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White House Issues Draft Executive Order Implementing 'Pay-to-Play' Policy for Federal Contractors

The Obama administration recently issued a draft **Executive Order** (the Draft Order) implementing a "pay-to-play" policy applicable to all federal contractors. The Draft Order requires every federal contracting agency and department to require all entities submitting a bid for any federal contract to disclose certain political contributions and expenditures made in the two years prior to submission of the offer.

Contractors will be required to disclose the following in connection with bidding on any federal contract:

- All contributions or expenditures to or on behalf of federal candidates, parties or party committees made by the bidding entity, as well as by the bidding entity's directors or officers, or any affiliates or subsidiaries within the entity's control; and
- Any contributions made to third parties with the intention or expectation that the parties would use those contributions to make independent expenditures or electioneering communications.

Such disclosure is required when the aggregate amount of such contributions and expenditures made by the bidding entity, its officers and directors, and its affiliates and subsidiaries exceeds \$5,000 to a given recipient during a given year. The Draft Order requires the Federal Acquisition Regulatory (FAR) Council to promulgate rules and regulations and issue orders as are deemed necessary to effectuate the Draft Order.

It is important to note that the Draft Order contains only disclosure requirements; it does not prohibit or otherwise limit political contributions or expenditures. Moreover, the Draft Order is explicit that the rules, regulations and orders issued by the FAR Council may not interfere with the ability of contractors, or their officers or employees, to engage in political activities to the extent otherwise permissible under the law. Presumably, this admonition will be read to prevent the FAR Council from adopting any rule or regulation that limits the ability of a bidding entity or its directors, officers or affiliates to make political contributions or expenditures.

While it is unclear when a Final Order may be issued, the Draft Order provides that it will be effective immediately upon the release of the Final Order and will apply to contracts resulting from solicitations issued on or after the effective date of the implementing rules issued by the FAR Council. We are closely monitoring this topic and will update clients when the Final Order is issued.

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