December 30, 2019

Campaign Finance Law: Disclosure and Disclaimer Requirements for Political Campaign Advertising

Federal campaign finance law sets forth disclosure and disclaimer requirements for certain types of political campaign advertisements. The term *disclosure* refers to periodic reporting to the Federal Election Commission (FEC) of funds received and spent, and the term *disclaimer* refers to an attribution statement that appears on a campaign-related communication. Generally, the Supreme Court has upheld the constitutionality of such requirements, determining that they serve the governmental interests of informing the electorate, deterring corruption or its appearance, and facilitating enforcement of the law. This In Focus surveys current law establishing disclosure and disclaimer requirements and discusses pertinent constitutional considerations for legislation, should Congress decide to enhance or modify such requirements.

Disclosure Requirements

Under the Federal Election Campaign Act (FECA), political committees, which include candidate committees and political action committees (PACs), must register with the FEC and comply with disclosure requirements. Political committees are required to file periodic reports that disclose the total amount of all contributions they receive, and the identity, address, occupation, and employer of any person who contributes more than $200 during a calendar year. In addition, entities other than political committees—such as labor unions and corporations, including incorporated tax-exempt Section 501(c)(4) organizations—making "independent expenditures" or "electioneering communications" generally must disclose information to the FEC, including the identity of certain donors over specific dollar thresholds. FECA generally defines an "independent expenditure" as funds spent on a communication expressly advocating for the election or defeat of a candidate and an "electioneering communication" as a broadcast, cable, or satellite communication during preelection periods that refers to a candidate, but does not call for election or defeat. These requirements have been the subject of litigation, as discussed below. The FEC is required to make these reports publicly available on the internet within 48 hours of receipt, or within 24 hours if the report is filed electronically, and available for public inspection in its offices.

Independent Expenditures

Generally, FECA requires organizations making independent expenditures that aggregate more than $250 in a calendar year to disclose, on a quarterly basis, (1) whether an independent expenditure supports or opposes a candidate, (2) under penalty of perjury, certification as to whether it was made independently of a campaign, and (3) the identity of each person who contributed more than $200 to the organization "for the purpose of furthering an independent expenditure." In addition, up to 20 days before an election, an organization must file a report each time it spends at least $10,000 on independent expenditures relating to that election, within 48 hours of incurring the cost of the expenditure. Less than 20 days before an election, an organization must file a report each time it spends at least $1,000 on independent expenditures relating to that election, within 24 hours of incurring the cost.

Until a recent court ruling, the donor disclosure regulation promulgated under FECA generally applied only to those donors who contributed money specifically "for the purpose of furthering the reported independent expenditure." As a result, unless a donation to an organization was made *specifically* for the purpose of funding a particular, reported independent expenditure, the FEC did not require an organization to disclose the donor's identity. This "purpose requirement" or exception for donor disclosure, however, was successfully challenged in court. In 2018, a federal district court invalidated the regulation, holding that it requires significantly less disclosure than the statute mandates by not requiring nonpolitical committee organizations to report donors unless there is a "direct link or specific intent" by the donor to spend the donation for the independent expenditure. Hence, this ruling requires groups making independent expenditures to disclose more of their donors than was required under the invalidated regulation. Citizens for Responsibility and Ethics in Washington (CREW) v. FEC*,* 316 F. Supp. 3d 349, 394 (D.D.C. 2018), *stay denied sub nom*, Crossroads Grassroots Policy Strategies v. CREW, 139 S. Ct. 50 (2018).

Electioneering Communications

Once an organization has paid for electioneering communications aggregating over $10,000 during a calendar year, FECA requires the organization to file disclosure of such payments and then requires subsequent filings each time the organization makes such payments aggregating more than $10,000 since the last filing. In such filings, the law requires an organization to disclose certain information, including the identity and principal place of business of the organization making the payment for the electioneering communication, the amount of each payment over $200, and the names of candidates identified in the communication.

In certain circumstances, organizations that pay for electioneering communications may also be required to disclose their donors. FECA requires the organization to disclose its donors who contributed at least $1,000, but

provides an exception to the requirement: if an organization establishes a separate bank account, consisting of donations from U.S. citizens and legal resident aliens made directly to the account for electioneering communications, the organization is required to disclose *only* those donors who contributed at least $1,000 to that account, instead of *all* such donors to the organization that are unrelated to electioneering communications.

Similar to the now-invalidated donor disclosure regulation for independent expenditures, an FEC regulation provides a purpose requirement or exception to the donor disclosure requirement for electioneering communications. The regulation permits organizations paying for electioneering communications to disclose only the identity of each person who made a donation of at least $1,000 specifically "for the purpose of furthering" electioneering communications. This regulation—specifically, the purpose requirement—has also been the topic of ongoing litigation. Most recently, in 2016, a three-judge federal appellate court panel upheld the regulation, determining, among other things, that the regulation was consistent with the governing statute and did not violate the First Amendment. Van Hollen v. FEC, 811 F. 3d. 486, 495, 501 (D.C. Cir. 2016), *reh'g en banc denied,* 2016 U.S. App. LEXIS 17528 (D.C. Cir. 2016).

Disclaimer Requirements

FECA also sets forth disclaimer requirements, providing that certain political campaign communications contain attribution statements. Regardless of the financing source, FECA requires a disclaimer on all public communications that expressly advocate for the election or defeat of a clearly identified candidate; electioneering communications; and all public communications that solicit contributions. In addition, public political advertising financed by a political committee must include disclaimers. For radio and television advertisements by candidate committees, FECA generally requires that the communication state who paid for the ad, along with an audio statement by the candidate identifying the candidate and stating that the candidate "has approved" the message. In the case of television ads, the candidate must make the statement in an unobscured, full-screen view, or if a voice-over conveys the candidate message, a clearly identifiable image of the candidate, along with a written message of attribution at the end of the communication, must accompany the voice-over.

For noncandidate-authorized communications—including ads financed by outside groups, corporations, and unions—FECA likewise generally requires that a disclaimer clearly state the name and permanent street address, telephone number, or website address of the entity who paid for the communication and state that the communication was not authorized by any candidate or candidate committee. In radio and television advertisements, such disclaimers are required to include in a clearly spoken manner the following audio statement: "[the name of the entity paying for the ad] is responsible for the content of this advertising." In addition, in television advertisements, a representative of the funding entity must convey the statement in an unobscured, full-screen view of the entity, in a voice-over, along with a written message of attribution at the end of the communication.

Constitutional Considerations

Should Congress consider legislation to change FECA's disclaimer and disclosure requirements, the Supreme Court's relevant case law informs the constitutional bounds of such legislation. Regarding disclosure requirements, in *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976), and more recently, in *McConnell v. FEC*, 540 U.S. 93, 201-02 (2003), and *Citizens United v. FEC*, 558 U.S. 310, 366-71 (2010), the Court has generally affirmed the constitutionality of disclosure requirements. As the *Buckley* Court determined, disclosure requirements serve the governmental interests of providing voters with information, deterring corruption and avoiding its appearance, and facilitating enforcement of the law. *Buckley*, 424 U.S. at 66-68. Should Congress consider legislation providing for enhanced disclosure requirements, it is notable that in *Citizens United*, the Supreme Court expressly held that the First Amendment does not limit Congress to requiring donor disclosure for speech that is the functional equivalent of express advocacy, that is, messages that expressly advocate election or defeat of a clearly identified candidate. *Citizens United*, 558 U.S. at 369. Therefore, it appears that a court could uphold legislation requiring greater disclosure of funding sources for communications containing express advocacy, as well as issue advocacy, to the extent that such regulation can be shown to be substantially related to important governmental interests identified by the Court.

Similarly, regarding disclaimer requirements, the Court has upheld the constitutionality of current FECA disclaimer requirements in *McConnell v. FEC*, 540 U.S. 93, 230-31 (2003), and again in *Citizens United*, 558 U.S. at 367 (2010). In upholding the current requirements, the Court emphasized how disclaimers provide critical information about advertising sources so that the electorate can more effectively judge the arguments they hear. Hence, the Court signaled that should Congress enact additional disclaimer requirements, a reviewing court is likely to uphold such requirements to the extent they are substantially related to the informational interests of the electorate. On the other hand, the Court in *Citizens United* appeared to rely upon the fact that the disclaimer requirements being evaluated in that case did not prevent anyone from speaking. Therefore, should a disclaimer requirement be so burdensome that it impedes the ability of a candidate or group to speak—for example, a requirement that a disclaimer comprise an unreasonable period of time in an ad—it could be invalidated under the First Amendment.

Related CRS Products

CRS Report R45320, *Campaign Finance Law: An Analysis of Key Issues, Recent Developments, and Constitutional Considerations for Legislation*, by L. Paige Whitaker

CRS In Focus IF10758, *Online Political Advertising: Disclaimers and Policy Issues*, by R. Sam Garrett

L. Paige Whitaker, Legislative Attorney

IF11398

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.