



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**RESPONSES TO QUESTIONS FOR THE RECORD
FROM THE MAJORITY AND MINORITY MEMBERS
OF THE COMMITTEE ON HOUSE ADMINISTRATION
TO COMMISSIONER SHANA M. BROUSSARD**

October 27, 2023

Majority

1. Since you were first appointed as a Commissioner, please provide a list of all travel you have done outside of the United States in your official capacity as a Commissioner. For each travel event, please provide the following information:
 - a. City and country of destination;
 - b. Reason for the visit;
 - c. Total cost of the travel (please provide an estimate if exact figures are unavailable); and
 - d. Whether the cost was borne by the travel sponsor or by the Federal Election Commission (“FEC”).
 - i. If the cost was not borne by the FEC, please list the sponsor and explain.

Response: Since my appointment in December 2020, I have traveled outside the United States in my official capacity twice. The requested information for each travel event is provided in the table below.

Destination	Purpose	Total Cost	Third-Party Cost	FEC Cost	Sponsor(s)
Quito, Ecuador December, 2022	Conference	\$2,197	\$764	\$1,433	National Electoral Council (Ecuador); Electoral Dispute Tribunal of Ecuador; Organization of American States
Santo Domingo, Dominican Republic November, 2021	Meeting	\$1,878	\$1,878	\$0	UNIORE (hosted by Central Electoral Board and the Superior Electoral Tribunal of the Dominican Republic)

The Commission votes to approve funding arrangements for official travel, and the process varies depending on the funding source. For expenses funded by the agency, the process begins when the Commission receives an appropriation of funds for a fiscal year, it considers and votes to approve a Management Plan for that fiscal year. Specified on each Management Plan is an allocation of funds for Commissioner travel expenses.

With respect to travel expenses funded by nonfederal sources, the Commission’s Designated Agency Ethics Official reviews offers by a private organization to pay for travel-related expenses to be incurred

by Commissioners and staff.¹ The Designated Agency Ethics Official determines pursuant to the Federal Travel Regulation (specifically, 41 C.F.R. §§ 304-5.1 and 304-5.3) whether there is a conflict of interest that would prevent the Commission from accepting the payment. The Commission then determines by no-objection ballot that the travel is in the interest of the government and that it relates to the employee's official duties.² With respect to the international trips described in the chart above, the Commissioners made this determination by a no-objection vote following circulation of information about the proposed reimbursement and travel, which includes the conflict of interest analysis from the Designated Agency Ethics Official.

Any official international travel by agency employees is first presented to the U.S. Department of State for review by the FEC's Office of Congressional, Legislative and Intergovernmental Affairs. Any information provided by the State Department is reviewed by Commissioners prior to approval of the payment of travel expenses or the acceptance of funding from a private organization.

2. When you were originally appointed to the Commission, you regularly voted against motions to close the file in enforcement matters on which the Commission had fully considered and voted on the underlying merits, but you have recently changed course. A federal district court recently held that this practice violated the Administrative Procedure Act in *Heritage Action for America v. FEC*, No. 22-1422, 2023 U.S. Dist. LEXIS 122680, (D.D.C. July 17, 2023). Please answer the following questions.
 - a. Why did you originally vote against motions to close enforcement case files after the Commission had fully considered a matter's legal merits?

Response: When a quorum was restored in December 2020, the Enforcement backlog stood at 446 matters. By the time I took over as Chair, it increased to 452. For context, the number of pending cases on our docket in September 2019 – just after we lost a quorum – was 260. In other words, our caseload increased over 70 percent while the Commission lacked a quorum.

These statistics are important because the relative number of times I voted against closing the file constituted a very small percentage of the agency's Enforcement docket. In eight matters, my votes not to close the file were based on the facts and my reading of FECA, which, in my view, contemplates split votes on closing the file in enforcement matters.

- i. Do you acknowledge this practice of failing to close the files of concluded enforcement matters violated the Administrative Procedure Act?

Response: No, the record is unclear. Since the files were closed on these eight matters, several decisions have addressed votes to close the file in the enforcement process. In *Heritage Action for America v. FEC*³, the U.S. District Court for the District of Columbia held that “a deadlocked reason-to-believe vote is equivalent to a dismissal (or termination)” that “requires prompt disclosure” under the Administrative Procedure Act, 5 U.S.C. § 555(e); 52 U.S.C. § 30109(a)(4)(B)(ii); and 11 C.F.R. §§

¹ FEC Directive No. 30, Circulation Authority; Invitation Policy (Oct. 5, 2006), available at https://www.fec.gov/resources/cms-content/documents/directive_30.pdf.

² See 41 C.F.R. § 304.5.1(b) and (c).

³ Civ. No. 1:22-cv-01422 (CJN) (slip op. July 17, 2023)

111.9 and 111.20.⁴ Two months later, a different judge in the U.S. District Court for the District of Columbia disagreed with the court in *Heritage Action*, finding that a vote to close the file, and not a deadlocked vote on reason-to-believe, constituted the dismissal of a matter.⁵ Generally, district court opinions are not considered binding on other district courts or on courts of appeals.⁶ Therefore, the *Heritage Action* opinion is not a controlling opinion. The conflict between the *CREW* decision and the *Heritage Action* opinion will likely be adjudicated at some point by the D.C. Circuit.

As a commissioner, until such time as the D.C. Circuit weighs in, I must take both of these decisions into consideration. Nevertheless, in light of these and other recent decisions, I do not consider voting to not close the file in enforcement matters an appropriate course of action.

b. Why did you change your approach?

Response: My responsibility as a commissioner is to assess the merits of each matter based on the facts and applicable law, including court decisions. Nevertheless, in August I voted with my colleagues to approve an agency procedure regarding litigation which provides, among other things, that in any case where the Commission does not agree by four or more affirmative votes to defend an action under 52 U.S.C. § 30109(a)(8) alleging a failure of the Commission to act, the Office of General Counsel will file, under seal, a copy of each vote certification, subject to appropriate redactions, concerning the underlying administrative complaint giving rise to the lawsuit.⁷ The Office of General Counsel will continue to file each such vote certification until the conclusion of the lawsuit. I believe that this procedure will provide transparency to the court, as well as to complainants and respondents.

3. When you were originally appointed to the Commission, you regularly voted against recommendations by the Office of General Counsel to defend your agency in litigation under 52 U.S.C. § 30109(a)(8), and thereby caused the FEC to fail to appear in federal court, but you have recently changed course. Please answer the following questions.
 - a. Why did you originally vote against recommendations by the Office of General Counsel to defend your agency in litigation under 52 U.S.C. § 30109(a)?

Response: FECA requires the affirmative vote of four members of the Commission to authorize defense of a lawsuit arising under 52 U.S.C. § 30109(a)(8). My responsibility as a commissioner is to consider the merits of each vote that I take. With respect to prior votes I took not to authorize defense of the agency, I did so because in my view, the facts and the applicable law regarding each particular matter did not warrant the use of the agency's resources to defend the case. I cannot predetermine how I will vote on a hypothetical lawsuit arising under 52 U.S.C. § 30109(a)(8).

⁴ *Heritage Action*, slip op. at 18-19.

⁵ *CREW v. FEC*, Civ. No 1:22-cv-03281 (CRC) (slip op. Sept. 20, 2023) at 14.

⁶ “‘A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.’ Many Courts of Appeals therefore decline to consider district court precedent when determining if constitutional rights are clearly established for purposes of qualified immunity.” *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (quoting 18 J. Moore et al., *Moore’s Federal Practice* § 134.02[1] [d], p. 134–26 (3d ed. 2011)).

⁷ Agency Procedure Regarding Litigation, 88 Fed. Reg. 56,021 (Aug. 17, 2023).

i. Why did you change your approach?

Response: I have not changed my approach towards votes to authorize defense of litigation. I will continue to exercise my duty under FECA to consider the merits of each vote that I take. However, the Commission recently adopted an agency procedure regarding litigation, discussed above, which I voted to approve.

By requiring the Office of General Counsel to file under seal vote certifications of votes on underlying administrative complaints, this agency procedure will ensure that courts are fully apprised of the status of enforcement matters that are the basis for action under (a)(8).

Minority

1. Commissioner Broussard, given your perspective as both a commissioner and former member of the FEC's career professional staff, how does the Commission benefit from hiring a diverse workforce and ensuring diversity at all levels of management?

Response: As only the second agency staff member to join the Commission, I consider my service a great privilege. Indeed, my commitment to the agency and its mission began long before my appointment, beginning in 2008, as a staff attorney in the Commission's Enforcement Division and later as Counsel to a commissioner. Those experiences allowed me to develop not only legal knowledge, but an understanding of the agency that gives me a unique perspective represented on the Commission.

Coupled with my experiences as the first African American to serve on the Commission in its 48-year history, I understand the benefits to the Commission from hiring a diverse workforce and ensuring diversity at all levels of management. As it stands, of the 293 employees in the total workforce in FY 2022, the racial and ethnic composition included a total of eight Hispanic/Latino employees, 93 Black/African American employees, 27 Asian employees, one employee of Native American/Alaskan Native heritage, and one employee who identified as bi- or multi-racial.⁸

Of the employees at the GS-15 level (which may, but not always, indicates managerial responsibilities), 15 are male and 18 are female; two are Hispanic/Latino; six are Black/African American; and 4 are Asian.⁹ Of the senior level employees, eight are male and three are female and one is Hispanic/Latina. The senior level ranks do not include anyone who is Black/African Americans, Asians, Native American/Alaskan Natives, or bi- or multi-racial.¹⁰

Generally speaking, a diverse workforce ensures a stronger agency and overall better performance and productivity when people with different backgrounds, experiences, and perspectives come together. Indeed, by its very nature, diversity promotes the benefits of hearing from individuals with different experiences who may understand and approach problems in unique ways. Diverse teams are professionally enriching as teammates are exposed to new skills and approaches to work.

For example, the Commission consists of six individuals with a wide range of professional experiences, including private practice, public interest, state party representation, legislative staff, and civil and criminal law enforcement. Together, we cover a wide spectrum of experiences that allows each of us to contribute a unique perspective to the matters before the Commission and exemplifies the benefits of a diverse workforce.

At the management level, diversity ensures that a range of views and experiences are represented by agency decisionmakers. For example, the agency's response to the COVID-19 pandemic, which disproportionately affected households of color that have higher rates of multi-generational families living under the same roof. Understanding these dynamics and how it affected our agency's workforce

⁸ See Fed. Election Comm'n, 2022 EEOC Management Directive 715 Report, Barrier Analysis FY 2022 II.A. (Jun. 1, 2023), <https://www.fec.gov/resources/cms-content/documents/2022-MD715-Report-June-2023.pdf>.

⁹ See *id.* at II.C.xi. However, attrition since FY 2022 has reduced the current workforce distribution of racial and ethnic minorities at the management level. For example, Black/African American employees at the GS-15 level currently stands at three compared to six in FY 2022.

¹⁰ *Id.*

was a significant consideration as the Commission led the way as one of the first federal agencies to return to work in early 2022. Specifically, it was important to consider more flexibility for agency staff caring for both older and younger generations within their own household whose access to safe and reliable care may have been affected by the nationwide closures and staffing shortages of day/elder cares, schools, and healthcare facilities.

2. How do the Commission's investigative capacity and enforcement priorities benefit from a diverse workforce, including in managerial positions?

Response: Whether consciously or not, mentors and mentees often share similar backgrounds. To be sure, this extends beyond race and ethnicity to life experiences like academic and professional pedigrees. By ensuring diversity at the managerial level, the Commission can expand opportunities for agency staff to learn from a more inclusive group of managers and apply their skills to challenging assignments.

This directly benefits the Commission's investigative capacity and enforcement priorities by ensuring that all agency staff are trained to conduct thorough, yet efficient investigations. Similarly, this ensures that all enforcement staff are trained and equally capable of handling even the most complex matters so that the enforcement docket continues to move forward with few barriers to success. In our audit capacity, which is likewise part of our agency's enforcement activities, a diverse workforce similarly benefits our audit teams through informal mentoring, as well as from the varied types of experiences that our auditors bring to the Commission, including forensic, operational, financial, and compliance audits, among others.

3. What additional resources are needed and what can Congress do to help the Commission develop a more diverse workforce, including at managerial levels, and ensure that staff of color are supported in their roles?

Response: First, resources to invest in our current workforce with training opportunities, including mandatory professional continuing education, that improve relevant skill sets and build a foundation for increasingly complex work assignments plays a key role in both professional development and preparation for leadership opportunities. While many employees rank this as a priority, the agency's budget rarely allows for meaningful opportunities to invest in division employee training let alone skill development for individuals.

Second, a deliberate approach to internal and external recruiting that expands the pool of qualified candidates would help increase diversity at all levels. This includes a conscious effort to meet diverse applicants where they are at. For example, participating in career fairs that target under-represented groups or leveraging the resources of professional associations for women and minorities. For younger workers entering the workforce, the agency can also be deliberate by recruiting at Historically Black Colleges and Universities (HBCUs) and other minority serving institutions (MSIs) where the talent pool ensures access to a wider group of students who are Black, Indigenous, or people of color (BIPOC), as well as post-secondary institutions for the deaf and the blind.

Question from Rep. Derek Kilmer (WA-06)

Under federal law, there are a number of rules in place that create a robust disclaimer and public access network for political advertisements circulated by broadcast, cable, and satellite providers. However,

large online internet platforms—which Americans increasingly cite as their leading source of news—are not subject to these same requirements under federal law.

This lack of transparency has dangerous implications for our democracy, with foreign adversaries able to purchase political advertisements with the intention of influencing the electorate without voters' knowledge. This is reflected in a 2021 declassified assessment by the Office of the Director of National Intelligence of foreign threats to the 2020 U.S. Federal elections. The declassified report found that: "Throughout the election cycle, Russia's online influence actors sought to affect U.S. public perceptions of the candidates, as well as advance Moscow's longstanding goals of undermining confidence in US election processes and increasing sociopolitical divisions among the American people."

The report also determined that Iran sought to influence the election by "creating and amplifying social media content that criticized [candidates]." Furthermore, multiple reports have indicated that online ads have become a key vector for strategic influence by the People's Republic of China. An April 2021 Wall Street Journal report noted that the Chinese Government and Chinese state owned enterprises are major purchasers of social media ads.

That's why, this Congress, I reintroduced the bipartisan Honest Ads Act alongside Representative Mike Gallagher, which was also introduced in the Senate by Senator Amy Klobuchar and Senator Lindsay Graham. The Honest Ads Act would prevent foreign actors from influencing our elections by ensuring that political ads sold online are covered by the same rules as ads sold on TV, radio, and satellite platforms.

While I recognize FEC efforts to address the "public communication" definition and internet communications disclaimers, I believe that the Honest Ads Act would improve transparency in this space by authorizing the statutory authorization scope needed to fully address these issues and guarantee these full transparency requirements at the federal level.

Question: Could you please share more about the extent to which FEC's Final Rule, which took effect in March 2023, expanded the transparency of certain online public communications viewed by the public, and how further authorization offered under the Honest Ads Act would provide greater authority to address the full scope of political advertisements and public communications viewed by the public online?

Response: Since 2011, the Commission had been considering a rulemaking on internet communication disclaimers and revising the definition of "public communication" to reflect the growing role of the internet and smart technology in political advertising.¹¹ Last December, the Commission published a Final Rule and explanation and justification revising the definition of "public communication" and the requirement concerning disclaimers on certain public communications placed for a fee on the internet ("Internet Disclaimers Final Rule").¹² The revised regulations clarify how the disclaimer requirements apply to internet public communications and allow for an adapted disclaimer under specific circumstances.

¹¹ Internet Communication Disclaimers, 76 Fed. Reg. 63,567 (Oct. 13, 2011).

¹² Internet Communication Disclaimers and Definition of "Public Communications," 87 Fed. Reg. 77,467 (Dec. 19, 2022).

At the same time that the Commission voted to approve the Internet Disclaimers Final, the Commission also approved a supplemental Notice of Proposed Rulemaking in another rulemaking addressing Technological Modernization.¹³ This supplemental NPRM asked whether the Commission should include the phrase “promoted for a fee” on another person’s website, digital device, application, or advertising platform in the definitions of “public communication” and “internet public communication.”

While I hope that the Internet Disclaimers Final Rule and a future Technological Modernization Final Rule can address the use of modern technology by the regulated community, I also understand the limits of the agency’s jurisdiction and welcome Congressional efforts to strengthen the rules related to online political advertising. For example, the Honest Ads Act supplements our rulemaking by requiring online ad vendors to maintain a public database of digital ads similar to public records that broadcast media and radio must maintain. This will greatly increase our ability to understand sources of funding, including foreign actors restricted from engaging in the political process.

10-27-2023

Date



Shana M. Broussard
Commissioner

¹³ Technological Modernization, 87 Fed. Reg. 75,518 (Dec. 9, 2022).