



FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 28, 2000

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2000-17

Joseph A. Rieser, Jr.
Reed Smith Shaw & McClay LLP
1301 K Street, NW
Suite 1100--East Tower
Washington, DC 20005-3317

Dear Mr. Rieser:

This responds to your letter dated June 9, 2000, on behalf of Extendicare Health Services, Inc. ("Extendicare"), requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the formation and administration of a separate segregated fund ("SSF" or "PAC") by a domestic subsidiary corporation that is wholly-owned by a foreign parent corporation.

Extendicare is a Delaware corporation with its principal place of business in Milwaukee, Wisconsin, and it is wholly owned by Extendicare, Inc., a Canadian corporation with its principal place of business in Ontario, Canada.¹ Through its wholly-owned subsidiaries, which are all United States entities, Extendicare operates 237 nursing and assisted living and retirement centers in 14 States with more than 25,000 people

¹ Extendicare is a wholly-owned subsidiary of Extendicare Holdings, Inc. ("Holdings"), a Wisconsin corporation with its principal place of business in Milwaukee. Holdings serves as the ultimate U.S. parent corporation, but its role is limited to that of a holding company: it has no operating assets and performs no management or administrative services. Holdings is a wholly-owned subsidiary of Extendicare International, Inc., a Canadian corporation, which, in turn, is a wholly-owned subsidiary of Extendicare, Inc., the top level parent corporation. The stock of this parent Canadian corporation is traded on the Toronto and New York Stock Exchanges.

employed by either Extencicare or its domestic subsidiaries.² Extencicare provides home office management and administrative services for its operating subsidiaries that operate the cited nursing and retirement centers.

Factual background

Extencicare's board of directors has changed from time to time in both size and composition over the years. Currently the board is comprised of three individuals, only one of whom is a US citizen. The other two are Canadian citizens who are not lawfully admitted for permanent residence in the United States, although they are lawfully admitted to the United States for both residence and work purposes. One of the Canadian directors is chair of the Extencicare board and is also deputy chair and CEO of the parent Canadian corporation. The other Canadian director is CEO of Extencicare and president of the parent Canadian corporation. The US citizen director is also the chief finance officer of both Extencicare and the parent Canadian corporation. The Extencicare president (not a board member) is a Canadian citizen who is not lawfully admitted for permanent residence in the United States. Of the remaining officers, a number are foreign nationals who do not have permanent resident alien status, and a number are U.S. citizens. In Extencicare's top management structure, there are board-elected officers, vice presidents who are not board-elected, and senior managers (with various titles and designations), hereinafter referred to as the "senior management team." Presently, the overwhelming majority of Extencicare's senior management team are U.S. citizens. One such official is Extencicare's vice president of government relations who is a United States citizen.

This vice president seeks Commission advice regarding whether Extencicare may establish and administer an SSF under the Act and Commission regulations that would solicit contributions from the eligible personnel of Extencicare and its subsidiaries who may lawfully make such contributions. The proposed SSF would make contributions to candidates for Federal and, perhaps (to the extent permitted under applicable State laws), State and local offices. In view of the foreign national status of two (out of three) members of Extencicare's board and given that its parent corporation is a foreign national, an approach for determining whether to establish an SSF is described. A plan of operation for an SSF is also described in the event that one is formed.

Special Committee proposal

The request states and explains that Extencicare's board would establish a special committee (the "Special Committee"). This Special Committee would be comprised only of individuals who are U.S. citizens or permanent resident aliens residing in the United States. The Special Committee would be charged with the authority and responsibility to determine whether it would be desirable and appropriate for Extencicare to establish an

² Extencicare's 1999 consolidated revenues from USA operations were over \$967 million, although its consolidated positive cash flow from operations that year was less than \$19 million. It had a consolidated loss for 1999, but had earnings in each of the preceding four years exceeding \$25.5 million.

SSF under 2 U.S.C. §441b(b)(2). If it should determine that it would be desirable and appropriate for Extencicare to establish such an SSF, the Special Committee would also have the authority and responsibility to determine what individual or individuals (the "PAC Committee") would administer the fund. Subject to the requirement that the members of the PAC Committee both be employees of Extencicare or its subsidiaries and be U.S. citizens or permanent resident aliens residing in the United States, the Special Committee would have complete discretion in determining the size and composition of the PAC Committee. In particular, the Special Committee would not be required to appoint to the PAC Committee only those individuals who were members of the Special Committee; it would have the authority to appoint those individuals whom it deemed best, regardless of whether or not they were members of the Special Committee. To the extent that the PAC Committee needs by-laws by which to govern itself, the Special Committee would expect to have the authority to approve and amend them.

The request further explains that the PAC Committee would have the complete authority to administer the SSF, without review or approval by the Special Committee or by Extencicare's board of directors. That is, it would decide: what individuals among Extencicare's (and its subsidiaries') work force would be solicited for contributions to the fund and when to solicit such contributions; to whom to make contributions and when to make them; and what expenditures to make from the fund and when to make them.

According to the request, Extencicare's by-laws presently allow the board to designate committees, to be comprised of one or more directors. The by-laws provide that, to the extent permitted by law and provided by the resolution establishing the committee, the committee shall have and may exercise all of the powers of the board in the management of the business and affairs of the corporation. The by-laws currently are silent with respect to whether individuals who are not directors may serve on such committees.

To the extent that Extencicare's board includes U.S. citizens or permanent resident aliens residing in the United States, it would be anticipated (but not necessarily foreordained) that all or some of such individuals would be appointed to serve on the Special Committee. However, because the size and composition of the board changes from time to time, it cannot be predicted in advance whether the board would always have at least one such individual on it. As a result, in order to assure that a Special Committee could always be constituted, it is proposed that Extencicare's by-laws would be specifically amended both to permit the board of directors to appoint the Special Committee and to provide that such Special Committee may or may not include members of the board of directors, as the board sees fit. Such an amendment to the by-laws will require the approval of either Extencicare's board or its shareholders.

Opinion format

Given this factual background and the described circumstances, Extendicare asks ten questions concerning the proposal to form and operate a PAC. Questions one through ten are set forth with some editing of the actual phrasing as used in the request. To facilitate the Commission's response, the basic statutory and regulatory provisions are stated initially and then applied to answer each question.

Act and Commission regulations

The Act and Commission regulations prohibit a foreign national from making a contribution, directly or through any other person, or an expenditure in connection with an election to any political office.³ 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).

The term "foreign national" includes a "foreign principal" as defined by 22 U.S.C. §611(b), but does not include any citizen of the United States. 2 U.S.C. §441e(b)(1). Section 611(b) defines a "foreign principal" to include:

- (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.

Accordingly, under §611(b)(2) and (3), a corporation organized under the laws of any State within the United States that has its principal place of business in the United States is not a foreign principal. Therefore, it follows that such a corporation would not be a foreign national under 2 U.S.C. §441e. The term "foreign national" also includes an individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence in the U.S. as defined by 8 U.S.C. §1101(a)(20). 2 U.S.C. §441e(b)(2).

³ Unlike most of the other provisions of the Act, section 441e applies to any election for any political office, including state and local as well as Federal offices. *United States v. Kanchanalak*, 192 F.3d 1037, 1044 (D.C. Cir. 1999) [concluding that Commission interpretations of 2 U.S.C. §441e in both its regulations and an advisory opinion have "consistently interpreted §441e as applicable to federal, state, and local elections since 1976."]

Commission regulations, at 11 CFR 110.4(a)(1)--(4), implement the foreign national prohibition, explaining its broad scope and barring foreign national participation in certain election-related activities:

(a) *Contributions or expenditures by foreign nationals.*

(1) A foreign national shall not directly or through any other person make a contribution, or an expenditure, or expressly or impliedly promise to make a contribution, or an expenditure, in connection with a convention, a caucus, or a primary, general, special, or runoff election in connection with any local, State, or Federal public office.

(2) No person shall solicit, accept, or receive a contribution as set out above from a foreign national.

(3) 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.

(4) For purposes of this section, *foreign national* means --

(i) A foreign principal, as defined in 22 U.S.C. 611(b); or

(ii) An individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence, as defined in 8 U.S.C. 1101(a)(20);

(iii) Except that *foreign national* shall not include any individual who is a citizen of the United States.

The Commission has applied section 110.4(a)(3) in past advisory opinions that considered factual situations and circumstances similar to those presented here. For example, in Advisory Opinion 1995-15, the Commission approved a PAC's operating structure where its sponsoring domestic corporation was about to be acquired by a foreign corporation. The attributes of the PAC's future composition included that all its members and officers would be US citizens. Citing this fact among others, along with prior advisory opinions, the Commission concluded that: "after the company is acquired by a foreign corporation, foreign nationals will not direct, control, or otherwise participate directly or indirectly in the decision-making process of the PAC, including the administration of or contributions by the PAC." Advisory Opinion 1995-15. In other opinions applying the cited regulations, the Commission has emphasized the requirement that foreign nationals, who are either on the corporate board or hold other positions with the corporation, may not vote on the selection of individuals who would operate the PAC

or exercise decision-making authority with respect to contributions and expenditures by the PAC, or by the domestic corporation itself in non-federal elections. Advisory Opinions 1992-16, and 1990-8; *see also* Advisory Opinion 1989-29 [same emphasis in opinion issued prior to adoption of 11 CFR 110.4(a)(3) where non-federal PAC was funded with corporate treasury moneys and proposed to make contributions only in non-federal elections subject to State law]. Recently, in Advisory Opinion 1999-28, the Commission indicated that the conclusions and guidance within these opinions have continued relevance to the operations of an SSF established by the United States subsidiary of a foreign national parent corporation. Given the cited regulations as applied in the cited opinions, and subject to the responses to the questions set forth below, Extencicare may establish and function as the connected organization for a PAC.

Questions and responses

- (1) Extencicare requests advice as to whether it is necessary to delegate to the Special Committee the decision whether or not to establish a separate segregated fund, and whether it is permissible under the Act for the board (which may or may not include foreign nationals) to make that decision, provided that it delegates to the Special Committee the authority to select the members of the PAC Committee.
- (2) As long as at least one member of Extencicare's board of directors is a U.S. citizen or a permanent resident alien residing in the United States, would it be permissible if the Special Committee established by the board consisted only of such director or directors?
- (3) May the board also appoint non-directors to the Special Committee? If so, must any other members of the Special Committee be board elected officers of Extencicare? May non-board elected officers be appointed? May non-officer employees be appointed?

The board itself may make the general corporate policy decision to establish an SSF, or it may delegate the authority to make this decision to the Special Committee. However, the board must delegate all decisions concerning the administration of the SSF to the Special Committee or to some other corporate personnel group comprised exclusively of United States citizens or individuals lawfully admitted for permanent residence in the United States. Such a delegation could also be made to any director, officer or other executive of Extencicare who is not a foreign national. Commission regulations would not bar the board's appointment of non-directors, non-board elected officers or non-officer employees to the Special Committee.

- (4) Regardless of whether or not any members of the board of directors are U.S. citizens or permanent resident aliens residing in the United States, may the Special Committee be comprised solely of non-directors?

Yes, this is merely a matter of internal corporate policy and practice.

- (5) Must members of the Special Committee be appointed for a fixed term, to be replaced by the board only upon the expiration of such term or in the event of a vacancy created by death, departure from Extencicare, etc., or may the members of the Special Committee serve at the pleasure of the board?

It would not matter whether the members of the Special Committee served for a fixed term or at the pleasure of the board. If desired, the Special Committee could be a self-perpetuating body.

- (6) Must members of the PAC Committee be appointed for a fixed term, to be replaced by the Special Committee only upon the expiration of such term or in the event of a vacancy created by death, departure from Extencicare, etc., or may members of the PAC Committee serve at the pleasure of the Special Committee?

It makes no difference whether the PAC Committee members are appointed for a fixed term or may serve at the pleasure of the Special Committee. The Commission emphasizes that, in addition to complying with §441e, the appointees to the PAC Committee would also have to qualify as executive or administrative personnel of Extencicare or one of its affiliated corporations. 2 U.S.C. §441b(b)(7), 11 CFR 114.1(c).⁴

- (7) Must members of the PAC Committee be board-elected officers of Extencicare, or may non-board elected officers, or non-officer employees, be appointed by the Special Committee to the PAC Committee?

Otherwise eligible personnel within any of the stated personnel groups may be appointed by the Special Committee to the PAC Committee. They must themselves be US citizens or permanent resident aliens in the United States. See response to question six and footnote 4.

Questions eight through ten, set forth below, concern the extent to which, if at all, the directors or officers of Extencicare who are foreign nationals may exercise control and oversight authority over the PAC Committee (and the PAC) with respect to personnel and financial matters. With respect to personnel, the request explains that some members of the PAC Committee may be supervised by Extencicare officers and executives who are foreign nationals and who would, in the normal course of their supervisory functions, have authority to make performance evaluations, compensation

⁴ The Commission notes that if Extencicare forms an SSF, the contribution solicitation and other functions of the SSF (and Extencicare to support the SSF) shall comply with 2 U.S.C. §441b(b)(1)--(7) and Commission regulations at 11 CFR Part 114. See, in particular, 11 CFR 114.5; see also Advisory Opinion 1999-28 which discusses the application of the cited SSF regulations in the same context as presented here, the PAC of a USA subsidiary of a foreign parent corporation.

reviews and other similar personnel decisions pertaining to these PAC personnel. The Extencicare job descriptions for such personnel would not specify duties for the PAC Committee, but those appointed thereto would assume PAC responsibilities as a part of their regular jobs. With respect to financial oversight, the request notes that personnel who will have PAC Committee duties hold positions in corporate departments of Extencicare whose budgets would be affected by the time and other corporate resources attributable to their PAC functions. The board currently reviews and approves the budgets for these departments and would propose to continue that function even if it represents a form of control over the direct or indirect costs paid by Extencicare for the establishment and administration of its PAC.

- (8) For purposes of performance evaluation, compensation review, and other similar personnel decisions in relation to an employee's PAC-related activities, may a PAC Committee member be supervised by his or her superior for regular Extencicare duties, or must such person be supervised and evaluated with respect to the quality of his or her services for the PAC Committee only by the Special Committee or a subcommittee thereof?

As was indicated in the response to questions one through three, the Extencicare board may make a general corporate policy decision to establish an SSF; it may similarly make a general corporate policy decision to terminate an SSF whose establishment it previously authorized. Those core decisions represent a permissible exercise of corporate control over an SSF by any corporation, including one that, like Extencicare, is owned by a foreign parent corporation or by other foreign nationals.

Beyond this level of basic corporate control through its governing board, other decisions of Extencicare and its personnel relating to the PAC, including its formation and operating policies, come within the purview of the foreign national prohibition as set forth in §110.4(a)(3). As already indicated in the responses above, this means that foreign national directors of Extencicare must avoid any participation in the administration of the PAC. For example, selecting and giving PAC work assignments to personnel who will serve on the PAC Committee must be made only by US citizens or individuals lawfully admitted for permanent residence in the United States.

With respect to the supervision by foreign nationals of personnel who have functions on the PAC Committee, the Commission concludes that a reasonable approach should be followed that would avert the possibility of arbitrary actions, favorable or unfavorable, by a foreign national supervisor solely on the basis of a subordinate's performance of duties with respect to PAC Committee matters. One permissible policy would be to require that all performance evaluations and compensation reviews (and other similar personnel related actions), to the extent they entail consideration of the

PAC functions of personnel who are subordinates of foreign nationals, be based exclusively on the input to the supervisor by the most senior person on the Special Committee or the PAC Committee who has direct knowledge of the employee's performance of PAC functions. Other approaches may also be reasonable. The Commission would not require that a separate system of supervision and evaluation be established outside the normal structure of personnel administration within Extencicare.

- (9) May the board of directors, if the Special Committee determines to establish an SSF, be involved in the review and approval of any budget for the establishment, administration and solicitation costs of the SSF? Is there a problem if the board, as it currently does, reviews and approves the budgets for such departments, even if they reflect, in part, the costs of establishing, administering and soliciting contributions to the SSF or in making permitted contributions and expenditures, even if such costs are indirect costs? Should the budget of the PAC Committee for direct, out-of-pocket expenses incurred in establishing, administering and soliciting contributions to the fund or in making permitted contributions or expenditures be viewed similarly or differently? Does it matter whether the board reviews and approves a separate budget for such direct and/or indirect costs?
- (10) If budgetary review by the board of direct, out-of-pocket costs and/or of the indirect costs of the SSF is not permitted, would it be permissible if the Special Committee, either by by-law or by board resolution, was accorded the authority to review and approve such budget? Would such delegation of authority be permissible if it were subject to a "not to exceed" limit? If neither the board nor the Special Committee may exercise such budget review authority, would it be permissible that such budget authority of the PAC Committee be subject to a "not to exceed" limit established from time to time in advance by the board and/or Special Committee?

The Commission concludes that a reasonable approach, one which comports with §110.4(a)(3)'s bar on foreign national participation in decisions concerning the administration of a PAC, should be followed. With respect to direct costs, one such approach would be to set a specific budget level for PAC direct costs at a "not to exceed" amount. The board's review power of direct costs (short of a decision to terminate the PAC entirely), should be limited to ascertaining and enforcing compliance by the Special Committee or the PAC Committee with the budget levels established by the board in accord with the above described procedures. Other budget setting and review procedures for the direct costs of PAC operations may also be reasonable if they assure compliance with Commission regulations. With respect to the indirect costs to Extencicare for PAC operations, the usual and normal corporate procedures for budget decisions and review may be followed and would not be prohibited by Commission regulations.

This response constitutes an advisory opinion concerning the 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)

Darryl R. Wold
Chairman

Enclosures (AOs 1999-28, 1995-15, 1992-16, 1990-8, and 1989-29)