



September 12, 2016

VIA ELECTRONIC MAIL

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

RE: Commissioner Ravel's Proposal to Rescind AO 2006-15 (TransCanada) (FEC Agenda Document No. 16-32-A)

Dear Chairman, Vice Chairman, and Commissioners:

The Center for Competitive Politics (“the Center”),¹ respectfully submits comments in response to Commissioner Ravel’s Proposal to Rescind Advisory Opinion (“AO”) 2006-15 (TransCanada) (“the Proposal”).² During the open meeting held on August 16, 2016, Chairman Petersen noted that the public would have the opportunity to comment on Commissioner Ravel’s Proposal and therefore the FEC would consider it at a September meeting.³ For the reasons given below, the Commission should reject the Proposal and affirm its considered policy, consistently applied since 1978, that domestic subsidiaries of foreign corporations, and the U.S. citizens they employ, may participate in the American political system.

I. The Commission is not empowered to “rescind” an Advisory Opinion ten years later; such a fundamental change in policy requires formal rulemaking.

There is no procedural mechanism allowing the Commission to “rescind” AO 2006-15 at this time. Neither the Federal Election Campaign Act nor its amendments establish such a procedure. And while the Commission’s regulations permit reconsideration of an advisory opinion under certain circumstances, those requirements are not met here. In any event, the Proposal suggests a radical change in Commission policy, upending settled expectations

¹ The Center is a nonpartisan, nonprofit § 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former Chairman of the Commission. In addition to scholarly and educational work, the Center is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels.

² Ann M. Ravel, Memorandum RE: Proposal to Rescind Advisory Opinion 2006-15 (TransCanada), Agenda Doc. No. 16-32-A, *available at* http://www.fec.gov/agenda/2016/documents/mtgdoc_16-32-a.pdf.

³ See FEC, Open Meeting Video, Aug. 16, 2016 at 2:40 *available at* <https://fec.adobeconnect.com/p3c8r381wtq/>.

established over decades. Consequently, the regulated community is entitled to the protections, and opportunity to be heard, inherent in formal rulemaking.

a. The deadline for reconsideration of AO 2006-15 has passed, and Commissioner Ravel is not entitled to move for reconsideration.

Under the Commission’s own regulations, the time for reconsidering—much less rescinding—AO 2006-15 has long passed. Under 11 C.F.R. § 112.6(a), the *requestor* of the original AO may seek reconsideration “within 30 calendar days of receipt of the opinion” and then only upon the “motion of a Commissioner who voted *with the majority* that originally produced the advisory opinion.”⁴ Alternatively, without action from the requestor, a Commissioner who voted in the majority issuing the advisory opinion may, *sua sponte*, move the FEC for reconsideration, subject to the same 30-day time limit.⁵

None of these conditions have been met for AO 2006-15. Neither TransCanada Corporation nor its U.S. subsidiaries have sought reconsideration. Commissioner Ravel did not vote with the majority in AO 2006-15, and was not a member of the Commission at the time. In any event, even if Commissioner Ravel were entitled to seek reconsideration, the deadline has long passed: AO 2006-15 was issued on May 19, 2006.⁶ Therefore Commissioner Ravel’s Proposal cannot be acted upon under 11 C.F.R. § 112.6. The only alternative is formal rulemaking.

b. Commissioner Ravel’s Proposal is directly contrary to the Federal Election Campaign Act’s (“FECA”) provisions for issuing new advisory opinions, and departs from an advisory opinion’s fact-bound analysis in favor of vague statements and press reports.

Under FECA, “[n]o opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section.”⁷ Here, the provisions of the section are clearly not met. In particular, no person has made “a complete written request concerning the application of this Act, chapter 95 or chapter 96 of title 26, or a rule or regulation prescribed by the Commission, with respect to a specific transaction or activity by the person,” the statutory predicate condition for the Commission to issue an advisory opinion.⁸

The rule that an Advisory Opinion may only be provided in response to a valid Advisory Opinion Request is not a mere legal nicety or “technicality.” It is part of the fundamental statutory

⁴ 11 C.F.R. § 112.6(a) (emphasis added).

⁵ 11 C.F.R. § 112.6(b).

⁶ AO 2006-15 (TransCanada) at 1; *but see* Certification of AO 2006-15, In the Matter of TransCanada Corp. dated May 18, 2006. In either event, 30 days from the decision was either June 17 or 18, 2006. Commissioner Ravel’s request, dated August 9, 2016, is approximately 3707 days past the deadline in 11 C.F.R. § 112.6.

⁷ 52 U.S.C. §30108(b).

⁸ 52 U.S.C. §30108(a)(1).

mandate that binds the Commission. To ignore it is to announce that the Commission intends to act as a vigilante body, roaming the land to right perceived wrongs whenever four commissioners wish to act, even where the offending target is the Commission’s own work.

Moreover, Congress’s jurisdictional command is rooted in good policy. The requirement that the Commission issue advice only in response to a concrete request ensures that there is some basis in fact before the Commission acts. AOs are particular interpretations of statute and regulation generated only when requested by a person—natural or otherwise—facing a particular set of circumstances.⁹ Others may rely on an AO only if the “specific transaction or activity. . . is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.”¹⁰ Thus the AO process is necessarily limited to concrete difficulties faced by concrete members of the regulated community.

By contrast, what Commissioner Ravel proposes is analogous to a court issuing an advisory opinion based upon hypothetical facts and unproven injury.¹¹ Like Article III standing, the advisory opinion statute demands some nexus to real persons in fact-specific situations.¹² And the Commission’s own regulations are explicit, prohibiting the Commission from hearing a “general question of interpretation or [a question] posing hypothetical situation[s].”¹³ Rather, “[a]dvisory opinion requests shall include a complete description of all facts relevant to the specific transaction or activity with respect to which the request is made.”¹⁴ Here, the Proposal would initiate a proceeding without such a demonstration of need in the form of a concrete person seeking guidance, and without the factual foundation of a properly-presented request.

Instead, the Proposal is premised upon vague statements,¹⁵ limited press reporting,¹⁶ and an asserted change in the law governing U.S. subsidiaries of foreign corporations.¹⁷ This is in

⁹ 52 U.S.C. § 30108(c)(1)(A); cf. 11 C.F.R. § 112.5(a)(1).

¹⁰ 52 U.S.C. § 30108(c)(1)(B); cf. 11 C.F.R. § 112.5(a)(2).

¹¹ See U.S. CONST. art. III, sec. 2, cl. 1; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (Defining Article III standing, requiring “injury in fact -- an invasion of a legally protected interest which is (a) concrete and particularized. . . and (b) actual or imminent, not conjectural or hypothetical.”) (internal citations and punctuation omitted).

¹² 52 U.S.C. § 30108(c)(1)(A) (“Any advisory opinion rendered by the Commission under subsection (a) may be relied upon by. . . any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered”) (emphasis added).

¹³ 11 C.F.R. § 112.1(b). And the Commission has declined to issue AOs in hypothetical situations. To take one example, footnote 2 of AO 2010-10 explicitly stated that, in that case, “the question of how independent expenditures should be reported on FEC Form 5, Schedule E [was] hypothetical and d[id] not qualify for an advisory opinion.”

¹⁴ 11 C.F.R. § 112.1(c).

¹⁵ Proposal at 4 (citing articles from *The Intercept* website as well as asserting there is “sufficient doubt that the ‘assumptions’ that were ‘material to [the] conclusion[s]’ presented in Advisory Opinion 2006-15 (TransCanada) remain valid.”) (brackets in the Proposal).

¹⁶ *Id.* (citing articles from *The Intercept* website).

¹⁷ *Id.* at 3 (“The *Citizens United* decision and its progeny in the lower federal courts have transformed the American campaign finance system.”) (citing a dissent in *Citizens United v. FEC*, 558 U.S. 310, 424, 465 (2010) (Stevens, J. dissenting)). This comment also discusses why *Citizens United* and other recent developments in campaign finance

stark contrast to the formal inquiry of the rulemaking process or the specific pleadings of an advisory opinion request.¹⁸ Not only is the Proposal procedurally improper, then, it also suggests a willingness to make Commission policy based upon hearsay in the press and hypothetical supposition. This is troubling for any act of an administrative agency, but especially so where the suggested action will undo decades of consistent policy and impact Constitutionally-protected liberties.

c. Rescinding AO 2006-15 will upset decades of analysis from the Commission.

The Proposal seeks to rescind AO 2006-15 (TransCanada) “and the parts of other advisory opinions that purported to permit Domestic subsidiaries of foreign corporations to make contributions or donations, either directly or through separate segregated funds, in connection with federal, state, and local elections.”¹⁹ The TransCanada Advisory Opinion does not stand alone in treating U.S. subsidiaries as distinct from their foreign parents. In fact, it is only one of a long line of advisory opinions to consider the matter and conclude that U.S. subsidiaries, and their U.S. employees, may continue to engage in political activity. Those opinions in turn formed the basis for the Commission rulemaking leading to 11 C.F.R. § 110.4(a)(3). Commissioner Ravel asks not to rescind one advisory opinion,²⁰ but to fundamentally change the law.

In 1978, just after the passage of FECA and its amendments in the wake of *Buckley v. Valeo*,²¹ the Commission considered the case of a U.S. corporation bought by a foreign corporation. In AO 1978-21 (Budd Citizenship Committee), a corporation (Budd Company of Troy, Michigan) that ran a multi-candidate political committee was bought by a West German corporation (Thyssen, A.G.).²² The political committee wished to continue to solicit contributions from the company’s U.S.-citizen executive and administrative personnel and to continue making contributions to candidates.²³ The Commission ruled “that the continuing

case law have not worked the change the Proposal asserts, and do not necessitate “rescinding” AO 2006-15. *See* Section II(b), *infra*.

¹⁸ *See, e.g.*, AO 2006-15 (TransCanada) at 1 (“The facts presented in this advisory opinion are based on your letter received March 28, 2006.”); *id.* at 6 (“The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.”). Such fact-specific language is standard for the Commission’s advisory opinions. *See, e.g.*, AO 2016-08 (eBundler.com) at 1, 8 (reciting same limitations).

¹⁹ Proposal at 4.

²⁰ A non-exhaustive list of the other advisory opinions include the following: AO 2009-14 (Mercedes-Benz USA/Sterling); AO 2000-17 (Extencicare Health Services, Inc.), AO 1999-28 (Bacardi-Martini, USA, Inc.), AO 1995-15 (Allison Engine Company Political Action Committee), AO 1992-16 (Nansay Hawaii, Inc.), AO 1992-07 (H&R Block, Inc.), AO 1990-08 (The CIT Group Holdings, Inc.), AO 1989-29 (GEM of Hawaii, Inc.), AO 1982-34 (Sonat Inc. Political Action Committee), AO 1981-36 (Japan Business Association of Southern California), AOs 1980-111 (Portland Cement Association), AO 1980-100 (Revere Sugar Corp.), and AO 1978-21 (Budd Citizenship Committee).

²¹ 424 U.S. 1 (1976) (per curiam).

²² AO 1978-21 (Budd Citizenship Committee) at 1.

²³ *Id.*

existence of the [c]ompany as a discrete corporation organized under the laws of Pennsylvania, with its principal place of business in the United States, would permit the [c]ompany to continue its sponsorship of the [political c]ommittee.”²⁴

But the AO was careful to note that “any solicitations for contributions, as well as contributions to and expenditures by the Committee, must conform with all other applicable provisions of the Act and Commission regulations.”²⁵ This included the requirements that “the individuals who exercise decision-making authority with respect to Committee activities are citizens of the United States or lawfully admitted for permanent residence in the United States.”²⁶ Furthermore, the Commission reasonably mandated that “decisions made for the [political c]ommittee by those individuals [] not be dictated or directed by personnel of Thyssen, A.G. or any other foreign corporation who are foreign nationals.”²⁷

The Commission’s decision was strengthened just two years later in AO 1980-100 (Revere Sugar Corp.) where the Commission held that under 22 U.S.C. § 611(b) “a domestic corporation whose principal place of business is within the United States is not a ‘foreign principal’ and hence not a ‘foreign national’” even though the overall ownership of the U.S. company consisted entirely of foreign corporations.²⁸ Because a subsidiary is “a discrete corporate entity. . . with its principal place of business in the United States,” it may set up a separate segregated fund.²⁹ Again, no foreign national could contribute to or direct the PAC’s activity.³⁰

Domestic direction and funding is crucial, as highlighted by a pair of advisory opinions in 1989. In AO 1989-20 (Kuilima), the Commission rejected the request of the Kuilima³¹ Development Company to establish a PAC when the corporation was based in the United States with U.S. citizen employees but “[a]ll of the directors and officers of those two companies are Japanese nationals” and all of its funding came from a foreign corporation.³² Yet in the very same year, the Commission released AO 1989-29 (GEM of Hawaii, Inc.), approving a PAC (for state and local contributions) “comprised of and administered solely by non-foreign nationals” with funding “derived from the operations of its stores in Hawaii.”³³ The AO further approved the

²⁴ *Id.* at 2.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ AO 1980-100 (Revere Sugar Corp.) at 2.

²⁹ *Id.*

³⁰ *Id.*

³¹ AO 1989-20 (Kuilima) at 3.

³² *Id.* at 2.

³³ AO 1989-29 (GEM of Hawaii, Inc.) at 3.

formation of a separate segregated fund, for contributions to federal candidates, subject to the same restrictions.³⁴

The basic idea that a subsidiary is distinct from its parent corporation has been applied in other contexts as well. For example, AOs 1980-111 (Portland Cement Association) and 1981-36 (Japan Business Association of Southern California) expanded the reasoning of corporate AOs to trade associations with foreign members; so long as the foreign nationals did not participate in funding the PACs, nor in the PACs' decision-making process, then the associations were free to create their own political committees.³⁵ AO 1982-34 (Sonat Inc. Political Action Committee), meanwhile, protected the rights of U.S. citizens who work for foreign subsidiaries of U.S. corporations to nonetheless participate in the U.S. company's separate segregated fund.³⁶

As noted by AO 2000-17 (Extencicare Health Services, Inc.), AO 1989-29 predates the Commission's adoption of 11 C.F.R. § 110.4(a)(3), which codified the reasoning of the prior AOs.³⁷ Thus, far from being outliers, the advisory opinions of the 1970s and 1980s formed the foundation for later formal rulemaking that applied their reasoning to all situations involving domestic subsidiaries. In each instance, the advisory opinions discerned, on the facts provided, if the control of the U.S. subsidiary's political activity was formally independent of influence from its parent company. If so, then the U.S. subsidiary was treated as independent of its parent foreign corporation. That remains the law.

Adopting Commissioner Ravel's Proposal will upset decades of practice and undermine the Commission's administrative rulings. This constitutes a call to profoundly change established Commission practice and the ability of U.S. subsidiary corporations, and their U.S.-citizen employees, to exercise their constitutional rights.

d. Rescinding AO 2006-15 is a fundamental shift in policy that requires full notice-and-comment rulemaking under FECA.

Pursuant to 52 U.S.C. §30108(c), an advisory opinion "may be relied on by ... any person involved in a specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered." Further, "any person who relies upon any provision or finding of an advisory opinion ... and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act..." The advisory opinion process is intended, thereby, to provide certainty to the enforcement process, allowing the regulated community to conform its actions to the law.

³⁴ *Id.*

³⁵ AO 1980-111 (Portland Cement Association) at 3; AO 1981-36 (Japan Business Association of Southern California) at 2-3.

³⁶ AO 1982-34 (Sonat Inc. Political Action Committee) at 3.

³⁷ AO 2000-17 (Extencicare Health Services, Inc.) at 6; *see Beyond its* 11 C.F.R. § 110.4(a)(3). This subsection was added on November 24, 1989. FEC, Contributions and Expenditures, 54 Fed. Reg. 48580 (Nov. 24, 1989). The advisory opinions formed part of the basis for the Commission's adoption of § 110.4(a)(3). *Id.*

Commissioner Ravel’s Proposal would undo those settled expectations. It would create a dramatic shift in the law, and, even if it complied with the procedures for rescinding an AO (which, as shown, it does not), it cannot be understood as a mere request to rescind a particular AO. The Proposal is not tied to AO 2006-15 (TransCanada) because it goes beyond the specific facts and circumstances of TransCanada’s advisory opinion request. It is likewise not merely guidance, because it changes the scope of speech and associational rights for multiple corporations, and their employees, nationwide. The Federal Election Campaign Act requires such broad, generally-applicable interpretations of the law to be adopted as formal rules, with all the procedural safeguards of proper notice and comment. After all, because Advisory Opinions apply to narrow, fact-based requests, while rulemaking may extend further based upon a fully-developed administrative record, the power to promulgate rules is distinct from the Commission’s power to grant advisory opinions, and distinctly granted.³⁸

Thus, Congress provided no way for the Commission to directly rescind a ten-year-old advisory opinion other than by formal rulemaking. Normal administrative notice and comment are required for the FEC to act on Commissioner Ravel’s Proposal.³⁹ But even if the legally-required procedures are initiated, the Proposal is based upon a mistaken understanding of current law, and relies solely on a press report and supposition. There is no need to initiate a rulemaking on that thin foundation.

II. Established law and precedent are enough to uphold the ban on foreign campaign funding.

a. Statutory and regulatory law expressly prohibit the activity the Proposal fears.

Commissioner Ravel’s Proposal makes the bald and unsubstantiated claim that “our campaign finance system is vulnerable to influence from foreign nationals and foreign corporations through Domestic subsidiaries and affiliates in ways unimaginable a decade ago.”⁴⁰ But the law has not changed, nor, as the above AOs show, is this concern newly imaginable. Federal statutes and the Commission’s own regulations expressly prohibit foreign nationals from directly or indirectly contributing to political organizations or making independent expenditures. Indeed, it should be noted that at the time that AO 2006-15 was issued, the Commission was quite familiar with efforts to violate the prohibition on foreign contributions, having engaged in several enforcement actions directed at those efforts, including some yielding six figure fines.⁴¹

³⁸ The Commission’s general rulemaking power is found at 52 U.S.C. § 30107(a)(8) (“The Commission has the power. . . to make, amend, and repeal such rules, pursuant to the provisions of [the APA], as are necessary to carry out the provisions of [FECA]”). Advisory Opinions fall under 52 U.S.C. §§ 30107(a)(7) and 30108.

³⁹ 11 C.F.R. § 200.3.

⁴⁰ Proposal at 3.

⁴¹ See e.g. MUR 4530 (DNC Services Corp/Democratic National Committee); MUR 4531 (Democratic National Committee); MUR 4547 (John Huang); MUR 4594 (Friends of Fasi); and MUR 4583 (D. Singh).

Congress has specifically banned direct or indirect contributions or expenditures by foreign nationals.⁴² The ban includes direct or indirect financing of independent expenditures or electioneering communications.⁴³ For the purposes of the ban, “foreign national” incorporates by reference 22 U.S.C. § 611(b) of the Foreign Agents Registration Act of 1938.⁴⁴ Section 611(b) specifically includes “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.”⁴⁵

Pursuant to statute, the Commission has promulgated regulations addressing this ban. Specifically, FEC regulations prohibit *any* participation by foreign nationals in decisions involving election-related activities:

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, political committee, or political organization with regard to such person’s Federal or non-Federal election-related activities, such as decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with elections for any Federal, State, or local office or decisions concerning the administration of a political committee.⁴⁶

Thus, the most direct answer to Commissioner Ravel’s fears is to simply look to existing law: a foreign national—whether a natural person or a corporation—cannot direct others to make expenditures or electioneering communications. So while a U.S. subsidiary’s board or management may choose to make an expenditure, it cannot do so at the behest of the parent foreign corporation. Likewise, foreign nationals on a corporation’s board must be separated from any decision concerning the making of expenditures or electioneering communications.

Furthermore, foreign persons are banned from funneling money through surrogates. Already, FECA expressly prohibits contributions in the name of another.⁴⁷ But other laws require financial institutions to monitor the transactions of funds to assure no fraud takes place. For instance, the Currency and Foreign Transactions Reporting Act of 1970,⁴⁸ more informally known as the “Bank Secrecy Act” (coupled with regulations stemming from that law)⁴⁹ already functions as a safeguard against any potential violations, requiring “[e]very bank [to] file with

⁴² 52 U.S.C. § 30121(a).

⁴³ 52 U.S.C. § 30121(a)(1)(C).

⁴⁴ 52 U.S.C. § 30121(b)(1).

⁴⁵ 22 U.S.C. § 611(b)(3).

⁴⁶ 11 C.F.R. § 110.20(i).

⁴⁷ 52 U.S.C. § 30122. *See also* 11 C.F.R. § 110.4.

⁴⁸ Codified at 31 U.S.C. § 5311 *et seq.*

⁴⁹ Relevant regulations at 31 C.F.R. Chapter X.

the Treasury Department... a report of any suspicious transaction relevant to a possible violation of law or regulation.”⁵⁰

Finally, the FEC itself has, through a properly issued advisory opinion, made clear that FECA requires that any political spending by a U.S. subsidiary be made from funds earned in the United States, and that the foreign parent may not replenish any part of the U.S. subsidiary’s political expenditures.⁵¹

The exercise of foreign electoral influence through corporations is already illegal, and concerns that it is ongoing are presently unfounded, relying on fear and supposition rather than evidence. Indeed, this is precisely why policy is formulated through proper notice and comment rulemakings: so that the agency can gather actual evidence, rather than newsy anecdotes, about the problem it seeks to address.

Any corporation that wishes to spend funds on campaign activity must follow existing rules requiring that (1) U.S. nationals make those decisions instead of foreign nationals, including shareholders, and (2) that any funds must come from the corporation’s domestic activities (and, again, not from foreign sources). None of those requirements is new.

b. *Citizens United* and its progeny uphold the foreign national ban on politics.

The Proposal asserts that “[t]he *Citizens United* decision and its progeny in the lower federal courts have transformed the American campaign finance system” leaving it “vulnerable to influence from foreign nationals and foreign corporations.”⁵² To support this belief, the Proposal cites Justice Stevens’ dissent in *Citizens United* for the proposition that the 2010 decision may allow “multinational corporations” that “may be foreign controlled” to contribute to political discourse in the United States.⁵³ A dissent is not law, and Justice Stevens did not purport to rely upon proven events. But, in any event, *Citizens United* did not address the longstanding prohibition on foreign contributions or expenditures, and the Supreme Court has since summarily reaffirmed that ban.

The *Citizens United* opinion expressly held that “[w]e need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process. . . .”⁵⁴ That is because the ban on corporate independent expenditures was “not limited to corporations or associations that were created in foreign countries or funded predominately by foreign shareholders.”⁵⁵ Therefore, the

⁵⁰ 31 C.F.R. § 1020.320 (Reports by banks of suspicious transactions).

⁵¹ AO 1992-16 (Nansay Hawaii). *See also Id.*, (Comm’r T. Potter, concurring) (“Finally, and perhaps most importantly, all Nansay Hawaii political contributions will come from profits from its U.S. investments. . . . [a] rigorous standard which is an essential element of the Advisory Opinion. . . .”); AO 2006-15 (TransCanada).

⁵² Proposal at 3.

⁵³ *Id.* (citing *Citizens United*, 558 U.S. at 424, 465) (Stevens, J. dissenting).

⁵⁴ *Citizens United*, 558 U.S. at 362.

⁵⁵ *Id.*

ban on corporate independent expenditures “would be overbroad even if [the Court] assumed, *arguendo*, that the Government has a compelling interest in limiting foreign influence over our political process.”⁵⁶ In short, *Citizens United* cannot be read the way Commissioner Ravel fears, because it expressly reached and rejected her argument. The ban on foreign influence on our elections—even by foreign corporations—stands firm in the wake of *Citizens United*.

This was made clear just a year later in a direct challenge to 52 U.S.C. § 30121, the statutory ban on contributions or expenditures by foreign nationals. In *Bluman v. FEC*,⁵⁷ a special three-judge court expressly rejected the argument that *Citizens United* altered the law governing foreign nationals: “the majority opinion in *Citizens United* is entirely consistent with a ban on foreign contributions and expenditures. And we find the force of Justice Stevens’s statement to be a telling and accurate indicator of where the Supreme Court’s jurisprudence stands on the question of foreign contributions and expenditures.”⁵⁸ In a unanimous order, the Supreme Court summarily affirmed the three-judge *Bluman* court.⁵⁹ Thus, the Proposal’s fears about *Citizens United* are refuted both by the Supreme Court’s express limitation on the reach of its decision and by on-point precedent before a three-judge district court, summarily affirmed by the Supreme Court.

Beyond its discussion of *Citizens United*, the *Bluman* court noted that the “Supreme Court has long held that the government (federal, state, and local) may exclude foreign citizens from activities that are part of democratic self-government in the United States.”⁶⁰ The *Bluman* court examined decades of Supreme Court precedent⁶¹ to sum up the law on foreign nationals: “[t]he government may exclude foreign citizens from activities ‘intimately related to the process of democratic self-government’”⁶² including political contributions and expenditures.

The *Bluman* court was clear: “we interpret the statute to bar foreign nationals. . . from making expenditures to expressly advocate the election or defeat of a political candidate; *and from making donations to outside groups when those donations in turn would be used to make contributions to candidates or parties or to finance express-advocacy expenditures.*”⁶³ The *Bluman* opinion thus addressed Commissioner Ravel’s precise worry: that foreign nationals would control the outlay of money for expenditures. The ban on foreign contributors or foreign-

⁵⁶ *Id.*

⁵⁷ 800 F. Supp. 2d 281 (D.D.C. 2011) (three-judge court) *summ. aff’d* 565 U.S. 1104 (2012). The matter was before United States Circuit Judge Brett M. Kavanaugh, and United States District Judges Ricardo M. Urbina and Rosemary M. Collyer.

⁵⁸ *Id.* at 289.

⁵⁹ 565 U.S. 1104 (2012).

⁶⁰ *Bluman*, 800 F. Supp. 2d at 282.

⁶¹ *Id.* at 287.

⁶² *Id.* (quoting *Bernal v. Fainter*, 467 U.S. 216, 220 (1984)).

⁶³ *Id.* at 284 (emphasis added).

backed expenditures has thus been one of the limited situations in which courts have upheld a ban on political activity by a certain class.⁶⁴

Given that the existing statutory ban on foreign nationals' political activity clearly includes foreign corporations, the Proposal appears to request no more than make-work regulations that would swell the Federal Register to no purpose. There is no basis for opening such a rulemaking.

III. The Commission and Department of Justice already hold the tools necessary to enforce the ban on foreign money, as evidenced by the Proposal's own references to violations of FECA.

a. Congress provided all the necessary tools to police the ban on foreign money.

The ban on foreign money is part of FECA and its amendments⁶⁵ and is therefore subject to FECA's enforcement procedures.⁶⁶ The law already provides two avenues for enforcement: civil penalties imposed by the Commission itself, and criminal prosecution by the Department of Justice. These are adequate to police the existing ban on foreign money.

FECA provides that "[a]ny person who believes a violation of this Act. . . has occurred, may file a complaint with the Commission."⁶⁷ The complaint must be "in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury."⁶⁸ Alternatively, the Commission may act on its own based upon "information ascertained in the normal course of carrying out its supervisory responsibilities" so long as there is "an affirmative vote of 4 of its members, that [the Commission] has reason to believe that a person has committed, or is about to commit, a violation of this Act."⁶⁹

FECA mandates detailed civil procedures, both to protect the rights of those accused of a violation and to permit a speedy resolution to any complaint. Through its Enforcement Division,⁷⁰ the Commission may "make an investigation of such alleged violation, which may

⁶⁴ See, e.g., *Wagner v. FEC*, 793 F.3d 1, 21-22 (D.C. Cir. 2015) (en banc) (noting that campaign finance law prohibits only certain classes of individuals from engaging in political activity, including government contractors and foreign nationals).

⁶⁵ 52 U.S.C. § 30121.

⁶⁶ See fn. 42, *supra*, for some of the FEC's past enforcement actions concerning the prohibition on foreign contributions.

⁶⁷ 52 U.S.C. § 30109(a)(1).

⁶⁸ *Id.*

⁶⁹ 52 U.S.C. § 30109(a)(2).

⁷⁰ Federal Election Commission, Associate General Counsel for Enforcement, Website http://www.fec.gov/about/offices/OGC/AGC_enforcement.shtml#enf ("Following procedures set forth in the statute, the Enforcement Division investigates alleged violations of the law, recommends to the Commission appropriate action to take with respect to apparent violations, and directly negotiates conciliation agreements, which may include civil penalties and other remedies, with respondents or their counsel to resolve the matter.").

include a field investigation or audit, in accordance” with FECA.⁷¹ Once the investigation is complete, the Commission’s General Counsel’s office files a report detailing “the position of the general counsel on the legal and factual issues of the case.”⁷² FECA allows and encourages the conciliation agreements and financial penalties, subject to the affirmative vote of four members of the Commission.⁷³

With limited exception, the Commission holds exclusive authority for civil enforcement of FECA.⁷⁴ Therefore, if the normal enforcement procedures are “unable to correct or prevent any violation of this Act. . . the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief.”⁷⁵ The FEC’s litigation division can bring an action “in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business” and seek “a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of \$ 5,000 or an amount equal to any contribution or expenditure involved in such violation).”⁷⁶ If the district court finds the person to have “committed a knowing a willful violation of this Act. . . the court may impose a civil penalty which does not exceed the greater of \$10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.”⁷⁷ If the case involves a straw contributor, the penalties are higher: “not less than 300 percent of the amount involved in the violation” and “not more than the greater of \$ 50,000 or 1,000 percent of the amount involved in the violation.”⁷⁸ In short, FECA provides this Commission with teeth to enforce violations of the Act, including the ban on foreign money.

For criminal enforcement, Congress requires the Commission to work with the Department of Justice. If the Commission, by an affirmative vote of at least four members, “determines that there is probable cause to believe that a knowing and willful violation of this Act. . . has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States.”⁷⁹ The criminal enforcement referral can happen at any time, irrespective of the civil enforcement timeline.⁸⁰ Congress detailed the criminal penalties for

⁷¹ 52 U.S.C. § 30109(a)(2).

⁷² 52 U.S.C. § 30109(a)(3).

⁷³ 52 U.S.C. § 30109(a)(5)(A).

⁷⁴ 52 U.S.C. § 30107(e). Under 52 U.S.C. § 30109(a)(8), a party who filed a complaint with the Commission may file a petition in the United States District Court for the District of Columbia if the Commission dismisses the complaint or fails to act on the complaint.

⁷⁵ 52 U.S.C. § 30109(6)(A).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ 52 U.S.C. § 30109(a)(5)(C).

⁸⁰ *Id.*

violations of FECA,⁸¹ including up to five years in prison and a \$25,000 fine, or both.⁸² Furthermore, the Attorney General is held accountable for promptly acting on the Commission's criminal referral: she must "report to the Commission any action taken by the Attorney General regarding the apparent violation" within sixty days of the referral and every thirty days thereafter until the case is closed.⁸³

Therefore, Congress has already carefully considered the means for enforcing FECA, including violations of the foreign money ban. The Commission itself can receive complaints, investigate, audit, and enforce civil penalties via conciliation agreements. It may bring cases to federal court to seek declaratory and injunctive relief and seek civil penalties through the court system. For knowing and willful violations, the Commission works with the Attorney General to enforce FECA's criminal penalties. "Rescinding" AO 2006-15 does nothing to enhance the Commission's broad powers, already granted by Congress, to police the foreign money ban.

b. Commissioner Ravel's cited criminal case demonstrates successful application of existing law, and allegations in *The Intercept* article can be investigated and, if true, addressed using powers the Commission already possesses.

In addition to missing the existing protections against foreign money in statutory, regulatory, and on-point precedent, the Proposal bases its concerns on (1) a complaint in a single criminal case and (2) a report from *The Intercept* website. These two instances suggest not the need for new rules, but rather that existing rules already provide the tools needed to police the foreign money ban.

First, the Proposal cites *United States v. Singh et al.*, wherein the government alleged violations of the ban on contributions from foreign nationals.⁸⁴ Ultimately, the foreign national pled guilty to two of the counts against him.⁸⁵ The resolution of that case proves that the current system can successfully police violations. The Federal Bureau of Investigation was able to successfully detect and investigate the foreign contributions,⁸⁶ and the local United States Attorney was able to successfully bring the defendants into criminal court, even obtaining a guilty plea from one party before trial. The Proposal's invocation of these proceedings is unpersuasive, as there is no need for further rulemaking when the existing process is already working.

⁸¹ See 52 U.S.C. § 30109(d) (detailing penalties, affirmative defenses, and mitigation factors for sentencing).

⁸² 52 U.S.C. § 30109(d)(1)(A)(i).

⁸³ 52 U.S.C. § 30109(c).

⁸⁴ Compl. at 1-2, No. 3:14-mj-00201-WVG (S.D. Cal. Jan. 17, 2014) (ECF No. 1). The Proposal cites to a third-party document hosting website, where the complaint is marked "Sealed." Using the federal court system's PACER web database, one finds that part of the document was unsealed January 21, 2014. Minute Order (S.D. Cal. Jan. 21, 2014). The case was transferred to another matter as a related case. The current docket report may be found on PACER at Docket Report, *United States v. Encinas et al.*, No. 3:14-cr-00344-MMA (S.D. Cal.).

⁸⁵ Consent to Rule 11 Plea, *Encinas*, No. 3:14-cr-00344-MMA (S.D. Cal. Mar. 18, 2014) (ECF No. 33); Order Accepting Guilty Plea (S.D. Cal. Apr. 1, 2014) (ECF No. 36).

⁸⁶ Compl. at 1-2, *United States v. Singh et al.*, No. 3:14-mj-00201-WVG (S.D. Cal. Jan. 17, 2014) (ECF No. 1).

Second, the Proposal cites an article from *The Intercept*. Of course, a press article does not have to meet the rigorous standards of an official investigation, either by the Department of Justice or this Commission. To the extent any of the article’s accusations are true, the government already has the tools necessary to investigate the claimed violations of campaign finance law, subject to the due process rights afforded by the United States Constitution and FECA. A single potential violation, alleged in the press and without any official investigation is insufficient grounds for concluding that the Commission lacks adequate enforcement power unless it “rescinds” a ten-year-old advisory opinion. In fact, the Commission appears to have received a validly filed complaint concerning the very allegations made in *The Intercept* article.⁸⁷

Given the successful prosecution in *United States v. Singh et al.* and the Commission’s ability to investigate the allegations in *The Intercept* article, Commissioner Ravel’s Proposal seeks to add new regulation where the existing law is sufficient and therefore seeks a “prophylaxis upon prophylaxis” approach that the Supreme Court has rejected. For instance, in *McCutcheon v. FEC*, the Supreme Court rejected Congress’s layering of aggregate contribution limits on top of the “base limits” applicable per candidate.⁸⁸ Since “the *base limits* themselves are a prophylactic measure” against *quid pro quo* corruption, the aggregate limits were a “prophylaxis-upon-prophylaxis” measure “ostensibly to prevent circumvention of the base limits.”⁸⁹ Such layering “requires that [courts] be particularly diligent in scrutinizing the law’s fit.”⁹⁰ In the instance of the aggregate limits, the government failed to show the law tailored to its interest.⁹¹ Instead, the aggregate limits “intrude without justification on a citizen’s ability to exercise ‘the most fundamental First Amendment activities.’”⁹²

Contribution limits differ from bans on foreign contributions and expenditures, but *McCutcheon*’s reasoning highlights the need for narrow rules tied to the government’s interest in regulating political activity.⁹³ Like the unconstitutional aggregate limits at issue in *McCutcheon*, the Proposal’s new rule would be “layered on top” of the existing bans on foreign money and influence in politics. Even with AO 2006-15 in effect, the ban on foreign money is robust and

⁸⁷ http://www.campaignlegalcenter.org/sites/default/files/APIC%20Right%20to%20Rise%20complaint%208_10_16.pdf.

⁸⁸ 572 U.S. ___, ___, 134 S. Ct. 1434, 1462 (2014) (Roberts, C.J., controlling opinion).

⁸⁹ *Id.* at 1458.

⁹⁰ *Id.* (quoting *FEC v. Wis. Right to Life Inc.*, 551 U.S. 449, 479 (2007) (Roberts, C. J., plurality opinion)).

⁹¹ *Id.* at 1462.

⁹² *Id.* (quoting *Buckley*, 424 U.S. at 14).

⁹³ *McCutcheon* was decided under “exacting scrutiny.” For expenditures, “under exacting scrutiny, the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest.” *Id.* at 1444. Contribution limits are subject to “a lesser but still ‘rigorous standard of review.’” *Id.* quoting *Buckley v. Valeo*, 424 U.S. 1, 29 (1976) (per curiam)). The *McCutcheon* Court continued to apply *Buckley*, holding that “[u]nder that standard, ‘[e]ven a ‘significant interference’ with protected rights of political association” may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.” *Id.* (quoting *Buckley*, 424 U.S. at 25) (emphasis added).

enforceable. The Proposal, then, would limit U.S. persons—natural and corporate—from exercising their rights to no purpose.

IV. Imposing an outright ban on *all* corporate political activity by U.S. subsidiaries treats corporations and unions differently, U.S. employees of some domestic corporations differently from U.S. employees of other domestic corporations, and ignores the right of independent actors to spend their money on political activity.

The Proposal would severely limit the rights of U.S. citizens to participate in the political process—simply because they work for a company that may be owned by a foreign corporation. Similarly, while not mentioned in the Proposal, labor unions (which face parallel bans on direct contributions and independent-but-foreign-controlled activity) represent a wide variety of employees—including some who work for U.S. subsidiaries of foreign corporations—and would need to be similarly regulated. The Proposal would strip away the rights of those U.S. persons for fear of amorphous foreign influence.

As has been the case for some time, corporations are—and continue to be—prohibited from donating directly to candidates and political parties.⁹⁴ The *Citizens United* decision allowed corporate entities and unions to donate to organizations that make independent expenditures,⁹⁵ including Super PACs,⁹⁶ social welfare nonprofits (like the Sierra Club and National Rifle Association), and trade associations (like the U.S. Chamber of Commerce and the National Association of Realtors). Additionally, the *Citizens United* decision allowed corporations and unions to make direct independent expenditures,⁹⁷ though very few large or publicly-traded corporations have done so.

As importantly, when a domestic subsidiary establishes a separate segregated fund, it must raise money for that fund from voluntary contributions made by U.S. nationals; while the corporations may pay the administrative costs of such a fund, it does not provide the money that is actually contributed to candidates.⁹⁸ Banning such funds would mute the voice of those *American* contributors, an eventuality that the Proposal does not appear to have considered or addressed.

Labor unions likewise are—and continue to be—prohibited from donating directly to candidates and political parties.⁹⁹ The Proposal’s single-minded focus on corporate political

⁹⁴ 52 U.S.C. § 30118(a). This is the same provision also limiting labor union contributions.

⁹⁵ 558 U.S. at 365.

⁹⁶ *SpeechNow.org v. FEC*, 599 F.3d 686, 694 (D.C. Cir. 2010) (en banc) (“In light of the [*Citizens United*] Court’s holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption.”).

⁹⁷ 558 U.S. at 365.

⁹⁸ *See, e.g.*, AO 1992-16 (Nansay Hawaii).

⁹⁹ 52 U.S.C. § 30118(a). This is the same provision limiting corporate contributions.

spending, and on that spending as a vehicle for foreign money to enter U.S. elections, ignores the fact that unions also contribute to Super PACs,¹⁰⁰ have foreign members and affiliates, and may transfer funds between them. Prominent labor organizations such as the Service Employees *International* Union and the AFL-CIO include member unions with foreign affiliates. The AFL-CIO alone has at least 28 affiliates containing the word “international” as part of that union name.¹⁰¹ Even the American Federation of State, County and Municipal Employees (AFSCME) appears to have Canadian members.¹⁰² Given these well-known facts, the Proposal’s complete silence concerning unions is puzzling.

The bare assertion that “foreign ownership alters the thinking of Americans who run a U.S. subsidiary”¹⁰³ is unfounded and an insufficient response to these points.¹⁰⁴ The same could be said of American citizens employed by foreign corporations who donate directly to candidates or parties on their own, but the Proposal does not suggest that those persons should be relieved of their rights based upon their employment. Moreover, a complete ban on political involvement by these U.S. citizens is necessarily overbroad and betrays a lack of concern for less-invasive measures, such as the robust enforcement of existing law.

All of which leads to a more substantial objection. The Proposal assumes that U.S. subsidiaries, and the U.S. citizens who run them, simply cannot be trusted, “and [that] their loyalties cannot help but shift to the interests of their foreign owners.”¹⁰⁵ This is a cynical and unproven assumption with vast consequences. One—that employees of foreign corporations are also suspect—has already been suggested. But the general view that funds raised by domestic economic activity (or voluntarily contributed by U.S. nationals), and managed by U.S. citizens,

¹⁰⁰ Fredreka Schouten, “Labor unions launch \$50 million super PAC” *USAToday* May 12, 2016 *available at* <http://www.usatoday.com/story/news/politics/onpolitics/2016/05/12/labor-unions-launch-50-million-super-pac/84282910/> (“The AFL-CIO, The American Federation of State, County and Municipal Employees, the American Federation of Teachers and the National Education Association have joined together with [billionaire Tom] Steyer’s NextGen Climate organization to form the super PAC.”).

¹⁰¹ *See, e.g.*, AFL-CIO, “AFL-CIO Unions” *available at* <http://www.aflcio.org/About/AFL-CIO-Unions> (listing affiliates).

¹⁰² *See* “AFSCME “Union Plus Scholarship,” *available at* <http://www.afscme.org/members/advantage/education/union-plus-scholarship> (“Participating union members from Puerto Rico, Canada, Guam and Virgin Islands and U.S. citizens are eligible.”).

¹⁰³ *See, e.g.*, Robert Lenhard, FEC to Reconsider Political Involvement by U.S. Subsidiaries of Foreign Corporations on Tuesday, Covington & Burling LLP’s *Inside Political Law*, Aug. 15, 2016 *available at* <https://www.insidepoliticallaw.com/2016/08/15/fec-to-reconsider-political-involvement-by-u-s-subsidiaries-of-foreign-corporations-on-tuesday/>.

¹⁰⁴ This comment assumes that the relevant U.S. subsidiary is wholly- or majority-owned and directly controlled by a particular foreign corporation. If not, the suggestion that the management of a U.S. subsidiary is necessarily disloyal, or at least suspect, falls apart. After all, simply owning a share in a company is not the same as controlling a company. For large public corporations, for example, the benefit of the capital raised from the sale of the shares has long passed and a foreign national owning a share does not impart direct control over the company (only, at best, the ability to vote for the board and certain other major decisions). Thus shareholders do not “fund” a political expenditure, and do not direct a company, other than choosing management. And the law already requires firewalls to prevent foreign management from directing a U.S. subsidiary’s political activities. 11 C.F.R. § 110.20(i).

¹⁰⁵ *See* Lenhard, *supra* n. 98.

cannot help but be corrupted is a depressingly narrow view. In a globalized world, nearly every corner of the economy, and nearly every citizen's personal resources, is traceable in some way to foreign economic activity. Sometimes that connection is direct: factory workers are paid from the sale of their products abroad, and lawyers are paid by firms whose clients may include foreign persons. To recast this interconnectivity as "indirect influence," and to decide the political rights of Americans on that basis, does violence to our collective status as a self-governing people and to the autonomy of every individual American connected in some way to the wider world.

That view is not the law. Absent proof of straw contributions or other pass-through schemes,¹⁰⁶ what one does with one's own money is distinct from the prior source of the money. For example, Bill Clinton was paid amounts in foreign funds.¹⁰⁷ That would not prevent him from contributing a limited amount to a candidate's campaign or an unlimited amount to a Super PAC. Likewise, if the CEO of, or a clerk working for, General Electric gives money from his personal funds to a candidate, that is distinct from the *corporation* giving money to the candidate. Saying otherwise diminishes the personal choices of those autonomous individuals. In an analogous case, a similar distinction is made between *corporations* and natural persons that are government contractors; the CEO of a government contractor may still make contributions, even if the original source of the funds used is her corporate salary.¹⁰⁸ Thus, tracing back sources of money through several layers of independent actors does not protect against foreign money in politics, but it certainly restricts the rights of U.S. citizens.

* * *

The Proposal is an unlawful attempt to make nationwide policy by "rescinding" advisory opinions going back decades. It suggests a poorly-conceived policy implicating not only corporations, but also labor unions and U.S. workers. It fails to establish a factual basis for its fear of foreign influence, instead proceeding on the basis of vague statements, press reports, and hypotheticals. In sum, given the strong protections already in place, the Commission need not and should not adopt the Proposal as the basis for formal rulemaking.

Thank you for considering these comments. The Center looks forward to working with the Commission to prevent foreign funding of U.S. campaigns while safeguarding the First Amendment rights of U.S. citizens. Please do not hesitate to contact us should you have any

¹⁰⁶ *E.g.*, Compl. at 1-2, *United States v. Singh et al.*, No. 3:14-mj-00201-WVG (S.D. Cal. Jan. 17, 2014) (ECF No. 1); *United States v. Danielczyk*, 683 F.3d 611, 614 (4th Cir. 2012) *cert. denied* 133 S. Ct. 1459 (U.S. 2013).

¹⁰⁷ *See, e.g.*, Lauren Carroll, "Fact-checking 'Clinton Cash' author on claim about Bill Clinton's speaking fees" PunditFact *available at* <http://www.politifact.com/punditfact/statements/2015/apr/26/peter-schweizer/fact-checking-clinton-cash-author-claim-about-bill/> (categorizing speaking fees from foreign sources by Bill Clinton from 2003 until 2013). PunditFact is a division of the PolitiFact fact-checking website service.

¹⁰⁸ *Wagner v. FEC*, 793 F.3d at 27-28 (denying a First Amendment *under-inclusiveness* challenge based on the fact that *solo* contractors were prohibited from making contributions while *corporate* contractors could set up separate segregated funds and the corporate employees could contribute in their personal capacity); *see also*, Zac Morgan and Joe Trotter, "'Avengers' of Campaign Finance" Daily Caller *available at* <http://dailycaller.com/2013/07/24/avengers-of-the-campaign-finance/> (explaining the arguments in *Wagner* using the characters Iron Man and the Hulk from the Marvel Universe).

questions about these comments, or if the presence of a Center representative at a future meeting of the Commission would be helpful to the resolution of this matter.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Allen Dickerson", written over a horizontal line.

Allen Dickerson
Legal Director