Supreme Court Decision Foretells Increased Donor Scrutiny in 2020 Federal Elections

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More than seven years after the 2012 election, the identity of a $1.7 million donor may be publicly disclosed in the Federal Election Commission ("FEC") records following the Supreme Court's decision in *Doe* vs. *FEC*. This decision is part of a trend where the courts have permitted, or in some cases even mandated, additional donor disclosure stemming from existing federal campaign finance laws – laws often unenforced by the FEC. Although the case directly relates to a donor from the 2012 election, the decision's impact will reverberate throughout the 2020 election and is cause for donors and organizations to take a closer look at their approach to disclosure.

This case involves the only sport being played these days in Washington, DC (or in any city for that matter given the coronavirus pandemic) – inside baseball. With countless procedural twists and turns, one thing remains clear: a donor (in this case a trust) made a contribution to an LLC, which in turn donated to a 501(c)(4), which in turn again, donated to a federal Super PAC. Now that trust's name will become public because the Supreme Court refused to hear the case, which was appealed from the D.C. Circuit Court of Appeals. The kicker? The donor in this case was not even a named party to the FEC administrative enforcement case.

For those desperate for sport – even FEC inside baseball – we've included a brief overview of how the case ended up here. But if you just want the top-line takeaways, please skip ahead to Section II.

1. **The Procedural Buildup to the Supreme Court's Denial of a Petition for Certiorari**

On March 23, 2020, the Supreme Court of the United States denied petition for a writ of certiorari by two "John Doe" plaintiffs – a trust and a trustee – who sought to maintain their anonymity as the source of a series of transfers that ultimately put $1.7 million in a federal Super PAC. The 2012 donation actually involved three separate transactions, although they all occurred on the same day:

- First- the John Doe plaintiffs, a trust and trustee, donated to an LLC;
- Second- the LLC donated the same amount to a 501(c)(4) social welfare organization; and
- Third- the 501(c)(4) organization donated an almost identical amount to a federal Super PAC.

As a result of these transactions, the Super PAC disclosed the 501(c)(4) as the donor on its FEC reports.

No questions were asked about the donation or transaction until several years later when the 501(c)(4) amended its federal tax filings (an IRS Form 990) to identify the $1.7 million transaction as a "pass through" transaction. At that point, a campaign finance watchdog group asked the FEC to launch an investigation into the transaction as a prohibited contribution in the name of another.

Section 30122 of the Federal campaign finance law prohibits a person from making a contribution in the name of another – these types of contributions are often called conduit contributions, "Straw Man" contributions, or "False Name" contributions. Regardless of the specific name used, these rules prohibit a person (including corporations and other non-human entities like LLCs, trusts, and PACs) from using another person to make a contribution which has the effect of concealing the true identity of the donor. In other words, the "true source" of the contribution must be disclosed.

After a lengthy investigation, the FEC concluded that the 501(c)(4) was not, in fact, the "true source" of the contribution to the Super PAC. Rather, the FEC concluded that the 501(c)(4) allowed itself to be used as a "straw man" donor on behalf of the LLC, and the FEC settled those allegations with those entities, with each paying a civil penalty. However, the Office of the General Counsel and the Democratic Commissioners wanted to take it a step further and make the finding that the trust was the "true source" of the contribution. This would have the effect of requiring the Super PAC to amend its FEC reports and disclose the trust, as well as the LLC, as the source of the $1.7 million contribution from the 501(c)(4) organization. However, due to a lack of time left on the investigatory clock, other FEC Commissioners declined to approve further investigation.

In most FEC matters, that would have been the end of it. But here, the trust and the trustee — our John Doe plaintiffs — were informed that their identities would be released on the FEC's website because their names appeared as part of the investigatory record related to the closed case. And this would occur even though the John Doe plaintiffs were not formally named as parties in the FEC complaint nor deemed to have violated the law by the FEC. Thus, on December 15, 2017 – the eve of the release of the FEC's public file with their names – the John Doe plaintiffs sought an injunction to prevent the FEC's disclosure of their identities. They were denied that request, as the federal district court ruled that the FEC could permissibly disclose the names pursuant to its procedures, but the disclosure was stayed pending appeal. That appeal has now ended.

The Supreme Court's denial of cert to hear the case essentially means that the trial court's earlier ruling stands: the names of the donors may be disclosed. At least one FEC Commissioner has indicated that she will authorize the release of the names of the donors in this case as soon as the appeals court processes the Supreme Court's order.

The disclosure of a previously secret $1.7 million donor certainly will pique the interest of some, and depending on the donor's identity may have other ramifications. However, the implications of the case reach farther – they could hasten the speed of donor disclosure pushes in the 2020 federal elections.

1. **Here are our takeaways:**
2. **Look for increased vigilance by campaign finance watchdogs.**

The FEC watchdogs, Campaign Legal Center, CREW, and others, have been on a bit of a winning streak against the agency, racking up victories on substantive disclosure rules as well as on procedural grounds. With the FEC lacking a quorum, look for additional complaints and litigation looking to press this advantage, especially if this case presages that the Supreme Court is hesitant to step into the fray during a presidential election year.

1. **All political organizations that care about donor disclosure, especially 501(c)(4)s, should exercise appropriate due diligence with respect to their donors.**

If online contribution platforms require an affirmation that a PAC's or other organization's contributions are from their own funds, and not reimbursed or advanced, political and social welfare organizations should require the same affirmation, even from donors who give millions. At the very least, the receipt of such an affirmation can be strong evidence to negate a knowing and willful violation of Section 30122, which can be criminally prosecuted by DOJ. At best, an affirmation of the legality of the contribution can help you avoid costly legal proceedings and penalties years after the fact.

1. **Donor disclosure is serious business.**

The prohibition of Section 30122 against the contribution in the name of another is a serious one: it is one of the few federal campaign finance violations primarily drafted with criminal penalties in mind, not just civil or administrative fines. As this case demonstrates, it is also a provision that is taken seriously. Regardless of whether the FEC regains quorum in 2020, Section 30122 violations are pursued by the FEC (even belatedly) and often by the Department of Justice's Public Integrity Section.

1. **Pay attention to administrative complaints, even if you're not a named party.**

John Doe 1 and John Doe 2 were not named respondents in the FEC matter and were not brought into the proceeding until the ninth inning. The internal procedures and machinations are very complex, with respondents afforded due process rights that simply are not available to witnesses. Such proceedings, whether before the FEC or a state regulator like California's Fair Political Practices Commission ("FPPC"), warrant serious attention and the counsel of an attorney with specific knowledge of that agency.

Although donor disclosure issues may be the farthest thing from your mind during the COVID-19 pandemic, don't be caught off guard by the shifts occurring at the federal level in 2020 as signaled by this case. Nossaman's Government Relations & Regulations Group has the experience to help you make sense out of the donor disclosure rules or assist with an enforcement matter. If you have any questions about these issues, please contact Bill Powers, wpowers@nossaman.com or Amber Maltbie, amaltbie@nossaman.com.