COVINGTON

New Tactic Emerges in Fight to Compel Companies to Disclose So-Called "Dark Money" Contributions

June 25, 2018

Election and Political Law

A new corporate political disclosure trend is coming. For years, those advocating increased corporate political disclosure have looked for ways to force companies to publicly reveal the names and amounts of corporate contributions to so-called "dark money" 501(c)(4) social welfare nonprofits and 501(c)(6) trade associations. To date, these initiatives have had, at best, limited success. Shareholder resolutions, for example, have pressed companies to adopt policies that require public disclosure of contributions to 501(c)(4) and (c)(6) organizations, but these proposals have almost never received a majority of votes cast. Similarly, reform groups during the final years of the Obama Administration pushed for an executive order that would require federal government contractors to disclose information about their political spending, to no avail. A rulemaking petition asking the SEC to adopt a rule on corporate political disclosure has not moved forward, despite more than 1.2 million public comments. And, notwithstanding pressure resulting from the annual CPA-Zicklin Index, which ranks the political disclosure practices of the S&P 500, fully 70 percent of the S&P 500 reportedly disclose no information on their websites about 501(c)(4) contributions.

But this month, by signing an unprecedented Executive Order, Montana Governor Steve Bullock introduced a new tactic in the effort to compel companies to publicly disclose 501(c)(4) and (c)(6) contributions. (Although the first of its kind, the Executive Order is the latest episode in Montana's long quest to seeking public disclosure of the names of donors to politically active nonprofits.) If not struck down by the courts, that tactic could be quickly and easily copied by many other jurisdictions and could have more far-reaching consequences than previous 501(c)(4) and (c)(6) disclosure efforts. In structure, Governor Bullock's Executive Order resembles many pay-to-play disclosure regimes, in that it requires would-be state contractors for services contracts over $25,000 and goods contracts over $50,000 to disclose "covered expenditures" aggregating to more than $2,500 made by the entity and "any of its parent entities, or any affiliates or subsidiaries within the entity's control" within the previous two years.

What is novel is that "covered expenditures" are defined broadly to include not only contributions "to or on behalf of a candidate for office, a political party, or a party committee in Montana" but also contributions "to another entity, regardless of the entity's tax status, that pays for an electioneering communication, or that makes contributions, transfers, or expenditures to another entity … that pays for electioneering communications." "Electioneering communications," in turn, refer to paid public communications made within "60 days of the initiation of voting in an election in Montana, that can be received by more than 100 recipients in the district in Montana voting on the candidate or ballot issue" if the communication refers to or

depicts a candidate "in that election in Montana" or "refers to political party, ballot issue, or other question submitted to the voters in that election in Montana."

These provisions are extremely broad and leave many open questions. For example, how is a company to know whether recipients of its funds themselves make contributions to entities that pay for electioneering communications in Montana? Does the reference to "party committees" mean that any ad that mentions the word "Republican" or "Democrat" shortly before an election triggers disclosure? Won't the disclosure be misleading? For example, if a company seeks a state contract and is a member of a Montana trade association that pays for an electioneering communication, the company will need to disclose payments to the association over the prior two years, and all electioneering communications the association ran, and the candidates the trade association supported, irrespective of whether the company knew of the ads or supported that candidate. These important questions are left unaddressed in the Executive Order.

The Governor has instructed the state's Department of Administration to issue policies and orders in advance of the October 1, 2018 effective date to implement this Order. But regardless of the content of that clarifying language, this tactic—using state government contracting rules to force broad disclosure of corporate political donations—could upend the current corporate political disclosure state of play. If these changes are adopted by executive order rather than through the more deliberate legislative process, we could see many more jurisdictions that adopt similarly far-reaching disclosure requirements. Because these executive orders do not need legislative approval, Montana's Executive Order may be only the first domino to fall in the coming months.

If you have any questions concerning the material discussed in this client advisory, please contact the following members of our Election and Political Law practice:

Zachary G. Parks	+1 202 662 5208	zparks@cov.com
Robert Kelner	+1 202 662 5503	rkelner@cov.com
Robert Lenhard	+1 202 662 5940	rlenhard@cov.com
Derek Lawlor	+1 202 662 5091	dlawlor@cov.com
Matthew Shapanka	+1 202 662 5136	mshapanka@cov.com

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.