

## Midterms Alert: Before Contributing to a Super PAC this Election Season, Confirm That Your Business Has No Federal Government Contracts

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If your business is considering making a contribution to an independent expenditure-only political action committee (“super PAC”) this election cycle, be sure to verify whether it is currently negotiating or performing a contract with the U.S. government.

Corporations and LLCs that are treated as corporations for federal tax purposes are prohibited from making contributions to federal candidates, party committees and PACs. A corporation may, however, make contributions to a super PAC, provided that the corporation is not a federal government contractor.

Federal campaign finance law prohibits federal contractors from making contributions to any federal political party, committee or candidate, or any person for any political purpose. The term “federal contractor” is broadly defined to include any person or entity who enters into a contract with any department or agency of the federal government for services, materials, supplies, equipment or property if payment for such contract is made with congressionally-appropriated funds. The prohibition applies at the beginning of contract negotiations or when proposal requests are submitted (whichever is earlier) and continues until contract negotiations terminate or the contractor completes performance of the contract (whichever is later).

Even a single federal contract can preclude a business from contributing to super PACs, as the Federal Election Commission (FEC) recently reminded Marathon Petroleum Company LP while assessing the company with an \$85,000 penalty.

In a unanimous decision, the FEC held that Marathon, a subsidiary of the oil and gas giant Marathon Petroleum Corporation, violated the law by making two \$500,000 contributions to two super PACs in the run-up to the 2020 election. At the time it made the two super PAC contributions, Marathon had a single federal contract valued at just over \$1 million with the Defense Logistics Agency, an agency within the Department of Defense, for jet fuel from its Detroit refinery. Although Marathon maintained a legal review program that pre-cleared political contributions, its compliance team was unaware of the government contract, which its lawyers characterized as an “inadvertent oversight.”

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In response to an FEC complaint, Marathon obtained refunds of its contributions and argued that the contract's minimal value relative to the company's overall revenue did not warrant additional FEC action. Citing several recent enforcement cases involving smaller government contracts, the FEC affirmed that there is no de minimis exception to the ban on contributions by federal contractors. It also rejected Marathon's argument that the federal contractor ban is unconstitutional as applied to contributions to super PACs.

The FEC's action against Marathon underscores the importance of thorough compliance programs for any business involved in political activities. A single oversight by an entity making political contributions could result in legal liability under federal and state campaign finance regulations as well as pay-to-play laws. Before making any contributions or expenditures for political purposes, a company should confirm whether it currently has or is negotiating any contracts with government entities.

The Akin Gump political law and government contracts teams will continue to monitor developments to keep clients informed on this and other key issues. We are available to conduct due diligence and develop and implement compliance programs for politically active businesses.

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