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# E-ALERT | Election and Political Law

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## AN UPDATE ON LITIGATION OVER THE ELECTIONEERING COMMUNICATION DISCLOSURE RULES

In our April 3, 2012 E-Alert, we discussed a federal district court decision that struck down the FEC regulation limiting disclosure of donors for electioneering communications.[1] 11 C.F.R. § 104.20(c)(9). The Court's ruling in the case, *Van Hollen v. FEC*, took effect immediately.

Over the past month, the defendant FEC and the third-party intervenors in support of the FEC—the Center for Individual Freedom ("CIF") and the Hispanic Leadership Fund ("HLF")—have considered whether to seek relief from the district court's decision. Some steps have been taken. On April 5, 2012, the intervenors filed separate motions to stay the district court's order. They subsequently also filed notices of appeal to the U.S. Court of Appeals for the D.C. Circuit, where the case is now pending, and asked the D.C. Circuit for an emergency stay pending appeal.

Last week saw two significant developments in the case. First, the FEC advised the district court that it will not appeal the order invalidating the regulation. This leaves only CIF and HLF to defend the regulation on appeal. Second, the district court denied the intervenors' respective motions to stay pending appeal, leaving the D.C. Circuit to decide whether it should grant an emergency stay pending appeal. Briefing on the motions for an emergency stay will be completed this Wednesday on May 2, 2012. We can expect an expeditious ruling on the motion for emergency stay from the D.C. Circuit—perhaps even by week's end.

The FEC's decision not to pursue an appeal has led some to question whether CIF and HLF may proceed in the D.C. Circuit in the agency's absence. Moreover, there has been some confusion over whether the district court's order will apply to donors who contributed to entities that fund electioneering communications prior to the regulation's invalidation. We discuss these issues below.

### CAN THE THIRD-PARTY INTERVENORS APPEAL WITHOUT THE AGENCY?

The fact that the FEC declined to pursue an appeal of the district court's invalidation of the regulation would not seem to preclude CIF's and HLF's ability to proceed in the D.C. Circuit.

The seminal decision by the Supreme Court on this issue, *Diamond v. Charles*, 476 U.S. 54, 68 (1986), explains that an intervenor before the district court may "continue a suit in the absence of the party on whose side intervention was permitted," but that this right "is contingent upon a showing by the intervenor that he fulfills the requirements of Article III [standing]." Applying this rule in *Castro County, Texas v. Crespin*, 101 F.3d 121, 126–27 (D.C. Cir. 1996), the D.C. Circuit found that a defendant-intervenor was entitled to appeal a district court's order on a statutory attorneys' fees issue even though the original defendant in the case, the federal government, had left the

[1] An electioneering communication is defined to include a broadcast, cable or satellite ad that refers to a clearly identified candidate for federal office; that airs within 30 days of a primary election, convention or caucus, or 60 days before a general, special or run-off election; and in the case of a House or Senate candidate, that is targeted to the relevant electorate. 2 U.S.C. 434(f)(3).

action in the district court when the case on the merits was settled. The D.C. Circuit justified this result by explaining that "there can be no doubt that [the intervenor] has demonstrated the requisite (i) injury-in-fact, (ii) causation, and (iii) redressability."

In this case, it is likely that CIF and HLF can establish Article III standing to appeal independent of the FEC. As these entities have explained in pleadings before the district court, the invalidation of the agency's regulation subjects them to greater disclosure obligations at significant cost. Indeed, the plaintiff's complaint specifically targets CIF as an organization that "spent 2.5 million in electioneering communications in the 2010 congressional elections, and disclosed none of its contributors" under the FEC's non-invalidated regulation. If the D.C. Circuit were to reverse the district court, this would redress CIF's and HLF's injuries-in-fact.

## WOULD THE DISTRICT COURT'S DECISION APPLY "RETROACTIVELY"?

Yes, though that is largely a result of the statute, which requires that a person funding an electioneering communication must disclose the identity of donors who, from January 1 of the preceding year up to the "disclosure date," contribute a sum that in aggregate exceeded $1,000.[2] 2 U.S.C. §434(f)(2)(E), (F). In practice, this means any entity obligated to file an electioneering communication report would have to disclose the name and address of donors who contributed in excess of $1,000 between January 1, 2011 and the date an electioneering communication aired.

This would be a surprising outcome for donors that contributed to entities that make electioneering communications, especially those who contributed while relying upon then-valid FEC regulations, and even more so for those who gave prior to April of 2011 when Congressman Van Hollen filed his suit. But if the history of this area of law is any guide, there is a fair amount of litigation and adaptation still to come.

## OTHER OUTSTANDING ISSUES.

Absent a stay from the D.C. Circuit, those active in issues communications during the remainder of 2012 will have to confront some difficult compliance questions under disclosure provisions that were drafted with the assumption that corporations and unions were barred from giving at all. Some are practical questions. What type of financial transactions constitute a "donation" or "contribution" that would trigger a disclosure obligation? May a segregated fund dedicated to electioneering communications, and consequently eligible for a more limited disclosure regime, only accept contributions from "individuals" as the statute says? Does a disclosure regime survive constitutional challenge if it requires an advocacy group to disclose all donors who gave over $1,000 over the past 18 months, simply because it spent more than $10,000 on a radio ad within a month of a primary election?

For the moment, we can await the D.C. Circuit's decision on the pending motion for an emergency stay before trying to answer these questions. Donors, issue advocacy groups, trade associations, and unions should continue to watch these proceedings closely, and may need to consider whether these recent and still-ambiguous changes in the law warrant a shift of strategy or practices.

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[2] The "disclosure date" is the date upon which the sum the person spends on electioneering communications exceeds $10,000. 2 U.S.C. § 434(f)(4).

If you have any questions concerning the material discussed in this client alert, please contact the following members of our election and political law practice group:


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