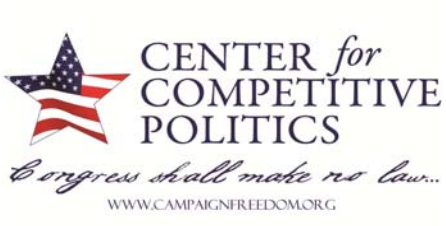

May 29, 2015

BY EMAIL (ContractorPetition@fec.gov)

Federal Election Commission
Attn.: Amy L. Rothstein, Assistant General Counsel
999 E Street NW
Washington, DC 20463

Re: Comments regarding the Petition for Rulemaking on Federal Contractors (REG 2014-09) (Notice 2015-06)

Dear Commissioners:

The Center for Competitive Politics ("CCP") submits these comments in response to the Petition for Rulemaking (the "Petition") filed by Public Citizen on November 18, 2014. The Petition asks the Federal Election Commission (the "Commission") to amend its regulations to address the circumstances under which certain business entities are considered distinct entities for the purposes of the federal contractor contribution prohibition.

CCP urges the Commission to deny the Petition. The rulemaking sought by the Petition would address primarily the very narrow issue of whether contributions to super PACs may be made by a corporate entity which has affiliates, subsidiaries, or parents that are federal contractors. Given that the constitutionality of the prohibition against federal contractor contributions, as applied to contributions to super PACs, is highly suspect and is likely to be invalidated if challenged in court, any rulemaking the Commission undertakes regarding this issue is likely to be a superfluous exercise.

Moreover, while the Petition attempts to suggest that a rulemaking is necessary because the Commission's approach to this issue has been vague and unclear, the Commission has been anything but unclear about this issue. It appears that Public Citizen simply dislikes the substantive outcome of the Commission's determinations regarding this issue. One special interest organization's subjective disagreement with an agency's policy, which is not otherwise impermissible, is not a sufficient or compelling rationale for commencing a rulemaking.

The Commission's regulatory approach to federal contractor contributions in the corporate context also is analogous to its approach to foreign national contributions in the corporate context. The Petition offers no explanation of why, if the Commission were to take up a rulemaking on federal contractor contributions which adopts Public Citizen's view of corporate-labor law, the Commission should not also take up a rulemaking on contributions made by domestic subsidiaries of foreign national corporations, thereby upending decades of Commission precedent that the public has come to rely on.

For these reasons, as discussed more fully below, the Commission's time and resources would be better spent on addressing more pressing and legitimate concerns.

I. The Petition Asks the Commission to Expand a Prohibition That Is Likely Already Unconstitutional.

Any person negotiating or performing a contract with the federal government is prohibited from making a contribution to any national political party or state party federal account, federal political committee, candidate for federal office, or "for any [federal] political purpose or use."[1] Because corporations are otherwise also prohibited from making these same types of contributions,[2] after the Supreme Court's decision in *Citizens United*[3] and the U.S. Court of Appeals for the D.C. Circuit's decision in *SpeechNow*,[4] the federal contractor contribution prohibition is primarily relevant in two contexts: 1) federal political contributions made by individuals, sole proprietorships, and certain partnerships and limited liability companies – all of which would otherwise be permitted to make such contributions but for their federal contracts;[5] and 2) contributions made by corporations to federal independent-expenditure-only political committees ("super PACs") – which would otherwise be permitted to accept contributions from any non-foreign source,[6] but for any federal contracts the contributors may have.

The Petition asks specifically for a rulemaking on "whether nominally separate entities of the same corporate family constitute a single contractor subject to the restrictions against campaign contributions from federal contractors."[7] Thus, the subject of the requested rulemaking really pertains primariliy to the narrow issue of whether certain corporate entities may contribute to a federal super PAC, and which was the subject of the enforcement complaint Public Citizen filed with the Commission in MUR 6726 (Chevron Corporation), and the genesis of the Petition.

The Commission does not appear to have ever explicitly stated that the prohibition against federal contractor contributions continues to apply to contributions made to super PACs after *Citizens United* and *SpeechNow*. However, to the extent the Commission appears to have

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[1] 52 U.S.C. §§ 30119(a) and 30125; 11 C.F.R. §§ 115.1 and 115.2.

[2] 52 U.S.C. § 30118.

[3] *Citizens United v. FEC*, 558 U.S. 310 (2010).

[4] *SpeechNow v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

[5] *See* 52 U.S.C. § 30116; 11 C.F.R. § 110.1(e) and (g); AO 1989-21 (Create-a-Craft) (noting that sole proprietorships are subject to the individual contribution limits and not to the prohibition against corporate contributions); Federal Election Commission, Campaign Guide for Corporations (Jan. 2007) at 16.

[6] *SpeechNow.org*, 599 F.3d 686; *see also* AOs 2010-09 (Club for Growth) and 2010-11 (Commonsense Ten).

[7] Petition at 1.

assumed (or not repudiated), on a few occasions, the notion that the prohibition continues to apply,[8] such a position is extremely tenuous.

In reciting the legislative history of the federal contractor contribution prohibition in *Wagner v. FEC*, the U.S. District Court for the District of Columbia has explained that the ban was enacted to prevent "traffic in jobs and in contracts, by political parties and factions in power," and schemes such as the "'Democratic campaign book' scandal, in which federal contractors were effectively required to pay bribes in order to secure government business."[9] As the court concluded, "It is thus clear that, in passing the ban, Congress wished to prevent corruption and the appearance thereof and, in doing so, to protect the integrity of the electoral system by ensuring that federal contracts were awarded based on merit."[10]

In *Citizens United*, the Supreme Court held that the only legitimate government interest in preventing corruption that could justify a prohibition on political speech was the prevention of *quid pro quo* corruption, and that independent speech poses an insufficient danger of such corruption. Reiterating its decision in *Buckley v. Valeo*, the Court stated that "The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."[11] "Given this analysis from *Citizens United*," the U.S. Court of Appeals for the D.C. Circuit "conclude[d] that the government has no anti-corruption interest in limiting contributions to an independent expenditure group such as SpeechNow."[12]

The type of "pay-to-play" exchange of campaign contributions in return for government contracts that the federal contractor contribution ban seeks to address is precisely the type of *quid pro quo* corruption that the Supreme Court held was insufficiently present in the context of independent expenditures, and which the D.C. Circuit held was insufficiently present in the context of contributions to independent expenditure-only groups, to justify this type of blanket

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[8] *See* MUR 6403 (Alaskans Standing Together), F&LA at 9 (noting that various corporate entities "apparently violated" the federal contractor contribution prohibition by making contributions to a super PAC); AOs 2010-09 (Club for Growth) and 2010-11 (Commonsense Ten) (noting that the super PACs would not accept contributions from federal contractors).

In MUR 6726 (Congressional Leadership Fund), the Commission did not address the question of the constitutionality of the contractor prohibition because the Commission concluded the corporate entity that made the contribution was not a federal contractor. MUR 6726, F&LA at 7 n.3.

[9] *Wagner v. FEC*, 854 F. Supp. 2d 83, 89 (D. D.C. 2012) (quoting 84 Cong. Rec. 9616 (1939) (statement of Rep. Ramspeck) and citing 84 Cong. Rec. 9599 (1939) (statement of Rep. Taylor)).

[10] *Id.* at 89.

[11] *Citizens United*, 558 U.S. at 357 (quoting *Buckley*, 424 U.S. 1, 47 (1976)). *See also McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) ("Any regulation must instead target what we have called '*quid pro quo*' corruption or its appearance. That Latin phrase captures the notion of a direct exchange of an official act for money.") (internal citations omitted).

[12] *SpeechNow v. FEC*, 599 F.3d at 695.

speech prohibition. Accordingly, the district court in *Wagner* noted that "*SpeechNow* creates substantial doubt about the constitutionality of any limits on Super PAC contributions – including [52 U.S.C. § 30119's] ban on contributions by federal contractors."[13]

Because the ban as applied to contributions to super PACs was not at issue in *Wagner*, the court did not rule on it.[14] Notwithstanding that the federal contractor ban has not yet been invalidated as applied to contributions to super PACs, even the most sincere supporter of stricter campaign finance regulation and ardent opponent of *Citizens United* and its progeny must acknowledge that, consistent with the current jurisprudence, the prohibition is unlikely to survive judicial scrutiny.[15] Accordingly, it would not be a prudent use of the Commission's time and resources to tinker with the contours of a prohibition that is tantamount to a "dead man walking."

II. The Commission's Regulatory Approach to the Contractor Prohibition Is Not Unclear and Is Consistent With Its Approach to the Foreign National Prohibition.

The Petition attempts to suggest that the Commission's current regulatory approach, as set forth in two enforcement matters, is an unclear and "loose standard[]" lacking in "exact[itude]" and "accura[cy]," and requests that the Commission "*clarify* in 11 C.F.R. § 115 the factors for determining whether entities of the same corporate family are in fact distinct business entities."[16] To the contrary, the regulatory approach the Commission has set forth is crystal clear, precise, and accurate. It appears that Public Citizen's objection is really to the substance of the Commission's policy, and by "loose standards," Public Citizen means that the standards are more permissive than what it would like. Public Citizen offers no compelling rationale in its Petition, however, for why the Commission should adopt Public Citizen's preferred alternative standards.

As the Commission explained in MUR 6726 (Congressional Leadership Fund):

> The Commission has recognized a parent company may make a contribution to an independent-expenditure-only political committee if it has an ownership interest in a federal-contractor subsidiary when (1) the subsidiary is a 'separate and

[13] *Wagner v. FEC*, 901 F. Supp. 2d 101, 107 (2012).

[14] *Id.*

[15] *See, e.g., N.Y. Progress & Protection PAC v. Walsh*, 17 F. Supp. 3d 319, 321 (S.D. N.Y. 2014) ("Our Supreme Court has made clear that only certain contribution limits comport with the First Amendment. Since contributing money is a form of speech, preventing *quid pro quo* corruption or its appearance is the only governmental interest strong enough to justify restrictions on political speech. More recently in *McCutcheon*, the Court concluded that 'the possibility that an individual who spends large sums may garner influence over or access to elected officials or political parties . . . does not give rise to such *quid pro quo* corruption.' . . . The Court agrees with Justice Breyer. He said that, '[t]his critically important definition of 'corruption' is inconsistent with the Court's prior case law.' But this Court is bound to apply this definition 'no matter how misguided . . . [the Court] may think it to be.'") (internal citations omitted).

[16] Petition at 1 and 5 (emphasis added).

> distinct legal entity' and (2) the parent company has sufficient revenue derived from sources other than its contractor subsidiary to make the contribution.[17]

In determining whether two entities are distinct legal entities, the Commission simply looks to whether they are separately incorporated and whether they are under the direction and control of separate management.[18]

The Commission's two-factor test for determining when a corporate entity should be considered separate from another corporate entity holding a federal contract is clear.[19] Ironically, the regulatory approach that is "loose" and lacking in "exact[itude]" and "accura[cy]"[20] is actually the one the Petition urges. The Petition would have the Commission adopt a free-ranging, discretionary, multi-factor, indefinite facts-and-circumstances standard that is incapable of being applied precisely and consistently, and which is a recipe to chill speech protected by the First Amendment, complicate the Commission's ability to fairly enforce its regulations and create more enforcement deadlocks and controversy.

Specifically, the Petition offers two models for the Commission to adopt. The first is the Worker Adjustment and Retraining Notification Act (WARN Act). As the Petition describes it:

> Under existing legal rules, independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as part of the parent or contracting company depending upon the degree of their independence from the parent. *Some of the factors to be considered* in making this determination are (i) common ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations.[21]

While some of these factors may be capable of being applied precisely and consistently, the test as a whole is extremely vague and discretionary, in that it only spells out "some of the factors to be considered." There does not appear to be any limit or guiding principles as to what other factors the Commission may consider in determining whether two corporate entities have a sufficient "degree of [] independence" from each other. Mover, it is unclear precisely what level

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[17] MUR 6726 (Congressional Leadership Fund), F&LA at 6 (citing MUR 6403 (Alaskans Standing Together). *See also* MUR 6403, F&LA at 6 ("Although they each have subsidiaries that hold federal contracts, those subsidiaries are separate and distinct legal entities from them, and the parent companies have sufficiently demonstrated that they made their contributions to [the super PAC] with revenue from sources other than the federal-contract-holding subsidiaries. Therefore, they are not government contractors as defined by the Act.").

[18] MUR 6726, F&LA at 6-7.

[19] The Petition attributes a third factor to the Commission's determination – whether "the two entities are under the direction and control of separate management." Even assuming that is also a factor the Commission takes into consideration regarding this issue, that does not make the Commission's regulatory approach any less clear.

[20] *See* Petition at 5.

[21] Petition at 5 (emphasis added).

of "common ownership" and "common directors and/or officers" would cause one entity's federal contracts to be attributed to another entity. Is 30% sufficient? 40%? Relatedly, precisely how is one supposed to determine what constitutes "de facto exercise of control" and "dependency of operations"? Such "loose standards"[22] are likely to confound not only the Commission, but also the corporations that must abide by them. Such a vague regulatory approach may or may not be permissible in the realm of labor law, but it is certainly impermissible in the realm of First Amendment-protected speech that the Commission regulates.[23]

Alternatively, the Petition suggests that the Commission adopt what it purports to be "similar criteria" under general federal labor law. Specifically, the Petition offers this formulation by the U.S. Court of Appeals for the First Circuit:

> To determine whether two or more business entities comprise a single employer, this court has applied the four facts set out in *Radio & Television Broadcast Union v. Broadcast Service of Mobile, Inc*., 380 U.S. 255, 256, 85 S.Ct. 876, 877, 13 L.Ed.2d 789 (1965) (*per curiam*): (l) inter-relation of operations, (2) common management, (3) centralized control of labor relations and (4) common ownership . . . No one of these facts is controlling, nor need all of them be present. Single employer status ultimately depends on 'all the circumstances of the case' and is marked by an absence of an 'arms-length' relationship found among unintegrated companies.[24]

Although it is perhaps marginally better than the WARN Act standard, the First Circuit's formulation also still leaves much to be desired in terms of precision. Specifically, this standard fails to specify exactly what level of "inter-relation of operations," "common management," "centralized control of labor relations," and "common ownership" would be sufficient to cause two entities to be considered one and the same for the purposes of the contractor contribution prohibition. Moreover, the standard fails to specify how these four factors are to be weighed relative to each other. The standard also would allow the Commission to disregard certain factors altogether, but does not specify under what circumstances the Commission may do so. As with the WARN Act standard, the First Circuit's formulation would be a disaster for the Commission and for corporations to apply, and would impermissibly chill First Amendment-protected speech.

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[22] *See* Petition at 5.

[23] *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) ("[W]here a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'") (internal citations omitted).

[24] Petition at 5.

Far from "clarify[ing] . . . the factors for determining whether entities of the same corporate family are in fact distinct business entities,"[25] the regulatory approaches the Petition urges would in fact muddle the issue where the Commission has already provided clarity.

The Petition also fails to explain why the Commission should look to another area of law that, on its face, is a poor fit for application to First Amendment speech when the Commission can look to its own precedents regarding another similar campaign finance issue. The Commission's determinations in MURs 6726 (Congressional Leadership Fund) and 6403 (Alaskans Standing Together) regarding when the federal contractor contribution prohibition applicable to one corporate entity is attributed to another corporate entity are analogous to (and presumably informed by) the Commission's determinations regarding when the foreign national contribution prohibition applicable to one corporate entity is attributed to another corporate entity.

With respect to the foreign national prohibition, the Commission has considered the following factors when determining whether a domestic subsidiary of a foreign corporation is subject to the foreign national ban:[26]

- Whether the subsidiary is a distinct corporate entity organized under the laws of, and has a principal place of business within, the United States;[27]

- If the domestic subsidiary uses corporate treasury funds to make a (non-federal) contribution, whether it uses its own net earnings and does not use any funds provided by the foreign corporate parent;[28]

- Whether any foreign national controls or participates in the decisionmaking regarding the political contributions made by the domestic subsidiary;[29]

In contrast to the Petition's preferred standards, the Commission has not considered ownership of one entity by another as a factor in the context of the foreign national contribution ban and, in fact, has recognized that a domestic subsidiary may still make contributions even if it is wholly owned by a foreign corporation.[30]

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[25] *See* Petition at 1.

[26] Since corporations generally are not permitted to make direct contributions at the federal level, these determinations have been primarily in the context of state-level contributions in jurisdictions where direct corporate contributions are permitted. Since the costs of establishing, administering, and soliciting contributions to a federal separate segregated fund are not contributions, the foreign national prohibition does not apply to a foreign corporation's payment of such expenses. *See* AO 1982-34 (Sonat).

[27] *See, e.g.*, AO 1995-15 (Allison Engine Company PAC).

[28] *See, e.g.*, AOs 2006-15 (TransCanada), 1992-16 (Nansay Hawaii), 1989-29 (GEM).

[29] *See, e.g.*, AOs 2000-17 (Extendicare), 1995-15 (Allison Engine Company PAC), 1990-8 (CIT).

[30] *See, e.g.*, AOs 2006-15 (TransCanada), 2000-17 (Extendicare), 1995-15 (Allison Engine Company PAC), 1992-16 (Nansay Hawaii), 1989-29 (GEM).

Obviously, some parts of the Commission's regulatory approach to the foreign national contribution ban are irrelevant to the federal contractor contribution ban. However, the Commission apparently has adopted and applied the relevant portion of its precedents regarding the foreign national ban to the federal contractor ban, and this approach is eminently appropriate, as the two issues are analogous.

Given the analogy between the two issues, Public Citizen's Petition fails to explain why its grievance with the Commission's approach to the federal contractor ban does not also extend to the Commission's approach to the foreign national ban – other than the fact that Public Citizen is apparently aggrieved by the Commission's disposition of the enforcement complaint that it filed with respect to the former issue. The analogy between these two issues should thus give the Commission yet additional pause in granting the Petition for rulemaking, as doing so would cast significant doubt over the continued applicability of the Commission's carefully and consistently crafted precedents over the past three decades regarding the foreign national prohibition. We are not aware of any serious, substantial objections to the Commission's approach to the foreign national prohibition, and see no reason why the Commission should throw that approach into turmoil in order to grant a Petition for rulemaking regarding the federal contractor prohibition that is likely unconstitutional as applied to the narrow subject of the requested rulemaking.

III. Conclusion

The Commission's approach regarding the federal contractor prohibition, as applied to contributions made to super PACs by corporate affiliates of entities with federal contracts, and the foreign national prohibition, as applied to contributions made by domestic subsidiaries of foreign corporations, is set forth not in its regulations, but in its advisory opinions (for the foreign national prohibition) and enforcement decisions (for the federal contractor prohibition). To the extent that the Commission initiates a rulemaking regarding either or both issues, the Commission could certainly provide more clarity to the public if it were simply to codify its existing regulatory approach in its regulations. However, the status quo is sufficiently clear and, for the reasons explained above, provides exponentially more clarity than the regulatory approach the Petition requests. The constitutionality of the federal contractor prohibition as applied to contributions made to super PACs is already highly questionable, and any rulemaking along the lines the Petition requests would only make the prohibition more clearly unconstitutional. Accordingly, the Commission should deny the Petition.

Respectfully yours,

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Center for Competitive Politics

[31] Eric Wang is also Special Counsel in the Election Law practice group at Wiley Rein, LLP. Any opinions expressed herein are those of the Center for Competitive Politics and Mr. Wang, and not necessarily those of his firm or its other clients.