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

AGENDA DOCUMENT NO. 19-41-A

AGENDA ITEM

For meeting of October 17, 2019

MEMORANDUM

TO: The Commission
FROM: Ellen L. Weintraub, Chair 
SUBJECT: Draft Interpretive Rule Concerning Prohibited Activities Involving Foreign Nationals
DATE: September 26, 2019

I request that the attached document be made public and that it be placed on the agenda of the Commission's next open meeting.

This is not my ideal statement of the law, but I believe this document fairly reflects the Commission's interpretation of the foreign-national political-spending prohibition.

FEDERAL ELECTION COMMISSION

11 CFR Part 110

[NOTICE 2019-XX]

Interpretive Rule Concerning Prohibited Activities Involving Foreign Nationals

AGENCY: FEDERAL ELECTION COMMISSION.

ACTION: Notice of Interpretive Rule.

SUMMARY: The Federal Election Commission is summarizing its interpretation of the prohibition on foreign national contributions, donations, expenditures, and disbursements in connection with a federal, state, or local election, as well as the prohibition on soliciting, accepting, or receiving a contribution from a foreign national, under the Federal Election Campaign Act and Commission regulations.

DATES: [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

SUPPLEMENTARY INFORMATION: The Federal Election Campaign Act, 52 U.S.C. 30101-45 (the “Act”), and Commission regulations prohibit any “foreign national” 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. 52 U.S.C. 30121(a)(1); 11 CFR § 110.20(b), (c), (e), (f).¹ The Act’s definition of “foreign national” includes an individual who is not a citizen or national of the United States and

¹ Courts have consistently upheld the provisions of the Act prohibiting foreign national contributions on the ground that the government has a clear, compelling interest in limiting the influence of foreign nationals over the activities and processes that are integral to democratic self-government, which include making political contributions and express advocacy expenditures. *See Bluman v. FEC*, 800 F. Supp. 2d 281, 288-89 (D.D.C. 2011), *aff’d* 565 U.S. 1104 (2012) (“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).

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

9 The Act defines a contribution to include “any gift, subscription, loan, advance, or
10 deposit of money or anything of value made by any person for the purpose of influencing any
11 election for Federal office.” 52 U.S.C. 30101(8). “Anything of value” includes all “in-kind
12 contributions,” such as “the provision of any goods or services without charge or at a charge that
13 is less than the usual and normal charge for such goods or services.” 11 CFR § 100.52(d)(1).
14 The Act also defines “contribution” to include the “payment by any person of compensation for
15 the personal services of another person which are rendered to a political committee without
16 charge for any purpose.” 52 U.S.C. 30101(8)(A)(ii); *see also* 11 CFR § 100.54.

17 In the Bipartisan Campaign Reform Act of 2002 (“BCRA”), Congress expanded the
18 Act’s foreign national prohibition to expressly prohibit “donations” in addition to contributions.
19 Pub. Law 107-155, 116 Stat. 81 (Mar. 27, 2002). It also codified the Commission’s longstanding
20 interpretation of the prohibition, expressly applying it to state and local elections as well as to
21 federal elections. *See* 52 U.S.C. 30121(a); Contribution Limits and Prohibitions, 67 FR 69928,
22 69940 (Nov. 19, 2002); *see also* Advisory Opinion 1999-28 (Bacardi-Martini USA) at 2 (quoting
23 *United States v. Kanchanalak*, 192 F.3d 1037 (D.C. Cir. 1999) (recognizing that Commission

1 had “consistently interpreted . . . since 1976” foreign national prohibition to extend to state and
2 local elections)).

3 Section 110.20(i) of the Commission’s regulations implementing the Act’s foreign
4 national prohibition provides:

5 A foreign national shall not direct, dictate, control, or directly or indirectly participate
6 in the decision-making process of any person, such as a corporation, labor
7 organization, political committee, or political organization with regard to such
8 person’s Federal or non-Federal election-related activities, such as decisions
9 concerning the making of contributions, donations, expenditures, or
10 disbursements . . . or decisions concerning the administration of a political committee.
11

12 The Commission has explained that this provision also bars foreign nationals from “involvement
13 in the management of a political committee.” Contribution Limits and Prohibitions, 67 FR
14 69928, 69946 (Nov. 19, 2002); *see also* Advisory Opinion 2004-26 (Weller) at 2-3 (noting that
15 the foreign national prohibition at section 110.20(i) is broad and concluding that, while the
16 foreign national fiancé of a candidate could participate in committees’ activities as a volunteer
17 without making a prohibited contribution, she “must not participate in [the candidate’s] decisions
18 regarding his campaign activities” and “must refrain from managing or participating in the
19 decisions of the Committees”).

20 The Act also prohibits any person from soliciting, accepting, or receiving a contribution
21 from a foreign national. 52 U.S.C. 30121(a)(2). To solicit means “to ask, request, or
22 recommend, explicitly or implicitly, that another person make a contribution, donation, transfer
23 of funds, or otherwise provide anything of value.” 11 CFR § 110.20(a)(6) (citing 11 CFR
24 § 300.2(m)).

25 In light of these provisions, Commission regulations permit any person or company —
26 foreign or domestic — to provide goods or services to a political committee, without making a
27 contribution, if that person or company does so as a “commercial vendor,” *i.e.*, in the ordinary

1 course of business, and at the usual and normal charge, as long as foreign nationals do not
2 directly or indirectly participate in any committee’s management or decision-making process in
3 connection with its election-related activities. 11 CFR § 114.2(f)(1); *see* 11 CFR § 116.1(c)
4 (defining “commercial vendor” as “any persons providing goods or services to a candidate or
5 political committee whose usual and normal business involves the sale, rental, lease or provision
6 of those goods or services”). For example, in MUR 5998, the Commission found that the foreign
7 national owners of a venue did not make or facilitate a contribution to a political committee by
8 allowing the committee to rent the venue for a fundraising event. Factual and Legal Analysis at
9 4-6, MUR 5998 (Lord Jacob Rothschild). The venue at issue was rented out for events in the
10 ordinary course of business, and the owners charged the committee the usual and normal amount
11 for the service. *Id.* The Commission noted that there was no available information to suggest —
12 and the foreign nationals and political committee expressly denied — that the foreign nationals
13 had any “decision-making role in the event.” *Id.* at 5.

14 The Commission has found that not all participation by foreign nationals in the election-
15 related activities of others will violate the Act. In MUR 6959, for example, the Commission
16 found no reason to believe that a foreign national violated 52 U.S.C. 30121 by performing
17 clerical duties, such as online research and translations, during a one month-long internship with
18 a party committee. Factual and Legal Analysis at 4-5, MUR 6959 (Cindy Nava) (noting that
19 available information, which was based on two press reports that did not detail the foreign
20 national’s activities, did not indicate that the foreign national participated in any political
21 committee’s decision-making process).² Similarly, in MURs 5987, 5995, and 6015, the

² The Commission also found that a \$3,000 stipend that the foreign national received from third parties resulted in an in-kind contribution from the third parties to the committee, but the value of the foreign national

1 Commission found no reason to believe that a foreign national violated 52 U.S.C. 30121 by
2 volunteering his services to perform at a campaign fundraiser and agreeing to let the political
3 committee use his name and likeness in its emails promoting the concert and soliciting support,
4 where the record did not indicate that the foreign national had been involved in the committee's
5 decision-making process in connection with the making of contributions, donations,
6 expenditures, or disbursements. Factual and Legal Analysis at 6-9, MURs 5987, 5995, and 6015
7 (Sir Elton John); *see also* Factual and Legal Analysis at 5, MUR 5998 (Lord Jacob Rothschild);
8 Advisory Opinion 2004-26 (Weller).

9 By contrast, the Commission has consistently found a violation of the foreign national
10 prohibition where foreign national officers or directors of a U.S. company participated in the
11 company's decisions to make contributions or in the management of its separate segregated fund.
12 *See, e.g.,* Conciliation Agreement, MUR 6093 (Transurban Grp.) (U.S. subsidiary violated Act
13 by making contributions after its foreign parent company's board of directors directly
14 participated in determining whether to continue political contributions policy of its U.S.
15 subsidiaries); Conciliation Agreement, MUR 6184 (Skyway Concession Company, LLC) (U.S.
16 company violated Act by making contributions after its foreign national CEO participated in
17 company's election-related activities by vetting campaign solicitations or deciding which
18 nonfederal committees would receive company contributions, authorizing release of company
19 funds to make contributions, and signing contribution checks); Conciliation Agreement, MUR
20 7122 (American Pacific International Capital, Inc.) (U.S. corporation owned by a foreign

volunteer's services to the committee was not a contribution. *Id.* at 4-5 (citing 52 U.S.C. 30101(8)(A)(ii); 11 CFR § 100.54; Advisory Opinion 1982-04 (Apodaca)).

1 company violated the Act by making a contribution after its board of directors, which included
2 foreign nationals, approved a proposal by a U.S. citizen corporate officer to contribute).

3 In addition, although goods or services provided at the usual and normal charge do not
4 constitute a contribution under the Act, soliciting, accepting, or receiving information in
5 connection with an election from a foreign national, as opposed to purchasing the information at
6 the usual and normal charge or hiring a foreign national in a bona fide commercial transaction to
7 perform services for a federal campaign, could potentially result in the receipt of a prohibited in-
8 kind contribution. Indeed, the Commission has recognized the “broad scope” of the foreign
9 national contribution prohibition and found that even where the value of a good or service “may
10 be nominal or difficult to ascertain,” such contributions are nevertheless banned. Advisory
11 Opinion 2007-22 (Hurysz) at 6 (citing Regulations on Contribution Limitations and Prohibitions,
12 67 FR 69928, 69940 (Nov. 19, 2002) (“As indicated by the title of section 303 of BCRA,
13 ‘Strengthening Foreign Money Ban,’ Congress amended [52 U.S.C. 30121] to further delineate
14 and expand the ban on contributions, donations, and other things of value by foreign nationals.”)
15 (emphasis added)).³

16 This interpretive rule summarizes the Commission’s interpretation of existing statutory and
17 regulatory provisions and therefore does not constitute an agency action subject to notice and
18 comment requirements or a delayed effective date under the Administrative Procedure Act. *See*
19 5 U.S.C. 553. The provisions of the Regulatory Flexibility Act, which apply when notice and
20 comment are required by the Administrative Procedure Act or another statute, do not apply.

³ *See* Factual & Legal Analysis at 13-20, MUR 6414 (Carnahan) (explaining that a committee’s receipt of investigative or opposition research services without paying the usual or normal charge may result in an in-kind contribution); *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 \$700 and the cost of copying political flyers).

1 *See* 5 U.S.C. 603(a). The Commission is not required to submit this interpretive rule for
2 congressional review. *See* 52 U.S.C. 30111(d)(1) and (4).

3 Dated:

4 On behalf of the Commission,

5 **Ellen L. Weintraub,**

6 *Chair,*

7 *Federal Election Commission.*

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