"DARK MONEY" GETS A LITTLE LIGHT: *CREW V. FEC* AND ITS IMPLICATIONS FOR THE 2018 MIDTERMS

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One of the longest-standing regulations allowing for "dark money" in federal election law was invalidated by a recent federal court decision, meaning politically active nonprofit organizations that make independent expenditures will now be forced to disclose more of their donors. The ruling was issued by Chief Judge Beryl A. Howell of the United States District Court for the District of Columbia in *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission and Crossroads GPS ("CREW v. FEC").* On September 18, the Supreme Court declined Crossroads GPS's application asking the Court to block the ruling, meaning it is now in effect nationwide. While the litigation is under appeal and other provisions allowing "dark money" still exist, the decision in CREW v. FEC is likely to impact the 2018 midterm elections and beyond.

CREW V. FEC: THE DECISION

CREW v. FEC initially arose following the 2012 election, after Crossroads GPS, a 501(c)(4) organization aligned with the Super PAC American Crossroads, spent over $6 million in its effort to defeat Senator Sherrod Brown (D-OH) in his re-election bid. Because of the regulation at issue, 11 C.F.R. 109.10(e)(1)(vi), Crossroads GPS was not required to disclose the names of the contributors that funded its spending. CREW filed a complaint against Crossroads GPS, alleging that the organization had failed to properly report contributions funding its independent expenditures. The regulation at issue in the case, on the books since 1980, addresses the disclosure requirements applicable to so-called "nonpolitical committees" that make independent expenditures. Nonpolitical committees are groups other than political committees that have "major purposes" other than political advocacy.

Nonpolitical committees are subject to certain disclosure requirements, set out at 52 U.S.C. § 30104(c), when they make independent expenditures of more than $250 in a given calendar year. An "independent expenditure" is defined at 52 U.S.C. § 30101(17) as "an expenditure by a person…expressly advocating the election or defeat of a clearly identified candidate [and] that is not made in concert or cooperation with or at the request or suggestion of such candidate..." If nonpolitical committees pass a $250 independent expenditure threshold, according to 52 U.S.C. § 30104(c)(2)(C), they must file disclosure statements with the Federal Election Commission ("FEC") that include "the identification of each person who made a contribution in excess of $200…which was made for the purpose of furthering an *independent expenditure*" (emphasis added).

CREW v. FEC hinges on an FEC regulation issued under this disclosure statement requirement mandating that such statements include "[t]he identification of each person who made a contribution in excess of $200 to the

person filing such report, which contribution was made for the purpose of furthering *the reported independent expenditure*" (emphasis added). Thus, the FEC regulation's text ("the reported independent expenditure") differs from the statutory text ("an independent expenditure") in a subtle but important way. This difference in the FEC regulation allows nonprofits permitted to engage in political activity, such as chambers of commerce and trade associations (organized under Section 501(c)(6)), as well as social welfare organizations (organized under 501(c)(4)), to make independent expenditures without any FEC limitation on the total amount. While doing so, under the FEC regulation, these groups are not forced to disclose the source of their funding unless contributions are earmarked for specific communications.

In Chief Judge Howell's view, this FEC regulatory framework "impermissibly narrows the mandated disclosure…which requires the identification of such donors…even when the donor has not expressly directed that the funds be used in the precise manner reported." Therefore, Chief Judge Howell ordered that the regulation be vacated.

PRACTICAL EFFECTS OF THE DECISION: IS IT FINAL?

The Supreme Court's denial on September 18 of Crossroads GPS's application for stay means that Chief Judge Howell's regulatory vacatur takes immediate effect. In practice, the decision means that one of the major avenues in election law allowing "dark money" has been closed. Now, politically active nonprofits and social welfare organizations must report the sources of all contributions made over $200 for the general purpose of advancing independent expenditures. Notably, the decision has little impact on entities organized under Section 501(c)(3) of the Internal Revenue Code, since they are still barred by statute from intervening "on behalf of (or in opposition to) any candidate for public office."

However, the ruling in *CREW v. FEC* may not be permanent. The decision is currently under appeal before the Court of Appeals for the District of Columbia Circuit, and appeal to the Supreme Court is likely if the D.C. Circuit affirms the lower court's ruling. Under Chief Justice John Roberts' leadership, the Supreme Court has generally sided with parties arguing for fewer limits on political speech.

In addition, other routes for "dark money" still exist, most notably in the case of Super PACs that accept money from nonprofit groups who do not on their own make independent expenditures, meaning the nonprofit groups *still* will not be required to disclose *their* donors.

Finally, the new framework created by the decision will not truly be clear until FEC's commissioners come together to issue new regulations consistent with Judge Howell's decision. It is uncertain, however, when or if that will be possible, given the even ideological split among FEC's four current commissioners, often resulting in a deadlock on key issues.

MIXED REACTIONS FOLLOWING THE DECISION

Predictably, the decision has been cheered by many long-time advocates who have worked to rid federal elections of "dark money." Ellen Weintraub, the FEC Democratic Vice Chairwoman, called the decision a "real victory for transparency" and added that "[a]s a result, the American people will be better informed about who's paying for the ads they're seeing this election season." Democratic Representative John Sarbanes of Maryland likewise reacted favorably, saying the development was "a hugely positive step forward in terms of transparency."

At the same time, free speech advocates and others have been disappointed. FEC Chairwoman Caroline Hunter, a Republican, lamented the decision, saying it was "unfortunate that citizens and groups who wish to advocate for their candidate will now have to deal with a lot of uncertainty less than two months before the election."

RAMIFICATIONS FOR 2018 AND BEYOND

In the days following the Supreme Court's refusal to halt Chief Judge Howell's ruling, commentators have also differed regarding just how significantly the effect will be felt leading up to the midterm elections. On the one hand, David Keating, president of the Institute for Free Speech, said it was a "real prospect" that groups would "choose silence rather than speech—and there are good reasons why they would do that." Keating said many groups might find it too risky to continue using already-contributed money for independent expenditures, since donors "gave…money under the assumption they would remain confidential…" Noah Bookbinder, executive director of CREW, the plaintiff in the underlying litigation, predicted the decision would have a noticeable effect on spending in the midterm elections.

On the other hand, others, including Keating, have said that Chief Judge Howell's decision could only change the route by which "dark money" enters the midterm election campaign, rather than the amount or overall effect of the money. Many have speculated that rather than make the independent expenditures themselves and thus be forced to disclose donor information to FEC, nonpolitical committees will instead take the money they have received and donate it to Super PACs already spending on the issues in question. This is the approach apparently followed by the Koch network, which following Chief Judge Howell's decision, opted to launch a new Super PAC to work alongside its nonprofit entity Americans for Prosperity. The new Super PAC could accept contributions from Americans for Prosperity, a 501(c)(4) organization that would now have to reveal its independent expenditure donors, and make the independent expenditures itself, all while the initial donors remain secret. This strategy may serve as a model others follow in the coming weeks.

Finally, no state laws are directly impacted by this ruling. However, if state election law frameworks are based on similar language as that invalidated by Judge Howell's decision, litigation could be prompted moving forward.

CONCLUSION

Please contact any member of the K&L Gates election law team to assist in determining the impact of the new ruling on you, your business, or nonprofit entity, and potential independent expenditures. We will work with you to design a path forward in light of the ruling. Our election law team will also continue to follow developments at both the state and federal levels. In this context, this decision and its implications will be covered in the latest update to the K&L Gates *Guide to Political and Lobbying Activities*, expected next month. You can read the current version, which was updated in 2017.

UPDATE: OCTOBER 10, 2018

Following the recent decision by U.S. District Court Judge Beryl Howell invalidating a regulation allowing "dark money" in federal election law, the Federal Election Commission ("FEC") issued a press release offering guidance to those submitting quarterly reports due on October 15.

According to the guidance, there will be no reporting changes (from previous filing practices) for those entities that made independent expenditures prior to September 18. However, for those nonpolitical committees that made independent expenditures on or after September 18 that totaled more than $250, the new filing practices mandated by Judge Howell may be effective.

The new guidance provides that "[f]or contributions received between July 1, 2018 (the beginning of the reporting period) and Aug. 3, 2018 (the date of the district court's opinion)," the information required to be disclosed includes only "the identification of each person who made a contribution in excess of $200… for the purpose of furthering the reported independent expenditure" (emphasis added). But for contributions received between August 4 and September 30 (the end of the reporting period), the guidance sets out that the information required to be disclosed includes "the identification of each person whose contribution(s) in excess of $200…was made for the purpose of furthering any independent expenditure" (emphasis added).

Thus, the FEC has chosen the date following Judge Howell's decision—August 4—as the day when contributions received (and spent on September 18 or later) must begin to be reported according to the new framework. For example, the identification of the contributor would need to be disclosed for a contribution received on August 10 and used for one or more independent expenditures on September 20.

At this time, it remains uncertain when the FEC will more formally issue regulations in accordance with Judge Howell's ruling.

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