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Campaign Finance

Proposed Executive Order Would Require Government Contractors To Report Political Spending




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A draft Executive Order circulating around Washington would require government contractors to publicly disclose their political contributions. In recent weeks, members of Congress and industry representatives have voiced sharp concerns with this proposal, including that the disclosure requirements would be burdensome for contractors, chill political speech, and create the appearance of partisanship in government contracting. Indeed, the House of Representatives passed legislation that would bar federal agencies from imposing such disclosure requirements on contractors, and similar legislation is pending in the Senate.[1]

If implemented, the draft Executive Order would require disclosure of contributions by an entity submitting a bid for a federal contract, by the entity's ''directors or officers,'' or by the entity's ''affiliates or subsidiaries.'' Contractors would be required to disclose direct contributions to political candidates and parties and, more significantly, contributions made to third parties with the intention or expectation that those third parties would use them to pay for election related advertising.

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Adding New Disclosure Obligations for Contractors.

The new disclosure obligations in the draft Executive Order are similar to those found in state ''pay-to-play'' laws that require disclosure of contributions by state government contractors and by their officers and affiliates.[2] State laws frequently also limit the amount of such contributions, but the draft Executive Order would not impose a similar limitation. The draft Executive Or-

[1] The legislative block to the proposed disclosure requirement is contained in the National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, which passed the House on May 26, 2011. On that same day, a group of Republican senators, including Minority Leader Mitch McConnell (R-Ky.), introduced similar legislation in the Senate, Keeping Politics Out of Federal Contracting Act of 2011, S. 1100.

[2] *See, e.g.*, Md. Code Ann. Elec. Law §§ 14-101–14-108; N.J. Stat. Ann. §§ 19:44A-20.14, -20.15, -20.26; 25 Pa. Cons. Stat. Ann. § 3260a.

der reasons that while contractors already are prohibited from making certain contributions, these new measures are necessary to address the perception that political campaign spending leads to favoritism in the contracting process.

While the proposed disclosure requirements are intended to ''increase transparency and accountability to ensure an efficient and economical procurement process,'' some industry groups and lawmakers believe that the requirements would in practice create new problems in government contracting. Representative Darrell Issa (R-Calif.), chairman of the House Committee on Oversight and Government Reform and one of the most outspoken critics of the draft Executive Order, recently noted that there is ''now bipartisan alarm on Capitol Hill that the proposed Executive Order runs afoul of the government's responsibility to keep federal procurement and contracting fair and unbiased.'' During a recent joint hearing before the House Committee on Small Business and the House Committee on Oversight and Government Reform, entitled ''Politicizing Procurement: Will President Obama's Proposal Curb Free Speech and Hurt Small Business?,'' some members of Congress and industry representatives expressed their concerns with the draft Executive Order. Among these concerns are that the proposed requirements would chill political speech and politicize the procurement process because agency officials involved in government contracting would have access to information regarding the political donations of bidding entities. Others voiced concern that the additional disclosure and certification requirements would be a substantial burden on contractors, especially small businesses, because contractors would be required to track and verify political spending from a variety of sources.

Members of Congress are also concerned that the order is an attempt to circumvent the legislature and impose requirements similar to those proposed in the Democracy Is Strengthened by Casting Light On Spending in Elections Act (''DISCLOSE Act''),[3] which Congress failed to pass in 2010. The proposed DISCLOSE Act was a response to *Citizens United v. Federal Election Commission*,[4] a Supreme Court decision from 2010 which held that independent political spending by corporations and unions for political ads is protected by the First Amendment. Although the DISCLOSE Act was passed by the House of Representatives, the Senate ultimately did not pass it.

Despite the opposition from industry and some members of Congress, the draft Executive Order has received support elsewhere. As reported by *Federal Contracts Report*, (95 FCR 482, 5/10/11), campaign reform groups have expressed support for the draft Executive Order. A May 4 letter to President Obama from a group of reform groups, liberal groups, and labor groups backed the draft Executive Order, stating that the order ''attacks the perception and reality of . . . 'pay-to-play' arrangements by shining a light on political spending by contractors.'' Among the signers of this letter were the Campaign Legal Center, Common Cause, Democracy 21, and Public Citizen.

[3] H.R. 5175 and S. 3628.
[4] 558 U.S. 50 (2010).

Disclosure of Recent Contributions or Expenditures. The draft Executive Order, as currently formulated, would impose several requirements.

- All entities submitting bids for federal contracts (no minimum stated) would be required to disclose certain contributions and expenditures made within the previous two years; certification that proper disclosure had been made would be a condition of award.
- Contributions by the bidding entity, its directors or officers, or any ''affiliates or subsidiaries within its control'' would have to be disclosed. As discussed below, the terms ''affiliates'' and ''subsidiaries'' would presumably be defined in implementing regulations.
- Contributions or expenditures to or on behalf of federal candidates, parties or party committees would have to be disclosed. Also covered would be 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.''[5] These reporting requirements for third-party contributions go beyond what is required by existing federal disclosure rules.
- Disclosure would be required when the aggregate amount of contributions and expenditures by the donors listed above exceeds $5,000 to a given recipient in a year.
- The data would be made publicly available on a federal government website, specifically at http://www.data.gov.
- The draft Executive Order would be effective immediately when signed by the president and would cover contracts resulting from solicitations issued on or after the effective date of action taken by the Federal Acquisition Regulatory Council to adopt appropriate rules.

FAR Council Would Carry Out the Executive Order and Address Unresolved Issues. The draft Executive Order provides that the FAR Council would have authority over this program and would 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 Federal Acquisition Regulation 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. Among those many issues are:

- *How will key terms be defined?* The draft Executive Order leaves several key terms undefined. For example, the order requires a bidding contractor to disclose political spending by ''any affiliates or subsidiaries within its control.'' But how will the FAR Council define ''affiliates'' and ''subsidiaries''? Will these terms include a contractor's majority owners or investors? What does it mean for an affiliate or subsidiary to be ''within'' an entity's ''control''? Will this mean that a parent corporation's contributions need not be reported by a subsidiary? How these key terms are defined would have a major impact on the scope of these new disclosure requirements.

[5] ''Electioneering communications'' include communications, such as television or radio advertisements, that air shortly before an election, refer to an identified candidate for federal office, and are targeted to the relevant electorate.

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■ *How will reporting be accomplished?* While the draft Executive Order mandates that contractors report their political spending, it does not indicate *how* or *when* contractors would report this information. For example, will reporting be accomplished through the Central Contractor Registration (''CCR'') database, the Online Representations and Certifications Application (''ORCA''), or some new reporting system? Will contractors be required to file regular (e.g., quarterly) reports of their contributions? Will contractors be given a grace period at the close of a particular reporting period to gather and aggregate the applicable data, or will the FAR Council require real-time reporting of contributions? The FAR Council would be charged with adopting a workable disclosure process.

■ *How will the FAR Council ease the administrative burden?* The draft Executive Order instructs the FAR Council to issue rules, regulations, and orders that ''minimize the costs of compliance for contractors'' and do ''not interfere with the ability of contractors or their officers or employees to engage in political activities'' permitted by law. How the FAR Council responds to this instruction could be vital for contractors, because the expansive scope of the disclosure requirements suggests that contractors could face significant administrative burdens and costs in tracking contributions from the various covered donors.

■ *Will there be sanctions for non-compliance?* The draft Executive Order provides that the FAR Council would adopt rules enforcing the disclosure requirements. These rules could impose sanctions on contractors for non-compliance and for making false certifications.

Practical Concerns for Contractors. If the president signs this Executive Order, it will present some familiar problems for clients that are currently covered by state pay-to-play laws. In some respects, the federal rules will be easier to comply with than many state laws. In part this is because fewer individuals are covered by the draft Executive Order than is true under the more onerous state laws. For example, while the draft Executive Order requires reporting political contributions by ''directors or officers,'' it does not cover contributions by other senior executives, much less executives involved in or compensated based on state contracting, or the spouses or children of executives, as is true in some states.

In addition, these rules should be easier to comply with because some of the data that must be reported is already available on-line and easily searchable in the Federal Election Commission's (''FEC'') records. Those contributions that must be disclosed and are not currently on the FEC system, primarily contributions where the donor ''intends'' or ''expects'' the funds to be used for certain kinds of political ads, may largely disappear as organizations soliciting such contributions re-tailor their fundraising pitches to avoid triggering these disclosure rules.

Nonetheless, the requirement that federal contractors report contributions to third parties that are expected to be used for political advertising is the most significant part of the draft Executive Order, and it could present vexing issues for contractors if the Executive Order is issued in its current form. Many major corporations contribute funds to trade associations, and some large trade associations do fund political advertising. Under current law, trade associations often are not required to disclose the identity of member companies that support the association's political advertising.

It appears that a key intended effect of the draft Executive Order is to compel disclosure by the government contractors themselves of such contributions to trade associations. This was also a key intended effect of the DISCLOSE Act, which is why critics see the draft Executive Order as an attempt by the Administration to make an end-run around Congress. While trade associations may find that they can navigate their way around the Executive Order by avoiding soliciting contributions that are earmarked for political advertising, much will depend on the regulations adopted by the FAR Council. If the Executive Order is issued, some government contractors may conclude that they do not want their trade associations to engage in political advertising because of the legal and business risks that such advertising could pose for the government contractors. This could have a significant effect on the role of trade associations and other tax-exempt organizations in the political process.

While the compliance burden associated with the draft Executive Order will be less onerous than in some current state laws, there could be a fair amount of *Sturm und Drang* surrounding the issuance of the Executive Order. As noted above, the Republican-led House recently passed legislation that would block implementation of the proposed disclosure requirement, and similar legislation is pending in the Senate. It also seems likely a constitutional challenge will be filed in court, if the Executive Order does issue. As a result, we expect the validity of any new disclosure rules to come under almost immediate challenge from a number of fronts.