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September 14, 2016

Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463
Submitted via email

RE: Proposal to rescind Advisory Opinion 2006-15 (TransCanada – foreign money)

Dear Commissioners:

These comments are submitted on behalf of Public Citizen in response to the proposal to rescind Advisory Opinion 2006-15 (TransCanada) in an effort to close a potential avenue for foreign money to enter U.S. federal, state and local elections. In light of the damage to our campaign finance system caused by the U.S. Supreme Court’s *Citizens United v. Federal Election Commission* decision, Public Citizen strongly supports this proposal as a necessary step to help maintain the integrity of the national law that bans foreign money in U.S. elections (52 U.S.C. §30121).

A. Prohibition on “Foreign Nationals” Financing U.S. Elections

Concern that foreign spending in U.S. elections threatens democratic sovereignty and national security is as old as the founding of the nation. In his presidential farewell address, President George Washington long ago cautioned: “Against the insidious wiles of foreign influence, the jealousy of a free people ought to be constantly awake; since history and experience prove that foreign influence is one of the most baneful foes of Republican Government.”

Restrictions on foreign influence over American politics are contained in the Emolument Clause of the U.S. Constitution limiting gifts from foreign governments to American public officials. Immediately preceding World War II, Congress feared a Nazi propaganda effort and passed the Foreign Agents Registration Act of 1938 (FARA) to require disclosure of foreign sources funding lobbying and grassroots campaigns. In 1966, Congress amended FARA to ban for the first time foreign nationals from making any campaign contributions to federal, state or local candidates. In 1974, the foreign contribution ban was incorporated into the Federal Election Campaign Act, giving the Federal Election Commission (FEC) jurisdiction over its enforcement. In 2002, the ban was strengthened even further under the Bipartisan Campaign Reform Act (BCRA) by expanding it to include prohibiting foreign nationals from independently *spending* money to influence elections or from donating indirectly to support political parties. It also enhanced the penalties for violating the law.

Historically, the Federal Election Commission has enforced the ban on foreign money fairly well in U.S. elections. Even though the advisory opinion that is the focus of this discussion may have undermined the prohibition somewhat, it was not a wholesale abandonment of the principle. In AO 2006-15, the FEC defined “foreign national” narrowly in regard to corporate interests to include only those companies that are organized under the laws of a foreign country. Thus, U.S. subsidiaries of entirely foreign-owned companies, as long as the subsidiaries are organized under U.S. law, could make campaign contributions and expenditures under certain constraints. The FEC ruled that the donations and disbursements by the subsidiaries of wholly owned foreign companies are permitted as long as they derive entirely from funds generated by the subsidiaries’ U.S. operations; and all decisions concerning the donations and disbursements will be made by individuals who are U.S. citizens or permanent residents, except for setting overall budget amounts.

No doubt the campaign contribution decisions made by the American directors of U.S. subsidiaries would be influenced by the foreign owners of the company. Subsidiaries of an entirely foreign-owned company are not likely to act in a vacuum and make decisions about the company’s money contrary to the wishes of the company hierarchy. But corporate involvement in U.S. elections at the time was limited and transparent. In most elections, corporations could establish PACs to make contributions and expenditures, but the sources of donations to and from the PACs were capped -- \$5,000 per year at the federal level -- and the money was disclosed to the public. The opportunities for mischief were fairly limited.

B. *Citizens United*: The End of Limits

The constraints on foreign money in U.S. elections inherent in a campaign finance system of PACs, contribution limits and disclosure largely fell apart in 2010 following the *Citizens United* decision.¹ The Roberts Court ruled in the 5-to-4 decision that corporations may now make unlimited expenditures in federal, state and local elections – and from funds straight out of the corporate treasuries. While jurisdictions may still limit or ban direct corporate *contributions* to candidates, corporate political *spending* is now a free-for-all. Furthermore, subsequent lower court decisions – *FreeSpeechNow.org v. FEC*² and *Emily’s List v. FEC*³ – invalidated the \$5,000 donor limit to independent expenditure committees, which have since become known as “super PACs.”

The consequences of *Citizens United* on the financing of campaigns have been nothing less than staggering. One of these consequences has been to open the door to substantial foreign money in U.S. elections.

Many corporations have chosen to launder campaign money through “dark money” electioneering nonprofit organizations, which have exploded onto the political scene after 2010. Since these nonprofit organizations are not obligated to disclose the sources of their electioneering funds, their corporate sponsors remain anonymous. Though the law against foreign principals directing funds to affect U.S. elections remains on the books, it is nearly

¹ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

² *FreeSpeechNow.org v. Federal Election Commission*, 599 F.3d 686 (DC Cir. 2010)

³ *Emily’s List v. Federal Election Commission*, 581 F.3d 1 (DC Cir. 2010).

impossible to track the sources of this “dark money,” making nonprofit organizations an easy avenue for foreign money.

More directly related to AO 2006-15, however, is the ability of U.S. subsidiaries of wholly owned foreign companies to chip in unlimited treasury funds into U.S. elections. They may now make unlimited expenditures for or against candidates or, alternatively, make unlimited donations from corporate treasury funds to super PACs and nonprofit organizations specifically for electioneering purposes. The American directors of the subsidiaries will likely continue claiming that they alone are making the calls on political spending decisions, but given the nature of the corporate hierarchy and global and interconnected status of major corporations, that simply is not credible. These decisions are going to be made in the interest of the foreign owners.

Republican party lawyer Charles Spies penned a memo dated February 19, 2015, that gives instructions to subsidiaries of foreign-owned companies how to make unlimited contributions to super PACs legally under the law and AO 2006-15. One month later, American Pacific International Capital, Inc. (APIC) – a corporation licensed in California but owned by Chinese foreign nationals – made a \$1.3 million donation to Jeb Bush’s Right to Rise super PAC.

In the words of investigative reporters Jon Schwarz and Lee Fang, the Chinese company had, quite literally, “gotten the memo.”⁴


C. Conclusion: Ban Campaign Contributions and Expenditures from Subsidiaries of Foreign-Owned Corporations

Spies’s memorandum provides a roadmap for how foreign nationals can direct political money into U.S. elections, without much subterfuge and with the appearance of being legal. It is a roadmap that is likely to become increasingly followed by foreign interests seeking to influence American politics.

Rescinding Advisory Opinion 2006-15 will not close all the avenues for foreign financing of federal, state and local elections, but it would shut down a gaping loophole in the foreign influence ban, especially now that wealthy foreign nationals even possess an instruction manual.

Closing this avenue for foreign campaign money in U.S. elections is entirely within the purview, and is entirely of the making, of the Federal Election Commission. Public Citizen strongly recommends that the FEC rescind AO 2006-15.

Sincerely,



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⁴ Jon Schwarz and Lee Fang, “The Citizens United Playbook,” *The Intercept* (Aug. 3, 2016).