



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

June 26, 1992

CERTIFIED MAIL,  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1992-16

Roy A. Vitousek, III  
Cades, Schutte, Fleming & Wright  
Hualalai Center  
75-170 Hualalai Road  
Suite B-303  
Kailua-Kona, Hawaii

Dear Mr. Vitousek:

This responds to your letters dated March 18 and May 4, 1992, as supplemented by your letters dated May 20 and June 15, 1992, requesting an advisory opinion on behalf of Nansay Hawaii, Inc. concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the involvement of a U.S. subsidiary of a foreign corporation in state and local elections.

Nansay Hawaii ("the company") is a wholly owned subsidiary of Nansay Corporation (Japan), which is a privately held corporation. The company is a corporation organized under the laws of Hawaii, and it has its principal place of business in that State. Both Nansay Corporation and the company are engaged primarily in real estate development and management.

The company's Board of Directors is made up of four directors, two of whom are United States citizens and one of whom has been lawfully admitted for permanent residence. One of the citizen directors is the company's president. The company's By-Laws provide that a majority of the directors constitute a quorum to transact business and that any act or business must receive the approval of a majority of the quorum. According to the By-Laws, the Board may also create and appoint special committees.

Nansay Hawaii owns several parcels of developed and undeveloped real estate in Hawaii, either directly or as a general partner in a limited partnership. The company derives revenue from lease

rents, sales, and other income from its developed Hawaii properties. Two of the properties, an office building and a resort hotel are "profit centers"; they generate net earnings, i.e., income exceeding expenses after debt service. To meet the debt service with respect to undeveloped properties as well as funding development costs and operating expenses incurred by the company, the company receives "regular subsidies in the form of loans or contributions to capital from its foreign national parent." There are no direct contributions from the foreign national parent to the accounts of the profit centers.<sup>1/</sup>

You state that Nansay Hawaii wishes to make contributions to state and local candidates. You express concern as to whether the funding of the company would affect its ability to make contributions in state and local elections. The company is also concerned about the lawfulness of its process of making election-related decisions. The company seeks an advisory opinion on whether it may make the proposed contributions based on the conditions set out below.

The company proposes to make contributions from the operating accounts of the above-mentioned office building and resort hotel, both developed properties located in Hawaii. These operating accounts are separate bank accounts maintained by the company and "into which are deposited the receipts from operations of these properties and from which the expenses of operations, including debt service, are paid." The company has experienced net positive cash flow from the building and resort, and anticipates that this will continue. The resort anticipates a net earnings of \$444,000 in 1992, after payment of debt service, and the office building anticipates net earnings of \$58,000 after debt service. You note that, "[a]s with any other expense which would decrease the net operating revenues of the corporation," political contributions may result in an increase in the subsidies to the company from the foreign national parent.

You state that the company's president has proposed that the Board of Directors consider a resolution authorizing the establishment of a special committee made up of the two U.S. citizen Board members and empowering that committee to make all election-related decisions on behalf of the company. The committee could then either make election-related decisions itself or delegate the authority to specific senior management employees of the company who are also U.S. citizens. The resolution creating the committee and appointing the Board members to the committee would be considered and voted on by a majority of the directors who attend a duly noticed regular or special meeting of the Board.

You state that the Board would play no direct role in determining the aggregate amount of political contributions. This amount would be determined by the committee in consultation with the president and the chief financial officer, both of whom are U.S. citizens.<sup>2/</sup>

The Act and Commission regulations prohibit foreign nationals from making a contribution directly or through any other person, or making an expenditure, in connection with an election to any political office. In addition, it is unlawful to solicit, accept or receive a 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. 2 U.S.C. 431(11). Unlike most of the other provisions of the Act, section 441e applies to any election for any political office, including state and local offices.

The term "foreign national" includes a "foreign principal" as defined by 22 U.S.C. 611(b), 2 U.S.C. 441e(b)(1); 11 CFR 110.4(a)(4)(i). 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, with a principal place of business within the United States, is not a foreign principal and, accordingly, would not be a foreign national under 2 U.S.C. 441e. As a discrete entity incorporated under the laws of Hawaii with its principal place of business in that state, Nansay Hawaii falls outside the definition of a foreign principal.

Section 441e, however, also prohibits contributions by a foreign national through any other person. In Advisory Opinion 1989-20, 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. See also Advisory Opinion 1985-3.

In this regard, the Commission takes note of your statement that, as with any other expense that would decrease the net operating revenues of the corporation, the contributions may result in an increase in the subsidies from the foreign national parent. The Commission recognizes that there are legitimate business reasons for foreign parent subsidization of U.S. subsidiaries, e.g., to cover losses from business operations and to enable expansion of the subsidiary's business ventures. In order to avoid contributions to candidates by the foreign parent through the subsidiary (i.e. foreign funding of these contributions), however, certain conditions should be met.

The subsidiary must be able to demonstrate through a reasonable accounting method that it has sufficient funds in its account, other than funds given or loaned by its foreign national parent, from which the contribution is made. See, by analogy, 11 CFR 102.5(b)(1)(ii). In addition, the foreign parent must consider the political contributions of its subsidiary when granting further subsidies to or further capitalization of the subsidiary. The amount that the foreign parent distributes to the subsidiary cannot replenish all or any portion of the subsidiary's political contributions during the period since the preceding subsidy payment. The parent should make this review each time it makes payments to its U.S. subsidiary, and must reduce its subsidy if indicated by such review.

In the situation presented, however, Nansay Hawaii will make its political contributions by using net earnings generated from properties owned by it. You have also indicated that the two accounts for these properties are not presently subsidized by the parent. Therefore, it appears that the foreign parent would not be making contributions through Nansay Hawaii. To further ensure that such contributions are not made, the company and its foreign parent must monitor all subsidy outlays by the parent to the company pursuant to the requirements set forth above.

The prohibitions of the Act and regulations also pertain to those making decisions as to a corporation's political contributions. According to 2 U.S.C. 441e(b)(2), the term "foreign national" includes an individual who is not a U.S. citizen and who is not lawfully admitted for permanent residence as defined by 8 U.S.C. 1101(a)(20). When considering political contributions by domestic subsidiaries of foreign corporations, the Commission has consistently interpreted 441e to prohibit any director or officer of the company or its parent who is a foreign national, or any other foreign national, from participating in any way in the decision-making process with regard to making contributions to candidates. See Advisory Opinions 1989-29, 1989-20, 1985-3, and 1982-10. Commission regulations also state:

A foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision-making process of any person, such as a corporation, labor organization, or political committee, with regard to such person's Federal or nonfederal election-related activities, such as decisions concerning the making of contributions or expenditures in connection with elections for any local, State, or Federal office or decisions concerning the administration of a political committee.

11 CFR 110.4(a)(3).

Based on the conditions set out by you, it appears that Nansay Hawaii can satisfy this requirement. In addressing the application of 11 CFR 110.4(a)(3) to the operation of a separate segregated fund by a domestic subsidiary, the Commission conditioned its approval of the operation partly on the basis that foreign national members of the subsidiary's Board would abstain from voting on matters concerning the SSF and its activities. The Commission also conditioned its approval on the basis that the foreign national Board members would abstain from voting on the selection of individuals to operate the SSF and exercise decision-making authority with respect to SSF contributions and expenditures. Advisory Opinion 1990-8. If only the non-foreign national Board members, who presently constitute both a quorum and a majority of the Board, participate in the discussion and vote on the selection of the proposed committee, and only non-foreign nationals participate in the functions and operations of the committee, Nansay Hawaii will be in compliance with section 110.4(a)(3).

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

Sincerely,

(signed)

Scott E. Thomas  
Vice-Chairman for the Federal Election Commission

Enclosures (AOs 1990-8, 1989-29, 1989-20, 1985-3, and 1982-10)

#### ENDNOTES

1/ The subsidy amounts from the foreign parent exceed the net revenues generated by the developed properties.

2/ You explained that the company's corporate budget is prepared, reviewed, and approved by the president and chief financial officer and that the budget is not reviewed or approved by the board.