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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

A Game-Changer For Political Giving By Contractors

Law360, New York (May 25, 2011) -- In what appears to have been a trial balloon of sorts, a draft White House executive order concerning political contributions by federal government contractors has been circulating among political lawyers and journalists in Washington. If issued by the president in its current form, the draft executive order could have an immediate effect on the willingness of major federal contractors to support political advertising campaigns by trade associations and other advocacy groups. The leaked document has kicked up a significant dust storm of controversy, including opposition from influential elements of the business community such as the U.S. Chamber of Commerce.

The draft executive order, as currently formulated, would require all firms that submit bids for federal contracts to disclose certain federal contributions and expenditures made within the previous two years. Certification that proper disclosure had been made would be a condition of awarding a federal government contract.

Disclosure would be required for contributions by the bidding firm, its directors or officers, and any "affiliates or subsidiaries within its control." Contributions or expenditures to, or on behalf of, federal candidates, political action committees and political party committees would all be subject to disclosure.

None of that does much to change the existing disclosure regime under federal election laws, which already requires disclosure by campaigns and other political committees of most contributions. The potential game changer is the draft executive order's requirement that bidders disclose contributions made to "third-party entities with the intention or reasonable expectation" that such third parties would use the contributions to make "independent expenditures" or "electioneering communications." These reporting requirements for third-party contributions go far beyond what is required by existing federal disclosure rules.

"Independent expenditures" are television, radio or print advertisements that expressly advocate for the election or defeat of a federal candidate but are not coordinated with a candidate or political party. A typical example would be an advertisement asking voters to "vote for" or "vote against" a particular candidate.

An “electioneering communication” is a broadcast advertisement that airs within 30 days of a primary election or within 60 days of a general election, refers to a federal candidate, and is targeted to that candidate’s electorate. Trade associations, and many other kinds of tax-exempt advocacy organizations, make use of these tools to help advance their causes and shape the issues debate during election seasons.

A number of factors have converged in recent years to encourage trade associations and other advocacy organizations to fund election related advertising. Two U.S. Supreme Court decisions encouraged this trend. The first, McConnell v. FEC, 540 US 93 (2003), banned corporate donations to national political party committees like the Republican National Committee and Democratic National Committee. This diverted significant resources away from political parties and toward outside interest groups.

The second, more recent, decision was Citizens United v. FEC, 558 US 50 (2010). In Citizens United, the Supreme Court made clear that corporations, including incorporated trade associations, can spend unlimited amounts of corporate treasury funds on independent expenditures. Very few corporations have chosen directly to exercise this right under Citizens United. Instead, most election-related advertising is conducted by trade associations and by so-called social welfare organizations that are organized under Section 501(c)(4) of the Internal Revenue Code.

Campaign finance reform advocates have portrayed Citizens United as opening up the flood gates to corporate money in elections, and they have worked hard to find a legislative or administrative mechanism to limit the impact of the Supreme Court’s decision. Their first attempt was the DISCLOSE Act — formally the Democracy Is Strengthened by Casting Light On Spending in Elections Act.[1]

This bill, which died in the U.S. Senate, would have required extensive disclosure of contributions that were used to fund political advertising. The DISCLOSE Act was the subject of intense lobbying, both for and against it, and there is likely to be a similar level of advocacy by federal contractors concerning the draft executive order.

Because Congress failed to enact the DISCLOSE Act, opponents of the act have portrayed the draft executive order as an attempt to make an end-run around Congress and to enact the DISCLOSE Act’s key provisions by presidential fiat. The draft executive order does not include the kind of complex regulatory regime that the DISCLOSE Act would have imposed on corporations and trade associations. But it does appear to share with the DISCLOSE Act the intent of discouraging corporate money in elections, particularly where trade associations are the vehicle for election related advocacy.

The drafters of the executive order used the federal government’s role in administering government contracts as the legal hook on which to hang the president’s authority to regulate corporate campaign money. As a result, the executive order is more narrowly targeted than the DISCLOSE Act. Even so, there are many major corporations that are federal government contractors and would have to take into account the possible effect of any payment to a trade association or outside group for election related advertising on the company’s pending or proposed bids for federal contracts.

The draft executive order provides that the Federal Acquisition Regulation Council (FAR Council) would have the authority to adopt necessary rules, regulations and orders to carry out the executive order. If the draft executive order is signed, the FAR Council presumably would issue proposed amendments to the FAR in order to implement the executive order. In doing so, the FAR Council would need to address several issues that are left unresolved by the draft order.

Some key terms used in the draft are undefined. For example, it is unclear who or what will be considered "affiliates" of the bidding firm. Could affiliates include majority owners or investors? Which entities will be treated as affiliates that are "controlled" by the bidding firm? The FAR Council would also need to determine how and where contractors would disclose their contributions, and what the sanctions would be for those that fail to disclose, or inaccurately disclose, their contribution history.

The draft executive order is loosely modeled on certain state and local "pay to play" laws that regulate political contributions by state and local government contractors. In most cases, those state and local laws actually limit or ban contributions by contractors and some of their executives.

The draft executive order stops far short of such measures, focusing instead on disclosure. This limited scope may be intended to help ward off a constitutional challenge. Given the intense interest in the draft by the business community, however, there are likely to be a long series of challenges, initially through lobbying, and ultimately perhaps in the courts.

--By Robert K. Kelner, Covington & Burling LLP

Robert Kelner is a partner in Covington's Washington, D.C., office and chairman of the firm's election and political law practice.

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[1] H.R. 5175 and S. 3628.