



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

September 18, 2018

The Honorable Amy J. Klobuchar
Ranking Member, Committee on Rules and Administration
United States Senate
305 Russell Senate Office Building
Washington, DC 20510

Dear Senator Klobuchar:

Thank you for your letter of June 12, 2018, which asks three questions about the Federal Election Commission's administration and enforcement of the foreign national prohibition in the Federal Election Campaign Act of 1971, as amended ("FECA").¹ Following a brief discussion of the legal background, your questions are repeated below, and the FEC's response to each follows.

Legal Background

The foreign national prohibition referred to in your letter has been a provision of FECA since the Federal Election Campaign Act Amendments of 1976.² In 2002, Congress strengthened and clarified the law governing foreign nationals' participation in the electoral process as part of the Bipartisan Campaign Reform Act of 2002 ("BCRA").³ Since then, FECA's foreign national prohibition has read as follows:

It shall be unlawful for—

- (1) a foreign national, directly or indirectly, to make—
 - (A) a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election;
 - (B) a contribution or donation to a committee of a political party; or

¹ *Federal Election Campaign Act of 1971*, Pub. L. No. 92-225, 86 Stat. 3 (Feb. 7, 1972) ["FECA"], codified at 52 U.S.C. §§ 30101 to 30145.

² *Federal Election Campaign Act Amendments of 1976*, Pub. L. No. 94-283, § 112, 90 Stat. 475, 493 (May 11, 1976).

³ *Bipartisan Campaign Reform Act of 2002*, Pub. L. No. 107-155, § 303, 116 Stat. 81, 96 (March 27, 2002) ["BCRA"]. BCRA also prohibited presidential inaugural committees from accepting foreign national donations. *BCRA*, § 308, 116 Stat. at 103-04, codified at 36 U.S.C. § 510.

- (C) an expenditure, independent expenditure, or disbursement for an electioneering communication (within the meaning of section 30104(f)(3) of this title); or
- (2) a person to solicit, accept, or receive a contribution or donation described in subparagraph (A) or (B) of paragraph (1) from a foreign national.⁴

Subsection (b) of this provision defines “foreign national.”⁵

In 2002, to implement BCRA, the FEC revised its regulation on the foreign national prohibition.⁶ With those revisions, the FEC incorporated the revised statutory prohibition into its regulations.⁷

In addition, the FEC adopted related definitions,⁸ including a three-prong definition of a knowing standard to establish the degree of knowledge required to show a violation of the foreign national prohibition, which includes actual knowledge, a “reason to know” standard, and a willful blindness standard.⁹ The revised regulation also sets forth categories of facts that are illustrative of the types of information that should lead a recipient to question whether a contribution or donation originated from a foreign national. These include contributors or donors who: (i) use a foreign passport; (ii) provide a foreign address; (iii) use a check drawn on a foreign bank or a wire transfer from a foreign bank; or (iv) reside abroad.¹⁰ The Commission adopted a narrowly tailored safe harbor with which political committees can satisfy their duty to investigate their receipts in order to confirm that they do not come from foreign sources. Based on practices the Commission observed, the safe harbor protects any person who seeks and obtains copies of current and valid U.S. passports for any contributors or donors who meet any of the four factual criteria enumerated above.¹¹

⁴ FECA, § 319(a), *codified at* 52 U.S.C. § 30121(a).

⁵ FECA, § 319(b), *codified at* 52 U.S.C. § 30121(b) (defining foreign national primarily as a “foreign principal” or individuals who are neither citizens of the United States nor lawfully admitted for permanent residence).

⁶ See 11 C.F.R. § 110.20; 67 Fed. Reg. 69,928 (Nov. 19, 2002). The FEC adopted its first regulation on the foreign national prohibition in 1976, 41 Fed. Reg. 35,950 (Aug. 25, 1976), which was codified at 11 C.F.R. § 110.4(a). In 1989, the FEC revised its regulations concerning earmarked contributions to prohibit foreign nationals from being conduits and intermediaries and further revised the foreign national regulation to add an explicit prohibition on expenditures and to clarify that foreign nationals may not participate in the election-related activities of others. 54 Fed. Reg. 34,098 (Aug. 17, 1989); 54 Fed. Reg. 48,581 (Nov. 24, 1989). In the 2002 rulemaking, the foreign national regulation was revised and recodified to 11 C.F.R. § 110.20.

⁷ 11 C.F.R. § 110.20(b), (c), (e), (f) and (g).

⁸ 11 C.F.R. § 110.20(a).

⁹ 11 C.F.R. § 110.20(a)(4).

¹⁰ 11 C.F.R. § 110.20(a)(5).

¹¹ 11 C.F.R. § 110.20(a)(7).

The FEC's 2002 regulation also makes explicit that the foreign national prohibition applies to donations to political parties' building funds.¹² The FEC determined that a rule that prohibits persons from knowingly providing substantial assistance to foreign nationals to circumvent FECA was necessary to effectuate its foreign national prohibition; consequently to address the issue, the Commission included such a prohibition in its regulation.¹³ The Commission also decided to retain the prohibition in its previous version of this regulation on participation by foreign nationals in election-related decisions made by any person, including entities such as corporations, labor organizations or political committees.¹⁴ In 2004, the FEC amended its regulations to incorporate BCRA's prohibition on foreign national donations to inaugural committees into Commission regulations.¹⁵

1. What steps is the FEC currently taking to protect our national elections from foreign influence?

The FEC's role in protecting our national elections from foreign influence consists of enforcing the foreign national prohibition in FECA, promoting voluntary compliance with it, and seeking to identify prohibited contributions or donations from foreign nationals.

One of the FEC's primary responsibilities is enforcing FECA, including the foreign national prohibition.¹⁶ In fact, the FEC has exclusive jurisdiction over the civil enforcement of federal campaign finance laws, and it maintains a robust enforcement program to ensure that the campaign finance laws are fairly enforced. In exercising that authority, the Commission uses a variety of methods to uncover possible campaign finance violations. Complaints alleging noncompliance with the foreign national prohibition have been handled primarily as FEC enforcement cases, or Matters Under Review ("MURs").¹⁷ The Enforcement Division of the Office of General Counsel ("OGC") handles MURs through the FEC's traditional enforcement program pursuant to the procedures set forth in FECA.¹⁸

¹² 11 C.F.R. § 110.20(d).

¹³ 11 C.F.R. § 110.20(h).

¹⁴ 11 C.F.R. § 110.20(i).

¹⁵ 11 C.F.R. §§ 104.21(b)(1)(iii) and 110.20(j); BCRA, § 308, 116 Stat. at 103-04, *codified at* 36 U.S.C. § 510.

¹⁶ FECA, § 309, *codified at* 52 U.S.C. § 30109.

¹⁷ See, e.g., MURs 7035 (Australian Labor Party, *et al.*), 6919 (Canseco for Congress, *et al.*) and 6129 (American Resort Development Association Resort Owners Coalition PAC), *available at*: <https://www.fec.gov/data/legal/search/enforcement/>.

¹⁸ The Commission's responsibilities include defending the constitutionality of the foreign national prohibition, which has been challenged in litigation. The Commission has successfully defended constitutional challenges to the foreign national prohibition in *Bluman v. FEC*, 800 F. Supp. 2d 281, 282-83 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012), and other provisions of FECA that enable detection of violations of that prohibition. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 67-68 (1976) (*per curiam*) ("[R]ecordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations . . ."); *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010) (*en banc*) ("[R]equiring disclosure of

Another Commission enforcement and compliance program is the Alternative Dispute Resolution (“ADR”) Program, which seeks to resolve less complex matters more swiftly by encouraging settlement using a streamlined process that focuses on remedial measures for candidates and political committees. Some matters that involved allegations of foreign national prohibition violations have been resolved in the ADR Program.¹⁹

Because of the large number of political committees and growing number and size of financial disclosure reports filed with the FEC, voluntary compliance is essential to enforcing FECA. Accordingly, the Commission devotes considerable resources to encouraging voluntary compliance. One way the Commission does so is by issuing advisory opinions. FECA directs the Commission to issue advisory opinions to answer questions about the application of FECA and FEC regulations to specific factual situations.²⁰ Advisory opinions promote voluntary compliance not only by the requestors, but also by others engaged in transactions or activities that are indistinguishable in all material aspects. Many of the Commission’s advisory opinions are related to the foreign national prohibition.²¹

Another means of promoting voluntary compliance with FECA’s requirements are the Commission’s educational outreach efforts. The agency strives to reduce the number of inadvertent violations by issuing clear guidance to the public through information and outreach activities, such as compliance information available on the FEC website, including guidance about the foreign national prohibition.²² In June 2017, the Commission’s brochure on foreign nationals, which provides a general primer on the foreign national prohibition, was updated and

such information deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals.”); *Indep. Inst. v. FEC*, 216 F. Supp. 3d 176, 191 (D.D.C. 2016), *aff’d*, 137 S. Ct. 1204 (2017) (“[D]isclosures help the Commission to enforce existing regulations and to ensure that foreign nationals or foreign governments do not seek to influence United States’ elections.”) (internal citations omitted).

¹⁹ See, e.g., ADR 822 (Artega), available at: <http://eqs.fec.gov/eqs/searcheqs>.

²⁰ FECA, § 308, codified at 52 U.S.C. § 30108.

²¹ See, e.g., Advisory Opinions 2006-16 (Gary Johnson 2012), 2016-10 (Parker), 2016-08 (eBundler.com), 2015-09 (Senate Majority PAC and House Majority PAC), 2014-20 (Make Your Laws PAC, Inc.), 2012-28 (CTIA The Wireless Association), 2012-09 (Points for Politics), 2011-22 (Virginia Poultry Growers Cooperative, Inc.), 2011-15 (Hassan) (this advisory opinion led to litigation in which Mr. Hassan’s claims were dismissed. See *Hassan v. FEC*, 2013 WL 1164506 (D.C. Cir. Mar. 11, 2013)), 2010-14 (DSCC), 2010-05 (Starchannel Communications), 2009-14 (Mercedes-Benz USA LLC), 2007-22 (Hurysz), 2007-12 (Tyco), 2006-16 (Gary Johnson 2012), 2006-15 (TransCanada Corp.), 2006-08 (Brooks), 2005-10 (Berman/Doolittle), 2004-32 (Spirit), 2004-26 (Weller), 2003-12 (Flake), and 1987-25 (Otaola), available at: <https://www.fec.gov/data/legal/advisory-opinions/>.

²² The FEC also hosts instructional conferences, seminars and webinars where Commissioners and staff explain FECA’s requirements. Whenever prohibited contribution sources are discussed in conference materials and presentations, the foreign national prohibition is emphasized. Additionally, the agency maintains its own YouTube channel, which can be found at <http://www.youtube.com/FECTube>. Videos about contributions emphasize the foreign national prohibition.

published on the FEC website.²³ Other pages on the Commission’s website provide information on specific questions about foreign national activities.²⁴

The Reports Analysis Division (“RAD”) of the FEC’s Office of Compliance reviews all federal campaign finance reports to track compliance with FECA and to ensure that the public record provides a full and accurate representation of reported campaign finance activity.²⁵ If the review identifies an apparent violation or raises questions about the information disclosed on a report, RAD sends a request for additional information (“RFAI”) to the filer, affording an opportunity to take remedial action or correct the public record, if necessary.²⁶

The Reports Analysis Division bases its review of reports on Commission-approved *Review and Referral Procedures* that have categories of review with specific thresholds for determining when an RFAI should be sent to a filer.²⁷ The *RAD Review and Referral Procedures* include instructions to review reported receipts for contributions that may be excessive, prohibited or otherwise impermissible. FECA’s foreign national prohibition is among the prohibitions considered, and the *RAD Review and Referral Procedures* specify that contributions be examined to identify those from contributors with a foreign address on an FEC

²³ See FEC Record: Foreign Nationals (June 23, 2017), <https://www.fec.gov/updates/foreign-nationals/>.

²⁴ These pages discuss the definition of “foreign national,” how to determine nationality of a contributor, and address issues such as domestic subsidiaries of foreign corporations and the provision of substantial assistance to a foreign national making a contribution. See Who can and cannot contribute, <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/who-can-and-cannot-contribute/>. Other FEC webpages provide guidance about foreign national volunteers providing services to, but not participating in the decision making of, political committees; the ability of “super PACs” and the non-contribution accounts of “hybrid PACs” to raise funds outside the contribution limits and source prohibitions, *except* for the foreign national prohibition (and certain other FECA source prohibitions); and similarly, the fact that state, district and local political party committees when accepting donations for the purpose of constructing or purchasing a national party building are not under any donation limitation, but must abide by the foreign national prohibition (along with certain other FECA source prohibitions). See Volunteer Activity, <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/volunteer-activity/>; Contributions to super PACs and hybrid PACs, <https://www.fec.gov/help-candidates-and-committees/taking-receipts-pac/contributions-to-super-pacs-and-hybrid-pacs/>; Donations to political party building funds, <https://www.fec.gov/help-candidates-and-committees/taking-receipts-political-party/building-fund-donations-party/>. Finally, another FEC webpage states that federal candidates may not solicit funds for nonfederal elections, outside of the limits and source prohibitions of FECA and Commission regulations. This page also provides guidance for federal candidates attending events raising funds for nonfederal elections. See Federal candidate participation in nonfederal fundraising for party committees, <https://www.fec.gov/help-candidates-and-committees/making-disbursements-political-party/federal-candidates-participation-nonfederal-fundraising-party-committees/>.

²⁵ FECA, § 311(b), *codified at* 52 U.S.C. § 30111(b).

²⁶ RFAIs sent to filers are made public, as are the filers’ responses. If the filer is able to resolve the FEC’s concerns, it may avoid an enforcement action. If not, the Commission has several tools available to it, such as referring the filer for an audit or to the traditional enforcement program.

²⁷ *RAD Review and Referral Procedures for the 2017-2018 Election Cycle*, subject to limited redactions, are available on the FEC website: https://transition.fec.gov/pdf/2017-2018_rad_review_referral_procedures.pdf. These procedures are updated and approved by the Commission every two years, with content based on input from both staff and Commissioners.

report. If a RAD analyst identifies contributions with reported foreign addresses on a filer's reports in excess of the dollar amount or percentage threshold, an RFAI will be sent. For responses to RFAIs that are not sufficient to resolve an issue, the *RAD Review and Referral Procedures* provide thresholds for further Commission action, including assessment of audit points (which could result in a referral for an FEC audit), referral for enforcement action to the Alternative Dispute Resolution Office or to the Office of General Counsel.

The FEC's Audit Division conducts audits of committees that, according to the *RAD Review and Referral Procedures*, have not substantially complied with the law. As required by the public funding statutes, the FEC also audits all Presidential campaigns that receive public funds. All of these audits include an analysis of receipts that seeks to identify contributions or donations from foreign nationals. Subject to Commission-approved thresholds, receipt of prohibited contributions or donations can result in a referral to OGC Enforcement or to ADR. Audit referrals of foreign national prohibition issues have resulted in enforcement proceedings,²⁸ while other audits identified apparently prohibited foreign national contributions, but generally due to the refunded, small dollar amounts at issue, enforcement matters were not pursued against the audited committees. Nonetheless, publicly available FEC Audit Reports documented the Commission's finding and circumstances that resulted in no further action.

2. *Following the 2016 presidential election, has the Commission taken any steps to increase its ability to identify or detect political spending by foreign sources?*

With respect to enforcement matters, the Commission has issued an instruction related particularly to the foreign national prohibition. Timely resolution of any enforcement matters involving allegations of prohibited activity by foreign nationals remains a particular priority for the FEC. In fact, at the Commission's public meeting on September 15, 2016, FEC Commissioners unanimously directed the Office of General Counsel to prioritize cases involving allegations of foreign influence.²⁹ As a follow-up, at the Commission's public meeting on May 25, 2017, then-Chairman Steven T. Walther called upon the FEC staff to apply their resources to continue to fulfill the prioritization of any such enforcement matters and to further the Commission's regulatory, educational, and enforcement work in this area.³⁰

The Commission is also currently engaged in a rulemaking proceeding concerning potential revisions to the regulations on disclaimers required on certain internet communications, which could have implications related to the foreign national prohibition.

²⁸ See, e.g., MUR 6919 (Canseco for Congress, *et al.*), <https://www.fec.gov/data/legal/matter-under-review/6919/>.

²⁹ See FEC Press Release (May 25, 2017) <https://www.fec.gov/updates/fec-approves-amended-audit-division-recommendation-memorandum-approves-advisory-opinion-and-agrees-commence-work-party-rulemaking/>.

³⁰ *Id.*

Disclaimers on paid digital and internet-based advertisements are one tool used to expose prohibited expenditures by foreign nationals. Disclaimers “provide the electorate with information and insure that the voters are fully informed about the person or group who is speaking,” to enable people “to evaluate the arguments to which they are being subjected.”³¹ Disclaimers serve this important function even on communications paid for by persons, like foreign nationals, prohibited from engaging in electoral expenditures; complaints about disclaimer violations can result in conciliation of violations of both disclaimer and prohibited source rules.³²

Commission regulations require disclaimers on political committees’ mass emails, publicly available websites, and public communications, including communications by political committees that are placed for a fee on another person’s website; disclaimers are also required on any electioneering communication by any person and on any public communication, including communications placed for a fee on another person’s website, by any person containing express advocacy or a solicitation for contributions.³³

In three advisory opinions, the Commission considered the application of exceptions to the general disclaimer regulations in the context of paid digital and internet advertisements.³⁴ After it issued these advisory opinions, the Commission sought public comment regarding whether it should take broader action and revise its disclaimer rules for paid internet communications, as described below.

In 2011, the Commission issued an Advance Notice of Proposed Rulemaking (“ANPRM”) to seek public input on whether to open a rulemaking revising its disclaimer regulations for paid online communications.³⁵ The Commission re-opened the comment period on this ANPRM twice, in 2016 and 2017.³⁶ In response to the 2017 re-opening of the comment period, the Commission received more than 149,000 comments.

³¹ *Citizens United v. FEC*, 558 U.S. 310, 368 (2010) (internal quotations and alterations removed).

³² *Accord* Conciliation Agreement at 10, MUR 5158 (Brady Campaign to Prevent Gun Violence) (Feb. 16, 2005), <http://eqs.fec.gov/eqsdocsMUR/0000370E.pdf> (conciliating violation of disclaimer and corporate expenditure rules on express advocacy communications by a then-prohibited corporate payor).

³³ *See* 11 C.F.R. § 110.11(a).

³⁴ *See* Advisory Opinion 2002-09 (Target Wireless), <https://www.fec.gov/data/legal/advisory-opinions/2002-09/>, Advisory Opinion 2010-19 (Google), <https://www.fec.gov/data/legal/advisory-opinions/2010-19/>, Advisory Opinion 2011-09 (Facebook), <https://www.fec.gov/data/legal/advisory-opinions/2011-09/>.

³⁵ *See* Internet Disclaimer Communications, 76 Fed. Reg. 63,567 (Oct. 13, 2011), <http://sers.fec.gov/fosers/showpdf.htm?docid=353587>.

³⁶ *See* Internet Communication Disclaimers, 81 Fed. Reg. 71,647 (Oct. 18, 2016), <http://sers.fec.gov/fosers/showpdf.htm?docid=353586> ; Internet Communication Disclaimers, 82 Fed. Reg. 46,937 (Oct. 10, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=357882>.

On March 26, 2018, the Commission issued a Notice of Proposed Rulemaking (“NPRM”) requesting comment on revisions to the definition of “public communication” and on two alternative proposals to amend its regulations concerning disclaimers on public communications on the internet that contain express advocacy, solicit contributions, or are made by political committees.³⁷ By the close of the comment period, the Commission received more than 165,000 comments on the NPRM, which showed very strong public interest in vigorous enforcement. The Commission held a public hearing on June 27 and 28, 2018, at which it received testimony from 18 persons who had requested to appear.³⁸ The Commission is currently considering the comments and testimony it has received in order to consider a final rule.

3. *Are there any recommendations from the FEC on how Congress or the Administration can prevent illegal foreign spending in the 2018 and 2020 elections?*

FECA provides authority for the Commission to make “any recommendations for any legislative or other action the Commission considers appropriate” and to transmit the recommendations to the President and Congress.³⁹ The Commission’s most recent legislative recommendations were approved on December 14, 2017, when the Commission agreed to 12 Legislative Recommendations on a variety of topics.⁴⁰ However, none related to the foreign national prohibition.

³⁷ See Internet Communication Disclaimers, 83 Fed. Reg. 12,864 (Mar. 26, 2018), <http://sers.fec.gov/fosers/showpdf.htm?docid=373521>.

³⁸ See Agenda, June 27-28, 2018 Public Hearing: Internet Communication Disclaimers and Definition of “Public Communication,” available at <https://www.fec.gov/updates/june-27-28-2018-public-hearing/>.

³⁹ See FECA, § 311, codified at 52 U.S.C. § 30111(a)(9).

⁴⁰ <http://www.fec.gov/law/feca/feca.shtml#legrec>.

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We appreciate your interest in the FEC. Additional comments from Commissioners may be forthcoming. Should you or your staff wish to communicate further on these or any other matters, please do not hesitate to contact any of the Commissioners or the Commission's Director of Congressional Affairs, Duane Pugh, at (202) 694-1002 or dpugh@fec.gov.

Sincerely,



Caroline C. Hunter
Chair



Matthew S. Petersen
Commissioner



Steven T. Walther
Commissioner

cc: The Honorable Roy D. Blunt
Chairman, Committee on Rules and Administration
United States Senate