WASHINGTON
LEGISLATIVE OFFICE


June 1, 2011

Director Jacob J. Lew
Office of Management and Budget
Eisenhower Executive Office Building
1650 Pennsylvania Avenue, NW
Washington, DC 20503

Re: Draft Executive Order on Disclosure of Political Contributions by Federal Contract Bidders

Dear Director Lew:

We are writing to express support for the goals expressed in the recently circulated draft Executive Order that would require bidders on federal contracts to disclose certain political contributions made by the bidding entities and their officers and directors. We believe that if the breadth of the disclosures is narrowed, the Order would be a significant improvement on the outright speech restrictions on contractors contained in the DISCLOSE Act offered in the 111th Congress. We urge you to clarify the scope of disclosures contemplated in the final Executive Order to ensure that the required information is directly related to the goal of assuring the integrity of the public bidding system and is not chilling the associational and speech rights of Americans by identifying the names of donors to non-partisan advocacy groups.

The American Civil Liberties Union (ACLU) is America's oldest and largest civil liberties organization with over half a million members, countless additional activists and supporters, and 53 affiliates nationwide. We have actively participated in every significant policy debate in the long history of campaign finance reform whether through our lobbying or litigation arms. We also have long advocated for heightened transparency in government. While we opposed important aspects of campaign finance laws over the decades, we also have a long and proud history in support of transparency in the campaign funding context. We have long supported disclosure of direct contributions to candidates, as well as to political action committees. Because independent expenditures have a direct impact on candidate elections, we have also supported disclosure of such expenditures. We have also supported heightened disclosure in connection with federal lobbying activities and have been a leader in the effort to broaden transparency standards under the Freedom of Information Act for government as a whole. At the same time, while advocating for disclosure, we have fought to protect the speech and privacy rights of those whose participation in the political process posed no threat of corruption or appearance of corruption.

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Our advocacy on these issues requires a balancing of competing civil liberties interests. On the one hand, the public's right to know must sometimes give way to the fundamental constitutional rights of free speech and associational privacy. On the other hand, there are times when personal privacy and the First Amendment right to anonymous campaign speech can be outweighed by carefully drafted rules designed to achieve a substantial governmental interest. We believe the Executive Order has the potential to achieve that delicate balance, but only if the required disclosures in fact further the interest they are intended to serve.

Here, the asserted interest is in maintaining the integrity of the public bidding process. We agree that public confidence in that system is critical, and that it is generally enhanced by transparency. In particular, citizens are entitled to know that government contracts are neither awarded nor denied based on political contributions or expenditures.

Under existing law, federal candidates are required to disclose contributions over a threshold amount so that the voters can assess whether that support has affected, or may affect, a candidate's position on the issues. For similar reasons, existing law also requires disclosure of independent expenditures that promote the election or defeat of federal candidates. The award of discretionary government contracts can likewise be influenced by political contributions and independent expenditures. To be sure, there is some risk that a rule requiring those bidding on federal contracts to disclose their political contributions and independent expenditures can promote political discrimination rather than inhibit it. But, as Justice Brandeis once said, "sunlight is often the best disinfectant," and we believe that is true in this case as well. Political retaliation and political favoritism will both be more difficult with more transparency. Moreover, because political contributions and independent expenditures are already subject to disclosure, there is less reason to fear that their disclosure in this context will create any additional chill on political speech or association. Even so, some would suggest that those awarding contracts could be subject to political pressures arising out of disclosure of political donations by bidders to entities making independent expenditures because these donations are not currently disclosed. Accordingly, the requirement could be modified to postpone disclosure until award of the bid or execution of the contract. And so we support the proposed Order to the extent it requires disclosure of donations to entities that have actually engaged in independent expenditures or electioneering communications that expressly promote the election or defeat of federal candidates.

We do, nonetheless, have several concerns about the breadth of the proposed Executive Order.

1. We do not believe that the disclosure rules should extend to all "electioneering communications" beyond those that expressly promote the election or defeat of particular candidates. Although the term "electioneering communications" is not defined in the proposed E.O., in the absence of any other definition it is reasonable to assume that the E.O. is incorporating by reference the definition included in the Bipartisan Campaign Reform Act. Under BCRA, an "electioneering communication" is defined to include any broadcast communication within 60 days of a general election or 30 days of a primary that identifies a candidate for federal office by name or position. We recognize, of course, that the disclosure provisions of BCRA were upheld by the Supreme Court as facially valid in *Citizens United*. However, as we have argued before, that definition would reach even a radio ad by a non-partisan advocacy organization like

the ACLU asking people to call their Senators before a vote on a critical civil liberties bill, such as the repeal of Don't Ask, Don't Tell, as long as the ad was broadcast during the blackout period. Accordingly, we recommend narrowing the definition of "electioneering communications" as used in the E.O. to just those communications that can be construed in no other way than as an appeal to support or oppose a candidate for public office. Otherwise, the disclosure regimen would compel disclosure of information about donors to organizations having no potentially corrupting tie to any elected official whatsoever.

2. We are also concerned that the use of the phrase 'intention or reasonable expectation' in Section 2(b) of the draft Order creates an ambiguity that could be abused in the implementation of the Order. The Order would require the disclosure of "[a]ny contributions made to third party entities with the intention or reasonable expectation that parties would use those contributions to make independent expenditures or electioneering communications." The E.O. offers no guidance on how a contributor should form that "reasonable expectation," assuming that the organization receiving the contribution does more than broadcast "electioneering communications" or engage in "electioneering communications." The E.O. could easily provide greater certainty by limiting the reporting obligation to contributions to third party entities that have actually made independent expenditures or electioneering contributions within the previous two year election cycle. Such expenditures are a matter of public record, thereby providing a certain basis for compliance by a bidding entity.

3. We are worried about mission creep. If federal contractors can be required to make these disclosures then federal grantees might be subject to a similar disclosure regime, including researchers and academics. So, too, may certain federal employees. That would be a drastic and unprecedented step. For that reason, we believe it is important to document the factual predicate for the E.O. If there is a history of improper influence in the bidding process, it can and should be documented. If not, the E.O. should not be used as a back door mechanism to compel disclosures that are not required by existing law and not related to the contracting process.

4. We see no reason why the threshold for disclosure should be any different under the E.O. than under BCRA for individual corporate officers and directors. Once the $5,000 threshold for corporate contributions is crossed, every political contribution by an officer or director must be disclosed regardless of amount. But if a $50 contribution to a candidate need not be disclosed by the candidate because it is deemed too low to present even the appearance of corruption, there is no apparent reason why it should be seen as potentially corrupting simply because the individual making the contribution works for a company seeking a federal contract. Aggregate reporting by the bidding entity should suffice for smaller donations below the BCRA threshold.

**Conclusion and Recommendations**

Because the proposed Executive Order would provide greater transparency over the public bidding process and would help provide greater public confidence that improper influence is not a factor in the award of such contracts, we endorse the concept of heightened disclosure of certain political contributions in connection with the submission of bids on federal contracts. In particular, we believe that integrity in the public bidding process justifies disclosure of contributions to organizations making actual independent expenditures in clear support of or opposition to federal candidates. We also believe the Order can be clarified and improved. Accordingly, in issuing the final form of the Executive Order, we urge you to incorporate certain additional critical concepts:

1. Narrow the definition of electioneering communications as used in the E.O. so that the privacy of donors to non-partisan issue advocates is protected;
2. Replace the reference to 'intention or reasonable expectation' set forth in Section 2(b) in favor of more certain language that triggers reporting only if the recipient entity has actually made independent expenditures or electioneering communications (as narrowly defined) in the previous election cycle.
3. Document the factual predicate of attempted improper influence in bidding on federal contracts through a pattern of contributions to federal elected officials;
4. Exempt those officers and directors whose contributions are less than the reporting threshold under current election law from the disclosure obligation of the contract bidder; and
5. Collect disclosure reports under seal for opening following bid award or, alternatively, limit reporting to the winning bidder and require disclosure prior to contract execution.

With these improvements, we believe the administration would achieve its goal of heightening transparency in the public contracting process while avoiding a chilling impact on the privacy, speech and associational rights of those participating in the political process. If you would like to discuss our comments or if you have questions, please don't hesitate to contact me at 202-675-2309 or mmacleod@dcaclu.org.

Sincerely,

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Washington Legislative Office
Chief of Staff/First Amendment Counsel

cc: Robert Bauer, White House Counsel