FEDERAL ELECTION COMMISSION

FIRST GENERAL COUNSEL'S REPORT

MUR 7165
DATE COMPLAINT FILED: October 27, 2016
DATE OF NOTIFICATIONS: November 2, 2016
RESPONSE RECEIVED: January 9, 2017
DATE ACTIVATED: January 24, 2017

EARLIEST SOL: October 4, 2021
LATEST SOL: October 19, 2021
ELECTION CYCLE: 2016

COMPLAINANT: Campaign Legal Center

MUR 7196
DATE COMPLAINT FILED: November 10, 2016
DATE OF NOTIFICATIONS: November 17, 2016
RESPONSE RECEIVED: January 6, 2017
DATE ACTIVATED: January 24, 2017

EARLIEST SOL: October 4, 2021
LATEST SOL: October 19, 2021
ELECTION CYCLE: 2016

COMPLAINANT: American Democracy Legal Fund

RESPONDENTS: Great America PAC and Dan Backer in his official capacity as treasurer
Eric Beach
Jesse Benton

RELEVANT STATUTE AND REGULATIONS: 52 U.S.C. § 30121
11 C.F.R. § 110.20
11 C.F.R. § 300.2(m)

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

The Complaints in these matters allege that Great America PAC and Dan Backer in his official capacity as treasurer ("GAP"), as well as Eric Beach and Jesse Benton — GAP's former co-chair and a political consultant, respectively — knowingly and willfully solicited a contribution from a foreign national in violation of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations. The Complaints base their allegations on an October 24, 2016, article appearing on *The Telegraph UK*'s website, which chronicles how two reporters posed as consultants for a fictitious Chinese donor and discussed a series of transactions with Beach and Benton that would allow the donor to indirectly contribute $2 million to GAP.

Based on the information contained in the Complaints and the cited article, we recommend that the Commission find reason to believe that GAP, Beach, and Benton knowingly and willfully violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g) by soliciting a contribution or a promise to contribute from a foreign national. We also recommend that the Commission authorize the use of compulsory process, if necessary, for an investigation.

II. FACTUAL BACKGROUND

GAP is an independent-expenditure-only political committee ("IEOPC") that supported Donald J. Trump during the 2016 presidential election.[1] Eric Beach was one of GAP's

[1] *See* GAP, Amended Statement of Organization (Mar. 14, 2016); Compl. (MUR 7196) at 2 (Nov. 10, 2016).

co-chairs.[2] Jesse Benton was a strategist for GAP until May 2016, when he resigned and opened an independent political consulting firm, Titan Strategies LLC ("Titan").[3]

According to the *Telegraph* article,[4] two undercover journalists contacted Beach on October 4, 2016, posing as consultants to a fictitious Chinese national allegedly interested in contributing $2 million to GAP.[5] During the initial phone conversation, one of the journalists explained that their "benefactor" was not a U.S. national but wanted to make a donation to support Trump's campaign.[6] Beach reportedly "appeared interested despite raising concerns about [the donor's] nationality and saying he would need to know the donor's identity."[7] Beach also reportedly suggested during this initial phone call that the donation could be "put through a social welfare organization called a 501(c)(4)," which "he described as a 'non-disclose entity' through which the client could make a contribution for a 'specific purpose.'"[8]

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2 Resp. (MUR 7165) at 2 (Jan. 9, 2017); Resp. (MUR 7196) at 2 (Jan. 6, 2017).

3 Resp. (MUR 7165) at 2, 7; Resp. (MUR 7196) at 1-2, 6. Benton's resignation followed his criminal convictions for, among other things, causing false campaign expenditure reports to be filed and conspiring to do the same, in order to conceal a payment made to an Iowa state senator to endorse Ron Paul's presidential bid. *See* Compl. (MUR 7165) at 2 (Oct. 27, 2016) (citing Maggie Haberman, *A Donald Trump 'Super PAC' is Hit with Leadership Woes*, N.Y. TIMES (May 6, 2016, 12:55 PM), https://www.nytimes.com/politics/ first-draft/2016/05/06/a-donald-trump-super-pac-is-hit-with-leadership-woes/).

4 Investigative Team, *Exclusive Investigation: Donald Trump Faces Foreign Donor Fundraising Scandal*, TELEGRAPH (Oct. 24, 2016, 8:10 PM), http://www.telegraph.co.uk/news/2016/10/24/exclusive-investigation-donald-trump-faces-foreign-donor-fundrai/ ("Investigative Team Article"). Both Complaints heavily cite this article. *See generally* Compl. (MUR 7165); Compl. (MUR 7196).

5 Investigative Team Article. The reporters contacted several organizations based on reports that they were "involved in hiding foreign donations." *Id.* GAP was the only group that responded. *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

After the call, the article asserts that the reporters received an email from Benton with the subject line "From Eric Beach."[9] Benton reportedly described himself as a "consultant" for GAP and stated that "'Eric Beach asked me to reach out.'"[10] Benton explained in the body of the email that Beach "had not wanted a 'paper trail' of contact."[11] Benton then allegedly proposed channeling the $2 million from the Chinese client through his consulting firm, Titan.[12]

As reported in the *Telegraph* article, Benton followed up the email by meeting the undercover reporters at a New York hotel on October 13, 2016, where he laid out his plan in greater detail.[13] Benton allegedly suggested that the Chinese client pay the $2 million to Titan, which Benton could bill as "'a large retainer'" for consulting services, and for which he could provide an invoice "for the sake of 'appearances.'"[14] Titan would then donate the funds evenly to two 501(c)(4) organizations, one of which was run by Beach, and the 501(c)(4)s would pass the money through to GAP.[15] When the reporters asked whether this contribution would ensure that their client "won't just be treated as an another [sic]," Benton said, "It'll do that, yeah."[16] Benton warned the reporters that they "'shouldn't put any of this on paper.'"[17]

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9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Pro-Trump Fundraisers Agree to Accept Illicit Foreign Donation*, YOUTUBE, https://www.youtube.com/watch?v=xQnOxM9iqOw (posted Oct. 24, 2016) ("YouTube Video"). The reporters filmed some of their interactions with Beach and Benton and published clips of the footage beside the article. *See* Investigative Team Article. The video footage is no longer available on *The Telegraph*'s website, but a copy is available on YouTube.

17 Investigative Team Article.

The article reports that following a phone call with Beach, Benton also told the reporters that GAP wished to invite them to an event in Las Vegas, Nevada on October 19, 2016, to watch the final presidential debate.[18] Benton said he had to "stay away from Vegas" because "'everything that we're doing is legal by the book but there's perceptions and some grey areas.'"[19]

The reporters attended the event, where they spoke to Beach.[20] According to the article, Beach told the reporters, with respect to their client, "'One thing he has to understand is, what you guys have to understand is: you can get credit, but don't overdo it with the influence,'" and he advised them, "'I would just manage [your client's] expectations, say: [Y]ou're going to get credit but your non-disclosed [donation] is not disclosed. Not just for your benefit, but for everyone's benefit.'"[21] At another point, Beach offered, "'[Trump's] going to win the election so, again, I'm not going to twist your arm or anything. I just think that there's no way that [GAP], and you guys have been participating indirectly or directly, won't be remembered.'"[22] He also attempted to reassure the reporters that the contribution was legal, stating, "'It's not illegal, what we're—the whole structure. But it's, you know. I would never let you guys give to the PAC, to give to the c4 because that is illegal.'"[23]

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18 *Id.*

19 *Id.*

20 *See id.*

21 *Id.* (alteration in original) (internal quotation marks omitted).

22 YouTube Video.

23 *Id.*

III. LEGAL ANALYSIS

Based on the series of events described in the *Telegraph* article, the Complaints allege that Benton, Beach, and GAP knowingly and willfully solicited a contribution from a foreign national, in violation of 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g).[24] As discussed in more detail throughout this report, GAP and Beach deny the allegations, asserting multiple defenses; Benton did not file a Response.[25]

A. The Scope of the Solicitation Prohibition Reaches Fictitious Foreign Nationals

GAP and Beach's primary argument is that they could not have violated the Act by soliciting a foreign national contribution because "there was never any foreign national to be solicited."[26] It is a matter of first impression whether the Act's prohibitions on the solicitation of foreign nationals reach the solicitation of a foreign contributor who is fictitious. The Commission has not addressed this question in any enforcement matters or advisory opinions, and the courts are also silent.[27]

In the absence of any precedent squarely on point, we interpret the Act and form a conclusion based on the plain meaning of section 30121(a)(2), the policy behind the prohibition

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[24] Compl. (MUR 7165) at 7-10; Compl. (MUR 7196) at 1, 4-5.

[25] *See* Resp. (MUR 7165) at 6; Resp. (MUR 7196) at 4.

[26] Resp. (MUR 7165) at 6; Resp. (MUR 7196) at 4-5.

[27] In MUR 6687 (Obama for America), the Commission dismissed allegations that the Obama campaign solicited foreign nationals for contributions when it emailed a solicitation to "OsamaforObama2012@gmail.com" and allowed a "Bin Laden" solicitation page to be posted to its website, the latter of which resulted in a $3 contribution. Factual & Legal Analysis at 3-4, 8, MUR 6687 (Obama for America). Both the email address and solicitation page were created by journalists conducting a sting operation. *Id.* The Commission dismissed the allegations "to conserve Commission resources," given the *de minimis* amount of money at stake and the fact that the persons solicited were undercover journalists. *Id.* at 8. Because the Commission dismissed the Complaint rather than finding no reason to believe the Obama committee solicited foreign nationals, despite the fictitious nature of the contributor and would-be contributors, the Commission left open the question of whether the Act prohibits the solicitation of non-existent foreign nationals. *See id.*

on foreign national involvement in elections, the Act's other restrictions on soliciting funds, and related anti-corruption statutes. Based on these sources, we believe that the statute and Commission regulations, fairly construed, prohibit an individual from making a solicitation with the intent to violate the ban on foreign national participation in the electoral process, as demonstrated by the individual's awareness of facts that would lead a reasonable person to conclude that, or inquire whether, the contributor is an actual foreign national.

1. The Act and Regulations Support an Intent-Focused Standard

A "foreign national" is an individual who is not a citizen of the United States or a national of the United States and who is not lawfully admitted for permanent residence.[28] The Act prohibits foreign nationals from making, directly or indirectly, a contribution or donation, or an express or implied promise to make a contribution or donation, in connection with a federal, state, or local election.[29] The Act also prohibits any person from soliciting, accepting, or receiving a contribution or donation, or a promise to make a contribution or donation, from a foreign national,[30] and the regulations prohibit any person from providing "substantial assistance" in the solicitation of a foreign national.[31]

In relevant part, the precise text of the solicitation ban states that "[i]t shall be unlawful for . . . a person to solicit . . . a contribution or donation . . . from a foreign national."[32] This language creates three elements the Commission must identify in order to find a violation of the

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28 52 U.S.C. § 30121(b)(2); *see also* 11 C.F.R. § 110.20(a)(3)(ii).

29 52 U.S.C. § 30121(a)(1)(A).

30 *Id.* § 30121(a)(2).

31 11 C.F.R. § 110.20(h).

32 52 U.S.C. § 30121(a)(2).

statute: (1) that there was a solicitation; (2) that the solicitation was for a contribution or donation; and (3) that the person solicited for the contribution or donation was a foreign national. While the final element here appears to require the presence of an actual foreign national, as described below, courts routinely allow criminal convictions to stand under similarly phrased statutes when one of the actors in the transaction is fictional or an undercover agent.[33] The inquiry focuses on whether the defendant sincerely believed that the undercover agent or fictional figure was who he or she purported to be.[34] Thus, under this prevailing interpretation, the final element of a section 30121(a)(2) violation may be satisfied by a showing that the solicitor believed that the subject of the solicitation was a foreign national.

Commission regulations support this interpretation by adding a *mens rea* requirement to the anti-solicitation provision, providing that no person shall "*knowingly* solicit, accept, or receive from a foreign national any contribution or donation" prohibited by the regulations,[35] or "*knowingly* provide substantial assistance in the solicitation, making, acceptance, or receipt" of any prohibited foreign national contribution.[36] In defining "knowingly," the regulations state that the solicitor must have either "actual knowledge" that the person being solicited is a foreign national, "[b]e aware of facts that would lead a reasonable person to conclude that there is a substantial probability that the source of the funds" is a foreign national, or "[b]e aware of facts

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33 *See infra* Section II.A.2.

34 *See id.*

35 11 C.F.R. § 110.20(g) (emphasis added).

36 *Id.* § 110.20(h) (emphasis added). "Substantial assistance" is "active participation in the solicitation . . . of a foreign national contribution or donation with an intent to facilitate successful completion of the transaction." Contribution Limitations and Prohibitions, 67 Fed. Reg. 69,928, 69,945 (Nov. 19, 2002) ("E&J"); *see also* Advisory Op. 2016-10 (Parker) at 3. Therefore, in defining "substantial assistance," the Commission has explicitly added another intent-based standard on top of the "knowingly" requirement.

that would lead a reasonable person to inquire whether the source of the funds . . . is a foreign national," but fail to "conduct a reasonable inquiry."[37] Thus, the solicitor does not need to know for certain that the source of the contribution is a foreign national. Rather, it is sufficient for the solicitor to be aware of facts that suggest that the potential contributor is a foreign national. Accordingly, the regulations seem to acknowledge the possibility that a person may violate the Act when he subjectively believes, or has reason to believe, that he is requesting foreign money.

2. Courts Have Interpreted Other Anti-Corruption Statutes to Make Intent Determinant in Establishing a Violation

As mentioned above, federal courts regularly uphold the criminal convictions of defendants who engage in corrupt transactions with undercover operatives or fictitious parties when there is evidence that the defendant intended to complete the crime. One corruption statute the Commission may wish to consider as an analogy to the Act is federal bribery. Senator John McCain noted the parallels between campaign finance law and the bribery statute during the debate on the Bipartisan Campaign Finance Reform Act of 2002 ("BCRA"), stating that BCRA's solicitation prohibitions are "no different from the Federal laws and ethics rules that prohibit Federal officeholders from using their offices or positions of power to solicit money or other benefits."[38]

Specifically, the federal bribery statute prohibits the offer of "anything of value" to a "public official" with intent to "influence any official act," and it similarly prohibits a "public official" from soliciting or accepting "anything of value" in connection with "the performance of

[37] 11 C.F.R. § 110.20(a)(4).

[38] 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

any official act."[39] The text of the bribery statute that refers to the presence of a "public official" mirrors the requirement in section 30121(a)(2) that there be a "foreign national" present. Interpreting such a requirement in the bribery context, courts have focused on the defendant's intent to enter into a corrupt transaction as the essential element of the crime, stating that bribery occurs when a person offers or asks for money with the requisite intent to influence an official act, regardless of whether there is no actual public official to be bribed.[40]

In upholding bribery convictions arising from sting operations, federal courts have also implicitly and explicitly rejected the "factual impossibility defense," which the Respondents raise here. Such a defense traditionally applies "when the actions intended are proscribed by the criminal law, but an unknown circumstance or fact prevents the defendant from bringing about the intended result."[41] Most jurisdictions, however, reject factual impossibility as a defense to

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39 18 U.S.C. § 201(b)(1)-(2).

40 *See Lopez v. United States*, 373 U.S. 427, 428-32 (1963) (upholding the conviction of a defendant charged with "attempted bribery," based on the defendant trying to avoid tax liability by giving money to an Internal Revenue Service ("IRS") agent acting as an informant); *United States v. Wright*, 665 F.3d 560, 568 (10th Cir. 2012) (stating, in an honest services fraud case, that "[i]ntent is determinant"); *United States v. Arbelaez*, No. 94-20349, 1995 WL 103637, at *1-2 (5th Cir. Mar. 2, 1995) (affirming a defendant's conviction for bribing an undercover agent posing as an immigration official); *United States v. Opdahl*, 930 F.2d 1530, 1535 (11th Cir. 1991) (stating that it is the undercover agent's "purported role as an IRS official, not his actual status as an internal investigator for the IRS, that is relevant to the issue of the defendant's intent"); *United States v. Pilarinos*, 864 F.2d 253, 253-55 (2d Cir. 1988) (upholding a bribery conviction arising from a sting operation in which there was no actual public official involved); *United States v. Gallo*, 863 F.2d 185, 189 (2d Cir. 1988) (stating, where a bribe was to be passed through a conduit and ultimately to a fictitious "connection in Washington," that "[w]hether or not there was a federal official to whom bribes were actually paid is not determinative" and "the public official who is the target of the bribe . . . need not even exist"); *United States v. Jacobs*, 431 F.2d 754, 757-60 (2d Cir. 1970) (stating that "[t]he statute makes attempted bribery a crime" because "so long as a bribe is 'offered or promised' with the requisite intent 'to influence any official act' the crime is committed").

41 22 CORPUS JURIS SECUNDUM § 126 (2017).

inchoate crimes, *i.e.*, attempt, conspiracy, and solicitation.[42] They reason that impossibility is not a defense "when adequate proof of intent to commit a specific crime exists."[43]

Federal courts have embraced this intent-based approach in bribery cases. In *United States v. Hood*, a case in which a politician solicited campaign contributions in exchange for a promise to appoint the contributors to offices that did not exist, the Supreme Court stated, "Whether the corrupt transaction would or could ever be performed is immaterial," and that it is "no less corrupt to sell an office one may never be able to deliver than to sell one he can."[44] Rejecting an impossibility argument based on the public official being an undercover officer, the Second Circuit has similarly stated that there may be a conviction even where the "object of the bribe could not be attained."[45]

Therefore, in situations of political corruption analogous to soliciting illegal contributions from foreign nationals under the Act, federal courts have widely recognized that factual

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[42] *See, e.g.*, *United States v. Temkin*, 797 F.3d 682, 690 (9th Cir. 2015) ("[F]actual impossibility is not a defense to an inchoate offense."); *United States v. Washington*, 106 F.3d 983, 1006 (D.C. Cir. 1997) (explaining that, "but for the fact that the crime was made factually impossible because the 'principals' were really undercover government agents," it would have occurred, making "factual impossibility [ ] no defense"); *United States v. Hamrick*, 43 F.3d 877, 885 (4th Cir. 1995) ("[W]e now join those circuits that have expressly held that [factual impossibility] is not a defense to an attempt crime."); *United States v. Peete*, 919 F.2d 1168, 1175-76 (6th Cir. 1990) (providing, as an example of factual impossibility, a situation in which "a public official induces a payment to achieve some result despite the fact that the official has no actual ability to achieve that result," and stating that factual impossibility would not be a defense in that situation); *United States v. Johnson*, 767 F.2d 673, 675 (10th Cir. 1985) ("Factual impossibility may fall away as a defense to an attempt charge when adequate proof of intent to commit a specific crime exists."); *United States v. Innella*, 690 F.2d 834, 835 (11th Cir. 1982) (stating that impossibility is not a defense when "the defendant's objective actions, taken as a whole, . . . strongly corroborate the required culpability"); *United States v. Oviedo*, 525 F.2d 881, 885 (5th Cir. 1976) (rejecting the impossibility defense when there is evidence of unique acts that "mark the defendant's conduct as criminal in nature," thereby allowing for an inference that the defendant had criminal intent).

[43] *Johnson*, 767 F.2d at 675.

[44] *United States v. Hood*, 343 U.S. 148, 149-51 (1952).

[45] *United States v. Rosner*, 485 F.2d 1213, 1229 (2d Cir. 1973). In another case, the Second Circuit rejected the impossibility defense when real public officials were accepting and receiving corrupt payments from undercover agents. *United States v. Myers*, 692 F.2d 823, 826-28 (2d Cir. 1982).

impossibility is not a defense and that there may be a conviction even when the defendant is engaging in a transaction with an undercover operative or someone who does not exist.[46] Because the plain language of the statute and the legislative history behind it (discussed below) support treating 52 U.S.C. § 30121(a)(2) no differently than the bribery statute or similar inchoate offenses,[47] the Commission can proceed with an enforcement action against those who intend to violate the foreign national solicitation ban, even where the foreign national is fictitious or otherwise an undercover agent.[48]

3. The Legislative History of the Foreign National Prohibition Supports Broad Restrictions on Soliciting Foreign Funds

Reading section 30121(a)(2) to apply to situations in which there is no actual foreign national also comports with the legislative history of the Act. The prohibition on foreign national contributions and solicitations, and Congress's concern about the potential influence of foreign nationals in elections, pre-dates the Act. Congress enacted the first prohibition on

[46] Federal courts have also interpreted state-level bribery statutes in a fashion that makes intent the determinative factor. *See, e.g.*, *United States v. Traitz*, 871 F.2d 368, 386 (3d Cir. 1989) (stating, with respect to Pennsylvania's and New Jersey's bribery statutes, that "[e]ach defendant should be judged by what he thought he was doing and what he meant to do . . ."); *United States v. Mazzio*, 501 F. Supp. 340, 343 (E.D. Pa. 1980) (rejecting an impossibility argument premised on the fact that the person the defendant bribed was an undercover officer). Furthermore, in the Department of Justice's ("DOJ's") first-ever sting operation to enforce the Foreign Corrupt Practices Act ("FCPA"), which criminalizes bribing foreign officials, the D.C. District Court denied a defendant's motion to dismiss the indictment on the grounds that no actual foreign official participated in the FCPA bribery scheme, finding that there may be a conviction when the foreign official was actually an undercover agent. *See* Mot. to Dismiss, *United States v. Goncalves*, No. 09-335 (D.D.C. Mar. 9, 2011), ECF No. 271; Resp., *Goncalves*, No. 09-335 (Mar. 23, 2011), ECF No. 298; Min. Entry, *Goncalves*, No. 09-335 (May 6, 2011). Since the so-called "Africa Sting" case, it does not appear that the DOJ has tried any additional FCPA sting cases.

[47] *See* 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

[48] While the Respondents argue that the Commission, as a policy matter, should not use resources to investigate sting operations, *see* Resp. (MUR 7165) at 2, 9; Resp. (MUR 7196) at 2, 7, courts have recognized that, often, the only way to expose political corruption is to use undercover techniques, *see United States v. Kelly*, 707 F.2d 1460, 1473-74 (D.C. Cir. 1983) ("[C]orruption is 'that type of elusive, difficult to detect, covert crime which may justify . . . undercover activities.'"); *United States v. Jannotti*, 673 F.2d 578, 609 (3d Cir. 1982) (stating that corruption "easily elude[s] detection" without undercover techniques); *Rosner*, 485 F.2d at 1223 (stating that corruption is "hard to detect except by infiltration").

soliciting foreign contributions in 1966 as an amendment to the Foreign Agents Registration Act of 1938 ("FARA"), banning the solicitation of "foreign principals" and the agents of "foreign principals."[49] In 1974, Congress extended FARA to prohibit the solicitation of "foreign nationals," which included a broader category of foreign actors.[50] It then moved the restrictions on foreign contributions and solicitations from FARA to the Act,[51] amending the text most recently with BCRA.[52]

The Commission has explained that the purpose behind the ban on foreign national *contributions* is to "prevent foreign national funds from influencing elections."[53] This goal stems from Congress's concern that foreign participation in U.S. elections would harm "the integrity of the decision-making process of our Government,"[54] because foreign nationals are loyal to their own countries and would use their political influence to support leaders and policies that do not benefit the United States.[55]

However, the fact that the foreign national prohibition extends beyond the acceptance and receipt of foreign national funds in connection with an election to the *solicitation* of a

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[49] Foreign Agents Registration Act Amdts. of 1966, Pub. L. No. 89-486, § 613, 80 Stat. 244, 248-49.

[50] Fed. Elections Campaign Act Amdts. of 1974, Pub. L. No. 93-443, § 613, 88 Stat. 1263, 1269.

[51] Fed. Elections Campaign Act Amdts. of 1976, Pub. L. No. 94-283, § 324, 90 Stat. 475, 493.

[52] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 303, 116 Stat. 81, 96. The Supreme Court has historically upheld exclusions of foreign nationals from activities "intimately related to the process of democratic self-government." *Bluman v. FEC*, 800 F. Supp. 2d 281, 287 (D.D.C. 2011) (quoting *Bernal v. Fainter*, 467 U.S. 216, 220 (1984)), *aff'd*, 565 U.S. 1104 (2012). In *Bluman*, a federal court (affirmed without opinion by the Supreme Court) held that BCRA's prohibition on foreign national contributions was constitutional because it was supported by the government's compelling interest "in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process."

[53] E&J at 69,945.

[54] 111 Cong. Rec. S6984-85 (daily ed. Apr. 5, 1965) (statement of Sen. Fulbright).

[55] *See* 120 Cong. Rec. S4716 (daily ed. Mar. 28, 1974) (statement of Sen. Bentsen).

contribution or promise to contribute, indicates that even the potential for, or the appearance of the potential for, foreign national influence in elections was also a major congressional concern. There are only three instances in which the Act prohibits the solicitation of an entire class of funds in this manner: soft money contributions, contributions from federal contractors, and contributions from foreign nationals.[56]

In considering the purpose of the ban on foreign national solicitations in section 30121(a)(2), the legislative history behind the restrictions on soliciting soft money in BCRA is instructive. BCRA not only created the current restrictions on soliciting soft money, but it also amended the Act to prohibit foreign national contributions, donation, or solicitations "in connection with a Federal, State, or local election"[57] and clarified that the "ban on contributions [by] foreign nationals applies to soft money donations."[58]

The legislative history of BCRA establishes that the prohibitions on soft money, including the ban on soliciting soft money, exist to prevent corruption or even the appearance of corruption. Senator McCain, one of BCRA's sponsors, argued that the solicitation prohibition must exist "to deter the opportunity for corruption to grow and flourish, to maintain the integrity of our political system, and to prevent any appearance that our Federal laws, policies, or activities can be inappropriately compromised or sold."[59] This concern that the mere act of

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[56] 52 U.S.C. § 30119(a)(2) (federal contractors), § 30121(a)(2) (foreign nationals), § 30125(a)(1), (d), (e)(1) (soft money). There are other provisions of the Act that prohibit certain solicitation tactics, such as coercive solicitations, solicitations based on fraudulent misrepresentations, and solicitations using information obtained from Commission reports, among others, but we are concerned with substantive solicitation bans based on the source of the funds. *See, e.g.*, *id.* §§ 30111(a)(4), 30118(b)(3), 30124(b).

[57] *Compare* 2 U.S.C. § 441e(a) (2000), *with id.* § 441e(a)(1)(A) (2004).

[58] E&J at 69,944 (quoting 148 Cong. Rec. S1991-97 (daily ed. Mar. 18, 2002) (statement of Sen. Feingold)); *see* 148 Cong. Rec. S2774 (daily ed. Mar. 22, 2002) (statement of Sen. Lieberman).

[59] 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain); *see also id.* at S2099, S2114, S2116 (statements of Sen. Dodd and Sen. Levin) (echoing Senator McCain's sentiment).

soliciting large sums of money is enough to create the appearance of corruption, regardless of whether the solicitor ultimately receives any soft money funds, stemmed from various fundraising scandals, including cases that involved contributions and solicitations by foreign nationals.[60]

Applying this same rationale to the foreign national ban, which goes beyond preventing corruption or the appearance of corruption and to the fundamental question of who should be able to participate in our democratic process, the Commission could conclude that even the prospect of potential foreign influence in our political system undermines the public's faith in the system and should be prohibited under the circumstances presented here.

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In sum, we recommend that the Commission apply 52 U.S.C. § 30121(a)(2) to prohibit all "knowing" solicitations of foreign nationals, regardless of whether the "foreign national" is fictitious. Reading the statute to reach the conduct of individuals who have the requisite intent to solicit foreign money comports with the text of the statute as well as the important policy interests underlying its adoption, and parallels how comparable statutes addressing political corruption have been interpreted. Accordingly, the lack of an actual foreign national in this matter should not prevent the Commission from finding reason to believe thatGAP, Beach, and Benton violated 52 U.S.C. § 30121(a)(2), provided they had the requisite intent and engaged in activities amounting to solicitation, which we address below.

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[60] *See* INVESTIGATION OF ILLEGAL OR IMPROPER ACTIVITIES IN CONNECTION WITH 1996 FEDERAL ELECTION CAMPAIGNS, S. REP. NO. 105-167 (1998), https://www.congress.gov/congressional-report/105th-congress/senate-report/167 (discussing findings that the Democratic National Committee ("DNC") solicited and accepted contributions from Chinese foreign nationals); *see also* MUR 4530 (DNC Services Corp./DNC); MUR 4531 (DNC); MUR 4547 (John Huang, *et al.*); MUR 4642 (DNC Services Corp./DNC); MUR 4909 (DNC Services Corp./DNC).

B. GAP, Beach, and Benton Knowingly and Willfully Solicited a Foreign National Contribution

The available information shows that there is reason to believe that Beach, Benton, and GAP solicited a contribution from a foreign national because the three elements that must be present in order to find a violation are present here.[61] Specifically, there was a solicitation, the solicitation was for a contribution or donation,[62] and Beach and Benton believed that the person solicited for the contribution or donation was a foreign national. Further, the available information supports a finding that the violation was knowing and willful.

1. The Respondents Solicited a Contribution

First, the Respondents' communications with the reporters satisfy the definition of "solicitation." "To solicit" means "to ask, request, or recommend, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value," including by making a communication "that provides a method of making a contribution" or "provides instructions on how or where to send contributions."[63]

Beach was reportedly the first person to speak to the reporters, and during the initial phone call, he reportedly suggested that their client contribute his $2 million to a social welfare

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[61] We include GAP in this finding under an agency theory. A person is the agent of an organization if he or she has "actual authority, either express or implied, to engage in [particular] activities on behalf of" the organization, including making solicitations. *See* 11 C.F.R. §§ 109.3, 300.2(b) (defining "agent" for the coordination and soft money regulations). Beach was clearly an agent of GAP because he was one of its co-chairs and therefore had actual authority to make binding decisions and solicit funds for GAP. *See* Resp. (MUR 7165) at 2; Resp. (MUR 7196) at 2. While Beach's actions alone are enough to impute liability to GAP, it also appears that Benton was an agent of GAP for the purpose of this solicitation, despite the Respondents' assertion to the contrary. *See* Resp. (MUR 7165) at 2-3, 7-8; Resp. (MUR 7196) at 1-3, 6. The *Telegraph* article states that Beach asked Benton to work with the journalists, and that Benton believed he was a "consultant" on the project. Investigative Team Article. Thus, it appears that Benton had at least implied authority to solicit the journalists for GAP.

[62] Because the Respondents have not contested that the alleged solicitation was for a contribution or donation, we do not analyze that prong of the violation.

[63] 11 C.F.R. § 300.2(m).

organization and that the client could earmark the money for a "'specific purpose.'"[64] Beach then reportedly put the reporters in touch with Benton so that Benton could facilitate their goal.[65] The article also asserts that Beach invited, or approved of Benton inviting, the reporters to GAP's Las Vegas event, where he encouraged them to make the contribution or pledge a contribution by highlighting the credit or influence their client would receive in exchange for $2 million.[66] For example, Beach reportedly stated that when Trump won the election, the client's participation would be "remembered."[67] Such actions constitute a solicitation because Beach implicitly recommended that the client make a contribution, offered a reward of sorts for that contribution, and provided instructions on a method for making the contribution.[68]

Similarly, in his in-person meeting with the undercover reporters, Benton reportedly outlined a plan for the Chinese client to pass $2 million through Titan, two 501(c)(4) organizations, and finally to GAP.[69] Then, using the same promises as Beach, he attempted to induce the contribution by offering influence, stating that "we can have that [the fact of the contribution] whispered into Mr. Trump's ear whenever your client feels it's appropriate" and

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64 *See* Investigative Team Article.

65 *Id.* The Respondents claim that after Beach raised doubts about the legality of the proposed contribution, he made a standard business referral to Benton, so that Benton could "facilitate legal avenues to engage in some sort of activity." Resp. (MUR 7165) at 3; Resp. (MUR 7196) at 2-3, 5. However, it appears that Beach knew of and supported the conduit plan, based on the comments he made to the reporters at the Las Vegas event. *See* Investigative Team Article; YouTube Video.

66 *See* Investigative Team Article; YouTube Video.

67 *See* Investigative Team Article. While the Respondents' argue that any statements about the client's influence after making a contribution were "speculation," *see* Resp. (MUR 7165) at 4, 7-9; Resp. (MUR 7196) at 7, it appears that Beach (and Benton, discussed below) presented influence as a promise, *see* Investigative Team Article; YouTube Video.

68 *See* 11 C.F.R. § 300.2(m).

69 Investigative Team Article.

that the contribution would get the client special treatment.[70] In so doing, Benton made a solicitation as defined under the Commission's regulations because he implicitly recommended that the client make a contribution, and he provided a clear "method of making a contribution" or "instructions on how or where to send" the contribution.[71]

The Respondents argue that Benton was not actually soliciting a contribution for GAP; he was soliciting money for the 501(c)(4)s, which would choose on their own how to spend the funds.[72] Benton's own words as reported in the article, however, directly contradict this argument. According to the article, when the reporters asked Benton how much of the money contributed to the 501(c)(4)s would end up with GAP, he replied, "[A]ll of it."[73] He also added that the contribution would "allow us to spend two million more dollars on digital and television advertising for Mr. Trump."[74] These reported exchanges support the conclusion that Benton's proposal to have the $2 million funneled through the two 501(c)(4) organizations was not intended to fund those organizations' own activities or to be spent at their own discretion.

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70 *Id.*; YouTube Video.

71 11 C.F.R. § 300.2(m).

72 *See* Resp. (MUR 7165) at 8-9; Resp. (MUR 7196) at 7. The basis of Respondents' argument here appears to be precedent holding that foreign nationals can participate in issue advocacy and other speech that is not express campaign speech or its functional equivalent, so soliciting a foreign national for a 501(c)(4) might not be illegal. *See Bluman*, 800 F. Supp. 2d at 284 ("[The Act], as we interpret it, does not bar foreign nationals from issue advocacy — that is, speech that does not expressly advocate the election or defeat of a specific candidate."); *see also* Resp. (MUR 7165) at 8; Resp. (MUR 7196) at 7. We need not reach the issue of whether foreign nationals can donate to 501(c)(4)s for the purpose of engaging in issue advocacy or other civic activity without running afoul of the Act because the transaction Benton proposed was not designed to help the Chinese donor engage in issue advocacy; it was designed to pass the foreign national's money through to an IEOPC, which is a registered political committee specifically created to make independent expenditures, which foreign nationals are clearly barred from making. *See* 52 U.S.C. § 30121(a)(1)(C) (stating that foreign nationals are prohibited from making independent expenditures); *see also id.* § 30101(17) (defining "independent expenditure" as, *inter alia*, an expenditure "expressly advocating the election or defeat of a clearly identified candidate").

73 YouTube Video.

74 Investigative Team Article.

Rather, Benton's recommendation to transfer the money through two layers of conduits was specifically designed to make $2 million in contributions to GAP without revealing that those funds came from a foreign national source.[75]

2. The Respondents Believed the Person they were Soliciting for a Contribution was a Foreign National

As to the final element of the violation, the available information shows that both Beach and Benton believed the person they were soliciting for a contribution was a foreign national. According to the article, during their first contact with Beach, one of the reporters explicitly stated that their client, who wanted to make a contribution to GAP, was not a U.S. national.[76] Beach acknowledged his understanding of this information when he expressed concern about the donor's foreign nationality.[77] It appears that Benton, likewise, understood that the client was a foreign national, discussing with the reporters the legality of, in his words, donations "'originating from a foreign source.'"[78] By proceeding with their discussions with the undercover reporters with explicit knowledge that the client was a foreign national, Beach and Benton evidenced an intent to solicit a contribution or promise to contribute from someone they believed was a foreign source. Accordingly, as there is information that Beach, Benton, and GAP solicited a contribution from a person they believed to be a foreign national, we

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[75] The Respondents' argument that Benton was merely "spit balling" ideas and never made a formal pitch is also unavailing. *See* Resp. (MUR 7165) at 8-9; Resp. (MUR 7196) at 7. Over the course of multiple communications, Benton offered only one plan for how the reporters' client should make a contribution. *See* Investigative Team Article.

[76] Investigative Team Article.

[77] *Id.*

[78] *Id.*

recommend that the Commission find reason to believe the Respondents violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g).

3. The Violation was Knowing and Willful

Further, it appears that the Respondents' violations were knowing and willful. A violation of the Act is knowing and willful when the respondent acts "with full knowledge of all the relevant facts and a recognition that the action is prohibited by law."[79] This standard does not require proving knowledge of the specific statute or regulation the respondent allegedly violated.[80] Rather, it is sufficient to demonstrate that a respondent "acted voluntarily and was aware that his conduct was unlawful."[81] This awareness may be shown through circumstantial evidence, such as a "defendant's elaborate scheme for disguising" her actions, or other "facts and circumstances from which the jury reasonably could infer [the defendant] knew her conduct was unauthorized and illegal."[82]

Based on the *Telegraph* article, there is evidence that Beach and Benton were aware that their conduct was illegal. First, Benton's plan to use conduits to obscure who was involved in the transaction was a "scheme for disguising" the illegality of the foreign national contribution.[83] Benton also commented to the reporters that "[y]ou shouldn't put any of this on paper," and

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79 122 Cong. Rec. H3778 (daily ed. May 3, 1976).

80 *See United States v. Danielczyk*, 917 F. Supp. 2d 573, 579 (E.D. Va. 2013) (citing *Bryan v. United States*, 524 U.S. 184, 195 & n.23 (1998) (holding that, to establish that a violation is willful, the government needs to show only that the defendant acted with knowledge that her conduct was unlawful, not knowledge of the specific statutory provision violated)).

81 *Id.* (internal quotation marks omitted).

82 *United States v. Hopkins*, 916 F.2d 207, 213-15 (5th Cir. 1990) (internal quotation marks omitted). As the *Hopkins* court noted, "It has long been recognized that 'efforts at concealment [may] be reasonably explainable only in terms of motivation to evade' lawful obligations." *Id.* at 214 (quoting *Ingram v. United States*, 360 U.S. 672, 679 (1959)).

83 *See id.* at 213-15.

explained that certain actions were going to happen "for the sake of appearances" only.[84] It therefore appears that Benton was aware that his plan was illegal and was taking steps to conceal it, which supports the conclusion that he knowingly and willfully violated the Act.[85]

Though Beach reportedly reassured the reporters on the phone and in person that any transaction he proposed was legal, and now argues that he was unaware of Benton's suggestions, his statements indicate that he was aware of the scheme and knew that soliciting and accepting the foreign client's money was illegal.[86] For example, Beach suggested obscuring the contribution through a 501(c)(4) "non-disclose entity" in the first instance, reportedly told Benton to avoid "a 'paper trail' of contact," and cautioned the reporters that the contribution should remain undisclosed "'for everyone's benefit.'"[87] Beach also referenced the foreign client "participating" in GAP's activities during the conversation in Las Vegas, which showed that he was aware that the client's contribution would ultimately end up in GAP's account.[88] Finally, Beach referenced the "whole structure" of the scheme that "we're" proposing, suggesting that he was aware of the complex conduit transactions that Benton had designed and was part of Benton's plan.[89] This information supports the conclusion that Beach participated in the illegal solicitation — and efforts to hide it — with knowledge that his activities were unlawful.

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84 Investigative Team Article.

85 *Id.*; *see* 122 Cong. Rec. H3778; *Hopkins*, 916 F.2d 207, 213-15; *Danielczyk*, 917 F. Supp. 2d at 579. While Benton initially claimed that attorneys vetted the transaction and told him it was legal, he later admitted to the reporters that there were "grey areas" and arguments that it was not legal. *See* Investigative Team Article. Benton's subsequent admissions, and his extensive steps to disguise the transaction, outweigh his initial assertions.

86 *See* Investigative Team Article; Resp. (MUR 7165) at 3; Resp. (MUR 7196) at 2-3, 5.

87 Investigative Team Article.

88 *Id.*

89 YouTube Video.

In light of these interactions with the reporters and the above analysis concluding that the absence of an actual foreign national is immaterial to the Respondents' liability, we recommend that the Commission find reason to believe that Benton, Beach, and GAP knowingly and willfully violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g) by soliciting a contribution or promise to contribute from a foreign national. We also recommend that the Commission approve compulsory process, if necessary, for use in an investigation.[90]

IV. INVESTIGATION

We propose an investigation to obtain more details about the communications between the Respondents and the undercover reporters and corroborate the details provided in the Complaints. The *Telegraph* article references additional recordings and emails that were not made public as part of the article. Obtaining those communications would help the Commission understand the details of the proposed transaction and assess Beach's and Benton's varying levels of participation in the solicitation.[91] Although we plan to use informal investigative methods, we recommend that the Commission authorize the use of compulsory process, which we would use in the event the parties do not cooperate in providing this information.

V. RECOMMENDATIONS

1. Find reason to believe that Great America PAC and Dan Backer in his official capacity as treasurer knowingly and willfully violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g);

2. Find reason to believe that Eric Beach knowingly and willfully violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g);

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[90] One of the Complaints requests that the Commission refer the Respondents to the DOJ for criminal prosecution. *See* Compl. (MUR 7196) at 5-6. Under the Act, the Commission may make such a referral after a finding of probable cause to believe a knowing and willful violation of the Act has occurred. 52 U.S.C. § 30109(a)(5)(C).

[91] Accessing all of the recordings and emails will also address the Respondents' argument that *The Telegraph* is an unreliable source because it selectively edited the recordings and used email quotations out of context in order to bolster the story. *See* Resp. (MUR 7165) at 1, 5; Resp. (MUR 7196) at 1, 4.

3. Find reason to believe that Jesse Benton knowingly and willfully violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g);

4. Authorize the use of compulsory process, as necessary;

5. Approve the attached Factual and Legal Analyses; and

6. Approve the appropriate letters.

Lisa J. Stevenson
Acting General Counsel

5/24/18
Date

Kathleen M. Guith
Kathleen M. Guith
Associate General Counsel for Enforcement

Lynn Y. Tran
Assistant General Counsel

Shanna M. Reulbach
Attorney

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Great America PAC and Dan Backer in his official capacity as treasurer
Eric Beach

MURs: 7165 & 7196

I. INTRODUCTION

These matters were generated by Complaints filed with the Federal Election Commission (the "Commission") by Campaign Legal Center and American Democracy Legal Fund. The Complaints allege that Great America PAC and Dan Backer in his official capacity as treasurer ("GAP") and Eric Beach — one of GAP's co-chairs during the relevant time — knowingly and willfully solicited a contribution from a foreign national in violation of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations. The Complaints base their allegations on an October 24, 2016, article appearing on *The Telegraph UK*'s website, which chronicles how two reporters posed as consultants for a fictitious Chinese donor and discussed a series of transactions with Beach and Jesse Benton, a consultant for GAP, that would allow the donor to indirectly contribute $2 million to GAP. Based on the information contained in the Complaints and the cited article, the Commission finds reason to believe that GAP and Beach knowingly and willfully violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g) by soliciting a contribution or a promise to contribute from a foreign national.

II. FACTUAL BACKGROUND

GAP is an independent-expenditure-only political committee ("IEOPC") that supported Donald J. Trump during the 2016 presidential election.[1] Eric Beach was one of GAP's

[1] *See* GAP, Amended Statement of Organization (Mar. 14, 2016); Compl. (MUR 7196) at 2 (Nov. 10, 2016).

co-chairs.[2] Jesse Benton was a strategist for GAP until May 2016, when he resigned and opened an independent political consulting firm, Titan Strategies LLC ("Titan").[3]

According to the *Telegraph* article,[4] two undercover journalists contacted Beach on October 4, 2016, posing as consultants to a fictitious Chinese national allegedly interested in contributing $2 million to GAP.[5] During the initial phone conversation, one of the journalists explained that their "benefactor" was not a U.S. national but wanted to make a donation to support Trump's campaign.[6] Beach reportedly "appeared interested despite raising concerns about [the donor's] nationality and saying he would need to know the donor's identity."[7] Beach also reportedly suggested during this initial phone call that the donation could be "put through a social welfare organization called a 501(c)(4)," which "he described as a 'non-disclose entity' through which the client could make a contribution for a 'specific purpose.'"[8]

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2 Resp. (MUR 7165) at 2 (Jan. 9, 2017); Resp. (MUR 7196) at 2 (Jan. 6, 2017).

3 Resp. (MUR 7165) at 2, 7; Resp. (MUR 7196) at 1-2, 6. Benton's resignation followed his criminal convictions for, among other things, causing false campaign expenditure reports to be filed and conspiring to do the same, in order to conceal a payment made to an Iowa state senator to endorse Ron Paul's presidential bid. *See* Compl. (MUR 7165) at 2 (Oct. 27, 2016) (citing Maggie Haberman, *A Donald Trump 'Super PAC' is Hit with Leadership Woes*, N.Y. TIMES (May 6, 2016, 12:55 PM), https://www.nytimes.com/politics/ first-draft/2016/05/06/a-donald-trump-super-pac-is-hit-with-leadership-woes/).

4 Investigative Team, *Exclusive Investigation: Donald Trump Faces Foreign Donor Fundraising Scandal*, TELEGRAPH (Oct. 24, 2016, 8:10 PM), http://www.telegraph.co.uk/news/2016/10/24/exclusive-investigation-donald-trump-faces-foreign-donor-fundrai/ ("Investigative Team Article"). Both Complaints heavily cite this article. *See generally* Compl. (MUR 7165); Compl. (MUR 7196).

5 Investigative Team Article. The reporters contacted several organizations based on reports that they were "involved in hiding foreign donations." *Id.* GAP was the only group that responded. *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

After the call, the article asserts that the reporters received an email from Benton with the subject line "From Eric Beach."[9] Benton reportedly described himself as a "consultant" for GAP and stated that "'Eric Beach asked me to reach out.'"[10] Benton explained in the body of the email that Beach "had not wanted a 'paper trail' of contact."[11] Benton then allegedly proposed channeling the $2 million from the Chinese client through his consulting firm, Titan.[12]

As reported in the *Telegraph* article, Benton followed up the email by meeting the undercover reporters at a New York hotel on October 13, 2016, where he laid out his plan in greater detail.[13] Benton allegedly suggested that the Chinese client pay the $2 million to Titan, which Benton could bill as "'a large retainer'" for consulting services, and for which he could provide an invoice "for the sake of 'appearances.'"[14] Titan would then donate the funds evenly to two 501(c)(4) organizations, one of which was run by Beach, and the 501(c)(4)s would pass the money through to GAP.[15] When the reporters asked whether this contribution would ensure

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

that their client "won't just be treated as an another [sic]," Benton said, "It'll do that, yeah."[16] Benton warned the reporters that they "'shouldn't put any of this on paper.'"[17]

The article reports that following a phone call with Beach, Benton also told the reporters that GAP wished to invite them to an event in Las Vegas, Nevada on October 19, 2016, to watch the final presidential debate.[18] Benton said he had to "stay away from Vegas" because "'everything that we're doing is legal by the book but there's perceptions and some grey areas.'"[19]

The reporters attended the event, where they spoke to Beach.[20] According to the article, Beach told the reporters, with respect to their client, "'One thing he has to understand is, what you guys have to understand is: you can get credit, but don't overdo it with the influence,'" and he advised them, "'I would just manage [your client's] expectations, say: [Y]ou're going to get credit but your non-disclosed [donation] is not disclosed. Not just for your benefit, but for everyone's benefit.'"[21] At another point, Beach offered, "'[Trump's] going to win the election so, again, I'm not going to twist your arm or anything. I just think that there's no way that [GAP], and you guys have been participating indirectly or directly, won't be remembered.'"[22]

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16 *Pro-Trump Fundraisers Agree to Accept Illicit Foreign Donation*, YOUTUBE, https://www.youtube.com/watch?v=xQnOxM9iqOw (posted Oct. 24, 2016) ("YouTube Video"). The reporters filmed some of their interactions with Beach and Benton and published clips of the footage beside the article. *See* Investigative Team Article4. The video footage is no longer available on *The Telegraph*'s website, but a copy is available on YouTube.

17 Investigative Team Article.

18 *Id.*

19 *Id.*

20 *See id.*

21 *Id.* (alteration in original) (internal quotation marks omitted).

22 YouTube Video.

He also attempted to reassure the reporters that the contribution was legal, stating, "'It's not illegal, what we're — the whole structure. But it's, you know. I would never let you guys give to the PAC, to give to the c4 because that is illegal.'"[23]

III. LEGAL ANALYSIS

Based on the series of events described in the *Telegraph* article, the Complaints allege that Beach and GAP knowingly and willfully solicited a contribution from a foreign national, in violation of 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g).[24] As discussed in more detail below, GAP and Beach deny the allegations and assert multiple defenses.[25]

A. The Scope of the Solicitation Prohibition Reaches Fictitious Foreign Nationals

GAP and Beach's primary argument is that they could not have violated the Act by soliciting a foreign national contribution because "there was never any foreign national to be solicited."[26] It is a matter of first impression whether the Act's prohibitions on the solicitation of foreign nationals reach the solicitation of a foreign contributor who is fictitious. The Commission has not addressed this question in any enforcement matters or advisory opinions, and the courts are also silent.[27]

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23 *Id.*

24 Compl. (MUR 7165) at 7-10; Compl. (MUR 7196) at 1, 4-5.

25 *See* Resp. (MUR 7165) at 6; Resp. (MUR 7196) at 4.

26 Resp. (MUR 7165) at 6; Resp. (MUR 7196) at 4-5.

27 In MUR 6687 (Obama for America), the Commission dismissed allegations that the Obama campaign solicited foreign nationals for contributions when it emailed a solicitation to "OsamaforObama2012@gmail.com" and allowed a "Bin Laden" solicitation page to be posted to its website, the latter of which resulted in a $3 contribution. Factual & Legal Analysis at 3-4, 8, MUR 6687 (Obama for America). Both the email address and solicitation page were created by journalists conducting a sting operation. *Id.* The Commission dismissed the allegations "to conserve Commission resources," given the *de minimis* amount of money at stake. *Id*. at 8.

In the absence of any precedent squarely on point, we interpret the Act and form a conclusion based on the plain meaning of section 30121(a)(2), the policy behind the prohibition on foreign national involvement in elections, the Act's other restrictions on soliciting funds, and related anti-corruption statutes. Based on these sources, we believe that the statute and Commission regulations, fairly construed, prohibit an individual from making a solicitation with the intent to violate the ban on foreign national participation in the electoral process, as demonstrated by the individual's awareness of facts that would lead a reasonable person to conclude that, or inquire whether, the contributor is an actual foreign national.

1. The Act and Regulations Support an Intent-Focused Standard

A "foreign national" is an individual who is not a citizen of the United States or a national of the United States and who is not lawfully admitted for permanent residence.[28] The Act prohibits foreign nationals from making, directly or indirectly, a contribution or donation, or an express or implied promise to make a contribution or donation, in connection with a federal, state, or local election.[29] The Act also prohibits any person from soliciting, accepting, or receiving a contribution or donation, or a promise to make a contribution or donation, from a foreign national,[30] and the regulations prohibit any person from providing "substantial assistance" in the solicitation of a foreign national.[31]

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28 52 U.S.C. § 30121(b)(2); *see also* 11 C.F.R. § 110.20(a)(3)(ii).

29 52 U.S.C. § 30121(a)(1)(A).

30 *Id.* § 30121(a)(2).

31 11 C.F.R. § 110.20(h).

In relevant part, the precise text of the solicitation ban states that "[i]t shall be unlawful for . . . a person to solicit . . . a contribution or donation . . . from a foreign national."[32] This language creates three elements the Commission must identify in order to find a violation of the statute: (1) that there was a solicitation; (2) that the solicitation was for a contribution or donation; and (3) that the person solicited for the contribution or donation was a foreign national. While the final element here appears to require the presence of an actual foreign national, as described below, courts routinely allow criminal convictions to stand under similarly phrased statutes when one of the actors in the transaction is fictional or an undercover agent.[33] The inquiry focuses on whether the defendant sincerely believed that the undercover agent or fictional figure was who he or she purported to be.[34] Thus, under this prevailing interpretation, the final element of a section 30121(a)(2) violation may be satisfied by a showing that the solicitor believed that the subject of the solicitation was a foreign national.

Commission regulations support this interpretation by adding a *mens rea* requirement to the anti-solicitation provision, providing that no person shall "*knowingly* solicit, accept, or receive from a foreign national any contribution or donation" prohibited by the regulations,[35] or "*knowingly* provide substantial assistance in the solicitation, making, acceptance, or receipt" of any prohibited foreign national contribution.[36] In defining "knowingly," the regulations state

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[32] 52 U.S.C. § 30121(a)(2).

[33] *See infra* Section II.A.2.

[34] *See id.*

[35] 11 C.F.R. § 110.20(g) (emphasis added).

[36] *Id.* § 110.20(h) (emphasis added). "Substantial assistance" is "active participation in the solicitation . . . of a foreign national contribution or donation with an intent to facilitate successful completion of the transaction." Contribution Limitations and Prohibitions, 67 Fed. Reg. 69,928, 69,945 (Nov. 19, 2002) ("E&J"). Therefore, in

that the solicitor must have either "actual knowledge" that the person being solicited is a foreign national, "[b]e aware of facts that would lead a reasonable person to conclude that there is a substantial probability that the source of the funds" is a foreign national, or "[b]e aware of facts that would lead a reasonable person to inquire whether the source of the funds . . . is a foreign national," but fail to "conduct a reasonable inquiry."[37] Thus, the solicitor does not need to know for certain that the source of the contribution is a foreign national. Rather, it is sufficient for the solicitor to be aware of facts that suggest that the potential contributor is a foreign national. Accordingly, the regulations seem to acknowledge the possibility that a person may violate the Act when he subjectively believes, or has reason to believe, that he is requesting foreign money.

2. Courts Have Interpreted Other Anti-Corruption Statutes to Make Intent Determinant in Establishing a Violation

As mentioned above, federal courts regularly uphold the criminal convictions of defendants who engage in corrupt transactions with undercover operatives or fictitious parties when there is evidence that the defendant intended to complete the crime. One corruption statute the Commission regards as an analogy to the Act is federal bribery. Senator John McCain noted the parallels between campaign finance law and the bribery statute during the debate on the Bipartisan Campaign Finance Reform Act of 2002 ("BCRA"), stating that BCRA's solicitation prohibitions are "no different from the Federal laws and ethics rules that prohibit Federal officeholders from using their offices or positions of power to solicit money or other benefits."[38]

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defining "substantial assistance," the Commission has explicitly added another intent-based standard on top of the "knowingly" requirement.

[37] 11 C.F.R. § 110.20(a)(4).

[38] 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

Specifically, the federal bribery statute prohibits the offer of "anything of value" to a "public official" with intent to "influence any official act," and it similarly prohibits a "public official" from soliciting or accepting "anything of value" in connection with "the performance of any official act."[39] The text of the bribery statute that refers to the presence of a "public official" mirrors the requirement in section 30121(a)(2) that there be a "foreign national" present. Interpreting such a requirement in the bribery context, courts have focused on the defendant's intent to enter into a corrupt transaction as the essential element of the crime, stating that bribery occurs when a person offers or asks for money with the requisite intent to influence an official act, regardless of whether there is no actual public official to be bribed.[40]

In upholding bribery convictions arising from sting operations, federal courts have also implicitly and explicitly rejected the "factual impossibility defense," which the Respondents raise here. Such a defense traditionally applies "when the actions intended are proscribed by the criminal law, but an unknown circumstance or fact prevents the defendant from bringing about the intended result."[41] Most jurisdictions, however, reject factual impossibility as a defense to

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[39] 18 U.S.C. § 201(b)(1)-(2).

[40] *See Lopez v. United States*, 373 U.S. 427, 428-32 (1963) (upholding the conviction of a defendant charged with "attempted bribery," based on the defendant trying to avoid tax liability by giving money to an Internal Revenue Service ("IRS") agent acting as an informant); *United States v. Wright*, 665 F.3d 560, 568 (10th Cir. 2012) (stating, in an honest services fraud case, that "[i]ntent is determinant"); *United States v. Arbelaez*, No. 94-20349, 1995 WL 103637, at *1-2 (5th Cir. Mar. 2, 1995) (affirming a defendant's conviction for bribing an undercover agent posing as an immigration official); *United States v. Opdahl*, 930 F.2d 1530, 1535 (11th Cir. 1991) (stating that it is the undercover agent's "purported role as an IRS official, not his actual status as an internal investigator for the IRS, that is relevant to the issue of the defendant's intent"); *United States v. Pilarinos*, 864 F.2d 253, 253-55 (2d Cir. 1988) (upholding a bribery conviction arising from a sting operation in which there was no actual public official involved); *United States v. Gallo*, 863 F.2d 185, 189 (2d Cir. 1988) (stating, where a bribe was to be passed through a conduit and ultimately to a fictitious "connection in Washington," that "[w]hether or not there was a federal official to whom bribes were actually paid is not determinative" and "the public official who is the target of the bribe . . . need not even exist"); *United States v. Jacobs*, 431 F.2d 754, 757-60 (2d Cir. 1970) (stating that "[t]he statute makes attempted bribery a crime" because "so long as a bribe is 'offered or promised' with the requisite intent 'to influence any official act' the crime is committed").

[41] 22 CORPUS JURIS SECUNDUM § 126 (2017).

inchoate crimes, *i.e.*, attempt, conspiracy, and solicitation.[42] They reason that impossibility is not a defense "when adequate proof of intent to commit a specific crime exists."[43]

Federal courts have embraced this intent-based approach in bribery cases. In *United States v. Hood*, a case in which a politician solicited campaign contributions in exchange for a promise to appoint the contributors to offices that did not exist, the Supreme Court stated, "Whether the corrupt transaction would or could ever be performed is immaterial," and that it is "no less corrupt to sell an office one may never be able to deliver than to sell one he can."[44] Rejecting an impossibility argument based on the public official being an undercover officer, the Second Circuit has similarly stated that there may be a conviction even where the "object of the bribe could not be attained."[45]

Therefore, in situations of political corruption analogous to soliciting illegal contributions from foreign nationals under the Act, federal courts have widely recognized that factual

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[42] *See, e.g.*, *United States v. Temkin*, 797 F.3d 682, 690 (9th Cir. 2015) ("[F]actual impossibility is not a defense to an inchoate offense."); *United States v. Washington*, 106 F.3d 983, 1006 (D.C. Cir. 1997) (explaining that, "but for the fact that the crime was made factually impossible because the 'principals' were really undercover government agents," it would have occurred, making "factual impossibility [ ] no defense"); *United States v. Hamrick*, 43 F.3d 877, 885 (4th Cir. 1995) ("[W]e now join those circuits that have expressly held that [factual impossibility] is not a defense to an attempt crime."); *United States v. Peete*, 919 F.2d 1168, 1175-76 (6th Cir. 1990) (providing, as an example of factual impossibility, a situation in which "a public official induces a payment to achieve some result despite the fact that the official has no actual ability to achieve that result," and stating that factual impossibility would not be a defense in that situation); *United States v. Johnson*, 767 F.2d 673, 675 (10th Cir. 1985) ("Factual impossibility may fall away as a defense to an attempt charge when adequate proof of intent to commit a specific crime exists."); *United States v. Innella*, 690 F.2d 834, 835 (11th Cir. 1982) (stating that impossibility is not a defense when "the defendant's objective actions, taken as a whole, . . . strongly corroborate the required culpability"); *United States v. Oviedo*, 525 F.2d 881, 885 (5th Cir. 1976) (rejecting the impossibility defense when there is evidence of unique acts that "mark the defendant's conduct as criminal in nature," thereby allowing for an inference that the defendant had criminal intent).

[43] *Johnson*, 767 F.2d at 675.

[44] *United States v. Hood*, 343 U.S. 148, 149-51 (1952).

[45] *United States v. Rosner*, 485 F.2d 1213, 1229 (2d Cir. 1973). In another case, the Second Circuit rejected the impossibility defense when real public officials were accepting and receiving corrupt payments from undercover agents. *United States v. Myers*, 692 F.2d 823, 826-28 (2d Cir. 1982).

impossibility is not a defense and that there may be a conviction even when the defendant is engaging in a transaction with an undercover operative or someone who does not exist.[46] Because the plain language of the statute and the legislative history behind it (discussed below) support treating 52 U.S.C. § 30121(a)(2) no differently than the bribery statute or similar inchoate offenses,[47] the Commission can proceed with an enforcement action against those who intend to violate the foreign national solicitation ban, even where the foreign national is fictitious or otherwise an undercover agent.[48]

3. The Legislative History of the Foreign National Prohibition Supports Broad Restrictions on Soliciting Foreign Funds

Reading section 30121(a)(2) to apply to situations in which there is no actual foreign national also comports with the legislative history of the Act. The prohibition on foreign national contributions and solicitations, and Congress's concern about the potential influence of foreign nationals in elections, pre-dates the Act. Congress enacted the first prohibition on

[46] Federal courts have also interpreted state-level bribery statutes in a fashion that makes intent the determinative factor. *See, e.g.*, *United States v. Traitz*, 871 F.2d 368, 386 (3d Cir. 1989) (stating, with respect to Pennsylvania's and New Jersey's bribery statutes, that "[e]ach defendant should be judged by what he thought he was doing and what he meant to do . . ."); *United States v. Mazzio*, 501 F. Supp. 340, 343 (E.D. Pa. 1980) (rejecting an impossibility argument premised on the fact that the person the defendant bribed was an undercover officer). Furthermore, in the Department of Justice's ("DOJ's") first-ever sting operation to enforce the Foreign Corrupt Practices Act ("FCPA"), which criminalizes bribing foreign officials, the D.C. District Court denied a defendant's motion to dismiss the indictment on the grounds that no actual foreign official participated in the FCPA bribery scheme, finding that there may be a conviction when the foreign official was actually an undercover agent. *See* Mot. to Dismiss, *United States v. Goncalves*, No. 09-335 (D.D.C. Mar. 9, 2011), ECF No. 271; Resp., *Goncalves*, No. 09-335 (Mar. 23, 2011), ECF No. 298; Min. Entry, *Goncalves*, No. 09-335 (May 6, 2011). Since the so-called "Africa Sting" case, it does not appear that the DOJ has tried any additional FCPA sting cases.

[47] *See* 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

[48] While the Respondents argue that the Commission, as a policy matter, should not use resources to investigate sting operations, *see* Resp. (MUR 7165) at 2, 9; Resp. (MUR 7196) at 2, 7, courts have recognized that, often, the only way to expose political corruption is to use undercover techniques, *see United States v. Kelly*, 707 F.2d 1460, 1473-74 (D.C. Cir. 1983) ("[C]orruption is 'that type of elusive, difficult to detect, covert crime which may justify . . . undercover activities.'"); *United States v. Jannotti*, 673 F.2d 578, 609 (3d Cir. 1982) (stating that corruption "easily elude[s] detection" without undercover techniques); *Rosner*, 485 F.2d at 1223 (stating that corruption is "hard to detect except by infiltration").

soliciting foreign contributions in 1966 as an amendment to the Foreign Agents Registration Act of 1938 ("FARA"), banning the solicitation of "foreign principals" and the agents of "foreign principals."[49] In 1974, Congress extended FARA to prohibit the solicitation of "foreign nationals," which included a broader category of foreign actors.[50] It then moved the restrictions on foreign contributions and solicitations from FARA to the Act,[51] amending the text most recently with BCRA.[52]

The Commission has explained that the purpose behind the ban on foreign national *contributions* is to "prevent foreign national funds from influencing elections."[53] This goal stems from Congress's concern that foreign participation in U.S. elections would harm "the integrity of the decision-making process of our Government,"[54] because foreign nationals are loyal to their own countries and would use their political influence to support leaders and policies that do not benefit the United States.[55]

However, the fact that the foreign national prohibition extends beyond the acceptance and receipt of foreign national funds in connection with an election to the *solicitation* of a

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[49] Foreign Agents Registration Act Amdts. of 1966, Pub. L. No. 89-486, § 613, 80 Stat. 244, 248-49.

[50] Fed. Elections Campaign Act Amdts. of 1974, Pub. L. No. 93-443, § 613, 88 Stat. 1263, 1269.

[51] Fed. Elections Campaign Act Amdts. of 1976, Pub. L. No. 94-283, § 324, 90 Stat. 475, 493.

[52] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 303, 116 Stat. 81, 96. The Supreme Court has historically upheld exclusions of foreign nationals from activities "intimately related to the process of democratic self-government." *Bluman v. FEC*, 800 F. Supp. 2d 281, 287 (D.D.C. 2011) (quoting *Bernal v. Fainter*, 467 U.S. 216, 220 (1984)), *aff'd*, 565 U.S. 1104 (2012). In *Bluman*, a federal court (affirmed without opinion by the Supreme Court) held that BCRA's prohibition on foreign national contributions was constitutional because it was supported by the government's compelling interest "in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process."

[53] E&J at 69,945.

[54] 111 Cong. Rec. S6984-85 (daily ed. Apr. 5, 1965) (statement of Sen. Fulbright).

[55] *See* 120 Cong. Rec. S4716 (daily ed. Mar. 28, 1974) (statement of Sen. Bentsen).

contribution or promise to contribute, indicates that even the potential for, or the appearance of the potential for, foreign national influence in elections was also a major congressional concern. There are only three instances in which the Act prohibits the solicitation of an entire class of funds in this manner: soft money contributions, contributions from federal contractors, and contributions from foreign nationals.[56]

In considering the purpose of the ban on foreign national solicitations in section 30121(a)(2), the legislative history behind the restrictions on soliciting soft money in BCRA is instructive. BCRA not only created the current restrictions on soliciting soft money, but it also amended the Act to prohibit foreign national contributions, donation, or solicitations "in connection with a Federal, State, or local election"[57] and clarified that the "ban on contributions [by] foreign nationals applies to soft money donations."[58]

The legislative history of BCRA establishes that the prohibitions on soft money, including the ban on soliciting soft money, exist to prevent corruption or even the appearance of corruption. Senator McCain, one of BCRA's sponsors, argued that the solicitation prohibition must exist "to deter the opportunity for corruption to grow and flourish, to maintain the integrity of our political system, and to prevent any appearance that our Federal laws, policies, or

[56] 52 U.S.C. § 30119(a)(2) (federal contractors), § 30121(a)(2) (foreign nationals), § 30125(a)(1), (d), (e)(1) (soft money). There are other provisions of the Act that prohibit certain solicitation tactics, such as coercive solicitations, solicitations based on fraudulent misrepresentations, and solicitations using information obtained from Commission reports, among others, but we are concerned with substantive solicitation bans based on the source of the funds. *See, e.g.*, *id.* §§ 30111(a)(4), 30118(b)(3), 30124(b).

[57] *Compare* 2 U.S.C. § 441e(a) (2000), *with id.* § 441e(a)(1)(A) (2004).

[58] E&J at 69,944 (quoting 148 Cong. Rec. S1991-97 (daily ed. Mar. 18, 2002) (statement of Sen. Feingold)); *see* 148 Cong. Rec. S2774 (daily ed. Mar. 22, 2002) (statement of Sen. Lieberman).

activities can be inappropriately compromised or sold."[59] This concern that the mere act of soliciting large sums of money is enough to create the appearance of corruption, regardless of whether the solicitor ultimately receives any soft money funds, stemmed from various fundraising scandals, including cases that involved contributions and solicitations by foreign nationals.[60]

Applying this same rationale to the foreign national ban, which goes beyond preventing corruption or the appearance of corruption and to the fundamental question of who should be able to participate in our democratic process, the Commission concludes that even the prospect of potential foreign influence in our political system undermines the public's faith in the system and should be prohibited under the circumstances presented here.

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In sum, the Commission may apply 52 U.S.C. § 30121(a)(2) to prohibit all "knowing" solicitations of foreign nationals, regardless of whether the "foreign national" is fictitious. Reading the statute to reach the conduct of individuals who have the requisite intent to solicit foreign money comports with the text of the statute as well as the important policy interests underlying its adoption, and parallels how comparable statutes addressing political corruption have been interpreted. Accordingly, the lack of an actual foreign national in this matter does not prevent the Commission from finding reason to believe that GAP and Beach violated 52 U.S.C.

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[59] 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain); *see also id.* at S2099, S2114, S2116 (statements of Sen. Dodd and Sen. Levin) (echoing Senator McCain's sentiment).

[60] *See* INVESTIGATION OF ILLEGAL OR IMPROPER ACTIVITIES IN CONNECTION WITH 1996 FEDERAL ELECTION CAMPAIGNS, S. REP. NO. 105-167 (1998), https://www.congress.gov/congressional-report/105th-congress/senate-report/167 (discussing findings that the Democratic National Committee ("DNC") solicited and accepted contributions from Chinese foreign nationals); *see also* MUR 4530 (DNC Services Corp./DNC); MUR 4531 (DNC); MUR 4547 (John Huang, *et al.*); MUR 4642 (DNC Services Corp./DNC); MUR 4909 (DNC Services Corp./DNC).

§ 30121(a)(2), provided they had the requisite intent and engaged in activities amounting to solicitation, which we address below.

B. GAP and Beach Knowingly and Willfully Solicited a Foreign National Contribution

The available information shows that there is reason to believe that Beach and GAP solicited a contribution from a foreign national because the three elements that must be present in order to find a violation are present here.[61] Specifically, there was a solicitation, the solicitation was for a contribution or donation,[62] and Beach and Benton believed that the person solicited for the contribution or donation was a foreign national. Further, the available information supports a finding that the violation was knowing and willful.

[61] We include GAP in this finding under an agency theory. A person is the agent of an organization if he or she has "actual authority, either express or implied, to engage in [particular] activities on behalf of" the organization, including making solicitations. *See* 11 C.F.R. §§ 109.3, 300.2(b) (defining "agent" for the coordination and soft money regulations). Beach was clearly an agent of GAP because he was one of its co-chairs and therefore had actual authority to make binding decisions and solicit funds for GAP. *See* Resp. (MUR 7165) at 2; Resp. (MUR 7196) at 2. While Beach's actions alone are enough to impute liability to GAP, it also appears that Benton was an agent of GAP for the purpose of this solicitation, despite the Respondents' assertion to the contrary. *See* Resp. (MUR 7165) at 2-3, 7-8; Resp. (MUR 7196) at 1-3, 6. The *Telegraph* article states that Beach asked Benton to work with the journalists, and that Benton believed he was a "consultant" on the project. Investigative Team Article. Thus, it appears that Benton had at least implied authority to solicit the journalists for GAP.

[62] Because the Respondents have not contested that the alleged solicitation was for a contribution or donation, we do not analyze that prong of the violation.

1. The Respondents Solicited a Contribution

First, the Beach's and Benton's communications with the reporters satisfy the definition of "solicitation." "To solicit" means "to ask, request, or recommend, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value," including by making a communication "that provides a method of making a contribution" or "provides instructions on how or where to send contributions."[63]

Beach was reportedly the first person to speak to the reporters, and during the initial phone call, he reportedly suggested that their client contribute his $2 million to a social welfare organization and that the client could earmark the money for a "'specific purpose.'"[64] Beach then reportedly put the reporters in touch with Benton so that Benton could facilitate their goal.[65] The article also asserts that Beach invited, or approved of Benton inviting, the reporters to GAP's Las Vegas event, where he encouraged them to make the contribution or pledge a contribution by highlighting the credit or influence their client would receive in exchange for $2 million.[66] For example, Beach reportedly stated that when Trump won the election, the client's participation would be "remembered."[67] Such actions constitute a solicitation because

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63 11 C.F.R. § 300.2(m).

64 *See* Investigative Team Article.

65 *Id.* The Respondents claim that after Beach raised doubts about the legality of the proposed contribution, he made a standard business referral to Benton, so that Benton could "facilitate legal avenues to engage in some sort of activity." Resp. (MUR 7165) at 3; Resp. (MUR 7196) at 2-3, 5. However, it appears that Beach knew of and supported the conduit plan, based on the comments he made to the reporters at the Las Vegas event. *See* Investigative Team Article; YouTube Video.

66 *See* Investigative Team Article; YouTube Video.

67 *See* Investigative Team Article. While the Respondents' argue that any statements about the client's influence after making a contribution were "speculation," *see* Resp. (MUR 7165) at 4, 7-9; Resp. (MUR 7196) at 7, it appears that Beach (and Benton, discussed below) presented influence as a promise, *see* Investigative Team Article; YouTube Video.

Beach implicitly recommended that the client make a contribution, offered a reward of sorts for that contribution, and provided instructions on a method for making the contribution.[68]

Similarly, in his in-person meeting with the undercover reporters, Benton reportedly outlined a plan for the Chinese client to pass $2 million through Titan, two 501(c)(4) organizations, and finally to GAP.[69] Then, using the same promises as Beach, he attempted to induce the contribution by offering influence, stating that "we can have that [the fact of the contribution] whispered into Mr. Trump's ear whenever your client feels it's appropriate" and that the contribution would get the client special treatment.[70] In so doing, Benton made a solicitation as defined under the Commission's regulations because he implicitly recommended that the client make a contribution, and he provided a clear "method of making a contribution" or "instructions on how or where to send" the contribution.[71]

The Respondents argue that Benton was not actually soliciting a contribution for GAP; he was soliciting money for the 501(c)(4)s, which would choose on their own how to spend the

[68] *See* 11 C.F.R. § 300.2(m).

[69] Investigative Team Article.

[70] *Id.*; YouTube Video.

[71] 11 C.F.R. § 300.2(m).

funds.[72] Benton's own words as reported in the article, however, directly contradict this argument. According to the article, when the reporters asked Benton how much of the money contributed to the 501(c)(4)s would end up with GAP, he replied, "[A]ll of it."[73] He also added that the contribution would "allow us to spend two million more dollars on digital and television advertising for Mr. Trump."[74] These reported exchanges support the conclusion that Benton's proposal to have the $2 million funneled through the two 501(c)(4) organizations was not intended to fund those organizations' own activities or to be spent at their own discretion. Rather, Benton's recommendation to transfer the money through two layers of conduits was specifically designed to make $2 million in contributions to GAP without revealing that those funds came from a foreign national source.[75]

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[72] *See* Resp. (MUR 7165) at 8-9; Resp. (MUR 7196) at 7. The basis of Respondents' argument here appears to be precedent holding that foreign nationals can participate in issue advocacy and other speech that is not express campaign speech or its functional equivalent, so soliciting a foreign national for a 501(c)(4) might not be illegal. *See Bluman*, 800 F. Supp. 2d at 284 ("[The Act], as we interpret it, does not bar foreign nationals from issue advocacy—that is, speech that does not expressly advocate the election or defeat of a specific candidate."); *see also* Resp. (MUR 7165) at 8; Resp. (MUR 7196) at 7. We need not reach the issue of whether foreign nationals can donate to 501(c)(4)s for the purpose of engaging in issue advocacy or other civic activity without running afoul of the Act, because the transaction Benton proposed was not designed to help the Chinese donor engage in issue advocacy; it was designed to pass the foreign national's money through to an IEOPC, which is a registered political committee specifically created to make independent expenditures, which foreign nationals are clearly barred from making. *See* 52 U.S.C. § 30121(a)(1)(C) (stating that foreign nationals are prohibited from making independent expenditures); *see also id.* § 30101(17) (defining "independent expenditure" as, *inter alia*, an expenditure "expressly advocating the election or defeat of a clearly identified candidate").

[73] YouTube Video.

[74] Investigative Team Article.

[75] The Respondents' argument that Benton was merely "spit balling" ideas and never made a formal pitch is also unavailing. *See* Resp. (MUR 7165) at 8-9; Resp. (MUR 7196) at 7. Over the course of multiple communications, Benton offered only one plan for how the reporters' client should make a contribution. *See* Investigative Team Article.

2. The Respondents Believed the Person they were Soliciting for a Contribution was a Foreign National

As to the final element of the violation, the available information shows that both Beach and Benton believed the person they were soliciting for a contribution was a foreign national. According to the article, during their first contact with Beach, one of the reporters explicitly stated that their client, who wanted to make a contribution to GAP, was not a U.S. national.[76] Beach acknowledged his understanding of this information when he expressed concern about the donor's foreign nationality.[77] It appears that Benton, likewise, understood that the client was a foreign national, discussing with the reporters the legality of, in his words, donations "'originating from a foreign source.'"[78] By proceeding with their discussions with the undercover reporters with explicit knowledge that the client was a foreign national, Beach and Benton evidenced an intent to solicit a contribution or promise to contribute from someone they believed was a foreign source. Accordingly, as there is information that Beach and Benton, acting for GAP, solicited a contribution from a person they believed to be a foreign national, the Commission finds reason to believe that the Respondents violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g).

3. The Violation was Knowing and Willful

Further, it appears that the Respondents' violations were knowing and willful. A violation of the Act is knowing and willful when the respondent acts "with full knowledge of all

[76] Investigative Team Article.

[77] *Id.*

[78] *Id.*

the relevant facts and a recognition that the action is prohibited by law."[79] This standard does not require proving knowledge of the specific statute or regulation the respondent allegedly violated.[80] Rather, it is sufficient to demonstrate that a respondent "acted voluntarily and was aware that his conduct was unlawful."[81] This awareness may be shown through circumstantial evidence, such as a "defendant's elaborate scheme for disguising" her actions, or other "facts and circumstances from which the jury reasonably could infer [the defendant] knew her conduct was unauthorized and illegal."[82]

Based on the *Telegraph* article, there is evidence that Beach and Benton were aware that their conduct was illegal. First, Benton's plan to use conduits to obscure who was involved in the transaction was a "scheme for disguising" the illegality of the foreign national contribution.[83] Benton also commented to the reporters that "[y]ou shouldn't put any of this on paper," and explained that certain actions were going to happen "for the sake of appearances" only.[84] It

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79 122 Cong. Rec. H3778 (daily ed. May 3, 1976).

80 *See United States v. Danielczyk*, 917 F. Supp. 2d 573, 579 (E.D. Va. 2013) (citing *Bryan v. United States*, 524 U.S. 184, 195 & n.23 (1998) (holding that, to establish that a violation is willful, the government needs to show only that the defendant acted with knowledge that her conduct was unlawful, not knowledge of the specific statutory provision violated)).

81 *Id.* (internal quotation marks omitted).

82 *United States v. Hopkins*, 916 F.2d 207, 213-15 (5th Cir. 1990) (internal quotation marks omitted). As the *Hopkins* court noted, "It has long been recognized that 'efforts at concealment [may] be reasonably explainable only in terms of motivation to evade' lawful obligations." *Id.* at 214 (quoting *Ingram v. United States*, 360 U.S. 672, 679 (1959)).

83 *See id.* at 213-15.

84 Investigative Team Article.

therefore appears that Benton was aware that his plan was illegal and was taking steps to conceal it.[85]

Though Beach reportedly reassured the reporters on the phone and in person that any transaction he proposed was legal, and now argues that he was unaware of Benton's suggestions, his statements indicate that he was aware of the scheme and knew that soliciting and accepting the foreign client's money was illegal.[86] For example, Beach suggested obscuring the contribution through a 501(c)(4) "non-disclose entity" in the first instance, reportedly told Benton to avoid "a 'paper trail' of contact," and cautioned the reporters that the contribution should remain undisclosed "'for everyone's benefit.'"[87] Beach also referenced the foreign client "participating" in GAP's activities during the conversation in Las Vegas, which showed that he was aware that the client's contribution would ultimately end up in GAP's account.[88] Finally, Beach referenced the "whole structure" of the scheme that "we're" proposing, suggesting that he was aware of the complex conduit transactions that Benton had designed and was part of Benton's plan.[89] This information supports the conclusion that Beach participated in the illegal solicitation — and efforts to hide it — with knowledge that his activities were unlawful.

In light of these interactions with the reporters, and the above analysis concluding that the absence of an actual foreign national is immaterial to the Respondents' liability, the Commission

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85 *Id.*; *see* 122 Cong. Rec. H3778; *Hopkins*, 916 F.2d 207, 213-15; *Danielczyk*, 917 F. Supp. 2d at 579. While Benton initially claimed that attorneys vetted the transaction and told him it was legal, he later admitted to the reporters that there were "grey areas" and arguments that it was not legal. *See* Investigative Team Article. Benton's subsequent admissions, and his extensive steps to disguise the transaction, outweigh his initial assertions.

86 *See* Investigative Team Article; Resp. (MUR 7165) at 3; Resp. (MUR 7196) at 2-3, 5.

87 Investigative Team Article.

88 *Id.*

89 YouTube Video.

finds reason to believe that Beach and GAP knowingly and willfully violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g) by soliciting a contribution or promise to contribute from a foreign national.[90]

[90] One of the Complaints requests that the Commission refer the Respondents to the DOJ for criminal prosecution. *See* Compl. (MUR 7196) at 5-6. Under the Act, the Commission may make such a referral after a finding of probable cause to believe a knowing and willful violation of the Act has occurred. 52 U.S.C. § 30109(a)(5)(C).

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Jesse Benton MURs: 7165 & 7196

I. INTRODUCTION

These matters were generated by Complaints filed with the Federal Election Commission (the "Commission") by Campaign Legal Center and American Democracy Legal Fund. The Complaints allege that political consultant Jesse Benton knowingly and willfully solicited a contribution from a foreign national in violation of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations. The Complaints base their allegation on an October 24, 2016, article appearing on *The Telegraph UK*'s website, which chronicles how two reporters posed as consultants for a fictitious Chinese donor and discussed a series of transactions with Benton and Eric Beach, a co-chair of Great America PAC ("GAP"), that would allow the donor to indirectly contribute $2 million to GAP. Based on the information contained in the Complaints and the cited article, the Commission finds reason to believe that Benton knowingly and willfully violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g) by soliciting a contribution or a promise to contribute from a foreign national.

II. FACTUAL BACKGROUND

GAP is an independent-expenditure-only political committee ("IEOPC") that supported Donald J. Trump during the 2016 presidential election.[1] Eric Beach was one of GAP's co-chairs.

[1] *See* GAP, Amended Statement of Organization (Mar. 14, 2016); Compl. (MUR 7196) at 2 (Nov. 10, 2016).

Jesse Benton was a strategist for GAP until May 2016, when he resigned and opened an independent political consulting firm, Titan Strategies LLC ("Titan").[2]

According to the *Telegraph* article,[3] two undercover journalists contacted Beach on October 4, 2016, posing as consultants to a fictitious Chinese national allegedly interested in contributing $2 million to GAP.[4] During the initial phone conversation, one of the journalists explained that their "benefactor" was not a U.S. national but wanted to make a donation to support Trump's campaign.[5] Beach reportedly "appeared interested despite raising concerns about [the donor's] nationality and saying he would need to know the donor's identity."[6] Beach also reportedly suggested during this initial phone call that the donation could be "put through a social welfare organization called a 501(c)(4)," which "he described as a 'non-disclose entity' through which the client could make a contribution for a 'specific purpose.'"[7]

After the call, the article asserts that the reporters received an email from Benton with the subject line "From Eric Beach."[8] Benton reportedly described himself as a "consultant" for GAP

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[2] Benton's resignation followed his criminal convictions for, among other things, causing false campaign expenditure reports to be filed and conspiring to do the same, in order to conceal a payment made to an Iowa state senator to endorse Ron Paul's presidential bid. *See* Compl. (MUR 7165) at 2 (Oct. 27, 2016) (citing Maggie Haberman, *A Donald Trump 'Super PAC' is Hit with Leadership Woes*, N.Y. TIMES (May 6, 2016, 12:55 PM), https://www.nytimes.com/politics/ first-draft/2016/05/06/a-donald-trump-super-pac-is-hit-with-leadership-woes/).

[3] Investigative Team, *Exclusive Investigation: Donald Trump Faces Foreign Donor Fundraising Scandal*, TELEGRAPH (Oct. 24, 2016, 8:10 PM), http://www.telegraph.co.uk/news/2016/10/24/exclusive-investigation-donald-trump-faces-foreign-donor-fundrai/ ("Investigative Team Article"). Both Complaints heavily cite this article. *See generally* Compl. (MUR 7165); Compl. (MUR 7196).

[4] Investigative Team Article. The reporters contacted several organizations based on reports that they were "involved in hiding foreign donations." *Id.* GAP was the only group that responded. *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

and stated that "'Eric Beach asked me to reach out.'"[9] Benton explained in the body of the email that Beach "had not wanted a 'paper trail' of contact."[10] Benton then allegedly proposed channeling the $2 million from the Chinese client through his consulting firm, Titan.[11]

As reported in the *Telegraph* article, Benton followed up the email by meeting the undercover reporters at a New York hotel on October 13, 2016, where he laid out his plan in greater detail.[12] Benton allegedly suggested that the Chinese client pay the $2 million to Titan, which Benton could bill as "'a large retainer'" for consulting services, and for which he could provide an invoice "for the sake of 'appearances.'"[13] Titan would then donate the funds evenly to two 501(c)(4) organizations, one of which was run by Beach, and the 501(c)(4)s would pass the money through to GAP.[14] When the reporters asked whether this contribution would ensure that their client "won't just be treated as an another [sic]," Benton said, "It'll do that, yeah."[15] Benton warned the reporters that they "'shouldn't put any of this on paper.'"[16]

The article reports that following a phone call with Beach, Benton also told the reporters that GAP wished to invite them to an event in Las Vegas, Nevada on October 19, 2016, to watch

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9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Pro-Trump Fundraisers Agree to Accept Illicit Foreign Donation*, YOUTUBE, https://www.youtube.com/watch?v=xQnOxM9iqOw (posted Oct. 24, 2016) ("YouTube Video"). The reporters filmed some of their interactions with Beach and Benton and published clips of the footage beside the article. *See* Investigative Team Article. The video footage is no longer available on *The Telegraph*'s website, but a copy is available on YouTube.

16 Investigative Team Article.

the final presidential debate.[17] Benton said he had to "stay away from Vegas" because "'everything that we're doing is legal by the book but there's perceptions and some grey areas.'"[18]

The reporters attended the event, where they spoke to Beach.[19] According to the article, Beach told the reporters, with respect to their client, "'One thing he has to understand is, what you guys have to understand is: you can get credit, but don't overdo it with the influence,'" and he advised them, "'I would just manage [your client's] expectations, say: [Y]ou're going to get credit but your non-disclosed [donation] is not disclosed. Not just for your benefit, but for everyone's benefit.'"[20] At another point, Beach offered, "'[Trump's] going to win the election so, again, I'm not going to twist your arm or anything. I just think that there's no way that [GAP], and you guys have been participating indirectly or directly, won't be remembered.'"[21] He also attempted to reassure the reporters that the contribution was legal, stating, "'It's not illegal, what we're — the whole structure. But it's, you know. I would never let you guys give to the PAC, to give to the c4 because that is illegal.'"[22]

17 *Id.*

18 *Id.*

19 *See id.*

20 *Id.* (alteration in original) (internal quotation marks omitted).

21 YouTube Video.

22 *Id.*

Based on the series of events described in the *Telegraph* article, the Complaints allege that Benton knowingly and willfully solicited a contribution from a foreign national in violation of 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g).[23] Benton did not file a Response.

III. LEGAL ANALYSIS

A. The Scope of the Solicitation Prohibition Reaches Fictitious Foreign Nationals

It is a matter of first impression whether the Act's prohibitions on the solicitation of foreign nationals reach the solicitation of a foreign contributor who is fictitious. The Commission has not addressed this question in any enforcement matters or advisory opinions, and the courts are also silent.[24]

In the absence of any precedent squarely on point, we interpret the Act and form a conclusion based on the plain meaning of section 30121(a)(2), the policy behind the prohibition on foreign national involvement in elections, the Act's other restrictions on soliciting funds, and related anti-corruption statutes. Based on these sources, we believe that the statute and Commission regulations, fairly construed, prohibit an individual from making a solicitation with the intent to violate the ban on foreign national participation in the electoral process, as demonstrated by the individual's awareness of facts that would lead a reasonable person to conclude that, or inquire whether, the contributor is an actual foreign national.

1. The Act and Regulations Support an Intent-Focused Standard

[23] Compl. (MUR 7165) at 7-10; Compl. (MUR 7196) at 1, 4-5.

[24] In MUR 6687 (Obama for America), the Commission dismissed allegations that the Obama campaign solicited foreign nationals for contributions when it emailed a solicitation to "OsamaforObama2012@gmail.com" and allowed a "Bin Laden" solicitation page to be posted to its website, the latter of which resulted in a $3 contribution. Factual & Legal Analysis at 3-4, 8, MUR 6687 (Obama for America). Both the email address and solicitation page were created by journalists conducting a sting operation. *Id.* The Commission dismissed the allegations "to conserve Commission resources," given the *de minimis* amount of money at stake. *Id*. at 8.

A "foreign national" is an individual who is not a citizen of the United States or a national of the United States and who is not lawfully admitted for permanent residence.[25] The Act prohibits foreign nationals from making, directly or indirectly, a contribution or donation, or an express or implied promise to make a contribution or donation, in connection with a federal, state, or local election.[26] The Act also prohibits any person from soliciting, accepting, or receiving a contribution or donation, or a promise to make a contribution or donation, from a foreign national,[27] and the regulations prohibit any person from providing "substantial assistance" in the solicitation of a foreign national.[28]

In relevant part, the precise text of the solicitation ban states that "[i]t shall be unlawful for . . . a person to solicit . . . a contribution or donation . . . from a foreign national."[29] This language creates three elements the Commission must identify in order to find a violation of the statute: (1) that there was a solicitation; (2) that the solicitation was for a contribution or donation; and (3) that the person solicited for the contribution or donation was a foreign national. While the final element here appears to require the presence of an actual foreign national, as described below, courts routinely allow criminal convictions to stand under similarly phrased statutes when one of the actors in the transaction is fictional or an undercover agent.[30] The inquiry focuses on whether the defendant sincerely believed that the undercover agent or

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25 52 U.S.C. § 30121(b)(2); *see also* 11 C.F.R. § 110.20(a)(3)(ii).

26 52 U.S.C. § 30121(a)(1)(A).

27 *Id.* § 30121(a)(2).

28 11 C.F.R. § 110.20(h).

29 52 U.S.C. § 30121(a)(2).

30 *See infra* Section II.A.2.

fictional figure was who he or she purported to be.[31] Thus, under this prevailing interpretation, the final element of a section 30121(a)(2) violation may be satisfied by a showing that the solicitor believed that the subject of the solicitation was a foreign national.

Commission regulations support this interpretation by adding a *mens rea* requirement to the anti-solicitation provision, providing that no person shall "*knowingly* solicit, accept, or receive from a foreign national any contribution or donation" prohibited by the regulations,[32] or "*knowingly* provide substantial assistance in the solicitation, making, acceptance, or receipt" of any prohibited foreign national contribution.[33] In defining "knowingly," the regulations state that the solicitor must have either "actual knowledge" that the person being solicited is a foreign national, "[b]e aware of facts that would lead a reasonable person to conclude that there is a substantial probability that the source of the funds" is a foreign national, or "[b]e aware of facts that would lead a reasonable person to inquire whether the source of the funds . . . is a foreign national," but fail to "conduct a reasonable inquiry."[34] Thus, the solicitor does not need to know for certain that the source of the contribution is a foreign national. Rather, it is sufficient for the solicitor to be aware of facts that suggest that the potential contributor is a foreign national. Accordingly, the regulations seem to acknowledge the possibility that a person may violate the Act when he subjectively believes, or has reason to believe, that he is requesting foreign money.

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31 *See id.*

32 11 C.F.R. § 110.20(g) (emphasis added).

33 *Id.* § 110.20(h) (emphasis added). "Substantial assistance" is "active participation in the solicitation . . . of a foreign national contribution or donation with an intent to facilitate successful completion of the transaction." Contribution Limitations and Prohibitions, 67 Fed. Reg. 69,928, 69,945 (Nov. 19, 2002) ("E&J"). Therefore, in defining "substantial assistance," the Commission has explicitly added another intent-based standard on top of the "knowingly" requirement.

34 11 C.F.R. § 110.20(a)(4).

2. Courts Have Interpreted Other Anti-Corruption Statutes to Make Intent Determinant in Establishing a Violation

As mentioned above, federal courts regularly uphold the criminal convictions of defendants who engage in corrupt transactions with undercover operatives or fictitious parties when there is evidence that the defendant intended to complete the crime. One corruption statute the Commission regards as an analogy to the Act is federal bribery. Senator John McCain noted the parallels between campaign finance law and the bribery statute during the debate on the Bipartisan Campaign Finance Reform Act of 2002 ("BCRA"), stating that BCRA's solicitation prohibitions are "no different from the Federal laws and ethics rules that prohibit Federal officeholders from using their offices or positions of power to solicit money or other benefits."[35]

Specifically, the federal bribery statute prohibits the offer of "anything of value" to a "public official" with intent to "influence any official act," and it similarly prohibits a "public official" from soliciting or accepting "anything of value" in connection with "the performance of any official act."[36] The text of the bribery statute that refers to the presence of a "public official" mirrors the requirement in section 30121(a)(2) that there be a "foreign national" present. Interpreting such a requirement in the bribery context, courts have focused on the defendant's intent to enter into a corrupt transaction as the essential element of the crime, stating that bribery occurs when a person offers or asks for money with the requisite intent to influence an official act, regardless of whether there is no actual public official to be bribed.[37]

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[35] 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

[36] 18 U.S.C. § 201(b)(1)-(2).

[37] *See Lopez v. United States*, 373 U.S. 427, 428-32 (1963) (upholding the conviction of a defendant charged with "attempted bribery," based on the defendant trying to avoid tax liability by giving money to an Internal Revenue Service ("IRS") agent acting as an informant); *United States v. Wright*, 665 F.3d 560, 568 (10th Cir. 2012) (stating, in an honest services fraud case, that "[i]ntent is determinant"); *United States v. Arbelaez*, No. 94-20349, 1995 WL 103637, at *1-2 (5th Cir. Mar. 2, 1995) (affirming a defendant's conviction for bribing an undercover

In upholding bribery convictions arising from sting operations, federal courts have also implicitly and explicitly rejected the "factual impossibility defense." Such a defense traditionally applies "when the actions intended are proscribed by the criminal law, but an unknown circumstance or fact prevents the defendant from bringing about the intended result."[38] Most jurisdictions, however, reject factual impossibility as a defense to inchoate crimes, *i.e.*, attempt, conspiracy, and solicitation.[39] They reason that impossibility is not a defense "when adequate proof of intent to commit a specific crime exists."[40]

Federal courts have embraced this intent-based approach in bribery cases. In *United States v. Hood*, a case in which a politician solicited campaign contributions in exchange for a

agent posing as an immigration official); *United States v. Opdahl*, 930 F.2d 1530, 1535 (11th Cir. 1991) (stating that it is the undercover agent's "purported role as an IRS official, not his actual status as an internal investigator for the IRS, that is relevant to the issue of the defendant's intent"); *United States v. Pilarinos*, 864 F.2d 253, 253-55 (2d Cir. 1988) (upholding a bribery conviction arising from a sting operation in which there was no actual public official involved); *United States v. Gallo*, 863 F.2d 185, 189 (2d Cir. 1988) (stating, where a bribe was to be passed through a conduit and ultimately to a fictitious "connection in Washington," that "[w]hether or not there was a federal official to whom bribes were actually paid is not determinative" and "the public official who is the target of the bribe . . . need not even exist"); *United States v. Jacobs*, 431 F.2d 754, 757-60 (2d Cir. 1970) (stating that "[t]he statute makes attempted bribery a crime" because "so long as a bribe is 'offered or promised' with the requisite intent 'to influence any official act' the crime is committed").

[38] 22 CORPUS JURIS SECUNDUM § 126 (2017).

[39] *See, e.g.*, *United States v. Temkin*, 797 F.3d 682, 690 (9th Cir. 2015) ("[F]actual impossibility is not a defense to an inchoate offense."); *United States v. Washington*, 106 F.3d 983, 1006 (D.C. Cir. 1997) (explaining that, "but for the fact that the crime was made factually impossible because the 'principals' were really undercover government agents," it would have occurred, making "factual impossibility [ ] no defense"); *United States v. Hamrick*, 43 F.3d 877, 885 (4th Cir. 1995) ("[W]e now join those circuits that have expressly held that [factual impossibility] is not a defense to an attempt crime."); *United States v. Peete*, 919 F.2d 1168, 1175-76 (6th Cir. 1990) (providing, as an example of factual impossibility, a situation in which "a public official induces a payment to achieve some result despite the fact that the official has no actual ability to achieve that result," and stating that factual impossibility would not be a defense in that situation); *United States v. Johnson*, 767 F.2d 673, 675 (10th Cir. 1985) ("Factual impossibility may fall away as a defense to an attempt charge when adequate proof of intent to commit a specific crime exists."); *United States v. Innella*, 690 F.2d 834, 835 (11th Cir. 1982) (stating that impossibility is not a defense when "the defendant's objective actions, taken as a whole, . . . strongly corroborate the required culpability"); *United States v. Oviedo*, 525 F.2d 881, 885 (5th Cir. 1976) (rejecting the impossibility defense when there is evidence of unique acts that "mark the defendant's conduct as criminal in nature," thereby allowing for an inference that the defendant had criminal intent).

[40] *Johnson*, 767 F.2d at 675.

promise to appoint the contributors to offices that did not exist, the Supreme Court stated, "Whether the corrupt transaction would or could ever be performed is immaterial," and that it is "no less corrupt to sell an office one may never be able to deliver than to sell one he can."[41] Rejecting an impossibility argument based on the public official being an undercover officer, the Second Circuit has similarly stated that there may be a conviction even where the "object of the bribe could not be attained."[42]

Therefore, in situations of political corruption analogous to soliciting illegal contributions from foreign nationals under the Act, federal courts have widely recognized that factual impossibility is not a defense and that there may be a conviction even when the defendant is engaging in a transaction with an undercover operative or someone who does not exist.[43] Because the plain language of the statute and the legislative history behind it (discussed below) support treating 52 U.S.C. § 30121(a)(2) no differently than the bribery statute or similar inchoate offenses,[44] the Commission can proceed with an enforcement action against those who

41 *United States v. Hood*, 343 U.S. 148, 149-51 (1952).

42 *United States v. Rosner*, 485 F.2d 1213, 1229 (2d Cir. 1973). In another case, the Second Circuit rejected the impossibility defense when real public officials were accepting and receiving corrupt payments from undercover agents. *United States v. Myers*, 692 F.2d 823, 826-28 (2d Cir. 1982).

43 Federal courts have also interpreted state-level bribery statutes in a fashion that makes intent the determinative factor. *See, e.g.*, *United States v. Traitz*, 871 F.2d 368, 386 (3d Cir. 1989) (stating, with respect to Pennsylvania's and New Jersey's bribery statutes, that "[e]ach defendant should be judged by what he thought he was doing and what he meant to do . . ."); *United States v. Mazzio*, 501 F. Supp. 340, 343 (E.D. Pa. 1980) (rejecting an impossibility argument premised on the fact that the person the defendant bribed was an undercover officer). Furthermore, in the Department of Justice's ("DOJ's") first-ever sting operation to enforce the Foreign Corrupt Practices Act ("FCPA"), which criminalizes bribing foreign officials, the D.C. District Court denied a defendant's motion to dismiss the indictment on the grounds that no actual foreign official participated in the FCPA bribery scheme, finding that there may be a conviction when the foreign official was actually an undercover agent. *See* Mot. to Dismiss, *United States v. Goncalves*, No. 09-335 (D.D.C. Mar. 9, 2011), ECF No. 271; Resp., *Goncalves*, No. 09-335 (Mar. 23, 2011), ECF No. 298; Min. Entry, *Goncalves*, No. 09-335 (May 6, 2011). Since the so-called "Africa Sting" case, it does not appear that the DOJ has tried any additional FCPA sting cases.

44 *See* 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

intend to violate the foreign national solicitation ban, even where the foreign national is fictitious or otherwise an undercover agent.

3. The Legislative History of the Foreign National Prohibition Supports Broad Restrictions on Soliciting Foreign Funds

Reading section 30121(a)(2) to apply to situations in which there is no actual foreign national also comports with the legislative history of the Act. The prohibition on foreign national contributions and solicitations, and Congress's concern about the potential influence of foreign nationals in elections, pre-dates the Act. Congress enacted the first prohibition on soliciting foreign contributions in 1966 as an amendment to the Foreign Agents Registration Act of 1938 ("FARA"), banning the solicitation of "foreign principals" and the agents of "foreign principals."[45] In 1974, Congress extended FARA to prohibit the solicitation of "foreign nationals," which included a broader category of foreign actors.[46] It then moved the restrictions on foreign contributions and solicitations from FARA to the Act,[47] amending the text most recently with BCRA.[48]

The Commission has explained that the purpose behind the ban on foreign national *contributions* is to "prevent foreign national funds from influencing elections."[49] This goal

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45 Foreign Agents Registration Act Amdts. of 1966, Pub. L. No. 89-486, § 613, 80 Stat. 244, 248-49.

46 Fed. Elections Campaign Act Amdts. of 1974, Pub. L. No. 93-443, § 613, 88 Stat. 1263, 1269.

47 Fed. Elections Campaign Act Amdts. of 1976, Pub. L. No. 94-283, § 324, 90 Stat. 475, 493.

48 Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 303, 116 Stat. 81, 96. The Supreme Court has historically upheld exclusions of foreign nationals from activities "intimately related to the process of democratic self-government." *Bluman v. FEC*, 800 F. Supp. 2d 281, 287 (D.D.C. 2011) (quoting *Bernal v. Fainter*, 467 U.S. 216, 220 (1984)), *aff'd*, 565 U.S. 1104 (2012). In *Bluman*, a federal court (affirmed without opinion by the Supreme Court) held that BCRA's prohibition on foreign national contributions was constitutional because it was supported by the government's compelling interest "in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process."

49 E&J at 69,945.

stems from Congress's concern that foreign participation in U.S. elections would harm "the integrity of the decision-making process of our Government,"[50] because foreign nationals are loyal to their own countries and would use their political influence to support leaders and policies that do not benefit the United States.[51]

However, the fact that the foreign national prohibition extends beyond the acceptance and receipt of foreign national funds in connection with an election to the *solicitation* of a contribution or promise to contribute, indicates that even the potential for, or the appearance of the potential for, foreign national influence in elections was also a major congressional concern. There are only three instances in which the Act prohibits the solicitation of an entire class of funds in this manner: soft money contributions, contributions from federal contractors, and contributions from foreign nationals.[52]

In considering the purpose of the ban on foreign national solicitations in section 30121(a)(2), the legislative history behind the restrictions on soliciting soft money in BCRA is instructive. BCRA not only created the current restrictions on soliciting soft money, but it also amended the Act to prohibit foreign national contributions, donation, or solicitations "in

50 111 Cong. Rec. S6984-85 (daily ed. Apr. 5, 1965) (statement of Sen. Fulbright).

51 *See* 120 Cong. Rec. S4716 (daily ed. Mar. 28, 1974) (statement of Sen. Bentsen).

52 52 U.S.C. § 30119(a)(2) (federal contractors), § 30121(a)(2) (foreign nationals), § 30125(a)(1), (d), (e)(1) (soft money). There are other provisions of the Act that prohibit certain solicitation tactics, such as coercive solicitations, solicitations based on fraudulent misrepresentations, and solicitations using information obtained from Commission reports, among others, but we are concerned with substantive solicitation bans based on the source of the funds. *See, e.g.*, *id.* §§ 30111(a)(4), 30118(b)(3), 30124(b).

connection with a Federal, State, or local election"[53] and clarified that the "ban on contributions [by] foreign nationals applies to soft money donations."[54]

The legislative history of BCRA establishes that the prohibitions on soft money, including the ban on soliciting soft money, exist to prevent corruption or even the appearance of corruption. Senator McCain, one of BCRA's sponsors, argued that the solicitation prohibition must exist "to deter the opportunity for corruption to grow and flourish, to maintain the integrity of our political system, and to prevent any appearance that our Federal laws, policies, or activities can be inappropriately compromised or sold."[55] This concern that the mere act of soliciting large sums of money is enough to create the appearance of corruption, regardless of whether the solicitor ultimately receives any soft money funds, stemmed from various fundraising scandals, including cases that involved contributions and solicitations by foreign nationals.[56]

Applying this same rationale to the foreign national ban, which goes beyond preventing corruption or the appearance of corruption and to the fundamental question of who should be able to participate in our democratic process, the Commission concludes that even the prospect

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53 *Compare* 2 U.S.C. § 441e(a) (2000), *with id.* § 441e(a)(1)(A) (2004).

54 E&J at 69,944 (quoting 148 Cong. Rec. S1991-97 (daily ed. Mar. 18, 2002) (statement of Sen. Feingold)); *see* 148 Cong. Rec. S2774 (daily ed. Mar. 22, 2002) (statement of Sen. Lieberman).

55 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain); *see also id.* at S2099, S2114, S2116 (statements of Sen. Dodd and Sen. Levin) (echoing Senator McCain's sentiment).

56 *See* INVESTIGATION OF ILLEGAL OR IMPROPER ACTIVITIES IN CONNECTION WITH 1996 FEDERAL ELECTION CAMPAIGNS, S. REP. NO. 105-167 (1998), https://www.congress.gov/congressional-report/105th-congress/senate-report/167 (discussing findings that the Democratic National Committee ("DNC") solicited and accepted contributions from Chinese foreign nationals); *see also* MUR 4530 (DNC Services Corp./DNC); MUR 4531 (DNC); MUR 4547 (John Huang, *et al.*); MUR 4642 (DNC Services Corp./DNC); MUR 4909 (DNC Services Corp./DNC).

of potential foreign influence in our political system undermines the public's faith in the system and should be prohibited under the circumstances presented here.

* * *

In sum, the Commission may apply 52 U.S.C. § 30121(a)(2) to prohibit all "knowing" solicitations of foreign nationals, regardless of whether the "foreign national" is fictitious. Reading the statute to reach the conduct of individuals who have the requisite intent to solicit foreign money comports with the text of the statute as well as the important policy interests underlying its adoption, and parallels how comparable statutes addressing political corruption have been interpreted. Accordingly, the lack of an actual foreign national in this matter does not prevent the Commission from finding reason to believe Benton violated 52 U.S.C. § 30121(a)(2), provided he had the requisite intent and engaged in activities amounting to solicitation, which we address below.

B. Benton Knowingly and Willfully Solicited a Foreign National Contribution

The available information shows that there is reason to believe that Benton solicited a contribution from a foreign national because the three elements that must be present in order to find a violation are present here. Specifically, there was a solicitation, the solicitation was for a contribution or donation, and Benton believed that the person solicited for the contribution or donation was a foreign national. Further, the available information supports a finding that the violation was knowing and willful.

1. Benton Solicited a Contribution

First, Benton's communications with the reporters satisfy the definition of "solicitation." "To solicit" means "to ask, request, or recommend, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value," including by making a communication "that provides a method of making a contribution" or "provides instructions on how or where to send contributions."[57]

During his in-person meeting with the undercover reporters, Benton reportedly outlined a plan for the Chinese client to pass $2 million through Titan, two 501(c)(4) organizations, and finally to GAP.[58] Then, he attempted to induce the contribution by offering influence, stating that "we can have that [the fact of the contribution] whispered into Mr. Trump's ear whenever your client feels it's appropriate" and that the contribution would get the client special treatment.[59] In so doing, Benton made a solicitation as defined under the Commission's

[57] 11 C.F.R. § 300.2(m).

[58] Investigative Team Article.

[59] *Id.*; YouTube Video.

regulations because he implicitly recommended that the client make a contribution, and he provided a clear "method of making a contribution" or "instructions on how or where to send" the contribution.[60]

2. Benton Believed the Person he was Soliciting for a Contribution was a Foreign National

The available information also shows that Benton believed the person he was soliciting for a contribution was a foreign national. According to the article, during their first contact with Beach, one of the reporters explicitly stated that their client, who wanted to make a contribution to GAP, was not a U.S. national.[61] Beach acknowledged his understanding of this information when he expressed concern about the donor's foreign nationality.[62] It appears that Beach later conveyed this information to Benton, because Benton discussed with the reporters the legality of, in his words, donations "'originating from a foreign source.'"[63] By proceeding to discuss a transaction with the undercover reporters with explicit knowledge that the client was a foreign national, Benton evidenced an intent to solicit a contribution or promise to contribute from someone he believed was a foreign source. Accordingly, as there is information that Benton solicited a contribution from a person he believed to be a foreign national, the Commission finds reason to believe Benton violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g).

60 11 C.F.R. § 300.2(m).

61 Investigative Team Article.

62 *Id.*

63 *Id.*

3. The Violation was Knowing and Willful

Further, it appears that Benton's violation was knowing and willful. A violation of the Act is knowing and willful when the respondent acts "with full knowledge of all the relevant facts and a recognition that the action is prohibited by law."[64] This standard does not require proving knowledge of the specific statute or regulation the respondent allegedly violated.[65] Rather, it is sufficient to demonstrate that a respondent "acted voluntarily and was aware that his conduct was unlawful."[66] This awareness may be shown through circumstantial evidence, such as a "defendant's elaborate scheme for disguising" her actions, or other "facts and circumstances from which the jury reasonably could infer [the defendant] knew her conduct was unauthorized and illegal."[67]

Based on the *Telegraph* article, there is evidence that Benton was aware that his conduct was illegal. Benton's plan to use conduits to obscure who was involved in the transaction was a "scheme for disguising" the illegality of the foreign national contribution.[68] Benton also commented to the reporters that "[y]ou shouldn't put any of this on paper," and explained that

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64 122 Cong. Rec. H3778 (daily ed. May 3, 1976).

65 *See United States v. Danielczyk*, 917 F. Supp. 2d 573, 579 (E.D. Va. 2013) (citing *Bryan v. United States*, 524 U.S. 184, 195 & n.23 (1998) (holding that, to establish that a violation is willful, the government needs to show only that the defendant acted with knowledge that her conduct was unlawful, not knowledge of the specific statutory provision violated)).

66 *Id.* (internal quotation marks omitted).

67 *United States v. Hopkins*, 916 F.2d 207, 213-15 (5th Cir. 1990) (internal quotation marks omitted). As the *Hopkins* court noted, "It has long been recognized that 'efforts at concealment [may] be reasonably explainable only in terms of motivation to evade' lawful obligations." *Id.* at 214 (quoting *Ingram v. United States*, 360 U.S. 672, 679 (1959)).

68 *See id.* at 213-15.

certain actions were going to happen "for the sake of appearances" only.[69] It therefore appears that Benton was aware that his plan was illegal and was taking steps to conceal it.[70]

In light of these interactions with the reporters and the above analysis concluding that the absence of an actual foreign national is immaterial to Benton's liability, the Commission finds reason to believe that Benton knowingly and willfully violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g) by soliciting a contribution or promise to contribute from a foreign national.[71]

[69] Investigative Team Article.

[70] *Id.*; *see* 122 Cong. Rec. H3778; *Hopkins*, 916 F.2d 207, 213-15; *Danielczyk*, 917 F. Supp. 2d at 579. While Benton initially claimed that attorneys vetted the transaction and told him it was legal, he later admitted to the reporters that there were "grey areas" and arguments that it was not legal. *See* Investigative Team Article. Benton's subsequent admissions, and his extensive steps to disguise the transaction, outweigh his initial assertions.

[71] One of the Complaints requests that the Commission refer Benton to the DOJ for criminal prosecution. *See* Compl. (MUR 7196) at 5-6. Under the Act, the Commission may make such a referral after a finding of probable cause to believe a knowing and willful violation of the Act has occurred. 52 U.S.C. § 30109(a)(5)(C).