Federal Election Commission May 29, 2015
Attn: Amy L. Rothstein
Assistant General Counsel
999 E Street, N.W.
Washington, D.C. 20463

"Piercing the Veil" – Determining Whether Nominally Separate Entities of the Same Corporate Family Constitute a Single Contractor

(Comments on REG 2014-09)

Dear Ms. Rothstein:

Pay-to-play is the all-too-common practice of a business entity making campaign contributions to a public official with the hope of gaining a lucrative government contract. Rarely does pay-to-play constitute outright bribery for a government contract. Rather, pay-to-play usually involves a business entity endearing itself and buying access for consideration of a government contract. It often results in wasted taxpayer dollars as contracts are awarded based on politics rather than merit, and can cause legitimate businesses to think twice about engaging in government services, which is why the federal government and 15 states restrict campaign contributions from government contractors.[1]

The federal pay-to-play law reads in part: "It shall be unlawful for any person … who enters into any contract with the United States … to make any such contribution to any political party, committee, or candidate for public office or to any person for any political purpose or use…." (52 USC §30119, formerly 2 USC §441c)

Section 30119 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. In addition, the Act prohibits any person from knowingly soliciting a contribution from any person who is negotiating or performing a contract with the United States government. 52 USC §30119(a)(2); 11 CF.R. §115.2(c).

On February 25, 2014, the Commission dismissed a complaint charging that Chevron Corporation, Chevron USA, Inc. and the Congressional Leadership Fund violated the federal pay-to-play law. 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 congressional candidates. The complaint documented that Chevron is a major recipient of federal government contracts.

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[1] For a list and description of jurisdictions with pay-to-play laws that restrict campaign contributions from government contractors, go to: http://www.citizen.org/documents/wagner-case-record.pdf

The Commission dismissed the complaint on the grounds offered in Chevron's response: that one incorporated entity of Chevron – Chevron Corporation – made the campaign contribution, while a different incorporated entity of Chevron – Chevron USA – held the government contracts.[2]

The Commission's rationale for dismissing the complaint runs afoul of the spirit, if not the letter, of the pay-to-play law, allowing any major enterprise to make campaign contributions from one incorporated division, and to receive the rewards of lucrative government contracts to another incorporated division. Not only does this rationale underline the very purpose of the pay-to-play law, which is to prevent a government contractor from currying favor through campaign contributions, it also ignores well-established precedent for "piercing the veil" used by other governmental agencies in determining whether entities of the same corporate family are so interwoven as to constitute a single company.

Our organizations request that the Federal Election Commission revisit its rationale for defining a government contractor subject to the pay-to-play laws, and clarify the rules in Title 11, Section 115 of the Code of Federal Regulations, to provide a more accurate assessment, in conformity with legal precedent, of whether nominally separate entities of the same corporate family constitute a single contractor.

Specifically, we ask 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.

Some of the key factors in making such a determination should be (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.

A. Piercing the Veil

Piercing the veil doctrine, as it exists today, is most often used in order to decide if corporate shareholders (including parent corporations) should be held legally responsible for the actions of a corporation. It is one of the most litigated issues in U.S. corporate law, and there is a

[2] Whether Chevron Corporation held any federal contracts at the time of its campaign contribution to the Congressional Leadership Fund is a separate question that is in dispute. 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. 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." MUR 6726, Factual and Legal Analysis (March 11, 2014) at 6.

great deal of information available about the factors that courts have considered important in making this decision.[3] Many of the same factors could be used in cases involving contributions by related corporations to determine whether or not a parent company and its subsidiaries should be considered liable for each other's actions and obligations. In the Supreme Court case *United States v Bestfoods*, it was stated that "the corporate veil may be pierced when necessary to do justice in particular cases."[4]

One study conducted by University of Indiana compiled 31 factors that courts have considered when determining if the corporate veil should be pierced.[5] While 31 factors may be excessive, we believe that the FEC needs to use more of these factors and create firm guidelines as to the relationship that a corporation and its subsidiaries must have in order to protect the integrity of the federal pay-to-play laws. In the original decision on MUR 6726, only a few factors were cited as reasons for dismissing the case, and the research left many questions unanswered.[6] 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 to make a contribution, and show that that corporation had income not directly attributable to the contract that exceeded the amount of the contribution. The parent company can own 100 percent of the shares of the subsidiary company through linked companies, and the two corporations can share the same CEO and other directors, share the same headquarters, function as dependent components of a single corporation, and cast themselves 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.

We do not consider some of these factors to be as important in this case, given that the objective for the Federal Election Commission is not identical to that in some other contexts in which veil-piercing is attempted. In civil litigation, for example, the purpose of veil-piercing is often to avoid a situation where a corporate shell is used to avoid liability, and if the corporation is sufficiently capitalized to allow it to pay a judgment and meet its other debts, there usually is not any need to pierce the veil.

For the Federal Election Commission, however, the objective is to make sure that one corporation (the contractor) does not benefit from contributions made by another. Whether the contractor has sufficient capital to support its operations, and whether proper formalities have been observed, has little bearing on that objective. What is much more significant is whether the corporations are perceived as being the same, so that the recipient will identify the two and thus

[3] Wilson McLeod, "Shareholders' Liability and Workers' Rights: Piercing the Corporate Veil Under Federal Labor Law," *Hofstra Labor and Employment Law Journal* (Vol. 9:1, 1991). http://bit.ly/1JUGYA4

[4] CaseBriefs, "United States v. Bestfoods," http://bit.ly/1dxaCBJ

[5] William J. Rands, "Domination of a Subsidiary by a Parent," *Indiana Law Review* (Vol. 32:421, 1999). http://bit.ly/1bGqmkv

[6] MUR 6727, Factual and Legal Analysis (March 11, 2014).

fail to distinguish, in terms of the favoritism resulting from the contribution, between the contractor and the contributor.

B. Existing Precedent: National Labor Relations Board Standards

Precedent exists in other legal contexts that can provide some guidelines for the Federal Election Commission in promulgating more exacting standards in determining when two entities of the same corporate family are in fact a single company.

According to the National Labor Relations Board under the National Labor Relations Act (NLRA), the mere fact that a parent corporation owns all the stock of a subsidiary and exercises the authority "ordinarily incident to ownership" does not provide a basis for piercing the subsidiary's veil.[7] But when a parent goes beyond the normal exercise of ownership control over the subsidiary by preventing the subsidiary from operating as a genuinely independent entity, for example, or by interfering in its decision-making structures and procedures, then a subsidiary is considered a mere "instrumentality" of its parent and the veil must be pierced.[8]

The long-established NLRA "single employer" doctrine seeks to determine whether two or more enterprises are sufficiently intertwined that they should be considered a single employer for NLRA purposes. These new regulations were created to address a major issue in labor law. In the 1980s corporations often split in two, with one entity complying with NLRA requirements while the other did not. The division of the company was sometimes justified on the grounds that the two incorporated entities could compete in different markets, when in reality it was just an attempt to sidestep the law.[9]

In applying its "single employer" doctrine, the National Labor Relations Board and reviewing courts consider four basic factors: interrelation of the enterprises' operations; common management; centralized control of labor relations; and common ownership. No one factor is determinative and not all of them need to be shown, but together they provide a framework for evaluating whether separate enterprises should be considered one single employer.[10]

In an earlier 1960 decision, *NLRB v. Deena Artware, Inc.,* the U.S. Supreme Court held that the National Labor Relations Board properly imposed liability upon a parent company based on similar veil-piercing principles. Citing familiar corporate law doctrines, the Court ruled that inter-corporate liability would be appropriate when a parent's "dominion" over the subsidiary is

[7] McLeod, "Veil Under Federal Labor Law" at 116.

[8] Id. at 117.

[9] Id. at 141.

[10] Id. at 142.

"complete" or its "interference ... obtrusive" and when the subsidiary is "operated as a division of" the parent.[11]

C. The Forgotten Factor: How Does a Company Advertise Itself?

Regarding the Chevron case, many of the factors noted above suggest that Chevron Corporation and Chevron USA are but two entities of the same corporate family. 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.[12]

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.[13]

Regarding the criteria of common officers and common operations, as was pointed out in an addendum to MUR 6726, Chevron Corporation and Chevron USA Inc. are located in the same office building in San Ramon, California.[14] 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,"[15] 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."[16] This obviously leaves open the possibility that many of the companies' directors do, in fact, overlap.

Also overlooked by the FEC in MUR 6726 is that the company presents itself with one face: *Chevron*. The campaign contribution in 2012 was registered and reported to the FEC as coming from "Chevron." (Chevron exercised some greater caution in a subsequent $1 million donation to the same super PAC the following election cycle, as coming from "Chevron Policy, Government & Public Affairs," which appears to refer to an unincorporated division of Chevron Corporation, at the same address.) Chevron's 2013 and 2014 *Annual Reports*, for example, offer little data to distinguish Chevron USA or any other subsidiary; all their business efforts are simply referred to as undertaken by Chevron. On Chevron's web page there is little evidence of

[11] Id. at 151.

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

[13] *Id*.

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

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

[16] *Id.*

distinct business entities. Chevron U.S.A. is only mentioned one time on the website in the section about the company's history – nowhere does it mention Chevron U.S.A's current business model or the fact that it has government contracts.[17] There is very little differentiation between the subsidiaries and the parent on the company's website.

In piercing the veil, marketing two incorporated entities as a single company is a strong indication that they are indeed just two divisions of the same corporate family. It certainly rings that way for the recipients of Chevron's campaign contributions. In the minds of lawmakers and the public, Chevron doles out sizeable campaign contributions and Chevron receives lucrative government contracts.

D. Conclusion: Why MUR 6726 Should Not Serve as a Model For Future Cases

In the factual and legal analyses done for MUR 6726, there were some statements of fact and conclusions that could not be verified, and the final rationale used for dismissing the complaint fundamentally undermines the integrity of the federal pay-to-play laws. If that rationale stands for future cases, the effectiveness of 52 USC §30119 in reducing the potentially corrupting influence of large campaign contributions over the government contracting process will be at risk.

The Commission applied a simple and inaccurate standard in evaluating whether Chevron Corporation and Chevron USA should be seen as members of the same corporate family. The Commission found that because they are separately incorporated entities, and the parent company has sufficient revenue for its campaign contribution derived from sources other than its contractor subsidiary, the two entities do not qualify as an interwoven corporate family subject to the pay-to-play laws. The large campaign contribution from Chevron Corporation, in other words, was not viewed as coming from the contractor and thus was outside the prohibition of 52 USC §30119, regardless of whether such a contribution would in fact be likely to lead recipients to favor the interests of Chevron U.S.A. (including its interests in the award of government contracts).

The Commission reached this conclusion despite the fact that the corporate entities share the same CEO and probably other officers; derive revenues from each other's business operations; share the same address; depend in no small part on each other's success; and cast themselves as a single entity to lawmakers and government officials, the public, shareholders and the business community alike.

It is inevitable that large campaign contributions from Chevron Corporation are going to be widely perceived as coming from the Chevron corporate family; and lucrative government contracts awarded to Chevron U.S.A. are going to be widely perceived as benefiting the corporate family that doles out large campaign contributions.

[17] See Chevron, "Company History 1947-1979." http://bit.ly/1bGT3xJ

It is not necessary to get bogged down in the specifics of the Chevron case, however, because this rulemaking proceeding does not involve reconsideration of that vote. We are asking for a set of more exacting standards to be developed for 11 C.F.R. §115 that can be used in cases like this in the future.

The green light given by the Commission for federal contractors to develop simple mechanisms to evade 52 USC §30119 and make both campaign contributions to super PACs and receive lucrative government contracts is not yet being widely abused. So far, Chevron and a handful of other federal contractors – such as Oxbow Carbon, Bollinger Shipyards, Clean Energy and AJL Resources, Inc. – appear to have either taken advantage of this mechanism, or may be ignoring the law altogether, to pay to play in the game of government contracting. But, if not addressed soon, it is likely to spin out of control rapidly. Super PACs are increasingly dominating federal elections, providing campaigns with the means to sidestep contribution limits as they work closely with candidate and party committees,[18] and are now even taking on many of the critical functions of candidate campaigns.[19] As super PACs become *de facto* campaign committees for candidates, they provide a direct and valuable link to curry favor with lawmakers and candidates.

The Federal Election Commission could prevent further erosion of the federal pay-to-play law. More exacting standards for piercing the veil are readily available from the experiences of other governmental agencies, such as the Department of Labor, striving to preserve the efficacy of laws that regulate the conduct of business activity, and such standards have been established as precedent by the courts.

We urge 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. These factors should include, 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, especially, (v) the dependency of operations, including such a close relationship as to create a public perception of a single corporate enterprise.

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[18] Taylor Lincoln, SUPER-CONNECTED 2014 (Public Citizen, 2015).

[19] Jennifer Epstein, "Is New Hillary Clinton Super PAC Pushing Legal Boundaries?" Bloomberg News (May 12, 2015), available at: http://www.bloomberg.com/politics/articles/2015-05-13/is-new-hillary-clinton-super-pac-pushing-legal-boundaries ; and Philip Bump, "The Robots Are Here: Jeb Bush and the First Super PAC Run Campaign," *Washington Post* (April 21, 2015), available at: http://www.washingtonpost.com/blogs/the-fix/wp/2015/04/21/the-robots-are-here-jeb-bush-and-the-first-super-pac-run-campaign/

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