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Federal Election Commission
Claudio J. Pavia
Office of the General Counsel, Enforcement Division
1050 First Street, NE
Washington, DC 20463

Re: **Matter Under Review 7271**

Dear Mr. Pavia:

We write as counsel to the Democratic National Committee and William Derrough in his official capacity as treasurer (together, “Respondents” or the “DNC”), in response to the Commission’s reason to believe finding in the above referenced matter.

The Factual and Legal Analysis surmises that Alexandra Chalupa, as an agent of the DNC, may have obtained valuable research from the Ukrainian embassy on the Trump campaign and campaign manager Paul Manafort and that Ms. Chalupa “passed on this research to DNC officials.”¹ This is incorrect. Ms. Chalupa had a small contract with the DNC to do constituency organizing and was not engaged in any prohibited collection of research from foreign sources on the DNC’s behalf. Despite no evidence that Ms. Chalupa’s purported research either constituted a quantifiable thing of value or was on behalf of the DNC, the Commission baselessly concludes that the DNC may have solicited, accepted, or received an in-kind contribution from a foreign national.² The Commission provides *no* specific support for this conclusion.

The Commission bases its reason to believe finding on the Complaint’s interpretation of unsupported claims by unnamed sources published by a single news story, a story that relied heavily on private emails stolen by a hostile foreign power.³ Even if the Commission accepts those claims as true — an exercise that frankly ignores the widespread disinformation campaign that shaped the 2016 election and Commission precedent on standards for evaluating unsupported allegations — those claims do not support the conclusion that the DNC in any way solicited, accepted, or received an in-kind contribution from a foreign national. The allegations that the DNC was soliciting Ukrainian nationals for opposition research has been repeatedly

¹ MUR 7271, Factual and Legal Analysis (Democratic National Committee) at 1 (hereinafter “F&LA”).

² *Id.*

³ See Kenneth P. Vogel and David Stern, *Ukrainian Efforts to Sabotage Trump Backfire*, POLITICO (Jan. 11, 2017), available at <https://www.politico.com/story/2017/01/ukraine-sabotage-trump-backfire-233446>.

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denied and debunked.⁴ Even the author of the article in question has clarified that Ms. Chalupa was not representing the DNC in meeting with Ukrainian officials.⁵ Moreover, there is currently a swirl of disputed legal standards and the need for regulatory clarification on this issue among current Commissioners and the Department of Justice at a time when President Trump is actually and publicly requesting foreign meddling in our elections. Accordingly, Respondents respectfully request that the Commission, upon attaining the necessary quorum to consider enforcement matters, immediately reconsider its earlier determination, determine that no further action is appropriate against the DNC in this matter, and close the file.

I. There is No Evidence that the DNC Solicited, Accepted, or Received Contributions from a Foreign National

The Commission's policy on the enforcement process says that it will find reason to believe when a complaint "credibly alleges that a significant violation may have occurred[.]"⁶ Neither the Complaint nor the Commission's findings provide a single credible allegation that the DNC violated the law.

The Commission concludes that the DNC "may have been aware" or assented to Ms. Chalupa's purported research regarding Mr. Manafort based on two allegations: (1) information possessed by the Commission that, at the request of a DNC official, Ms. Chalupa asked the Ukrainian Embassy if President Poroshenko could field a question about Mr. Manafort at a press conference;⁷ and (2) a statement made to the press by another unnamed source who described Ms. Chalupa sharing information about Mr. Manafort and the Trump campaign with the DNC following Mr. Manafort's hiring by the campaign.⁸ Even if these statements are taken at face value, the described activities do not amount to contributions solicited or accepted by the DNC.

The Federal Election Campaign Act of 1971, as amended (the "Act") defines "contribution" as "any gift . . . of money or anything of value made by any person for the purpose of influencing

⁴ See Bill McCarthy, *Fact-checking Charlie Kirk's misleading tweet about Democrats, Ukraine*; POLITIFACT (Oct. 3, 2019), available at <https://www.politifact.com/punditfact/statements/2019/oct/03/charlie-kirk/fact-checking-charlie-kirks-misleading-tweet-about/>; Dan Merica, *First on CNN: Former DNC contractor denies working with Ukrainian officials on anti-Trump research*, CNN (July 14, 2017), available at <https://www.cnn.com/2017/07/14/politics/dnc-contractor-ukraine-alexandra-chalupa-trump/index.html>.

⁵ See Kenneth P. Vogel Twitter (July 12, 2017) ("1 more pt: DNC consultant WAS NOT repping DNC in mtgs with [Ukrainian flag] officials, while DJT, Jr. WAS repping Dad's campaign in mtg w/ [Russia flag]-linked atty."), available at <https://twitter.com/kenvogel/status/885181638929526785>.

⁶ See 72 F.R. 12545, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process (Mar. 16, 2007).

⁷ The allegation that Ms. Chalupa asked Ukrainian Embassy staff to try to arrange an interview in which then-Ukrainian president Petro Poroshenko "might discuss Manafort's ties to Yanukovich" is merely a hyperbolic description of this same claim.

⁸ F&LA at 8-9.

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any election for Federal office.”⁹ “Anything of value” encompasses “the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services[.]”¹⁰ The Commission’s Factual and Legal Analysis provides that a contribution may result from receiving information from a foreign national “as opposed to purchasing the information at the usual and normal charge[.]”¹¹ Chair Weintraub’s recent statement attempting to clarify the Commission’s interpretation of the foreign national ban likewise states that:

[A]lthough goods or services provided at the usual and normal charge do not constitute a contribution under the Act, soliciting, accepting, or receiving information in connection with an election from a foreign national, *as opposed to purchasing the information at the usual and normal charge* or hiring a foreign national in a bona fide commercial transaction to perform services for a federal campaign, could potentially result in the receipt of a prohibited in-kind contribution.¹²

The alleged “solicitations” in this matter — in the form of requesting a question be asked at a press conference — do not amount to soliciting information, much less the type of information that would be quantifiable to assess a usual and normal charge for its value. There is no “usual and normal charge” to submitting a question at a press conference, and these activities cannot result in contributions. For example, in Advisory Opinion 2007-22 (Hurysz), the Commission specifically approved a candidate’s plans to consult with Canadian citizens to learn about their election activities without providing payment.¹³

The Factual and Legal Analysis further asserts that unnamed sources described Ms. Chalupa as having had “shared information” about Mr. Manafort and the Trump campaign with the DNC following Mr. Manafort’s hiring by the campaign.¹⁴ But to the extent that Ms. Chalupa ever discussed Mr. Manafort’s dealings in the Ukraine with DNC staff, there is no evidence to suggest or reason to believe that any such information came from a foreign source as opposed to public reporting from the time.

Even more significantly, neither the Complaint nor the Factual and Legal Analysis has any substantiation for the proposition that the DNC had Ms. Chalupa solicit or obtain items of value from foreign nationals on its behalf; indeed, the Commission essentially ignores Ms. Chalupa’s plain statement of fact that she “was not an opposition researcher for the DNC, and the DNC

⁹ 52 U.S.C. § 30101(8)(A)(i).

¹⁰ 11 C.F.R. § 100.52(d)(2).

¹¹ F&LA at 6.

¹² See Draft Interpretive Rule Concerning Prohibited Activities Involving Foreign Nationals (Sept. 26, 2019) (emphasis added), available at https://www.fec.gov/resources/cms-content/documents/mtgdoc_19-41-A.pdf.

¹³ Advisory Opinion 2007-22 (Hurysz).

¹⁴ F&LA at 9.

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never asked me to go to the Ukrainian Embassy to collection information.”¹⁵ Similarly, the Factual and Legal Analysis glosses over the fact that a former DNC staffer told Politico, “We were not directing or driving [Ms. Chalupa’s] work on this.”¹⁶

Even if Ms. Chalupa’s activities did amount to solicitations of foreign nationals, she did not perform those activities as an agent of the DNC. As the DNC explained, Ms. Chalupa was an independent contractor who was retained in order to engage in outreach to American ethnic communities and support the DNC Ethnic Council.¹⁷ She was not a researcher, and her contract with the DNC specifically prohibited her from soliciting anything from foreign nationals in the scope of her consultancy.¹⁸

Inexplicably, the Factual and Legal Analysis turns a blind eye to the legally binding terms of the contract and direct denial from Ms. Chalupa herself that any research she conducted was done on behalf of the DNC in favor of spurious conjecture of “indirect signals.”¹⁹ Notably, the Factual & Legal Analysis fails to provide any particular finding of such an “indirect signal” apart from vague and unsupported accusations by unknown sources that the DNC may have encouraged her activities.

The Commission acknowledges that the Complaint relies “exclusively upon a January 11, 2017, *Politico* article” and specifically unnamed sources for the central facts of this matter.²⁰ In the past, Commissioners have declined to rely on press reports, noting the low probative value of such sources, and a “hearsay press article” cannot provide a basis for an enforcement action here.²¹ This case illustrates exactly why that is sound policy. *The article’s author himself has stated that Ms. Chalupa was not representing the DNC in meetings with officials.*²² If the Commission interpreted anything in the article to imply the contrary, it was simply incorrect. The allegation of the DNC’s involvement has also been debunked by Politifact’s analysis of the article, which concluded “[t]here’s no evidence that the DNC was working directly with

¹⁵ Michelle Ye Hee Lee, *The White House’s Facile Comparison of the Trump-Russia and Clinton-Ukraine Stories*, WASH. POST (July 25, 2017), available at <https://www.washingtonpost.com/news/fact-checker/wp/2017/07/25/the-white-houses-facile-comparison-of-the-trump-russia-and-clinton-ukraine-stories/>.

¹⁶ F&LA at 3, n.12

¹⁷ DNC Response at 2-3.

¹⁸ *Id.* at 4.

¹⁹ F&LA at 10.

²⁰ *Id.* at 1.

²¹ *See, e.g.*, Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman, Matters Under Review 6470, 6482, 6484 (Free and Strong America PAC, *et al.*) at 7 (March 30, 2016) (declining to provide evidentiary weight to a “hearsay press article”); Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter, Matter Under Review 6928 (Richard John “Rick” Santorum, *et al.*) at 9-10 (May 20, 2019) (noting the limited probative value of news articles reporting the unsworn accounts of third parties).

²² *See* Vogel tweet, *supra* note 5.

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Ukraine's government."²³ The article the Commission cites so extensively is also based in large part on hacked emails stolen by a foreign actor.²⁴ As two Commissioners recently wrote, "[w]e are concerned . . . that reliance on information made available only as the result of a foreign intelligence operation to inform our decision . . . would be incompatible with our responsibility as Commissioners to help 'preserve the basic conception of [an American] political community.' Further, such use might encourage similar violations of U.S. law in the future."²⁵

Thus, because both the Complaint and Factual and Legal Analysis fail to present sufficient facts to show that Ms. Chalupa solicited or received anything from Ukraine or its citizens on behalf of the DNC, the Commission should reconsider its finding and close the file.

II. Clear Determinations from the Commission are Needed on the Foreign National Ban

We are submitting this Response against the backdrop of an ongoing investigation into credible allegations that the President of the United States used the power of his office, and the threat of withholding foreign aid, to pressure the leader of Ukraine to take formal action against a political opponent to influence the 2020 presidential election.²⁶ There is, very simply, no equivalence between this conduct at the center of an impeachment investigation and asking a question regarding publicly reported facts at a press conference. Nevertheless, the Commission is considering the same statutory provisions, and given the investigation against President Trump, there appears to be substantial questions about the contours of the provision. For example, reports have recently surfaced that the Department of Justice declined to find that the allegations against President Trump amounted to a prosecutable campaign finance violation.²⁷ Indeed, the Commission's interpretation of the foreign national ban is the subject of currently ongoing debates among the remaining Commissioners. Chair Weintraub recently issued a draft interpretation of the foreign national rule, illustrating the need for clear guidance and interpretation. Moreover, it is not at all clear that the current Commission even agrees with the

²³ See *McCarthy*, *supra* note 4.

²⁴ See Vogel and Stern, *supra* note 3 (discussing statements made in hacked private emails released by Wikileaks).

²⁵ Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter, Matters Under Review 6940, 7097, 7146, 7160, 7193 (*Correct the Record*, *et al.*) at 8 (Aug. 21, 2019) (internal citation omitted).

²⁶ See, e.g., Brian Slodysko, *How Trump's Ukraine call could violate campaign finance laws*, WASH. POST (Sept. 25, 2019), available at https://www.washingtonpost.com/politics/how-trumps-ukraine-call-could-violate-campaign-finance-laws/2019/09/25/ed86361e-dfe9-11e9-be7f-4cc85017c36f_story.html.

²⁷ See Matt Zapotosky and Devlin Barrett, *Justice Dept. rejected investigation of Trump phone call just weeks after it began examining the matter*, WASH. POST (Sept. 25, 2019), available at https://www.washingtonpost.com/national-security/justice-dept-rejected-investigation-of-trump-phone-call-just-weeks-after-it-began-examining-the-matter/2019/09/25/6f7977ce-dfb5-11e9-8dc8-498eabc129a0_story.html (quoting a Justice Department official's statement that "If you cannot quantify what the thing of value would be, then it's fatal[.]").

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Chair's interpretation.²⁸ And yet, the Commission currently lacks a quorum and thus has no ability to take any action as a body at this time.

In light of the muddled nature of the Commission's and the Department of Justice's interpretations of the foreign national ban, it would be manifestly unfair for the Commission to now determine, during an enforcement matter and without any prior notice to the regulated community, that the foreign national ban prohibits even *asking a question*.²⁹ It is also not practicable to proceed with an enforcement proceeding at this time without a functioning Commission able to re-evaluate what we believe was an error in this case or conduct any of the other business, such as determining the proper scope of an investigation or contours of potential conciliation, necessary to any matter under review at this stage.

For these reasons, Respondents respectfully request that upon again obtaining a quorum, the Commission determine clear rules in this area of law, reconsider its unsupported findings in this matter, find that no further action is appropriate against the DNC, and close the file on this matter.

Very Truly Yours,



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Antoinette M. Fuoto

Counsel to Democratic National Committee

²⁸ See Statement of Commissioner Caroline C. Hunter on Consideration of Matters without a Quorum (Oct.1, 2019) (stating that she will not participate in discussions regarding the draft interpretative rule).

²⁹ See Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter, Matter Under Review 5724 (Jim Feldkamp for Congress) (Dec. 11, 2009) (stating that the law on familial gifts had become "hopelessly muddled" and that "respect for due process and fundamental fairness demand[ed]" that the Commission not penalize a respondent until it "articulate[d], either by rule or through policy statement, the permissible boundaries" of the law); Statement of Reasons of Chair Ellen L. Weintraub, Vice Chairman Matthew S. Petersen, and Commissioners Caroline C. Hunter and Steven T. Walther in Matters Under Review 7263 (Luke Messer) and 7264 (Todd Rokita) (June 20, 2019) (rejecting the Office of the General Counsel's recommendation to investigate based in part on "lack of explicit guidance" on a specific issue).