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Groups Sponsoring Electioneering Communications Must Disclose All Donors Pending Appeal of District Court Order

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Advocacy groups and trade associations that fund political advertisements may be compelled to make heightened donor disclosures as a result of recent litigation. The expanded disclosure requirements apply to "electioneering communications," which are ads aired via broadcast, cable, or satellite that refer to a clearly identified candidate for federal office, are made within 30 days of a primary or 60 days of a general election, and are targeted to the relevant electorate. The new ruling will affect many typical issue ads that highlight an official's position on an issue and urge the public to contact the official. As a result of the litigation, an organization sponsoring an electioneering communication may be required to disclose all donors of more than $1,000.

For trade associations and other nonprofits considering running pre-election ads, the recent court rulings create significant uncertainty about how the disclosure rules will be applied and practical challenges in fundraising and administration.

Rules for Electioneering Communications

The rules governing electioneering communications have shifted dramatically over the last 10 years. The term first found its way into law in 2002 when Congress passed the landmark campaign finance legislation, known as the McCain-Feingold law, which prohibited virtually all corporations (including most nonprofits) from paying for electioneering communications at all. In 2007, the Supreme Court in *FEC v. Wisconsin Right to Life, Inc.* limited the statute so that corporations were prohibited only from paying for electioneering communications that expressly advocated the election or defeat of a candidate for federal office or that were the "functional equivalent" of express advocacy. This opened the door to more spending on electioneering communications by trade associations and incorporated non-profits. In 2010, the Court struck down the ban entirely in its *Citizens United* decision.

The electioneering communications provisions of McCain-Feingold not only restricted funding sources, but they also imposed disclosure and reporting requirements. Following the *Wisconsin Right to Life* decision, the Federal Election Commission ("FEC") revised its disclosure rule. That rule, which is the target of Van Hollen's lawsuit, requires corporations and labor unions to disclose and report only those persons who make donations aggregating $1,000 or more to the corporation or labor union, *which were made for the specific purpose of furthering electioneering communications.*

The FEC explained that this limited disclosure was appropriate because it provides the public with information about those persons who contribute because they support the message

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conveyed by the electioneering communications. At the same time, it does not require disclosure of the vast number of customers, investors, or members who have provided funds for purposes entirely unrelated to the making of electioneering communications.

Van Hollen v. FEC

In April 2011, Representative Chris Van Hollen, Jr., a member of the U.S. House of Representatives from Maryland's 8th Congressional District, filed a lawsuit challenging the electioneering communications disclosure rule described above.

Twelve months later, in April 2012, the district court granted summary judgment to Rep. Van Hollen, invalidating the rule's narrow disclosure requirement. The court found that "there is no question that the regulation promulgated by the FEC directly contravenes the Congressional goal of increasing transparency and disclosure in electioneering communications." According to the court, the FEC's attempt to add a purpose or intent element to the meaning of the word "contribute" is an alteration, and not a clarification, to the law. The court explained that "a person who gives money to a non-profit corporation but has no opinion about how the non-profit uses the money is still a 'contributor.' Likewise, a person who gives money to a non-profit but does not know whether the non-profit makes 'electioneering communications' is still a contributor."

On May 14, the Court of Appeals for the District of Columbia Circuit denied an emergency motion filed by two 501(c)(4) groups seeking a stay pending appeal of the district court's order in *Van Hollen v. FEC*. As a result of the Court of Appeals decision, the district court order goes into effect immediately. Groups that fund electioneering communications this election season will apparently be required to report *all* "donors" that contribute $1,000 or more to the group. The Court of Appeals is scheduled to hear the merits of the appeal of the lower court decision in the fall.

Impact of Court of Appeals' Decision to Deny Motion to Stay

The two 501(c)(4) organizations that intervened in the litigation sought a stay of the ruling to prevent irreparable harm to the organizations and other speakers. They argued that compliance with the disclosure requirements imposed by the district court would be unduly burdensome. Under the district court's interpretation of the law, groups that fund electioneering communications must report every person who contributes $1,000 or more to the group irrespective of his or her purpose in transferring the funds.

This new requirement requires groups involved in funding political ads such as trade associations and 501(c)(4) organizations to decide whether to comply with the literal requirements of the statute and identify all donors that meet the monetary threshold or to refuse to disclose all donors and risk government enforcement. As a result of the uncertain status of the disclosure requirements for electioneering communications, there are significant implications for organizations contemplating pre-election advertising:

1.) An organization, such as a 501(c)(4) that makes an electioneering communication that is not intended to influence an election, would be subject to the broad disclosure provisions requiring it to disclose its donors.
2.) An organization could make independent expenditures—that is, ads that expressly advocate for or against a candidate—and face lesser disclosure obligations than for electioneering communications. For these kinds of ads, an organization need only report donors who contributed for the purpose of funding the independent expenditure.
3.) An organization could create an independent expenditure committee (i.e., a super PAC), transfer funds to that committee, pay for independent expenditures, and then disclose only the contribution from the original organization.
4.) An organization can create a segregated fund to pay for its electioneering communications and then only disclose contributors to the segregated account. What is not clear is whether the organization could simply contribute to the segregated account and disclose itself as the donor (prior to 2010, remember, a corporation could not fund electioneering communications that did not expressly advocate, and prior to 2007, a corporation could not fund any electioneering communications, so this would not have been an option).
5.) An organization that receives funds from various sources of revenue—such as customers, investors, due-paying members or institutional contributors—must decide who is a "donor" for purposes of reporting to the FEC. This distinction is particularly thorny for organizations that receive dues. The district court explained that the word "donation" clearly connotes providing something for nothing. Therefore, if dues are paid in exchange for benefits, such payments should not trigger these disclosure obligations.

The bottom line is that whether your organization funds issue ads during the electioneering communications window or independent expenditures, there are many disclosure rules to consider. Organizations must plan carefully when they solicit funds to be certain that they and their donors know what disclosure will be required.

Please contact the authors of this article if you have any questions or comments.

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