

ALERT

FEC Solicits Comments on Expanding Prohibition Against Political Contributions and Expenditures by Federal Contractors

April 2, 2015

On March 30, 2015, the Federal Election Commission (FEC) issued a Notice of Availability seeking comments on a Petition for Rulemaking submitted by Public Citizen seeking to expand the federal prohibition on campaign contributions by federal government contractors to parent and subsidiary companies. Comments are due May 29.

Federal campaign finance law and FEC regulations currently prohibit all federal contractors from making contributions or expenditures to support candidates for federal office, federal political party committees, and federal political action committees, including so-called super PACs. See 52 U.S.C. § 30119(a)(1); 11 CFR 115.2(a). This prohibition applies to any entity that "enters into any contract with the United States or any department or agency." 52 U.S.C. § 30119(a)(1); 11 CFR 115.1(a)(1). The FEC has consistently applied this prohibition to only the specific legal entity that holds the federal contract, and not necessarily to parent or subsidiary organizations.

Public Citizen submitted its petition on November 18, 2014, to request that the FEC revise its regulations to provide criteria for determining when separate corporate entities could be considered part of a single "contractor" for purposes of this prohibition. The petition cites the recent dismissal of a complaint filed by Public Citizen against Chevron for contributing to the Congressional Leadership Fund, a super PAC active in congressional elections. The FEC dismissed Public Citizen's complaint based on a determination that Chevron's ultimate parent company—which did not have federal contracts—made the contribution.

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The Public Citizen petition invokes relaxed legal standards borrowed from labor and employment law to argue that those same standards should apply when determining the identity of a contractor under federal election laws. Under the standards advocated by Public Citizen, a company that does not hold any federal government contracts would nonetheless be prohibited from making federal political campaign contributions or expenditures if another corporate entity with the same parent company (even several levels removed) or address or overlapping officers is a government contractor.

Such a standard appears to be inconsistent with general corporate law. In addition, the Federal Acquisition Regulation (FAR) generally limits reporting and certification requirements to the contractor bidding on the particular contract at issue (determined by the DUNS number of the bidding entity). *See, e.g.*, FAR 52.204-10 (requiring contractors to report first-tier subcontractor and executive compensation information based on the DUNS number of the prime or subcontractor). Thus, federal contractors generally are not required to report information related to corporate parents or affiliated companies. In addition, the FAR prohibits federal contractors from charging any costs associated with lobbying and political activity to government contracts - they are "unallowable." FAR 31.205-22. The Defense Contract Audit Agency (DCAA) and other agency auditors routinely audit contractors' financial and accounting systems to ensure that the Government is not charged for unallowable costs, and those audits have previously identified unallowable political contributions and required contractors to move those contributions to different cost pools not charged to the Government. Thus, to the extent that the political contributions of an affiliated company might otherwise be included in a government contractor's costs due to shared personnel or resources, the contractor is prohibited from charging those costs to its government contracts-even indirectly.

After the FEC receives comments on May 29, it will decide whether to begin formal rulemaking regarding the definition of a contractor in campaign finance regulations. If the FEC elects to undertake a rulemaking, interested parties would have another opportunity to provide comments on the proposed rules before any changes take effect.