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## AGENDA ITEM

For Meeting of: 7-27-00

### MEMORANDUM

TO: The Commission  
FROM: Commissioner Karl Sandstrom *KS*  
DATE: July 25, 2000  
SUBJECT: Advisory Opinion 2000-17 (Extendicare)

**SUBMITTED LATE**

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I hereby submit the attached amended version of Advisory Opinion 2000-17 for consideration at the Commission's Open Meeting scheduled for July 27, 2000.

1 ADVISORY OPINION 2000-17

2  
3 Joseph A. Rieser, Jr.  
4 Reed Smith Shaw & McClay LLP  
5 1301 K Street, NW  
6 Suite 1100--East Tower  
7 Washington, DC 20005-3317

8  
9 Dear Mr. Rieser:

10  
11 This responds to your letter dated June 9, 2000, on behalf of Extendicare Health  
12 Services, Inc. ("Extendicare"), requesting an advisory opinion concerning the application  
13 of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission  
14 regulations to the formation and administration of a separate segregated fund ("SSF" or  
15 "PAC") by a domestic subsidiary corporation that is wholly-owned by a foreign parent  
16 corporation.

17 Extendicare is a Delaware corporation with its principal place of business in  
18 Milwaukee, Wisconsin, and it is wholly owned by Extendicare, Inc., a Canadian  
19 corporation with its principal place of business in Ontario, Canada.<sup>1</sup> Through its wholly-  
20 owned subsidiaries, which are all United States entities, Extendicare operates 237 nursing  
21 and assisted living and retirement centers in 14 States with more than 25,000 people  
22 employed by either Extendicare or its domestic subsidiaries.<sup>2</sup> Extendicare provides home  
23 office management and administrative services for its operating subsidiaries that operate  
24 the cited nursing and retirement centers.

25 ***Factual background***

26 Extendicare's board of directors has changed from time to time in both size and  
27 composition over the years. Currently the board is comprised of three individuals, only

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<sup>1</sup> 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.

<sup>2</sup> Extendicare'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.

1 one of whom is a US citizen. The other two are Canadian citizens who are not lawfully  
2 admitted for permanent residence in the United States, although they are lawfully  
3 admitted to the United States for both residence and work purposes. One of the Canadian  
4 directors is chair of the Extencicare board and is also deputy chair and CEO of the parent  
5 Canadian corporation. The other Canadian director is CEO of Extencicare and president  
6 of the parent Canadian corporation. The US citizen director is also the chief finance  
7 officer of both Extencicare and the parent Canadian corporation. The Extencicare  
8 president (not a board member) is a Canadian citizen who is not lawfully admitted for  
9 permanent residence in the United States. Of the remaining officers, a number are foreign  
10 nationals who do not have permanent resident alien status, and a number are U.S.  
11 citizens. In Extencicare's top management structure, there are board-elected officers,  
12 vice presidents who are not board-elected, and senior managers (with various titles and  
13 designations), hereinafter referred to as the "senior management team." Presently, the  
14 overwhelming majority of Extencicare's senior management team are U.S. citizens. One  
15 such official is Extencicare's vice president of government relations who is a United  
16 States citizen.

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

26 ***Special Committee proposal***

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

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

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

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

28 To the extent that Extencicare's board includes U.S. citizens or permanent  
29 resident aliens residing in the United States, it would be anticipated (but not necessarily  
30 foreordained) that all or some of such individuals would be appointed to serve on the

1 Special Committee. However, because the size and composition of the board changes  
2 from time to time, it cannot be predicted in advance whether the board would always  
3 have at least one such individual on it. As a result, in order to assure that a Special  
4 Committee could always be constituted, it is proposed that Extencicare's by-laws would  
5 be specifically amended both to permit the board of directors to appoint the Special  
6 Committee and to provide that such Special Committee may or may not include members  
7 of the board of directors, as the board sees fit. Such an amendment to the by-laws will  
8 require the approval of either Extencicare's board or its shareholders.

9 ***Opinion format***

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

15 ***Act and Commission regulations***

16 The Act and Commission regulations prohibit a foreign national from making a  
17 contribution, directly or through any other person, or an expenditure in connection with  
18 an election to any political office.<sup>3</sup> In addition, it is unlawful to solicit, accept, or receive  
19 a contribution from a foreign national. 2 U.S.C. §441e(a); 11 CFR 110.4(a)(1) and (2).  
20 As defined in the Act, the term "person" includes a corporation. 2 U.S.C. §431(11).

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

23 Section 611(b) defines a "foreign principal" to include:

24 (1) a government of a foreign country and a foreign political party;

25  
26 (2) a person outside of the United States, unless it is established that such  
27 person is an individual and a citizen of and domiciled within the United  
28 States, or that such person is not an individual and is organized under or  
29 created by the laws of the United States or of any State or other place

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<sup>3</sup> 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."]

1 subject to the jurisdiction of the United States and has its principal place of  
2 business within the United States; and

3  
4 (3) a partnership, association, corporation, organization, or other combi-  
5 nation of persons organized under the laws of or having its principal place  
6 of business in a foreign country.

7  
8 Accordingly, under §611(b)(2) and (3), a corporation organized under the laws of  
9 any State within the United States that has its principal place of business in the United  
10 States is not a foreign principal. Therefore, it follows that such a corporation would not  
11 be a foreign national under 2 U.S.C. §441e. The term "foreign national" also includes an  
12 individual who is not a citizen of the United States and who is not lawfully admitted for  
13 permanent residence in the U.S. as defined by 8 U.S.C. §1101(a)(20). 2 U.S.C.  
14 §441e(b)(2).

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

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

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

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

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

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

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

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

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

1           The Commission has applied section 110.4(a)(3) in past advisory opinions that  
2 considered factual situations and circumstances similar to those presented here. For  
3 example, in Advisory Opinion 1995-15, the Commission approved a PAC's operating  
4 structure where its sponsoring domestic corporation was about to be acquired by a foreign  
5 corporation. The attributes of the PAC's future composition included that all its members  
6 and officers would be US citizens. Citing this fact among others, along with prior  
7 advisory opinions, the Commission concluded that: "after the company is acquired by a  
8 foreign corporation, foreign nationals will not direct, control, or otherwise participate  
9 directly or indirectly in the decision-making process of the PAC, including the  
10 administration of or contributions by the PAC." Advisory Opinion 1995-15. In other  
11 opinions applying the cited regulations, the Commission has emphasized the requirement  
12 that foreign nationals, who are either on the corporate board or hold other positions with  
13 the corporation, may not vote on the selection of individuals who would operate the PAC  
14 or exercise decision-making authority with respect to contributions and expenditures by  
15 the PAC, or by the domestic corporation itself in non-federal elections. Advisory  
16 Opinions 1992-16, and 1990-8; *see also* Advisory Opinion 1989-29 [same emphasis in  
17 opinion issued prior to adoption of 11 CFR 110.4(a)(3) where non-federal PAC was  
18 funded with corporate treasury moneys and proposed to make contributions only in non-  
19 federal elections subject to State law]. Recently, in Advisory Opinion 1999-28, the  
20 Commission indicated that the conclusions and guidance within these opinions have  
21 continued relevance to the operations of an SSF established by the United States  
22 subsidiary of a foreign national parent corporation. Given the cited regulations as applied  
23 in the cited opinions, and subject to the responses to the questions set forth below,  
24 Extencicare may establish and function as the connected organization for a PAC.

25 ***Questions and responses***

- 26       (1) Extencicare requests advice as to whether it is necessary to delegate to the  
27 Special Committee the decision whether or not to establish a separate segregated  
28 fund, and whether it is permissible under the Act for the board (which may or may  
29 not include foreign nationals) to make that decision, provided that it delegates to  
30 the Special Committee the authority to select the members of the PAC  
31 Committee.  
32

1 (2) As long as at least one member of Extencicare's board of directors is a U.S.  
2 citizen or a permanent resident alien residing in the United States, would it be  
3 permissible if the Special Committee established by the board consisted only of  
4 such director or directors?

5  
6 (3) May the board also appoint non-directors to the Special Committee? If so, must  
7 any other members of the Special Committee be board elected officers of  
8 Extencicare? May non-board elected officers be appointed? May non-officer  
9 employees be appointed?

10  
11 The board itself may make the general corporate policy decision to establish an  
12 SSF, or it may delegate the authority to make this decision to the Special Committee.  
13 However, the board must delegate all decisions concerning the administration of the SSF  
14 to the Special Committee or to some other corporate personnel group comprised  
15 exclusively of United States citizens or individuals lawfully admitted for permanent  
16 residence in the United States. Such a delegation could also be made to any director,  
17 officer or other executive of Extencicare who is not a foreign national. Commission  
18 regulations would not bar the board's appointment of non-directors, non-board elected  
19 officers or non-officer employees to the Special Committee.

20  
21 (4) Regardless of whether or not any members of the board of directors are U.S.  
22 citizens or permanent resident aliens residing in the United States, may the  
23 Special Committee be comprised solely of non-directors?

24  
25 Yes, this is merely a matter of internal corporate policy and practice. .

26  
27 (5) Must members of the Special Committee be appointed for a fixed term, to be  
28 replaced by the board only upon the expiration of such term or in the event of a  
29 vacancy created by death, departure from Extencicare, etc., or may the members  
30 of the Special Committee serve at the pleasure of the board?

31  
32 It would not matter whether the members of the Special Committee served for a  
33 fixed term or at the pleasure of the board. If desired, the Special Committee could be a  
34 self-perpetuating body.

35  
36 (6) Must members of the PAC Committee be appointed for a fixed term, to be  
37 replaced by the Special Committee only upon the expiration of such term or in the

1 event of a vacancy created by death, departure from Extencicare, etc., or may  
2 members of the PAC Committee serve at the pleasure of the Special Committee?  
3

4 It makes no difference whether the PAC Committee members are appointed for a  
5 fixed term or may serve at the pleasure of the Special Committee. The Commission  
6 emphasizes that, in addition to complying with §441e, the appointees to the PAC  
7 Committee would also have to qualify as executive or administrative personnel of  
8 Extencicare or one of its affiliated corporations. 2 U.S.C. §441b(b)(7), 11 CFR 114.1(c).<sup>4</sup>  
9

10 (7) Must members of the PAC Committee be board-elected officers of Extencicare,  
11 or may non-board elected officers, or non-officer employees, be appointed by the  
12 Special Committee to the PAC Committee?  
13

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

18 Questions eight through ten, set forth below, concern the extent to which, if at all,  
19 the directors or officers of Extencicare who are foreign nationals may exercise control  
20 and oversight authority over the PAC Committee (and the PAC) with respect to personnel  
21 and financial matters. With respect to personnel, the request explains that some members  
22 of the PAC Committee may be supervised by Extencicare officers and executives who are  
23 foreign nationals and who would, in the normal course of their supervisory functions,  
24 have authority to make performance evaluations, compensation reviews and other similar  
25 personnel decisions pertaining to these PAC personnel. The Extencicare job descriptions  
26 for such personnel would not specify duties for the PAC Committee, but those appointed  
27 thereto would assume PAC responsibilities as a part of their regular jobs. With respect to  
28 financial oversight, the request notes that personnel who will have PAC Committee duties  
29 hold positions in corporate departments of Extencicare whose budgets would be affected

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<sup>4</sup> 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.

1 by the time and other corporate resources attributable to their PAC functions. The board  
2 currently reviews and approves the budgets for these departments and would propose to  
3 continue that function even if it represents a form of control over the direct or indirect  
4 costs paid by Extendicare for the establishment and administration of its PAC.

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

11  
12 As was indicated in the response to questions one through three, the Extendicare  
13 board may make a general corporate policy decision to establish an SSF; it may similarly  
14 make a general corporate policy decision to terminate an SSF whose establishment it  
15 previously authorized. Those core decisions represent a permissible exercise of corporate  
16 control over an SSF by any corporation, including one that, like Extendicare, is owned by  
17 a foreign parent corporation or by other foreign nationals.

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

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

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

7 (9) May the board of directors, if the Special Committee determines to establish  
8 an SSF, be involved in the review and approval of any budget for the  
9 establishment, administration and solicitation costs of the SSF? Is there a  
10 problem if the board, as it currently does, reviews and approves the budgets  
11 for such departments, even if they reflect, in part, the costs of establishing,  
12 administering and soliciting contributions to the SSF or in making permitted  
13 contributions and expenditures, even if such costs are indirect costs? Should  
14 the budget of the PAC Committee for direct, out-of-pocket expenses incurred  
15 in establishing, administering and soliciting contributions to the fund or in  
16 making permitted contributions or expenditures be viewed similarly or  
17 differently? Does it matter whether the board reviews and approves a separate  
18 budget for such direct and/or indirect costs?  
19

20 (10) If budgetary review of the board of direct, out-of-pocket costs and/or of the  
21 indirect costs of the SSF is not permitted, would it be permissible if the  
22 Special Committee, either by by-law or by board resolution, was accorded the  
23 authority to review and approve such budget? Would such delegation of  
24 authority be permissible if it were subject to a "not to exceed" limit? If neither  
25 the board nor the Special Committee may exercise such budget review  
26 authority, would it be permissible that such budget authority of the PAC  
27 Committee be subject to a "not to exceed" limit established from time to time  
28 in advance by the board and/or Special Committee?  
29

30 The Commission concludes that a reasonable approach, one which comports with  
31 §110.4(a)(3)'s bar of foreign national participation in decisions concerning the  
32 administration of a PAC, should be followed. With respect to direct costs, one such  
33 approach would be to set a specific budget level for PAC direct costs at a "not to exceed"  
34 amount. The board's review power of direct costs (short of a decision to terminate the  
35 PAC entirely), should be limited to ascertaining and enforcing compliance by the Special  
36 Committee or the PAC Committee with the budget levels established by the board in  
37 accord with the above described procedures. Other budget setting and review procedures

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1 for the direct costs of PAC operations may also be reasonable if they assure compliance  
2 with Commission regulations. With respect to the indirect costs to Extendicare for PAC  
3 operations, the usual and normal corporate procedures for budget decisions and review  
4 may be followed and would not be prohibited by Commission regulations.

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

8 Sincerely,

9  
10 Darryl R. Wold  
11 Chairman

12  
13 Enclosures (AOs 1999-28, 1995-15, 1992-16, 1990-8, and 1989-29)