



## Government Law Advisory

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# Congress Seeks to Block Proposed Federal Executive Order that Would Require Disclosure of Political Spending by Government Contractors

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Last Friday, the Senate Armed Services Committee approved an amendment to the fiscal 2012 Defense Authorization Act, prohibiting executive agencies from mandating the disclosure of political spending by federal government contractors. The House version of the bill, which passed in May, includes a similar provision restricting disclosure requirements.

The amendments are in response to a draft Executive Order recently made public that seeks to expand on current federal government regulations of federal government contractors, restricting contributions during the negotiation and performance of a federal contract. Addressing perceived pay-to-play concerns by the Administration, the draft Executive Order aims for increased transparency and accountability in federal contracting with the Administration's goal of a more efficient and economical procurement process.

If the draft Executive Order is executed, all entities submitting offers for federal contracts must disclose certain political contributions and expenditures within the prior two years. Under the proposed Executive Order, the government contractor, its officers and directors, and its affiliates and subsidiaries will be required to disclose contributions made to or on behalf of federal candidates and parties, as well as contributions made to third-party entities for independent expenditures and electioneering communications. Disclosure would be required if contributions exceed \$5,000 to a given recipient over a one year period. All disclosed information would be publicly available through a centralized searchable database.<sup>1</sup>

## Federal Acquisition Regulatory Council

Under the draft Executive Order, the Federal Acquisition Regulatory Council (FAR Council) would have authority over the implementation of the disclosure program and would issue the rules, regulations, and orders. At a minimum, the proposed Executive Order would require offering contractors to certify, in accordance with a manner to be established by the FAR Council, the accuracy of the disclosed information as a condition of receiving the government contract.

The draft Executive Order leaves many issues unresolved, some of which the FAR Council will need to address if the Executive Order is implemented. For example:

- How will the FAR Council define terms such as "affiliates" and "subsidiaries"?
- What will the disclosure process look like?
- How will the enforcement be carried out and what will the implications be for

government contractors?

Additionally, the FAR Council must implement the proposed Executive Order's mandate to minimize the costs of compliance for contractors and establish a timetable for the activation of the public database.

The draft Executive Order, if implemented, will become effective immediately, and apply to contracts resulting from solicitations issued on or after the date the FAR Council issues the implementing regulations.

Many states have already enacted pay-to-play laws mandating disclosure for state contractors. Similar transparency legislation has failed to gain support in Congress. For example, the recent attempt to increase disclosure requirements and impose new restrictions on campaign contributions, the DISCLOSE ACT, died in both the Senate and House in the last congressional session.<sup>2</sup>

The draft Executive Order comes in the wake of the Supreme Court's decision in *Citizens United v. FEC*, which struck down limits on independent corporate campaign spending as a violation of the First Amendment.<sup>3</sup> The Supreme Court noted in *Citizens United* that "prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable."<sup>4</sup> Given the number of companies contracting with the Federal Government, the effect of the draft Executive Order is significant.

## Reaction from Congress

Members of Congress have been critical of the proposed Executive Order. In anticipation of the draft Executive Order's enactment, both Democrat and Republican legislators took steps to counteract the disclosure requirements, asserting that it will politicize the contract process. Recently, Congressman Tom Cole (R-OK) proposed, and the House approved, an amendment to the National Defense Authorization Act of 2012, prohibiting the disclosure of political contributions by contractors.<sup>5</sup> Under Cole's amendment, executive agencies cannot require companies submitting offers for federal contracts to disclose political contribution information as a condition for participating in the acquisition of government contracts. Senator Susan Collins (R-ME) filed the similar amendment to the Senate's version of the defense authorization bill, which is scheduled to be released from the Senate Armed Services Committee early next week.

Members of Congress critical of the proposed Executive Order also filed stand-alone legislation barring a requirement that federal contractors submit political spending information as a basis for receiving a federal contract. In the House, the bill titled "Keeping Politics Out of Federal Contracting Act of 2011" is currently in the Committee on Oversight and Government Reform, chaired by the bill's lead sponsor, Congressman Darrell Issa (R-CA).

Senator Collins filed an identical bill in the Senate, which is currently assigned to the Committee on Homeland Security and Government Affairs. Senators have reached out to President Obama, encouraging the White House to abandon the proposed Executive Order, and questioning whether mandating disclosure of political spending will appear as though party affiliation is a factor in government contract decisions.<sup>6</sup>

If the draft Executive Order is implemented by the Administration Congress will likely expedite its actions to block its implementation. Furthermore, it is likely the draft Executive Order will be challenged on constitutional grounds in court.

\* \* \*

***We will continue to monitor any future developments with the proposed Executive Order or pending legislation. Clients seeking further information about disclosure requirements for campaign spending should contact the author or your Mintz Levin attorney.***

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Appreciation to law clerk Adam Coffin for his work on this alert.

#### Endnotes

- 1 <http://www.data.gov>.
- 2 THE DISCLOSE ACT (Democracy is Strengthened by Casting Light on Spending Elections (S. 3628/H.R. 5275)).
- 3 130 S. Ct. 876 (2010).
- 4 *Id.* at 916.
- 5 Amendment to H.R. 1540, §845.
- 6 Letter from Senators McCaskill (D-MO), Lieberman (I-CT), Collins (R-ME) and Portman (R-OH), *available at* <http://mccaskill.senate.gov/files/documents/pdf/2011-05-12LettertoPresidentObamaondraftExecutiveOrder.pdf>.

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