November 18, 2014

Federal Election Commission
c/o Office of the General Counsel
999 E Street, NW
Washington, D.C. 20463

RE: Petition for Rulemaking to Revise 11 C.F.R. § 115

To Whom It May Concern:

Public Citizen respectfully submits this petition for rulemaking pursuant to 11 C.F.R. § 200.1 *et seq.* We ask that the Commission revisit the rules in Title 11, Section 115 of the Code of Federal Regulations, which deal with the permissibility of donations from federal contractors. Specifically, we request that the Commission update the language in §115 to provide a more accurate assessment, in conformity with well-established legal precedent, of whether nominally separate entities of the same corporate family constitute a single contractor subject to the restrictions against campaign contributions from federal contractors.

In at least one enforcement action – MUR 6726 ("Chevron Corporation") – the Commission has employed permissive standards defining entities within the same corporate family as "separate and distinct legal entities," allowing a single corporation to create an artificial firewall between one division that solicits and receives federal contracts and another division that makes campaign contributions, despite a preponderance of evidence that the two divisions constitute a single business enterprise. The Commission's standard places extraordinary and disproportionate emphasis on corporate form. Applying such a loose standard in defining "separate and distinct legal entities" causes irreparable harm to the intent and enforcement of 2 U.S.C. § 441c, the law prohibiting campaign contributions by federal contractors.

Public Citizen 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. This clarification of the rules should establish more exacting scrutiny to protect the integrity of 2 U.S.C. § 441c in conformance with established legal precedents that prevent corporations from creating nominally separate entities that operate as single enterprises to do what would otherwise be illegal for the company as a whole.

A. Restriction on Campaign Contributions by Federal Contractors (2 U.S.C. § 441c)

In the wake of the several recent court decisions regarding the constitutionality of various campaign finance regulations, including the 2010 *Citizens United v. Federal Election Commission* decision,[1] recognition of the pressing governmental need to curb "pay-to-play" behavior in government contracting has remained constant and unaltered. Allowing private

[1] *Citizens United v. Federal Election Commission*, 588 U.S. 310 (2010).

businesses seeking contracts from government agencies to contribute directly or indirectly to support the campaigns of government officials who can influence the awarding of those contracts raises the specter of corruption or the appearance of corruption and endangers the integrity of the government contracting process. Accordingly, the federal government and 15 states have enacted government contracting reforms to prevent or restrict government contractors and businesses competing for government contracts from making campaign contributions.[2] Some of these state pay-to-play laws date back over 40 years, though many of the more effective state laws are more recent, such as those in New Jersey, Connecticut and Illinois, modelled after the 1992 Securities and Exchange Commission's Rule G-37. These regulations have overwhelmingly survived constitutional challenges in district and appellate courts, largely because removing barriers to pay-to-play relationships could dearly undermine the integrity of the government contracting process.[3]

The federal government, too, has restrictions against contributions from government contractors. The first federal campaign financing statute was the Tillman Act of 1907, which prohibited corporations from making contributions to federal candidates. In 1925, the Corrupt Practices Act provided additional campaign limitations. Emergency legislation during World War II prohibited labor organizations from making contributions or expenditures in connection with a federal election, a ban that was later made permanent in the Taft-Hartley Act. In 1948, government contractors were added as prohibited sources of federal campaign funds.[4] The 1948 law prohibited contributions and expenditures by government contractors in support or opposition to federal candidates, and imposed criminal penalties for violations.

Following the financial scandals of the Nixon Administration, campaign contributions and expenditures by all entities were regulated under the Federal Election Campaign Act of 1971 (FECA), as subsequently amended. These limits were subjected to rigorous constitutional scrutiny by the Supreme Court in *Buckley v. Valeo*. The Court upheld FECA's limits on contributions, but overturned its expenditure limits as unconstitutional infringements on First Amendment speech.

FECA as amended re-codified the restrictions against campaign contributions from government contractors.[5] Section 441c prohibits any person who is a signatory to, or who is negotiating for, a contract to furnish material, equipment, services, or supplies to the United States Government, from making or promising to make a political contribution to a candidate, party or political committee. It has been construed by the FEC to reach only donations made or promised for the purpose of influencing the nomination or election of candidates for federal office. *See* 11 C.F.R. § 115.2. The statute applies to all types of businesses, including sole proprietorships, partnerships, and corporations. It reaches gifts made from such firms' business

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[2] For a description of the 15 states with pay-to-play laws restricting or banning campaign contributions from government contractors, see Appendix A, "Pay-to-Play Restrictions on Campaign Contributions from Government Contractors, 2013".

[3] See, for example, *Green Party of Connecticut v. Garfield*, 616 F.3d 189 (2d Cir. 2010); *Blount v. SEC*, 61 F. 3d 938 (D.C. Cir. 1995); and *FEC v. Weinstein*, 462 F. Supp. 243 (S.D.N.Y. 1978).

[4] 18 U.S.C. § 611 (1948).

[5] 2 U.S.C. § 441c.

or partnership assets. With respect to partnerships, however, the FEC has determined that section 441c does not prohibit donations made from the personal assets of the partners. *See* 11 C.F.R. § 115.4.

However, 11 C.F.R § 115 leaves much to be desired in its specificity regarding companies affiliated with or controlled by contractors. In the absence of an explicit ban on contributions by such entities, in recent years we have seen a few companies such as Chevron attempt to take advantage of this ambiguity and circumvent the restrictions on pay-to-play in the federal contracting process. This is where the Federal Election Commission needs to exercise appropriate oversight.

B. FEC Rationale for Dismissing the "Chevron Complaint"

On March 5, 2013, Public Citizen, Friends of the Earth, Greenpeace and Oil Change International filed a complaint with the Federal Election Commission charging that Chevron Corporation, Chevron USA, Inc. and the Congressional Leadership Fund violated 2 U.S.C. § 441c. The complaint (MUR 6726) documented that "Chevron" was recorded in FEC disclosure reports as making a $2.5 million campaign contribution on October 7, 2012, to the Congressional Leadership Fund, a registered super PAC which was used to finance negative ads against 14 Democratic congressional candidates. The complaint documented that Chevron USA is a major recipient of federal government contracts. Press statements by Chevron suggested that Chevron Corporation rather than Chevron USA made the campaign contribution. An addendum filing by Public Citizen documented that public records showed that both Chevron Corporation and Chevron USA had received government contracts in near proximity to the date of the contribution.

The Commission dismissed the complaint on February 25, 2014. The Commission accepted that Chevron Corporation (the parent company) made the campaign contribution, not Chevron USA (a subsidiary). Even though public records also appeared to show that Chevron Corporation was a federal contractor during the time period, the agency accepted Chevron's argument that the public records were in error.

The Commission's factual findings in this case are themselves subject to dispute. First of all, the Commission's records did not clearly document which entity made the contribution since both share the same address and are run by the same CEO, and the donor was listed by the Commission merely as "Chevron." Second, the record was very confusing as to whether Chevron Corporation itself held a government contract at the time of the campaign contribution.

In Chevron's response to the complaint, the corporation spent a great deal of effort negating the claim that Chevron Corporation itself was a government contractor: the contracts listed on www.usaspending.gov were in error, Chevron asserted, and ought to have been attributed to Chevron USA Product Company or some other contracting subsidiary.[6] Though Chevron Corporation had held contracts at some points in time, Chevron argued that the division did not hold contracts on the date of the campaign contribution. "Chevron Corporation is not,

[6] *See* MUR 6726, Chevron Response (May 1, 2013), at 6-8.

and was not in October 2012, in the business of federal contracting."[7] The Office of General Counsel noted that "one contract could arguably be attributed to Chevron during the relevant time period (Contract No. SP0600095C5541), [but] Chevron states that the true vendor for this contract was its subsidiary, Chevron USA Product Company."[8]

Nevertheless, this petition for rulemaking does not ask that the facts of the case be reevaluated. Rather, Public Citizen asks that the Commission reevaluate its standards for determining whether divisions within the same corporate family are separate and distinct business entities. The Commission should apply the more exacting scrutiny spelled out in other statutes and accepted by the courts in "piercing the veil" of formal corporate separateness. Using such standards, the Commission should evaluate whether one corporate entity is merely an "alter ego" of another and thus that the two corporations constitute a single entity subject to the federal contractor restrictions under 2 U.S.C. § 441c.

The Commission succinctly summarized its rationale for determining that Chevron Corporation and Chevron USA are distinct entities. The Commission found three factors to be dispositive:

(1) Chevron and Chevron USA are separately incorporated: Chevron in Delaware and Chevron USA in Pennsylvania, even though the entities share the same street address in San Ramon, California.
(2) Chevron claims that the two entities are under the direction and control of separate management, even though they share the same CEO and probably other directors and officers.
(3) Chevron has sufficient funds not derived from its federal contractor subsidiaries (Chevron USA) to make the $2.5 million campaign contribution.

With that limited analysis, and even somewhat contradictory findings, the Commission concluded Chevron Corporation and Chevron USA do not constitute a single business enterprise for purposes of the restrictions on campaign contributions by government contractors.

The FEC's decision has given a green light for Chevron and other federal contractors to evade the federal pay-to-play by creating a series of distinct entities within the same corporation. In the 2014 federal elections, Chevron gave another $1 million campaign contribution to the same Congressional Leadership Fund super PAC – this time under the name of another Chevron entity or division, "Chevron Policy, Government & Public Affairs." The address is P.O. Box 9034, Concord, California. This address is used in numerous filings across the country for Chevron USA, Chevron Products, Chevron Corporation, Chevron-Texaco Corporation and Chevron Policy, Government & Public Affairs, including not only the 2014 Congressional Leadership Fund filing with the FEC, but also state-level campaign finance filings in Idaho, Nevada, Oregon and Utah.

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[7] Id. at 12.

[8] MUR 6726, Factual and Legal Analysis (March 11, 2014) at 6.

C. Established Standards for "Piercing the Veil"

Under a variety of laws and in many contexts, federal regulators and the courts have established reasonable standards for determining whether affiliated corporate entities are treated as a single business enterprise subject to common regulation. Most notably, this issue has been tested in relation to the Worker Adjustment and Retraining Notification Act (WARN Act) in connection with employee layoffs. Section 639.3(a)(2) of Title 20 of the Code of Federal Regulations established by the Department of Labor clearly delineates the factors to be considered in deciding whether to treat subsidiaries and parent companies as a single "business enterprise" under the WARN Act:

> 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.

Courts have applied similar criteria when considering whether nominally separate corporations constitute a "single employer" under federal labor law. The First Circuit, for example, stated:

> 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): (1) inter-relation of operations, (2) common management, (3) centralized control of labor relations and (4) common ownership. *Soule Glass & Glazing Co. v. NLRB,* 652 F.2d 1055, 1075 (1981). 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.[9]

Similar criteria for "piercing the veil" have been upheld in other court decisions and today form a familiar body of legal precedent.[10]

These established criteria for judging whether two entities of the same corporate family are separate and distinct business entities when it comes to applying legal requirements are more exacting and accurate than the loose standards the Federal Election Commission has so far

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[9] *Penntech Papers, Inc. v. National Labor Relations Board*, 706 F.2d 18, 24-25 (1st Cir. 1983).

[10] See, for example, *Hollowell v. Orleans Regional Hospital*, 217 F.3d 379 (5th Cir. 2000); *United Paperworkers International Union, AFL-CIO, CLC v. Alden Corrugated Container Corporation*, 901 F. Supp. 426 (D. Mass. 1995); and *C.E.K. Industrial Mechanical Contractors, Inc. v. National Labor Relations Board*, 921 F.2d 350 (1st Cir. 1990).

applied in campaign finance cases. Under these criteria, the Federal Election Commission might very well have reached a different conclusion on whether Chevron Corporation, Chevron USA and Chevron Policy, Government & Public Affairs are components of a single business entity subject to the pay-to-play restrictions.

Regarding the criterion of common ownership, Chevron's response to MUR 6726 concedes common ownership of stock from Chevron Corporation through a short list of links to Chevron USA:

> Chevron Corporation holds 100% of the stock of Chevron Investments Inc. Chevron Investments Inc. in turn owns the stock of other companies, including Texaco Inc. Texaco Inc., in turn, owns the stock of other companies, including Chevron U.S.A. Holdings Inc. Chevron U.S.A. Holdings Inc., in turn, owns 100% of the shares of Chevron U.S.A. Inc.[11]

Additionally, Chevron's response emphasized that the Corporation derives its money not only from the government contracts awarded to Chevron USA (among numerous other contracting subsidiaries), but also from dividends on the stocks of these subsidiaries.[12]

Regarding the criteria of common officers and common operations, as Public Citizen pointed out in our addendum to MUR 6726, Chevron Corporation and Chevron USA Inc. are located in the same office building in San Ramon, California.[13] Moreover, in its legal analysis, the Commission admitted that "publicly available information indicates that Chevron and Chevron U.S.A. may share the same CEO,"[14] and the most definitive statement the analysis could make regarding the staff of the respective companies is that "*most* of the companies' directors and officers do not overlap."[15] This obviously leaves open the possibility that many of the companies' directors do, in fact, overlap.

Not only do the companies have overlapping officers and the same headquarters, publicly available information provides the distinct impression that Chevron Corporation and its subsidiary companies are merely various parts of one cohesive whole. On the Chevron website, for example, there is little emphasis on the distinction between Chevron Corporation and Chevron U.S.A. With respect to Texaco, which Chevron's response to our complaint identified as the holder of Chevron U.S.A. Holdings Inc.'s stock, Chevron's company history tab actually describes their relationship as a merger: "Another major branch of the family tree is The Texas Fuel Company, formed in Beaumont, Texas, in 1901. It later became known as The Texas Company and, eventually, Texaco. In 2001, our two companies merged."[16] Thus, Chevron's

[11] MUR 6726, Chevron Response, at 2.

[12] *Id*.

[13] M.U.R. 6726 "Chevron USA Inc.," Complaint, Appendix A; Addendum to Complaint, Attachment.

[14] MUR 6726, Notification to Public Citizen (March 11, 2014), at 6.

[15] *Id.*

[16] Chevron Corporation, About Chevron, Company Profile. http://www.chevron.com/about/leadership/ (last visited on 6/17/14.)

own statements indicate that Chevron and Texaco are alter egos – to talk about Texaco's interests without also calling them Chevron's interests is incoherent.

Similarly, a brief look at Chevron's 2013 Annual Report offers no data to distinguish Chevron U.S.A. or any other Chevron subsidiary; all of their activities are together simply referred to as projects undertaken by "Chevron." Chevron Corporation's response in MUR 6726 clearly states, "Chevron Corporation does not sell any goods or services to anyone."[17] Chevron's Annual Report, conversely, states, "Chevron is a global energy company with substantial business activities in … [many] countries."[18] It then emphasizes to its shareholders that "[t]he biggest factor affecting the results of operations for the company is the price of crude oil."[19] Even more tellingly, the report goes on to explain that "from time to time, certain **governments** have sought to renegotiate contracts or impose additional costs on the company,"[20] and that "the company continues to actively manage its schedule of work, **contracting**, procurement and supply-chain activities to effectively manage costs."[21] In all of these sentences discussing government contracts, no distinction is drawn between "Chevron," "the company," or "Chevron Corporation," and no reference at all is made to "Chevron U.S.A."[22]

Despite Chevron's insistence that its subsidiaries are legally separate entities, and that the parent corporation is nothing more than a shareholder, for all intents and purposes, there is only one Chevron being presented to the world. Actions taken by Chevron Corporation are done in the name of "Chevron," which will certainly lead to ramifications for the smaller subsidiary branches of "Chevron" that are doing local business on the ground around the country and the world. In other words, the word "Corporation" tacked on at the end of Chevron's $2.5 million donation to the Congressional Leadership Fund would not change the way that donation is viewed – it is a gift to a political committee from a company with whom the government does business. When the government then debates whether or not to give Chevron U.S.A. a federal contract, the thought that Chevron U.S.A. is distinct from Chevron Corporation will not play a role – the two companies are so closely intertwined that to draw a distinction between them on the basis of the state in which they are incorporated is to make a mockery of the federal pay-to-play law.[23]

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[17] MUR 6726, Chevron Response, at 2.

[18] Chevron Board of Directors, 2013 Chevron Annual Report (April 2014), available at http://www.chevron.com/annualreport/2013/documents/pdf/Chevron2013AnnualReport.pdf, at 10.

[19] *Id*.

[20] *Id*, emphasis added.

[21] *Id.* at 11, emphasis added.

[22] Id.

[23] Indeed, Chevron Corporation's own justification of its contribution to the Congressional Leadership Fund creates additional cause for concern. Chevron's response asserts that Chevron Corporation is merely a parent company that owns shares in its subsidiaries, and its main goal is to manage its assets in such a way as to maximize the gains for its shareholders. Thus, Chevron Corporation's donation to the CLF and its other political expenditures raise the question of why the parent corporation would wish to donate to super PACs other than to advance the interests of its subsidiaries, which are its sole source of income. Chevron's dependence on its subsidiaries has led some of Chevron Corporation's shareholders to petition the Corporation to disclose its political expenditures and to *refrain* from making political contributions. The shareholders' concern stemmed from a fear that the value of their stock would actually decrease due to the negative public perception of Chevron's political activities. *See* Carey Biron, "Chevron

D. The Commission's Loose Standard Undermines the Integrity of 2 U.S.C. § 441c

The Commission's Chevron decision has the potential of stripping the federal pay-to-play law of much of its binding force. Under the loose standard now employed by the Commission to determine whether companies are separate and distinct, all a federal contractor need do is create a legally separate company on paper, and show income not directly attributable to the contract that exceeds the amount of the contribution. The parent company can own 100 percent of the shares of the subsidiary company through linked companies, share the same CEO and other directors, share the same headquarters, function as dependent components of a single corporation, and cast itself as a single corporate enterprise to the public and lawmakers, and nonetheless give with impunity to political committees to support or oppose candidates and lawmakers.

A brief sampling of different media outlets' coverage of the Commission's decision in the Chevron matter shows that exonerating Chevron, and effectively allowing all other corporate government contractors to evade the pay-to-play law by establishing artificial distinctions among entities within their corporate family, has already generated a public perception of corruption. According to *The Washington Post*, shortly after the contribution, Representative Steve Israel (D-N.Y.) called it "the biggest political payoff in history."[24] A *Mother Jones* article described the incident, "Goodbye anti-pay-to-play laws, hello corporate America profiting off lucrative government deals based on campaign donations."[25] The article went on to say that this decision "could create a loophole a million dollars wide for other companies to exploit"[26] – a loophole that Chevron once again made use of in the 2014 elections.

E. The Commission should Promulgate a New Standard for Distinguishing Separate Entities of the Same Corporate Family

Public Citizen petitions the Federal Election Commission to clarify in 11 C.F.R. § 115 the factors for determining whether entities of the same corporate family are in fact distinct business entities for the purposes of the prohibition on campaign contributions from federal contractors. This clarification of the rules should establish more exacting scrutiny to protect the integrity of 2 U.S.C. § 441c, employing standards comparable to those used by the Department of Labor and other administrative agencies and established as precedent among the courts.

Rejects Shareholder Demands to Explain Record Political Spending," *Inter Press Service* (May 29, 2013), available at: *See* Chevron Stockholder Proposals, *Stockholder Proposal Regarding Lobbying Disclosure*, in NOTICE OF THE 2013 ANNUAL MEETING AND 2013 PROXY STATEMENT, May 29, 2013, available at http://www.chevron.com/documents/pdf/Chevron2013ProxyStatement.pdf

[24] Dan Eggen, *Chevron Donates $2.5 million to GOP super PAC*, THE WASHINGTON POST, Oct. 26, 2012, available at http://www.washingtonpost.com/blogs/post-politics/wp/2012/10/26/chevron-donates-2-5-million-to-gop-super-pac/.

[25] Patrick Caldwell, *Critics Say Chevron Flouted Pay-to-Play Law. FEC Says It's All Good.*, MOTHER JONES, Mar. 24, 2014, available at http://www.motherjones.com/politics/2014/03/chevron-super-pac-fec-pay-play.

[26] *Id.*

The standard for distinguishing separate and distinct business entities should require, at the least, scrutiny of the following factors: (i) common ownership, even via linked business enterprises, (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, including such a close relationship as to create a public perception of a single corporate enterprise. No one of these factors should be controlling, nor need all of them be present. Single contractor status should ultimately depend on all the circumstances of the case and be marked by an absence of an "arms-length" relationship found among unintegrated companies.

Sincerely,

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