FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

The Honorable Chairman Darrell E. Issa, Ranking Member Elijah Cummings, and
Members of the House Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

The Honorable Chairman Sam Graves, Ranking Member Nydia Velázquez, and
Members of the House Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515

May 10, 2011

Dear Chairmen Issa and Graves, Ranking Members Cummings and Velázquez, and Committee Members,

Thank you for the invitation to provide this statement on the White House's proposed Executive Order on "Disclosure of Political Spending by Government Contractors." I am pleased to submit my comments along with those of my colleague, Chair Cynthia Bauerly, with whom I have served on the Federal Election Commission since we both joined the agency in July 2008. The following comments may, in certain respects, supplement those of my colleague; at other points my remarks may present an alternative view. The complexities of campaign finance law and the First Amendment invariably result in differing viewpoints.

From my perspective as an FEC commissioner, the draft Executive Order may introduce additional complexity to an area of the law that some would argue already places undue burdens on core First Amendment rights. As things stand, civic-minded citizens and groups have to contend with at least 171 pages of statute, 366 pages of regulations, and thousands of pages of advisory opinions.

Addressing the reporting provisions in the order in which they are presented in the draft Executive Order, the proposal would add to this complex body of law and:

- Create duplicative reporting that may confuse not only firms competing to do business with the federal government, but also for government agency contracting officials;
- Set forth an additional, vague, and potentially unconstitutional reporting requirement; and
- Encroach upon the exclusive domain of the Federal Election Campaign Act of 1971, as amended (the "Act," or the "FECA").

**The Draft Executive Order May Impose Burdensome and Redundant Reporting Requirements**

To the extent the following contributions aggregate in excess of $5,000 during any calendar year, Section 2 of the draft Executive Order would require prospective contractors to report:

> (a) All contributions or expenditures to or on behalf of federal candidates, parties or party committees made by the bidding entity, its directors or officers, or any affiliates or subsidiaries within its control; and
>
> (b) Any contributions 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 requirements in Section 2(a) of the Executive Order may, to a large extent, impose additional and redundant reporting burdens on prospective contractors for information on certain contributions that is already readily available on various FEC disclosure reports.

Under the FECA and the FEC's implementing regulations, all political committees (including candidate committees, political party committees, "separate segregated funds" of unions and corporations, and "non-connected" committees that are formed separately from any union or corporation) already must report and itemize all contributions they receive from individuals aggregating in excess of $200 per calendar year, as well as all contributions they receive from any other political committees.[1] This itemized reporting includes, among other information, the names of individual contributors' employers. Moreover, in two advisory opinions issued last year, the FEC has extended these reporting requirements to the unlimited contributions, whether by individuals, unions, or corporations, made to independent-expenditure-only political committees that arose after the Supreme Court's *Citizens United* decision (so-called "Super PACs").[2]

Additionally, to the extent the draft Executive Order's requirement to report contributions made by a bidding entity's "affiliates or subsidiaries" may include whatever separate segregated fund ("SSF," or "PAC") it has formed, SSFs are already required under existing law to report all

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[1] 2 U.S.C. § 434(b)(3); 11 C.F.R. § 104.8.

[2] FEC Advisory Opinions 2010-09 (Club for Growth) and 2010-11 (Commonsense Ten). It has been suggested that, after *Citizens United*, although corporations are no longer prohibited from making expenditures, Section 441c(a) of the Act nevertheless continues to prohibit government contractors from making any contributions "for any political purpose," which may include contributions to independent-expenditure-only committees. Additionally, 11 C.F.R. § 115.2. which the FEC has not yet revisited, continues to prohibit government contractors from also making any "expenditures . . . for any political purpose." However, if government contractors continue to be prohibited from making either contributions or expenditures for any political purpose, then much of the proposed Executive Order would be moot, as the spending it purports to require to be reported would be illegal in the first instance. For the purposes of this memorandum, we assume, as the proposed Executive Order apparently does, that government contractors are no longer prohibited from making political expenditures. And if government contractors may fund independent expenditures directly, then it stands to reason that they also may make independent expenditures indirectly by funding other entities that sponsor such communications.

of their disbursements that aggregate in excess of $200 per calendar year to any recipient.[3] Furthermore, all sponsors of electioneering communications aggregating in excess of $10,000 per calendar year already must report detailed information about all contributors who gave an aggregate of $1,000 or more in the preceding calendar year "for the purpose of furthering electioneering communications."[4] Similarly, individuals or entities that are not political committees[5] making independent expenditures exceeding $250 per calendar year already must report each "contribution in excess of $200" given to the sponsor "for the purpose of furthering the reported independent expenditure."[6]

Thus, with respect to direct contributions to candidate- , party- , and other political committees, and with respect to disbursements for independent expenditures and electioneering communications, much of the draft Executive Order appears to require bidding entities to gather independently information that is already reported under existing law on various FEC reports, thereby introducing additional complexity to the bidding process. Not only that, it also would require firms to canvass all of their officers and directors for information on political contributions that those individuals make with their personal funds, and would essentially put firms in the uncomfortable position of monitoring their directors' and officers' personal political activities. Moreover, to the extent this requirement apparently is intended to ascribe to the firms the personal political activities of their directors and officers,[7] it blurs the distinction heretofore maintained in the Act and FEC regulations (and, in fact, strengthened by the ban on so-called "soft money" under the Bipartisan Campaign Reform Act of 2002) that direct contributions to candidate and party committees by individuals are to be made strictly in their personal capacities, and not on behalf of their employers.[8]

The following chart summarizes the existing FECA and FEC reporting requirements, and how Section 2(a) of the draft Executive Order may impose additional and redundant reporting burdens on prospective contractors:

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[3] 2 U.S.C. § 434(b)(6)(B). Of course, the recipients of SSF contributions also are required to report such contributions. *See supra* note 1.

[4] 2 U.S.C. § 434(f)(2); 11 C.F.R. § 104.20(b). It has been alleged that the Commission's regulation does not properly implement the statute in that the former introduces a "state of mind" qualification not contained in the latter. *Van Hollen v. Federal Election Commission*, No. 1:11-cv-00766-ABJ (D.D.C. filed Apr. 21, 2011), Complaint at ¶ 4. However, Section 434(f)(2) of the Act requires the reporting of "funds contributed" and "all contributors," and Section 431(20)(8)(A) of the Act in turn defines a "contribution" generally as anything "made by any person *for the purpose of* influencing any election for Federal office." (Emphasis added.) Accordingly, the Commission's regulation faithfully follows the statute.

[5] As discussed above, political committees must itemize all contributions aggregating in excess of $200 per calendar year from any contributor, regardless of their purpose.

[6] 2 U.S.C. § 434(c); 11 C.F.R. § 109.10(e)(1)(vi).

[7] As the draft Executive Order states, it is intended to address the purported "perception that political campaign spending provides enhanced access to or favoritism in the contracting process." In other words, the proposal is premised on the idea that the personal contributions of a firm's directors and officers are ascribed to the firm.

[8] Section 441f of the Act strictly prohibits anyone, including employees, from acting as "straw contributors" for anyone else.

**Figure 1 – Draft Executive Order's potential reporting burdens for bidding entities**

| Spending type | Existing reporting | Draft Executive Order reporting | Analysis |
|---|---|---|---|
| Direct contributions to candidate-, party-, and other political committees | These contributions are prohibited[9] | | |
| Direct contributions to independent-expenditure-only committees | All contributions aggregating in excess of $200 per calendar year to a recipient<br><br>(reported by recipients) | All contributions aggregating in excess of $5,000 per calendar year to a recipient by bidding entity<br><br>(reported by bidding entity) | Executive Order may create additional reporting burden for bidding entities concerning mostly duplicative information |
| Direct contributions to candidate-, party-, and other political committees by bidding entity's directors and officers | All contributions aggregating in excess of $200 per calendar year to a recipient<br><br>(reported by recipients) | All contributions aggregating in excess of $5,000 per calendar year to a recipient by bidding entity's directors and officers<br><br>(reported by bidding entity) | Executive Order may create additional reporting burden for bidding entities concerning mostly duplicative information |
| Direct contributions to candidate-, party-, and other political committees by bidding entity's PAC | (1) All contributions aggregating in excess of $200 per calendar year to a recipient (reported by recipients)<br><br>(2) All disbursements aggregating in excess of $200 per calendar year made to a recipient (reported by PAC) | All contributions aggregating in excess of $5,000 per calendar year to a recipient by bidding entity's PAC (assuming reference to "affiliates or subsidiaries" in EO includes PACs)<br><br>(reported by bidding entity) | Executive Order may create additional reporting burden for bidding entities concerning mostly duplicative information |
| Independent expenditures ("IEs") made by bidding entity | All IEs exceeding $250 per calendar year<br><br>(reported by bidding entity) | All "expenditures... on behalf of federal candidates… or party committees" aggregating in excess of $5,000 per calendar year with respect to a beneficiary<br><br>(reported by bidding entity) | Executive Order may create additional reporting burden for bidding entities concerning mostly duplicative information |
| Electioneering communications ("ECs") made by bidding entity | All ECs exceeding $10,000 per calendar year<br><br>(reported by bidding entity) | All "expenditures... on behalf of federal candidates… or party committees" aggregating in excess of $5,000 per calendar year with respect to a beneficiary<br><br>(reported by bidding entity) | Executive Order may create additional reporting burden for bidding entities concerning mostly duplicative information |
| Contributions to non-political committee entities that make IEs or ECs | All contributions aggregating in excess of $1,000 in the preceding calendar year for the purpose of furthering ECs; in excess of $200 for the purpose of furthering the reported IEs<br><br>(reported by recipients) | All contributions "with the intention or reasonable expectation" that recipient would use those contributions to make IEs or ECs<br><br>(reported by bidding entity) | See Figure 2(b) below |

[9] 2 U.S.C. §§ 441b; 441c(a).

**The Draft Executive Order May Require Additional Disclosure Under Unprecedented and Confusing Standards**

While Section 2(a) of the proposed Executive Order may impose additional and redundant reporting burdens, Section 2(b) appears to create unprecedented standards for reporting in two respects, both of which may introduce confusion for bidding entities.

First, the FECA defines an "expenditure" generally as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office."[10] Neither the Act nor FEC regulations currently requires entities that are not political committees to report their general political "expenditures."

Moreover, it is not clear there is constitutional authority to apply such a requirement to entities that are not political committees. In the landmark case *Buckley v. Valeo*, the Supreme Court held that:

> [W]hen the maker of the expenditure is not within these categories - when it is an individual other than a candidate or a group other than a "political committee" - the relation of the information sought to the purposes of the Act may be too remote. To insure that the reach of 434 (e) is not impermissibly broad, we construe "expenditure" for purposes of that section in the same way we construed the terms of 608 (e) - to reach only funds used for communications that expressly advocate 108 the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.[11]

In other words, the Court limited the reporting requirement applicable to individuals and groups that are not candidates and political committees only to the communications the FECA calls "independent expenditures."[12] Similarly, in *McConnell v. FEC*, the Supreme Court upheld the constitutionality of the Bipartisan Campaign Reform Act's electioneering communications reporting requirements for outside groups because, unlike the definition of "expenditure," the statute's definition electioneering communication "applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners. These components are both easily understood and objectively determinable."[13]

If Section 2(b) of the draft Executive Order – which applies to entities that are neither candidates nor political committees – were to be read constitutionally consistent with *Buckley* and *McConnell* by narrowing the reporting requirement only to "independent expenditures," then that would simply add a layer of redundancy to existing law, as all independent expenditures

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[10] 2 U.S.C. § 431(9)(A)(i).
[11] *Buckley v. Valeo*, 424 U.S. 1, 80 (1976).
[12] 2 U.S.C. § 431(17).
[13] 540 U.S. 93, 194 (2003).

exceeding $250 per calendar year are already required to be reported, regardless of the type of entity that sponsors them.[14] If, on the other hand, the draft Executive Order purports to require the reporting of "expenditures" in some sense other than that defined by the FECA and *Buckley*, then bidding entities would have to familiarize themselves with a new category of political spending that heretofore has not existed under campaign finance law.

Secondly, Section 2(b) of the draft Executive Order introduces a new standard for bidding entities to report their contributions to third-party entities if they have the "intention or reasonable expectation" that those contributions would be used to make independent expenditures or electioneering communications. As noted above, current law requires all sponsors of electioneering communications and independent expenditures exceeding certain monetary thresholds to report the sources of all contributions "for the purpose of furthering electioneering communications" or "for the purpose of furthering the reported independent expenditure."[15] Thus, the draft Executive Order creates a new subjective intent standard that has never been applied before, and would require not only bidding entities, but also whatever governmental entity or entities are charged with enforcing the new reporting requirements, to determine the circumstances under which this new subjective intent standard is triggered.[16]

The following charts illustrate how Section 2(b) of the draft Executive Order may create additional, unprecedented, confusing, and potentially unconstitutional standards for reporting by bidding entities:

**Figure 2(a) – Draft Executive Order's potentially unprecedented new reporting burdens for "expenditures"**

| Existing reporting requirements | Executive Order reporting requirement | Analysis |
|---|---|---|
| Independent expenditures, electioneering communications and direct contributions<br><br>(reported by bidders making such disbursements; see also Figure 1 above) | All "expenditures... on behalf of federal candidates… or party committees" aggregating in excess of $5,000 per calendar year with respect to a beneficiary<br><br>(reported by bidders making such "expenditures") | (1) To the extent "expenditures" is inconsistent with the statutory definition, as limited by *Buckley*, the draft Executive Order introduces an unprecedented and undefined new concept in campaign finance law;<br><br>(2) To the extent "expenditures" is understood to be constitutionally consistent with *Buckley*, this is merely duplicative with existing IE reporting requirements. |

[14] *See supra* note 6. Even when narrowed to independent expenditures containing express advocacy, the FEC and numerous state governments have had considerable trouble properly construing express advocacy. *See, e.g., Virginia Society for Human Life. Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001); *Maine Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8 (D. Maine), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996). *cert. denied.* 522 U.S. 810 (1997); *Right to Life of Dutchess Co., Inc. v. FEC*, 6 F. Supp.2d 248 (S.D.N.Y. 1998). *See also Ctr. for Individual Freedom, Inc. v. Ireland*, 2008 WL 4642268 (S.D.W.Va.), *amended by* 2009 WL 2009 WL 749868 (S.D.W.Va): *North Carolina Right to Life. Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008): *Iowa Right to Life Comm., Inc. v. Williams*, 87 F.3d 963 (8th Cir. 1999).

[15] *See supra* notes 4 and 6.

[16] The proposed Executive Order would task the Federal Acquisition Regulatory Council, which is organized under the Office of Management and Budget, with adopting rules and regulations and to issue orders to carry out the Executive Order, and would require each contracting department or agency to "cooperate with the FAR Council and provide such information and assistance as the FAR Council may require in the performance of its functions under this order."

**Figure 2(b) – Executive Order's potentially unprecedented new reporting burdens for independent expenditures and electioneering communications**

| Existing reporting requirements | Executive Order reporting requirement | Analysis |
|---|---|---|
| All contributions aggregating in excess of $1,000 in the preceding calendar year "for the purpose of furthering electioneering communications," and in excess of $200 "for the purpose of furthering the reported independent expenditure"<br><br>(reported by the recipients of such contributions; see also Figure 1 above) | All contributions "with the intention or reasonable expectation" that recipient would use those contributions to make IEs or ECs<br><br>(reported by bidders making such contributions) | Draft Executive Order may create a new subjective standard that has never been applied before. |

## The Draft Executive Order May Encroach on the Exclusive Domain of the FECA

Congress evidently intended the FECA to serve as a comprehensive statutory scheme to occupy the field of federal election law. As the text of the statute itself states, the FECA and FEC regulations "supersede and preempt any provision of State law with respect to election to Federal office."[17] While this language could be construed to be limited to a statement about preemption of state law, other provisions of the FECA and relevant court decisions suggest Congress also intended the FECA and the FEC specifically to serve as the sole legal authority in this area.

As the Act also states: "The [FEC] shall administer, seek to obtain compliance with, and formulate policy with respect to this Act . . . The [FEC] shall have exclusive jurisdiction with respect to the civil enforcement of such provisions."[18] As Justice Byron White noted, "The reference to 'exclusive' was designed to centralize all *governmental* enforcement authority in the FEC."[19] Thus, in *Galliano v. United States Postal Service*, where the Postal Service sought to regulate the names and disclaimers used by organizations soliciting political contributions by mail, the D.C. Circuit held the FEC was the "exclusive arbiter" of such questions.[20] "To permit the Postal Service to base findings of false representation on a political committee's name and disclaimers that are consistent with FECA requirements would defeat the substantive objective of that Act's first-amendment-sensitive provisions," the court stated.[21]

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[17] 2 U.S.C. § 453. *See also* H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974) ("[T]he Federal law is construed to occupy the field with respect to elections to federal office and . . . the Federal law will be the sole authority under which such election will be regulated."; H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 69 (1974) ("Federal law occupies the field with respect to . . . the source of campaign funds in federal races [and to] the conduct of Federal campaigns.").

[18] 2 U.S.C. § 437c(b)(1).

[19] *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 505 (J. White, dissenting) (emphasis in original).

[20] 836 F.2d 1362 (D.C. Cir. 1988).

[21] *Id.* at 1370.

The draft Executive Order cites the Federal Property and Administrative Services Act ("Procurement Act"), 40 U.S.C. § 101 *et seq.* as the legal authority pursuant to which it purports to impose these additional reporting requirements for political spending by bidding entities. However, the Procurement Act does not address political spending – including by government contractors – or the reporting thereof.[22] In fact, not surprisingly, it is the FECA which regulates political spending by government contractors.[23] Moreover, the FECA and implementing FEC regulations have provisions which are quite specific about the reporting of political contributions, electioneering communications, and independent expenditures made by all individuals and entities, including government contractors.[24] Applying the reasoning in *Galliano*, the Procurement Act, in contrast to the FECA, also was not promulgated with First Amendment sensitivities in mind.

In light of these considerations, the Executive Order's reliance on the Procurement Act to require additional reporting of political activities may conflict with the FECA's exclusive jurisdiction in this area.

**Conclusion**

The draft Executive Order appears to have a substantial nexus with existing campaign finance law administered by the FEC and, as discussed above, may encroach on the exclusive domain of the FECA. On a practical level, the draft Executive Order appears to impose additional burdens on bidding entities. In some respects, these burdens may be redundant with existing FEC reporting requirements while, in other respects, they may apply existing campaign finance law concepts in an unprecedented manner. Either way, the proposal introduces additional complexity and uncertainty to an already confusing area of the law governing the exercise of core First Amendment rights.

Thank you once again for the invitation to provide my input regarding this matter. Please do not hesitate to contact me or any members of my staff at (202) 694-1045 if you have any questions.

Sincerely,

Caroline C. Hunter
Vice Chair, Federal Election Commission

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[22] Section 31.205-22(a) of the Federal Acquisitions Regulation prohibits government contractors from counting as part of their reimbursable costs any expenses for any "attempts to influence the outcomes of any Federal, State, or local election," as well as "[e]stablishing, administering, contributing to, or paying the expenses of a political party, campaign, political action committee, or other organization established for the purpose of influencing the outcomes of elections." However, the purpose of the FAR provision is to protect government funds from being used for political activities, and is distinguishable from the proposed Executive Order, which addresses political spending by government contractors' own funds, as well as the personal funds of their directors and officers.

[23] 2 U.S.C. §§ 441c(a) and 441i(a).

[24] *See supra* notes 2, 4, 5, and 7.