FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Reporting Requirements and the Treatment of Federal Contractors Under the Federal Election Campaign Act and FEC Regulations

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Federal Election Commission

Submitted on May 10, 2011 to the

House Committee on Oversight and Government Reform and the

House Committee on Small Business

Chairmen Issa and Graves, Ranking Members Cummings and Velázquez, and Members of the Committees, thank you for the opportunity to submit written testimony to the House Committee on Oversight and Government Reform and the House Committee on Small Business in advance of the Committees' joint hearing on May 12, 2011. As requested, this statement is intended to provide the Committees with background on the existing framework for disclosure of campaign contributions, particularly with respect to government contractors, under the Federal Election Campaign Act (the "Act") and Federal Election Commission regulations. The Committees have also asked about the interplay between the Draft Executive Order (the "Draft EO") and the existing regime.

I would like to emphasize the scope of the Commission's expertise on some of the topics addressed by the upcoming hearing. The Commission is an independent regulatory agency created to administer and enforce the Act. It does not regularly deal with either issues particular to Federal contractors, because, as explained in more detail below, they are prohibited from making contributions under the Act, or issues particular to small businesses because the Act makes no distinction based upon that status. Instead, this statement focuses on providing the Committees with the requested overview of the existing framework of Federal campaign finance laws.

I. Treatment of Federal Contractors Under the Federal Election Campaign Act and Commission Regulations

The Act and Commission regulations currently limit political activity by any person who, under certain conditions, enters into any contract with the United States or any department or agency. *See* 2 U.S.C. 441c; 11 CFR Part 115. The Act prohibits Federal contractors from, for a certain time period, "directly or indirectly" making "any contribution of money or other things of value, or promising expressly or impliedly to make any such contribution to any political party, committee, or candidate for public office or to any person for any political purpose or use." 2 U.S.C. 441c(a)(1). The Act also prohibits knowingly soliciting any such contribution from a Federal contractor for political activity. 2 U.S.C. 441c(a)(2).

Correspondingly, Commission regulations prohibit Federal contractors from making, either directly or indirectly, any contribution or expenditure of money or other thing of value, or promising expressly or impliedly to make any such contribution or expenditure to any political party, committee, or candidate for Federal office or to any person for any political purpose or use. This prohibition does not apply to contributions or expenditures in connection with State or local elections. 11 CFR 115.2(a). The prohibition is in force between the earlier date of the commencement of negotiations or the sending out of requests for proposals and the later date of the completion of performance of the contract or termination of negotiations for the contract. 11 CFR 115.1(b). Commission regulations also prohibit any person from knowingly soliciting such contributions from a Federal contractor. 11 CFR 115.2(c).

Despite the general prohibition, the Act allows Federal contractors to establish and administer separate segregated funds ("SSFs") for the purpose of influencing Federal elections, unless otherwise prohibited. *See* 2 U.S.C. 441c(b). Under the Act, corporations, labor organizations and incorporated membership organizations may sponsor SSFs, popularly called PACs, which solicit contributions from a limited class of individuals and use these funds to make contributions and expenditures to influence Federal elections. 2 U.S.C. 431(4)(B); 441b(b). As the sponsor (i.e., the "connected organization") of the SSF, the corporation, labor organization or incorporated membership organization may absorb all the costs of establishing and operating the SSF and soliciting contributions to it. These administrative expenses are fully exempted from the Act's definitions of "contribution" and "expenditure." 2 U.S.C. 441b(b); 11 CFR 114.1(a)(2)(iii).

The Commission has further interpreted and implemented these regulations in Advisory Opinions and enforcement actions, particularly in defining who meets the definition of a Federal contractor. For example, the Commission has concluded that an individual who has entered into a personal services contract in his individual capacity with a Federal government agency is considered a Federal contractor and may not make contributions. Advisory Opinion ("AO") 2008-11 (Lawrence Brown). The Commission has also concluded that a law firm organized as a partnership representing the Federal Deposit Insurance Corporation and the Resolution Trust Corporation would be considered a Federal government contractor if the agencies compensate the firm from funds containing Congressional appropriations. AO 1990-20 (Bradbury, Bliss & Riordan). On the other hand, the Commission has concluded that a law firm partner and

associate who received appointments to the Federal panel of trustees for bankruptcy cases are not considered Federal contractors. AO 1988-49 (Lawyers for Better Government Fund – Federal).

There have been few recent occasions to address matters implicating these rules, in part because prior to the Supreme Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), corporations and labor organizations were generally prohibited from making contributions or expenditures in connection with a Federal election. *See* 2 U.S.C. 441b. Since most Federal contractors are incorporated entities, the Commission has not had many opportunities to consider the independent provisions that specifically address contractors. *See, e.g., FEC v. Weinsten*, 462 F. Supp. 243, 249 (S.D.N.Y. 1978) (concluding that considerations regarding treatment as corporation were the same as treatment as contractor). In the past, these rules were primarily implicated by sole proprietorships, partnerships, and membership organizations that are Federal contractors. Now that the Supreme Court has struck down the statutory prohibition on expenditures by corporations and labor organizations, the rules regarding contractors may require more frequent consideration.

II. Reporting Requirements for Political Committees, Independent Expenditures and Electioneering Communications

Even though government contractors are currently prohibited from making, either directly or indirectly, any contribution or expenditure in connection with a Federal election, certain individuals and entities associated with government contractors may engage in permissible political activity. *See* 11 CFR 115.4; 115.5; 115.6. When they do, they must adhere to existing disclosure laws. When a contractor establishes an SSF, the SSF must disclose its campaign contributions and expenditures. Any campaign contributions from a contractor's SSF or its stockholders, officers, or employees would have to be reported by the recipient political committee. While such reporting will indicate the source of these contributions, it will not necessarily indicate connections between a given individual contributor and any government contractor with which that contributor is associated.[1] The Act also requires persons who make Independent Expenditures or Electioneering Communications to report certain information to the Commission.

A. Political Committees

The Act requires political committees to file periodic reports disclosing the funds they raise and spend. 2 U.S.C. 434(a). Candidates must identify, for example, all committees that give them contributions, and they must identify individuals who give them more than $200 in an election cycle. Additionally, they must disclose expenditures exceeding $200 per election cycle to any individual or vendor. If a government contractor that is permitted to establish an SSF

[1] The Act and Commission regulations require the reporting of the name, mailing address, occupation and name of employer of individuals whose contributions exceed $200 in an election cycle. 2 U.S.C. 431(13); 11 CFR 100.12. If the treasurer of a political committee can show that best efforts have been used to obtain, maintain and submit such information, the Committee's report will be considered to be in compliance with the Act. 2 U.S.C. 432(i); 11 CFR 104.7. Even when a report includes complete and accurate identifying information, it cannot ensure that all relationships between a given contributor and government contractor will be set forth.

does so, that SSF, like all SSFs, is a "political committee" within the meaning of the Act. 2 U.S.C. 431(4)(B). Accordingly, the SSF must report to the FEC all of its receipts (including contributions it receives) and all of its disbursements (including contributions and expenditures that it makes). 2 U.S.C. 434(b).

B. Independent Expenditures

An Independent Expenditure is an expenditure for a communication "expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party or its agents." 11 CFR 100.16(a); *see* 2 U.S.C. 431(17). Every person that is not a political committee and that makes Independent Expenditures aggregating in excess of $250 with respect to a given election in a calendar year must file a report with the Commission containing certain information. 11 CFR 109.10(b); *see* 2 U.S.C. 434(c)(1).

A government contractor may not make Independent Expenditures or contributions for the making of an independent expenditure, because it is prohibited from making contributions or expenditures pursuant to 11 C.F.R. 115.2(a). Persons or entities, such as SSFs, associated with a government contractor may make Independent Expenditures from their own funds, or contribute funds to another for the purpose of making Independent Expenditures.

Under Commission regulations the person reporting the Independent Expenditure must include: (1) the person's name, mailing address, occupation and the name of his or her employer, if any; (2) the identification (name and mailing address) of the person to whom the expenditure was made; (3) the amount, date and purpose of each expenditure; (4) a statement that indicates whether such expenditure was in support of, or in opposition to, a candidate, together with the candidate's name and office sought; and (5) a verified certification as to whether such expenditure was coordinated with a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents. 11 CFR 109.10(e).

The Act states that persons who make Independent Expenditures exceeding $250 per calendar year must report contributors that make contributions in excess of $200 in a calendar year. 2 U.S.C. 434(b)(3)(A); 434(c)(1). The Act goes on to state that such persons must also report the identification of any person who makes a contribution in excess of $200 "for the purpose of furthering an independent expenditure." 2 U.S.C. 434(c)(2)(C).

In *Citizens United*, the Court invalidated the statutory prohibition on the making of Independent Expenditures by corporations and labor organizations. However, the Court upheld the relevant disclosure requirements, stating that "The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." 130 S. Ct. at 916. In light of the Supreme Court's decision in *Citizens United*, it may be appropriate for the Commission to revisit its regulations regarding the reporting of Independent Expenditures.

Additionally, U.S. Representative Chris Van Hollen has filed a Petition for Rulemaking requesting that the Commission "conduct a rulemaking to revise and amend 11 C.F.R. § 109.10(e)(1)(vi), the regulation relating to disclosure of donations made to persons, including corporations and labor organizations, which make Independent Expenditures, in order to conform the regulation with the law." Petition at 1. The essence of Representative Van Hollen's petition is that, while the statute requires disclosure of each person who makes a contribution or donation of more than $200 to the person making the Independent Expenditures, the regulation requires disclosure only of those who make a contribution or donation "for the purpose of furthering the reported independent expenditure." *See* Petition at 3. According to the petition, the regulation is inconsistent with the statute. *Id.*

C. Electioneering Communications

An Electioneering Communication is, with certain exceptions, any broadcast, cable or satellite communication that (1) refers to a clearly identified candidate for Federal office; (2) is made within 60 days before a general, special, or runoff election for the office sought by the candidate or 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and (3) in the case of a communication that refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate. 2 U.S.C. 434(f)(3). All government contractors may now make Electioneering Communications because they are not, by definition, expenditures under the Act, 2 U.S.C. 434(f)(3)(B)(ii), and, after *Citizens United*, the specific ban on corporations making Electioneering Communications is no longer valid.

Every person who makes a disbursement for the cost of Electioneering Communications aggregating in excess of $10,000 in a calendar year must file a reporting statement. 2 U.S.C. 434(f)(1). These statements must include, among other things: (1) the identification of the person making the disbursement for the Electioneering Communication, as well as the identification of any person sharing or exercising direction or control over the activities of such person, (2) if the person is not an individual, the principal place of business of the person, (3) the amount of each disbursement over $200 for the Electioneering Communication, and (4) all identified candidates referred to in the Electioneering Communication as well as the election in which those candidates are running for office. 2 U.S.C. 434(f)(2)(A)-(D). If the Electioneering Communication was financed from funds in a segregated bank account, the person sponsoring the ad is required to disclose the names and addresses of contributors of $1,000 or more to that segregated bank account 2 U.S.C. 434(f)(2)(E). By contrast, if the Electioneering Communication was financed by general treasury funds of the entity making the ad, the entity is required to report all contributors of $1,000 or more to that entity. 2 U.S.C. 434(f)(2)(F).

In *Citizens United*, the Court also invalidated the statutory prohibition on the making of Electioneering Communications by corporations and labor organizations. Accordingly, corporations and labor organizations making Electioneering Communications are no longer subject to the restrictions in 11 CFR 114.15.[2] Because the Commission's regulations regarding

[2] The regulation at 11 CFR 114.15 was promulgated in 2007 in response to the Supreme Court's decision in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), which held that Electioneering Communications by corporations and labor organizations could not be prohibited unless they contain the functional equivalent of express advocacy.

the reporting of Electioneering Communications were promulgated to reflect the framework of the Supreme Court's decision in *FEC v. Wisconsin Right to Life*, these rules are in need of clarification in light of the *Citizens United* decision.

Current Commission regulations specify the contents of reports filed by all persons when they make Electioneering Communications. [3] The information that must be reported depends on who is making disbursements for Electioneering Communications and how that person pays for them. *See* 11 CFR 104.20 (c)(1)-(9).

Current paragraph (c)(7)(i) states that if a person pays for Electioneering Communications exclusively from a segregated bank account that accepts funds only from individuals who are United States citizens, or who are lawfully admitted for permanent residence under 8 U.S.C. 1101(a)(20), then the Electioneering Communications may contain the functional equivalent of express advocacy, and the person paying for the electioneering communication must report the contributors of $1,000 or more to that segregated bank account since the first day of the preceding calendar year.

Similarly, current paragraph (c)(7)(ii) states that if a person paying for Electioneering Communications does so solely from a segregated bank account established to pay for Electioneering Communications that do not contain the functional equivalent of express advocacy, then the person paying for the electioneering communication must report contributors whose donations aggregated $1,000 or more since the first day of the preceding calendar year. Current paragraph (c)(7)(ii) differs from current paragraph (c)(7)(i) in that the segregated bank account is not limited to donations solely from individuals.

Current paragraph (c)(8) requires the reporting of the name and address of each person who donated an amount aggregating $1,000 or more within a certain time frame to the person making the electioneering communication if (1) the electioneering communication was not funded exclusively by one of these segregated bank accounts described in paragraph (c)(7), and (2) was not made by a corporation or labor organization pursuant to 11 CFR 114.15.

For Electioneering Communications made by corporations and labor organizations pursuant to 11 CFR 114.15, the rule at 11 CFR 104.20(c)(9) currently states that information about donors must be reported only if the donations aggregating to $1,000 or more were "made for the purpose of furthering Electioneering Communications." 11 CFR 104.20(c)(9).

The adequacy of the Commission's regulations regarding the disclosure of Electioneering Communications have been challenged and are likely to remain in dispute for the near future.

Following the Supreme Court's decision in *Citizens United*, this exception is superfluous. The Commission has received a petition for rulemaking from the James Madison Center proposing the elimination of several provisions implementing the statutory prohibition on Independent Expenditures and Electioneering Communications by corporations and labor organizations, including 11 CFR 114.15.

[3] Political committees do not file these reports because such spending by political committees is reported as an expenditure. 2 U.S.C. 434(f)(3); *see also* 11 CFR 104.20(b).

The Commission has recently been sued by Representative Chris Van Hollen regarding paragraph (c)(9) of the regulation. Representative Van Hollen's lawsuit alleges that "[t]he challenged regulation, 11 C.F.R. § 104.20(c)(9), is arbitrary, capricious, and contrary to law because it is inconsistent with a provision of the Bipartisan Campaign Reform Act ('BCRA') – BCRA § 201, codified at 2 U.S.C. § 434(f) -- that the regulation purports to implement. As a consequence, the regulation has frustrated the intent of Congress by creating a major loophole in the BCRA's disclosure regime by allowing corporations, including non-profit corporations, and labor organizations to keep secret the sources of donations they receive and use to make 'electioneering communications.'" Complaint at 1.

III. The Draft Executive Order

As requested, the relationship between the requirements of the Act and those that appear to be required by the Draft EO will be addressed. At the outset, the Draft EO provided by the Committees is not final, not signed by the President, and is subject to change at any point. Accordingly, any comments on the Draft EO are necessarily limited to the existing draft and may be inapplicable to any revised version.

Moreover, the ability to determine the scope of any regulatory overlap is limited by the fact that the Draft EO, if adopted, requires the Federal Acquisition Regulatory Council to provide further guidance on its implementation. *See* Draft Sections 2, 4. Those regulations would presumably include detail about the specifics of the certification required and the necessary disclosure, including to what entity, frequency and form. Without the implementing regulations, the manner by which persons seeking Federal contracts would disclose and certify their political activity cannot be known with certainty. For example, it is not clear whether the Draft EO requires those seeking Federal contracts to make the disclosure to the entity with contracting authority or to data.gov, or whether disclosures that have been made via existing requirements(e.g., to the FEC by the recipient committees in the case of contributions, or by the entity making Electioneering Communications or Independent Expenditures) would suffice. In addition, because the Draft EO is not specific as to who is to make the certification, it is possible that an agency's contracting officer would be required to make the certification that the disclosures had been made prior to making an award. Again, any regulations implementing the Draft EO would presumably set out the disclosure and certification procedure.

Certainly some of the information that the Draft EO requires to be disclosed is already publicly available. However, as mentioned previously, existing reporting will not necessarily reveal the connections between those engaging in political activity and the government contractors with which they are associated. Additionally, one potential effect of the Draft EO is that it could provide for a consolidated location for this information, simplifying public access to the data.

A. Time Frame

As noted above, under the Act and Commission regulations, Federal contractors are prohibited from making contributions from the earlier date of the commencement of negotiations or the sending out of requests for proposals and later date of the completion of performance of

the contract or termination of negotiations for the contract. The Draft EO does not prohibit any political activity and narrowly focuses on reporting and thus does not directly intersect with the statutory prohibition. However, the timeframe for disclosure of contributions in the Draft EO is not coterminous with the prohibition contained the Act. The Draft EO requires disclosure of contributions beginning two years from the submission of an offer. Of course, at some point, all successful bidders who may have been required to report under the Draft EO will become subject to the Act's prohibition, because it looks back to the beginning of the contracting process. Nonetheless, in many cases there may be a period where entities covered by the EO will be subject to its reporting requirements prior to the point that the prohibitions in the Act become applicable to it. Finally, it bears mentioning that while the reporting provisions of the Draft EO and the prohibition in the Act are in place for specified periods of time, the general reporting requirements of the Act are ongoing.

B. Contributions and Expenditures

The Draft EO Section 2(a) states that the disclosure shall include all contributions or expenditures to, or on behalf of, Federal candidates, parties or party committees made by the biding entity, its directors or officers, or any affiliates or subsidiaries within its control. Under current law, any contribution to a candidate committee, party committee or political committee over $200 would be reported to the FEC by the recipient committee. Expenditures on behalf of Federal candidates or committees that are made in coordination with them may, under some circumstances, be considered in-kind contributions under the Act and, if so, would be reported by the recipient as a contribution. The Act currently focuses reporting obligations in these instances on the recipient of the contributions rather than the contributors. As explained above, those making Independent Expenditures and Electioneering Communications are required to report them to the FEC.

C. Contributions to Third Party Entities

The Draft EO also addresses some political spending that is presently not reportable to the Commission. Section 2(b) of the Draft EO states that disclosure shall include: Any contribution made to third party entities with the intention or reasonable expectation that parties would use those contributions to make Independent Expenditures or Electioneering Communications. The Act requires political committees to report all contributions and expenditures. To the extent the third party entities identified in Section 2(b) are political committees under the Act, contributions to them would be reported to the FEC by the committee. To the extent that the third party entities are not political committees, as defined by the Act, contributions to such entities may not be reported to the FEC, outside the circumstances described above with respect to Electioneering Communications and Independent Expenditures. Disclosure of contributions to third party entities that are not political committees would represent more comprehensive and thorough disclosure of political spending than currently required by the Act or Commission regulations.

IV. Conclusion

Thank you for the opportunity to provide a statement regarding the existing framework for government contractor contributions and disclosure of contributions. The Commission stands ready to assist the Committees with any additional information it may be able to provide.