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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

AGENDA DOCUMENT NO. 22-59-A  
AGENDA ITEM  
For meeting of December 15, 2022

December 8, 2022

**MEMORANDUM**

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*  
Acting General Counsel

Neven Stipanovic *NFS*  
Associate General Counsel

Robert Knop *RMK*  
Assistant General Counsel

Tony Buckley *TB*  
Attorney

SUBJECT: REG 2022-06 (Disgorgement) - Notification of Availability

On August 25, 2022, the Commission received a Petition for Rulemaking from the Campaign Legal Center ("Petition"). The Petition asks the Commission to amend or clarify its regulations regarding the refunding of contributions that violate the source prohibitions or amount limitations of the Federal Election Campaign Act.

The Office of the General Counsel has examined the Petition and determined that it meets the requirements of 11 C.F.R. § 200.2(b). Therefore, we have drafted the attached Notification of Availability ("Notification") seeking comment on whether the Commission should initiate a full rulemaking on the proposal in the Petition. The Notification will be published in the *Federal Register* pursuant to 11 C.F.R. § 200.3(a)(1).

In keeping with the Commission's usual procedure, the Notification does not address the merits of the Petition. Instead, it states that consideration of the merits will be deferred until the close of the comment period.

The Office of the General Counsel requests that this draft be placed on the agenda for the December 15, 2022 open meeting.

Attachment

BILLING CODE: 6715-01-P

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Parts 103, 104, 9007, 9014 and 9038**

3 **[NOTICE 2022-XX]**

4 **Rulemaking Petition: Disgorgement of Contributions**

5 **AGENCY:** Federal Election Commission.

6 **ACTION:** Rulemaking Petition: Notification of Availability.

7 **SUMMARY:** On August 25, 2022, the Federal Election Commission received a Petition for  
8 Rulemaking asking the Commission to amend or clarify its regulations regarding the  
9 refunding of contributions that violate the source prohibitions or amount limitations of the  
10 Federal Election Campaign Act (“the Act”). The petitioner requests that the Commission amend  
11 its regulations to permit committees to disgorge illegal contributions to the United States  
12 Treasury, and to provide that the Commission may require disgorgement when, according to the  
13 petitioner, a refund would be unjust and create incentives for future lawbreaking.

14 **DATES:** Comments must be submitted on or before [INSERT DATE 60 DAYS AFTER THE  
15 DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

16 **ADDRESSES:** All comments must be in writing. Commenters may submit comments  
17 electronically via the Commission’s website at <http://sers.fec.gov/fosers/>, reference REG  
18 2022-06.

19 Each commenter must provide, at a minimum, his or her first name, last name, city, and  
20 state. All properly submitted comments, including attachments, will become part of the public  
21 record, and the Commission will make comments available for public viewing on the  
22 Commission’s website and in the Commission’s Public Records Office. Accordingly,

1 commenters should not provide in their comments any information that they do not wish to make  
2 public, such as a home street address, personal email address, date of birth, phone number, social  
3 security number, or driver’s license number, or any information that is restricted from disclosure,  
4 such as trade secrets or commercial or financial information that is privileged or confidential.

5 **FOR FURTHER INFORMATION CONTACT:** Mr. Robert Knop, Assistant General  
6 Counsel, or Mr. Tony Buckley, Attorney, Office of the General Counsel, at (202) 694-1650 or  
7 (800) 424– 9530.

8 **SUPPLEMENTARY INFORMATION:** On August 25, 2022, the Commission received a  
9 Petition for Rulemaking from the Campaign Legal Center (“Petition”). The Petition asks the  
10 Commission to “amend or clarify the scope and remedies provided in section 103.3 to promote  
11 the robust enforcement of FECA.” Petition at 8.

12 The Petition notes that “Commission regulations currently state that committee treasurers  
13 must examine ‘all contributions received for evidence of illegality,’ and ‘shall refund’ illegal  
14 contributions to the contributors.” Petition at 1 (citing 11 C.F.R. 103.3(b)). The Petition further  
15 notes that the requirement that committees refund improper contributions “is not required by  
16 FECA.” Petition at 2. The Petition asserts that refunding illegal contributions can undermine the  
17 enforcement purposes of FECA by unjustly rewarding those making illegal contributions.

18 According to the Petition, “when those caught brazenly violating the law are rewarded with the  
19 return of the money they contributed—the tool of their illegal activity—it sends the regulated  
20 community and the public a very troubling message that the FEC permits violators to profit from  
21 their violations.” Petition at 2.

22 The Act prohibits committees from accepting contributions in excess of certain limits or  
23 from certain sources. *See, e.g.*, 52 USC 30116(a) (limiting the amount a committee may accept

1 from a person); 30118(a) and 30119(a) (prohibiting a committee from accepting contributions  
2 from corporations, labor organizations, national banks, and federal contractors); *but see*  
3 *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686 (D.C. Cir. 2010) (en banc) (striking  
4 down contribution limits as applied to independent expenditure-only committees). Commission  
5 regulations generally require a committee treasurer to ascertain whether a contribution exceeds  
6 the amount limitations or is from a prohibited source. *See* 11CFR 103.3(b). A contribution  
7 determined to exceed the amount limitations may be redesignated, reattributed, or returned to the  
8 contributor. *See* 11 CFR 103.3(b)(3). A contribution determined to be from an improper source  
9 must be returned to the contributor. *See* 11CFR 103.3(b)(1) and (2).

10 In Advisory Opinion 1996-05 (Kim), a political committee asked how it should  
11 reimburse contributions that it belatedly discovered to be unlawful corporate contributions made  
12 in the names of others. The Commission concluded that the requestor may refund the  
13 contributions to the corporation or, in the alternative, pay the amount of the contributions to the  
14 United States Treasury. Subsequently, in an unrelated matter, *Fireman v. FEC*, 44 Fed. Cl. 528  
15 (1999), the Court of Federal Claims held that 11 CFR 103.3(b)(1) and (2) mandated a refund of  
16 all illegal contributions to the contributors regardless of the circumstances, and thereby rejected  
17 the Commission's interpretation of 11 CFR 103.3(b)(1) and (2) as permitting disgorgement of  
18 illegal contributions to the United States Treasury.

19 According to the Petition, “[m]any recent FEC enforcement matters involving prohibited  
20 contributions have resulted in a partial or complete contribution refund to the violator,  
21 undercutting the effect of any civil penalty.” Petition at 6. As one example, the Petition cites  
22 Matter Under Review (MUR) 7450, where a federal contractor made \$525,000 in illegal

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1 contributions and agreed to pay a \$125,000 civil penalty but had already recovered \$500,000 as a  
2 contribution refund before the Commission’s enforcement action was completed. Petition at 6-7.

3 The petition argues that “[t]he near certainty that federal contractors will recover their  
4 illegal contributions—more than offsetting any civil penalties the Commission assesses—  
5 undermines the deterrent effect of enforcing the federal contractor contribution ban.” Petition  
6 at 7. The Petition urges the Commission “to amend or clarify its regulations to explicitly  
7 recognize that illegal contributions may be disgorged, and that the Commission may require the  
8 disgorgement of illegal contributions in appropriate circumstances.” Petition at 8.

9 The Commission seeks comment on the Petition. The public may inspect the Petition on  
10 the Commission’s website at <http://sers.fec.gov/fosers/>.

11 The Commission will not consider the Petition’s merits until after the comment period  
12 closes. If the Commission decides that the Petition has merit, it may begin a rulemaking  
13 proceeding. The Commission will announce any action that it takes in the *Federal Register*.

14 Dated December XX, 2022

15  
16 On behalf of the Commission,

17  
18  
19 **Allen J. Dickerson,**

20 *Chairman,*

21 *Federal Election Commission.*

22  
23 BILLING CODE: 6715-01-P