



The End of "Dark Money" in Federal Races?

08.08.2018 | By [Amber R. Maltbie](#)

Late last week, U.S. District Court judge Beryl Howell struck down a Federal Election Commission (FEC) regulation that allowed certain non-profit organizations to engage in independent expenditure activities for the purpose of influencing federal elections without disclosing their donors. The regulation, which had been on the books since 1979, requires disclosure of contributions over \$200 that are made for the purpose of furthering *the reported* independent expenditure. (Emphasis added). Although the regulation saw little use for over twenty years, it gained new relevance after the Supreme Court's 2010 *Citizen's United* decision allowed unlimited corporate funds to be used for independent expenditures.*

The lawsuit, which was brought by Citizens for Responsibility and Ethics in Washington (CREW), argued that the regulation was too narrow and conflicted with the corresponding statutory provision. Under the current construction, corporate or individual donors can contribute unlimited sums to a non-profit 501(c)(4) social welfare organization or 501(c)(6) business association for the general purpose of funding independent expenditures, but the donors only have to be disclosed if they earmark their funds for a *specific* independent expenditure. Judge Howell agreed with CREW, vacated the regulation, and gave the FEC 45 days to issue an interim regulation that aligns with the statute.

The ruling could significantly impact donor disclosure going forward. Outside spending remains well below candidate and party committee spending, but continues to surpass previous spending records with each election cycle. Depending on how the new regulations are drafted, they may cause some donors to drop out or direct their political funding elsewhere. Judge Howell's decision does not impact donor disclosure for other types of political activity such as issue ads, or state-level independent expenditures that are regulated by state law.

CREW initially brought the suit against the FEC challenging the dismissal of an enforcement matter against a 501(c)(4), Crossroads GPS, and Crossroads GPS subsequently intervened as a defendant in the litigation. If the case is appealed, the appeal would likely have to come from Crossroads GPS. A decision by the FEC to file an appeal would require four votes, and the FEC currently is down to two Republican commissioners and

two Democratic commissioners. Unanimity is not likely, so the 45-day clock is ticking.

The case is *Citizens for Responsibility and Ethics in Washington, et al., v. Federal Election Commission and Crossroads Grassroots Policy Strategies*, No. 16-259, 2018 WL 3719268 (U.S. District Court for the District of Columbia, August 3, 2018).

Nossaman will continue to monitor this case as well as other developments that impact campaign finance, lobbying and government ethics laws. If you have any questions about how this decision or the forthcoming rulemaking may impact your activities, please contact the authors.

* Independent expenditures are communications that expressly advocate the election or defeat of a clearly identified candidate that are not coordinated with the candidate, candidate's campaign, or any agent thereof.