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October 18, 2018

Donor Disclosure: 501(c) Groups and Campaign Spending

Introduction

Independent spending in a 2012 Senate race, which resulted in a recently decided court case, *CREW v. FEC*, exemplifies a long-running policy debate about which contributions to politically active tax-exempt organizations should be disclosed in campaign finance reports. Federal Election Commission (FEC) guidance, and the court ruling, are significant because they require publicly reporting the original source of some contributions that previously remained private. Whether those contributions should be included in campaign finance disclosure reports has been a major point of debate in Congress and in the policy community.

After the court ruling took effect on September 18, 2018, certain groups that previously did not disclose some of their donors to the FEC now must do so. The FEC issued filing guidance on October 4, 2018, but another rulemaking is expected, which could change reporting requirements. Campaign practitioners offer differing interpretations of the new reporting requirements and suggest that additional litigation could occur. Regardless of what might unfold, or has, in the courts concerning this specific case—which is beyond the scope of this CRS product—the policy implications that *CREW v. FEC* highlights are relevant for congressional debate over donor disclosure in campaigns and beyond. The developments also could affect tax-exempt organizations' spending to elect or defeat candidates.

Independent Spending in 2012 Race

The disclosure and spending in question originated in the 2012 U.S. Senate race in Ohio. Affiliated with Republican super political action committee (super PAC) American Crossroads, Crossroads Grassroots Policy Strategies (Crossroads GPS) is a tax-exempt group regulated under §501(c)(4) of the Internal Revenue Code (IRC). Crossroads GPS reported making more than $6 million in *independent expenditures* (IEs) calling for election or defeat of candidates in the Ohio contest. It reported no donors for those IEs in its FEC reports.

This and similar fundraising and spending concerns the intersection of campaign finance law and tax law. For the purposes of this discussion, *CREW v. FEC* addresses whether tax-exempt organizations that are only partially regulated by campaign finance law must disclose their donors in FEC reports. These developments are among the latest in a decades-long debate about which activities and entities should be regulated by campaign finance law, tax law, or both. This CRS product does not address other matters in the case, such as legal interpretation or rulemaking authority.

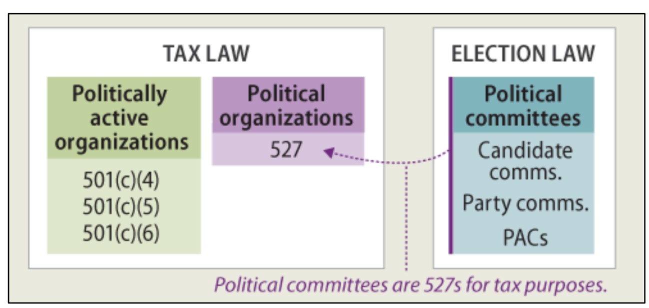
In November 2012, Citizens for Responsibility and Ethics in Washington (CREW), which identifies itself as a "watchdog" group, filed a complaint with the FEC, alleging, among other things, that Crossroads GPS failed to disclose its donors as required under the Federal Election Campaign Act (FECA; 52 U.S.C. §§30101-30114) and agency regulations. In November 2015, FEC commissioners deadlocked on whether Crossroads GPS had violated commission regulations and FECA (Matter Under Review 6696). CREW then sued the commission for, among other things, allegedly failing to enforce disclosure requirements.

In August 2018, Chief Judge Beryl A. Howell, of the U.S. District Court for the District of Columbia, ruled in CREW's favor. In part, the opinion invalidates an FEC regulation that permitted groups to withhold donor information from the agency in circumstances like the Crossroads GPS fundraising and spending. These developments are, therefore, relevant for other politically active tax-exempt groups that spend money to elect or defeat candidates.

Disclosing Donors

Under FECA and FEC regulations, donor disclosure depends on the kind of groups receiving and spending funds. **Figure 1** shows the distinction between different entities regulated under campaign finance law and tax law, which is essential to understanding donor disclosure.

Figure 1. Campaign Finance: Intersecting Areas of Law



Source: Congressional Research Service figure.

Most FECA provisions apply to *political committees*, which are candidate campaign committees, party committees, and PACs. Except for super PACs, political committees may not accept contributions above amounts specified in FECA. Political committees are also presumed to be primarily engaged in electing or defeating federal candidates. (Although regulated primarily by election law, political committees are regulated under IRC §527 for tax purposes. IRC §527 is unessential for this discussion.)

Crossroads GPS is not a political committee. It reports to the FEC only in specific cases as explained below. Crossroads GPS is organized under §501(c)(4) of the IRC as a *social welfare group*. Similar provisions apply to §501(c)(5) unions and §501(c)(6) trade associations. To maintain their tax-exempt status, these groups may not primarily engage in electing or defeating candidates. Because many of these groups are incorporated, the Supreme Court's 2010 *Citizens United* ruling confirmed that they could expressly advocate election or defeat of federal candidates through *independent expenditures* like the ones that Crossroads GPS and other groups subsequently aired, including in the Ohio race.

Changes in Reporting IE Donors

As nonpolitical committees, 501(c)s generally do not report to the FEC. If they expressly advocate for or against candidates through at least $250 per calendar year in IEs, however, FECA requires identifying donors who gave at least $200 "for the purpose of furthering an independent expenditure." The FEC regulation (11 C.F.R. 109.10(e)(1)(vi)) invalidated in *CREW v. FEC* required listing only donors who gave to further "*the reported* independent expenditure" (emphasis added). In practice, this meant that IE reports pre-*CREW* regularly listed expenditures but no donors, because those donors did not earmark their contributions specifically for use in IEs.

Potential Policy and Campaign Implications

The FEC is expected to consider a new rulemaking for the now-invalidated donor-disclosure rule. In the interim, the agency issued guidance on October 4, 2018. Disclosure specified in that guidance varies depending on when the contributions and IEs were made, and whether the case was under judicial review at the time. The new donor-disclosure threshold is broader than it was pre-*CREW*, encompassing IE donors and others. This does not appear to mean that groups must disclose *all* donors to the FEC, but campaign practitioners have offered varying interpretations of which contributors must be identified.

The October 2018 FEC guidance suggests that nonpolitical committees that make at least $250 annually in IEs must name donors who contributed at least $200 to further IEs, and those whose donations meet the FECA *contribution* definition, which includes money given "for the purpose of influencing any election for Federal office." An eventual rulemaking might narrow or broaden those disclosure requirements.

Particularly given this uncertainty, it is unclear whether 501(c) groups might choose to alter their political spending. Some will be unaffected, as they chose not to make IEs even before the ruling. IEs by nonpolitical committees have been comparatively modest. According to FEC data, nonpolitical committees (including (c)(4)s) made $197.2 million in IEs during the 2016 election cycle. That amount is approximately 12% of the $1.6 billion in total IEs for the cycle. However, total spending is perhaps less consequential than targeted spending in individual races, as the Ohio case and similar high-profile contests demonstrate. Nonpolitical committees can substantially affect the campaign environment of those races in which they choose to spend.

Continue IEs and Disclose Donors

In light of the FEC's guidance implementing the *CREW* ruling, some groups could choose to continue making IEs and to disclose their donors to the FEC, if those contributions fit the FECA *contribution* definition or were made for the purpose of furthering IEs.

Stop Making IEs to Avoid Disclosure

Some politically active 501(c) groups have stated that the District Court ruling chills their political speech and that they will curtail or refrain from making their planned IEs. These groups argue that donors made unrestricted contributions, not specifically for IEs, and did not expect to be identified in FEC reports.

Shift Spending to Other Communications

Even if a politically active 501(c) group chose to forgo making IEs as planned, at least three other options for electoral participation remain. First, rather than making an IE itself, a group could contribute to a super PAC, which could then make an IE. Second, groups could accept funds for IEs from limited liability corporations (LLCs), which do not have traditional "donors," and use those funds to make IEs. Third, rather than explicitly calling for election or defeat of federal candidates, groups could shift their spending to an advertising category known as *electioneering communications* (ECs). ECs are cable, broadcast, or satellite messages that refer to clearly identified candidates during pre-election periods but do not expressly advocate election or defeat. Separate "purpose of furthering" disclosure requirements still apply for contributions to ECs.

Potential Relationship to IRS Donor Disclosure

Separate from FEC reporting requirements, tax-exempt organizations must report their financial activity to the Internal Revenue Service (IRS) on an annual information return (form 990). Donor information is redacted from public versions of these reports. The IRS announced in July 2018 that it would no longer collect donor information on 990s, but filers must provide donor information to the agency if requested. This matter is not specifically related to the *CREW* case, but both developments affect politically active 501(c) groups' reporting obligations, and therefore may be relevant for general congressional interest in donor disclosure.

Proponents of more campaign finance reporting requirements generally oppose the IRS change, arguing that the information is one of the few sources of donor information for money that ultimately affects campaigns, even if the reports are not public. Those favoring less regulation generally contend that the reports are burdensome and of limited value for campaign finance disclosure and enforcement, especially since they are filed with the IRS rather than the FEC. Those favoring additional disclosure of 501(c) funds affecting campaigns generally support the *CREW* District Court ruling and oppose the IRS reporting change.

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