



FEDERAL ELECTION COMMISSION  
1050 FIRST STREET, N.E.  
WASHINGTON, D.C. 20463

**INTERPRETIVE STATEMENT OF CHAIRMAN ALLEN DICKERSON  
CONCERNING 11 C.F.R. § 103.3 AND THE DISGORGEMENT OF  
UNLAWFUL CONTRIBUTIONS**

The Federal Election Campaign Act (“FECA” or the “Act”) forbids certain individuals and entities, including corporations, federal contractors, and foreign nationals, from making political contributions to federal campaign committees. It also prohibits political committees from accepting such contributions. The Commission is entrusted with the civil enforcement of these prohibitions.

In exercising that authority, we have developed a curious practice. When conciliating with an unlawful contributor, we invariably impose a civil penalty. But we also insist, in many cases, that the contributor ask the recipient committee to disgorge the illegal contribution to the U.S. Treasury. This indirect procedure—where a federal agency, rather than ordering disgorgement of an unlawful contribution, asks a contributor to make that request on its behalf—appears to have developed organically in service of an attractive and appropriate goal: removing unlawful contributions from the campaign finance system.<sup>1</sup>

But however laudable our intentions, this approach lacks legal support. It violates the clear text of our regulations, which require the recipient of an unlawful contribution to refund the money rather than sending it to the Treasury, and illegally expands the scope of the penalties Congress has permitted us to impose.

Accordingly, in future matters involving unlawful contributions, I will not support conciliation attempts premised upon the recipient committee’s disgorgement of the offending contribution. The proper remedy in such cases is a civil penalty and the unwinding of the unlawful transaction.

\* \* \*

---

<sup>1</sup> Oddly, this does not appear to have been our consistent historical practice. While the Commission does not comprehensively track the penalties it imposes, research conducted by my office suggests that we rarely adopted this approach during the sixteen-year period from 2004 until immediately after the restoration of the Commission’s quorum in December 2020. While my position is based solely upon the legal arguments contained herein, it would be troubling if a long-dormant enforcement policy were quietly reinstated without adequate notice to commissioners and the public.

To illustrate the problem, consider a pair of conciliation agreements arising from allegations that a foreign national contributed to a President’s re-election campaign.

In 2000, we conciliated with a Chinese national and asked that he “waive[] any and all claims he may have to the refund of the \$20,000 in contributions to the [recipient committee] that he reimbursed,” and further required him to advise the [committee], in writing, of this waiver and to direct them to disgorge to the U.S. Treasury the \$20,000.”<sup>2</sup> A month later, the former President’s campaign committee agreed, pursuant to the Commission’s enforcement efforts, to “disgorge \$20,000 to the U.S. Treasury.”<sup>3</sup>

Upon reflection, I have come to believe that this approach is improper.

First, and most obviously, we have adopted regulations delimiting the responsibilities of committee treasurers, and those regulations unambiguously require the refund – not disgorgement—of an unlawful contribution. Treasurers bear the “responsib[ility] for examining all contributions for evidence of illegality,” and where a treasurer determines that a contribution is unlawful based upon information “not available...at the time of receipt and deposit, the treasurer shall refund the contribution to the contributor.”<sup>4</sup>

This language is unambiguous and carries the force of law; “[a]n agency is bound by its own regulations.”<sup>5</sup> Accordingly, we lack authority to require treasurers to do anything with these unlawful contributions besides return them. And our effort to nudge, or even order, treasurers to act contrary to the regulation has led us into confusion. At times, we awkwardly require respondents to request a disgorgement to

---

<sup>2</sup> Conciliation Agreement at 8, MUR 4530 (Chung), Aug. 25, 2000.

<sup>3</sup> Conciliation Agreement at 5, MUR 4547 (Clinton/Gore ’96 Primary Committee, Inc.), Sept. 13, 2000.

<sup>4</sup> 11 C.F.R. § 103.3(b)(2).

<sup>5</sup> *Pettiford v. Sec’y of the Navy*, 858 F. Supp. 2d 86, 91 (D.D.C. 2012) (citing to *Service v. Dulles*, 354 U.S. 363 (1957)); see also *Crediford v. Shulkin*, 877 F.3d 1040, 1047 (Fed. Cir. 2017) (stating same); *Terry v. Astrue*, 580 F.3d 471, 476 (7th Cir. 2009) (stating same); *Kelly v. R.R. Retirement Bd.*, 625 F.2d 486, 491 (3d Cir. 1980) (“[i]t is a well-established proposition that an agency is bound by its regulations”). See also *United States v. Nixon*, 418 U.S. 683, 695 (1974) (“So long as this regulation is extant it has the force of law”).

the Treasury<sup>6</sup> rather than demanding it ourselves.<sup>7</sup> We confusingly characterize disgorgement as a “refund...to the U.S. Treasury”<sup>8</sup> even where the Treasury is not the sources of the funds and consequently cannot enjoy a “refund” in the ordinary meaning of the term. At bottom, we undermine our own regulations by encouraging regulated entities to disregard them.

We also risk violating the Act. “Federal agencies are creatures of statute. They possess only those powers that Congress confers upon them,” and Congress placed limits on our enforcement authority.<sup>9</sup> One such restraint is a cap on the size of fines we may impose for violations of the Act. Except where we determine that a violation was done knowingly and willfully, we may only seek the greater of \$5,000 or the amount-in-violation.<sup>10</sup>

In practice, requiring a committee to both pay a fine and request disgorgement circumvents these limits. By seeking a statutory fine—a civil penalty ultimately collected by the U.S. Treasury—and also ordering disgorgement of the full amount of the illegal contribution—a civil penalty ultimately collected by the same U.S. Treasury—we risk imposing a penalty that is greater than 100 per cent of the amount-in-violation.

We may not think of disgorgement as an additional civil penalty, but that is the law. The Supreme Court has held that disgorgement of funds is a civil penalty when “[i]t is imposed as a consequence of violating a public law and it is intended to

---

<sup>6</sup> See Conciliation Agreement at 8, MUR 4530 (Chung), Aug. 25, 2000.

<sup>7</sup> See Conciliation Agreement at 4, MUR 5442 (Keyes 2000, Inc.), Sept. 27, 2004.

<sup>8</sup> Conciliation Agreement at 4, MUR 7767 (Hall for Congress), Jan. 25, 2021.

<sup>9</sup> *Judge Rotenberg Educ. Ctr., Inc. v. United States Food & Drug Admin.*, 3 F.4th 390, 399 (D.C. Cir. 2021); see also Statement of Vice Chair Dickerson Regarding Advisory Op. 2021-01 (Aluminate, Inc.), June 14, 2021 (stating that the Commission’s practice regarding 52 U.S.C. § 30111(a)(4) violated the clear meaning of the text).

<sup>10</sup> 52 U.S.C. § 30109(a)(5)(A) (“...a conciliation agreement entered into by the Commission...may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of \$5,000 or an amount equal to any contribution or expenditure involved in such violation”). For a knowing and willful violation, these amounts are doubled. 52 U.S.C. § 30109(a)(5)(B). And, in the specific case of a knowing and willful violation of FECA’s prohibition on making contributions in the name of another, the Commission may seek a penalty “which is not less than 300 per cent of the amount involved in the violation and is not more than the greater of \$50,000 or 1,000 per cent of the amount involved in the violation.” *Id.*

deter, not to compensate.”<sup>11</sup> That is clearly the case here. The Treasury has made no outlay requiring compensation, and the purpose of this policy is to deprive the offender of funds to which it is entitled under our regulations—a patently punitive purpose.<sup>12</sup>

One might argue that, to the contrary, disgorgement serves a remedial purpose: the restoration of the *status quo ante* and the elimination of unlawful funds from the political system. But a refund accomplishes those same goals. And, in any event, recent Supreme Court case law cuts against this argument. Specifically, the Court has explained that “[a] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.”<sup>13</sup> The suggestion that our approach is not intended, at least in part, as punishment is not credible.

Nor is the fact we punish the contributor indirectly, by requiring it to forgo a refund, persuasive. Our regulations provide that “the treasurer *shall* refund the contribution to the contributor.”<sup>14</sup> “Use of the word ‘shall’ in a statute” or regulation “generally creates a mandatory duty,” and so it is here.<sup>15</sup> We have no authority to compel a committee treasurer, even indirectly, to do anything more than unwind the unlawful transaction. We may not order a treasurer to ask an unlawful contributor if

---

<sup>11</sup> *Kokesh v. Sec. & Exch’g Comm’n*, 581 U.S. \_\_\_, 137 S. Ct. 1635, 1644 (2017). Disgorgement to the Treasury, as opposed to a direct refund to the contributor, can only be understood as having a deterrent or punitive aspect. The contributor no longer has access to funds that it would have had if the treasurer had properly refunded the money.

<sup>12</sup> Nor could these orders rest upon our general right to pursue “other appropriate relief” in court. 52 U.S.C § 30107(a)(6). Just last Term, a unanimous Supreme Court concluded that a general statutory grant of authority to seek civil enforcement in the courts is not license for a “Commission to seek, and a court to award, equitable monetary relief such as restitution or disgorgement.” *AMG Cap. Mgmt., LLC v. Fed. Trade Comm’n*, 593 U.S. \_\_\_, 141 S. Ct. 1341, 1344 (2021).

<sup>13</sup> *Kokesh*, 137 S. Ct. at 1645 (quoting *Austin v. United States*, 509 U.S. 602, 610 (1993) (emphasis in original)).

<sup>14</sup> *Id.* (emphasis supplied).

<sup>15</sup> *Appalachian Voices v. McCarthy*, 989 F. Supp. 2d 30, 54 (D.D.C. 2013); cf. *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 346 (2005) (“The word ‘may’ customarily connotes discretion. That connotation is particularly apt where, as here, ‘may’ is used in contraposition to the word ‘shall’”).

she wants the money back,<sup>16</sup> nor may we simply order a committee to directly disgorge unlawful funds to the Treasury.<sup>17</sup>

Indeed, prior to 1996, our policy was to follow the clear text of our regulation and require a recipient committee to “refund [an] illegal contribution” to “its source.”<sup>18</sup> This approach was changed—through an advisory opinion rather than rulemaking—in Advisory Opinion 1996-05 (Kim for Congress, *et al.*). There, over the Chair’s strong dissent,<sup>19</sup> the Commission explicitly overruled its past practice and announced that following our regulation was merely “one option” and “[i]n the alternative, the Committee may pay [the amount of the illegal contributions] to the United States Treasury”<sup>20</sup> because doing so would “comport with the underlying reason for the refund rule of 11 CFR [§] 103.3(b)(2).”<sup>21</sup>

This is specious reasoning. When a regulation is unambiguous but deemed insufficient to accomplish its animating purpose, the solution is for the agency to notice a new rule—not redefine the existing regulation by contorting its plain language.<sup>22</sup> Chairman Elliott noted precisely this in her dissent, declaring that “the manner for establishing such a [disgorgement] policy in direct contradiction to our previously published regulations is through regulatory reform, not on a case-specific situation as it arises in an advisory opinion request.”<sup>23</sup> Indeed, our governing statute prohibits the Commission from seeking to fill gaps in its regulations through any

---

<sup>16</sup> Conciliation Agreement at 8, MUR 4530 (Chung), Aug. 25, 2000.

<sup>17</sup> Conciliation Agreement at 4, MUR 5442 (Keyes 2000, Inc.) (“Respondents will pay a civil penalty to the Federal Election Commission in the amount of...\$23,000....Respondents will remit \$85,302 to the United States Treasury”).

<sup>18</sup> See Advisory Opinion 1984-52 (Russo).

<sup>19</sup> Dissenting Opinion of Chairman Elliott, Advisory Opinion 1996-05 (Kim for Congress), Mar. 18, 1996.

<sup>20</sup> Advisory Opinion 1996-05 (Kim for Congress) at 3, Mar. 18, 1996.

<sup>21</sup> *Id.* at 4, n.4.

<sup>22</sup> It is notable that our advisory opinion in Kim refers to the disgorgement not as a “refund,” but as the making of “[r]efund equivalent payments.” *Id.* Such sleight-of-terminology ought to have signaled the agency’s lack of fidelity to its own regulations.

<sup>23</sup> Dissenting Opinion of Chairman Elliott, Advisory Opinion 1996-05 (Kim for Congress), Mar. 18, 1996.

process or procedure *other* than formal rulemaking.<sup>24</sup> Accordingly, if challenged, it seems very unlikely that a reviewing court would bless our approach.

In fact, in 1999, the validity of Advisory Opinion 1996-05 was squarely placed before the United States Court of Federal Claims.<sup>25</sup> That case began when Simon Fireman and his corporation, Aqua-Leisure Industries, Inc., both made illegal contributions to Bob Dole’s 1996 Presidential campaign committee.<sup>26</sup> “Following Federal Election Commission Advisory Opinion 1996-5...the Dole Committee gave the illegal contributions to the United States Treasurer.”<sup>27</sup> Fireman and the company, however, sought their right to a refund under 11 C.F.R. § 103.3. The committee demurred because, “[h]aving [already] disgorged itself of the donations,” “which totaled \$69,000...the Dole Committee could not return the illegal contributions.”<sup>28</sup>

Fireman and Aqua-Leisure then sued the United States “seek[ing] the recovery of the contributions originally given to the Dole Committee.”<sup>29</sup> Ultimately, the United States settled the case “in full by paying Mr. Fireman \$69,000.”<sup>30</sup> Before that happened, however, the United States sought to dismiss Fireman’s lawsuit. In denying that motion, the court determined that the plaintiffs had raised a colorable claim “tak[ing] much of their reasoning from the dissenting opinion in AO 1996-5” that “the FEC acted illegally” in redefining 11 C.F.R. § 103.3 through that advisory opinion.<sup>31</sup>

---

<sup>24</sup> 52 U.S.C. § 30108(b) (“Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of Title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 30111(d) of this title”); *cf.* Statement of Reasons of Vice Chair Dickerson at 11, MURs 7165/7196 (Benton), Oct. 13, 2021 (“But that is not what our regulations state, and when faced with a gap in our regulatory scheme we are not permitted to fill it using our enforcement process”) (citing to 52 U.S.C. § 30108(b)).

<sup>25</sup> *Fireman v. United States*, 44 Fed. Cl. 528 (Fed. Cl. 1999).

<sup>26</sup> *Id.* at 530.

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

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Fed. Election Comm’n, “Record” at 3, Vol. 26, No. 1, (Jan. 2000). In settling the case, the United States did not concede that Advisory Opinion 1996-05 was improper or illegal. *Id.*

<sup>31</sup> *Fireman*, 44 Fed. Cl. at 538 (brackets supplied).

While the *Fireman* court did not invalidate the Commission’s re-interpretation of its regulation—the government’s settlement, likely prodded by just such a risk, avoided that outcome—the court’s opinion demonstrated that our approach to unwinding unlawful contributions rests on thin legal ice. Pointedly, the court noted that because the 1996 advisory opinion was a “re-interpretation” of the Commission’s previously held position, it would be “entitled to less deference” than would normally be expected from a court reviewing agency policy.<sup>32</sup> I do not wish to open the Commission to future litigation regarding our conciliation agreements, which is yet another reason to cease this practice.

\* \* \*

I concede that the current strictures of our regulation can result in unsatisfying outcomes. As just one example, it may seem odd for a foreign contributor—especially an unlawful donation from a foreign corporation or sovereign entity—to merely have its transaction unwound and to pay a fine.<sup>33</sup> But while “I understand the argument for disgorgement to be one of equity[,] such that a violator of a law should not be enriched due to a refund of contributions prohibited in the first place,” I recognize that “the manner for establishing a policy in direct contradiction to our previously published regulations is through regulatory reform.”<sup>34</sup>

Until such a rulemaking is undertaken, the Commission cannot lawfully continue its practice of encouraging discouragement of illegal contributions to the Treasury where our regulations instead require a refund.

I intend to vote accordingly in future Matters Under Review.

---

<sup>32</sup> *Id.*

<sup>33</sup> The agency twice used this process to avoid returning funds to contributions sourced from Chinese nationals seeking to influence the re-election of an American president. *See* MUR 4531 (DNC Services Corp., *et al.*); MUR 4642 (DNC Services Corp./Democratic Nat’l Comm.). But while I believe Advisory Opinion 1996-05 is unfaithful to our regulations, it remains on our books. The opinion protects future treasurers who choose to disgorge an unlawful contribution to the Treasury rather than refund it. As I have noted before in addressing a similar longstanding mistake in our interpretation of FECA, “our errors are not easily undone. Advisory opinions are not casual pronouncements; the Act specifically immunizes requestors from legal liability for relying on them, and we have long stated, correctly, that materially similar fact patterns are also protected.” Statement of Vice Chair Dickerson Regarding Advisory Opinion 2021-01 (Aluminate, Inc.) at 3, June 14, 2021 (citing to 52 U.S.C. §§ 30108(c)(1)(B); 30108(c)(2)).

<sup>34</sup> Dissenting Opinion of Chairman Elliott, Advisory Opinion 1996-05 (Kim for Congress), Mar. 18, 1996.



---

Allen Dickerson  
Chairman

April 22, 2022

---

Date