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Government Contractors And Pay-To-Play Laws

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The Federal Election Commission (FEC) recently fined a federal contractor $34,000 for contributing $200,000 to a federal independent expenditure-only political action committee (super PAC).[1] It was the first-ever fine for prohibited contributions to a super PAC under the federal contractor pay-to-play law. The law prohibits direct and indirect contributions to federal candidates, political party committees and political action committees (PAC) by any person who contracts with a federal agency to provide goods or services.[2] The prohibition applies from the date of an agency procurement solicitation or the start of contract negotiations to the completion of the federal contract.

The federal contractor fined $34,000 said the violation was inadvertent and that it has since established a pay-to-play compliance plan. Because the company's business model did not generally rely on government work, it may not have considered that any contract with a federal agency triggers the federal ban on contractor contributions. Had it been aware of the ban, it may have nonetheless been unsure about its application to federal super PAC contributions by federal contractors.

Generally, individuals, except foreign nationals, may contribute to federal candidates and committees subject to contribution limits and may make unlimited contributions to super PACs. However, a consultant under contract to a federal agency or a sole proprietor with a federal contract may not contribute to federal candidates or committees. Corporations may not contribute to federal candidates, political action committees or national political party committees but they may contribute to super PACs. Since the pay-to-play law predates the emergence of super PACs, it does not expressly address super PAC contributions by a federal contractor.

The FEC had not previously addressed whether applying the federal contractor ban to super PAC contributions is consistent with the U.S. Supreme Court's decisions on the regulation of independent expenditures. Without directly answering this question, in 2014, the FEC dismissed a complaint challenging contributions to a federal super PAC by the parent company of a wholly-owned subsidiary that was a federal contractor.[3] In 2015, the D.C. Circuit Court of Appeals said the contribution ban on consultants and sole proprietors does not violate the First Amendment because it prevents corruption and promotes sound merit-based administration of federal contracts.[4]

The court did not address the constitutionality of banning contractor contributions to a federal super

PAC which does not contribute to candidates and engages only in independent speech. The FEC approved a petition for rulemaking on this issue in 2015, but a rule was never adopted.

This $34,000 fine is the first definitive statement by the FEC that neither individuals nor companies holding a federal contract may contribute to a federal super PAC. The FEC's action does not prohibit a federal contractor's contribution to a state super PAC if allowed under state law. Many states do not restrict contributions by consultants or businesses that contract with government agencies.

Federal, state and local pay-to-play laws

Pay-to-play laws are not unique to the federal government. They are in place on the state and local level in many jurisdictions, but there is no single uniform approach to them. Companies that do not make political contributions with general treasury funds may nonetheless be subject to regulation since many jurisdictions target employee activity.

Unlike federal law, some jurisdictions prohibit political contributions by officers and other employees of government contractors. Others may establish certain dollar thresholds or specific types of contracts that trigger pay-to-play regulation. Pay-to-play laws may allow contributions but require periodic reporting to state regulators. Some industries may be covered while others are not and a parent company and its subsidiaries may be treated differently.

Note that financial service companies are subject to additional limitations under federal regulations including Securities Exchange Commission (SEC) rules and under many state and local laws. SEC rules prevent investment advisers and certain employees and officers from receiving compensation for advisory services for two years after making a contribution to a covered public official. In 2016, the SEC fined a company $12 million for the pay-to-play scheme of one of its officers to win contracts to service a state pension fund that included making targeted political contributions. The officer paid over $274,000 in disgorgement, interest and penalties.[5]

Pay-to-play compliance plans

While the violations described here may seem extreme, far less activity can prompt enforcement actions resulting in fines, bid disqualification and the voiding of contracts. Any business that bids on local, state or federal contracts should adopt a pay-to-play compliance plan or risk inadvertently engaging in prohibited political activity.

A company should identify each jurisdiction in which it has or is pursuing a government contract. If the jurisdiction does not have a pay-to-play law, a "gift ban" – a general prohibition on providing "anything of value" to a public official – will generally apply. When all applicable states with pay-to-play laws are identified, the contractor must determine the following:

- Covered industries or businesses
- Covered officers and employees, if any
- Limitations on political contributions (i.e., bans or limits, corporate or individual)
- Reporting obligations, if any

- Penalities
- A process for monitoring contracts, screening contributions and training employee
- A process for addressing violations when identified

Prohibited contributions will generally include contributions solicited from others and the expenses of hosting an event or providing other services to a candidate. Pay-to-play laws in some jurisdictions may reach activities that are not generally regulated by campaign finance laws such as company-hosted candidate events that do not involve fundraising and contributions to organizations that engage in public policy advocacy activities.

Conclusion

In the recent FEC enforcement action, the affected super PAC said it was not aware that the contributor was a federal contractor. Although some jurisdictions require contractor registration, candidates and committees will not be able to identify and return a prohibited contractor contribution in every instance. Accordingly, a government contractor is responsible for monitoring its own activity and complying with local, state and federal laws and to do so effectively, it must adopt a pay-to-pay compliance plan. Once adopted, continuous monitoring and audits are necessary to reduce the risk of unintentional violations of applicable laws.

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1 Conciliation Agreement, Sept. 25, 2017.

2 52 U.S.C. § 30119Con(a)(1).

3 MUR 6726, Factual and Legal Analysis, March 11, 2014.

4 Wagner v. FEC, 793 F.3d 1 (2015).

5 In the *Matter of State Street Bank and Trust Co*., U.S. Securities and Exchange Commission, Order (Jan. 14, 2016); *In the Matter of Vincent Debaggis*, U.S. Securities and Exchange Commission, Order (Jan. 14, 2016).

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