



FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 19, 1989

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1989-29

Edean S. Hayashida, Chairman
GEM Political Action Committee
GEM of Hawaii, Inc.
1199 Dillingham Boulevard
Honolulu, Hawaii 96817

Dear Mrs. Hayashida:

This responds to your letter dated August 9, 1989, as supplemented by letters dated November 7 and November 27, 1989, requesting an advisory opinion on behalf of GEM of Hawaii, Inc. ("GEM" or "the company") concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the political activities of GEM and GEM Political Action Committee ("GEM PAC" or "the committee").

You state that GEM is incorporated in the state of Hawaii and its principal place of business is in that state. It is a wholly-owned subsidiary of a Japanese corporation. The company has three directors, two of whom are Japanese nationals. The president and chief executive officer, who is also a director, is an American. According to a letter from GEM's vice president and treasurer, the company derives its revenues from merchandise sales and other related ventures in Hawaii.

You state that GEM has a political action committee "which is comprised of employees who are U.S. citizens and residents of the State of Hawaii." You explain that the administrators and managers of GEM PAC and the other employees comprising GEM PAC are U.S. citizens and residents of the State of Hawaii. Neither the Japanese directors nor any other foreign national participates in decision-making as to where contributions should be directed or in the administration of the committee in any way. You further state that GEM is the source of the funds for the committee for administration and solicitation expenses and for contributions made by the committee to candidates or political party committees. The committee proposes to make contributions in Federal, state, and local elections.

You ask whether contributions by GEM are lawful and whether GEM PAC is "the proper vehicle" for the making of such contributions. You also ask the Commission to state how GEM may otherwise make contributions if the responses to the first two questions are in the negative.¹

The Act and Commission regulations prohibit contributions and expenditures by corporations in connection with an election for Federal office. 2 U.S.C. 441b(a); 11 CFR 114.2. Therefore, GEM itself is prohibited from making contributions to candidates for Federal office or to committees supporting Federal candidates. From the information presented by you, it appears that GEM is the only source of funds for contributions made by GEM PAC and proposes to essentially make corporate contributions through the committee to Federal candidates or political committees. Because corporate contributions are prohibited in Federal elections whether made directly or indirectly, GEM PAC may not make contributions or expenditures to influence a Federal election campaign. Cf. Advisory Opinions 1989-20 (prohibiting contributions to non-Federal candidates by a domestic subsidiary from the funds of its foreign parent) and 1980-7 (permitting a state-chartered corporation to make contributions in non-Federal elections provided that it is not merely an instrumentality of its Federally chartered parent).

Because you have indicated that GEM and GEM PAC also propose to make contributions in state and local elections your request raises an issue as to the application of 2 U.S.C. 441e. That provision prohibits foreign nationals from making contributions directly or through any other person, in connection with an election to any political office. In addition, it is unlawful for any person to solicit, accept, or receive any such contribution from a foreign national. 2 U.S.C. 441e(a); 11 CFR 110.4(a)(1) and (2). As defined in the Act, the term "person" includes a corporation or a committee. 2 U.S.C. 431(11). Unlike most of the other provisions of the Act, 441e applies to any election for any political office, including state and local offices as well as Federal offices. According to 2 U.S.C. 441e(b)(1), the term "foreign national" includes a "foreign principal" as defined specifically by 22 U.S.C. 611(b). Section 611(b) defines a "foreign principal" as including:

- (1) a government of a foreign country and a foreign political party:
- (2) a person outside of the United States, unless it is established that such person is an individual and a citizen of and domiciled within the United States, or that such person is not an individual and 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; and
- (3) 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.

Under 22 U.S.C. 611(b), a corporation organized under the laws of any state within the United States whose principal place of business is within the United States is not a foreign principal and, accordingly, would not be a foreign national under 2 U.S.C. 441e. Hawaiian statutory sections pertaining to "Election Campaign Contributions and Expenditures" permit corporate

contributions up to \$2,000 per election for state and local candidates. HRS 11-191(18 and 11-204(a)).² As a discrete entity incorporated under the laws of Hawaii with its principal place of business in that state, GEM falls outside the definition of foreign national.

Section 441e, however, also prohibits contributions by a foreign national through any other person. GEM has stated that its revenues are derived from the operations of its stores in Hawaii. This situation is distinguishable, therefore, from the situation presented in Advisory Opinion 1989-20 where the Commission prohibited contributions by a real estate development company that was predominantly funded by a foreign national parent, and whose projects were not yet generating income; the Commission concluded that contributions were being made, in effect, by the parent through the domestic subsidiary. See Advisory Opinion 1985-3. Additionally, in order to comply with 441e, GEM must ensure that neither the foreign national parent, nor any other foreign nationals, including directors, officers, or other personnel of your company, participate in any decisions by GEM to contribute to GEM PAC or to other committees or campaigns for state or local office. Advisory Opinions 1985-3 and 1982-10. The Commission concludes, therefore, that, subject to the conditions set out, GEM itself may contribute to state and local campaign committees and to GEM PAC to the extent permitted by state and local laws.

In its present operation, GEM PAC is not a separate segregated fund of GEM, but merely a vehicle through which GEM proposes to contribute to candidates. You have also asserted that GEM PAC is comprised of and administered solely by non-foreign nationals. Based on the conditions permitting GEM to make a contribution and on the administration of the committee, the Commission concludes that GEM PAC may contribute to state and local candidates to the extent permitted by state and local law. Advisory Opinions 1983-31, 1983-19, 1982-34, 1981-36, 1980-111, 1980-100, and 1978-21.

GEM, as a discrete, non-foreign national entity, may establish a separate segregated fund pursuant to 2 U.S.C. 441b(b)(2)(C) and 11 CFR 114.5 and may solicit voluntary contributions for the fund from GEM's executive and administrative personnel and stockholders, and their families, provided that no solicitee or contributor to the fund is a foreign national. Advisory Opinions 1983-19, 1980-111, 1980-100 and 1978-21. See also Advisory Opinion 1977-53. The fund, in turn, may make lawful contributions to Federal candidates, to political committees, and to the extent permitted by state and local law, to non-Federal candidates. The decisions and administration of the separate segregated fund are subject to the same restrictions set forth above with respect to contributions by GEM and GEM PAC in state and local elections.

This response constitutes an advisory opinion concerning application of the Act or regulations prescribed by the Commission to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

Danny L. McDonald
Chairman for the Federal Election
Commission

Enclosures (AOs 1989-20, 1985-3, 1983-31, 1983-19, 1982-34, 1982-10, 1981-36, 1980-111, 1980-100, 1980-7, 1978-21, and 1977-53)

P.S. Chairman McDonald and Commissioner Thomas voted against approval of this opinion and will file a dissenting opinion at a later date.

1/ In your letter of August 9, you refer to contributions made in the past by GEM "through a political action committee," and your question appeared to pertain only to the legality of those past contributions. The Commission may not issue an advisory opinion as to the lawfulness of past activity, but may only address a specific transaction or activity that the requestor "plans to undertake or is presently undertaking and intends to undertake in the future." 11 CFR 112.1(b). This opinion, therefore, will address only prospective transactions or activities of GEM or GEM PAC.

2/ The Commission notes, however, that Hawaiian election provisions cannot allow a corporation to engage in activity that is barred by 2 U.S.C. 441e.