



FEDERAL ELECTION COMMISSION
Washington, DC 20463

VIA ELECTRONIC AND CERTIFIED MAIL
RETURN RECEIPT REQUESTED

May 13, 2022

Erin Chlopak and Sophie Gonsalves-Brown
Campaign Legal Center
1101 14th Street NW, Suite 400
Washington, DC 20005
echlopak@campaignlegal.org
sgonsalvesbrown@campaignlegalcenter.org

RE: MUR 7886 (Astellas Pharma U.S.,
Inc., *et al.*)

Dear Ms. Chlopak and Ms. Gonsalves-Brown:

This letter is in reference to the complaint Campaign Legal Center filed with the Federal Election Commission on March 17, 2021, concerning Astellas Pharma U.S., Inc. ("Astellas"), and the Senate Leadership Fund and Caleb Crosby in his official capacity as treasurer ("SLF"). The Commission found that there was 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. On May 9, 2022, the Commission accepted a conciliation agreement signed by Astellas, dismissed the allegation that SLF violated 52 U.S.C. § 30119(a)(2) and 11 C.F.R. § 115.2(c) by knowingly soliciting a federal contractor contribution, and closed the file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). A copy of the agreement with Astellas and the Commission's Factual and Legal Analysis is enclosed for your information.

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. *See* 52 U.S.C. § 30109(a)(8). If you have any questions, please contact me at (202) 694-1650 or lconley@fec.gov.

Sincerely,

A handwritten signature in cursive script that reads "Laura Conley".

Laura Conley
Attorney

Enclosures
Conciliation Agreement
Factual & Legal Analysis

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
)	
Astellas Pharma U.S., Inc.)	MUR 7886
)	

CONCILIATION AGREEMENT

This matter was initiated by a signed, sworn, and notarized Complaint filed with the Federal Election Commission. The Commission found reason to believe that Astellas Pharma U.S., Inc. (“Respondent”), violated 52 U.S.C. § 30119(a) and 11 C.F.R. § 115.2(a) by making contributions while Respondent was a federal government contractor.

NOW, THEREFORE, the Commission and Respondent, having participated in informal methods of conciliation, prior to a finding of probable cause to believe, do hereby agree as follows:

I. The Commission has jurisdiction over Respondent and the subject matter of this proceeding, and this Agreement has the effect of an agreement entered under 52 U.S.C. § 30109(a)(4)(A)(i).

II. Respondent has had a reasonable opportunity to demonstrate that no action should be taken in this matter.

III. Respondent enters voluntarily into this Agreement with the Commission.

IV. The pertinent facts in this matter are as follows:

1. Respondent is a biopharmaceutical manufacturer that held a Federal Supply Schedule (“FSS”) contract with the U.S. Department of Veterans Affairs between October 15, 2013, and September 29, 2021.

2. On or around August 23, 2019, Respondent made a \$5,000 contribution to Black Bear PAC, Inc., and Charles Gantt in his official capacity as treasurer (“Black Bear PAC”), an independent expenditure-only political committee. Respondent made a second \$5,000 contribution to Black Bear PAC on or around June 16, 2020.

3. On or around November 23, 2020, Respondent made a \$50,000 contribution to the Senate Leadership Fund and Caleb Crosby in his official capacity as treasurer (“SLF”), another independent expenditure-only political committee.

4. Before making the contribution to SLF, Respondent informed its outside legal counsel and compliance vendor of its intent to make that contribution. Respondent contends that, based on the responses it received, it believed the contribution to SLF was permissible.

5. On or around April 15, 2021, SLF refunded the \$50,000 contribution to Respondent.

6. Respondent acknowledges that a purpose of the federal contractor contribution ban, as described in Section V of this Agreement, is to prevent corruption and the appearance thereof. Respondent contends that there is no evidence of actual corruption or improper influence in the record of this matter.

7. Respondent contends that it had meaningful controls in the form of training for its Policy & Government Affairs employees regarding federal, state, and local campaign finance rules and a written policy that expressly prohibited Astellas personnel from using Astellas corporate funds to influence a federal election. Astellas acknowledges, however, that its personnel either were unaware of or inadvertently violated this policy in making the prohibited contributions at issue in this matter.

8. Respondent contends that it has implemented new internal controls,

policies, and procedures to prevent similar situations in the future, specifically augmenting its policy to add additional controls and approvals for federal contributions, conducting supplemental training sessions for Policy & Government Affairs employees, and increasing the level of oversight and review with respect to Astellas' political activities and contributions by both Astellas' support functions and vendors.

9. Respondent further contends that it is entering into this conciliation agreement in order to avoid the cost, delay, and uncertainty of litigation.

V. The pertinent law in this matter is as follows:

1. The Federal Election Campaign Act of 1971, as amended (the "Act") and the Commission's regulations bar contributions to political committees by any person who enters into a contract with the United States or its departments or agencies for "furnishing any material, supplies, or equipment," if payment on such contract "is to be made in whole or in part from funds appropriated by Congress." 52 U.S.C. § 30119(a)(1); 11 C.F.R. § 115.2(a). Such contributions are barred for the period between (1) the earlier of commencement of negotiations or when requests for proposal are sent out, and (2) the later of the completion of performance on or termination of negotiations for the contract. 11 C.F.R. § 115.1(b).

2. These prohibitions apply to a federal contractor who makes contributions to any political party, political committee, federal candidate, or "any person for any political purpose or use." 11 C.F.R. § 115.2(a).

VI. Respondent violated 52 U.S.C. § 30119(a)(1) and 11 C.F.R. § 115.2(a) by making federal contractor contributions.

VII. Respondent will take the following actions:

1. Respondent will pay a civil penalty to the Commission in the amount of

seven thousand five hundred dollars (\$7,500) pursuant to 52 U.S.C. § 30109(a)(5)(A).

2. Respondent will cease and desist from violating 52 U.S.C. § 30119(a)(1) and 11 C.F.R. § 115.2(a).

3. Respondent waives any rights it may have to a refund of any of the contributions to Black Bear PAC. Respondent shall request that Black Bear PAC disgorge the \$10,000 in contributions to the U.S. Treasury. Should Black Bear PAC refund the \$10,000 in contributions to Respondent, the Respondent agrees to disgorge all such funds to the U.S. Treasury. Respondent shall inform the Commission when it notifies Black Bear PAC of the matter set forth in this paragraph, and of any disgorgement of the \$10,000 in contributions to the U.S. Treasury.

VIII. The Commission, on request of anyone filing a complaint under 52 U.S.C. § 30109(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this Agreement. If the Commission believes that this Agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.

IX. This Agreement shall become effective as of the date that all parties hereto have executed same and the Commission has approved the entire Agreement.

X. Respondent shall have no more than 30 days from the date this Agreement becomes effective to comply with and implement the requirements contained in this Agreement and to so notify the Commission.

XI. This Conciliation Agreement constitutes the entire agreement between the parties on the allegations and contributions described herein, and no other statement, promise, or agreement, either written or oral, made by either party or by agents of either party, that is not

contained in this written Agreement shall be enforceable.

FOR THE COMMISSION:

Lisa J. Stevenson
Acting General Counsel

BY: Charles Kitcher
Charles Kitcher
Associate General Counsel
for Enforcement

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Kitcher
Date: 2022.05.11 11:48:36
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Date

FOR THE RESPONDENT:



BY: Robert D. Lenhard
Robert D. Lenhard
Counsel for Astellas Pharma U.S., Inc.

4/6/2022
Date

**FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS**

Respondent: Astellas Pharma U.S., Inc.

MUR 7886

I. INTRODUCTION

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

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

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

II. FACTUAL BACKGROUND

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

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

² USASpending.gov, *Award Profile – Indefinite Delivery Vehicle*, https://www.usaspending.gov/award/CONT_IDV_V797D30296_3600 (last visited Oct. 29, 2021).

³ 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).

⁴ 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.

⁵ 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).

⁶ USASpending.gov, *Award Profile – Indefinite Delivery Vehicle*, 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.⁷ Each submitted a sworn declaration, attached to Astellas’s Response, outlining the
 6 circumstances of the contribution.⁸ 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.”⁹

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.”¹⁰ Spinello asked Spulak “if we need to do anything . . . with this
 12 contribution to comply with applicable law.”¹¹ Spulak responded that “[t]here is nothing that
 13 you need to do. Contributions to IE committees are not reported . . . by the donor.”¹² 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.¹³

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

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

⁸ Devaney Decl.; Spinello Decl.; Rollins Decl.

⁹ Devaney Decl. ¶ 6; *see* Spinello Decl. ¶ 6.

¹⁰ Spinello Decl., Ex. A at 1 (emails between Spinello and Spulak).

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

¹² *Id.*

¹³ *Id.*

¹⁴ *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.”¹⁵ 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.”¹⁶ 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.”¹⁷ 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.”¹⁸
 10 Spinello replied: “Right, thanks for the clarity.”¹⁹

11 On November 23, 2020, Astellas made the \$50,000 contribution to SLF.²⁰ 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.²¹ 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.²² There is no available information on who initiated the refund.

¹⁵ Spinello Decl. ¶ 9.

¹⁶ *Id.*, Ex. B at 1.

¹⁷ *Id.*

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

¹⁹ Spinello Decl., Ex. B at 1.

²⁰ 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>.

²¹ Devaney Decl. ¶ 7; Spinello Decl. ¶¶ 8, 10; Rollins Decl. ¶ 8.

²² 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.²³ 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.²⁴ 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.²⁵ 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.”²⁶
 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.”²⁷ 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.²⁸ Astellas does not address its efforts to market its
 16 products for sale after the FSS contract was awarded.

²³ 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>.

²⁴ Compl. ¶¶ 19-20.

²⁵ Astellas Resp. at 1-2, 4.

²⁶ *See id.* at 3-5.

²⁷ *Id.* at 4.

²⁸ *Id.* at 4-5.

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

III. LEGAL ANALYSIS

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

²⁹ *Id.* at 5-6.

³⁰ *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.*

³¹ *Id.* at 7.

³² *Id.* at 6-7.

³³ *Id.* at 7-9.

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

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

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

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

³⁵ 11 C.F.R. § 115.1(b).

³⁶ *Id.* § 115.2(a).

³⁷ Astellas Resp. at 4; USASpending.gov, *Award Profile – Indefinite Delivery Vehicle*, https://www.usaspending.gov/award/CONT_IDV_V797D30296_3600 (last visited Oct. 29, 2021).

³⁸ *See* Astellas Resp. at 3.

³⁹ 11 C.F.R. § 115.1(c)(2).

⁴⁰ 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.”⁴¹

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.⁴² 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.⁴³ 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

⁴¹ 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>.

⁴² 11 C.F.R. § 115.1(b)(1).

⁴³ *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.⁴⁴ 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.⁴⁵ 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.⁴⁶ 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.⁴⁷

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.⁴⁸ 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."⁴⁹ It is unclear whether counsel or the vendor

⁴⁴ 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*.").

⁴⁵ Astellas Resp. at 2, 4.

⁴⁶ *See id.* at 1-10.

⁴⁷ *See id.* at 4.

⁴⁸ Spinello Decl., Exs. A-B.

⁴⁹ *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.⁵⁰ 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).⁵¹ 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.⁵²

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.⁵³ Again, Astellas relies on matters in which the amount in violation was small.⁵⁴ 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

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

⁵¹ 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).

⁵² 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.

⁵³ Astellas Resp. at 6-7.

⁵⁴ *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.”⁵⁵ 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.”⁵⁶

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.⁵⁷ 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.⁵⁸

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.⁵⁹
17 However, no court has made such a ruling,⁶⁰ and under those circumstances the Commission has

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

⁵⁶ *Id.*

⁵⁷ *Id.* at 2.

⁵⁸ 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”).

⁵⁹ Astellas Resp. at 1.

⁶⁰ 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,

MUR 7886 (Astellas Pharma U.S., Inc., *et al.*)

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1 continued to enforce the ban as to IEOPCs.⁶¹ 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.

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).

⁶¹ *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).