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E-ALERT | Election and Political Law

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FEDERAL COURT STRIKES DOWN FEC REGULATION LIMITING DISCLOSURE OF DONORS FOR ELECTIONEERING COMMUNICATIONS

The disclosure rules that apply to political ads that air shortly before an election were thrown into question on Friday when a federal trial court in Washington, DC invalidated the FEC's regulation that limited the disclosure of donors to groups that air electioneering communications. The decision may have an impact on contributions to and spending by issues groups that are not federal PACs, such as groups operating under Section 501(c)(4) of the tax code and trade associations. This advisory highlights the key elements of the decision and provides an initial assessment of the consequences.

THE LITIGATION AND THE DECISION

In 2002, when Congress passed the Bipartisan Campaign Reform Act (BCRA), it created a new form of regulated speech: "electioneering communications." Electioneering communications were defined to include a broadcast, cable or satellite ad that referred to a clearly identified candidate for federal office, aired 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, was targeted to the relevant electorate. 2 U.S.C. 434(f)(3).

Corporations and unions were prohibited from paying for electioneering communications. 2 U.S.C. 441b(b)(2). Entities that could spend their resources on electioneering communications, such as individuals, partnerships and unincorporated associations, had to disclose their donors using one of two methods. If the person established a segregated bank account, from which all electioneering communications were funded, it could limit disclosure to only those persons whose funds were deposited in that account. If the person did not use a segregated account, it was required to disclose all contributors, regardless of how those funds were used. While this restriction was upheld by the Supreme Court in *McConnell v. FEC,* 540 U.S. 93 (2003), the Supreme Court later struck down the ban on corporate or union funding of electioneering communications in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (WRTL).

In the wake of *WRTL*, the FEC held a rulemaking to determine what effect the decision should have on its regulations. The outcome was two alternatives with very different results: one applied the existing electioneering communication disclosure rules to unions and corporations and the second concluded that only ads containing express advocacy or its functional equivalent qualified as electioneering communications subject to the disclosure rules and the ban on corporate and union funding. After dozens of comments and two days of testimony by fifteen witnesses, the agency adopted a compromise: corporations or unions that funded electioneering communications would have to disclose donors who gave for the purpose of funding the electioneering communication, but otherwise were not obligated to disclose their funding sources. It was this regulation that Congressman Van Hollen challenged.

On March 30, 2012, District Court Judge Amy Berman Jackson issued a decision in *Van Hollen v. FEC,* concluding that the FEC's regulation limiting disclosure to donors who gave for the purpose of

funding electioneering communications was contrary to the intent of Congress when it passed BCRA. While the court acknowledged the somewhat novel issue of what administrative law principles apply when the Supreme Court alters the legal landscape, the court concluded that the statutory language was clear, and requires "every person" making an electioneering communication to either establish a segregated fund to pay for the communication and disclose the donors to that fund, or to disclose all donors to the organization. While the court acknowledged that there was a concern this might prove too burdensome or too broad as a matter of policy, it concluded that it was the role of Congress to repair the law, not the FEC.

WHAT NOW?

The parties to the litigation have several decisions at this point.

- The FEC could appeal, but it requires the affirmative votes of four of the six Commissioners to do so. It may be difficult to find this level of consensus on a charged issue such as this.
- The two intervenor-defendants in the case could appeal. They include advocacy groups that either challenged the plaintiff's standing to bring the case or argued in favor of the lower disclosure thresholds.
- The FEC could re-write its regulation in light of the Court's decision. This seems unlikely, given the stakes, the proximity to the election, and the absence of consensus at the FEC.

Outside groups, including trade associations, must decide how to assess this change to the law and the political and legal risks. Their decisions may turn on whether the case is appealed.

- Some groups could decide to comply with the statute, either establishing segregated electioneering communications accounts, or disclosing all donors. For these groups, some difficult decisions await, including what constitutes a "contribution" or "donation" and if a segregated fund is used, whose funds to put in the account.
- Others may refuse to disclose their donors, leading to a legal impasse and litigation. For example, if three Commissioners voted against an appeal, the other three Commissioners might respond by voting against any enforcement action that is based on a decision they view as flawed. If this were to occur, any person that filed a complaint could sue the FEC in federal court, seeking an order to compel the agency to proceed with an enforcement action against a non-disclosing group. This process could take years to work through.
- Lastly, some groups may decide to file "independent expenditure" reports instead of electioneering communications reports, arguing that their ads contain express advocacy or are susceptible to no other reasonable interpretation. An odd result of Friday's decision is that independent expenditure ads (those that expressly advocate for the election or defeat of a candidate) now face lower disclosure obligations than do electioneering communications. As was the case under the now invalidated electioneering communications disclosure rule, non-federal PACs paying for independent expenditures need only disclose those donors who contributed for the purpose of funding the independent expenditure. It is easy to imagine a 501(c)(4) group running "issue ads" that do not include express advocacy up until the 30 days before a primary and 60 days before a general election, and then switching to independent expenditure ads, thereby operating with the lowest level of disclosure available throughout.

To the degree that individuals view the election laws as murky, counterintuitive or the product of an Alice in Wonderland-like experience, the effect of this decision may serve to reinforce that view.

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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