FEC releases new disclosure guidance in the wake of recent federal court decision

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October 10, 2018

The Federal Election Commission (FEC) released guidance last week regarding a recent decision by the United States District Court for the District of Columbia, *CREW v. FEC*, that has significant campaign finance compliance implications for non-committee entities (persons other than political committees, e.g., nonprofit corporations) that make federal independent expenditures (IEs) between now and election day. The district court ruling invalidated an FEC regulation, 11 C.F.R. 109.10 (e)(1)(vi), which required non-committee organizations making IEs to disclose only those donors that contributed more than US$200 specifically for a particular IE. The district court's decision in *CREW* effectively stated that the regulation subverted Congress' intent of compelling campaign finance disclosure in the IE-engagement setting. In response to the court's findings and shortly after interveners in the case failed in their efforts to procure an emergency stay from either the D.C. Circuit or U.S. Supreme Court, the FEC released its new guidelines to help parties better understand the new state of play.

The FEC's guidance makes clear that non-committee organizations, including 501(c)(4) nonprofits, that are funding IEs related to federal elections made on or after September 18, 2018, will need to disclose additional donor information that prior to the *CREW* decision would have been kept private. Under 11 C.F.R. 109.10(b), (e)(1)(i)-(v) and (e)(2), organizations that spend in excess of US$250 on IEs in a calendar year are required to report itemized receipts of contributions and identify each person who made contributions that aggregate to US$200 or more during the year that are related to the IE activity. Under the vacated regulation and pre-*CREW* interpretation, organizations only needed to disclose the identity of those donors who made contributions for the purpose of furthering the particular IE being disclosed. Under the new guidance, however, the disclosure obligation is much more broad.

For contributions received between August 4, 2018, and September 30, 2018, the FEC is requiring reporting organizations to identify all donors to the entity who contributed more than US$200 in 2018 if the contribution was intended to influence election activity. Additionally, the filing entity is required to separately identify those contributors who gave for the purpose of furthering *any* IE—not just the IE being disclosed.

For contributions made to non-committee IE reporters in future calendar quarters, the FEC will require similarly broad disclosure. All such reporting entities will need to identify all donors to the organization who contributed more than US$200 annually that are "earmarked for political purposes." Furthermore, all such reporting organizations will need to identify, with a special notation, all donors who contribute more than the US$200 aggregate threshold for the purpose of supporting *any* IE—not just the IE being specifically disclosed.

Looking ahead, it will be interesting to see how the FEC seeks to interpret the meaning of "earmarked for political purposes" for the sake of this guidance. This phrase, which emanates from the definition of the term "contribution" set forth in the Supreme Court's seminal *Buckley v. Valeo* decision, is quite ambiguous in scope. As such, there may be financial backers of certain election-related activities - such as public-opinion polling and voter turnout efforts - that now face the specter of public disclosure because of unrelated IE activity by the non-committee organizations they support. The impact of this potential new disclosure obligation on non-committee reporters is significant, particularly

for 501(c)(4) entities and other nonprofit organizations whose donors are used to anonymity under federal tax rules and guidance. However, the message from the FEC is clear in the wake of the *CREW* holding - if nonprofit or other non-committee organizations make IEs and have donors contribute funds earmarked for political purposes, those donors will now need to be disclosed.

The advent of these new rules also brings new compliance risks for politically active nonprofits and other entities, as organizations assess whether to engage in IE or IE-related communications or conduct, and as they analyze whether particular donors need be disclosed on Schedule 5-A of FEC Form 5 submissions. Dentons' Political Law team will continue to monitor the legal issues and developments surrounding nonprofit non-committee disclosure rules, but in the meantime please consult legal counsel should your organization be considering playing in the IE space.

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