



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )  
 ) MUR 7243  
CITGO Petroleum Corporation, *et al.* )  
 )  
 )

**STATEMENT OF REASONS OF  
VICE CHAIR ALLEN DICKERSON AND COMMISSIONERS SEAN J. COOKSEY  
AND JAMES E. “TREY” TRAINOR III**

This matter presents a question of first impression for the Commission about the correct interpretation of one of our regulations: 11 C.F.R. § 110.20(j). That regulation provides in relevant part that “[a] foreign national shall not, directly or indirectly, make a donation to an inaugural committee.” The question is whether this regulation, in addition to barring foreign nationals from making donations to inaugural committees, also prohibits foreign nationals from participating in the decision-making process for such donations. We conclude that it does not.

Because the regulation’s text and structure, as well as our precedents, confirm that it does not apply to the conduct at issue in this matter, we voted to find no reason to believe that Respondents violated the law. Our colleagues disagreed, and after voting 3-3 on the merits, the Commission voted 4-2 to close the file—a once-ministerial act that is no longer routine. Now able to acknowledge our deliberation on the matter, we write to explain the reasoning behind our votes.

**I. Factual Background**

The relevant facts can be summarized briefly. CITGO Petroleum Corporation (“CITGO”) is an energy company incorporated in Delaware<sup>1</sup> with headquarters in Houston, Texas.<sup>2</sup> It focuses on the “refining, marketing, and transportation of petroleum products, including gasoline, diesel fuel, jet fuel, petrochemicals and lubricants,” from which it generates significant revenues in the

<sup>1</sup> See State of Delaware Department of State: Division of Corporations, Entity Details, available at <https://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx> (visited March 1, 2021).

<sup>2</sup> See <https://web.archive.org/web/20180116041427/http://citgo.com/Home.jsp> (snapshot of Jan. 16, 2018). The Inaugural Committee’s disclosure report includes CITGO’s Houston, Texas address with respect to the donation at issue. See Inaugural Committee Amended 2017 90 Day Post-Inaugural Report (June 28, 2017) at 21.

United States.<sup>3</sup> As described in its Response, CITGO is wholly owned by CITGO Holding, Inc. (“CITGO Holding”), a Delaware corporation, which is, in turn, “an indirect, wholly owned subsidiary of a foreign corporation,” Petroléos de Venezuela, S.A. (“PDVSA”).<sup>4</sup>

On December 22, 2016, CITGO donated \$500,000 to the 58th Presidential Inaugural Committee (“Inaugural Committee”).<sup>5</sup> According to CITGO, it “donated its own funds, derived entirely from its domestic operations.”<sup>6</sup> The available information indicates that CITGO had ample funds from its domestic operations to make the \$500,000 donation to the Inaugural Committee, as supported by the Declaration of CITGO Assistant Treasurer Gina Renee Coon. According to that declaration, the account CITGO used to make the donation contains only funds from CITGO’s operations, receives no subsidies from PDVSA, and at all times had a balance well in excess of that needed to complete the donation.<sup>7</sup>

The Complaint in this matter does not contradict these facts. Instead, it alleges that foreign nationals selected by PDVSA sit on CITGO’s board of directors and were involved in the decision to make the donation.<sup>8</sup> If true, the Complaint avers, this violates the Commission’s regulation at 11 C.F.R. § 110.20(j) that “[a] foreign national shall not, directly or indirectly, make a donation to an inaugural committee” because foreign nationals participated in CITGO’s decision-making process for the donation.<sup>9</sup> As explained below, we reject that theory.

## II. Legal Analysis

In interpreting one of our regulations, we begin, as we should, with the text of the rule. The Commission’s regulations against foreign nationals making election- and inaugural-related contributions and expenditures are contained at 11 C.F.R. § 110.20. We assume, but do not affirm, that the regulations contained in 11 C.F.R. § 110.20 are legitimate outgrowths of the underlying statutes—something the Respondents do not challenge. At the same time, we recognize that many of our regulations are vulnerable to such challenges.

The provision relating to inaugural-committee donations at § 110.20(j) states in relevant part that “[a] foreign national shall not, directly or indirectly, make a donation to an inaugural committee.” The regulation thus has three straightforward elements: (1) a foreign national, (2) “directly or indirectly, mak[ing] a donation,” (3) to an inaugural committee.

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<sup>3</sup> CITGO Resp. at 1 (June 20, 2017).

<sup>4</sup> CITGO Resp. at 1.

<sup>5</sup> CITGO Resp., Gina Renee Coon Decl. ¶ 3; Inaugural Committee Resp. at 2. (June 30, 2017).

<sup>6</sup> CITGO Resp. at 2–3.

<sup>7</sup> CITGO Resp. at 2; Coon Decl. ¶ 5.

<sup>8</sup> Compl. at 9–10 (April 26, 2017).

<sup>9</sup> 11 C.F.R. § 110.20(j).

Put simply, the regulation was not violated here because CITGO made the donation to the Inaugural Committee,<sup>10</sup> and CITGO is not a foreign national. As noted above, CITGO is incorporated in Delaware and maintains its headquarters in Texas. It is therefore a U.S. corporation.<sup>11</sup> And because we recognize the separate corporate personhood<sup>12</sup> of CITGO from its shareholders, directors, and officers, this conclusion is unaffected by CITGO's foreign parent company or foreign directors.<sup>13</sup> Indeed, no one in this matter has suggested the Commission disregard those corporate distinctions.

Further, CITGO is the person who made the donation within the meaning of the regulation. "To make a donation" is an idiomatic way of phrasing the verb "to donate."<sup>14</sup> We can readily understand what is included in the meaning of that word with reference to dictionaries. For example, *Black's Law Dictionary* defines "donate" to mean "[t]o give (property or money) without receiving consideration for the transfer."<sup>15</sup> Other reliable dictionaries indicate much the same, defining "donate" as an act of giving or transferring, often to charity.<sup>16</sup> In other words, to an ordinary speaker of English, "to donate" refers to the discrete act of transferring something of value to another without receiving anything in exchange, generally for the purpose of assisting the donee. In this sense, "to donate" is altogether distinct from planning, advising, negotiating, or deciding to make a donation, in the same way that one might say that planning or deciding to purchase a piece of property or to enter a marriage is different from actually completing those acts. This establishes a critical limitation on the scope of the regulation.

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<sup>10</sup> It is uncontroverted that the 58th Presidential Inaugural Committee is, obviously, an inaugural committee. Inaugural Committee Resp. at 2. As a result, the third element of a violation under the regulation is met and warrants no discussion.

<sup>11</sup> See 28 U.S.C. § 1332(c)(1) ("[A] corporation shall be deemed to be a citizen of every State ... by which it has been incorporated and of the State ... where it has its principal place of business."); see also *Hertz Corp. v. Friend*, 559 U.S. 77, 92–93 (2010) (defining principal place of business as "the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, *i.e.*, the 'nerve center,' and not simply an office where the corporation holds its board meetings").

<sup>12</sup> See 1 U.S.C. § 1 (defining "person" to include corporations).

<sup>13</sup> As the Supreme Court has recognized, it is "[a] basic tenet of American corporate law ... that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). See also *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (corporate separateness is a "principle of corporate law deeply ingrained in our economic and legal systems"); *Topp v. CompAir Inc.*, 814 F.2d 830 (1st Cir.1987), (applying the "general rule" that a "subsidiary corporation which is incorporated as a separate entity from its parent corporation is considered to have its own principal place of business").

<sup>14</sup> Make a Donation, *Merriam-Webster*, available at <https://www.merriam-webster.com/dictionary/make%20a%20donation> (visited March 1, 2021).

<sup>15</sup> *Black's Law Dictionary* at 595 (10th ed. 2014).

<sup>16</sup> *E.g.*, Donate, *Cambridge Dictionary*, available at <https://dictionary.cambridge.org/dictionary/english/donate> (visited March 1, 2021) ("to give money or goods to help a person or organization"); Donate, *Merriam Webster's Collegiate Dictionary* at 214 (11th ed. 2004) (defining "donate," in relevant part, as "to make a gift of: contribute").

With that understanding, the facts show that, by any reasonable assessment, CITGO made the donation. The wire transfer to the Inaugural Committee came from CITGO, from an account the corporation controlled, with funds held in its name and generated from its own operations.<sup>17</sup> The donor information provided to the Inaugural Committee stated that it came from CITGO.<sup>18</sup> Finally, there is no allegation or evidence that PDVSA used CITGO as a conduit to donate its own funds, or reimbursed or subsidized the funds CITGO used. As a result, the donation complied with the rule.

The Complaint does not directly dispute any of this. Nevertheless, it maintains that foreign nationals on CITGO's board of directors may have participated in the decision-making process for or directed the donation, and this means that foreign nationals "made" the donation indirectly, in violation of the regulation.<sup>19</sup> The Office of General Counsel adopted the same theory in recommending the Commission find reason to believe CITGO and PDVSA violated the regulation.<sup>20</sup>

But that interpretation defies the plain meaning of the regulation's text, and it is inconsistent with how the Commission has generally interpreted the prohibition on "directly or indirectly" making a contribution, expenditure, or donation. In other matters, the Commission has reasoned that this "directly or indirectly" language demands that no foreign national provide, subsidize, or reimburse the funds that make up the contribution, expenditure, or donation.<sup>21</sup> For a domestic subsidiary of a foreign parent company, we have required that the funds used to make the contribution, expenditure, or donation be generated solely by domestic operations and not originate from or be reimbursed by the foreign parent company, as is true here. In such cases, we have reasoned that the foreign parent company is not making or funding the transfer.<sup>22</sup>

Moreover, the Complaint's theory—that participating in the decision-making process of a donation constitutes indirectly "making" the donation—is inconsistent with the regulation's text and surrounding structure. Looking at other subsections within 11 C.F.R. § 110.20, one sees that many of the subsections follow a parallel structure to § 110.20(j): "A foreign national shall not, directly or indirectly, make [a certain transaction.]" The covered transactions outside of § 110.20(j)

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<sup>17</sup> CITGO Resp., Coon Decl. ¶¶ 3–5.

<sup>18</sup> Inaugural Committee Resp. at 2, Exs. D, E.

<sup>19</sup> Compl. at 9–10.

<sup>20</sup> First General Counsel's Report at 6–9, MUR 7243 (CITGO Petroleum Corp.).

<sup>21</sup> *See, e.g.*, Factual & Legal Analysis at 6, MUR 6946 (Clinton) (finding no reason to believe Respondent violated 11 C.F.R. § 110.20(b),(c) by bringing a foreign national as a guest to an event where a U.S. citizen made the contribution with his own funds, without reimbursement, and not on behalf of a foreign national).

<sup>22</sup> *See* Advisory Opinion 1992-16 (Nansay Hawaii) at 3–4 (advising that the domestic subsidiary of a foreign parent could use net earnings generated by the subsidiary in the United States and from segregated accounts that were not subsidized by the foreign corporate parent to make political donations, provided the subsidiary could demonstrate through a reasonable accounting method that it had sufficient funds in its accounts, other than funds given or loaned by its foreign parent corporation, from which the donations were made); Advisory Opinion 2006-15 (TransCanada) at 4–5 (similar).

are election related: for example, foreign nationals shall not, directly or indirectly, make a contribution or donation in connection with an election,<sup>23</sup> make a contribution or donation to a political committee or party,<sup>24</sup> make a disbursement for an electioneering communication,<sup>25</sup> or make an independent expenditure.<sup>26</sup>

But, importantly, the regulation also contains a separate prohibition on foreign nationals participating in the decision-making process for those election-related transactions. Section 110.20(i) states that:

A foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision-making process of any person, such as a corporation, labor organization, political committee, or political organization with regard to such person’s Federal or non-Federal election-related activities, such as decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with elections for any Federal, State, or local office or decisions concerning the administration of a political committee.<sup>27</sup>

If the Complaint’s theory is correct that a prohibition against making a certain transaction “directly or indirectly” includes decision-making participation, then this language in § 110.20(i) would be redundant—generally a sign that an interpretation is wrong.

As a matter of proper interpretive theory, we should avoid adopting legal interpretations that would render parts of our regulations superfluous. If the Commission writes different regulations using different words, it is because those regulations are intended to cover different kinds of conduct, and they should be read that way.<sup>28</sup> That we have a prohibition on foreign nationals participating in the decision-making process for election-related transactions in § 110.20(i)—separate and apart from the prohibitions on making those transactions in subsections (b)–(f)—but no similar decision-making prohibition for inaugural-committee donations implies

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<sup>23</sup> 11 C.F.R. § 110.20(b).

<sup>24</sup> 11 C.F.R. § 110.20(c).

<sup>25</sup> 11 C.F.R. § 110.20(e).

<sup>26</sup> 11 C.F.R. § 110.20(f).

<sup>27</sup> 11 C.F.R. § 110.20(i).

<sup>28</sup> See, e.g., *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (plurality) (declining to read statute to “significantly overlap” with a distinct statute, resisting a reading that would “render superfluous an entire provision passed in proximity as part of the same Act”). See also *Bailey v. United States*, 516 U.S. 137, 146 (1995) (“We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.”); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (“Appellants’ argument . . . would make either the first or the second condition redundant or largely superfluous, in violation of the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.”).

that such participation is *not* prohibited under § 110.20(j).<sup>29</sup> That is the best reading of the regulation.

### III. Conclusion

No violation occurred here. Regardless of whether our colleagues think that CITGO's conduct *should* violate the law, we have an obligation to apply the law as it is, not as some might want it to be. If our fellow Commissioners are displeased with the result, their recourse is to propose revisions to the regulation, not to enforce a provision that isn't there.

A fundamental value of due process is fair notice. If the regulated community cannot look to our regulations for clear guidance as to what it may and may not do, then this agency is failing in its mission and undermining the rule of law. When our regulations are unclear or incomplete, it is incumbent upon us to clarify them, whether through new regulations, interpretive guidance, advisory opinions, or otherwise. Yet too often, this agency seeks to engage in interpretation-by-enforcement, using pending actions against individuals as the means for changing or evolving our regulatory rules *sub silentio*. That tactic is unfit for any government agency, but is especially inappropriate for the Federal Election Commission given our "unique" role as a regulator "of core constitutionally protected activity."<sup>30</sup>

Allen Dickerson  
Vice Chair

April 1, 2021

Date

Sean J. Cooksey  
Commissioner

March 31, 2021

Date

James E. "Trey" Trainor III  
Commissioner

April 1, 2021

Date

<sup>29</sup> Section 110.20(i) does not cover inaugural-committee donations because, as the Commission has expressly recognized, inaugural committees (which are typically organized as tax-exempt organizations under § 501(c) of the Internal Revenue Code) do not engage in "election-related activities." *See* Advisory Op. 1980-144 (Presidential Inaugural Committee) at 2 ("Funds received and expended by the [Presidential Inaugural] Committee are used to finance inaugural activities rather than any Federal election.").

<sup>30</sup> *Am. Fed'n of Labor-Congress of Indus. Orgs. v. Fed. Election Comm'n*, 333 F.3d 168, 170 (D.C. Cir. 2003).