

“Things of Value” and the Foreign Contribution Ban

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The Federal Election Campaign Act (FECA), as amended, prohibits foreign nationals from contributing money “or other thing[s] of value” in connection with a federal, state, or local election. A “[thing](#),” as one dictionary has it, is some entity that “cannot be specifically designated or precisely described.” Sure enough, the scope of this ban has largely proven blurry, inconsistent, and frequently contested. FECA’s prohibition has been the subject of [much debate](#) in the wake of congressional inquiries over the Trump Administration’s dealings with Ukraine earlier this year. This Sidebar introduces the debate in three parts: first, it provides an overview of historical developments that led to the present statutory language; second, it discusses the relevant code and regulatory sections that compose the ban; and third, it reviews patterns and practical difficulties arising in the interpretation and enforcement of this prohibition, with special attention to opposition research and the contribution of information. The post concludes with considerations for Congress.

History of the Foreign Contribution Ban

Concerns over foreign interference in domestic affairs date to America’s founding, when delegates to the constitutional convention feared that the new nation would make a tempting target for European powers willing to pay for influence and compliance. Alexander Hamilton [warned](#), “One of the weak sides of republics, among their numerous advantages, is that they afford too easy an inlet to foreign corruption.” In response, the Constitution’s drafters tried to inoculate federal leaders and institutions from outside meddling. [Members of Congress](#) and the [President](#), for example, must satisfy U.S. residency and citizenship requirements, and officeholders are [prohibited](#) from accepting presents, emoluments, offices, or titles of nobility from foreign states without the consent of Congress.

These concerns extended to more modern times. [Fearful](#) on the eve of World War II that “the Nazi German government had established an extensive underground propaganda apparatus,” in 1938 Congress enacted the Foreign Agents Registration Act ([FARA](#)), which in its original form required agents of foreign entities engaged in political work in the United States to register with the federal government and to

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disclose payments made from and on behalf of the foreign principal. In 1966, Congress [amended](#) FARA to make it a felony for a foreign principal to use an agent to make “any contribution of money or other thing of value . . . in connection with an election to any political office.” But while FARA also made it illegal for candidates to solicit, accept, or receive such a contribution, it only governed contributions from *agents* of foreign entities. Congress did not prohibit foreign nationals from making direct campaign contributions to candidates until 1974, when it [amended](#) FECA in [response](#) to allegations that President Nixon’s reelection campaign had accepted millions of dollars in foreign contributions. In 1989, the Federal Election Commission (FEC) [broadened](#) the ban by regulation to cover all expenditures—including “a gift of money *or anything of value*”—made for the purpose of influencing a federal election. Congress adopted this prohibition and extended it to state and local elections through the [Bipartisan Campaign Reform Act of 2002](#).

Legal Definitions

The contemporary ban on foreign contributions is codified at [52 U.S.C. § 30121\(a\)\(1\)](#), which makes it unlawful for a foreign national, directly or indirectly, to make an expenditure or “a contribution or donation of money or other thing of value” in connection with a federal, state, or local election. It is also illegal for a person to “solicit, accept, or receive a contribution” from a foreign national, or to provide substantial assistance in the solicitation or making of a contribution or expenditure by a foreign national. Violators are subject to criminal penalties, including [prison](#) time up to five years and [fines](#) up to \$250,000, and [civil penalties](#) proportionate to the value of the illegal contribution.

The [technical definitions](#) of “contribution” and “thing of value” are, on their face, seemingly circular. A contribution is “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.” Expenditure is defined the same way. And by [regulation](#), “the term anything of value includes all in-kind contributions.” Thus, the FEC has [recognized](#), “Congress has limited the scope of the foreign national prohibition as to the meaning of the term ‘contribution.’”

Tangible and Intangible Things of Value

In 1979 the [Second Circuit](#) recognized that the words “thing of value” “are found in so many criminal statutes throughout the United States that they have in a sense become words of art.” The court catalogued a broad range of applications. For example, amusement is a thing of value under gambling statutes, and the testimony of a witness is a thing of value under extortion statutes. In the case before it, the court held that information about whether a potential co-conspirator is a government informant is a thing of value under a statute prohibiting the selling of any “thing of value” of the United States for personal gain. Under bribery statutes, as yet another example, courts have construed “anything of value” to include [a promise](#) of future employment, [reduced police investigation](#) of drug trafficking, [an extended curfew](#) during a defendant’s pretrial release, and [an agreement](#) not to run in a primary election.

As this list [suggests](#), “[t]he word ‘thing’ notwithstanding, the phrase is generally construed to cover intangibles as well as tangibles.” Tangible things of value tend to be easier to recognize, value, and categorize under campaign finance law. FEC [regulations](#) list several common examples: securities, facilities, equipment, supplies, membership lists, and mailing lists are all things of value that foreign nationals may not contribute for free or reduced charge to American campaigns. In an [advisory opinion](#), the FEC has recognized that printed materials including flyers, advertisements, door hangers, tri-folds, and signs are all things of value for purposes of FECA and thus may not be accepted from foreign nationals, even if those materials were originally produced for foreign campaigns. Notably, this prohibition extends even to materials whose value “may be nominal or difficult to ascertain.” Campaigns

do, however, remain free to [purchase](#) these materials—and any other thing of value from a foreign national—at the market price or an otherwise commercially reasonable rate.

Intangible things of value, such as services and information, require a more complicated inquiry that has resulted in confusion and inconsistency even within the FEC. As with the provision of tangible goods, foreign nationals may offer services to a U.S. campaign if they are appropriately compensated by the campaign. And the [statute](#) also allows foreign nationals to volunteer by providing services *without* compensation on behalf of a candidate or political committee. Because Congress did not appear to intend to leave campaign services by foreign nationals completely unregulated, the difficulty presents in demarcating the boundaries of this volunteer exemption.

FEC Advisory Opinions provide some guidance. [Traditional volunteer activities](#), such as “lit drops, door to door canvassing, handing out literature at transit stations, telephone banking, and get out the vote activities” plainly fall within the exemption and may be provided by foreign nationals, who are similarly [free](#) to attend campaign rallies and events and give speeches endorsing their chosen candidate or cause. The FEC has also [permitted](#) foreign nationals to design a political committee’s website code, logos, and trademarks without compensation.

Other kinds of activities have received inconsistent treatment. In 1981, for example, the FEC [determined](#) that the foreign contribution ban prohibited a foreign artist from donating a painting to a campaign committee for fundraising. In a subsequent deliberation, the FEC [indicated](#) that the 1981 donation did not qualify for the volunteer exemption because it was created and bestowed for a fundraising purpose. But a later Advisory Opinion specifically [allowed](#) foreign nationals to participate in fundraising activity, including in the direct solicitation of funds.

In 2009 the FEC [reviewed](#) a complaint against musician Elton John and the Hillary Clinton for President Committee after Elton John performed a fundraising concert for the campaign. The campaign paid for the concert venue and related expenses such as airline travel, hotel incidentals, security, wardrobe, and license fees, but Mr. John was not otherwise remunerated for his efforts. The FEC determined notwithstanding the fact that Mr. John and the painter reviewed in the 1981 Advisory Opinion were each artists who sought to donate their services to a political fundraising event, “Elton John’s uncompensated concert performance would constitute the donation of service, not a tangible good, and is, therefore, significantly different from the activity considered in the” 1981 Advisory Opinion. But this distinction was soon discarded as well. In a 2014 Advisory Opinion, the FEC expressly [superseded](#) its 1981 opinion and rejected any inference that donations of services are analyzed differently than donations of goods.

Thus, the volunteer exemption for foreign nationals who seek to influence American elections does not turn on whether the volunteer produces something tangible or whether the volunteer participates in fundraising activities. Instead, what seems to matter is whether the foreign national participates in a political organization’s “[decision-making process](#),” which includes “decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with elections” as well as “decisions concerning the administration of a political committee.” Notably, this prohibition applies regardless of whether the foreign national is compensated for his activities.

Applying this distinction, the FEC [determined](#) that it was lawful for Hillary Clinton’s Committee to use Elton John’s name and likeness in an email solicitation for the concert because Mr. John did not participate in any decision-making process related to the fundraiser. Similarly, the FEC has [advised](#) that the foreign-national wife of a U.S. congressman was permitted to attend the re-election committee’s meetings regarding committee events and political strategy, but she was prohibited from “managing or participating in the decisions” of the committee.

Contributions of Information as a “Thing of Value”

FECA’s prohibitions have also been interpreted by the FEC to extend to a foreign national’s uncompensated contribution of information to a political campaign—at least in certain instances. For example, the FEC has determined that [polling information](#) and [opposition research](#) provided to political campaigns comprise in-kind contributions, even where the poll was commissioned for a separate candidate and where the opposition research was used only to preemptively warn candidates about issues that opponents might raise against them. However, it is unclear how far the prohibition on foreign entities’ provision on information to a campaign extends.

The Special Counsel’s Report on the Investigation into Russian Interference in the 2016 Presidential Election brought new attention to whether the foreign contribution ban reaches the provision of opposition research. The Report cautiously [recognized](#) that “candidate-related opposition research given to a campaign for the purpose of influencing an election could constitute a contribution to which the foreign-source ban could apply,” and summarized the arguments in favor of this view:

A campaign can be assisted not only by the provision of funds, but also by the provision of derogatory information about an opponent. Political campaigns frequently conduct and pay for opposition research. A foreign entity that engaged in such research and provided resulting information to a campaign could exert a greater effect on an election, and a greater tendency to ingratiate the donor to the candidate, than a gift of money or tangible things of value.

But the Report acknowledged that the matter remains uncertain: “At the same time, no judicial decision has treated the voluntary provision of uncompensated opposition research or similar information as a thing of value that could amount to a contribution under campaign-finance law.” Although the Supreme Court summarily [affirmed](#) in 2012 a lower court [opinion](#) (authored by then-Judge Brett Kavanaugh) holding that foreign citizens do not have a constitutional right to contribute to American candidates or political parties, [some scholars](#) have warned that the limited First Amendment rights of noncitizens and the rights of Americans to receive information from foreign speakers ought to allow certain kinds of communication between campaigns and foreigners without any scrutiny of the information’s value. Otherwise, they warn, it might be virtually impossible for campaigns—and voters—to learn about a rival candidate’s foreign misconduct.

As with other things of value, political information may be purchased from foreign nationals with campaign funds. In a 2007 Advisory Opinion, the FEC [determined](#) that it was permissible for a candidate to “use campaign funds or personal funds to purchase information from Canadians about Canada’s multi-party system and how third party and independent candidates win elections in Canada.”

Considerations for Congress

Significant questions are likely to persist in interpreting and applying the “thing of value” ban in this context. In its Advisory Opinion forbidding a candidate from accepting flyers, door hangers, and the like, the FEC recognized that the situation was similar to that in the Advisory Opinion forbidding the provision of original artwork. But now that the artwork opinion has been expressly superseded, what remains of the prohibition as it relates to other donated materials? Would the ban apply differently if a foreign national used her time to hand paint a yard sign, or digitally design a campaign brochure? Such “things” might hold even more value than leftover flyers and brochures that were originally designed for foreign campaigns. And as the Special Counsel’s Report reveals, the rules governing uncompensated services related to opposition research and the sharing of negative information about domestic candidates remain murky. One [bill](#) introduced this session would explicitly include “information sought or obtained for political

advantage” as a prohibited thing of value, but the constitutionality of such an approach may ultimately rest with the judiciary.

Author Information

Jacob D. Shelly
Legislative Attorney

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