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Federal Election Commission
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Submitted via email and U.S.P.S.

Petition for Rulemaking to Revise and Amend Regulations Regarding the Refunding of Illegal Contributions

Dear Ms. Stevenson,

Pursuant to 11 C.F.R. § 200.1 *et seq.*, Campaign Legal Center ("CLC") hereby petitions the Federal Election Commission ("FEC" or "Commission") to open a rulemaking to amend or clarify Commission regulations regarding the refunding of illegal political contributions, *i.e.*, contributions that violate the source prohibitions or amount limitations of the Federal Election Campaign Act ("FECA").

Commission regulations currently state that committee treasurers must examine "all contributions received for evidence of illegality," and "shall refund" illegal contributions to the contributors.[1] This regulation's reference to refunds is not required by FECA, appears facially inapplicable to corporate contributions to super PACs that are later found to be illegal, and—when read to require the refund of illegal contributions to the contributors—can produce counterproductive and inequitable results. In particular, refunding illegal contributions can undermine the enforcement purposes of FECA by unjustly rewarding those making illegal contributions, including in cases where the illegal contributions came from foreign nationals or federal contractors attempting to manipulate or corruptly influence elections or officeholders. In

[1] 11 C.F.R. § 103.3(b).

such circumstances, refunding an illegal contribution also undermines the deterrent effects of enforcing federal campaign finance laws. Put simply, when those caught brazenly violating the law are rewarded with the return of the money they contributed—the tool of their illegal activity—it sends the regulated community and the public a very troubling message that the FEC permits violators to profit from their violations.[2]

The Commission should proactively address these problems by amending or clarifying its regulations regarding the refunding of illegal contributions. The Commission should make clear that illegal contributions may be disgorged to the U.S. Treasury, and that the Commission may require disgorgement where appropriate—*e.g.*, when a refund would be unjust and create incentives for future lawbreaking.

Background

FECA prohibits contributions from certain sources, including foreign nationals, federal contractors, and, with respect to certain kinds of committees, corporations and labor unions.[3] It also prohibits contributions in the name of another, as well as contributions in excess of certain amounts.[4] These limits and prohibitions preserve the integrity of our elections, curtail corruption and the appearance thereof, and uphold FECA's disclosure regime, which provides voters with crucial information about the sources of election spending.

FECA prohibits political committees from knowingly accepting prohibited contributions,[5] but does not specify what committees are required to do with a contribution that initially appears legal but is later determined to be prohibited. Commission regulations, however, provide that if a committee treasurer initially determines that a contribution does not "appear to be made by a corporation, labor organization, foreign national or Federal contractor, or made in the name of another, but later discovers that [the contribution] is illegal"—including, *e.g.*, receiving notice that the contributor has entered into a conciliation agreement with the Commission acknowledging that the contribution is illegal—"the treasurer *shall refund* the contribution to the contributor within thirty days of the date on which the illegality is discovered."[6]

In the absence of any explicit requirements in FECA regarding how to handle prohibited contributions, the Commission first promulgated regulations on

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2 *See Fireman v. United* States, 44 Fed. Cl. 528, 539 (Fed. Cl. 1999).

3 *See* 52 U.S.C. §§ 30118, 30119, 30121.

4 *See* 52 U.S.C. §§ 30116, 30122.

5 *See* 52 U.S.C. §§ 30116(f), 30118(a), 30121(a)(2), 30122.

6 11 C.F.R. § 103.3(b)(2) (emphasis added).

this issue in 1977, to provide clarity to political committees "as a guide to the proper handling of questionable"—*i.e.*, potentially illegal—contributions.[7] When the rule was first implemented, the Commission explained that it required the refund of illegal contributions to the original contributors.[8] Nevertheless, the Commission has for years sought disgorgement in certain cases as an exercise of its equitable power.

A short history of Commission precedents interpreting Section 103.3 shows stark disagreement on whether Commission regulations permit disgorgement of prohibited contributions—highlighting the need for the Commission to explicitly amend or clarify the rule.

In Advisory Opinion 1984-52 (Russo), the Commission described its regulation at 11 C.F.R. § 103.3(b) as a "mandatory refund requirement," citing the Commission's general rule that illegal contributions "be returned by the recipient once their unlawful nature is discovered."[9] But in Advisory Opinion 1996-05 (Kim), the Commission read 11 C.F.R. § 103.3(b) to permit committees to disgorge illegal contributions to the U.S. Treasury "where there is a factual dispute as to the actual source of the contributions."[10] The Commission thus approved disgorgement as a viable alternative remedy, under certain circumstances, implicitly interpreting its existing regulation to permit disgorgement.[11]

Nevertheless, in a one-paragraph statement dissenting from the opinion, then-FEC Chair Lee Ann Elliott asserted that Section 103.3(b) "clearly require[s] illegal contributions to be refunded to the contributor," and that "[p]rescribing the remedy of disgorgement of illegal contributions to the U.S. Treasury is beyond [the Commission's] authority in the context of an enforcement action,

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[7] *See Communication Transmitting Proposed Regulations*, H.R. Doc. No. 95-44, 95th Cong., 1st Sess. at 45 (1977) ("Contributions of questionable legality shall either be returned to the contributor or deposited while the treasurer determines the validity of the contribution.").

[8] Contribution and Expenditure Limitations and Prohibitions; Contributions by Persons and Multicandidate Political Committees, 52 Fed. Reg. 760, 769 (Jan. 9, 1987) ("The rule requires the amount of the contribution to be refunded to the contributor within thirty days after the discovery of the illegality.").

[9] Advisory Op. 1984-52 (Russo).

[10] Advisory Op. 1996-05 (Kim).

[11] Consistent with Advisory Opinion 1996-05, then-FEC General Counsel Lawrence Noble, testifying before Congress in 1997, observed that "[i]n some instances, the FEC now seeks to have the illegal contributions disgorged to the U.S. Treasury, rather than returned to the contributor. This is particularly appropriate where the return of the contribution would result in unjust enrichment. . . . I believe that [the FEC] do[es], in the appropriate case, have general equitable authority to seek disgorgement." *Hearing Before the Subcomm. on Commercial and Admin. L. of the Comm. on the Judiciary on H.R. 1494 Apprehension of Tainted Money Act of 1997*, 105th Cong. 2, 32 (1997).

[or] . . . in an Advisory Opinion."[12] Chair Elliott's position has been cited as a basis for subsequent challenges to the disgorgement of illegal contributions.

A subsequent civil suit before the U.S. Court of Federal Claims illustrated the inequity of applying Section 103.3 strictly as written. The plaintiffs in *Fireman v. United States* sought to recover $69,000 that they had illegally contributed to a presidential campaign committee, which the committee disgorged to the U.S. Treasury—explicitly following the Commission's interpretation in Advisory Opinion 1996-05—after plaintiffs had been criminally prosecuted for making excessive and prohibited corporate contributions.[13] The plaintiffs, relying principally on Chair Elliott's dissent in Advisory Opinion 1996-05, asserted that they were entitled to recover their illegal contributions because Commission regulations required the committee to refund the contributions.[14]

The court agreed that under the FEC's previous approach to section 103.3(b), "donors had a right to be repaid any money that they illegally donated to a campaign," whereas after Advisory Opinion 1996-05, "donors' guaranteed interest in the return of the money [they had illegally donated] has been eliminated."[15] The court noted that "the language 'shall refund' [in section 103.3(b)(2)] seems clear enough on its face to support the proposition that the Plaintiffs are entitled to a refund and the regulation confers a right of recovery on them." Yet although the court concluded that section 103.3(b) "expressly instructs recovery" of illegal contributions, it also commented on the merits of the FEC's revised interpretation of the rule permitting disgorgement as an alternative:

> The position taken by the FEC in [Advisory Opinion] 1996–5 has some attraction. The majority opinion recognizes that disgorging the illegal donations to the United States Treasury accomplishes the goal of ensuring that campaigns do not profit from an illegal contribution [and that] if donors knew that an illegal donation would not be returned to them, donors may be more diligent in obeying the law.[16]

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[12] Dissenting Op. of Chair Lee Ann Elliott, Advisory Op. 1996-05 (Kim) (Mar. 18, 1996).

[13] *Fireman v. United* States, 44 Fed. Cl. 528 (Fed. Cl. 1999).

[14] *Id.* at 533.

[15] *Id.* at 536; *see also id.* at 530 note 1 ("AO 1996–5 permitted a campaign to return illegal donations to the United States Treasurer[, overruling] an earlier interpretation of the same regulation, 11 C.F.R. § 103.3(b)(2) . . . [wherein] the Federal Election Commission (FEC) required the illegal donation to be returned to the donor when the donor was identified.").

[16] *Id.* at 539.

Aside from this historical dispute regarding disgorgement, Section 103.3(b)(2) is today being improperly applied to at least one increasingly common category of contributions: a contribution that the recipient committee—typically a super PAC or the noncontribution account of a hybrid PAC—knows was made by a corporation. Specifically, the regulation's "shall refund" clause applies only when a committee treasurer "determined that at the time a contribution was received and deposited, it *did not appear to be made by a corporation*, . . . but later discover[ed] that it is illegal."[17] On its face, therefore, the regulation does not apply to situations where a contribution *does* "appear to be made by a corporation"—a circumstance that has become increasingly common in the post-*Citizens United* era—but is later determined to be unlawful.[18]

Nonetheless, the Commission appears to be routinely applying Section 103.3(b)(2) to corporate contributions that initially appear lawful but are later determined to be illegal, including, *e.g.*, corporate contributions that violate FECA's foreign national or federal contractor prohibitions. Indeed, in each of the matters discussed below—including MUR 7613 (Zekelman, *et al.*) and MUR 7450 (Ashbritt, Inc.)—the contribution at issue was manifestly made by a corporation,[19] such that the Commission's reliance on Section 103.3(b)(2) was improper and contrary to the text of the regulation. Until the regulation is amended or clarified as requested in this petition, the Commission must comply with the rule as written and cease interpreting it to prohibit the disgorgement or require the refund of corporate contributions later discovered to be illegal.

Notwithstanding that the Commission appears to be misreading 11 C.F.R. § 103.3(b), disgorgement appears to have become accepted Commission practice. The official current guidance to committees confusingly provides that committees "must refund" any illegal contribution within 30 days of discovering the illegality, or "[a]lternatively, the committee may disgorge the funds to the U.S. Treasury."[20] Thus, even if one were to assume, *arguendo*, that Section 103.3(b)(2) applies to all illegal contributions, including those clearly made by corporations, the Commission's application of the refund rule is both ad hoc and frequently inequitable.

In recent years, the Commission has negotiated conciliation agreements that required contributors to waive a refund and request that the recipient

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17 11 C.F.R. § 103.3(b)(2) (emphasis added).

18 *See Citizens United v. FEC*, 558 U.S. 310 (2010).

19 *See, e.g.*, Conciliation Agreement ¶ VIII.3, MUR 7613 (Zekelman, *et al.*) (requiring that a super PAC refund or disgorge a foreign national contribution made by a corporation).

20 *How to Report Disgorged Contributions*, fec.gov/help-candidates-and-committees/filing-reports/disgorged-contributions (last viewed Aug. 10, 2022).

committees disgorge their illegal contributions.[21] But in other cases, the Commission has applied 11 C.F.R. § 103.3(b) in a manner that has produced wildly unjust results, including, *e.g.*, permitting a super PAC to refund a seven-figure illegal contribution to its foreign national source.

In MUR 7613, the Commission determined that Barry Zekelman, a foreign national and the Chief Executive Officer of Zekelman Industries, Inc., violated FECA by participating in the decision to have Zekelman Industries' domestic subsidiary, Wheatland Tube, LLC, make a $1.75 million prohibited foreign national contribution to America First Action ("AFA"), a super PAC supporting the 2020 reelection campaign of President Donald Trump.[22] News reports indicated that this super PAC contribution was a key part of Zekelman's effort to gain access to and influence President Trump regarding steel industry tariffs directly tied to Zekelman Industries' business prospects.[23] The Commission ultimately negotiated a $975,000 civil penalty—the third largest in FEC history—for this major violation of federal law, yet the negotiated conciliation agreement also provided that Zekelman "will request that AFA refund" the contribution "or, in the alternative, request that AFA disgorge" it, leaving that important choice up to Zekelman.[24] Unsurprisingly, AFA subsequently refunded the $1.75 million contribution in full,[25] leaving Zekelman firmly in the black even after paying the civil penalty—a clear miscarriage of justice.

The refund in the Zekelman matter was exceptionally inequitable, but it was not an isolated instance. Many recent FEC enforcement matters involving prohibited contributions have resulted in a partial or complete contribution refund *to the violator*, undercutting the effect of any civil penalty. For instance, Ashbritt, Inc., a federal contractor, made $525,000 in illegal contributions and agreed to pay a $125,000 civil penalty, but the company had already recovered $500,000 as a contribution refund long before the Commission took any

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[21] *E.g.*, Conciliation Agreement at 3, MUR 7878 (Crystal Run Healthcare, LLP) (Mar. 17, 2021); Conciliation Agreement at 5, MUR 7221 (James Laurita, Jr.) (Jun. 6, 2019); Conciliation Agreement at 4, MUR 7472 (Barletta) (Dec. 20, 2018); Conciliation Agreement at 6, MUR 7248 (Cancer Treatment Centers of America Global, Inc.) (Aug. 1, 2017).

[22] *See* Factual and Legal Analysis at 7-10, MUR 7613 (Zekelman Industries, Inc.).

[23] Eric Lipton, *He's One of the Biggest Backers of Trump's Push to Protect American Steel. And He's Canadian.*, N.Y. Times (May 20, 2019), https://www.nytimes.com/2019/05/20/us/politics/hes-one-of-the-biggest-backers-of-trumps-push-to-protect-american-steel-and-hes-canadian.html (reporting that the Trump administration agreed "to eliminate the 25 percent tariffs on steel imports from Canada and Mexico, while leaving them in place for most of the rest of the world[, which] will benefit Mr. Zekelman, whose biggest manufacturing plant is in Harrow, Ontario, meaning the company will now be able to ship Canadian-made pipe into the United States tariff free").

[24] Conciliation Agreement at 4, MUR 7613 (Zekelman Industries, Inc.) (Apr. 7, 2022).

[25] America First Action, Inc., July 2022 Quarterly Report at 14 (Jul. 15, 2022).

action. [26] Similarly, another federal contractor, Marathon Petroleum, contributed a combined $1 million to two super PACs and agreed to pay an $85,000 civil penalty, but received a full refund for all of its illegal contributions.[27]

These matters illustrate an unfortunate standard operating procedure that has emerged with respect to FECA's federal contractor contribution ban, a crucial bulwark against corruption that was unanimously upheld in 2015 by the *en banc* U.S. Court of Appeals for the D.C. Circuit.[28] Committees that learn they have received prohibited federal contractor contributions often refund those contributions shortly after an administrative complaint is filed, long before the Commission takes any enforcement action. While committees understandably may want to demonstrate prompt compliance with FECA's requirements, the result for the federal contractor is to be made whole despite their illegal conduct—particularly if, as commonly happens, the Commission dismisses the complaint, based at least partially on the fact that the illegal contribution was refunded.[29]

Even when the Commission enforces the law and imposes consequences for illegal contributions, the eventual civil penalties frequently pale in comparison to the refunded amount of the contributions, which are by then safely back in the federal contractor's pocket. The near certainty that federal contractors will recover their illegal contributions—more than offsetting any civil penalties the Commission assesses—undermines the deterrent effect of enforcing the federal contractor contribution ban. The refund of such contributions sends an unfortunate message: even if someone is caught making illegal contributions, their funds will be returned for them to not only pay any civil penalty, but to potentially try again and influence future elections.[30]

Clarifying the Commission's authority to pursue disgorgement in appropriate circumstances would help deter future violations and avoid rewarding those caught violating the law.

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[26] Conciliation Agreement ¶¶ IV.4, VII.1, MUR 7450 (Ashbritt, Inc.) (Jul. 19, 2021).

[27] Conciliation Agreement ¶¶ IV.5, IX.1, MUR 7843 (Marathon Petroleum) (Feb. 17, 2022).

[28] *Wagner v. FEC*, 793 F.3d 1, 18, 22 (D.C. Cir. 2015) (en banc).

[29] *See, e.g.*, Certification, MUR 7888 (Martin Marietta Materials, Inc.) (Apr. 11, 2022).

[30] *See, e.g.*, Conciliation Agreement ¶¶ IV.3, VII.1, MUR 7451 (Ring Power Corp.) (Jun. 19, 2019) ($50,000 federal contractor contribution was refunded and FEC assessed a $9,500 fine); Conciliation Agreement ¶¶ IV.3, VII.1, MUR 7568 (Alpha Marine Servs., LLC) ($100,000 federal contractor contribution was refunded and FEC assessed a $17,000 fine).

Request for Rulemaking

FEC Chairman Dickerson recently issued an interpretive statement explaining his view that 11 C.F.R. § 103.3(b) as currently written requires committees to refund illegal contributions.[31] Echoing then-Chair Elliott's statement dissenting from Advisory Opinion 1996-05, Chairman Dickerson suggested that the Commission must undertake a rulemaking to permit it to seek the disgorgement of illegal contributions. While we believe that the Commission already possesses the equitable power to seek disgorgement, we support a rulemaking to amend or clarify the scope and remedies provided in section 103.3 to promote the robust enforcement of FECA.

The current rule, by its terms, does not apply to contributions made that facially "appear to be made by a corporation [or] labor organization" even when such contributions initially appear legal, but are later determined to be from a prohibited source.[32] Moreover, when the rule is read to require the refund of an illegal contribution to the contributor, it undermines the enforcement of FECA's source prohibitions and amount limitations. Requiring committees to refund illegal contributions renders any civil penalty a mere cost of doing business, allowing those that have violated the law to recover their "investment" and potentially use the same funds to illicitly influence elections again. The refund of illegal contributions also undermines the deterrent effects of any civil penalty that the Commission might assess. Disgorgement of illegal contributions, by contrast, would prevent unjust enrichment, permanently remove illegally contributed funds from our election system, and eliminate the extremely poor incentives generated by the current rules.

We urge the Commission to amend or clarify its regulations to explicitly recognize that illegal contributions may be disgorged, and that the Commission may require the disgorgement of illegal contributions in appropriate circumstances. The Commission should also consider issuing guidance regarding the factual circumstances that it may consider when determining whether to require disgorgement, as well as providing examples of instances where disgorgement would be necessary and appropriate to fully vindicate the Commission's enforcement interests under FECA.

Revising the Commission's rules regarding disgorgement would help reduce ad hoc enforcement outcomes and avoid future situations where bad actors are unjustly rewarded with a refund despite their blatant efforts to illegally influence elections and undermine the democratic process, sending a clear deterrent message to potential future lawbreakers.

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[31] Interpretative Statement by Chairman Allen Dickerson Concerning 11 C.F.R. § 103.3 and the Disgorgement of Unlawful Contributions (Apr. 22, 2022).

[32] 11 C.F.R. § 103.3(b)(2).

We respectfully petition the Commission to take proactive steps toward achieving these goals by revising and amending its regulations accordingly.

Sincerely,

/s/ Saurav Ghosh

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