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NEWSLETTER

FEC Emergency Rule Affirms Greater Donor Disclosure Requirements for Nonprofits, But Leaves Unanswered Questions

July 2022

On June 8, 2022, the Federal Election Commission (FEC or Commission) approved an interim final rule affirming greater disclosure by nonprofits and others making independent expenditures in federal elections. While in some sense the new rule is minimalist and merely codifies judicial precedent, the Commission's decision to undertake this rulemaking is still an important development in its own right. Moreover, the accompanying policy statement issued by the FEC's three Republican Commissioners provides some additional clarification, particularly given that Commissioners are still debating how to apply the disclosure requirements in the enforcement context.

The Commission's new regulation comes several years after a federal district court invalidated a decades-old reporting rule for independent expenditures. Under the prior regime, non-political committees that made independent expenditures needed to disclose only those who gave funds to the organization for the purpose of furthering a particular independent expenditure – e.g., "I want to give $100,000 to help you fund *X* ad." But in a lengthy 2018 decision by U.S. Chief District Judge Beryl Howell – later affirmed by the U.S. Court of Appeals for the D.C. Circuit – the court concluded that this regulation misconstrued "the broad disclosure that Congress intended when enacting" the underlying statute in 1979. In the court's view, the statute required the maker of an independent expenditure to disclose more, including "non-trivial donors [whose] contributions were made for political purposes to influence any election for federal office, or at the request or authorization of a candidate or the candidate's agent." In addition, the court concluded that the maker of the independent

Authors

Andrew G. Woodson
Partner
202.719.4638
awoodson@wiley.law

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expenditure needed to specially identify those who contributed with the goal of supporting an organization's independent expenditures generally, even if not one specific ad in particular.

When the court made its initial ruling, much of the regulated community was confused about how to comply. The term "political purposes," for example, was not defined and left many wondering how broadly the Commission and courts would interpret it. On October 4, 2018, the Commission cobbled together a press release attempting to answer at least some of these questions. But as commissioners ultimately recognized, there are serious concerns with expecting the regulated community to adhere to an interim legal interpretation buried in a press release on the FEC's website. Thus, FEC Chairman Allen Dickerson and Commissioner Shana Broussard led the Commission's effort to reach an agreement on a more permanent solution. Ultimately, however, the Commission's Republican and Democratic caucuses could not settle on new substantive text, and so they agreed the best course of action was to (1) remove the specific regulatory language invalidated by the court; and (2) add a citation in the regulatory text back to the district court decision just remove the specific regulatory language invalidated by the court. Rather than go through the traditional notice-and-comment process, the Commission made this change effective immediately so that the public would have guidance well in advance of the November 2022 election.

When the Commission issued its rulemaking, the three Republican commissioners issued an interpretive statement of their own providing further guidance to the regulated community. The Republicans, in particular, sought to clarify what is meant by donors who give for "political purposes," as that phrase is "ambiguous" and "if read too broadly, could envelop and chill substantial amounts of protected speech outside of the [law's] permissible purview." In their judgment, donations need to be disclosed by the maker of an independent expenditure under this standard only where the funds are "designated or solicited for, or restricted to, activities or communications that expressly advocate the election or defeat of a clearly identified candidate for federal office." In practical terms, this means identifying: (1) a "donor who gives money to a non-committee organization with a specific instruction that the organization use the funds for independent expenditures or other activities to expressly advocate for or against a federal candidate," or (2) a donor "who gives in direct response to a solicitation for funding such expenditures or activities." Unrestricted donations, however, are not so earmarked in the Republican commissioners' view and thus are not reportable.

While this interpretive statement is certainly helpful, it does not answer every question about how the independent expenditure reporting regime works in practice, nor have the courts weighed in on the validity of the Republican commissioners' position. As a result, many nonprofit organizations are expected to use their resources on electioneering communications and other activities this cycle rather than restarting their independent expenditure programs. Caution seems particularly warranted this year given that two Democratic commissioners just released a statement in an enforcement case – Matter Under Review 7516 – holding that a major DC issue organization needed "to disclose 'nearly all' [donations] received during a reporting period when [independent expenditures] were made."