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Federal Court Issues Important Ruling Concerning Donor Disclosure for Groups Making Independent Expenditures

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Election and Political Law

On Friday, the Chief Judge of the United States District Court for the District of Columbia issued a surprise decision that vacated a Federal Election Commission regulation that since 1980 has guided disclosure of the funding of independent expenditures. This change is scheduled to take effect on September 17, 2018, and will substantially affect the thinking of non-political committees (*e.g.*, politically active social welfare organizations, Section 527 political organizations, and LLC's) that plan to make independent expenditures in the 2018 general election, and individual and organizational donors to such groups.

The most important effect of this decision is that entities that are not registered with the FEC, and that make an independent expenditure of over $250 in support of or opposition to a federal candidate after September 17th, will have to (a) disclose the identity of all donors who gave over $200 to the group for the purpose of influencing a federal election, and (b) identify which of those donors gave for the purpose of funding any of the group's independent expenditures. Prior to the decision, these groups only disclosed the identity of donors who gave for the purpose of funding the specific ad that was being reported.

We expect this decision to be appealed and that the Court of Appeals will be asked to stay the trial court's ruling until after the election. It is hard to predict, at this early stage, whether that would be successful or not. The trial court gave the FEC 45 days to implement guidance for how groups should comply with these new disclosure obligations. Yet, the fractured nature of FEC decision making, and the presence of only four sitting Commissioners at an agency that needs a minimum of four votes to proceed with any action, makes it unlikely the FEC will provide helpful guidance much prior to the date the trial court's decision takes effect, if at all.

A summary of some of the key points of the decision, and steps donors should consider, follows.

What Happened: In 2012, Crossroads GPS reported it spent over $17 million on independent expenditures in federal races, and that no one had given it funds specifically to pay for those particular ads. Citizens for Responsibility and Ethics in Washington (CREW) filed a complaint with the FEC, alleging that this was not an accurate description of Crossroads' donors. The FEC subsequently dismissed the matter and CREW filed suit, alleging the FEC acted improperly in dismissing its action, and that the agency's regulation was inconsistent with the statute.

Central to the litigation was the claim by CREW that the FEC had long misinterpreted the law, relying on a regulation that impermissibly narrowed the statutory disclosure obligations, 11 C.F.R. 109.10(e)(1)(vi). The Court agreed, finding first that the statute—but not the FEC's regulation—required that an entity that was not registered with the FEC (*i.e.*, was not a candidate committee, party committee or PAC), and that made an independent expenditure over $250, must disclose the donors who gave more than $200 to the group for a political purpose, or at the request or authorization of a candidate or candidate's agent, in connection with a federal election. *See* 52 U.S.C. 30104(c)(1) and 30104(b)(3). Thus, *all* donors to the group had to be reported, if their payment constituted a "contribution" *i.e.*, was made for the purpose of influencing a federal election or at the request of a federal candidate. Second, the court concluded that the statute required these groups also to identify which of their donors had given for the purpose of funding any of the group's independent expenditures, not—as the FEC's regulation stated—only the independent expenditure that was being reported by the group at the time. This is also very significant, for many of these politically active groups have interpreted the FEC's regulation to require no disclosure of a donor unless that donor was explicit that their funds were to be used to pay for a particular ad.

The specific contours of this ruling are important, for even if it withstands further legal challenge, these groups will only be required to disclose donors whose contribution was for the purpose of influencing a federal election or was solicited by a federal candidate. Thus, how these groups solicit contributions, and what the donor's intent is when giving, will be very important under this new standard. The court explicitly recognizes this in its decision. In rebutting the argument that this ruling will lead to a wholesale disclosure of all donors, specifically by popular conservative and liberal advocacy groups, the court stated: "Thus, the identities of contributors to both the NRA and the Sierra Club for 'those organizations' general programs' need not be identified; only those non-trivial donors contributing to fund those organization's political efforts in federal campaign and independent expenditure activities are required to be disclosed under 52 U.S.C. § 30104(c)." In litigating the case, CREW focused on evidence that Crossroads GPS officials had solicited funds for election related purposes and had shown potential donors campaign advertisements during pitch sessions with donors. The Court drew attention to this evidence. Consequently, this decision may have more of an effect on how funds are *raised* than on whether these groups can continue to operate in the political arena.

What next? The trial court stayed the vacature for 45 days to allow the FEC time to provide the regulated community with guidance on how to comply with the statute, absent the limiting regulation. There are some basic questions about how to report donors who give for the purpose of influencing an election as opposed to those who give for a specific independent expenditure, as well as some more nuanced questions, such as how one would determine if a contribution was given for the purpose of influencing an election. Some answers can be inferred from existing forms and decisional law, but guidance would provide helpful clarity. However, it seems likely the trial court's decision will divide the Commission, and consequently, any interpretive guidance is likely to be thin in content and late in arriving.

The FEC and Crossroads are both parties to the litigation, and while the FEC Commissioners are likely to divide 2-2 on whether to file an appeal, Crossroads is almost certain to appeal. Thus, while the FEC may not participate, the case is likely to go forward on appeal, and we would expect Crossroads to seek to stay the trial court decision, citing the disruptions in election spending that may result.

Finally, while it will matter primarily to Crossroads and any of its undisclosed donors, the trial court concluded the FEC's dismissal of the complaint against Crossroads was "contrary to law" and remanded the matter to the FEC for reconsideration consistent with the court's decision. While the trial court indicated that the FEC may conclude that no penalty is warranted given Crossroads' reliance on an existing regulation, it also indicated that disclosure of donors is still a permissible remedy. We will see whether there are four Commissioners who agree, or whether this matter will continue to be litigated before the District Court.

What are the implications for donors? Donors who do not wish to be disclosed will need to take account of the Court's decision. At least until a stay is issued (if there is a stay) and perhaps until the D.C. Circuit rules on an appeal, donors will have to assume that there is an increased risk that groups to which they contribute will need to disclose their donations, if the donation was solicited in a way that suggests the funds will be used to influence a federal election or if the donor conveys a desire to see the funds used for independent expenditures. Obviously, this is a risk that is more easily managed for contributions going forward than it is for contributions made earlier in 2018.

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:

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