this voluntariness requirement suggest that an SSF advances the speech interests of the
7 individuals in an organization's restricted class who have contributed to the SSF and
8 without whose contributions the SSF could not make a contribution or expenditure? Or
9 do SSFs speak on behalf of the connected organizations that administer, maintain and
10 control them?

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

16 The foreign corporation may delegate authority to U.S. nationals to oversee
17 domestic political activities, including the making of independent expenditures and
18 electioneering communications. Are such U.S. nationals agents of the foreign
19 corporation, and, if so, are they obligated by their fiduciary duties to their employer to act
20 in a manner consistent with the foreign employer's interests? Can U.S. national
21 employees be expected to make decisions independently, without regard to the interests
22 of their employer? Do they have authority to do so? Does the relationship between
23 foreign principals and their U.S. national employees support any of the three alternative

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1 approaches proposed by the Commission? Do the Commission's existing regulations
2 prohibiting expenditures and disbursements for electioneering communications by
3 foreign nationals adequately implement the prohibition on foreign nationals making
4 contributions or donations in connection with Federal, State or local elections, 2 U.S.C.
5 441e(a)(1)(A), in light of the holding in Citizens United?

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

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

18 Regardless of whether the Commission looks only to voting shares, or also
19 considers non-voting shares and debt, at what level of foreign ownership should the
20 Commission conclude that a domestic corporation is "owned or controlled" by a foreign
21 national? Would 5 percent foreign ownership be sufficient for such a determination?
22 Alternatively, is a threshold of 20 percent, or 50 percent, more appropriate? Should
23 different thresholds be applicable for different ownership structures? For instance,

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1 should the Commission apply different thresholds to privately held and publicly held
2 corporations? If a corporation is controlled by a single majority shareholder who owns
3 more than 50 percent of the corporation's shares, would it be appropriate for the
4 Commission to disregard all other minority shareholders? How should the Commission
5 analyze ownership interests in a non-stock corporation such as a nonprofit entity or a
6 foundation? In such instances should the Commission look to who has provided funding,
7 or pledged funding, for a non-stock corporation?

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

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

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

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

18 C. Proposed Alternatives

19 Alternative A

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

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

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

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

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

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

15 In essence, Alternative A is based on the proposition that when a foreign person²¹
16 owns or controls a substantial block of voting or non-voting shares of a domestic
17 corporation, even if less than a majority, that person may has the power to assert effective
18 control over the decisions made by the entity, and the actions of the domestic corporation
19 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

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

5 Is the proposed definition of "foreign national" in Alternative A consistent with
6 2 U.S.C. 441e, which defines "foreign national," in part, by reference to 22 U.S.C.
7 611(b)? If so, does Alternative A appropriately restrict foreign national participation in
8 the U.S. electoral process? Is Alternative A consistent with the First Amendment rights
9 of domestic subsidiaries controlled by foreign parent corporations or foreign
10 governments? Would Alternative A be justified by the government's "interest in
11 preventing foreign individuals or associations from influencing our Nation's political
12 process"? Citizens United, 130 S. Ct. at 911 (declining to reach the question of whether
13 this interest is "compelling").

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

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.").

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

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

15 The language of proposed paragraphs (C) and (D) raises several additional
16 questions. They refer to one or more foreign nationals having “the power, individually or
17 in concert with other foreign nationals, to direct, dictate, or control the corporation’s
18 decision-making process.” Should this include only decision-making power that is set
19 forth in the corporate by-laws, or should it also include de facto control of the
20 corporation’s decision-making? Should it explicitly include control that might be
21 achieved through control structures, collateral agreements, indebtedness, market share, or
22 otherwise? Should it include power to control corporate decision-making that is granted
23 by the law of the State under whose laws the corporation is incorporated, even if such

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1 control is not formally granted by the corporation's by-laws? Should paragraphs (C) and
2 (D) instead refer to a corporation in which one or more foreign nationals "directs,
3 dictates, or controls the decision-making process of the corporation"?

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

8 Alternative B

9 Alternative B prohibits domestic subsidiaries that are owned or controlled by
10 foreign nationals from using treasury funds for independent expenditures or
11 electioneering communications other than communications to the restricted class.

12 Alternative B also sets forth the conditions that constitute ownership or control by a
13 foreign national. Specifically, Alternative B provides that domestic subsidiaries are
14 controlled or owned by foreign nationals if any of the following conditions is present:

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

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

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

22 (d) one or more foreign nationals has the power, individually or in concert with
23 other foreign nationals, to direct, dictate or control, directly or indirectly, the

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1 corporation's decision-making process with respect to the corporation's political
2 activities.

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

17 Likewise, Alternative B differs from Alternative A in providing that a foreign
18 national owns or controls a domestic corporation when a majority of the members of the
19 domestic corporation's board of directors are foreign nationals, as opposed to the one-
20 third of the members threshold in Alternative A. Is a "majority of the members" bright
21 line for the board of directors appropriate? Would it be more appropriate to have a bright
22 line threshold for publicly held corporations that is different from the threshold for

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1 privately held corporations? The different thresholds in Alternative A and Alternative B
2 are intended to provide contrasts in approach.

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

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

22

1 Alternative C

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

11 Second, Alternative C provides the conditions under which a U.S. subsidiary may
12 make independent expenditures or electioneering communications, so long as no foreign
13 national controls the corporation’s decision-making with respect to its election-related
14 activities and the domestic corporation uses only U.S. net earnings, with no
15 replenishment, subsidization, offsets or other financial consequences from its foreign
16 parent. As noted above, the Commission has previously determined that the activities of
17 U.S. subsidiaries are to be governed by 11 CFR 110.20(i), which prohibits the
18 involvement of foreign nationals in the decision-making of SSFs and of corporations.
19 However, the Commission has never had occasion to apply 11 CFR 110.20(i) to the
20 making of independent expenditures and electioneering communications by domestic
21 subsidiaries of foreign nationals, because such activity was independently prohibited by
22 2 U.S.C. 441b.

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

18 Proposed Alternative C incorporates language from Commission advisory
19 opinions addressing the activities of domestic subsidiaries of foreign corporations. The
20 regulation sets forth two conditions on the establishment of an SSF that were first
21 articulated by the Commission in 1980. Advisory Opinion 1980-111 (Portland Cement).
22 The first condition prohibits foreign nationals from participating in decision-making
23 related to the SSF's activities, pursuant to 11 CFR 110.20(i). The second condition

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1 prohibits the solicitation of foreign nationals for donations to the SSF, pursuant to
2 11 CFR 110.20(g). See Advisory Opinion 1980-111 (Portland Cement); Advisory
3 Opinion 2004-42 (Pharmavite). Does the proposed regulation satisfactorily implement
4 the policies intended by the Act with respect to the limiting the capacity of foreign
5 nationals to influence the U.S. election process? Given that both of the referenced
6 provisions already exist in the Commission regulations, is this first part of Alternative C
7 necessary? Is it useful to reiterate these two previously separate conditions together in
8 one paragraph to make clear that they apply in tandem to SSFs of domestic subsidiaries
9 owned by foreign nationals? Could proposed paragraph (k) state simply that a domestic
10 subsidiary of a foreign national corporation may establish an SSF provided it complies
11 with 11 CFR 110.20(g) and (i), or that it may establish an SSF provided it complies with
12 all other existing regulations? Should the Commission adopt any additional conditions
13 on the establishment of an SSF by a domestic subsidiary and, if so, what conditions
14 should be considered and why?

15 Next, proposed Alternative C sets forth two conditions on the making of
16 disbursements for electioneering communications and communications containing
17 express advocacy beyond the restricted class. The first condition prohibits foreign
18 nationals from participating in decision-making related to contributions, donations,
19 expenditures, or disbursements in connection with any election, pursuant to 11 CFR
20 110.20(i). See Advisory Opinion 2006-16 (TransCanada). The second condition, which
21 is based on prior Commission advisory opinions on the topic of domestic subsidiaries'
22 donations to State and local candidates, provides that the funds used to finance
23 electioneering communications and express advocacy communications beyond the

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1 restricted class must be solely from U.S. net earnings, and must not be subsidized or
2 replenished by the foreign national parent. Id.; see also MUR 4594 (Longevity Int'l
3 Enterprises Corp.) (providing that a domestic subsidiary may not make donations to State
4 and local candidates using funds originating from a foreign parent). The Commission
5 seeks comment on this proposal.

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

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

20 Would it be appropriate for the Commission to adopt more restrictive rules for
21 domestic subsidiaries that are owned or controlled by a foreign government or by a
22 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).

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

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

20 If the Commission does not adopt Alternative A, B or C, should the Commission
21 adopt some other regulation specifically addressing the relationships between foreign
22 parent corporations and domestic subsidiaries, or between foreign and domestic partners,
23 limiting how much control or influence the foreign national may exert over its domestic

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1 subsidiary or partner before the latter is also subject to the prohibitions on foreign
2 national expenditures and electioneering communications? Put another way, should the
3 Commission adopt a rule other than those proposed in this NPRM setting forth when a
4 foreign parent corporation's control or influence over its domestic subsidiary is so great
5 as to justify a restriction on the subsidiary's speech? If the Commission did adopt such a
6 rule, what information, criteria or factors would be relevant in gauging the level of
7 foreign control or influence? Alternatively, since the making of independent
8 expenditures and electioneering communications is distinct from activities sanctioned
9 under prior Commission precedent, should the Commission instead handle the Court's
10 concern about expenditures by foreign-controlled corporations on a case-by-case basis in
11 enforcement and Advisory Opinions? Would this approach be preferable to adopting a
12 new regulation?

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

14 The Commission certifies that the attached proposed rules, if adopted, would not
15 have a significant economic impact on a substantial number of small entities. There are
16 two bases for this certification. First, there are few small entities that would be affected
17 by these proposed rules. The Commission's proposed revisions may affect some for-
18 profit corporations, labor organizations, individuals, and some non-profit organizations.
19 Individuals and labor organizations are not "small entities" under 5 U.S.C. 601(6). Many
20 non-profit organizations that might use general treasury funds to make independent
21 expenditures or electioneering communications are not "small organizations" under
22 5 U.S.C. 601(4) because they are not financed by a small identifiable group of

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1 individuals, but rather rely on contributions from a large number of individuals to fund
2 operations and activities.

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

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1 **List of Subjects**

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7 11 CFR Part 110

8 Campaign funds, political committees and parties.

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4 **PART 110 – CONTRIBUTION AND EXPENDITURE LIMITATIONS AND**
5 **PROHIBITIONS (2 U.S.C 431(8), 431(9), 432(c)(2), 434(i)(3), 438(a)(8), 441a, 441b,**
6 **441d, 441e, 441f, 441g, 441h and 36 U.S.C. 510)**

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

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

10 **ALTERNATIVE A for 110.20**

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

12 **§ 110.20 Prohibition on contributions, donations, expenditures, independent**
13 **expenditures, and disbursements by foreign nationals (2 U.S.C. 441e, 36 U.S.C. 510).**

14 (a) * * *

15 (3) Foreign national means –

16 * * *

17 (iv) Any corporation

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

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(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

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

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

4 * * * * *

5 (k) Domestic corporation owned or controlled by foreign national

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

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

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

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

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

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

- 1 ~~(iii) Over which one or more foreign nationals described in paragraph~~
2 ~~(a)(1) or (2) of this section has the power, individually or in~~
3 ~~concert with other foreign nationals, to direct, dictate or control,~~
4 ~~directly or indirectly, the decision-making process of the~~
5 ~~corporation with respect to its interests in the United States; or~~
- 6 ~~(iv) Over which one or more foreign nationals described in paragraph~~
7 ~~(a)(1) or (2) of this section has the power, individually or in~~
8 ~~concert with other foreign nationals, to direct, dictate or control,~~
9 ~~directly or indirectly, the decision-making process of the~~
10 ~~corporation with respect to activities in connection with any~~
11 ~~Federal, State, or local election, including –~~
- 12 ~~(A) The making of a contribution, donation, expenditure,~~
13 ~~independent expenditure, or disbursement for an~~
14 ~~electioneering communication; or~~
- 15 ~~(B) the administration of a separate segregated fund established~~
16 ~~or maintained by the corporation.~~
- 17 ~~(3) Any corporation that reports disbursements for electioneering~~
18 ~~communications pursuant to 11 CFR 104.20 or that reports expenditures~~
19 ~~for independent expenditures pursuant to 11 CFR 109.10 must include in~~
20 ~~each report a statement that the corporation is in compliance with the~~
21 ~~prohibitions described in paragraphs (e), (f), and (k) of this section.~~

22 **ALTERNATIVE C for 110.20**

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

1 § 110.20 Prohibition on contributions, donations, expenditures, independent
2 expenditures, and disbursements by foreign nationals (2 U.S.C. 441e, 36 U.S.C. 510).

3 * * * * *

4 ~~(k) Domestic corporation owned or controlled by foreign national~~

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

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

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

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

1 ~~(i) No foreign national shall direct, dictate, control, or directly or~~
2 ~~indirectly participate in the decision-making process of such as a~~
3 ~~corporation or separate segregated fund, with regard to such corporation or~~
4 ~~fund's Federal or non-Federal election-related activities, including~~
5 ~~decisions concerning the making of contributions, donations, expenditures,~~
6 ~~or disbursements in connection with elections for any Federal, State, or~~
7 ~~local office or decisions concerning the administration of a separate~~
8 ~~segregated fund pursuant to paragraph (i) of this section; and~~
9 ~~(ii) The domestic corporation uses only its U.S. net earnings, not~~
10 ~~subsidized or replenished by the foreign national parent, to fund election-~~
11 ~~related activity;~~
12 ~~(iii) The expenditure or payment is not coordinated with a candidate, an~~
13 ~~authorized committee, a political party committee, or an agent of any of~~
14 ~~the foregoing.~~

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On behalf of the Commission,

Cynthia L. Bauerly
Chair
Federal Election Commission

DATED: _____
BILLING CODE: 6715-01-P