GODFREY & KAHN S.C.

Political Law Flash
August 2018

CREW v. FEC: Donor disclosure by tax exempt organizations

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Under federal law, a tax exempt organization may engage in limited political activity, including sponsoring independent expenditures – express advocacy communications that support or oppose a clearly identified candidate. These tax exempt organizations do not register as political committees but must report their independent expenditures to the Federal Election Commission (FEC) when spending exceeds statutory thresholds.

On Aug. 3, 2018, the United States District Court for the District of Columbia (D.C. District Court) held in *CREW, et al v. FEC*[1] that a tax exempt organization must disclose a donor's identity to the FEC when the donation is made for the purpose of influencing federal elections, including for the purpose of furthering independent expenditures in federal elections.[2] The decision's impact depends on whether the FEC adopts a new regulation or appeals the decision. Even if the FEC does not appeal, Crossroads Grassroots Policy Strategies, Inc. – a section 501(c)(4) social welfare organization – is a party to the action may choose to do so. If the decision stands, it is unlikely to affect an organization that relies on general purpose grants for financial support rather than donations earmarked for specific activities.

The decision does not directly affect tax exempt organizations making independent expenditures in state and local elections or the privacy of their donors.

FEC compliance requirements

According to the D.C. District Court, the FEC's application of federal campaign finance statutes is too narrow. Under federal law, an organization must report the names of individuals and entities that donated more than $200 if (1) the donation was made for the political purpose or influencing an election for federal office or (2) the donation was made for the purpose of furthering an independent expenditure that exceeds $250.

The FEC regulations administering these statutory provisions require donor disclosure only when donations are expressly earmarked for the purpose of furthering a specific independent expenditure whether planned or already produced. The FEC has not required disclosure when a donation is earmarked to support general political activity, including express advocacy.

The court ordered the FEC to issue an interim regulation within 45 days that requires donor disclosure whenever donations are earmarked for the political purpose of influencing any election for federal office, including for the purpose of furthering an organization's independent expenditures. The court said any earmarked donation

[1] Memorandum Opinion, *Citizens for Responsibility and Ethics in Government, et. al. v. Federal Election Commission and Crossroads Grassroots Policy Strategies,* United States District Court for the District of Columbia, No. 16-259 (BAH), Aug. 3, 2018.
[2] The decision does not impact political committees that engage in express advocacy including PACs and super PACs.

triggers reporting and that it is not necessary for the donor to direct the precise manner in which funds are spent. The FEC's current makeup (two Republicans, one Democrat and an Independent) and history of deadlocks creates uncertainty as to whether it will adopt a regulation as ordered.

State compliance requirements

Whether a particular state may be impacted by the D.C. Circuit Court's interpretation of federal law depends on that state's statutes and rules and the authority delegated to its campaign finance regulators. The decision will not impact a state without statutory or regulatory donor disclosure requirements for tax exempt organizations that make expenditures in state or local elections. For example, Wisconsin campaign finance law does not require donor disclosure by tax exempt organizations under any circumstances. Accordingly, there is no Wisconsin statute that state regulators or a court could interpret in the manner federal law has been interpreted by the D.C. District Court.

Of the states that require the disclosure of donors to tax exempt organizations engaging in political activity, statutes and practices different considerably. Some states may already require the disclosure described by the D.C. Circuit Court. Others may have statutes or rules that mirror federal laws and regulations, but that are also narrowly applied. In that case, either a court or a regulatory agency, if so authorized, may choose to interpret them in the manner that the D.C. Circuit Court interpreted federal law.

Conclusion

If *Crew v. FEC* stands, it has a direct potential effect only on donors to organizations that are engaged in federal political activity only. For states that do not already require similar disclosures, the court's conclusions would apply to state or local political activity only if adopted by legislative, regulatory or judicial action. In any case, a tax exempt organization generally should not allow donors to direct its activity and should instead rely on general purpose grants that are spent at the discretion of the organization.