May 29, 2015

Submitted by email to ContractorPetition@fec.gov

Amy L. Rothstein
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Comments on REG 2014-09— Rulemaking Petition: Federal Contractors

Dear Ms. Rothstein:

These comments are submitted jointly by the Campaign Legal Center (CLC) and Democracy 21 in support of the petition filed by Public Citizen asking the Federal Election Commission (FEC) to revise the regulations found at 11 C.F.R. § 115.2, which prohibit federal contractors from making contributions or expenditures to any political party, political committee, or federal candidate, or to any person for any political purpose or use. This regulation implements the statutory prohibition on federal contractors found at 52 U.S.C. § 30119 (formerly 2 U.S.C. § 441c). We urge the FEC to initiate a rulemaking for the purpose of adopting rules that identify specific factors for determining whether entities of the same corporate family are distinct business entities for purposes of the prohibition on contributions by Federal contractors. 80 Fed. Reg. 16,595 (March 30, 2015).

It has long been recognized at the federal, state and local levels of government that political contributions made by government contractors present a genuine danger of real and apparent corruption. And there is no doubt that the danger still exists. *See, e.g.*, *Green Party of Conn. v. Garfield*, 616 F.3d 189 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 3090 (2011) and *Yamada v. Weaver*, 872 F. Supp. 2d 1023 (2012), *aff'd in part, rev'd in part, Yamada v. Snipes*, Nos. 12–15913, 12–17845, 2015 WL 2384944 (9th Cir. May 20, 2015). Therefore, it is imperative that the FEC's regulations implement the statutory prohibition on government contractors in a meaningful and effective manner. Unfortunately, the FEC's current regulations, as applied by the Commission, undermine rather than effectively implement the prohibition with regard to corporate contractors.

In MUR 6726 (Chevron), the FEC applied the regulations in a manner that allows a corporate family that includes a government contractor to make contributions for independent expenditures as long as the contributions come from a parent, child or sibling corporation that is separately incorporated. The fact that the government contractor and the contributing company are commonly controlled, share directors and officers and form one business entity for all practical purposes is apparently irrelevant to the FEC, even though to all other outside parties, including the recipient of the contribution, the contribution is seen as coming from one business. This application of the statutory government contactor ban is a classic example of putting form over substance and allows easy evasion of the ban on contributions by government contractors.

Furthermore, it ignores the longstanding rule requiring that affiliated corporations be treated as a single entity.

Petitioners correctly point out that "[u]nder a variety of laws and in many contexts, federal regulators and the courts have established reasonable standards for determining whether affiliated corporate entities are treated as a single business enterprise subject to common regulation." Petition at 5. In fact, the campaign finance laws do so as well. In order to prevent the circumvention of the limits and prohibitions through the use of separate legal entities under common control, the Federal Election Campaign Act of 1971, as amended, 52 U.S.C. § 30101, et seq. (FECA), provides that "all contributions made by political committees established or financed or maintained or controlled by any corporation, . . . including any parent, subsidiary, branch, division, department, or local unit of such corporation . . . shall be considered to have been made by a single political committee . . . ." 52 U.S.C. § 30116(a)(5).

Likewise, the FEC's regulations repeat the statutory language and then provide a long detailed list of factors that will be considered when determining whether two entities are affiliated, *i.e.*, to determine whether the relationship between the two organizations is such that they should be treated as one. 11 C.F.R. § 100.5(g). This non-exhaustive set of factors includes whether the relationship involves:

- Controlling interest in the voting stock or securities;
- The authority or ability to direct or participate in the governance through provisions of constitutions, bylaws, contracts, or other rules, or through formal or informal practices or procedures;
- The authority or ability to hire, appoint, demote or otherwise control the officers, or other decision-making employees;
  Common or overlapping officers or employees indicating a formal or ongoing relationship; and
- The provision of funds in a significant amount or on an ongoing basis.

11 C.F.R. 100.5(g)(4). Therefore, FECA and the FEC's regulations look to the substance of the relationship between two entities, and beyond the formality of whether two entities are separately incorporated, in applying the law's limits and prohibitions.

While the ban on contributions by federal contractors dates back over 70 years, the FEC did not have to directly apply the concept of affiliation in the context of government contractors until recently. Until 2010, FECA prohibited virtually all corporations, including government contractors, from making any contributions or expenditures in connection with a federal election. 52 U.S.C. § 30118(a). Therefore, the prohibition on contributions and expenditures by government contractors who were corporations was, for most purposes, coextensive with the general ban on corporate contributions and expenditures. In fact, both the general ban on corporate contributions and expenditures and the government contractor ban, as applied to corporations, allowed corporations, including government contractors, to establish separate

segregated funds (SSFs), through which individuals who are part of the corporation's restricted class could make political contributions. Thus, the affiliation rules applied to corporate government contactor activity through SSFs, just as it applied to other corporations.

Then in *Citizens United* v. *FEC*, 588 U.S. 310 (2010), the Supreme Court held that corporations had a right to make independent expenditures in Federal elections, a ruling that was extended to allow corporations to make contributions to independent expenditure only committees. But the FEC has said that corporations that are government contractors still may not make contributions to such committees. As the FEC said after *Citizens United*, "[a] political committee that makes only independent expenditures may solicit and accept unlimited contributions from individuals, corporations, labor organizations, and other political committees, but not from . . . Federal contractors." Advisory Opinion 2011-11 (Colbert) at 4 (emphasis added).

Therefore, the issue of when two corporations are affiliated for the purposes of FECA has become relevant for government contractors in a context that does not apply to other corporations making contributions to fund independent expenditures. It would make no sense to require two affiliated corporations to be considered one entity for the purposes of the limits on contributions to candidates or political committees made by their SSFs, but not for the purpose of enforcing the ban on contributions of corporate treasury funds by government contractors to independent expenditure only committees.[1] The potential for evasion is the same—so the same affiliation rules should apply in both instances.

Allowing a corporation affiliated with a government contractor to make a contribution or expenditure based solely on the fact that they are separately incorporated, when one corporation owns and controls the other, is to allow wholesale evasion of the law. This concept has been long-recognized in other areas of FECA and the regulations should be revised to explicitly incorporate this concept into the government contractor regulations.

The Commission should undertake the rulemaking sought by the petition to address this important matter.

Sincerely,

/s/ J. Gerald Hebert
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Campaign Legal Center

/s/ Fred Wertheimer
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Democracy 21

[1] Even in the context of the prohibition on foreign national donations and expenditures in federal state and local elections, *see* 52 U.S.C. § 30121, the Commission looks beyond the formality of separate incorporation to determine whether a domestic subsidiary of a foreign national corporation is covered by the rules applicable to the foreign national and prohibits all foreign national involvement in the financing or decision-making regarding the domestic subsidiary's political activity. *See, e.g.*, Advisory Opinion 2000-17 (Extendicare); Advisory Opinion 1989-29 (GEM).

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