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NEWSLETTER

FEC Punishes Major Oil Company for Super PAC Contributions Because of Rare, Isolated Government Contracts

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The Federal Election Commission (FEC) has punished Marathon Petroleum Company LP (Marathon) for making three contributions, totaling $1.5 million, to two super PACs in 2019 and 2020, while one of the company's many units, unbeknownst to company lawyers approving the contributions, was negotiating a small, isolated contract to provide jet fuel to the federal Defense Logistics Agency.

The punishment, meted by a 6-0 vote of Commissioners, indicates little tolerance for small and even inadvertent government contracts. This matter is significant for many large companies with complex, far-flung operations, that might be in some stage of bidding or negotiations for small government contracts at the time they consider making contributions to super PACs. Many large companies may find it difficult or impractical to track all potential ongoing federal bid responses and negotiations.

The Federal Election Campaign Act prohibits any company or person "who enters into any contract with the United States or any department of agency thereof" from making any contribution to a federal political committee, including super PACs. 52 U.S.C. § 30119 (a)(1). Although the statutory language suggests the prohibition applies only after the company has "entered into" a contract, the statute goes on to apply the prohibition upon "commencement of negotiations" for a federal contract continuing until either negotiations terminate or contract performance is completed. 52 U.S.C. § 30119(a)(1). Commission regulations expand the time period further than the statutory period to cover even the time after "requests for proposals are sent out" by the government, if that occurs before

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Federal Election Commission Representation negotiations. 11 C.F.R. § 115.1(b).

Unbeknownst to Marathon lawyers reviewing a request for contributions to two super PACs, a Marathon office in Detroit, in 2019, had responded to a request for a bid it received from the Defense Logistics Agency, an agency of the U.S. Defense Department, to provide jet fuel. The federal agency awarded the contract in early 2020. Marathon delivered jet fuel and completed its contractual commitments in September 2020. The total value of the contract was $1 million, a miniscule contract and amount of money in the company's operations.

Marathon argued that it had not historically engaged in federal government contracting, and those who requested and provided legal review of the contributions in 2019 and 2020 were unaware that the Detroit office was bidding for a small federal contract or selling fuel to the government. At least one of the contributions occurred while bidding was underway but before Marathon had "entered the contract." Had company attorneys known, Marathon maintained, another corporate affiliate, that was not contracted with the federal government, would lawfully have made the contributions from its own independent revenues. In sum, Marathon's contributions resulted from inadvertent oversight in the company's contribution approval process and the company's inability to track all ongoing contractual negotiations across the company's many operating units and offices. Further, upon learning of the slip, Marathon immediately obtained refunds of its contributions.

In a past analogous matter (MUR 6403 (Arctic Slope)), the Commission had considered these factors persuasive in exercising its discretion to dismiss the matter. Marathon requested the same treatment. But the Commission took a more aggressive enforcement position, finding reason to believe Marathon had violated the contractor ban and proceeding to enforcement. Marathon chose to conciliate. The Commission approved the conciliation agreement and assessed a civil penalty of $85,000. The amount of the civil penalty, small by comparison to the amount of the contributions, might have been calibrated to the mitigating circumstances presented by Marathon.

Finally, Marathon also asserted a constitutional defense. Marathon argued that the federal contractor ban cannot constitutionally be applied to super PAC contributions under the reasoning of *Citizens United v. FEC*. According to the argument, independent expenditures by super PACs do not give rise to the kind of *quid pro quo* corruption that must be present to justify contribution and expenditure bans. That issue was likely not one the Commission believed it could credit in the absence of a court ruling or legislative action. So the issue, along with the Commission's regulation expanding the time period of the ban beyond the statutory period, remain open for a future court to consider.

Election Law News recently reported on another issue lurking for retail companies that casually sell wares or services to federal government agencies in a retail sales context rather than bidding and procurement context.