



CHAIR ELLEN L. WEINTRAUB
FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

October 18, 2019

The Honorable Amy J. Klobuchar
Ranking Member, Committee on Rules and Administration
U.S. Senate
SR-305 Russell Senate Office Building
Washington, DC 20510

Dear Senator Klobuchar:

Thank you for your letter of October 8, 2019, asking for my response to the following inquiries.

1. *From July 25, 2019, to the present, [provide] any documents relating to communications between the FEC (including any Commissioner or employee) and the Department of Justice (including any officer or employee) regarding potential violations of 52 U.S.C. 30121 or its implementing regulations by the President, his personal attorneys, the Attorney General, or any other members of the Administration.*

This is the second time that you, as Ranking Member of the Senate Rules Committee with jurisdiction over federal elections, have written to commissioners of the Federal Election Commission to get a simple Yes or No answer to the question: *Did the Department of Justice (DOJ) notify the FEC about or refer to the FEC a campaign finance complaint regarding potential violations of the foreign national political-spending ban by the President?* Your October 2 letter specifically referenced a *New York Times* op-ed referring to a complaint reportedly originating with the Office of the Inspector General of the Intelligence Community.¹ As noted in the Commission's October 8 response, the FEC does not generally confirm or deny the agency's receipt of notice or a referral from DOJ.² However, you have asked me an important question in the exercise of your oversight authority, and commissioners should be responsive if it is legal for us to do so. It is.

For these reasons, I am answering your question: No. The FEC has not received a notification or referral from DOJ regarding the complaint you reference.

¹ See Letter from Sen. Amy Klobuchar to Federal Election Commission (Oct. 2, 2019) (citing Neal K. Katyal and Joshua A. Geltzer, *Was There Another Cover-Up In Response to the Whistle-Blower?*, NY Times (Oct. 2, 2019), <https://www.nytimes.com/2019/10/02/opinion/trump-whistleblower-fec.html>.

² Though the Commission is not barred by law from doing so, ordinarily, for prudential reasons, we will not confirm that we have not received a referral from another agency. If the Commission says "no comment" when it receives referrals, and "no" when it does not, then the public might infer the existence of a referral from the former. However, we should respond to Congressional oversight whenever it is legal to do so; I do so here with the proviso that this letter should not be used to infer anything about any other "no comment" the Commission may put forward in the future.

2. *[Provide] a formal determination by the Commission as to whether the MOU between the Department and the FEC is active, and the dates of any cases referred to the Commission in the last 15 years.*

As the Commission explained earlier this year, the MOU³ between the FEC and the DOJ remains active. Though some DOJ-published materials state that DOJ no longer considers the agreement to reflect its current policy,⁴ it has not renegotiated the agreement with the Commission.⁵ Indeed, the Commission confirmed in its May response to oversight queries from the Committee on House Administration that the Commission continues to rely on the MOU:

In 1977, the Commission and DOJ entered into a Memorandum of Understanding (MOU) relating to their respective law enforcement jurisdiction and responsibilities. The MOU remains the primary guidance/procedural agreement used by the Commission to assist in collaboration and consultation efforts (including referrals) between the Commission and DOJ.⁶

The Commission has taken no action to change its position that the MOU is the primary guidance and procedural agreement used by the Commission to assist in collaboration and consultation efforts (including referrals) between the Commission and DOJ.

You also request the dates of any cases referred to the Commission in the last fifteen years. The table below provides the number of referrals received by the Commission from DOJ in each fiscal year that are related to cases that the Commission has closed:

Fiscal Year of Referral Receipt	Number of DOJ Referrals Received In Cases Now Closed
2005	0
2006	4
2007	1
2008	0
2009	4
2010	2

³ 43 Fed. Reg. 5441 (Feb. 8, 1978).

⁴ U.S. Dep’t of Justice, Crim. Div., Pub. Integrity Section, Federal Prosecution of Election Offenses, 8th edition, 170 (Dec. 2017) (stating “[I]n light of the significant statutory enhancements to the Department’s ability to prosecute FECA crimes that were contained in the 2002 Bipartisan Campaign Reform Act, the 1977 Memorandum no longer reflects current congressional intent or Department policy”); *see also* U.S. Dep’t of Justice, Crim. Div., Public Integrity Section, Federal Prosecution of Election Offenses, 7th edition, 205 (revised Aug. 2007). It is not clear which provisions of the Bipartisan Campaign Reform Act would prohibit or discourage DOJ from referring potential federal campaign-finance law violations to the Commission for civil enforcement as agreed to in the MOU.

⁵ The MOU was the subject of negotiations between the FEC and DOJ on two separate occasions—one in 2003-07 and again in 2012-13. No negotiations have taken place in the six years since then, and no agreement has ever been reached to revise the agreement.

⁶ *See* Responses to Questions for the Committee on House Administration, 26 (FEC, May 1, 2019) (response to question 32), available at <https://www.fec.gov/about/committee-on-house-administration-april-2019-questions/>.

2011	0
2012	0
2013	1
2014	0
2015	0
2016	0
2017	0
2018	0
2019	0
<i>FY 2020 to date</i>	0

DOJ referrals related to open FEC cases, if any, are *not* included in the numbers above due to the confidentiality requirements of the Federal Election Campaign Act (the “Act”)⁷. Thus, with respect to recent years in particular, no inferences should be drawn from these numbers regarding whether the Commission received other referrals from DOJ.

3. *[Provide] information regarding how the Commission defines “thing of value” and “anything of value” and any relevant information on recent cases in which the FEC has applied 52 U.S.C. § 30121, or deadlocked on whether or not to apply the ban.*

The Act defines a contribution to include “any gift, subscription, loan, advance, or deposit of money or *anything of value* made by any person for the purpose of influencing any election for Federal office.”⁸ “Anything of value” includes all “in-kind contributions,” defined as “the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services.”⁹

The Act and Commission regulations prohibit any “foreign national”¹⁰ from directly or indirectly making a contribution or donation of money *or other thing of value*, or an expenditure, independent expenditure, or disbursement, in connection with a federal, state, or local election.¹¹

⁷ 52 U.S.C. § 30101, *et seq.*

⁸ 52 U.S.C. § 30101(8) (emphasis added). In the context of federal campaign-finance law, the Federal Election Commission is the subject-matter expert on the Act’s provisions in general and the term “thing of value” specifically. Congress gave the Commission the authority to effectuate the Act through promulgating regulations. These are the regulations that the Commission and DOJ enforce civilly and criminally, respectively.

⁹ 11 C.F.R. § 100.52(d)(1).

¹⁰ The Act’s definition of “foreign national” includes an individual who is not a citizen or national of the United States and who is not lawfully admitted for permanent residence, as well as a “foreign principal” as defined at 22 U.S.C. § 611(b), which, in turn, includes “a government of a foreign country and a foreign political party” and “a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.” 52 U.S.C. § 30121(b); 22 U.S.C. § 611(b); *see also* 11 C.F.R. § 110.20(a)(3); Factual & Legal Analysis, Matter Under Review (“MUR”) 4583 (Devendra Singh and the Embassy of India) (finding reason to believe that Indian Embassy as well as embassy official knowingly and willfully violated Act’s ban on foreign national contributions).

¹¹ 52 U.S.C. § 30121(a)(1); 11 C.F.R. §§ 110.20(b), (c), (e), (f) (emphasis added).

The Act also prohibits any person from soliciting, accepting, or receiving a contribution or donation from a foreign national.¹²

“Solicitation” is broadly defined. To solicit means “to ask, request, or recommend, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide *anything of value*.”¹³ Nothing need be received in response to a solicitation of a foreign national for the request itself to be illegal.¹⁴

The Commission has interpreted “anything of value” broadly under the Act. The Commission has likewise recognized the “broad scope” of the foreign national contribution prohibition and found that even where the value of a good or service “may be nominal or difficult to ascertain,” such contributions are nevertheless banned.¹⁵

The ban on political spending by foreign nationals in U.S. elections is firmly established in law. Courts, including the Supreme Court, have consistently upheld the provisions of the Act prohibiting foreign national contributions on the ground that the government has a clear and compelling interest in limiting the influence of foreign nationals over the activities and processes that are integral to democratic self-government.¹⁶

The attached document, “The Law of a ‘Thing of Value,’” provides a summary of the types of tangible and intangible goods and services that have been found to have “value” by the Commission and other U.S. government entities.

You also ask for any relevant information on recent cases in which the FEC applied the foreign national political-spending ban or deadlocked on whether to apply it. In September 2016, the Commission accepted my proposal to direct the Office of General Counsel

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

¹³ 11 C.F.R. § 110.20(a)(6) (citing 11 C.F.R. § 300.2(m)) (emphasis added). Commission regulations further provide that a solicitation is an oral or written communication that, construed as reasonably understood in the context in which it is made (including the conduct of the persons involved), contains a clear message asking, requesting or recommending that another person make a contribution, donation, transfer of funds or otherwise provide anything of value. 11 C.F.R. § 300.2(m). A solicitation may be made directly or indirectly. *Id.* It does not include mere statements of political support or mere guidance as to the applicability of a particular law or regulation. *Id.*

¹⁴ *See* 52 U.S.C. § 30121(a)(2).

¹⁵ *See, e.g.*, Advisory Opinion 2007-22 at 6 (Hurysz) (citing Regulations on Contribution Limitations and Prohibitions, 67 FR 69928, 69940 (Nov. 19, 2002) (“As indicated by the title of section 303 of BCRA, ‘Strengthening Foreign Money Ban,’ Congress amended [52 U.S.C. 30121] to further delineate and *expand* the ban on contributions, donations, and other things of value by foreign nationals.”) (emphasis added)); *see also Bluman v. FEC*, 800 F. Supp. 2d 281, 285, 288-89 (D.D.C. 2011), *aff’d* 565 U.S. 1104 (2012) (upholding the ban on political spending by foreign nationals in a case involving a total of \$700 plus the cost of copying political flyers).

¹⁶ *See, e.g., Bluman*, 800 F. Supp. 2d at 288-89 (“It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government. It follows, therefore, that the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.”); *United States v. Singh*, 924 F.3d 1030, 1040-44 (9th Cir. 2019).

to prioritize foreign national prohibition matters.¹⁷ At that point, 14 enforcement matters that included alleged violations of the foreign national prohibition were pending. Since then, the Commission has closed all 14 with the following resolutions:

- Two matters were resolved when the Commission entered conciliation agreements with the respondents, which contained civil penalties of \$29,000 and \$940,000 respectively.¹⁸
- Two matters were closed after the Commission found no reason to believe any of the respondents had violated the law.¹⁹
- Three matters were dismissed by majority vote of the Commission with respect to the majority of respondents, while other respondents were the subject of “no reason to believe” findings.²⁰
- One matter was dismissed pursuant to staff recommendations under the Commission’s Enforcement Priority System.²¹

¹⁷ In the Commission’s open session of September 15, 2016, the Commission, without objection, directed the Office of General Counsel to “prioritize cases involving allegations of foreign influence.”

¹⁸ See MUR 7035 (Australian Labor Party and Bernie 2016), Certification (Feb. 12, 2018), <https://www.fec.gov/data/legal/matter-under-review/7035/> (Australian Labor Party made and Bernie 2016 accepted a prohibited foreign national contribution when the party paid the airfare and stipends for its own delegates to work on a U.S. presidential campaign); MUR 7122 (Right to Rise USA, *et al.*), Certifications (Dec. 14, 2018 and Mar. 7, 2019), <https://www.fec.gov/data/legal/matter-under-review/7122/> (U.S. corporation owned by foreign company violated Act by making contribution after its board of directors, which included foreign nationals, approved proposal by U.S. citizen corporate officer to contribute); see also Statement of Reasons of Chair Ellen L. Weintraub (Apr. 12, 2019), MUR 7122 (Right to Rise, *et al.*), https://www.fec.gov/files/legal/murs/7122/7122_1.pdf.

¹⁹ See MUR 6959 (DNC and Nava), Certification (Oct. 20, 2016), <https://www.fec.gov/data/legal/matter-under-review/6959/> (finding no reason to believe a violation had occurred where foreign national intern did not participate in any political committee’s decision-making or management processes); MUR 7059 (Human Rights for Vietnam PAC), Certification (Feb. 23, 2017), https://www.fec.gov/data/legal/matter-under-review/7059 (finding no reason to believe that those who contributed to a congressional campaign were foreign nationals).

²⁰ See MUR 7081 (Floridians for a Strong Middle Class), Certifications (Feb. 23, 2017 and Sept. 20, 2017), https://www.fec.gov/data/legal/matter-under-review/7081 (Commission decided by a vote of 4-2 to dismiss matter involving an LLC that was alleged to have provided funds from a foreign national where the record was unclear where the funds came from) (Commissioners Weintraub and Ravel dissenting); Statement of Reasons of Commissioners Ellen L. Weintraub and Ann M. Ravel (Feb. 28, 2017) (supporting an investigation to “determine the truth of the matter” regarding whether Chinese foreign nationals contributed to the PAC through the LLC); MURs 6962 and 6982 (Hillary for America and Project Veritas), Certification (June 28, 2017), https://www.fec.gov/data/legal/matter-under-review/6962 (concluding that a Project Veritas employee provided substantial assistance to a foreign national in the making of a contribution when she encouraged the committee to permit a known Canadian national to purchase Hillary Clinton merchandise at a campaign rally but dismissing the matter because the amount in violation was \$155. The Commission also found no reason to believe the other Respondents had violated the law where there was no information available to suggest they were aware of the transaction).

²¹ See MUR 6944 (Farias), Certification (Nov. 15, 2016) https://www.fec.gov/data/legal/matter-under-review/6944 (dismissing matter involving contribution by an LLC where there was insufficient information to determine whether it was a foreign national entity, the contribution was *de minimis* and was refunded 70 days after it was received).

- Four matters were closed after split votes.²²
- One matter was dismissed by a majority vote of the Commission with respect to the principal respondent, after a previous finding of reason to believe, on the basis that the criminal conviction of the principal respondent for the same activity and the sentence imposed therefor (three years' imprisonment, a fine of \$3,700, and restitution of \$560,995) adequately resolved the matter.²³
- And in one matter, the Commission found no reason to believe the foreign national provision of the Act was violated, while closing the matter after finding no reason to believe pertaining to a number of other allegations and a split vote on one other allegation.²⁴

Subsequent to September 1, 2016, and as of October 15, 2019, the Commission has received an additional 48 matters that were initially evaluated as potentially raising issues under the foreign national political-spending prohibition. Of these 48, 11 have been closed; three were determined by the Office of General Counsel not to raise foreign-national issues but remain open as to other allegations; and four recently received matters are in the Commission's case-intake process. Thirty foreign-national matters are active: The Commission has voted in nine of those matters to find reason to believe the law may have been violated,²⁵ and six matters await a vote

²² See MUR 6976 (Johnny W. Streets, Jr. (City Council Committee)), Certifications (Nov. 17, 2016 and Dec. 9, 2016), <https://www.fec.gov/data/legal/matter-under-review/6976> (Commission split on whether to find reason to believe a violation may have occurred in matter involving contributions from three business entities totaling \$3,000 in checks that listed Canadian addresses (Commissioners Ravel, Walther and Weintraub voting to find reason to believe a violation may have occurred; Commissioners Goodman, Hunter, and Petersen voting to dismiss); Statement of Vice Chair Caroline C. Hunter and Commissioners Lee E. Goodman and Matthew S. Petersen (Mar. 13, 2017), <https://www.fec.gov/files/legal/murs/6976/17044405949.pdf> (supporting dismissal because of modest amount involved but emphasizing that “[t]he foreign national prohibition is an important protection against foreign interference in American elections”); MURs 7094, 7096 and 7098 (Donald J. Trump for President, Inc.), Certification (Aug. 2, 2018), <https://www.fec.gov/data/legal/matter-under-review/7094> (Commission split on whether to find reason to believe a violation may have occurred in connection with allegations that campaign violated the ban on soliciting contributions from foreign nationals when members of foreign parliaments reported receiving email solicitations for contributions from the Trump Committee at their official foreign government email addresses) (Commissioners Weintraub and Walther voting to find reason to believe); Statement of Vice Chair Ellen L. Weintraub (Sept. 6, 2018), https://www.fec.gov/files/legal/murs/7094/7094_1.pdf (supporting an investigation to determine “the number of solicitations sent to foreign nationals, whether the campaign received any contributions from foreign nationals as a result of the solicitations, and how exactly the email addresses of members of foreign parliaments came to be on the campaign’s email lists”).

²³ See MUR 6865 (Azano), Certifications (June 14, 2019, July 17, 2018, and Aug. 12, 2015), <https://www.fec.gov/data/legal/matter-under-review/6865/> (finding reason to believe that a foreign national knowingly and willfully violated the foreign national political-spending ban by making one \$30,000 federal contribution and almost \$580,000 in direct and in-kind political donations in the names of others in connection with local elections, but took no further action as to Azano and his co-conspirators after their federal criminal convictions).

²⁴ See MUR 6932 (Hillary for America), Certifications (Mar. 28, 2019 and Feb. 8, 2019), <https://www.fec.gov/data/legal/matter-under-review/6932/> (finding that payments received from domestic and foreign corporations for speaking engagements prior to announcing candidacy were *bona fide* payments for regular ongoing business and did not constitute excessive or prohibited corporate or foreign national contributions).

²⁵ The Act requires that the Commission find “reason to believe that a person has committed, or is about to commit, a violation” of the Act as a precondition to opening an investigation into the alleged violation. 52 U.S.C. § 30109(a)(2). A “reason to believe” finding is not a finding that the respondent violated the Act, but instead simply

from the Commission when it regains a quorum.

The additional matters that have been closed include the following resolutions:

- Two matters were closed after the Commission found no reason to believe any of the respondents had violated the law.²⁶
- One matter was transferred to the Alternative Dispute Resolution Office and the Commission subsequently dismissed the matter by a majority vote.²⁷
- Three matters were dismissed by a majority vote.²⁸
- Three matters were closed after split votes.²⁹
- One matter was dismissed after being further prioritized for early dismissal under the Commission’s Enforcement Priority System.³⁰

means that the Commission believes a violation may have occurred. *See* Guidebook for Complainants and Respondents on the FEC Enforcement Process, https://transition.fec.gov/em/respondent_guide.pdf.

²⁶ *See* MUR 7141 (Beverly Hills Residents and Businesses to Preserve Our City, *et al.*), Certification (Nov. 7, 2017), <https://www.fec.gov/data/legal/matter-under-review/7141> (Commission voted 4-1 to find no reason to believe the parties violated the law even though the company that contributed to the ballot measure committee was chaired by a foreign national where U.S. resident stated that he made the decision to contribute to the ballot measure committee) (Commissioner Weintraub dissenting); *see also* MUR 7144 (Jacobs) Certification (May 11, 2017), <https://www.fec.gov/data/legal/matter-under-review/7144/> (finding no reason to believe that a violation occurred where the alleged foreign national was actually a lawful permanent U.S. resident).

²⁷ *See* ADR 822 (Arteaga), Certification (June 12, 2017), <https://eqs.fec.gov/eqs/searcheqs.jsessionid=1442CC376B6637DD3CD9A090A65E028C?SUBMIT=continue>, (dismissing where amount contributed was \$70).

²⁸ *See* MURs 7430, 7444 and 7445 (Unknown Respondents), Certification (Dec. 17, 2018), <https://www.fec.gov/data/legal/matter-under-review/7430/> (exercising prosecutorial discretion to dismiss where the five contributions totaled \$30).

²⁹ *See* MUR 7205 (Jill Stein for President), Certification (Aug. 1, 2018), <https://www.fec.gov/data/legal/matter-under-review/7205/> (splitting on whether to find reason to believe a violation occurred where at least one foreign national appeared to have contributed to the recount effort); Statement of Reasons of Vice Chair Ellen L. Weintraub on MUR 7205 (highlighting the importance of the “zero-tolerance policy on foreign donations” and the need for an investigation where the complaint included screenshots of Twitter users who were possible foreign nationals); MUR 7272 (Party of Regions) Certification (May 10, 2019), <https://www.fec.gov/data/legal/matter-under-review/7272/> (splitting on whether the money that foreign nationals gave to lobbyists was for the purpose of making political contributions); *see* Statement of Reasons of Chair Ellen L. Weintraub on MUR 7272 (Party of Regions, *et al.*) (highlighting the importance of the American public knowing the extent of foreign influence campaigns against our country and explaining that even if the statute of limitations expired, an investigation was merited to illuminate what happened); MUR 7314 (NRA, *et al.*), Certification (July 10, 2019); <https://www.fec.gov/data/legal/matter-under-review/7314/> (splitting on whether there was reason to believe that foreign nationals were using the NRA to funnel millions of dollars into federal elections); *see* Statement of Reasons of Chair Ellen L. Weintraub on MUR 7314 (explaining that violation was significant and deserved investigation).

³⁰ *See* MUR 7414 (Marge Doyle for Congress, *et al.*) Certification (Apr. 15, 2019), <https://www.fec.gov/data/legal/matter-under-review/7414/> (exercising prosecutorial discretion to dismiss matter after finding that the alleged foreign national was in fact a U.S. citizen).

I appreciate your interest in any matters over which the Commission may have jurisdiction. Should you or your staff members wish to communicate further on these or any other matters at any time, please do not hesitate to contact me and my staff.

Sincerely,

A handwritten signature in blue ink that reads "Ellen L. Weintraub" with a long, sweeping horizontal line extending to the right.

Ellen L. Weintraub
Chair