



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 Ranking Member Klobuchar:

Thank you for your letter of October 8, 2019, which poses three requests to the Federal Election Commission (FEC or Commission). The Chair has informed me that she will provide her response as a single Commissioner to your request, rather than transmit a response on behalf of the Commission, as has been historical Commission practice. As you may know, the position of Commission Chair is largely ceremonial and carries administrative responsibilities, and the Chair may speak on behalf of the Commission only with the consent of other Commissioners. Accordingly, please find below my responses to your inquiries.

From July 25, 2019, to the present, 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.

The Federal Election Campaign Act (FECA or the Act) requires the Commission to keep confidential any complaints or referrals it has received until the enforcement matter is resolved and the case is formally closed.¹ Thus, the Commission is limited in what information it may reveal in its enforcement activities and, in particular, as to its communications with the Department of Justice (DOJ). Such communications are subject not only to FECA's statutory confidentiality provision, but also potentially the common law doctrine of law enforcement privilege. Therefore, the Commission is unable to provide responsive documents, if any, to this request that may relate to open matters, if any.

¹ FECA § 309(a)(12); codified at 52 U.S.C. § 30109(a)(12).

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.

Since September 1, 2019, the Commission has had only three Commissioners. Absent a quorum of at least four Commissioners, the Commission cannot make a “formal determination” as to whether the MOU between DOJ and the FEC is still active.² While it still had a quorum of Commissioners, the Commission recently stated that 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.”³ The Commission is also aware that, as of 2007, DOJ has publicly taken the position that “in 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.”⁴ The MOU has been the subject of negotiations between the FEC and DOJ on two separate occasions—one in 2003-07 and again in 2012-13. However, no revised agreement has been reached.

In response to your request for 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; these numbers reflect *only* the DOJ referrals that are related to cases that the Commission has closed. DOJ referrals that are related to open cases at the FEC, if any, are *not* included in the numbers below due to FECA’s confidentiality requirements and, potentially, the law enforcement privilege. In light of these considerations, the Commission generally does not confirm or deny the agency’s receipt of a referral from DOJ. Thus, with respect to recent years in particular, no inferences should be drawn from these numbers either that the Commission received or did not receive other referrals from DOJ.

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

² See U.S. Dep’t of Justice & FEC, Memorandum of Understanding, 43 Fed. Reg. 5441 (Feb. 8, 1978).

³ The Commission made this statement in response to a question from the Committee on House Administration. See FEC, Responses to Questions for the Committee on House Administration, 26 (May 1, 2019) (response to question 32); available at <https://www.fec.gov/about/committee-on-house-administration-april-2019-questions/>.

⁴ DOJ, Criminal Division, Public Integrity Section, *Federal Prosecution of Election Offenses*, 7th revised ed., 205 (Aug. 2007) (citing Bipartisan Campaign Reform Act of 2002, Pub. Law 107-155, 116 Stat. 81 (2002)); see also *Federal Prosecution of Election Offenses*, 8th ed., 170 (Dec. 2017).

FY 2009	4
FY 2010	2
FY 2011	0
FY 2012	0
FY 2013	1
FY 2014	0
FY 2015	0
FY 2016	0
FY 2017	0
FY 2018	0
FY 2019	0
FY 2020 to date	0

Information regarding how the Commission defines “thing of value” and “anything of value”

Without a quorum of four or more Commissioners, the Commission is unable to make new determinations about the scope of terms like “anything of value” or “things of value.” However, the Commission has previously promulgated regulations, issued advisory opinions and approved legal analyses in enforcement and compliance actions that addressed these issues. For purposes of the definition of “contribution,” the Commission’s regulations define “anything of value” to include all in-kind contributions and, unless specifically exempted, “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.”⁵

Regarding how the Commission further defines a “thing of value” and “anything of value,” please see the following Advisory Opinions:

Advisory Opinion 2018-13 (OsiaNetwork) (monetary mining rewards from individuals’ participation in cryptocurrency mining pools are things of value);

Advisory Opinion 2015-07 (Hillary for America) (recognizing that campaign event attendees’ payments for their own food, beverages, and valet parking are things of value but concluding that the provision of such goods or services would not be in-kind contributions, because the campaign committee did not plan to otherwise pay those costs itself);

Advisory Opinion 2010-30 (Citizens United) (a 501(c)(4) organization’s rental of its email list to political committees would be something of value to the committee, absent

⁵ 11 C.F.R. § 100.52(d)(1); *see also* 11 C.F.R. § 100.111(e)(1) (definition of “anything of value” for purposes of defining “expenditure”). These regulations are based on FECA’s definitions of “contribution” and “expenditure” at 52 U.S.C. § 30101(8) and (9). Commission regulations do not separately define “thing of value” for the purposes of the prohibition on contributions and other activities by foreign nationals. *See* 11 C.F.R. § 110.20 (implementing 52 U.S.C. § 30121). Further, the Act and Commission regulations include numerous exceptions to the definition of “contribution.” *See* 52 U.S.C. § 30101(8)(B); 11 C.F.R §§ 100.71-.94.

payment of the usual and normal charge for such rentals);
Advisory Opinion 2007-22 (Hurysz) (materials previously used in foreign elections would constitute a thing of value because “[a]lthough the value of these materials may be nominal or difficult to ascertain, they have some value”);
Advisory Opinion 1988-47 (Vento) (provision of free magazines is something of value);
Advisory Opinion 1987-16 (Dukakis for President) (computer equipment is something of value);
Advisory Opinion 1984-24 (Sierra Club) (corporation’s donation of services of its employees and use of its facilities incidental to its employees’ services is something of value to candidate); and
Advisory Opinion 1977-12 (Meyer) (provision of facilities and equipment to campaign is something of value).

For information regarding how the Commission applied the definition of a “thing of value” and “anything of value,” in closed enforcement matters, please see the following Matters under Review (MURs):

MUR 5409 (Norquist) (a list of activists is a thing of value, noting that the “lack of a market value . . . does not necessarily equate to a lack of value”);
MUR 6040 (Rangel for Congress) (political committees’ use of rent-controlled apartment for less than half of market rental rate provided something of value to the committees where other tenants not given rent-controlled rate);
MUR 6414 (Carnahan) (a committee’s receipt of opposition research or investigative services without the usual or normal charge may result in an in-kind contribution);
MUR 6958 (McCaskill) (split vote on whether a campaign pollster’s description of polling results in “broad generalities” was a thing of value); and
MUR 7302 (Campbell) (the appearance of a business name and logo in background of campaign ad may constitute things of value); *see also* MUR 6542 (Mullin for Congress) (same).

Any relevant information on recent case in which the FEC has applied 52 U.S.C. § 30121, or deadlocked on whether or not to apply the ban.

In September 2016, the Commission directed the agency to prioritize foreign national prohibition matters.⁶ 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 totaling

⁶ 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.”

Links in the footnotes below are to the files of closed enforcement matters released on the Commission’s web site.

\$969,000.⁷

--Two matters were closed after the Commission found no reason to believe any of the respondents had violated the law.⁸

--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.⁹

--One matter was dismissed pursuant to staff recommendations under the Commission's Enforcement Priority System.¹⁰

--Four matters were closed after split votes.¹¹

--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.¹²

--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.¹³

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 prohibition. Of these 48, 11 have been closed; 30 remain active and assigned to attorneys in the Office of General Counsel as foreign national matters; 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.

⁷ See MUR 7035 (Australian Labor Party), <https://www.fec.gov/data/legal/matter-under-review/7035/>; MUR 7122 (Right to Rise USA), <https://www.fec.gov/data/legal/matter-under-review/7122/>.

⁸ See MUR 6959 (DNC and Nava), <https://www.fec.gov/data/legal/matter-under-review/6959/>; MUR 7059 (Human Rights for Vietnam PAC), <https://www.fec.gov/data/legal/matter-under-review/7059/>.

⁹ See MUR 7081 (Floridians for a Strong Middle Class), <https://www.fec.gov/data/legal/matter-under-review/7081/>; MURs 6962 and 6982 (Hillary for America; Project Veritas), <https://www.fec.gov/data/legal/matter-under-review/6962/>.

¹⁰ See MUR 6944 (Farias), <https://www.fec.gov/data/legal/matter-under-review/6944/>.

¹¹ See MUR 6976 (Johnny W. Streets, Jr. (City Council Committee)), <https://www.fec.gov/data/legal/matter-under-review/6976/>; MURs 7094, 7096 and 7098 (Donald J. Trump for President, Inc.), <https://www.fec.gov/data/legal/matter-under-review/7094/>.

¹² See MUR 6865 (Azano), <https://www.fec.gov/data/legal/matter-under-review/6865/>.

¹³ See MUR 6932 (Hillary for America), <https://www.fec.gov/data/legal/matter-under-review/6932/>.

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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.¹⁴

--One matter was transferred to the Alternative Dispute Resolution Office and the Commission subsequently dismissed the matter by a majority vote.¹⁵

--Three matters were dismissed by a majority vote.¹⁶

--Three matters were closed after split votes.¹⁷

--One matter was dismissed pursuant to staff recommendations under the Commission's Enforcement Priority System.¹⁸

We 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 Duane Pugh, the Commission's Director of Congressional Affairs, at (202) 694-1002 or dpugh@fec.gov.

Sincerely,



Caroline C. Hunter
Commissioner

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

¹⁴ See MUR 7141 (Beverly Hills Residents and Businesses to Preserve Our City), <https://www.fec.gov/data/legal/matter-under-review/7141/>; MUR 7144 (Jacobs), <https://www.fec.gov/data/legal/matter-under-review/7144/>.

¹⁵ See ADR 822 (Arteaga), <https://eqs.fec.gov/eqs/searcheqs.jsessionid=1442CC376B6637DD3CD9A090A65E028C?SUBMIT=continue>.

¹⁶ See MURs 7430, 7444 and 7445 (Unknown Respondents), <https://www.fec.gov/data/legal/matter-under-review/7430/>.

¹⁷ See MUR 7205 (Jill Stein for President), <https://www.fec.gov/data/legal/matter-under-review/7205/>; MUR 7272 (Party of Regions), <https://www.fec.gov/data/legal/matter-under-review/7272/>; MUR 7314 (NRA), <https://www.fec.gov/data/legal/matter-under-review/7314/>.

¹⁸ See MUR 7414 (Marge Doyle for Congress), <https://www.fec.gov/data/legal/matter-under-review/7414/>.