FEDERAL ELECTION COMMISSION
Washington, DC 20463

September 10, 2021

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

American Democracy Legal Fund
455 Massachusetts Avenue, NW
Washington, DC 20001

RE: MUR 7196 (Great America PAC, *et al.*)

Dear Sir or Madam:

This letter is in reference to the complaint that Brad Woodhouse filed on behalf of the American Democracy Legal Fund with the Federal Election Commission ("Commission") on November 10, 2016, alleging violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations by Great America PAC and Dan Backer in his official capacity as treasurer ("GAP"), Eric Beach, and Jesse Benton.

On February 25, 2021, the Commission found that there was reason to believe that GAP and Benton knowingly and willfully violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g). The Commission took no action as to Beach. The Commission then commenced an investigation. On June 23, 2021, the Commission entered into a conciliation agreement with GAP in settlement of its violations, and closed the file as to GAP. A copy of the executed conciliation agreement with GAP is enclosed.

On August 31, 2021, the Commission considered the General Counsel's and the Benton's briefs and did not find probable cause to believe that Benton violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g). Accordingly, the Commission closed the entire file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). The Factual and Legal Analyses, which explain the Commission's reason to believe findings, are enclosed for your information. A Statement of Reasons explaining the Commission's probable cause decision will follow.

The Act allows a complainant to seek judicial review of the Commission's dismissal of part of this action. *See* 52 U.S.C. § 30109(a)(8). If you have any questions, please contact me at (202) 694-1643 or sghosh@fec.gov.

Sincerely,

Saurav Ghosh

Saurav Ghosh

Enclosures:
Factual and Legal Analysis for GAP
Factual and Legal Analysis for Benton
Conciliation Agreement with GAP

MUR719600319

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Great America PAC and Dan Backer in his official capacity as treasurer
MURs: 7165 & 7196

I. INTRODUCTION

These matters were generated by complaints filed with the Federal Election Commission (the "Commission"), which allege that Great America PAC and Dan Backer in his official capacity as treasurer ("GAP") and Jesse Benton — a consultant for GAP 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 describes two reporters posing as consultants for a fictitious Chinese donor and discussing a series of transactions with Eric Beach — one of GAP's co-chairs during the relevant time — and Benton that would allow the donor to contribute $2 million to GAP. Based on the available information, including a video published online with the *Telegraph* article, the Commission finds reason to believe that GAP knowingly and willfully violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g) by soliciting a contribution from a foreign national.

II. FACTUAL BACKGROUND

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

[1] *See* GAP, Amend. Statement of Org. (Mar. 14, 2016).

strategist for GAP until May 2016, when he resigned and opened an independent political consulting firm, Titan Strategies LLC ("Titan").

According to the complaints, undercover journalists contacted Beach posing as representatives of a Chinese national offering to contribute $2 million to GAP.[2] Although the *Telegraph* video does not contain explicit language stating that the representatives' ostensible principal is a foreign national, this is the only inference that can be reasonably drawn from the conversations recorded in the video and respondents have not argued to the contrary. The contact occurred "[i]n or around October 2016" and Beach reportedly stated that he needed information about the donor and "rais[ed] concerns about his nationality," and that he would "need to know the origins" of contributions to GAP.[3] Beach then referred the reporters to Benton,[4] who allegedly met with the reporters and offered to transmit the $2 million contribution to GAP through his company, Titan, and two 501(c)(4) organizations.[5] The reporters recorded their discussions with Benton, and clips of those recordings are shown in the *Telegraph* video, which include the following exchanges between Benton and the reporters:[6]

> Jesse Benton: "I'll actually probably send, I'll send money from my company to both."
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> ***
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> Undercover reporter: "So I'm just thinking also about logistics, how this would actually work. That is the 501(c)(4) that the money is going into — yeah?"

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[2] Compl. at 2-3, MUR 7165 (Oct. 27, 2016); Compl. at 2, MUR 7196 (Nov. 10, 2016); *Pro-Trump Fundraisers Agree to Accept Illicit Foreign Donation*, YOUTUBE, https://www.youtube.com/watch?v=xQnOxM9iqOw (posted Oct. 24, 2016) ("Telegraph Video"). The video is no longer available on the *Telegraph* website, but a copy is available on YouTube.

[3] Nicholas Confessore, *Consultant with Tíes to Donald Trump Linked to Offer to Hide Source of Donations*, N.Y. TIMES (Oct. 24, 2016), https://www.nytimes.com/2016/10/25/us/politics/consultant-with-ties-to-donald-trump-linked-to-offer-to-hide-source-of-donations.html ("NYTimes Article").

[4] NYTimes Article.

[5] MUR 7165 Compl. at 3-4; MUR 7196 Compl. at 3.

[6] Telegraph Video.

Jesse Benton: "Correct."
Undercover reporter: "Yeah. And that's through your company, yeah?"
Jesse Benton: "That's correct."
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Undercover reporter: "How much do you think you can pass on to the super PAC because I think that's what I am going to get asked."
Jesse Benton: "All of it."
Undercover reporter: "All of it?"
[Benton nods his head]
***
Undercover reporter: "Can I report back that it's getting used for on-the-ground grassroots stuff or it's getting used for TV, or could be a mixture?"
Jesse Benton: "It's a mixture."
***
Jesse Benton: "It will definitely allow us to spend two million more dollars on digital and television advertising for Mr. Trump."
Undercover reporter: "Right, and that'll be spent by the super PAC?"
Jesse Benton: "Yes it will be."
***
Jesse Benton: "You shouldn't put any of this on paper."
***
Undercover reporter: "It's not like he's asking for anything directly but he just wants to know that he won't just be treated as 'A N Other' — what do you think?"
Jesse Benton: "It'll do that, yeah."
***
Jesse Benton: "And we can have that whispered into Mr. Trump's ear whenever your client feels it's appropriate."

III. FACTUAL AND LEGAL ANALYSIS

A. The Act and Commission Regulations Prohibit Knowingly Soliciting Foreign National Contributions

The Act and Commission regulations prohibit any "foreign national" from directly or indirectly making a contribution or donation of money or other thing of value, or an expenditure, independent expenditure, or disbursement, in connection with a federal, state, or local election.[7]

[7] 52 U.S.C. § 30121(a)(1); 11 C.F.R. § 110.20(b), (c), (e), (f). Courts have consistently upheld the provisions of the Act prohibiting foreign national contributions on the ground that the government has a clear, compelling interest in limiting the influence of foreigners over the activities and processes that are integral to democratic self-government, which include making political contributions and express-advocacy expenditures.

The Act's definition of "foreign national" includes an individual who is not a citizen or national of the United States and who is not lawfully admitted for permanent residence.[8] Moreover, the Act prohibits any person from soliciting, accepting, or receiving any such contribution or donation from a foreign national,[9] and Commission regulations further prohibit any person from knowingly providing substantial assistance in soliciting, making, accepting, or receiving any such contribution or donation.[10]

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.[11]

In the absence of any precedent squarely on point, the Commission interprets the Act and forms a conclusion based on the plain meaning of section 30121(a)(2), the policy behind the longstanding prohibition on foreign national involvement in elections, the Act's parallel restriction on soliciting soft money, and the interpretation of related federal anti-corruption

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See Bluman v. FEC, 800 F. Supp. 2d 281, 288–89 (D.D.C. 2011), *aff'd* 132 S. Ct. 1087 (2012); *United States v. Singh*, 924 F.3d 1030, 1041–44 (9th Cir. 2019).

[8] 52 U.S.C. § 30121(b)(2).

[9] 52 U.S.C. § 30121(a)(2); *see* 11 C.F.R. § 110.20(g).

[10] 11 C.F.R. § 110.20(h). 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.

[11] 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.

statutes. Accordingly, the Commission concludes that the Act and Commission regulations, fairly construed, prohibit an individual from making a solicitation with the intent to violate the prohibition 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 a foreign national.

The Act, as implemented by the Commission, effectively provides three elements to the foreign national solicitation prohibition: (1) a solicitation; (2) for a contribution or donation in connection with a federal election; (3) from a source that the person making the solicitation knows or reasonably believes to be a foreign national.[12]

1. Plain Meaning of Section 30121

The precise text of the foreign national solicitation prohibition states that "[i]t shall be unlawful for . . . a person to solicit . . . a contribution or donation . . . from a foreign national."[13] The Commission regulation implementing this provision, however, incorporates a *mens rea* element by providing that "[n]o person shall *knowingly* solicit, accept, or receive from a foreign national any contribution or donation."[14]

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

12 52 U.S.C. § 30121(a)(2); 11 C.F.R. § 110.20(g); *see* 11 C.F.R. § 110.20(a)(4).

13 52 U.S.C. § 30121(a)(2).

14 11 C.F.R. § 110.20(g) (emphasis added).

reasonable inquiry."[15] Thus, by implication, the person making a solicitation does not need to know for certain that the target of the solicitation (the potential source of the contribution) is a foreign national. Rather, it is sufficient for the solicitor to be aware of facts that would lead to a reasonable conclusion that the potential contributor is a foreign national, even if that conclusion is ultimately wrong because, *e.g.*, the person being solicited is a U.S. national, or is fictitious. 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. History of the Foreign National Prohibition

The history of the statutory prohibition on foreign national contributions and solicitations further supports the conclusion that the Act prohibits soliciting anyone that the solicitor reasonably believes to be a foreign national.[16] The Commission has explained that the long-standing purpose behind the prohibition on foreign national contributions is to "prevent foreign national funds from influencing elections."[17]

That the Act prohibits not just the provision of foreign national contributions but also the *solicitation* of such contributions indicates that even the appearance of foreign national influence in U.S. elections is a major congressional concern. Viewed in light of that concern, section

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15 *Id.* § 110.20(a)(4).

16 The foreign national prohibition, and Congress's concern about the potential influence of foreigners in U.S. 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"), prohibiting the solicitation of "foreign principals" and the agents of "foreign principals." Foreign Agents Registration Act Amdts. of 1966, Pub. L. No. 89-486, § 613, 80 Stat. 244, 248-49. In 1974, Congress extended FARA to prohibit the solicitation of "foreign nationals," which included a broader category of foreign actors. Fed. Elections Campaign Act Amdts. of 1974, Pub. L. No. 93-443, § 613, 88 Stat. 1263, 1269. It then moved the restrictions on foreign contributions and solicitations from FARA to the Act, Fed. Elections Campaign Act Amdts. of 1976, Pub. L. No. 94-283, § 324, 90 Stat. 475, 493, amending the text most recently with BCRA. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 303, 116 Stat. 81, 96

17 E&J at 69,945.

30121 reaches conduct *intended* to inject foreign influence into the electoral process, even where — because of circumstances unknown to the person engaged in the conduct — there is actually no possibility of such foreign influence resulting from their conduct.

3. The Act's Comparable Soft Money Prohibitions

There are only three instances in which the Act prohibits the solicitation of an entire class of funds: soft money contributions, contributions from federal contractors, and contributions from foreign nationals.[18] In considering the scope of the prohibition on foreign national solicitations in section 30121(a)(2), the legislative history of the soft money prohibition is instructive: The Bipartisan Campaign Finance Reform Act of 2002 ("BCRA") not only created the Act's current restrictions on soliciting soft money, it also amended the Act to prohibit foreign national contributions, donations, or solicitations "in connection with a Federal, State, or local election"[19] and clarified that the "ban on contributions [by] foreign nationals applies to soft money donations."[20]

The Act's foreign national prohibition goes to the fundamental question of who should be able to participate in our democratic process.[21] In light of Congress's decision to broaden the

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[18] 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 prohibitions based on the source of the funds. *See, e.g.*, *id.* §§ 30111(a)(4), 30118(b)(3), 30124(b).

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

[20] 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).

[21] In *Bluman v. FEC*, a federal district court (affirmed without opinion by the U.S. 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." *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).

scope of section 30121 in BCRA, section 30121 forecloses any solicitation of foreign money into the electoral process, even if such a solicitation could not have succeeded because of a circumstance unknown to the person soliciting the contribution or donation.

4. Related Federal Anti-Corruption Laws

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 and reasonably believed he or she could obtain the fruits of the corrupt bargain. For instance, courts routinely uphold such convictions under the federal bribery statute, which prohibits the offer of "anything of value" to a "public official" with intent to "influence any official act," and conversely prohibits a "public official" from soliciting or accepting "anything of value" in connection with "the performance of any official act."[22] The "public official" element of the bribery statute mirrors the "foreign national" element of section 30121(a)(2), and, in interpreting the former, courts have focused on a 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 actually any public official to be bribed.[23]

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[22] 18 U.S.C. § 201(b)(1)-(2). .

[23] *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

For example, in *United States v. Hood*, which involved a politician soliciting campaign contributions in exchange for promises to appoint potential contributors to nonexistent offices, 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."[24] Similarly, the U.S. Court of Appeals for the Second Circuit concluded that a bribery conviction could stand even though the "object of the bribe could not be attained," thereby rejecting the so-called "factual impossibility" defense based on the purported public official seeking the bribe actually being an undercover police officer.[25]

In the context of federal bribery law, federal courts have widely recognized that "factual impossibility" is not a viable defense and that convictions can stand even when the defendant is trying to enter into a corrupt transaction that cannot be completed (often because the person offering or seeking the bribe is an undercover officer and not, in fact, a "public official").[26] Additionally, most jurisdictions reject factual impossibility as a defense to inchoate crimes, *i.e.*,

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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").

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

[25] *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).

[26] 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.

attempt, conspiracy, and solicitation.[27] They reason that impossibility is not a defense "when adequate proof of intent to commit a specific crime exists."[28]

Section 30121, in sum, prohibits all "knowing" solicitations of foreign nationals, whether the person making the solicitation has "actual knowledge" that the person being solicited is a foreign national, or is aware of facts that would lead a reasonable person to conclude that the person being solicited is a foreign national — even if that conclusion is ultimately wrong. Reading the Act to proscribe such conduct comports with section 30121's plain meaning; the longstanding congressional concern, underlying section 30121's enactment, with foreign influence over the U.S. political process; and the interpretation and application of the Act's prohibition of soft money solicitations and the federal bribery statute.

B. GAP, Through its Agent Benton, Solicited a Contribution from a Source that Benton Knew or Reasonably Believed to be a Foreign National

The available information indicates that there is reason to believe that GAP, through its agent Benton, knowingly solicited a contribution from a foreign national because Benton's conduct satisfies the three elements of the statutory prohibition at section 30121(a)(2): Benton,

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[27] *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).

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

acting as GAP's agent, solicited a contribution, and he knew or reasonably believed that he was soliciting a foreign national to provide that contribution.

1. Solicitation

Benton's communications with the reporters indicate that he made a "solicitation" for the Act's purposes. As applicable here, 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,"[29] including by making a communication "that provides a method of making a contribution" or "provides instructions on how or where to send contributions."[30] Furthermore:

> A solicitation is an oral or written communication that, construed as reasonably understood in the context in which it is made, contains a clear message asking, requesting, or recommending that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value. A solicitation may be made directly or indirectly. The context includes the conduct of persons involved in the communication. A solicitation does not include mere statements of political support or mere guidance as to the applicability of a particular law or regulation.[31]

The Commission has also explained that "the Commission's objective standard hinges on whether the recipient should have reasonably understood that a solicitation was made."[32]

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[29] 11 C.F.R. § 110.20(a)(6) (cross-referencing 11 C.F.R. § 300.2(m)).

[30] *Id.* § 300.2(m)(1)(i)-(ii).

[31] *Id.* § 300.2(m).

[32] Solicitation E&J, 71 Fed. Reg. at 13,929 ("[I]t is necessary to reasonably construe the communication in context, rather than hinging the application of the law on subjective interpretations of the Federal candidate's or officeholder's communications or on the varied understandings of the listener. The revised definition reflects the need to account for the context of the communication and the necessity of doing so through an objective test.").

The available information indicates that GAP, through its agent Benton, made a "solicitation" under the Act.[33] The *Telegraph* video indicates that after undercover journalists posing as representatives of a Chinese national contacted Beach offering to contribute $2 million to GAP, Beach referred them to Benton, who was recorded meeting with the reporters to provide them with a specific "method of making a contribution" so that it could not be traced back to their client.[34] Benton told the reporters that he would "send . . . [the] money from my company to both" 501(c)(4) organizations, and confirmed the reporter's queries "about logistics" — *i.e.* that the funds would be passed through Benton's company into the 501(c)(4).[35] Benton also confirmed that "all of it" — meaning the full $2 million that the reporters' client intended to donate — would then be "pass[ed] on to the Super PAC [GAP]" from the 501(c)(4)s.[36]

Benton further confirmed that the money would be provided to GAP for its activities in support of Trump's 2016 presidential candidacy when he told the reporters: "It [the donation] will definitely allow us to spend two million more dollars on digital and television advertising for Mr. Trump."[37] He confirmed the reporter's question that those funds "would be spent by the

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[33] *See* Restatement (Third) of Agency 3d § 300.1 (2006) ("Actual authority . . . is created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent take action on the principal's behalf."); *see also* 11 C.F.R. § 110.20(a)(6) (cross-referencing 11 C.F.R. § 300.2(m)) (prohibiting the solicitation of a foreign national contribution "directly or indirectly") (emphasis added); *cf.* 11 C.F.R. § 300.2(b)(1)(i) (defining "agent" in the context of soft-money rules as "any person who has actual authority, either express or implied, . . . [t]o solicit . . . any contribution, donation, or transfer of funds"). Benton was an agent of GAP for the purposes of this solicitation because, as a consultant for GAP to whom Beach apparently delegated authority to act, he had actual authority to act on GAP's behalf, despite assertions to the contrary. *See* MUR 7165 Resp. at 2-3, 7-8; MUR 7196 Resp. at 1-3, 6.

[34] 11 C.F.R. § 300.2(m)(1)(i).

[35] Telegraph Video.

[36] *Id.*

[37] Telegraph Video.

Super PAC [GAP]."[38] Benton's recorded statements, which provide a detailed plan for the reporters' client to make a contribution to GAP without public disclosure of their client's identity, indicate that he, as an agent of GAP, "ask[ed], request[ed], or recommend[ed], explicitly or implicitly," that the reporter's client make a contribution to GAP.[39]

Benton's statements also contradict any potential argument that he was not actually soliciting a contribution for GAP, but was instead soliciting money for the 501(c)(4)s, which could choose how to spend the funds: When the reporters asked Benton how much of the money would be passed on to the Super PAC, GAP, he told them, "All of it."[40] He also added that the contribution would "allow us to spend two million more dollars on digital and television advertising for Mr. Trump."[41] These statements plainly indicate that Benton's proposal to have the $2 million funneled through 501(c)(4) organizations was not intended to fund those organizations' own activities or to be spent at their discretion, but rather was intended to provide the $2 million contribution to GAP. Accordingly, Benton made a "solicitation" under the Act while acting as an agent of GAP.

2. Contribution or Donation

The available information indicates that Benton sought a "contribution" under the Act. A "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office."[42]

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38 *Id.*

39 11 C.F.R. § 110.20(a)(6) (cross-referencing 11 C.F.R. § 300.2(m)).

40 Telegraph Video.

41 *Id.*

42 52 U.S.C. § 30101(8)(A).

According to the *Telegraph* video, the reporters said that they represented a Chinese national offering to provide a $2 million donation to GAP in support of Trump's 2016 presidential candidacy, which clearly would have constituted a "contribution."

3. Foreign National Source

The available information indicates that Benton "knowingly" solicited a contribution from a foreign national — *i.e.*, he actually knew, or was "aware of facts that would lead a reasonable person to conclude that . . . the source of the funds solicited . . . is a foreign national."[43] The discussions captured in the *Telegraph* video are not consistent with discussion of a lawful domestic contribution, and respondents have suggested no alternative interpretation of those exchanges.[44] Accordingly, there is reason to believe that Benton provided the reporters with a detailed plan for the Chinese national to make a contribution to GAP through his company and two 501(c)(4) organizations.[45] Benton confirmed that "all of" the $2 million would be provided to GAP, and reiterated that the contribution would allow GAP, specifically, to "spend two million more dollars on digital and television advertising for Mr. Trump."[46] Benton also assured the reporters that their client's contribution would have the effect of ensuring he would not be treated as just "A N Other" supporter, but one whose name could be "whispered into Mr. Trump's ear whenever your client feels it's appropriate."[47] Considered together, Benton's statements and proposal to funnel the $2 million contribution to GAP through two layers of

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43 11 C.F.R. § 110.20(a)(4)(ii).

44 Telegraph Video.

45 *Id.*

46 *Id.*

47 *Id.*

conduits — to obscure the true source of those funds — support the inference that Benton knew or was aware of sufficient facts to reasonably conclude that the person being solicited to provide the funds was a foreign national who could not legally make a contribution to GAP or appear on GAP's disclosure reports.

By proceeding with discussions with the undercover reporters with apparent knowledge that their client was a foreign national, Benton evidenced an intent to solicit a $2 million contribution to GAP in support of its electoral activities during the 2016 election from someone he knew or reasonably believed to be a foreign national. That conduct is sufficient to support finding reason to believe GAP, acting through its agent Benton, violated the Act and Commission regulations.

C. There is Reason to Believe the Violations Were Knowing and Willful

The available information indicates 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."[48] This standard does not require proving knowledge of the specific statute or regulation the respondent violated.[49] Rather, it is sufficient to demonstrate that a respondent "acted voluntarily and was aware that his conduct was unlawful."[50] This awareness may be shown through circumstantial evidence, such as a "defendant's elaborate scheme for disguising" her actions, or other "facts and

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[48] 122 Cong. Rec. H3778 (daily ed. May 3, 1976).

[49] *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)).

[50] *Id.* (internal quotation marks omitted).

circumstances from which the jury reasonably could infer [the defendant] knew her conduct was unauthorized and illegal."[51]

Based on the *Telegraph* video, there is evidence that Benton was aware that his conduct was illegal and engaged in an elaborate scheme to conceal it. Benton's plan to use two layers of conduits to obscure the true contributor, whom he believed to be a foreign national, as well as to conceal his role in facilitating the contribution, was an "elaborate scheme for disguising" an illegal foreign national contribution.[52] Moreover, Benton explicitly told the reporters, "You shouldn't put any of this on paper."[53] Benton therefore appears to have known that his plan was illegal and took numerous steps to conceal it.[54]

* * * * *

Accordingly, the Commission finds reason to believe that GAP knowingly and willfully violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g) by knowingly soliciting a contribution from a foreign national.

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[51] *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)).

[52] *Hopkins* at 213-15.

[53] Telegraph Video.

[54] *See* 122 Cong. Rec. H3778; *Hopkins*, 916 F.2d 207, 213-15; *Danielczyk*, 917 F. Supp. 2d at 579.

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"), which allege that Great America PAC and Dan Backer in his official capacity as treasurer ("GAP") and Jesse Benton — a consultant for GAP 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 describes two reporters posing as consultants for a fictitious Chinese donor and discussing a series of transactions with Eric Beach — one of GAP's co-chairs during the relevant time — and Benton that would allow the donor to contribute $2 million to GAP. Based on the available information, including a video published online with the *Telegraph* 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 from a foreign national.

II. FACTUAL BACKGROUND

GAP is an independent-expenditure-only political committee that supported Donald J. Trump during the 2016 presidential election.[1] Beach was one of GAP's co-chairs. Benton was a strategist for GAP until May 2016, when he resigned and opened an independent political consulting firm, Titan Strategies LLC ("Titan").

[1] *See* GAP, Amend. Statement of Org. (Mar. 14, 2016).

According to the complaints, undercover journalists contacted Beach posing as representatives of a Chinese national offering to contribute $2 million to GAP.[2] Although the *Telegraph* video does not contain explicit language stating that the representatives' ostensible principal is a foreign national, this is the only inference that can be reasonably drawn from the conversations recorded in the video. The contact occurred "[i]n or around October 2016" and Beach reportedly stated that he needed information about the donor and "rais[ed] concerns about his nationality," and that he would "need to know the origins" of contributions to GAP.[3] Beach then referred the reporters to Benton,[4] who allegedly met with the reporters and offered to transmit the $2 million contribution to GAP through his company, Titan, and two 501(c)(4) organizations.[5] The reporters recorded their discussions with Benton, and clips of those recordings are shown in the *Telegraph* video, which include the following exchanges between Benton and the reporters:[6]

> Jesse Benton: "I'll actually probably send, I'll send money from my company to both."
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> Undercover reporter: "So I'm just thinking also about logistics, how this would actually work. That is the 501(c)(4) that the money is going into — yeah?"
> Jesse Benton: "Correct."
> Undercover reporter: "Yeah. And that's through your company, yeah?"
> Jesse Benton: "That's correct."
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> ***

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[2] Compl. at 2-3, MUR 7165 (Oct. 27, 2016); Compl. at 2, MUR 7196 (Nov. 10, 2016); *Pro-Trump Fundraisers Agree to Accept Illicit Foreign Donation*, YOUTUBE, https://www.youtube.com/watch?v=xQnOxM9iqOw (posted Oct. 24, 2016) ("Telegraph Video"). The video is no longer available on the *Telegraph* website, but a copy is available on YouTube.

[3] Nicholas Confessore, *Consultant with Tíes to Donald Trump Linked to Offer to Hide Source of Donations*, N.Y. TIMES (Oct. 24, 2016), https://www.nytimes.com/2016/10/25/us/politics/consultant-with-ties-to-donald-trump-linked-to-offer-to-hide-source-of-donations.html ("NYTimes Article").

[4] NYTimes Article.

[5] MUR 7165 Compl. at 3-4; MUR 7196 Compl. at 3.

[6] Telegraph Video.

Undercover reporter: "How much do you think you can pass on to the super PAC because I think that's what I am going to get asked."
Jesse Benton: "All of it."
Undercover reporter: "All of it?"
[Benton nods his head]

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Undercover reporter: "Can I report back that it's getting used for on-the-ground grassroots stuff or it's getting used for TV, or could be a mixture?"
Jesse Benton: "It's a mixture."

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Jesse Benton: "It will definitely allow us to spend two million more dollars on digital and television advertising for Mr. Trump."
Undercover reporter: "Right, and that'll be spent by the super PAC?"
Jesse Benton: "Yes it will be."

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Jesse Benton: "You shouldn't put any of this on paper."

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Undercover reporter: "It's not like he's asking for anything directly but he just wants to know that he won't just be treated as 'A N Other' — what do you think?"
Jesse Benton: "It'll do that, yeah."

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Jesse Benton: "And we can have that whispered into Mr. Trump's ear whenever your client feels it's appropriate."

III. FACTUAL AND LEGAL ANALYSIS

A. The Act and Commission Regulations Prohibit Knowingly Soliciting Foreign National Contributions

The Act and Commission regulations prohibit any "foreign national" from directly or indirectly making a contribution or donation of money or other thing of value, or an expenditure, independent expenditure, or disbursement, in connection with a federal, state, or local election.[7] The Act's definition of "foreign national" includes an individual who is not a citizen or national

[7] 52 U.S.C. § 30121(a)(1); 11 C.F.R. § 110.20(b), (c), (e), (f). Courts have consistently upheld the provisions of the Act prohibiting foreign national contributions on the ground that the government has a clear, compelling interest in limiting the influence of foreigners over the activities and processes that are integral to democratic self-government, which include making political contributions and express-advocacy expenditures. *See Bluman v. FEC*, 800 F. Supp. 2d 281, 288–89 (D.D.C. 2011), *aff'd* 132 S. Ct. 1087 (2012); *United States v. Singh*, 924 F.3d 1030, 1041–44 (9th Cir. 2019).

of the United States and who is not lawfully admitted for permanent residence.[8] Moreover, the Act prohibits any person from soliciting, accepting, or receiving any such contribution or donation from a foreign national,[9] and Commission regulations further prohibit any person from knowingly providing substantial assistance in soliciting, making, accepting, or receiving any such contribution or donation.[10]

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.[11]

In the absence of any precedent squarely on point, the Commission interprets the Act and forms a conclusion based on the plain meaning of section 30121(a)(2), the policy behind the longstanding prohibition on foreign national involvement in elections, the Act's parallel restriction on soliciting soft money, and the interpretation of related federal anti-corruption statutes. Accordingly, the Commission concludes that the Act and Commission regulations, fairly construed, prohibit an individual from making a solicitation with the intent to violate the

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[8] 52 U.S.C. § 30121(b)(2).

[9] 52 U.S.C. § 30121(a)(2); *see* 11 C.F.R. § 110.20(g).

[10] 11 C.F.R. § 110.20(h). 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.

[11] 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.

prohibition 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 a foreign national.

The Act, as implemented by the Commission, effectively provides three elements to the foreign national solicitation prohibition: (1) a solicitation; (2) for a contribution or donation in connection with a federal election; (3) from a source that the person making the solicitation knows or reasonably believes to be a foreign national.[12]

1. Plain Meaning of Section 30121

The precise text of the foreign national solicitation prohibition states that "[i]t shall be unlawful for . . . a person to solicit . . . a contribution or donation . . . from a foreign national."[13] The Commission regulation implementing this provision, however, incorporates a *mens rea* element by providing that "[n]o person shall *knowingly* solicit, accept, or receive from a foreign national any contribution or donation."[14]

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."[15] Thus, by implication, the person making a solicitation does not need to

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12 52 U.S.C. § 30121(a)(2); 11 C.F.R. § 110.20(g); *see* 11 C.F.R. § 110.20(a)(4).

13 52 U.S.C. § 30121(a)(2).

14 11 C.F.R. § 110.20(g) (emphasis added).

15 *Id.* § 110.20(a)(4).

know for certain that the target of the solicitation (the potential source of the contribution) is a foreign national. Rather, it is sufficient for the solicitor to be aware of facts that would lead to a reasonable conclusion that the potential contributor is a foreign national, even if that conclusion is ultimately wrong because, *e.g.*, the person being solicited is a U.S. national, or is fictitious. 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. History of the Foreign National Prohibition

The history of the statutory prohibition on foreign national contributions and solicitations further supports the conclusion that the Act prohibits soliciting anyone that the solicitor reasonably believes to be a foreign national.[16] The Commission has explained that the long-standing purpose behind the prohibition on foreign national contributions is to "prevent foreign national funds from influencing elections."[17]

That the Act prohibits not just the provision of foreign national contributions but also the *solicitation* of such contributions indicates that even the appearance of foreign national influence in U.S. elections is a major congressional concern. Viewed in light of that concern, section 30121 reaches conduct *intended* to inject foreign influence into the electoral process, even where

[16] The foreign national prohibition, and Congress's concern about the potential influence of foreigners in U.S. 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"), prohibiting the solicitation of "foreign principals" and the agents of "foreign principals." Foreign Agents Registration Act Amdts. of 1966, Pub. L. No. 89-486, § 613, 80 Stat. 244, 248-49. In 1974, Congress extended FARA to prohibit the solicitation of "foreign nationals," which included a broader category of foreign actors. Fed. Elections Campaign Act Amdts. of 1974, Pub. L. No. 93-443, § 613, 88 Stat. 1263, 1269. It then moved the restrictions on foreign contributions and solicitations from FARA to the Act, Fed. Elections Campaign Act Amdts. of 1976, Pub. L. No. 94-283, § 324, 90 Stat. 475, 493, amending the text most recently with BCRA. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 303, 116 Stat. 81, 96

[17] E&J at 69,945.

— because of circumstances unknown to the person engaged in the conduct — there is actually no possibility of such foreign influence resulting from their conduct.

3. The Act's Comparable Soft Money Prohibitions

There are only three instances in which the Act prohibits the solicitation of an entire class of funds: soft money contributions, contributions from federal contractors, and contributions from foreign nationals.[18] In considering the scope of the prohibition on foreign national solicitations in section 30121(a)(2), the legislative history of the soft money prohibition is instructive: The Bipartisan Campaign Finance Reform Act of 2002 ("BCRA") not only created the Act's current restrictions on soliciting soft money, it also amended the Act to prohibit foreign national contributions, donations, or solicitations "in connection with a Federal, State, or local election"[19] and clarified that the "ban on contributions [by] foreign nationals applies to soft money donations."[20]

The Act's foreign national prohibition goes to the fundamental question of who should be able to participate in our democratic process.[21] In light of Congress's decision to broaden the scope of section 30121 in BCRA, section 30121 forecloses any solicitation of foreign money into

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[18] 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 prohibitions based on the source of the funds. *See, e.g.*, *id.* §§ 30111(a)(4), 30118(b)(3), 30124(b).

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

[20] 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).

[21] In *Bluman v. FEC*, a federal district court (affirmed without opinion by the U.S. 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." *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).

the electoral process, even if such a solicitation could not have succeeded because of a circumstance unknown to the person soliciting the contribution or donation.

4. Related Federal Anti-Corruption Laws

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 and reasonably believed he or she could obtain the fruits of the corrupt bargain. For instance, courts routinely uphold such convictions under the federal bribery statute, which prohibits the offer of "anything of value" to a "public official" with intent to "influence any official act," and conversely prohibits a "public official" from soliciting or accepting "anything of value" in connection with "the performance of any official act."[22] The "public official" element of the bribery statute mirrors the "foreign national" element of section 30121(a)(2), and, in interpreting the former, courts have focused on a 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 actually any public official to be bribed.[23]

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[22] 18 U.S.C. § 201(b)(1)-(2). .

[23] *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").

For example, in *United States v. Hood*, which involved a politician soliciting campaign contributions in exchange for promises to appoint potential contributors to nonexistent offices, 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."[24] Similarly, the U.S. Court of Appeals for the Second Circuit concluded that a bribery conviction could stand even though the "object of the bribe could not be attained," thereby rejecting the so-called "factual impossibility" defense based on the purported public official seeking the bribe actually being an undercover police officer.[25]

In the context of federal bribery law, federal courts have widely recognized that "factual impossibility" is not a viable defense and that convictions can stand even when the defendant is trying to enter into a corrupt transaction that cannot be completed (often because the person offering or seeking the bribe is an undercover officer and not, in fact, a "public official").[26] Additionally, most jurisdictions reject factual impossibility as a defense to inchoate crimes, *i.e.*,

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

[25] *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).

[26] 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.

attempt, conspiracy, and solicitation.[27] They reason that impossibility is not a defense "when adequate proof of intent to commit a specific crime exists."[28]

Section 30121, in sum, prohibits all "knowing" solicitations of foreign nationals, whether the person making the solicitation has "actual knowledge" that the person being solicited is a foreign national, or is aware of facts that would lead a reasonable person to conclude that the person being solicited is a foreign national — even if that conclusion is ultimately wrong. Reading the Act to proscribe such conduct comports with section 30121's plain meaning; the longstanding congressional concern, underlying section 30121's enactment, with foreign influence over the U.S. political process; and the interpretation and application of the Act's prohibition of soft money solicitations and the federal bribery statute.

B. Benton Solicited a Contribution from a Source that He Knew or Reasonably Believed to be a Foreign National

The available information indicates that there is reason to believe that Benton knowingly solicited a contribution from a foreign national because his conduct satisfies the three elements

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[27] *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).

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

of the statutory prohibition at section 30121(a)(2): Benton solicited a contribution, and he knew or reasonably believed that he was soliciting a foreign national to provide that contribution.

1. Solicitation

Benton's communications with the reporters indicate that he made a "solicitation" for the Act's purposes. As applicable here, 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,"[29] including by making a communication "that provides a method of making a contribution" or "provides instructions on how or where to send contributions."[30] Furthermore:

> A solicitation is an oral or written communication that, construed as reasonably understood in the context in which it is made, contains a clear message asking, requesting, or recommending that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value. A solicitation may be made directly or indirectly. The context includes the conduct of persons involved in the communication. A solicitation does not include mere statements of political support or mere guidance as to the applicability of a particular law or regulation.[31]

The Commission has also explained that "the Commission's objective standard hinges on whether the recipient should have reasonably understood that a solicitation was made."[32]

The available information indicates that Benton made a "solicitation" under the Act. The *Telegraph* video indicates that after undercover journalists posing as representatives of a Chinese

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[29] 11 C.F.R. § 110.20(a)(6) (cross-referencing 11 C.F.R. § 300.2(m)).

[30] *Id.* § 300.2(m)(1)(i)-(ii).

[31] *Id.* § 300.2(m).

[32] Solicitation E&J, 71 Fed. Reg. at 13,929 ("[I]t is necessary to reasonably construe the communication in context, rather than hinging the application of the law on subjective interpretations of the Federal candidate's or officeholder's communications or on the varied understandings of the listener. The revised definition reflects the need to account for the context of the communication and the necessity of doing so through an objective test.").

national contacted Beach offering to contribute $2 million to GAP, Beach referred them to Benton, who was recorded meeting with the reporters to provide them with a specific "method of making a contribution" so that it could not be traced back to their client.[33] Benton told the reporters that he would "send . . . [the] money from my company to both" 501(c)(4) organizations, and confirmed the reporter's queries "about logistics" — *i.e.* that the funds would be passed through Benton's company into the 501(c)(4).[34] Benton also confirmed that "all of it" — meaning the full $2 million that the reporters' client intended to donate — would then be "pass[ed] on to the Super PAC [GAP]" from the 501(c)(4)s.[35]

Benton further confirmed that the money would be provided to GAP for its activities in support of Trump's 2016 presidential candidacy when he told the reporters: "It [the donation] will definitely allow us to spend two million more dollars on digital and television advertising for Mr. Trump."[36] He confirmed the reporter's question that those funds "would be spent by the Super PAC [GAP]."[37] Benton's recorded statements, which provide a detailed plan for the reporters' client to make a contribution to GAP without public disclosure of their client's identity, indicate that he "ask[ed], request[ed], or recommend[ed], explicitly or implicitly," that the reporter's client make a contribution to GAP.[38]

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33 11 C.F.R. § 300.2(m)(1)(i).

34 Telegraph Video.

35 *Id.*

36 Telegraph Video.

37 *Id.*

38 11 C.F.R. § 110.20(a)(6) (cross-referencing 11 C.F.R. § 300.2(m)).

Benton's statements also contradict any potential argument that he was not actually soliciting a contribution for GAP, but was instead soliciting money for the 501(c)(4)s, which could choose how to spend the funds: When the reporters asked Benton how much of the money would be passed on to the Super PAC, GAP, he told them, "All of it."[39] He also added that the contribution would "allow us to spend two million more dollars on digital and television advertising for Mr. Trump."[40] These statements plainly indicate that Benton's proposal to have the $2 million funneled through 501(c)(4) organizations was not intended to fund those organizations' own activities or to be spent at their discretion, but rather was intended to provide the $2 million contribution to GAP. Accordingly, Benton made a "solicitation" under the Act.

2. Contribution or Donation

The available information indicates that Benton sought a "contribution" under the Act. A "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office."[41] According to the *Telegraph* video, the reporters said that they represented a Chinese national offering to provide a $2 million donation to GAP in support of Trump's 2016 presidential candidacy, which clearly would have constituted a "contribution."

3. Foreign National Source

The available information indicates that Benton "knowingly" solicited a contribution from a foreign national — *i.e.*, he actually knew, or was "aware of facts that would lead a reasonable person to conclude that . . . the source of the funds solicited . . . is a foreign

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39 Telegraph Video.

40 *Id.*

41 52 U.S.C. § 30101(8)(A).

national."[42] The discussions captured in the *Telegraph* video are not consistent with discussion of a lawful domestic contribution.[43] Accordingly, there is reason to believe that Benton provided the reporters with a detailed plan for the Chinese national to make a contribution to GAP through his company and two 501(c)(4) organizations.[44] Benton confirmed that "all of" the $2 million would be provided to GAP, and reiterated that the contribution would allow GAP, specifically, to "spend two million more dollars on digital and television advertising for Mr. Trump."[45] Benton also assured the reporters that their client's contribution would have the effect of ensuring he would not be treated as just "A N Other" supporter, but one whose name could be "whispered into Mr. Trump's ear whenever your client feels it's appropriate."[46] Considered together, Benton's statements and proposal to funnel the $2 million contribution to GAP through two layers of conduits — to obscure the true source of those funds — support the inference that Benton knew or was aware of sufficient facts to reasonably conclude that the person being solicited to provide the funds was a foreign national who could not legally make a contribution to GAP or appear on GAP's disclosure reports.

By proceeding with discussions with the undercover reporters with apparent knowledge that their client was a foreign national, Benton evidenced an intent to solicit a $2 million contribution to GAP in support of its electoral activities during the 2016 election from someone

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42 11 C.F.R. § 110.20(a)(4)(ii).

43 Telegraph Video.

44 *Id.*

45 *Id.*

46 *Id.*

he knew or reasonably believed to be a foreign national. That conduct is sufficient to support finding reason to believe Benton violated the Act and Commission regulations.

C. There is Reason to Believe the Violations Were Knowing and Willful

The available information indicates that Benton's 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."[47] This standard does not require proving knowledge of the specific statute or regulation the respondent violated.[48] Rather, it is sufficient to demonstrate that a respondent "acted voluntarily and was aware that his conduct was unlawful."[49] 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."[50]

Based on the *Telegraph* video, there is evidence that Benton was aware that his conduct was illegal and engaged in an elaborate scheme to conceal it. Benton's plan to use two layers of conduits to obscure the true contributor, whom he believed to be a foreign national, as well as to conceal his role in facilitating the contribution, was an "elaborate scheme for disguising" an

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47 122 Cong. Rec. H3778 (daily ed. May 3, 1976).

48 *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)).

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

50 *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)).

illegal foreign national contribution.[51] Moreover, Benton explicitly told the reporters, "You shouldn't put any of this on paper."[52] Benton therefore appears to have known that his plan was illegal and took numerous steps to conceal it.[53]

* * * * *

Accordingly, 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 knowingly soliciting a contribution from a foreign national.

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51 *Hopkins* at 213-15.

52 Telegraph Video.

53 *See* 122 Cong. Rec. H3778; *Hopkins*, 916 F.2d 207, 213-15; *Danielczyk*, 917 F. Supp. 2d at 579.

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Great America PAC and Dan Backer in his official capacity as treasurer	)	MURs 7165 and 7196
	)	
	)	

CONCILIATION AGREEMENT

These matters were initiated by signed, sworn, and notarized complaints submitted by Campaign Legal Center and American Democracy Legal Fund. The Federal Election Commission ("Commission") found reason to believe that Great America PAC and Dan Backer in his official capacity as treasurer ("GAP" or the "Respondents") knowingly and willfully violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g) by soliciting a contribution from a foreign national.

NOW, THEREFORE, the Commission and the Respondents, having participated in informal methods of conciliation, prior to a finding of probable cause to believe, agree as follows:

I. The Commission has jurisdiction over the Respondents and the subject matter of this proceeding, and this agreement has the effect of an agreement entered pursuant to 52 U.S.C. § 30109(a)(4)(A)(i).

II. Respondents have had a reasonable opportunity to demonstrate that no action should be taken in this matter.

III. Respondents enter voluntarily into this agreement with the Commission.

IV. The pertinent facts in this matter are as follows:

1. GAP is a hybrid political committee, or "*Carey* committee," *see Carey v. Federal Election Commission*, 791 F. Supp. 2d 121 (D.D.C. 2011), with a separate,

segregated account used exclusively for independent expenditures that supported Donald J. Trump during the 2016 presidential election. Eric Beach was one of GAP's co-chairs at all relevant times.

2. Jesse Benton was a strategist for GAP until May 2016, when he resigned. He owned and operated an independent political consulting firm, Titan Strategies LLC ("Titan"). Benton remained in contact with Beach after ending his employment with GAP.

3. According to a news article and recorded video published online by the *Telegraph UK*, both of which were cited in the complaints, undercover reporters contacted Beach in the fall of 2016 posing as representatives of a Chinese national — who did not actually exist — who wanted to contribute to GAP. Beach expressed interest but stated that he needed more information about the donor and had concerns about his nationality, and that he would need to know the origins of contributions to GAP. Beach further emphasized, "[A]ny path we recommend is legal."

4. Beach also suggested during this initial phone call that the donation could be directed to a 501(c)(4) organization through which the reporters' purported foreign national client could make a contribution for a specific purpose.

5. Beach referred the reporters to Benton to discuss whether he could potentially help them with their proposed contribution. Benton sent an email introduction to the reporters and later met with them in person. At their meeting, which the reporters recorded, Benton offered to transmit the $2 million contribution through his company, Titan. Benton was recorded meeting with the reporters and recommending to them a specific plan, or "method of making a contribution" without being linked back to their

client. 11 C.F.R. § 300.2(m)(1)(i). Benton was recorded on video telling the reporters that he would "send . . . [the] money from my company to both," referring to two 501(c)(4) organizations, whose names he did not mention at the time, and confirmed that the funds would be passed through Benton's company, Titan, into the 501(c)(4)s. Benton also confirmed that "all of it" — which meant the full $2 million that the reporters' client intended to donate — would then be "pass[ed] on" to "the super PAC" from the 501(c)(4)s. Benton also warned the reporters that they "shouldn't put any of this on paper."

6. The Act and Commission regulations prohibit any "foreign national" from directly or indirectly making a contribution or donation of money or other thing of value, or an expenditure, independent expenditure, or disbursement, in connection with a federal, state, or local election. 52 U.S.C. § 30121(a)(1); 11 C.F.R. § 110.20(b), (c), (e), (f). A "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A).

7. The Act further prohibits any person from soliciting, accepting, or receiving any such contribution or donation from a foreign national. 52 U.S.C. § 30121(a)(2). The Commission's regulation implementing this provision provides that "[n]o person shall *knowingly* solicit, accept, or receive from a foreign national any contribution or donation." 11 C.F.R. § 110.20(g).

8. Commission regulations define "knowingly," to include "actual knowledge" that the person being solicited is a foreign national, "aware[ness] 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 "aware[ness] 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." 11 C.F.R. § 110.20(a)(4).

9. The Act's definition of "foreign national" includes an individual who is not a citizen or national of the United States and who is not lawfully admitted for permanent residence. 52 U.S.C. § 30121(b)(2).

10. 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," 11 C.F.R. § 110.20(a)(6) (cross-referencing 11 C.F.R. § 300.2(m)), including by making a communication "that provides a method of making a contribution" or "provides instructions on how or where to send contributions." *Id.* § 300.2(m)(1)(i)-(ii).

11. Benton made a "solicitation" under the Act, and GAP acknowledges that the Commission has found that Benton did so with GAP's knowledge and on its behalf. Benton's recorded statements, which provide a detailed plan for the reporters' client to make a contribution to a political committee that one of the reporters referred to as "the super PAC" without public disclosure of their client's identity, indicate that he asked, requested, or recommended, explicitly or implicitly, that the reporters' client make a contribution. GAP acknowledges that the Commission has found, based on the context of Beach's referral to Benton and the purpose of Benton's meeting with the reporters, that Benton and the reporters understood "the super PAC" to refer to GAP.

12. Benton's statements and proposal to funnel the $2 million contribution to "the super PAC" through two layers of conduits — to obscure the true source of those funds — indicate that Benton knew or was aware of sufficient facts to reasonably

conclude that the person being solicited to provide funds was a foreign national who could not legally make a contribution to a political committee or appear on its disclosure reports. By proceeding to recommend a plan for the undercover reporters' client to make a contribution to "the super PAC," having been informed that the source of the contribution would be a foreign national, Benton solicited a $2 million contribution from someone he knew or reasonably believed to be a foreign national. GAP acknowledges that the Commission has found that Benton solicited that foreign national contribution for GAP's benefit.

13. Benton engaged in an "elaborate scheme for disguising" a foreign national contribution. *See United States v. Hopkins*, 916 F.2d 207, 214-15 (5th Cir. 1990). Benton was recorded on video explicitly telling the reporters, "You shouldn't put any of this on paper." The foregoing actions and statements reflect that Benton knew that his plan was illegal and that he took steps to conceal it.

14. GAP contends that Benton was an independent political consultant who was not acting as GAP's agent or for GAP's benefit when he performed the acts at issue in this agreement. GAP further contends that Benton attempted to conceal his actions, including from GAP, as shown by his statements to the reporters that GAP's co-chair, Eric Beach, had to be kept "deliberately ignorant" of the "exact arrangements" for the contribution, and that "you shouldn't put any of this on paper." In addition, GAP contends that neither Benton nor the reporters specifically mentioned GAP, but rather referred only to "the super PAC," in their recorded discussions.

V. Solely for the purpose of settling this matter expeditiously and avoiding the expense of litigation, without admission with respect to any other proceeding:

1. Respondents agree not to further contest the Commission's finding that GAP, through Benton's actions on its behalf, violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g) by knowingly soliciting a contribution from a foreign national.

2. Respondents acknowledge that the Commission found reason to believe that these violations were knowing and willful, but do not admit to the knowing and willful aspect of these violations.

3. Respondents will cease and desist from committing further violations of 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g).

4. Respondents will pay a civil penalty to the Commission in the amount of twenty five thousand dollars ($25,000), pursuant to 52 U.S.C. § 30109(a)(5)(B).

VI. The Commission, on request of anyone filing a complaint under 52 U.S.C. § 30109(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this agreement. If the Commission believes that this agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.

VII. This agreement shall become effective as of the date that all parties hereto have executed the same and the Commission has approved the entire agreement.

VIII. Respondents shall have no more than 30 days from the date this agreement becomes effective to comply with and implement the requirements contained in this agreement and to so notify the Commission.

IX. This Conciliation Agreement constitutes the entire agreement between the parties on the matters raised herein, and no other statement, promise, or agreement, either written or

oral, made by either party or by agents of either party, that is not contained in this written agreement shall be enforceable.

FOR THE COMMISSION:

Lisa J. Stevenson
Acting General Counsel

BY: Charles Kitcher 6/28/21
Charles Kitcher Date
Acting Associate General Counsel
for Enforcement

FOR THE RESPONDENTS:

06/08/2021
Dan Backer Date
Counsel for Respondents

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