

1 **FEDERAL ELECTION COMMISSION**

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3 **FIRST GENERAL COUNSEL'S REPORT**

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5 **MUR: 7523**

6 DATE COMPLAINT FILED: Oct. 22, 2018

7 DATE OF NOTIFICATION: Oct. 24, 2018

8 DATE OF LAST RESPONSE: Dec. 18, 2018

9 DATE ACTIVATED: Mar. 5, 2019

10 EARLIEST EXPIRATION OF SOL: April 1, 2023

11 LATEST EXPIRATION OF SOL: June 1, 2023

12 ELECTION CYCLE: 2018

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15 **COMPLAINANT:**

Yes for Responsible Mining

16 **RESPONDENTS:**

17 Stop I-186 to Protect Mining and Jobs

18 Sandfire Resources America, Inc.

19 Sandfire Resources, NL

20 Montana Mining Association

21 **RELEVANT STATUTES  
22 AND REGULATIONS:**

23 52 U.S.C. § 30101(1)

24 52 U.S.C. § 30118

25 52 U.S.C. § 30121

26 52 U.S.C. § 30125(e)

27 11 C.F.R. § 100.2(a)

28 11 C.F.R. § 110.20(a)(3)(ii), (b), (g)

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30 **INTERNAL REPORTS CHECKED:**

Disclosure Reports

31  
32 **FEDERAL AGENCIES CHECKED:**

None

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34 **I. INTRODUCTION**

35 The Complaint in this matter alleges that Sandfire Resources America, Inc. (“Sandfire”)  
36 and Sandfire Resources NL (“Sandfire NL”) violated the Federal Election Campaign Act of  
37 1971, as amended (the “Act”), by making prohibited foreign national donations to the Montana  
38 Mining Association (“MMA”) and Stop I-186 to Protect Mining and Jobs (“Stop I-186”) for the  
39 purpose of opposing a Montana ballot initiative that the Complaint states would “increase  
40 [Montana’s] ability to deny permits for hardrock mines . . . to avoid polluting the state’s

1 waters.”<sup>1</sup> The Complaint further alleges that MMA and Stop I-186 also violated the Act by  
2 knowingly accepting such donations.<sup>2</sup>

3 Respondents do not dispute the facts alleged in the Complaint but make the legal  
4 argument that ballot initiatives are not “elections” under the Act and that, therefore, the Act’s  
5 foreign national prohibition does not apply to their activities.<sup>3</sup>

6 As discussed below, the history of Congress’s changes to the Act’s foreign national  
7 provision and more recent Commission precedent concerning that provision indicate that,  
8 contrary to Respondents’ argument, 52 U.S.C. § 30121 applies to the donations at issue from  
9 Sandfire and Sandfire NL to MMA and Stop I-186 that were made for the purpose of influencing  
10 a ballot initiative, because that initiative falls within the scope of “election” as used in section  
11 30121. Nonetheless, because of the state of guidance from the Commission at the time of the  
12 donations at issue in this matter, including in light of this Office’s recommendations and the  
13 Commission’s split in MUR 6678 (MindGeek),<sup>4</sup> we recommend that the Commission decline to  
14 pursue enforcement against Respondents for these apparent violations. Accordingly, we  
15 recommend that the Commission dismiss the allegations that Sandfire and Sandfire NL violated  
16 52 U.S.C. § 30121 by making prohibited foreign national donations. Similarly, we recommend  
17 that the Commission dismiss the allegations that MMA and Stop I-186, the committees receiving  
18 the donations, violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g) by accepting  
19 prohibited foreign national donations.

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<sup>1</sup> Compl. at 2 (Oct. 22, 2018).

<sup>2</sup> *Id.*

<sup>3</sup> Sandfire Resp. at 1 (Dec. 17, 2018); MMA Resp. at 4 (Dec. 18, 2018). Ballot initiatives are also sometimes called ballot measures, propositions, or referendum. For purposes of this report, we use the terms interchangeably to include all questions put to the voters on a ballot other than the election of a candidate for office.

<sup>4</sup> MUR 6678 (MindGeek USA, Inc., *et al.*).

## 1    **II.    FACTUAL BACKGROUND**

2            The November 2018 election ballot in Montana included I-186, a ballot initiative that the  
3    Complaint asserts would have created additional regulation on water pollution by hardrock mines  
4    within the state.<sup>5</sup> In the eight months leading up to the election, Sandfire, a Canadian subsidiary  
5    of an Australian company, Sandfire NL,<sup>6</sup> made \$270,000 in donations to the MMA, an  
6    “incidental committee” established for the purpose of opposing I-186,<sup>7</sup> and on April 4, 2018,  
7    Sandfire made a \$17,857 donation to a state ballot issue committee, Stop I-186.<sup>8</sup> The Complaint  
8    alleges that Sandfire NL is the source of the donations made by Sandfire, asserting that  
9    “[a]ccording to its public filings, Sandfire Resources America has no sources of revenue in the  
10    United States, and a cash flow of zero.”<sup>9</sup>

11            While there were candidates, including federal candidates, on the same ballot as the  
12    initiative, the available information does not indicate that any of those candidates was linked to  
13    the ballot initiative beyond appearing on the same ballot.

## 14    **III.    LEGAL BACKGROUND**

15            The Act and Commission regulations prohibit any “foreign national” from directly or  
16    indirectly making a contribution or donation of money or other thing of value, or an expenditure,  
17    independent expenditure, or disbursement, in connection with a federal, state, or local election.<sup>10</sup>

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<sup>5</sup> Compl. at 2.

<sup>6</sup> *Id.* at 3.

<sup>7</sup> *Id.* Under Montana law, “incidental committee” means a political committee that is not specifically organized or operating for the primary purpose of supporting or opposing candidates or ballot issues but that may incidentally become a political committee by receiving a contribution or making an expenditure. *See* MCA 13-1-101(22)(a).

<sup>8</sup> Compl. at 3; *see* MCA 13-1-101(7) (defining “ballot issue committee”).

<sup>9</sup> Compl. at 3.

<sup>10</sup> 52 U.S.C. § 30121(a)(1); 11 C.F.R. § 110.20(b), (c), (e), (f).

1 The Act's definition of "foreign national" includes an individual who is not a citizen or national  
2 of the United States and who is not lawfully admitted for permanent residence as well as a  
3 "foreign principal" as defined at 22 U.S.C. § 611(b), which, in turn, includes a "partnership,  
4 association, corporation, organization, or other combination of persons organized under the laws  
5 of or having its principal place of business in a foreign country."<sup>11</sup> The Act also prohibits any  
6 person from soliciting, accepting, or receiving a contribution or donation from a foreign  
7 national.<sup>12</sup>

8 In affirming the constitutionality of the Act's ban on foreign national contributions, the  
9 court in *Bluman v. FEC* held:

10 It is fundamental to the definition of our national political  
11 community that foreign citizens do not have a constitutional right  
12 to participate in, and thus may be excluded from, activities of  
13 democratic self-government. It follows, therefore, that the United  
14 States has a compelling interest for purposes of First Amendment  
15 analysis in limiting the participation of foreign citizens in activities  
16 of American democratic self-government, and in thereby  
17 preventing foreign influence over the U.S. political process.<sup>13</sup>

18 The Commission has explained that "[s]uch exclusion 'is part of the sovereign's obligation to  
19 preserve the basic conception of a political community.'"<sup>14</sup>

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<sup>11</sup> 52 U.S.C. § 30121(b); 22 U.S.C. § 611(b)(3); *see also* 11 C.F.R. § 110.20(a)(3).

<sup>12</sup> 52 U.S.C. § 30121(a)(2). Commission regulations employ a "knowingly" standard. 11 C.F.R. § 110.20(g). A person knowingly solicits, accepts, or receives a prohibited foreign national contribution or donation if that person has actual knowledge that funds originated from a foreign national, is aware of facts that would lead a reasonable person to conclude that there is a substantial probability that the funds originated from a foreign national, or is aware of facts that would lead a reasonable person to inquire whether the funds originated from a foreign national but failed to conduct a reasonable inquiry. 11 C.F.R. § 110.20(a)(4).

<sup>13</sup> 800 F. Supp. 2d 281, 287 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012); *see also United States v. Singh*, 924 F.3d 1030, 1040-44 (9th Cir. 2019); Advisory Op. 2018-12 at 7 (Defending Digital Campaigns, Inc.) ("AO 2018-12").

<sup>14</sup> AO 2018-12 at 7 (quoting *Bluman*, 800 F. Supp. 2d at 287).

1           The Act defines “election” to mean “a general, special, primary, or runoff election” as  
2 well as “a convention or caucus of a political party which has authority to nominate a  
3 candidate.”<sup>15</sup> Commission regulations further specify that “[e]lection means the process by  
4 which individuals, whether opposed or unopposed, seek nomination for election, or election, *to*  
5 *Federal office.*”<sup>16</sup> Section 30121 states that “[i]t shall be unlawful for” a foreign national,  
6 directly or indirectly, to make “a contribution or donation of money or other thing of value, or to  
7 make an express or implied promise to make a contribution or donation, in connection with a  
8 Federal, State, or local election.”<sup>17</sup> By expressly including state and local elections within its  
9 prohibition on contributions or donations by foreign nationals, section 30121 on its face applies  
10 beyond the context of the Commission’s general regulatory definition of elections, which makes  
11 reference both to “individuals” and the pursuit of “*Federal office.*”<sup>18</sup> The text of section 30121  
12 thus raises the question whether the state or local elections to which it applies includes elections  
13 such as the one at issue in this matter in which ballot initiatives are put to voters.

14           Prior to Congress’s enactment of the Bipartisan Campaign Reform Act of 2002  
15 (“BCRA”),<sup>19</sup> the Act prohibited foreign national contributions “in connection with an election *to*  
16 *any political office.*”<sup>20</sup> Accordingly, before BCRA, the Commission treated foreign national  
17 donations relating only to ballot initiatives as generally outside the purview of the Act on the  
18 basis that ballot initiative elections generally are not in connection with elections for political

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<sup>15</sup> 52 U.S.C. § 30101(1).

<sup>16</sup> 11 C.F.R. § 100.2(a) (emphasis added).

<sup>17</sup> 52 U.S.C. § 30121(a)(1)(A).

<sup>18</sup> *Id.* (emphasis added).

<sup>19</sup> Pub. L. No. 107-155, 116 Stat. 81 (2002).

<sup>20</sup> *See* 2 U.S.C. § 441e(a) (2000) (emphasis added).

1 office.<sup>21</sup> Nonetheless, in pre-BCRA Advisory Opinion 1989-32, the Commission described  
2 circumstances in which a ballot initiative “inextricably linked” to a candidate would be “in  
3 connection with” that candidate’s election to political office and, therefore, a committee  
4 supporting such a ballot initiative would be prohibited from accepting funds from a foreign  
5 national.<sup>22</sup>

6 In enacting BCRA, Congress amended the Act’s foreign national section to prohibit  
7 foreign national contributions or donations “in connection with a Federal, State, or local  
8 election.”<sup>23</sup> In the course of issuing implementing regulations to correspond with the revised  
9 statutory provision, the Commission concluded that the deletion of the phrase “election to any  
10 public office” and the substitution of the “broader phrase ‘Federal, State, or local election’” was  
11 meant to clarify congressional intent “to prohibit foreign national support of candidates and their  
12 committees and political organizations and foreign national activities in connection with all  
13 Federal, State, and local elections.”<sup>24</sup>

14 Shortly after the passage of BCRA, in Advisory Opinion 2003-37 (Americans for a Better  
15 Country), the Commission addressed whether a political committee’s non-federal account could  
16 raise and spend funds from foreign nationals for voter registration and mobilization activities on  
17 behalf of federal candidates. In framing its analysis, the Commission began by generally

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<sup>21</sup> See Advisory Op. 1989-32 (McCarthy) (“AO 1989-32”).

<sup>22</sup> *Id.* at 3-6 (detailing ways in which a candidate and a ballot initiative committee seeking to accept foreign national funds were “inextricably linked,” including through overlapping staff between candidate and ballot initiative committee, linking the name of the candidate and committee in public communications, the candidate soliciting for the committee, and appearance of candidate and initiative on same ballot, concluding that because of these links the activities of the ballot initiative committee were campaign-related and thus the foreign national prohibition applied to the ballot initiative committee).

<sup>23</sup> Compare 2 U.S.C. § 441e(a) (2000), with 2 U.S.C. § 441e(a)(1)(A) (2002) (now codified at 52 U.S.C. § 30121(a)(1)(A)).

<sup>24</sup> Contribution Limitations and Prohibitions, 67 Fed. Reg. 69928, 69944 (Nov. 19, 2002) (“2002 E&J”).

1 explaining the foreign national prohibition and specifically explaining that its application is not  
2 limited to “elections for political office”:

3           The Act, as amended by BCRA, prohibits foreign nationals from,  
4           among other things, directly or indirectly making a contribution or  
5           donation of money or other thing of value, or to expressly or  
6           impliedly promise to make a contribution or donation, in  
7           connection with a Federal, State, or local election (*this prohibition*  
8           *is not limited to elections for political office*).<sup>25</sup>

9  
10           This language from AO 2003-37, which was not prepared in connection with an analysis  
11 of ballot initiatives, remains the only Commission-approved interpretation of the meaning of the  
12 Act's post-BCRA foreign national prohibition's use of “election” with respect to non-candidate  
13 elections. Nonetheless, the Commission has addressed the scope of the term “election” in a  
14 number of advisory opinions considering whether ballot measure activities are “in connection  
15 with” an election as that term is used in BCRA's “soft money” provision now codified at  
16 52 U.S.C. § 30125(e). Like the pre-BCRA foreign national provision, BCRA's soft money  
17 provision refers to elections *for office*, prohibiting federal candidates and officeholders, their  
18 agents, and entities directly or indirectly established, financed, maintained, or controlled by  
19 them, or acting on their behalf, from raising or spending nonfederal funds “in connection with an  
20 election for Federal office” and “in connection with any election other than an election for  
21 Federal office.”<sup>26</sup>

22           The first of the post-BCRA soft money ballot initiative advisory opinions, Advisory  
23 Opinion 2003-12 (Flake), was considered shortly before AO 2003-37 interpreted the foreign  
24 national provision as discussed above. In AO 2003-12, the Commission was asked whether,

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<sup>25</sup> Advisory Op. 2003-37 (Americans for a Better Country) at 20 (superseded on other grounds by Political Committee Status & Definition of Contribution, 69 Fed. Reg. 68056, 68063 (Nov. 23, 2004)) (emphasis added) (“AO 2003-37”).

<sup>26</sup> 52 U.S.C. § 30125(e).

1 under the soft money rules, a ballot initiative committee's activities were in connection with  
2 "any election other than an election for Federal office."<sup>27</sup> The Commission determined that they  
3 were, once the initiative qualified for the ballot.<sup>28</sup> In reaching this conclusion, the Commission  
4 considered Congress's use of the phrase "any election" in place of the phrase "any election *to*  
5 *any political office*."<sup>29</sup> The Commission concluded that this difference in language indicated  
6 Congress's intent that the soft money provision "is not limited to elections for a political  
7 office."<sup>30</sup> It explained:

8 As used in subparagraph (B) of section [30125(e)(1)], the term, "in  
9 connection with *any election other than* an election for Federal  
10 office" is, on its face, clearly intended to apply to a different  
11 category of elections than those covered by subparagraph (A),  
12 which refers to "an election for Federal office." This phrasing, "in  
13 connection with any election other than an election for Federal  
14 office" also differs significantly from the wording of other  
15 provisions of the Act that reach beyond Federal elections.  
16 Particularly relevant is the prohibition on contributions or  
17 expenditures by national banks and corporations organized by  
18 authority of Congress, which applies "in connection with any  
19 election to *any political office*." [52 U.S.C. § 30118(a)]. Where  
20 Congress uses different terms, it must be presumed that it means  
21 different things. Congress expressly chose to limit the reach of  
22 section [30118(a)] to those non-Federal elections for a "political  
23 office," while intending a broader sweep for section  
24 [30125(e)(1)(B)], which applies to "any election" (with only the  
25 exclusion of elections to Federal office). Therefore, the  
26 Commission concludes that the scope of section [30125(e)(1)(B)]  
27 is not limited to elections for a political office.<sup>31</sup>

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<sup>27</sup> See AO 2003-12 at 4-6.

<sup>28</sup> *Id.* at 5-6. The Commission also concluded that when a ballot measure committee is established, financed, maintained, or controlled by a federal candidate, as was the case in AO 2003-12, its activities before qualifying for the ballot, such as signature gathering, are also "in connection with any election other than an election for Federal office." *Id.* at 6.

<sup>29</sup> *Id.* at 5 (emphasis in original).

<sup>30</sup> *Id.* at 5-6.

<sup>31</sup> *Id.* (emphasis in original, footnote omitted); see also Factual & Legal Analysis, MUR 5367 (Darrell Issa) (concluding, based on the analysis in AO 2003-12, that a recall election was "an election other than an election for federal office" and that, therefore, BCRA's soft money provisions applied to Congressman Issa's efforts to solicit



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2           The Commission distinguished AO 1989-32, which had concluded that ballot initiative  
3 activity conducted independently from candidates (*i.e.*, “pure” ballot initiative activity) was not  
4 “in connection with” a candidate’s election and was, therefore, outside the scope of the foreign  
5 national contribution prohibition. The Commission explained that its interpretation in AO 1989-  
6 32 was based on pre-BCRA statutory language which “then limited activity ‘in connection with  
7 any election to political office.’”<sup>32</sup>

8           Two years later, in Advisory Opinion 2005-10 (Berman/Doolittle), the Commission  
9 considered whether the soft money provision prohibits federal candidates and officeholders from  
10 raising funds for ballot measure committees formed solely to support or oppose ballot initiatives  
11 where the ballot initiative committee was not established, financed, maintained, or controlled by  
12 a federal candidate and where no federal candidates appeared on the same ballot.<sup>33</sup> The  
13 Commission concluded that the proposed activity was not prohibited, issuing an opinion without  
14 explaining the basis for its conclusion. The four Commissioners who voted to approve the  
15 opinion explained their rationales in two concurring statements, one in which two  
16 Commissioners stated their position that the soft money provision did not apply to any non-  
17 candidate elections and the other in which the other two Commissioners stated their position that  
18 the soft money provision did not apply under the particular facts presented.<sup>34</sup>

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soft money for a ballot measure committee that was supporting the recall and that was established, maintained, financed, or controlled by Issa).

<sup>32</sup> AO 2003-12 at 6.

<sup>33</sup> Advisory Op. 2005-10 at 2 (Berman/Doolittle) (“AO 2005-10”).

<sup>34</sup> *See* Concurring Opinion of Comm’rs Mason & Toner at 1-2, AO 2005-10 (stating that the soft money provision “applies to federal and non-federal elections for public office, but does not apply to non-candidate political activity, such as ballot initiatives or referenda”); Concurring Statement of Comm’rs McDonald & Weintraub at 1-2, AO 2005-10 (stating that the soft money ban did not apply because, under the factual circumstances, where no federal candidate would be on the ballot and the committee was not established, financed, maintained, or controlled by a federal candidate, the committee’s activities were “not in connection with a federal election”); *see also*

1           In Advisory Opinion 2010-07 (Yes on FAIR), the Commission again addressed whether  
2 federal candidates' raising of soft money for ballot initiative activity was in connection with an  
3 election for federal office within the meaning of the soft money provision.<sup>35</sup> In this instance, the  
4 requestor represented that the ballot initiative committee was not established, financed,  
5 maintained, or controlled by a federal candidate but that the initiative would appear on the same  
6 ballot as federal candidates.<sup>36</sup> The Commission agreed that Members of Congress could solicit  
7 funds outside the Act's limits and source prohibitions prior to the initiative qualifying for the  
8 ballot but were unable to agree on whether Members could continue to make solicitations outside  
9 the limits and prohibitions after the initiative qualified for the ballot.<sup>37</sup>

10           After this series of advisory opinions, a three-judge district court, in *Bluman v. FEC*,  
11 upheld the constitutionality of the foreign national prohibition.<sup>38</sup> In so doing, the court addressed  
12 the plaintiffs' arguments that the prohibition was "underinclusive and not narrowly tailored  
13 because it permits foreign nationals to make contributions and expenditures related to ballot  
14 initiatives."<sup>39</sup> Neither the court, nor the Commission in its briefs, analyzed the correctness of  
15 this understanding of the prohibition, instead focusing on whether such underinclusivity would

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Dissenting Opinion of Comm'r Thomas at 2, AO 2005-10 ("In my view, the clear phrase 'any election' means just that — *any* election. This broad statutory language includes elections to decide ballot initiatives as well as elections to select public officials.").

<sup>35</sup> Advisory Op. 2010-07 (Yes on FAIR) ("AO 2010-07").

<sup>36</sup> *Id.* at 2.

<sup>37</sup> See AO 2010-07 at 3; Concurring Opinion of Comm'rs Bauerly, Walther & Weintraub at 4, AO 2010-07 (concluding that "[a]fter an initiative has qualified for a ballot on which Federal candidates will also appear, the activities of a ballot initiative committee are, 'in connection with' an election within the meaning of [ 52 U.S.C. § 30125]"); Concurring Opinion of Comm'rs Petersen, Hunter & McGahn at 4, AO 2010-07 (concluding that AO 2003-12 has been superseded and that "ballot measures and referenda are not 'elections' within the meaning of the Act").

<sup>38</sup> *Bluman*, 800 F. Supp. 2d at 288.

<sup>39</sup> *Id.* at 291.

1 be fatal to the provision's constitutionality.<sup>40</sup> In upholding the constitutionality of the foreign  
2 national prohibition with respect to contributions to candidates and parties, express advocacy  
3 expenditures, and donations to outside groups to be used for the same purposes,<sup>41</sup> the *Bluman*  
4 court ultimately did not decide whether Congress could prohibit — or had prohibited — foreign  
5 nationals from making donations with respect to pure ballot initiatives.<sup>42</sup>

6 The meaning of “election” in the post-BCRA foreign national prohibition vis-à-vis its  
7 application to pure ballot initiative activity was first before the Commission in a post-*Bluman*  
8 enforcement matter in MUR 6678 (MindGeek).<sup>43</sup> After discussing the above history of treating  
9 or not treating ballot initiative activity as in connection with an election, particularly in the soft  
10 money context, this Office reasoned:

11 [I]t may not be appropriate to extrapolate Commission analysis  
12 under section [30125(e)] to this matter, given that a different  
13 statute containing different terms is at issue: section [30125(e)]  
14 addresses funds “in connection with any election other than an  
15 election for Federal office,” while section [30121] focuses on  
16 foreign national contributions and donations “in connection with a  
17 Federal, State, or local election.”<sup>44</sup>  
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<sup>40</sup> *Id.* (concluding that respecting plaintiffs' underinclusivity argument, “Congress’s determination that foreign contributions and expenditures pose a greater risk in relation to candidate elections than such activities pose in relation to ballot initiatives is a sensible one and, in our view, does not undermine the validity of the statutory ban on contributions and expenditures” by foreign nationals to candidates); *Bluman v. FEC*, FEC Opposition to Plaintiffs’ Motion for Summary Judgment and Reply in Support of FEC Motion to Dismiss at 38-39 & n.17, Civ. No. 10-1766 (Mar. 1, 2011) (responding to plaintiffs’ argument that the statute does not go far enough, noting that Commission, in AO 2003-12, “indirectly indicated that it might interpret” foreign national provision to apply to ballot initiatives, but had since, in AO 2005-10, “suggested that it does not,” and arguing that the “exemption of ballot measures” demonstrated narrow tailoring). *Compare Bluman*, 800 F. Supp. 2d at 284 (“This statute, as we interpret it, does not bar foreign nationals from issue advocacy — that is, speech that does not expressly advocate the election or defeat of a specific candidate.”).

<sup>41</sup> *Bluman*, 800 F. Supp. 2d at 291.

<sup>42</sup> *Id.* at 292 (explaining, with respect to plaintiffs’ “concern that Congress might bar them from issue advocacy and speaking out on issues of public policy,” that “[o]ur holding does not address such questions, and our holding should not be read to support such bans”).

<sup>43</sup> MUR 6678 (MindGeek USA, Inc., *et al.*).

<sup>44</sup> First Gen. Counsel’s Rpt., MUR 6678 (MindGeek USA, Inc., *et al.*) at 18.

1 Citing the lack of legislative history directly on the issue as well as the *dicta* in *Bluman* accepting  
2 the parties' uncontested notion that the foreign national provision may not extend to ballot  
3 initiatives, this Office declined to provide a recommendation regarding whether section 30121  
4 applies to the pure ballot initiative activity in that matter.<sup>45</sup> Instead, we recommended that the  
5 Commission exercise its prosecutorial discretion and dismiss the allegations as a result of "the  
6 lack of clear legal guidance on whether the foreign national prohibition extends to pure ballot  
7 initiative activity."<sup>46</sup>

8 The Commission ultimately split on whether to pursue the allegations in MUR 6678 and  
9 Commissioners issued four statements of reasons supporting various views on the scope of the  
10 foreign national contribution ban.<sup>47</sup> In the years since it considered MUR 6678, the Commission  
11 has not again squarely faced the question whether the foreign national prohibition reaches pure  
12 ballot initiative activity.<sup>48</sup>

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<sup>45</sup> *But see id.* at 19, n.74 ("Despite the recommendation not to proceed with an enforcement action on these facts, the Commission may still, if it so chooses, use the enforcement matter as a vehicle to provide further public guidance on the underlying legal issue through issuance of a clarifying Factual & Legal Analysis or a unified Statement of Reasons. The Commission may also wish to address the issue of section [30121's] application to ballot measure activity by regulation or other advance notice.").

<sup>46</sup> *Id.* 19-20; *see Bluman*, 800 F. Supp. 2d at 281. In recommending dismissing the allegations, this Office also noted the "lack of information in the current record suggesting that the Ballot Measure Committee's activity was inextricably linked with the election of any candidate" and further noted that such information would have supported a finding of a violation whether or not the prohibition extends to "pure ballot measure activity." *See* First Gen. Counsel's Rpt., MUR 6678 (MindGeek USA, Inc., *et al.*) at 19.

<sup>47</sup> *See* Certification, MUR 6678 (Mar. 18, 2015); Statement of Reasons, Comm'r. Ravel, MUR 6678; Statement of Reasons, Comm'r. Weintraub, MUR 6678; Statement of Reasons, Comm'rs. Petersen, Hunter & Goodman, MUR 6678; Supp. Statement of Reasons, Comm.'r Goodman, MUR 6678.

<sup>48</sup> *Cf.* Factual & Legal Analysis, MUR 7141 (Wang Jianlin, *et al.*) (assuming, *arguendo*, that the foreign national prohibition did extend to ballot initiatives but finding no reason to believe a foreign national violation had occurred because the funds did not appear to originate with a foreign national and no foreign national appeared to have participated in the decision to make the donation).

#### 1 **IV. LEGAL ANALYSIS**

2 Sandfire and Sandfire NL appear to be foreign nationals, as defined in the Act, and it is  
3 undisputed that they made donations to pure ballot initiative committees in Montana. Thus, this  
4 matter again directly raises whether section 30121 reaches such activity. Similar to MUR 6678,  
5 we recommend that the Commission not pursue these allegations as a result of the lack of clear  
6 legal guidance as to the scope of the section 30121. But, in light of the substantial, if not  
7 growing, concern of foreign influence in the process of American democratic self-governance,  
8 which the Commission itself has observed and relied upon in consideration of matters raising  
9 such concerns,<sup>49</sup> and the lack of additional legal guidance to the regulated community on the  
10 scope of section 30121 in the five years since the Commission's consideration of MUR 6678, we  
11 now provide more conclusive recommendations to the Commission on the application of the  
12 foreign national prohibition to ballot measure activity like the activity presented in this matter.

13 As discussed below, consistent with the breadth of section 30121, as revised by Congress  
14 in BCRA, as well as the Commission's precedent, including its recent consideration of the Act's  
15 foreign national prohibition, it appears that section 30121 applies to Sandfire and Sandfire NL's  
16 foreign spending in connection with the I-186 ballot initiative. We nevertheless recommend that  
17 the Commission again exercise prosecutorial discretion and dismiss the allegations so that this  
18 analysis may be applied only prospectively.

19 The Act's general definition of "election" in section 30101(1) makes reference to  
20 different kinds of elections including "general, special, primary, or runoff election[s]," but does

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<sup>49</sup> See, e.g., Minutes of Open Meeting of Federal Election Commission at 13 (Sept. 16, 2016) (directing this Office to prioritize cases "involving allegations of foreign influence"); Responses to Questions from the Committee on House Administration, Fed. Election Comm'n at 41-42 (May 1, 2019); see also *Explanatory Statement to Consolidated Appropriations Act, 2018*, 164 Cong. Rec. H2045, H2520 (Mar. 22, 2018) ("Preserving the integrity of elections, and protecting them from undue foreign influence, is an important function of government at all levels.").

1 not, by its own terms, exclude non-candidate-based elections.<sup>50</sup> Thus, that general definition  
2 does not on its face resolve whether a state ballot initiative is a “Federal, State, or local election”  
3 for purposes of the foreign national prohibition in section 30121.<sup>51</sup> Similarly, the Commission’s  
4 general regulatory definition of “election” in 11 C.F.R. § 100.2, which, as discussed above, is  
5 limited to candidate-based elections, or nominations for election, *to federal office*,<sup>52</sup> does not  
6 resolve the meaning of “election” in the foreign national prohibition, which expressly extends  
7 beyond the federal context addressed in section 100.2.

8 In the absence such specificity, the word “election” should be given its plain and ordinary  
9 meaning in the context of “the language and design of the statute as a whole.”<sup>53</sup> The Random  
10 House Dictionary of the English Language defines “election” as “the selection of a person or  
11 persons for office by vote” and “a public vote upon a proposition submitted.”<sup>54</sup> The inclusion of  
12 the non-candidate meaning of “election,” *i.e.*, ballot initiatives, within the ordinary meaning of  
13 “election” substantially predates BCRA.<sup>55</sup> Similarly, other provisions of federal law that, like

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<sup>50</sup> 52 U.S.C. § 30101(1)(A).

<sup>51</sup> *Id.* § 30121.

<sup>52</sup> 11 C.F.R. § 100.2.

<sup>53</sup> *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme”) (internal quotation omitted); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) (“When terms used in a statute are undefined, we give them their ordinary meaning.”); *United States v. Palmer*, 854 F.3d 39, 47 (D.C. Cir. 2017) (“Congress is presumed, absent indication to the contrary and there is none here, to use words in their ordinary meaning.”); *Shays v. FEC*, 414 F.3d 76, 105 (D.C. Cir. 2005) (“The meaning — or ambiguity — of certain words or phrases may only become evident when placed in context.” (citing Webster’s Third New International Dictionary to determine ordinary meaning of “ask”)).

<sup>54</sup> *Election*, Random House Dictionary of the English Language, Unabridged (2nd ed. 1987).

<sup>55</sup> *See, e.g., Burson v. Freeman*, 504 U.S. 191, 205 (1992) (tracing history of Tennessee candidate and ballot measure polling place regulation, upheld as constitutional by the Court, to 1897 act criminalizing “the use of bribery, violence, or intimidation in order to induce a person to vote or refrain from voting for any particular person or measure”) (emphasis added).

1 the foreign national prohibition, regulate not only federal but also state and local elections, have  
2 been interpreted using this ordinary meaning and thus including ballot measures in addition to  
3 candidate elections.<sup>56</sup>

4 The BCRA revisions to the Act's foreign national prohibition indicate that Congress  
5 intended the prohibition to be applied in accordance with this ordinary meaning. Previously, the  
6 Act's foreign national provision applied only to contributions "in connection with *an election to*  
7 *any political office* or in connection with any primary election, convention, or caucus held *to*  
8 *select candidates for any political office.*"<sup>57</sup> In BCRA, however, Congress amended the text of  
9 the foreign national provision to remove the candidate-focused references, including the  
10 references to "political office." In their place, Congress prohibited foreign national contributions  
11 or donations "in connection with a Federal, State, or local election."<sup>58</sup> This change in statutory  
12 language indicates that Congress intended that the prohibition apply broadly and no longer be  
13 limited to candidate-focused elections. "When Congress acts to amend a statute," the Supreme  
14 Court has stated that it "presume[s] it intends its amendment to have real and substantial  
15 effect."<sup>59</sup>

16 The applicability of the ordinary meaning of "elections," in the context of the foreign  
17 national prohibition, is reinforced by Congress's treatment of other sections of the Act that were

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<sup>56</sup> See Interpretive Guidelines, 41 Fed. Reg. 29998, 29999 (1976) (defining "elections" to which Dept. of Justice will apply Voting Rights Act ("VRA") Language Minority Group provisions, now codified at 52 U.S.C. § 10301 *et seq.*, as "any type of election, whether it is a primary, general or special election . . . includ[ing] elections of officers as well as elections regarding such matters as bond issues, constitutional amendments and referendums"); 28 C.F.R. § 51.17 (including "an initiative, referendum, or recall election" in term "special election" subject to VRA pre-clearance requirements).

<sup>57</sup> 2 U.S.C. § 441e(a) (2000) (emphasis added).

<sup>58</sup> 52 U.S.C. § 30121(a)(1)(A).

<sup>59</sup> *Stone v. INS*, 514 U.S. 386, 397 (1995); see also *Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.").

1 revised by BCRA. For example, Congress, in BCRA, amended the section of the Act prohibiting  
2 contributions by national banks (now codified at 52 U.S.C. § 30118), a provision that has long  
3 applied to state and local, as well as federal, elections to “political office.”<sup>60</sup> Despite amending  
4 other aspects of this prohibition, Congress retained the “to any political office” limitation in the  
5 scope of “elections” to which the national bank prohibition applies. Thus, in the same set of  
6 revisions to the Act, Congress chose to retain the limiting “political office” language in some  
7 places but remove it in others. “When Congress amends one statutory provision but not another,  
8 it is presumed to have acted intentionally.”<sup>61</sup> The BCRA changes to the statutory language of  
9 these two prohibitions — removing the limiting “political office” language in the foreign  
10 national provision while leaving it in the national bank provision — suggest that Congress  
11 intended the foreign national prohibition to apply not only to state and local candidate elections,  
12 but also to non-candidate elections such as ballot initiatives as well.

13 This understanding is consistent with Congress’s other amendments, in BCRA, to expand  
14 the foreign national prohibition. For instance, BCRA expanded the scope of the foreign national  
15 prohibition beyond “contributions,” to include “donations” in order to make clear that foreign  
16 nationals could not evade the prohibition by targeting state and local elections.<sup>62</sup> The BCRA

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<sup>60</sup> BCRA § 203, 116 Stat. at 91-92, codified at 2 U.S.C. § 441b (now 52 U.S.C. § 30118) (“It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office. . . .”). The national bank prohibition, like the foreign national prohibition, applies not only to federal but also to state and local elections but only in the case of such elections for political office. *See* Advisory Opinion 1987-14 (First Nat’l Bank of Shreveport) at 1 (“a national bank is prohibited from making a contribution or expenditure in connection with any election to any political office, including local, state or Federal offices”).

<sup>61</sup> *See Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 174 (2009).

<sup>62</sup> BCRA § 303, 116 Stat. 81, 96; *see also* 2002 E&J at 69944 (explaining that, through the addition of “donation,” and the removal of references to “candidates” and “political office,” “Congress left no doubt as to its intention to prohibit foreign national support of . . . foreign national activities in connection with all Federal, State, and local elections”); *see also* Statement of Sen. Feingold, 148 Cong. Rec. S1991-1997 (daily ed. Mar. 18, 2002); Statement of Sen. Lieberman, 148 Cong. Rec. S2774 (daily ed. Mar. 22, 2002).



1 amendments further added prohibitions against presidential inaugural committees accepting  
2 foreign national donations,<sup>63</sup> instructed the United States Sentencing Commission to provide  
3 guidelines which include a sentencing enhancement for criminal violations of the Act which  
4 involve “a contribution, donation, or expenditure from a foreign source,”<sup>64</sup> and added significant  
5 prohibitions and limitations on candidate and party committees’ receipt, solicitation, donation,  
6 and transfer of soft money, including from foreign nationals.<sup>65</sup> These changes reflect Congress’s  
7 multifaceted effort to “prevent[] foreign influence over the U.S. political process.”<sup>66</sup>

8         Of note, this context-based understanding of the term “elections” is not an issue that only  
9 arises in federal law. In fact, in the state in which this matter arises, the Montana code defines  
10 “election” in candidate based terms, as “general, special, or primary election,” but the portion of  
11 that same title regarding ballot issues includes provisions on “Election Procedures” and  
12 “Determination of the result of election.”<sup>67</sup> There too the context indicates that despite the  
13 general definition only referencing candidate-based “elections,” in some provisions “elections” is  
14 clearly intended to take its ordinary meaning and include ballot measures.<sup>68</sup>

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<sup>63</sup> BCRA § 308, 116 Stat. at 103-04, codified at 36 U.S.C. § 510 (extending foreign national prohibition to non-election context as applied to inaugural committees). Prior to these BCRA amendments, the Commission had concluded that funds received and expended by inaugural committee are neither “contributions” nor “expenditures” because they “are used to finance inaugural activities rather than any Federal election.” Advisory Opinion 1980-144 (Presidential Inaugural Committee – 1981).

<sup>64</sup> BCRA § 314, 116 Stat. at 107.

<sup>65</sup> BCRA § 101, 116 Stat. at 82-86.

<sup>66</sup> *Bluman*, 800 F. Supp. 2d at 288.

<sup>67</sup> MCA 13-1-101(12); MCA 13-1-101(19) (defining general election as “an election that is held for offices that first appear on a primary election ballot unless the primary is canceled as authorized by law, and that is held on a date specified in 13-1-104”); *see* MCA 13-27-501 *et seq.*

<sup>68</sup> *See Public Citizen v. Dept. of Justice*, 491 U.S. 440, 454 (1989) (“Where the literal reading of a statutory term would compel ‘an odd result,’ we must search for other evidence of congressional intent to lend the term its proper scope.”) (internal citation omitted).

1 Further, in its explanation and justification of the post-BCRA foreign national  
2 regulations, the Commission stated that “[a]s indicated by the title of section 303 of BCRA,  
3 ‘Strengthening Foreign Money Ban,’ Congress amended [52 U.S.C. 30121] to further delineate  
4 and expand the ban on contributions, donations, and other things of value by foreign  
5 nationals.”<sup>69</sup> This expansive purpose, seen in context of Congress’s removal of limiting  
6 language as to the elections within the scope of some sections of the Act but retaining it in  
7 others, its addition of further prohibitions regarding foreign national activity in American  
8 elections at all levels, and its extension of the foreign national prohibition to the non-electoral  
9 context of inaugurations, all taken together, support the conclusion that “election” for purposes  
10 of section 30121 includes ballot initiative activity.<sup>70</sup>

11 That understanding of “election” in the foreign national prohibition is not only consistent  
12 with the ordinary meaning of the term and Congress’s broad intent, in the context of BCRA, to  
13 prevent foreign influence over the U.S. political process, but it is also consistent with the  
14 Commission’s past conclusions. As noted above, the Commission explained in the 2002 E&J  
15 that Congress’s deletion of the phrase “election to any public office” from the Act’s foreign  
16 national provision, and the substitution of the “broader phrase ‘Federal, State, or local election,’”  
17 was meant to clarify congressional intent “to prohibit foreign national support of candidates and  
18 their committees and political organizations and foreign national activities in connection with all  
19 Federal, State, and local elections.”<sup>71</sup> Moreover, in AO 2003-37, the Commission concluded that

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<sup>69</sup> 2002 E&J at 69440.

<sup>70</sup> *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350 (1943) (“Courts will construe the details of an act in conformity with its dominating general purpose”).

<sup>71</sup> 2002 E&J at 69944.

1 these changes meant not only that the Act now expressly covered non-federal elections, but also  
2 that “this prohibition is not limited to elections for political office.”<sup>72</sup>

3 Consistent with the intent behind Congress’s BCRA amendments to the foreign national  
4 prohibition in the Act, the Commission has interpreted and applied the foreign national  
5 prohibition broadly. For instance, in Advisory Opinion 2010-14, the Commission approved of a  
6 national party committee’s pre-election use of a recount and election-contest fund, but reiterated  
7 that such a fund, though it does not fund “election” activities, was subject to the foreign national  
8 prohibition and could not accept contributions from foreign nationals.<sup>73</sup>

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<sup>72</sup> AO 2003-37 at 20; *accord* AO 2003-12 at 5-6 (concluding that soft money provisions are “not limited to elections for a political office”); *see supra* p. 6-8.

<sup>73</sup> Advisory Op. 2010-14 (DSCC) at 2.

1 foreign national prohibition to ballot measure activity similarly furthers the Act's purpose to  
2 protect "activities intimately related to the process of democratic self-governance."<sup>76</sup>

3 While not disputing the factual allegations in this matter, Respondents argue that the  
4 "foreign national prohibition does not apply to state and local ballot measure activity as a matter  
5 of law."<sup>77</sup> Respondent's primary argument is that ballot measure activity does not fit within the  
6 definition of "election" in the Act or Commission regulations. To support this argument,  
7 Respondents rely on pre-BCRA Supreme Court cases interpreting the Act's different, pre-BCRA  
8 text as limited to regulating candidate elections.<sup>78</sup> While acknowledging BCRA's changes to the  
9 foreign national prohibition to include "donations," in addition to "contributions," in order to  
10 indicate that the prohibition applied to soft money, Respondents contend that the replacement of  
11 the candidate-based "election to any political office" with the more general phrase "in  
12 connection with a Federal, State, or local election" was done because a court had declared the  
13 prior language ambiguous and that it did not reflect an intent to broaden the scope of the  
14 provision.<sup>79</sup> But Respondents' argument fails to account for Congress's removal of the "for

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<sup>76</sup> *Bluman*, 800 F. Supp. 2d at 287 (quoting *Bernal v. Fainter*, 467 U.S. 216, 220 (1984)) (internal quotations omitted).

<sup>77</sup> Sandfire Resp. at 2; *see* MMA Resp. at 2 ("[T]he Act's limitations and restrictions – including the foreign national prohibition – do not apply to funds received or expended in support of a state or local ballot initiative, like the one at issue here.").

<sup>78</sup> Sandfire Resp. at 2 (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 (1995) ("The Federal Election Campaign Act of 1971, at issue in *Buckley*, regulates only candidate elections, not referenda or other issue-based ballot measures."); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789 n.26 (1978) (The Act, "by [its] terms, do[es] not apply to referendum votes.")); MMA Resp. at 3 (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 (1995)).

<sup>79</sup> *See* Sandfire Resp. at 4-5; MMA Resp. at 3-4. As discussed above, Congress's purpose in enacting BCRA went beyond eliminating soft money and also included "Strengthening Foreign Money Ban." *Supra*, p. 18.

1 political office” language from the foreign national prohibition while simultaneously retaining  
2 that same allegedly ambiguous phrasing in the national bank prohibition. Thus, rather than  
3 reflecting an intent to remove ambiguity while retaining the same substance, the distinction in  
4 Congress’s choice reflects that it intended the scope of those provisions to be substantively  
5 different, with the consequence that section 30121 is applies more broadly.<sup>80</sup>

6 Respondents also contend that section 30101(1) of the Act and the Commission’s  
7 regulatory definition of “election” in 11 C.F.R. § 100.2 foreclose the application of section  
8 30121 to ballot initiatives.<sup>81</sup> As discussed above, however, the definition of election in section  
9 30101(1) encompassing “a general, special, primary, or runoff election” does not, by its own  
10 terms, exclude non-candidate-based elections.<sup>82</sup> Nor is the question resolved by the regulatory  
11 definition in 11 C.F.R. § 100.2, which is limited to elections “to federal office,” while the foreign  
12 national prohibition on its face reaches a more broad set of elections, including state and local  
13 elections. Instead, the term “election” should be given its ordinary meaning and “read in [its]  
14 context and with a view to [its] place in the overall statutory scheme.”<sup>83</sup> Here, the relevant  
15 context, which includes the Act’s application and the history of the provision, including

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<sup>80</sup> To the extent that Respondents distinguish between the different electoral contexts of electing representatives and passing ballot initiatives into law and argue that soft money concerns are less problematic in the latter context, Sandfire Resp. at 7; MMA Resp. at 4, that argument similarly overlooks that in BCRA Congress saw fit not only to limit the risks of corruption and its appearance with respect to candidates but also to avoid corruption of the process of self-governance resulting from the activities of foreign nationals, *Bluman*, 800 F. Supp. 2d at 287, 288 n.3 (recognizing Congress’s effort to “prevent[] foreign influence over the U.S. political process” by “limiting the participation of foreign citizens in activities of American democratic self-government”).

<sup>81</sup> Sandfire Resp. at 3-4; MMA Resp. at 2-4.

<sup>82</sup> *Supra* p. 13-14; *see* 52 U.S.C. § 30101(1)(A).

<sup>83</sup> *Davis v. Mich. Dep’t of Treas.*, 489 U.S. 803, 809 (1989) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”); *see also* AO 2003-12 at 5 (stating that the scope of section 30125 should not turn on the one word, “election,” read in isolation); *cf. id.* (“Likewise, 11 CFR 100.2(a), which defines ‘election . . . to Federal office,’ does not explain the meaning of [section 30125(e)(1)(B)], which, by its own terms, applies to elections other than elections to Federal office.”).

1 Congress's revisions to it, indicates that "election" in the foreign national prohibition includes  
2 ballot initiatives.

3 Respondents finally contend that this issue has been foreclosed by the court in *Bluman*.<sup>84</sup>  
4 Not so. As discussed above, the court in *Bluman* addressed the application of section 30121 to  
5 ballot initiatives only in the context the plaintiffs' arguments that the prohibition was  
6 "underinclusive and not narrowly tailored because it permits foreign nationals to make  
7 contributions and expenditures related to ballot initiatives."<sup>85</sup> But the *Bluman* court rejected the  
8 plaintiffs' constitutional challenge to section 30121, and it did not in *dicta* resolve an  
9 unrepresented question about the scope of "election" set forth in the foreign national prohibition.

10 BCRA's changes to the Act's foreign national provision broadened the application of that  
11 provision to reach ballot initiative activity such as that at issue by Sandfire and Sandfire NL. As  
12 recognized by both Congress and the Commission, years after the passage of BCRA, the threat  
13 of foreign influence in American elections remains at least a substantial, if not a growing,  
14 concern.<sup>86</sup> The Commission has informed Congress that it continues to enforce the foreign  
15 national provision and prioritize cases involving allegations of foreign influence.<sup>87</sup> Accordingly,  
16 based on Congress's changes to the foreign national prohibition in BCRA and more recent  
17 Commission precedent with respect to that provision, it appears that 52 U.S.C. § 30121 applies  
18 to the donations at issue in this matter.

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<sup>84</sup> See Sandfire Resp. at 6; MMA Resp. at 3.

<sup>85</sup> *Bluman*, 800 F. Supp. 2d at 291.

<sup>86</sup> See *supra* n. 49.

<sup>87</sup> See Letter to House Committee on Appropriations and Senate Committee on Appropriations, Fed. Election Comm'n at 1, 17-18 (Sept. 18, 2018) (reporting on Commission's role "in enforcing the foreign national prohibition, including how it identifies foreign contributions to elections, and what it plans to do in the future" as required by Explanatory Statement for 2018 Appropriations Act); *Explanatory Statement to Consolidated Appropriations Act, 2018*, 164 Cong. Rec. at H2520.

1           Nonetheless, in light of the state of the Commission's guidance on this question,<sup>88</sup>  
2 including its split on whether to pursue the allegations in MUR 6678, we recommend that the  
3 Commission dismiss the allegations in the present matter for prudential reasons, as a matter of  
4 prosecutorial discretion,<sup>89</sup> and apply section 30121 to ballot initiative activity only prospectively.  
5 Thus, we recommend that the Commission dismiss the allegations that Sandfire and Sandfire NL  
6 violated 52 U.S.C. § 30121 by making prohibited foreign national donations.<sup>90</sup> Similarly, we  
7 recommend that the Commission dismiss the allegations that MMA and Stop I-186 violated  
8 52 U.S.C. § 30121 by accepting prohibited foreign national donations.<sup>91</sup>

## 9   **V.   RECOMMENDATIONS**

- 10           1.   Dismiss the allegation that Sandfire Resources America, Inc. and Sandfire  
11               Resources, NL violated 52 U.S.C. § 30121(a)(1) by making prohibited foreign  
12               national donations;
- 13           2.   Dismiss the allegation that Montana Mining Association and Stop I-186 to Protect  
14               Mining and Jobs violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g) by  
15               knowingly soliciting, accepting, or receiving prohibited foreign national  
16               donations;
- 17           3.   Approve the attached Factual and Legal Analysis;
- 18           4.   Approve the appropriate letters; and
- 19           5.   Close the file.

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<sup>88</sup>       *Supra*, p. 3-12; *see* Sandfire Resp. at 9 (referencing “the Commission’s inconsistent decisions” regarding the application of the foreign national prohibition to ballot initiatives as a reason to dismiss the matter).

<sup>89</sup>       *See* First Gen. Counsel’s Rpt., MUR 6678 (MindGeek USA, Inc., *et al.*); Certification, MUR 6678 (Mar. 18, 2015); *see also* *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (“A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”); *cf.* Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545 (Mar. 16, 2007) (“The Commission has previously used the finding ‘reason to believe, but take no further action’ in cases where the Commission finds that there is a basis for investigating the matter or attempting conciliation, but the Commission declines to proceed for prudential reasons. . . . [T]he Commission believes that resolving these matters through dismissal or dismissal with admonishment more clearly conveys the Commission’s intentions and avoids possible confusion about the meaning of a reason to believe finding.”).

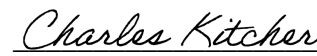
<sup>90</sup>       *See Heckler v. Chaney*, 470 U.S. 821 (1985).


<sup>91</sup>       *Id.*


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11-12-2020  
Date

Lisa J. Stevenson  
Acting General Counsel

  
Charles Kitcher  
Acting Associate General Counsel  
for Enforcement

  
Mark Allen  
Assistant General Counsel

  
Nicholas O. Mueller  
Attorney

Attachment:  
Factual and Legal Analysis



1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3

4 **RESPONDENTS:** Stop I-186 to Protect Mining and Jobs **MUR: 7523**  
 5 Sandfire Resources America, Inc.  
 6 Sandfire Resources, NL  
 7 Montana Mining Association  
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10 **I. INTRODUCTION**

11 This matter involves allegations that that Sandfire Resources America, Inc. (“Sandfire”)  
 12 and Sandfire Resources NL (“Sandfire NL”) violated the Federal Election Campaign Act of  
 13 1971, as amended (the “Act”), by making prohibited foreign national donations to the Montana  
 14 Mining Association (“MMA”) and Stop I-186 to Protect Mining and Jobs (“Stop I-186”) for the  
 15 purpose of opposing a Montana ballot initiative that the Complaint states would “increase  
 16 [Montana’s] ability to deny permits for hardrock mines . . . to avoid polluting the state’s  
 17 waters.”<sup>1</sup> The Complaint further alleges that MMA and Stop I-186 also violated the Act by  
 18 knowingly accepting such donations.<sup>2</sup>

19 Respondents do not dispute the facts alleged in the Complaint but make the legal  
 20 argument that ballot initiatives are not “elections” under the Act and that, therefore, the Act’s  
 21 foreign national prohibition does not apply to their activities.<sup>3</sup>

22 As discussed below, the history of Congress’s changes to the Act’s foreign national  
 23 provision and more recent Commission precedent concerning that provision indicate that,

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<sup>1</sup> Compl. at 2 (Oct. 22, 2018).

<sup>2</sup> *Id.*

<sup>3</sup> Sandfire Resp. at 1 (Dec. 17, 2018); MMA Resp. at 4 (Dec. 18, 2018). Ballot initiatives are also sometimes called ballot measures, propositions, or referendum. For purposes of this Factual and Legal Analysis, we use the terms interchangeably to include all questions put to the voters on a ballot other than the election of a candidate for office.

1 contrary to Respondents’ argument, 52 U.S.C. § 30121 applies to the donations at issue from  
2 Sandfire and Sandfire NL to MMA and Stop I-186 that were made for the purpose of influencing  
3 a ballot initiative, because that initiative falls within the scope of “election” as used in section  
4 30121. Nonetheless, because of the state of guidance from the Commission at the time of the  
5 donations at issue in this matter, including in light of the Commission’s split in MUR 6678  
6 (MindGeek),<sup>4</sup> the Commission declines to pursue enforcement against Respondents for these  
7 apparent violations. Accordingly, the Commission dismisses the allegations that Sandfire and  
8 Sandfire NL violated 52 U.S.C. § 30121 by making prohibited foreign national donations.  
9 Similarly, the Commission dismisses the allegations that MMA and Stop I-186, the committees  
10 receiving the donations, violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g) by  
11 accepting prohibited foreign national donations.

## 12 **II. FACTUAL BACKGROUND**

13 The November 2018 election ballot in Montana included I-186, a ballot initiative that the  
14 Complaint asserts would have created additional regulation on water pollution by hardrock mines  
15 within the state.<sup>5</sup> In the eight months leading up to the election, Sandfire, a Canadian subsidiary  
16 of an Australian company, Sandfire NL,<sup>6</sup> made \$270,000 in donations to the MMA, an  
17 “incidental committee” established for the purpose of opposing I-186,<sup>7</sup> and on April 4, 2018,  
18 Sandfire made a \$17,857 donation to a state ballot issue committee, Stop I-186.<sup>8</sup> The Complaint

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<sup>4</sup> MUR 6678 (MindGeek USA, Inc., *et al.*).

<sup>5</sup> Compl. at 2.

<sup>6</sup> *Id.* at 3.

<sup>7</sup> *Id.* Under Montana law, “incidental committee” means a political committee that is not specifically organized or operating for the primary purpose of supporting or opposing candidates or ballot issues but that may incidentally become a political committee by receiving a contribution or making an expenditure. *See* MCA 13-1-101(22)(a).

<sup>8</sup> Compl. at 3; *see* MCA 13-1-101(7) (defining “ballot issue committee”).

1 alleges that Sandfire NL is the source of the donations made by Sandfire, asserting that  
2 “[a]ccording to its public filings, Sandfire Resources America has no sources of revenue in the  
3 United States, and a cash flow of zero.”<sup>9</sup>

4 While there were candidates, including federal candidates, on the same ballot as the  
5 initiative, the available information does not indicate that any of those candidates was linked to  
6 the ballot initiative beyond appearing on the same ballot.

### 7 **III. LEGAL BACKGROUND**

8 The Act and Commission regulations prohibit any “foreign national” from directly or  
9 indirectly making a contribution or donation of money or other thing of value, or an expenditure,  
10 independent expenditure, or disbursement, in connection with a federal, state, or local election.<sup>10</sup>  
11 The Act’s definition of “foreign national” includes an individual who is not a citizen or national  
12 of the United States and who is not lawfully admitted for permanent residence as well as a  
13 “foreign principal” as defined at 22 U.S.C. § 611(b), which, in turn, includes a “partnership,  
14 association, corporation, organization, or other combination of persons organized under the laws  
15 of or having its principal place of business in a foreign country.”<sup>11</sup> The Act also prohibits any  
16 person from soliciting, accepting, or receiving a contribution or donation from a foreign  
17 national.<sup>12</sup>

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<sup>9</sup> Compl. at 3.

<sup>10</sup> 52 U.S.C. § 30121(a)(1); 11 C.F.R. § 110.20(b), (c), (e), (f).

<sup>11</sup> 52 U.S.C. § 30121(b); 22 U.S.C. § 611(b)(3); *see also* 11 C.F.R. § 110.20(a)(3).

<sup>12</sup> 52 U.S.C. § 30121(a)(2). Commission regulations employ a “knowingly” standard. 11 C.F.R. § 110.20(g). A person knowingly solicits, accepts, or receives a prohibited foreign national contribution or donation if that person has actual knowledge that funds originated from a foreign national, is aware of facts that would lead a reasonable person to conclude that there is a substantial probability that the funds originated from a foreign national, or is aware of facts that would lead a reasonable person to inquire whether the funds originated from a foreign national but failed to conduct a reasonable inquiry. 11 C.F.R. § 110.20(a)(4).

1           In affirming the constitutionality of the Act’s ban on foreign national contributions, the  
2 court in *Bluman v. FEC* held:

3                   It is fundamental to the definition of our national political  
4 community that foreign citizens do not have a constitutional right  
5 to participate in, and thus may be excluded from, activities of  
6 democratic self-government. It follows, therefore, that the United  
7 States has a compelling interest for purposes of First Amendment  
8 analysis in limiting the participation of foreign citizens in activities  
9 of American democratic self-government, and in thereby  
10 preventing foreign influence over the U.S. political process.<sup>13</sup>

11 The Commission has explained that “[s]uch exclusion ‘is part of the sovereign’s obligation to  
12 preserve the basic conception of a political community.’”<sup>14</sup>

13           The Act defines “election” to mean “a general, special, primary, or runoff election” as  
14 well as “a convention or caucus of a political party which has authority to nominate a  
15 candidate.”<sup>15</sup> Commission regulations further specify that “[e]lection means the process by  
16 which individuals, whether opposed or unopposed, seek nomination for election, or election, *to*  
17 *Federal office.*”<sup>16</sup> Section 30121 states that “[i]t shall be unlawful for” a foreign national,  
18 directly or indirectly, to make “a contribution or donation of money or other thing of value, or to  
19 make an express or implied promise to make a contribution or donation, in connection with a  
20 Federal, State, or local election.”<sup>17</sup> By expressly including state and local elections within its  
21 prohibition on contributions or donations by foreign nationals, section 30121 on its face applies  
22 beyond the context of the Commission’s general regulatory definition of elections, which makes

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<sup>13</sup> 800 F. Supp. 2d 281, 287 (D.D.C. 2011), *aff’d*, 565 U.S. 1104 (2012); *see also United States v. Singh*, 924 F.3d 1030, 1040-44 (9th Cir. 2019); Advisory Op. 2018-12 at 7 (Defending Digital Campaigns, Inc.) (“AO 2018-12”).

<sup>14</sup> AO 2018-12 at 7 (quoting *Bluman*, 800 F. Supp. 2d at 287).

<sup>15</sup> 52 U.S.C. § 30101(1).

<sup>16</sup> 11 C.F.R. § 100.2(a) (emphasis added).

<sup>17</sup> 52 U.S.C. § 30121(a)(1)(A).

1 reference both to “individuals” and the pursuit of “*Federal office.*”<sup>18</sup> The text of section 30121  
2 thus raises the question whether the state or local elections to which it applies includes elections  
3 such as the one at issue in this matter in which ballot initiatives are put to voters.

4 Prior to Congress’s enactment of the Bipartisan Campaign Reform Act of 2002  
5 (“BCRA”),<sup>19</sup> the Act prohibited foreign national contributions “in connection with an election *to*  
6 *any political office.*”<sup>20</sup> Accordingly, before BCRA, the Commission treated foreign national  
7 donations relating only to ballot initiatives as generally outside the purview of the Act on the  
8 basis that ballot initiative elections generally are not in connection with elections for political  
9 office.<sup>21</sup> Nonetheless, in pre-BCRA Advisory Opinion 1989-32, the Commission described  
10 circumstances in which a ballot initiative “inextricably linked” to a candidate would be “in  
11 connection with” that candidate’s election to political office and, therefore, a committee  
12 supporting such a ballot initiative would be prohibited from accepting funds from a foreign  
13 national.<sup>22</sup>

14 In enacting BCRA, Congress amended the Act’s foreign national section to prohibit  
15 foreign national contributions or donations “in connection with a Federal, State, or local  
16 election.”<sup>23</sup> In the course of issuing implementing regulations to correspond with the revised

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<sup>18</sup> *Id.* (emphasis added).

<sup>19</sup> Pub. L. No. 107-155, 116 Stat. 81 (2002).

<sup>20</sup> *See* 2 U.S.C. § 441e(a) (2000) (emphasis added).

<sup>21</sup> *See* Advisory Op. 1989-32 (McCarthy) (“AO 1989-32”).

<sup>22</sup> *Id.* at 3-6 (detailing ways in which a candidate and a ballot initiative committee seeking to accept foreign national funds were “inextricably linked,” including through overlapping staff between candidate and ballot initiative committee, linking the name of the candidate and committee in public communications, the candidate soliciting for the committee, and appearance of candidate and initiative on same ballot, concluding that because of these links the activities of the ballot initiative committee were campaign-related and thus the foreign national prohibition applied to the ballot initiative committee).

<sup>23</sup> *Compare* 2 U.S.C. § 441e(a) (2000), *with* 2 U.S.C. § 441e(a)(1)(A) (2002) (now codified at 52 U.S.C. § 30121(a)(1)(A)).

1 statutory provision, the Commission concluded that the deletion of the phrase “election to any  
2 public office” and the substitution of the “broader phrase ‘Federal, State, or local election’” was  
3 meant to clarify congressional intent “to prohibit foreign national support of candidates and their  
4 committees and political organizations and foreign national activities in connection with all  
5 Federal, State, and local elections.”<sup>24</sup>

6         Shortly after the passage of BCRA, in Advisory Opinion 2003-37 (Americans for a Better  
7 Country), the Commission addressed whether a political committee’s non-federal account could  
8 raise and spend funds from foreign nationals for voter registration and mobilization activities on  
9 behalf of federal candidates. In framing its analysis, the Commission began by generally  
10 explaining the foreign national prohibition and specifically explaining that its application is not  
11 limited to “elections for political office”:

12                 The Act, as amended by BCRA, prohibits foreign nationals from,  
13                 among other things, directly or indirectly making a contribution or  
14                 donation of money or other thing of value, or to expressly or  
15                 impliedly promise to make a contribution or donation, in  
16                 connection with a Federal, State, or local election (*this prohibition*  
17                 *is not limited to elections for political office*).<sup>25</sup>  
18

19         This language from AO 2003-37, which was not prepared in connection with an analysis  
20 of ballot initiatives, remains the only Commission-approved interpretation of the meaning of the  
21 Act’s post-BCRA foreign national prohibition’s use of “election” with respect to non-candidate  
22 elections. Nonetheless, the Commission has addressed the scope of the term “election” in a  
23 number of advisory opinions considering whether ballot measure activities are “in connection  
24 with” an election as that term is used in BCRA’s “soft money” provision now codified at

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<sup>24</sup> Contribution Limitations and Prohibitions, 67 Fed. Reg. 69928, 69944 (Nov. 19, 2002) (“2002 E&J”).

<sup>25</sup> Advisory Op. 2003-37 (Americans for a Better Country) at 20 (superseded on other grounds by Political Committee Status & Definition of Contribution, 69 Fed. Reg. 68056, 68063 (Nov. 23, 2004)) (emphasis added) (“AO 2003-37”).

1 52 U.S.C. § 30125(e). Like the pre-BCRA foreign national provision, BCRA’s soft money  
 2 provision refers to elections *for office*, prohibiting federal candidates and officeholders, their  
 3 agents, and entities directly or indirectly established, financed, maintained, or controlled by  
 4 them, or acting on their behalf, from raising or spending nonfederal funds “in connection with an  
 5 election for Federal office” and “in connection with any election other than an election for  
 6 Federal office.”<sup>26</sup>

7 The first of the post-BCRA soft money ballot initiative advisory opinions, Advisory  
 8 Opinion 2003-12 (Flake), was considered shortly before AO 2003-37 interpreted the foreign  
 9 national provision as discussed above. In AO 2003-12, the Commission was asked whether,  
 10 under the soft money rules, a ballot initiative committee’s activities were in connection with  
 11 “any election other than an election for Federal office.”<sup>27</sup> The Commission determined that they  
 12 were, once the initiative qualified for the ballot.<sup>28</sup> In reaching this conclusion, the Commission  
 13 considered Congress’s use of the phrase “any election” in place of the phrase “any election *to*  
 14 *any political office*.”<sup>29</sup> The Commission concluded that this difference in language indicated  
 15 Congress’s intent that the soft money provision “is not limited to elections for a political  
 16 office.”<sup>30</sup> It explained:

17 As used in subparagraph (B) of section [30125(e)(1)], the term, “in  
 18 connection with *any election other than* an election for Federal  
 19 office” is, on its face, clearly intended to apply to a different  
 20 category of elections than those covered by subparagraph (A),

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<sup>26</sup> 52 U.S.C. § 30125(e).

<sup>27</sup> See AO 2003-12 at 4-6.

<sup>28</sup> *Id.* at 5-6. The Commission also concluded that when a ballot measure committee is established, financed, maintained, or controlled by a federal candidate, as was the case in AO 2003-12, its activities before qualifying for the ballot, such as signature gathering, are also “in connection with any election other than an election for Federal office.” *Id.* at 6.

<sup>29</sup> *Id.* at 5 (emphasis in original).

<sup>30</sup> *Id.* at 5-6.

1           which refers to “an election for Federal office.” This phrasing, “in  
2           connection with any election other than an election for Federal  
3           office” also differs significantly from the wording of other  
4           provisions of the Act that reach beyond Federal elections.  
5           Particularly relevant is the prohibition on contributions or  
6           expenditures by national banks and corporations organized by  
7           authority of Congress, which applies “in connection with any  
8           election to *any political office*.” [52 U.S.C. § 30118(a)]. Where  
9           Congress uses different terms, it must be presumed that it means  
10          different things. Congress expressly chose to limit the reach of  
11          section [30118(a)] to those non-Federal elections for a “political  
12          office,” while intending a broader sweep for section  
13          [30125(e)(1)(B)], which applies to “any election” (with only the  
14          exclusion of elections to Federal office). Therefore, the  
15          Commission concludes that the scope of section [30125(e)(1)(B)]  
16          is not limited to elections for a political office.<sup>31</sup>

17  
18          The Commission distinguished AO 1989-32, which had concluded that ballot initiative  
19          activity conducted independently from candidates (*i.e.*, “pure” ballot initiative activity) was not  
20          “in connection with” a candidate’s election and was, therefore, outside the scope of the foreign  
21          national contribution prohibition. The Commission explained that its interpretation in AO 1989-  
22          32 was based on pre-BCRA statutory language which “then limited activity ‘in connection with  
23          any election to political office.’”<sup>32</sup>

24          Two years later, in Advisory Opinion 2005-10 (Berman/Doolittle), the Commission  
25          considered whether the soft money provision prohibits federal candidates and officeholders from  
26          raising funds for ballot measure committees formed solely to support or oppose ballot initiatives  
27          where the ballot initiative committee was not established, financed, maintained, or controlled by

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<sup>31</sup>        *Id.* (emphasis in original, footnote omitted); *see also* Factual & Legal Analysis, MUR 5367 (Darrell Issa) (concluding, based on the analysis in AO 2003-12, that a recall election was “an election other than an election for federal office” and that, therefore, BCRA’s soft money provisions applied to Congressman Issa’s efforts to solicit soft money for a ballot measure committee that was supporting the recall and that was established, maintained, financed, or controlled by Issa).

<sup>32</sup>        AO 2003-12 at 6.



1 a federal candidate and where no federal candidates appeared on the same ballot.<sup>33</sup> The  
2 Commission concluded that the proposed activity was not prohibited, issuing an opinion without  
3 explaining the basis for its conclusion. The four Commissioners who voted to approve the  
4 opinion explained their rationales in two concurring statements, one in which two  
5 Commissioners stated their position that the soft money provision did not apply to any non-  
6 candidate elections and the other in which the other two Commissioners stated their position that  
7 the soft money provision did not apply under the particular facts presented.<sup>34</sup>

8 In Advisory Opinion 2010-07 (Yes on FAIR), the Commission again addressed whether  
9 federal candidates' raising of soft money for ballot initiative activity was in connection with an  
10 election for federal office within the meaning of the soft money provision.<sup>35</sup> In this instance, the  
11 requestor represented that the ballot initiative committee was not established, financed,  
12 maintained, or controlled by a federal candidate but that the initiative would appear on the same  
13 ballot as federal candidates.<sup>36</sup> The Commission agreed that Members of Congress could solicit  
14 funds outside the Act's limits and source prohibitions prior to the initiative qualifying for the

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<sup>33</sup> Advisory Op. 2005-10 at 2 (Berman/Doolittle) ("AO 2005-10").

<sup>34</sup> See Concurring Opinion of Comm'rs Mason & Toner at 1-2, AO 2005-10 (stating that the soft money provision "applies to federal and non-federal elections for public office, but does not apply to non-candidate political activity, such as ballot initiatives or referenda"); Concurring Statement of Comm'rs McDonald & Weintraub at 1-2, AO 2005-10 (stating that the soft money ban did not apply because, under the factual circumstances, where no federal candidate would be on the ballot and the committee was not established, financed, maintained, or controlled by a federal candidate, the committee's activities were "not in connection with a federal election"); see also Dissenting Opinion of Comm'r Thomas at 2, AO 2005-10 ("In my view, the clear phrase 'any election' means just that — *any* election. This broad statutory language includes elections to decide ballot initiatives as well as elections to select public officials.").

<sup>35</sup> Advisory Op. 2010-07 (Yes on FAIR) ("AO 2010-07").

<sup>36</sup> *Id.* at 2.

1 ballot but were unable to agree on whether Members could continue to make solicitations outside  
2 the limits and prohibitions after the initiative qualified for the ballot.<sup>37</sup>

3 After this series of advisory opinions, a three-judge district court, in *Bluman v. FEC*,  
4 upheld the constitutionality of the foreign national prohibition.<sup>38</sup> In so doing, the court addressed  
5 the plaintiffs' arguments that the prohibition was "underinclusive and not narrowly tailored  
6 because it permits foreign nationals to make contributions and expenditures related to ballot  
7 initiatives."<sup>39</sup> Neither the court, nor the Commission in its briefs, analyzed the correctness of  
8 this understanding of the prohibition, instead focusing on whether such underinclusivity would  
9 be fatal to the provision's constitutionality.<sup>40</sup> In upholding the constitutionality of the foreign  
10 national prohibition with respect to contributions to candidates and parties, express advocacy  
11 expenditures, and donations to outside groups to be used for the same purposes,<sup>41</sup> the *Bluman*

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<sup>37</sup> See AO 2010-07 at 3; Concurring Opinion of Comm'rs Bauerly, Walther & Weintraub at 4, AO 2010-07 (concluding that "[a]fter an initiative has qualified for a ballot on which Federal candidates will also appear, the activities of a ballot initiative committee are, 'in connection with' an election within the meaning of [ 52 U.S.C. § 30125]"); Concurring Opinion of Comm'rs Petersen, Hunter & McGahn at 4, AO 2010-07 (concluding that AO 2003-12 has been superseded and that "ballot measures and referenda are not 'elections' within the meaning of the Act").

<sup>38</sup> *Bluman*, 800 F. Supp. 2d at 288.

<sup>39</sup> *Id.* at 291.

<sup>40</sup> *Id.* (concluding that respecting plaintiffs' underinclusivity argument, "Congress's determination that foreign contributions and expenditures pose a greater risk in relation to candidate elections than such activities pose in relation to ballot initiatives is a sensible one and, in our view, does not undermine the validity of the statutory ban on contributions and expenditures" by foreign nationals to candidates); *Bluman v. FEC*, FEC Opposition to Plaintiffs' Motion for Summary Judgment and Reply in Support of FEC Motion to Dismiss at 38-39 & n.17, Civ. No. 10-1766 (Mar. 1, 2011) (responding to plaintiffs' argument that the statute does not go far enough, noting that Commission, in AO 2003-12, "indirectly indicated that it might interpret" foreign national provision to apply to ballot initiatives, but had since, in AO 2005-10, "suggested that it does not," and arguing that the "exemption of ballot measures" demonstrated narrow tailoring). Compare *Bluman*, 800 F. Supp. 2d at 284 ("This statute, as we interpret it, does not bar foreign nationals from issue advocacy — that is, speech that does not expressly advocate the election or defeat of a specific candidate.").

<sup>41</sup> *Bluman*, 800 F. Supp. 2d at 291.

1 court ultimately did not decide whether Congress could prohibit — or had prohibited — foreign  
2 nationals from making donations with respect to pure ballot initiatives.<sup>42</sup>

3 The meaning of “election” in the post-BCRA foreign national prohibition vis-à-vis its  
4 application to pure ballot initiative activity was first before the Commission in a post-*Bluman*  
5 enforcement matter in MUR 6678 (MindGeek).<sup>43</sup> After discussing the above history of treating  
6 or not treating ballot initiative activity as in connection with an election, particularly in the soft  
7 money context, the Office of General Counsel (“OGC”) reasoned:

8 [I]t may not be appropriate to extrapolate Commission analysis  
9 under section [30125(e)] to this matter, given that a different  
10 statute containing different terms is at issue: section [30125(e)]  
11 addresses funds “in connection with any election other than an  
12 election for Federal office,” while section [30121] focuses on  
13 foreign national contributions and donations “in connection with a  
14 Federal, State, or local election.”<sup>44</sup>

15  
16 Citing the lack of legislative history directly on the issue as well as the *dicta* in *Bluman* accepting  
17 the parties’ uncontested notion that the foreign national provision may not extend to ballot  
18 initiatives, the OGC declined to provide a recommendation regarding whether section 30121  
19 applies to the pure ballot initiative activity in that matter.<sup>45</sup> Instead, the OGC recommended that  
20 the Commission exercise its prosecutorial discretion and dismiss the allegations as a result of

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<sup>42</sup> *Id.* at 292 (explaining, with respect to plaintiffs’ “concern that Congress might bar them from issue advocacy and speaking out on issues of public policy,” that “[o]ur holding does not address such questions, and our holding should not be read to support such bans”).

<sup>43</sup> MUR 6678 (MindGeek USA, Inc., *et al.*).

<sup>44</sup> First Gen. Counsel’s Rpt., MUR 6678 (MindGeek USA, Inc., *et al.*) at 18.

<sup>45</sup> *But see id.* at 19, n.74 (“Despite the recommendation not to proceed with an enforcement action on these facts, the Commission may still, if it so chooses, use the enforcement matter as a vehicle to provide further public guidance on the underlying legal issue through issuance of a clarifying Factual & Legal Analysis or a unified Statement of Reasons. The Commission may also wish to address the issue of section [30121’s] application to ballot measure activity by regulation or other advance notice.”).

1 “the lack of clear legal guidance on whether the foreign national prohibition extends to pure  
2 ballot initiative activity.”<sup>46</sup>

3 The Commission ultimately split on whether to pursue the allegations in MUR 6678 and  
4 Commissioners issued four statements of reasons supporting various views on the scope of the  
5 foreign national contribution ban.<sup>47</sup> In the years since it considered MUR 6678, the Commission  
6 has not again squarely faced the question whether the foreign national prohibition reaches pure  
7 ballot initiative activity.<sup>48</sup>

#### 8 **IV. LEGAL ANALYSIS**

9 Sandfire and Sandfire NL appear to be foreign nationals, as defined in the Act, and it is  
10 undisputed that they made donations to pure ballot initiative committees in Montana. Thus, this  
11 matter again directly raises whether section 30121 reaches such activity. Similar to MUR 6678,  
12 the Commission will not pursue these allegations as a result of the lack of clear legal guidance as  
13 to the scope of the section 30121. But, in light of the substantial, if not growing, concern of  
14 foreign influence in the process of American democratic self-governance, which the Commission  
15 itself has observed and relied upon in consideration of matters raising such concerns,<sup>49</sup> and the

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<sup>46</sup> *Id.* 19-20; *see Bluman*, 800 F. Supp. 2d at 281. In recommending dismissing the allegations, the OGC also noted the “lack of information in the current record suggesting that the Ballot Measure Committee’s activity was inextricably linked with the election of any candidate” and further noted that such information would have supported a finding of a violation whether or not the prohibition extends to “pure ballot measure activity.” *See* First Gen. Counsel’s Rpt., MUR 6678 (MindGeek USA, Inc., *et al.*) at 19.

<sup>47</sup> *See* Certification, MUR 6678 (Mar. 18, 2015); Statement of Reasons, Comm’r. Ravel, MUR 6678; Statement of Reasons, Comm’r. Weintraub, MUR 6678; Statement of Reasons, Comm’rs. Petersen, Hunter & Goodman, MUR 6678; Supp. Statement of Reasons, Comm’r Goodman, MUR 6678.

<sup>48</sup> *Cf.* Factual & Legal Analysis, MUR 7141 (Wang Jianlin, *et al.*) (assuming, *arguendo*, that the foreign national prohibition did extend to ballot initiatives but finding no reason to believe a foreign national violation had occurred because the funds did not appear to originate with a foreign national and no foreign national appeared to have participated in the decision to make the donation).

<sup>49</sup> *See, e.g.*, Minutes of Open Meeting of Federal Election Commission at 13 (Sept. 16, 2016) (directing this Office to prioritize cases “involving allegations of foreign influence”); Responses to Questions from the Committee on House Administration, Fed. Election Comm’n at 41-42 (May 1, 2019); *see also Explanatory Statement to*

1 lack of additional legal guidance to the regulated community on the scope of section 30121 in the  
2 five years since the Commission’s consideration of MUR 6678, we now provide a more  
3 conclusive determination on the application of the foreign national prohibition to ballot measure  
4 activity like the activity presented in this matter.

5 As discussed below, consistent with the breadth of section 30121, as revised by Congress  
6 in BCRA, as well as the Commission’s precedent, including its recent consideration of the Act’s  
7 foreign national prohibition, it appears that section 30121 applies to Sandfire and Sandfire NL’s  
8 foreign spending in connection with the I-186 ballot initiative. Nevertheless, the Commission  
9 again exercises its prosecutorial discretion and dismisses the allegations so that this analysis may  
10 be applied only prospectively.

11 The Act’s general definition of “election” in section 30101(1) makes reference to  
12 different kinds of elections including “general, special, primary, or runoff election[s],” but does  
13 not, by its own terms, exclude non-candidate-based elections.<sup>50</sup> Thus, that general definition  
14 does not on its face resolve whether a state ballot initiative is a “Federal, State, or local election”  
15 for purposes of the foreign national prohibition in section 30121.<sup>51</sup> Similarly, the Commission’s  
16 general regulatory definition of “election” in 11 C.F.R. § 100.2, which, as discussed above, is  
17 limited to candidate-based elections, or nominations for election, *to federal office*,<sup>52</sup> does not  
18 resolve the meaning of “election” in the foreign national prohibition, which expressly extends  
19 beyond the federal context addressed in section 100.2.

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*Consolidated Appropriations Act, 2018*, 164 Cong. Rec. H2045, H2520 (Mar. 22, 2018) (“Preserving the integrity of elections, and protecting them from undue foreign influence, is an important function of government at all levels.”).

<sup>50</sup> 52 U.S.C. § 30101(1)(A).

<sup>51</sup> *Id.* § 30121.

<sup>52</sup> 11 C.F.R. § 100.2.

1           In the absence such specificity, the word “election” should be given its plain and ordinary  
 2 meaning in the context of “the language and design of the statute as a whole.”<sup>53</sup> The Random  
 3 House Dictionary of the English Language defines “election” as “the selection of a person or  
 4 persons for office by vote” and “a public vote upon a proposition submitted.”<sup>54</sup> The inclusion of  
 5 the non-candidate meaning of “election,” *i.e.*, ballot initiatives, within the ordinary meaning of  
 6 “election” substantially predates BCRA.<sup>55</sup> Similarly, other provisions of federal law that, like  
 7 the foreign national prohibition, regulate not only federal but also state and local elections, have  
 8 been interpreted using this ordinary meaning and thus including ballot measures in addition to  
 9 candidate elections.<sup>56</sup>

10           The BCRA revisions to the Act’s foreign national prohibition indicate that Congress  
 11 intended the prohibition to be applied in accordance with this ordinary meaning. Previously, the  
 12 Act’s foreign national provision applied only to contributions “in connection with *an election to*

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<sup>53</sup> *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme”) (internal quotation omitted); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) (“When terms used in a statute are undefined, we give them their ordinary meaning.”); *United States v. Palmer*, 854 F.3d 39, 47 (D.C. Cir. 2017) (“Congress is presumed, absent indication to the contrary and there is none here, to use words in their ordinary meaning.”); *Shays v. FEC*, 414 F.3d 76, 105 (D.C. Cir. 2005) (“The meaning — or ambiguity — of certain words or phrases may only become evident when placed in context.” (citing Webster’s Third New International Dictionary to determine ordinary meaning of “ask”).

<sup>54</sup> *Election*, Random House Dictionary of the English Language, Unabridged (2nd ed. 1987).

<sup>55</sup> *See, e.g., Burson v. Freeman*, 504 U.S. 191, 205 (1992) (tracing history of Tennessee candidate and ballot measure polling place regulation, upheld as constitutional by the Court, to 1897 act criminalizing “the use of bribery, violence, or intimidation in order to induce a person to vote or refrain from voting for any particular person or measure”) (emphasis added).

<sup>56</sup> *See* Interpretive Guidelines, 41 Fed. Reg. 29998, 29999 (1976) (defining “elections” to which Dept. of Justice will apply Voting Rights Act (“VRA”) Language Minority Group provisions, now codified at 52 U.S.C. § 10301 *et seq.*, as “any type of election, whether it is a primary, general or special election . . . includ[ing] elections of officers as well as elections regarding such matters as bond issues, constitutional amendments and referendums”); 28 C.F.R. § 51.17 (including “an initiative, referendum, or recall election” in term “special election” subject to VRA pre-clearance requirements).

1 *any political office* or in connection with any primary election, convention, or caucus held to  
2 *select candidates for any political office.*<sup>57</sup> In BCRA, however, Congress amended the text of  
3 the foreign national provision to remove the candidate-focused references, including the  
4 references to “political office.” In their place, Congress prohibited foreign national contributions  
5 or donations “in connection with a Federal, State, or local election.”<sup>58</sup> This change in statutory  
6 language indicates that Congress intended that the prohibition apply broadly and no longer be  
7 limited to candidate-focused elections. “When Congress acts to amend a statute,” the Supreme  
8 Court has stated that it “presume[s] it intends its amendment to have real and substantial  
9 effect.”<sup>59</sup>

10 The applicability of the ordinary meaning of “elections,” in the context of the foreign  
11 national prohibition, is reinforced by Congress’s treatment of other sections of the Act that were  
12 revised by BCRA. For example, Congress, in BCRA, amended the section of the Act prohibiting  
13 contributions by national banks (now codified at 52 U.S.C. § 30118), a provision that has long  
14 applied to state and local, as well as federal, elections to “political office.”<sup>60</sup> Despite amending  
15 other aspects of this prohibition, Congress retained the “to any political office” limitation in the  
16 scope of “elections” to which the national bank prohibition applies. Thus, in the same set of

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<sup>57</sup> 2 U.S.C. § 441e(a) (2000) (emphasis added).

<sup>58</sup> 52 U.S.C. § 30121(a)(1)(A).

<sup>59</sup> *Stone v. INS*, 514 U.S. 386, 397 (1995); *see also Russello v. United States*, 464 U.S. 16, 23-24 (1983) (“Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.”).

<sup>60</sup> BCRA § 203, 116 Stat. at 91-92, codified at 2 U.S.C. § 441b (now 52 U.S.C. § 30118) (“It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office. . . .”). The national bank prohibition, like the foreign national prohibition, applies not only to federal but also to state and local elections but only in the case of such elections for political office. *See Advisory Opinion 1987-14 (First Nat’l Bank of Shreveport)* at 1 (“a national bank is prohibited from making a contribution or expenditure in connection with any election to any political office, including local, state or Federal offices”).

1 revisions to the Act, Congress chose to retain the limiting “political office” language in some  
2 places but remove it in others. “When Congress amends one statutory provision but not another,  
3 it is presumed to have acted intentionally.”<sup>61</sup> The BCRA changes to the statutory language of  
4 these two prohibitions — removing the limiting “political office” language in the foreign  
5 national provision while leaving it in the national bank provision — suggest that Congress  
6 intended the foreign national prohibition to apply not only to state and local candidate elections,  
7 but also to non-candidate elections such as ballot initiatives as well.

8         This understanding is consistent with Congress’s other amendments, in BCRA, to expand  
9 the foreign national prohibition. For instance, BCRA expanded the scope of the foreign national  
10 prohibition beyond “contributions,” to include “donations” in order to make clear that foreign  
11 nationals could not evade the prohibition by targeting state and local elections.<sup>62</sup> The BCRA  
12 amendments further added prohibitions against presidential inaugural committees accepting  
13 foreign national donations,<sup>63</sup> instructed the United States Sentencing Commission to provide  
14 guidelines which include a sentencing enhancement for criminal violations of the Act which  
15 involve “a contribution, donation, or expenditure from a foreign source,”<sup>64</sup> and added significant  
16 prohibitions and limitations on candidate and party committees’ receipt, solicitation, donation,

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<sup>61</sup> See *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 174 (2009).

<sup>62</sup> BCRA § 303, 116 Stat. 81, 96; *see also* 2002 E&J at 69944 (explaining that, through the addition of “donation,” and the removal of references to “candidates” and “political office,” “Congress left no doubt as to its intention to prohibit foreign national support of . . . foreign national activities in connection with all Federal, State, and local elections”); *see also* Statement of Sen. Feingold, 148 Cong. Rec. S1991-1997 (daily ed. Mar. 18, 2002); Statement of Sen. Lieberman, 148 Cong. Rec. S2774 (daily ed. Mar. 22, 2002).

<sup>63</sup> BCRA § 308, 116 Stat. at 103-04, codified at 36 U.S.C. § 510 (extending foreign national prohibition to non-election context as applied to inaugural committees). Prior to these BCRA amendments, the Commission had concluded that funds received and expended by inaugural committee are neither “contributions” nor “expenditures” because they “are used to finance inaugural activities rather than any Federal election.” Advisory Opinion 1980-144 (Presidential Inaugural Committee – 1981).

<sup>64</sup> BCRA § 314, 116 Stat. at 107.



1 and transfer of soft money, including from foreign nationals.<sup>65</sup> These changes reflect Congress's  
2 multifaceted effort to “prevent[] foreign influence over the U.S. political process.”<sup>66</sup>

3 Of note, this context-based understanding of the term “elections” is not an issue that only  
4 arises in federal law. In fact, in the state in which this matter arises, the Montana code defines  
5 “election” in candidate based terms, as “general, special, or primary election,” but the portion of  
6 that same title regarding ballot issues includes provisions on “Election Procedures” and  
7 “Determination of the result of election.”<sup>67</sup> There too the context indicates that despite the  
8 general definition only referencing candidate-based “elections,” in some provisions “elections” is  
9 clearly intended to take its ordinary meaning and include ballot measures.<sup>68</sup>

10 Further, in its explanation and justification of the post-BCRA foreign national  
11 regulations, the Commission stated that “[a]s indicated by the title of section 303 of BCRA,  
12 ‘Strengthening Foreign Money Ban,’ Congress amended [52 U.S.C. 30121] to further delineate  
13 and expand the ban on contributions, donations, and other things of value by foreign  
14 nationals.”<sup>69</sup> This expansive purpose, seen in context of Congress’s removal of limiting  
15 language as to the elections within the scope of some sections of the Act but retaining it in  
16 others, its addition of further prohibitions regarding foreign national activity in American  
17 elections at all levels, and its extension of the foreign national prohibition to the non-electoral

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<sup>65</sup> BCRA § 101, 116 Stat. at 82-86.

<sup>66</sup> *Bluman*, 800 F. Supp. 2d at 288.

<sup>67</sup> MCA 13-1-101(12); MCA 13-1-101(19) (defining general election as “an election that is held for offices that first appear on a primary election ballot unless the primary is canceled as authorized by law, and that is held on a date specified in 13-1-104”); *see* MCA 13-27-501 *et seq.*

<sup>68</sup> *See Public Citizen v. Dept. of Justice*, 491 U.S. 440, 454 (1989) (“Where the literal reading of a statutory term would compel ‘an odd result,’ we must search for other evidence of congressional intent to lend the term its proper scope.”) (internal citation omitted).

<sup>69</sup> 2002 E&J at 69440.

1 context of inaugurations, all taken together, support the conclusion that “election” for purposes  
2 of section 30121 includes ballot initiative activity.<sup>70</sup>

3 That understanding of “election” in the foreign national prohibition is not only consistent  
4 with the ordinary meaning of the term and Congress’s broad intent, in the context of BCRA, to  
5 prevent foreign influence over the U.S. political process, but it is also consistent with the  
6 Commission’s past conclusions. As noted above, the Commission explained in the 2002 E&J  
7 that Congress’s deletion of the phrase “election to any public office” from the Act’s foreign  
8 national provision, and the substitution of the “broader phrase ‘Federal, State, or local election,’”  
9 was meant to clarify congressional intent “to prohibit foreign national support of candidates and  
10 their committees and political organizations and foreign national activities in connection with all  
11 Federal, State, and local elections.”<sup>71</sup> Moreover, in AO 2003-37, the Commission concluded that  
12 these changes meant not only that the Act now expressly covered non-federal elections, but also  
13 that “this prohibition is not limited to elections for political office.”<sup>72</sup>

14 Consistent with the intent behind Congress’s BCRA amendments to the foreign national  
15 prohibition in the Act, the Commission has interpreted and applied the foreign national  
16 prohibition broadly. For instance, in Advisory Opinion 2010-14, the Commission approved of a  
17 national party committee’s pre-election use of a recount and election-contest fund, but reiterated  
18 that such a fund, though it does not fund “election” activities, was subject to the foreign national  
19 prohibition and could not accept contributions from foreign nationals.<sup>73</sup> The application of the

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<sup>70</sup> *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350 (1943) (“Courts will construe the details of an act in conformity with its dominating general purpose”).

<sup>71</sup> 2002 E&J at 69944.

<sup>72</sup> AO 2003-37 at 20; *accord* AO 2003-12 at 5-6 (concluding that soft money provisions are “not limited to elections for a political office”); *see supra* p. 6-8.

<sup>73</sup> Advisory Op. 2010-14 (DSCC) at 2.

1 foreign national prohibition to ballot measure activity similarly furthers the Act’s purpose to  
2 protect “activities intimately related to the process of democratic self-governance.”<sup>74</sup>

3 While not disputing the factual allegations in this matter, Respondents argue that the  
4 “foreign national prohibition does not apply to state and local ballot measure activity as a matter  
5 of law.”<sup>75</sup> Respondent’s primary argument is that ballot measure activity does not fit within the  
6 definition of “election” in the Act or Commission regulations. To support this argument,  
7 Respondents rely on pre-BCRA Supreme Court cases interpreting the Act’s different, pre-BCRA  
8 text as limited to regulating candidate elections.<sup>76</sup> While acknowledging BCRA’s changes to the  
9 foreign national prohibition to include “donations,” in addition to “contributions,” in order to  
10 indicate that the prohibition applied to soft money, Respondents contend that the replacement of  
11 the candidate-based “election to any political office” with the more general phrase “in  
12 connection with a Federal, State, or local election” was done because a court had declared the  
13 prior language ambiguous and that it did not reflect an intent to broaden the scope of the  
14 provision.<sup>77</sup> But Respondents’ argument fails to account for Congress’s removal of the “for  
15 political office” language from the foreign national prohibition while simultaneously retaining  
16 that same allegedly ambiguous phrasing in the national bank prohibition. Thus, rather than

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<sup>74</sup> *Bluman*, 800 F. Supp. 2d at 287 (quoting *Bernal v. Fainter*, 467 U.S. 216, 220 (1984)) (internal quotations omitted).

<sup>75</sup> Sandfire Resp. at 2; *see* MMA Resp. at 2 (“[T]he Act’s limitations and restrictions – including the foreign national prohibition – do not apply to funds received or expended in support of a state or local ballot initiative, like the one at issue here.”).

<sup>76</sup> Sandfire Resp. at 2 (citing *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 356 (1995) (“The Federal Election Campaign Act of 1971, at issue in *Buckley*, regulates only candidate elections, not referenda or other issue-based ballot measures.”); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 789 n.26 (1978) (The Act, “by [its] terms, do[es] not apply to referendum votes.”)); MMA Resp. at 3 (citing *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 356 (1995)).

<sup>77</sup> *See* Sandfire Resp. at 4-5; MMA Resp. at 3-4. As discussed above, Congress’s purpose in enacting BCRA went beyond eliminating soft money and also included “Strengthening Foreign Money Ban.” *Supra*, p. 17-18.

1 reflecting an intent to remove ambiguity while retaining the same substance, the distinction in  
 2 Congress’s choice reflects that it intended the scope of those provisions to be substantively  
 3 different, with the consequence that section 30121 is applies more broadly.<sup>78</sup>

4 Respondents also contend that section 30101(1) of the Act and the Commission’s  
 5 regulatory definition of “election” in 11 C.F.R. § 100.2 foreclose the application of section  
 6 30121 to ballot initiatives.<sup>79</sup> As discussed above, however, the definition of election in section  
 7 30101(1) encompassing “a general, special, primary, or runoff election” does not, by its own  
 8 terms, exclude non-candidate-based elections.<sup>80</sup> Nor is the question resolved by the regulatory  
 9 definition in 11 C.F.R. § 100.2, which is limited to elections “to federal office,” while the foreign  
 10 national prohibition on its face reaches a more broad set of elections, including state and local  
 11 elections. Instead, the term “election” should be given its ordinary meaning and “read in [its]  
 12 context and with a view to [its] place in the overall statutory scheme.”<sup>81</sup> Here, the relevant  
 13 context, which includes the Act’s application and the history of the provision, including  
 14 Congress’s revisions to it, indicates that “election” in the foreign national prohibition includes  
 15 ballot initiatives.

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<sup>78</sup> To the extent that Respondents distinguish between the different electoral contexts of electing representatives and passing ballot initiatives into law and argue that soft money concerns are less problematic in the latter context, Sandfire Resp. at 7; MMA Resp. at 4, that argument similarly overlooks that in BCRA Congress saw fit not only to limit the risks of corruption and its appearance with respect to candidates but also to avoid corruption of the process of self-governance resulting from the activities of foreign nationals, *Bluman*, 800 F. Supp. 2d at 287, 288 n.3 (recognizing Congress’s effort to “prevent[] foreign influence over the U.S. political process” by “limiting the participation of foreign citizens in activities of American democratic self-government”).

<sup>79</sup> Sandfire Resp. at 3-4; MMA Resp. at 2-4.

<sup>80</sup> *Supra* p. 13; *see* 52 U.S.C. § 30101(1)(A).

<sup>81</sup> *Davis v. Mich. Dep’t of Treas.*, 489 U.S. 803, 809 (1989) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”); *see also* AO 2003-12 at 5 (stating that the scope of section 30125 should not turn on the one word, “election,” read in isolation); *cf. id.* (“Likewise, 11 CFR 100.2(a), which defines ‘election . . . to Federal office,’ does not explain the meaning of [section 30125(e)(1)(B)], which, by its own terms, applies to elections other than elections to Federal office.”).

1            Respondents finally contend that this issue has been foreclosed by the court in *Bluman*.<sup>82</sup>  
2            Not so. As discussed above, the court in *Bluman* addressed the application of section 30121 to  
3            ballot initiatives only in the context the plaintiffs’ arguments that the prohibition was  
4            “underinclusive and not narrowly tailored because it permits foreign nationals to make  
5            contributions and expenditures related to ballot initiatives.”<sup>83</sup> But the *Bluman* court rejected the  
6            plaintiffs’ constitutional challenge to section 30121, and it did not in *dicta* resolve an  
7            unpresented question about the scope of “election” set forth in the foreign national prohibition.  
8            BCRA’s changes to the Act’s foreign national provision broadened the application of that  
9            provision to reach ballot initiative activity such as that at issue by Sandfire and Sandfire NL. As  
10           recognized by both Congress and the Commission, years after the passage of BCRA, the threat  
11           of foreign influence in American elections remains at least a substantial, if not a growing,  
12           concern.<sup>84</sup> The Commission has informed Congress that it continues to enforce the foreign  
13           national provision and prioritize cases involving allegations of foreign influence.<sup>85</sup> Accordingly,  
14           based on Congress’s changes to the foreign national prohibition in BCRA and more recent  
15           Commission precedent with respect to that provision, it appears that 52 U.S.C. § 30121 applies  
16           to the donations at issue in this matter.

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<sup>82</sup>        See Sandfire Resp. at 6; MMA Resp. at 3.

<sup>83</sup>        *Bluman*, 800 F. Supp. 2d at 291.

<sup>84</sup>        See *supra* n. 49.

<sup>85</sup>        See Letter to House Committee on Appropriations and Senate Committee on Appropriations, Fed. Election Comm’n at 1, 17-18 (Sept. 18, 2018) (reporting on Commission’s role “in enforcing the foreign national prohibition, including how it identifies foreign contributions to elections, and what it plans to do in the future” as required by Explanatory Statement for 2018 Appropriations Act); *Explanatory Statement to Consolidated Appropriations Act, 2018*, 164 Cong. Rec. at H2520.

1           Nonetheless, in light of the state of the Commission’s guidance on this question,<sup>86</sup>  
2 including its split on whether to pursue the allegations in MUR 6678, the Commission dismisses  
3 the allegations in the present matter for prudential reasons, as a matter of prosecutorial  
4 discretion,<sup>87</sup> and will apply section 30121 to ballot initiative activity only prospectively. Thus,  
5 the Commission dismisses the allegations that Sandfire and Sandfire NL violated 52 U.S.C.  
6 § 30121 by making prohibited foreign national donations.<sup>88</sup> Similarly, the Commission  
7 dismisses the allegations that MMA and Stop I-186 violated 52 U.S.C. § 30121 by accepting  
8 prohibited foreign national donations.<sup>89</sup>

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<sup>86</sup>       *Supra*, p. 3-12; *see* Sandfire Resp. at 9 (referencing “the Commission’s inconsistent decisions” regarding the application of the foreign national prohibition to ballot initiatives as a reason to dismiss the matter).

<sup>87</sup>       *See* First Gen. Counsel’s Rpt., MUR 6678 (MindGeek USA, Inc., *et al.*); Certification, MUR 6678 (Mar. 18, 2015); *see also* *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (“A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”); *cf.* Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545 (Mar. 16, 2007) (“The Commission has previously used the finding ‘reason to believe, but take no further action’ in cases where the Commission finds that there is a basis for investigating the matter or attempting conciliation, but the Commission declines to proceed for prudential reasons. . . . [T]he Commission believes that resolving these matters through dismissal or dismissal with admonishment more clearly conveys the Commission’s intentions and avoids possible confusion about the meaning of a reason to believe finding.”).

<sup>88</sup>       *See* *Heckler v. Chaney*, 470 U.S. 821 (1985).

<sup>89</sup>       *Id.*