U.S. Supreme Court Denies Request for Stay of Ruling Requiring Nonprofit Donor Disclosure

September 19, 2018

The U.S. Supreme Court has rejected a request to stay a prior federal district court opinion that vacated a key Federal Election Commission donor disclosure regulation. As noted in an earlier Client Alert, that district court ruling was issued last month by Judge Beryl Howell of the U.S. District Court for the District of Columbia, who held that an FEC disclosure regulation related to "independent expenditures" (i.e. public communications that expressly advocate a candidate's election or defeat) was overly narrow and thus inconsistent with the underlying Federal Election Campaign Act provision. The Supreme Court's denial of the request to stay the ruling marks the end of a tumultuous few weeks for the case, and will allow the ruling, with potentially significant consequences for 501(c)(4) and 501(c)(6) organizations, to go into effect. ***Going forward, nonprofits and other organizations required to file "independent expenditure" disclosure reports with the FEC will be required to disclose all contributors who donated more than $200 toward influencing federal elections, regardless of whether the donor had earmarked their donation for a particular independent expenditure.***

The case was brought by Citizens for Responsibility and Ethics in Washington (CREW), who sued after the FEC dismissed an administrative complaint against Crossroads GPS, a 501(c)(4) organization, alleging that the group did not disclose the names of contributors to a 2012 effort to unseat Ohio Senator Sherrod Brown. The U.S. District Court for the District of Columbia sided with the plaintiffs, concluding that the challenged regulation "has permitted reporting non-political committees to evade the statutory disclosure requirements" by allowing donors to avoid identification on FEC reports provided that they not earmark their donations to be used on an independent expenditure. Crossroads GPS appealed, and the D.C. Circuit denied their appeal on September 15th. That same day, Crossroads GPS filed an emergency stay motion, which Chief Justice John Roberts of the U.S. Supreme Court, who oversees emergency petitions arising from the D.C. Circuit, granted.

On September 18th, the Supreme Court denied the request for a stay, in an order issued by Chief Justice Roberts. The practical effect of this decision is that, moving forward, 501(c)(4) and 501(c)(6) organizations that plan to make independent expenditures in federal races will need to disclose to the public any donor that gave money for the purpose of influencing federal elections, regardless of whether they wanted to earmark their funds towards a particular federal race or particular communication. In the past, these organizations had relied on the prior FEC rule that required them to disclose a donor's name to the public only where the donor earmarked funds for a particular communication. The prior rule resulted in many organizations sponsoring advertisements using express-advocacy terms like "vote for," "oppose," and the like in federal races while reporting few (if any) donors on FEC reports.

The FEC has not yet issued rules or guidance on when a particular donor must be disclosed, but nonprofit organizations should be aware that the new disclosure rules may require significant changes in their fundraising and reporting approaches.

Caplin & Drysdale's Political Law and Exempt Organizations Groups are available to assist any potential sponsors of federal-level independent expenditures determine their disclosure obligations. If you have questions concerning this alert or for more information, please contact:

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