



**FEDERAL ELECTION COMMISSION**  
Washington, DC 20463

**VIA ELECTRONIC MAIL**

January 14, 2022

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RE: MUR 7886  
Astellas Pharma U.S., Inc.

Dear Mr. Lenhard, Mr. Parks, and Ms. Pence:

On March 24, 2021, the Commission notified your client, Astellas Pharma U.S., Inc. (“Astellas”), of a complaint alleging that it violated the Federal Election Campaign Act of 1971, as amended (the “Act”), and provided your client with a copy of the complaint.

After reviewing the allegations contained in the complaint and your client’s response, the Commission, on January 7, 2022, found reason to believe that Astellas violated 52 U.S.C. § 30119(a) and 11 C.F.R. § 115.2(a) by making prohibited federal contractor contributions. The Factual and Legal Analysis, which formed a basis for the Commission’s finding, is enclosed for your information.

In order to expedite the resolution of this matter, the Commission has authorized the Office of the General Counsel to enter into negotiations directed towards reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe. Pre-probable cause conciliation is not mandated by the Act or the Commission’s regulations but is a voluntary step in the enforcement process that the Commission is offering to your client as a way to resolve this matter at an early stage and without the need for briefing the issue of whether or not the Commission should find probable cause to believe that your client violated the law.

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Please note that your client has a legal obligation to preserve all documents, records, and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. *See* 18 U.S.C. § 1519.

If your client is interested in engaging in pre-probable cause conciliation, please contact Laura Conley, the attorney assigned to this matter, at (202) 694-1475 or [lconley@fec.gov](mailto:lconley@fec.gov), within seven days of receipt of this letter. During conciliation, your client may submit any factual or legal materials that it believes are relevant to the resolution of this matter. No action by the Commission or any person and no information derived in connection with any conciliation attempt by the Commission may be made public by the Commission without the written consent of the respondent and the Commission. 52 U.S.C. § 30109(a)(4)(B). The Commission may proceed to the next step in the enforcement process if a mutually acceptable conciliation agreement cannot be reached within 60 days. *See* 52 U.S.C. § 30109(a); 11 C.F.R. Part 111 (Subpart A). Conversely, if your client is not interested in pre-probable cause conciliation, the Commission may conduct formal discovery in this matter or proceed to the next step in the enforcement process. Please note that once the Commission enters the next step in the enforcement process, it may decline to engage in further settlement discussions until after making a probable cause finding.

Pre-probable cause conciliation, extensions of time, and other enforcement procedures and options are discussed more comprehensively in the Commission's Guidebook for Complainants and Respondents on the FEC Enforcement Process, which is available on the Commission's website at [https://www.fec.gov/resources/cms-content/documents/respondent\\_guide.pdf](https://www.fec.gov/resources/cms-content/documents/respondent_guide.pdf).

Please be advised that, although the Commission cannot disclose information regarding an investigation to the public, it may share information on a confidential basis with other law enforcement agencies.<sup>1</sup>

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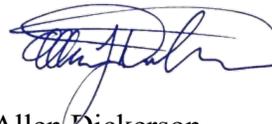
<sup>1</sup> The Commission has the statutory authority to refer knowing and willful violations of the Act to the Department of Justice for potential criminal prosecution, 52 U.S.C. § 30109(a)(5)(C), and to report information regarding violations of law not within its jurisdiction to appropriate law enforcement authorities. *Id.* § 30107(a)(9).

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This matter will remain confidential in accordance with 52 U.S.C. § 30109(a)(4)(B) and 30109(a)(12)(A) unless you notify the Commission in writing that your client wishes the matter to be made public. For your information, we have enclosed a brief description of the Commission's procedures for handling possible violations of the Act.

We look forward to your response.

On behalf of the Commission,

A handwritten signature in blue ink, appearing to read "Allen Dickerson", written over a horizontal line.

Allen Dickerson  
Chairman

Enclosures  
Factual and Legal Analysis

1 **FEDERAL ELECTION COMMISSION**  
2 **FACTUAL AND LEGAL ANALYSIS**

3  
4 Respondent: Astellas Pharma U.S., Inc.

MUR 7886

5  
6 **I. INTRODUCTION**

7 This matter was generated by a Complaint filed with the Federal Election Commission by  
8 the Campaign Legal Center, alleging that Astellas Pharma U.S., Inc. (“Astellas”), a  
9 biopharmaceutical company, made a prohibited \$50,000 contribution to Senate Leadership Fund  
10 and Caleb Crosby in his official capacity as treasurer (“SLF”) while Astellas was a federal  
11 government contractor in November 2020. The Federal Election Campaign Act of 1971, as  
12 amended (the “Act”) prohibits federal contractors from making such contributions.

13 Astellas acknowledges holding multiple federal contracts at the time it made the  
14 contribution but argues that the Commission should exercise its prosecutorial discretion to  
15 dismiss the Complaint for several reasons, including that Astellas made the contribution in  
16 reliance on erroneous advice of counsel and its compliance vendor; the type of contract held by  
17 Astellas purportedly was insulated from influence or corruption from elected officials; Astellas  
18 had internal controls to prevent this type of violation and has taken measures to deter future  
19 violations; and SLF refunded the contribution. In addition, Astellas argues that the federal  
20 contractor prohibition is unconstitutional as applied to contributions to independent expenditure-  
21 only political committees (“IEOPCs”).

22 As explained below, Astellas’s arguments for dismissal are either unconvincing or are  
23 more appropriately viewed as arguments for mitigation. Further, Astellas appears to have also  
24 made two earlier prohibited federal contractor contributions, totaling \$10,000, in 2019 and 2020.  
25 Accordingly, the Commission finds reason to believe that Astellas violated 52 U.S.C. § 30119(a)  
26 and 11 C.F.R. § 115.2(a) by making prohibited contributions.

## 1 II. FACTUAL BACKGROUND

2 Astellas is a biopharmaceutical company that sells products for use in cardiology,  
3 oncology, infectious diseases, and other areas.<sup>1</sup> Between October 15, 2013, and September 29,  
4 2021, Astellas held a Federal Supply Schedule (“FSS”) contract administered by the U.S.  
5 Department of Veterans Affairs (the “VA”)<sup>2</sup> and two related Blank Purchase Agreement  
6 (“BPA”) contracts to sell to certain VA pharmacies and the military health care program,  
7 TRICARE.”<sup>3</sup> FSS contracts are “indefinite delivery/indefinite quantity type contracts,” meaning  
8 that sales are not guaranteed; instead, once an FSS contract is awarded, a vendor is added to a list  
9 of approved suppliers from which multiple agencies may choose to make purchases.<sup>4</sup> The VA  
10 recommends that prospective contractors “conduct market research to identify and assess your  
11 competition prior to submitting a proposal,” as contract holders must market their products to  
12 federal purchasers once an FSS is awarded, and the competition is “fierce.”<sup>5</sup> In this instance,  
13 federal spending data shows that the Department of Justice and the VA placed more than \$3  
14 million in orders pursuant to Astellas’s FSS contract.<sup>6</sup>

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<sup>1</sup> Astellas US, *U.S. Products*, <https://www.astellas.com/us/about/product> (last visited Oct. 29, 2021).

<sup>2</sup> USASpending.gov, *Award Profile – Indefinite Delivery Vehicle*, [https://www.usaspending.gov/award/CONT\\_IDV\\_V797D30296\\_3600](https://www.usaspending.gov/award/CONT_IDV_V797D30296_3600) (last visited Oct. 29, 2021).

<sup>3</sup> Astellas Resp. at 4 n.8 (June 7, 2021). BPA contracts, as described by Astellas, provide “even lower pricing under the FSS to specific government entities.” *Id.* at 4. USASpending.gov describes BPAs as “a method federal agencies use to make repeat purchases of supplies or services by setting up a ‘charge account’ with trusted vendors.” USASpending.gov, *Contracts 101*, <https://usaspending-help.zendesk.com/hc/en-us/articles/1500001853502-Contracts-101> (last visited Oct. 29, 2021).

<sup>4</sup> See Compl. ¶ 6 n.6 (Mar. 17, 2021) (citing U.S. Dep’t of Veterans Affairs, *VA Federal Supply Schedule Service*, <https://www.fss.va.gov/>); Astellas Resp. at 4-5.

<sup>5</sup> Dep’t of Veterans Affairs, *Prospective Contractors*, <https://www.va.gov/opal/nac/fss/prospective.asp> (last visited Oct. 29, 2021); Dep’t of Veterans Affairs, *Marketing to the Federal Government*, <https://www.va.gov/opal/nac/fss/marketing.asp> (last visited Oct. 29, 2021).

<sup>6</sup> USASpending.gov, *Award Profile – Indefinite Delivery Vehicle*, [https://www.usaspending.gov/award/CONT\\_IDV\\_V797D30296\\_3600](https://www.usaspending.gov/award/CONT_IDV_V797D30296_3600) (last visited Oct. 29, 2021) (showing approximately \$3 million in purchases under “Child Award Orders” tab).

1           In November 2020, while Astellas held the FSS contract, three of its employees—John  
2 Spinello, the Senior Director for State Government Affairs; James Rollins, the Senior Director  
3 for Federal Affairs; and Joseph Devaney, the Vice President for Policy and Government  
4 Affairs—were involved in the decision to make a \$50,000 corporate contribution from Astellas  
5 to SLF.<sup>7</sup> Each submitted a sworn declaration, attached to Astellas’s Response, outlining the  
6 circumstances of the contribution.<sup>8</sup> According to the declarations, Devaney asked Spinello and  
7 Rollins to consult the company’s outside campaign finance counsel, Thomas Spulak of King &  
8 Spalding, LLP, “to determine whether Astellas could make the requested contribution.”<sup>9</sup>

9           Spinello emailed Spulak on November 17, 2020, and informed him that Astellas planned  
10 to make a \$50,000 “corporate contribution . . . to an independent expenditure committee, the  
11 Senate Leadership Fund.”<sup>10</sup> Spinello asked Spulak “if we need to do anything . . . with this  
12 contribution to comply with applicable law.”<sup>11</sup> Spulak responded that “[t]here is nothing that  
13 you need to do. Contributions to IE committees are not reported . . . by the donor.”<sup>12</sup> Spulak  
14 informed Spinello, however, that the committee would report the contribution to the Commission  
15 and that information about it would appear on a publicly available report.<sup>13</sup>

16           Spinello also notified Astellas’s campaign finance compliance and reporting vendor,  
17 Public Affairs Support Services, Inc. (“PASS”), of the upcoming contribution.<sup>14</sup> In his

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<sup>7</sup> Devaney Decl. ¶ 5 (May 25, 2021); Spinello Decl. ¶ 5 (May 25, 2021); Rollins Decl. ¶ 5 (May 26, 2021).

<sup>8</sup> Devaney Decl.; Spinello Decl.; Rollins Decl.

<sup>9</sup> Devaney Decl. ¶ 6; *see* Spinello Decl. ¶ 6.

<sup>10</sup> Spinello Decl., Ex. A at 1 (emails between Spinello and Spulak).

<sup>11</sup> *Id.* (“For example, wondering whether this contribution is required to be reported on a future LD-2 or other filing.”).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* ¶ 9; PASS, *About Us*, <https://pactrack.net/about-us/> (last visited Oct. 29, 2021).

1 declaration, Spinello describes PASS as the “final backstop” against campaign finance violations  
2 and states that he expected “if there were legal problems with a proposed contribution, PASS  
3 would flag those concerns.”<sup>15</sup> On November 17, 2020, Spinello emailed two PASS employees  
4 that “we are planning to make a \$50,000 contribution on Monday to the Senate Leadership Fund  
5 (McConnel) [sic]. This will come from our corporate account.”<sup>16</sup> He also stated that, “[s]ince  
6 this contribution is a bit larger than usual, I just wanted to give you a quick heads up. Let me  
7 know if you have any questions.”<sup>17</sup> A PASS Compliance Manager, Mindy Anderson, responded  
8 that “[t]he Senate Leadership Fund is a Super PAC (Independent Expenditure committee), it is  
9 not McConnell’s leadership PAC. That’s why you can make corporate contributions.”<sup>18</sup>  
10 Spinello replied: “Right, thanks for the clarity.”<sup>19</sup>

11 On November 23, 2020, Astellas made the \$50,000 contribution to SLF.<sup>20</sup> Devaney,  
12 Spinello, and Rollins attest that, based on the advice Astellas received, they believed at the time  
13 that the contribution to SLF was lawful.<sup>21</sup> On April 15, 2021, approximately three weeks after  
14 the Commission notified Astellas of the Complaint in this matter, SLF refunded the contribution  
15 to Astellas.<sup>22</sup> There is no available information on who initiated the refund.

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<sup>15</sup> Spinello Decl. ¶ 9.

<sup>16</sup> *Id.*, Ex. B at 1.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*; PASS, *Our Team*, <https://pactrack.net/about-us/our-team/> (last visited Oct. 29, 2021).

<sup>19</sup> Spinello Decl., Ex. B at 1.

<sup>20</sup> Astellas Resp. at 2. SLF reported receiving the contribution on November 30, 2020. Senate Leadership Fund, Amend. 2020 Year-End Report at 43 (Mar. 18, 2021), <https://docquery.fec.gov/pdf/807/202103189441299807/202103189441299807.pdf#navpanes=0>.

<sup>21</sup> Devaney Decl. ¶ 7; Spinello Decl. ¶¶ 8, 10; Rollins Decl. ¶ 8.

<sup>22</sup> Senate Leadership Fund, 2021 Mid-Year Report at 105 (July 31, 2021), <https://docquery.fec.gov/pdf/420/202107319465466420/202107319465466420.pdf> (reporting a refund disbursed on April 15, 2021); Astellas Compl. Notif. Letter at 1 (Mar. 24, 2021).

1           A review of FEC disclosure reports listing Astellas as the contributor also shows a pair of  
2 \$5,000 contributions to Black Bear PAC, Inc., another IEOPC, on August 23, 2019, and June 16,  
3 2020, that also fall within the time period that Astellas held the FSS contract.<sup>23</sup> No additional  
4 information is available about the circumstances of these contributions.

5           The Complaint contends that Astellas was a federal contractor in November 2020 and  
6 therefore made a prohibited contribution to SLF.<sup>24</sup> Astellas acknowledges holding the FSS and  
7 related BPA contracts and making the contribution, but it argues that the Commission should  
8 nonetheless exercise its prosecutorial discretion to dismiss this matter on five grounds.<sup>25</sup> First,  
9 Astellas contends that FSS contracts are not susceptible to influence or corruption and an  
10 enforcement action would therefore not further the “policy concerns that underlie the statute.”<sup>26</sup>  
11 Astellas argues that it is required to hold an FSS to participate in government reimbursement  
12 programs, such as Medicare, that the contracts are readily available, and are awarded in  
13 “administrative procedures not subject to discretion by elected officials.”<sup>27</sup> Further, Astellas  
14 argues that FSS contracts are insulated from influence because they do not guarantee sales and  
15 impose statutory caps on drug prices.<sup>28</sup> Astellas does not address its efforts to market its  
16 products for sale after the FSS contract was awarded.

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<sup>23</sup> Black Bear PAC, Inc., 2019 Year-End Report at 6 (Jan. 31, 2020), <https://docquery.fec.gov/pdf/740/202001319184780740/202001319184780740.pdf#navpanes=0>; Black Bear PAC, 2020 July Quarterly Report at 6 (July 14, 2020), <https://docquery.fec.gov/pdf/716/202007149244529716/202007149244529716.pdf#navpanes=0>.

<sup>24</sup> Compl. ¶¶ 19-20.

<sup>25</sup> Astellas Resp. at 1-2, 4.

<sup>26</sup> *See id.* at 3-5.

<sup>27</sup> *Id.* at 4.

<sup>28</sup> *Id.* at 4-5.

1           Second, Astellas argues that dismissal is appropriate because it relied on advice from  
2 counsel and its compliance vendor, both of whom it trusted to raise any legal concerns.<sup>29</sup> Third,  
3 Astellas contends that it had internal controls to prevent campaign finance violations, such as  
4 training on federal campaign finance rules, and a written policy stating that “Astellas is  
5 prohibited by U.S. federal law from making Federal Political Contributions.”<sup>30</sup> Fourth, Astellas  
6 argues that it has “taken meaningful steps to enhance its internal controls,” including conducting  
7 an internal investigation, revising policies and procedures, developing a training on the federal  
8 contractor ban, and increasing oversight of contributions.<sup>31</sup> Fifth, Astellas argues that dismissal  
9 is appropriate because the contribution was refunded after the Commission notified it of the  
10 Complaint.<sup>32</sup> Astellas alternatively contends that the federal contractor ban is unconstitutional as  
11 applied to IEOPCs, like SLF, and that therefore the Commission should find no reason to believe  
12 that Astellas violated the Act.<sup>33</sup>

### 13   **III.   LEGAL ANALYSIS**

14           The Act and the Commission’s regulations prohibit contributions to political committees  
15 by any person who enters into a contract with the United States or its departments or agencies for  
16 “furnishing any material, supplies, or equipment,” if payment on such contract “is to be made in  
17 whole or in part from funds appropriated by Congress.”<sup>34</sup> Such contributions are barred for the  
18 period between (1) the earlier of commencement of negotiations or when requests for proposal

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<sup>29</sup>     *Id.* at 5-6.

<sup>30</sup>     *Id.* at 6. Astellas’s policy defines Federal Political Contribution as “a payment, service, or anything of value given to influence a federal election.” *Id.*

<sup>31</sup>     *Id.* at 7.

<sup>32</sup>     *Id.* at 6-7.

<sup>33</sup>     *Id.* at 7-9.

<sup>34</sup>     52 U.S.C. § 30119(a)(1); 11 C.F.R. § 115.2(a).

1 are sent out, and (2) the later of the completion of performance on or termination of negotiations  
2 for the contract.<sup>35</sup> The prohibition covers contributions to any political party, political  
3 committee, federal candidate, or “any person for any political purpose or use.”<sup>36</sup>

4 Astellas acknowledges that it was a federal contractor at the time it made the \$50,000  
5 contribution to SLF, and federal spending data confirms its contractor status at that time, as well  
6 as when it made the additional \$10,000 in contributions to Black Bear PAC. Specifically, at the  
7 relevant times Astellas held an FSS contract awarded by the VA for pharmaceutical products.<sup>37</sup>  
8 Astellas contends that the Commission should either exercise its prosecutorial discretion and  
9 dismiss this matter or find no reason to believe, but its arguments are not compelling.

10 Astellas argues that the Commission should dismiss because FSS contracts are insulated  
11 from influence or corruption from elected officials, and therefore do not implicate the “policy  
12 concerns that underlie the statute.”<sup>38</sup> As an initial matter, the Commission’s implementing  
13 regulation defines “contract” to include written contracts “between any person and the United  
14 States or any of its departments or agencies, for the furnishing of personal property.”<sup>39</sup> That  
15 accurately describes Astellas’s FSS contract. Further, the Commission has stated that, for  
16 purposes of the federal contractor prohibition, “there is no distinction between a negotiated  
17 contract and a competitively bid contract. This conclusion follows from the language of  
18 [52 U.S.C. § 30119] which refers to ‘any contract.’”<sup>40</sup> Indeed, the Commission’s Explanation

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<sup>35</sup> 11 C.F.R. § 115.1(b).

<sup>36</sup> *Id.* § 115.2(a).

<sup>37</sup> Astellas Resp. at 4; USASpending.gov, *Award Profile – Indefinite Delivery Vehicle*, [https://www.usaspending.gov/award/CONT\\_IDV\\_V797D30296\\_3600](https://www.usaspending.gov/award/CONT_IDV_V797D30296_3600) (last visited Oct. 29, 2021).

<sup>38</sup> *See* Astellas Resp. at 3.

<sup>39</sup> 11 C.F.R. § 115.1(c)(2).

<sup>40</sup> Advisory Op. 1975-110 (Treen) at 2.

1 and Justification for the federal contractor prohibition states that it “covers all contracts entered  
2 into with the Federal government.”<sup>41</sup>

3           Additionally, notwithstanding whether the initial award of Astellas’s FSS contract was  
4 largely an administrative procedure, the federal contractor prohibition also covers the period  
5 during which a contract is performed.<sup>42</sup> According to the VA, FSS contract holders must market  
6 their products to potential government purchasers and competition is apparently “fierce,”  
7 suggesting that there is a period in which political influence could be beneficial. Additionally, it  
8 is not clear that lack of competition at the award stage is a relevant consideration under the  
9 federal contractor ban. For example, the Commission’s regulations expressly state that the ban  
10 covers “sole source” procurements, which are awarded by soliciting a proposal from a single  
11 provider without competition.<sup>43</sup> In any event, as discussed above, neither the Act nor the  
12 Commission’s regulations provide for exceptions to the ban based on the type of federal contract  
13 at issue.

14           The Commission has exercised prosecutorial discretion to dismiss allegations under the  
15 federal contractor ban in certain unique circumstances, but those conditions are not all met here.  
16 In MUR 6403 (*Alaskans Standing Together, et al.*), the Commission exercised its prosecutorial  
17 discretion when the relevant contractors did not ordinarily contract with the government, such  
18 that their officers responsible for the contributions were not aware of the contracts; the  
19 companies did not seek the contracts but were approached by the federal government because it

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<sup>41</sup> Explanation and Justification for Part 115, H.R. Doc. No. 95-44 at 120 (1977), <https://www.fec.gov/resources/cms-content/documents/95-44.pdf>.

<sup>42</sup> 11 C.F.R. § 115.1(b)(1).

<sup>43</sup> *Id.* § 115.1(c)(1); see U.S. Dep’t of Justice, *Fact Sheet – Sole Source Justification* at 1 (May 2017), <https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/Sole-Source-FactSheet-C.pdf> (describing sole source procurement).

1 had no other options in the geographic area; the contracts primarily benefitted the public—for  
2 example, one agreement was for hosting a Federal Aviation Administration beacon; and the  
3 amounts paid for the contracts were relatively small considering the contractors’ other income  
4 and assets.<sup>44</sup> Astellas contends that it does not usually contract with the government, and that the  
5 contribution to SLF constituted .01% of its receipts during the 2020 election cycle.<sup>45</sup> But it does  
6 not assert that its officers were unaware of the FSS, or that the government approached Astellas  
7 about entering the agreement.<sup>46</sup> Rather, Astellas indicates that it entered the FSS because it  
8 needed to do so to also participate in government reimbursement programs, such as Medicare  
9 and Medicaid, suggesting that its motivation was commercial.<sup>47</sup>

10 Astellas’s contention that it made the SLF contribution in reliance on erroneous advice is  
11 also unpersuasive. In prior matters, the Commission has not taken reliance on advice of counsel  
12 to justify a dismissal, but rather considered it as a mitigating factor during conciliation. Here, it  
13 appears that Astellas did not expressly raise the issue of its federal contractor status with either  
14 counsel or the compliance vendor.<sup>48</sup> Instead, Astellas asked counsel generally whether there was  
15 anything it needed to do “to comply with applicable law” and asked the compliance vendor only  
16 to let them know “if you have any questions.”<sup>49</sup> It is unclear whether counsel or the vendor

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<sup>44</sup> Factual & Legal Analysis (“F&LA”) at 4, 10, MUR 6403 (Ahtna, Inc. and NANA Regional Corp., Inc.); F&LA at 8, MUR 6403 (Arctic Slope Regional Corp.). *But see* F&LA at 4, MUR 7099 (Suffolk Construction Co., Inc.) (concluding that respondent’s argument that its federal contract work represented a “small fraction” of its business did not negate the company’s status as a federal contractor, and noting that “[w]hile Suffolk may consider its federal contract work a “*de minimis*” portion of its overall work, its \$200,000 in contributions to the Committee are not *de minimis*.”).

<sup>45</sup> Astellas Resp. at 2, 4.

<sup>46</sup> *See id.* at 1-10.

<sup>47</sup> *See id.* at 4.

<sup>48</sup> Spinello Decl., Exs. A-B.

<sup>49</sup> *Id.*

1 knew that Astellas held federal government contracts at the time. But, again, even if Astellas  
2 had made a specific request for advice regarding the legality of a federal contractor contribution  
3 to an IEOPC, this still would not relieve it of liability.

4 Astellas also argues that dismissal is appropriate because it received a full refund shortly  
5 after being notified of the Complaint, and it points to several matters in which the Commission  
6 exercised prosecutorial discretion after a refund was made.<sup>50</sup> However, in those matters, the  
7 Commission’s dismissal was animated in part by the relatively modest amounts at issue (\$1,000  
8 in one case and approximately \$1,700 in the other).<sup>51</sup> Here, the amount in violation is  
9 significantly higher (\$50,000). Contrary to Astellas’s argument that the refund should counsel in  
10 favor of dismissal, in prior federal contractor matters involving a refunded contribution to an  
11 IEOPC, the Commission has consistently found reason to believe but also considered the refund  
12 as a mitigating factor in calculating the penalty.<sup>52</sup>

13 In addition, Astellas argues for dismissal by pointing to its “internal controls” at the time  
14 of the contribution and efforts it has subsequently taken to enhance them in response to this  
15 matter.<sup>53</sup> Again, Astellas relies on matters in which the amount in violation was small.<sup>54</sup> In any  
16 event, there are questions about the effectiveness of the controls. As noted above, the Act  
17 prohibits all contributions by a federal contractor, and Astellas had held the FSS contract, and

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<sup>50</sup> Astellas Resp. at 6-7 (citing MUR 7394 (O’Donnell for Congress, *et al.*) and MUR 7338 (Rick for Congress, *et al.*)).

<sup>51</sup> F&LA at 3-4, MUR 7394 (O’Donnell for Congress, *et al.*) (dismissal citing the modest amount in violation and “remedial actions taken”); F&LA at 3, MUR 7338 (Rick for Congress, *et al.*) (same).

<sup>52</sup> The Commission has found reason to believe in a federal contractor matter even when the contractor represented that it proactively sought the refund. F&LA at 1, MUR 7451 (Ring Power Corp.). It is unclear from the available information whether Astellas or SLF initiated the refund in this matter.

<sup>53</sup> Astellas Resp. at 6-7.

<sup>54</sup> *Id.* at 3 (citing to MURs 7394 and 7338, further described in note 51 and accompanying text).

1 therefore has been subject to the prohibition, since 2013. Astellas’s internal policies clearly  
2 barred it from conveying “a payment, service, or anything of value given to influence a federal  
3 election.”<sup>55</sup> Even a cursory review of Astellas’s obligations would therefore have revealed that it  
4 was barred from making the contribution to SLF. Indeed, Astellas acknowledges that its written  
5 policy forbade such contributions and that the violation was the result of “human error.”<sup>56</sup>

6 Astellas contends that this case “reflects a highly unusual set of circumstances,” in which  
7 its employees failed to “consult and follow Astellas’[s] written policy” and the company’s legal  
8 counsel and compliance vendor did not provide appropriate advice.<sup>57</sup> Yet, it appears this may  
9 not have been Astellas’s only violation, and therefore not a product of “highly unusual”  
10 circumstances. As noted above, Astellas made \$10,000 in contributions to Black Bear PAC  
11 while holding its current FSS contract. To date, these contributions have not been refunded and  
12 were not explained in the Astellas Response, potentially calling into question the effectiveness of  
13 the company’s subsequent mitigation efforts. In any case, however, Astellas’s newly  
14 implemented internal controls do not excuse its past conduct.<sup>58</sup>

15 Astellas separately contends that the federal contractor ban is unconstitutional as applied  
16 to IEOPCs and argues that the Commission should therefore find no reason to believe.<sup>59</sup>  
17 However, no court has made such a ruling,<sup>60</sup> and under those circumstances the Commission has

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<sup>55</sup> *Id.* at 6 (providing excerpts of Federal, State, and Local Political Activity and Lobbying policy).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 2.

<sup>58</sup> *See* F&LA at 4, MUR 7451 (Ring Power Corporation) (stating that contractor’s “remedial measures—obtaining a refund and other steps taken to ensure it would no longer make prohibited contributions—do not excuse the violation”).

<sup>59</sup> Astellas Resp. at 1.

<sup>60</sup> Astellas points to dicta questioning the federal contractor ban as applied to IEOPCs at the district court level in *Wagner v. FEC*, 901 F.Supp.2d 101, 107 (D.D.C. 2012). Astellas Resp. at 9. However, the D.C. Circuit,

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- 1 continued to enforce the ban as to IEOPCs.<sup>61</sup> Accordingly, the Commission finds reason to
- 2 believe that Astellas violated 52 U.S.C. § 30119(a) and 11 C.F.R. § 115.2(a) by making a
- 3 prohibited \$50,000 contribution to SLF and \$10,000 in contributions to Black Bear PAC.

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sitting *en banc* in *Wagner*, upheld the validity of the federal contractor ban and did not address the ban specifically as applied to contributions made to IEOPCs. 793 F.3d 1 (D.C. Cir. 2015).

<sup>61</sup> *E.g.*, F&LA at 1, MUR 7568 (Alpha Marine Services Holdings, LLC) (finding reason to believe that a federal contractor made a prohibited contribution to the Congressional Leadership Fund, an IEOPC).