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The 'Alice in Wonderland' of campaign finance law

Wednesday, 05 September 2012 13:40

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COMMENTARY

Campaign finance law can sure be quirky.

In an ironic twist caused by a recent court ruling, independent, non-profit groups that run issue-oriented broadcast ads during federal campaigns now must disclose their contributors and spending if those ads mention the candidate's name. Previously, most such ads could avoid donor disclosure by simply refraining from an explicit appeal for the election or defeat of a candidate.

The ruling is threatening to trigger a stampede into a different loophole. If these same groups expressly advocate for or against a candidate and do so independently, they still can keep their donors secret.

In an odd parsing of the English language, the former type of ad is called electioneering communication, or issue advocacy, while the latter is termed independent expenditures.

In reality, both serve the same purpose: campaign advocacy, though one is subtle, the other direct.

Welcome to the "Alice in Wonderland" world of federal campaign finance regulation.

The situation originally stems from the 2002 Bipartisan Campaign Reform Act (BCRA). Otherwise known as McCain/Feingold, the Act inadvertently spawned the rapid growth of outside groups it set out to limit.

The main way it tried to restrict these groups was to ban them from running issue ads within 30 days of a primary and 60 days of a general election.

But the move to impose "blackout periods" on these ads as a way of limiting the influence of outside groups backfired. The issue ad ban was struck down in 2007 by the U.S. Supreme Court's 5-4 decision in FEC v. Wisconsin Right to Life.

In response, the FEC adopted new regulations that same year resulting in limited disclosure by groups undertaking issue ads.

In 2011, a Democratic congressman from Maryland filed a new legal challenge entitled Van Hollen v. FEC that contended the 2007 FEC rules ignored McCain/Feingold's mandate for broad disclosure by issue ad groups.

U.S. District Judge Amy Berman Jackson in March agreed and ordered the FEC to write new rules to make them consistent with the law's pro-disclosure edict. A D.C. Circuit Appeals Court panel already has rejected a stay of her ruling.

The FEC published revised rules and, beginning in September, is requiring donors to be disclosed by organizations airing any issue ads about federal candidates.

"This decision is an important step towards fulfilling the Supreme Court's promise in Citizens United that all spending in our elections will be fully disclosed…,'' said Trevor Potter, president of the Campaign Legal Center, which supported Van Hollen's lawsuit. Citizens United vs FEC was a landmark Supreme Court decision in January 2010 that allowed unlimited independent expenditures by corporations while upholding the legal right to demand broader disclosure of contributors.

The groups affected by the new FEC rules are the 501(c) so-called social welfare organizations and the 527 groups backed by corporations, labor unions, and wealthy individuals. The numbers refer to sections of the IRS code under which the groups are organized.

501(c) groups are permitted to participate in politics as long as their primary activity is not political. 527 groups are not limited in terms of their political involvement.

Until the new FEC rule on issue ads, 501(c) groups did not have to disclose their contributors publicly to anyone, and they reported only some issue ad expenses to FEC. (Reports filed by television networks, which are hard for the public to access, do disclose the cost of many issue ad buys during the campaign.) 527 organizations must report their contributors and expenses twice annually to the IRS.

Now both contributors and expenses related to issue ads have to be reported to the FEC. And it is a good bet that the U.S. Supreme Court will uphold the district judge's decision in Van Hollen as Citizens United came out strongly for disclosure.

However, it is only a stop-gap measure. The groups running issue ads already are changing their tactics to keep hiding their contributors. Already, outside groups on both sides of the political spectrum are planning to circumvent the requirement by planning ads that explicitly support or oppose candidates.

While those groups now will have to report their spending to the FEC, they can keep their donors secret if they spend their money independent of the candidates. At least for now, FEC rules require no disclosure of donors to independent expenditure committees.

By calling for the election or defeat of a candidate, these groups can continue to keep their donors hidden if they spend funds independently of candidates. They will continue to deny the public's legitimate right to know all the interests working to influence the outcome of an election.

http://www.elec.state.nj.us/pdffiles/jb_articles/njnewsroom/08062012_gubracedifferent.pdf

For this reason, it is important for Congress to enact legislation that would require full disclosure of financial activity by the 501(c) social welfare groups and the 527 organizations.

Similarly, this kind of action is necessary at the state level as well, including in New Jersey.

With a gubernatorial election as well as a legislative contest in the Garden State next year, it is incumbent upon the Legislature to pass legislation that will require registration and disclosure of contributions and expenditures by independent groups seeking to influence the outcome of the election.

To do so is in the interest of the public, which deserves nothing less than transparency in elections.

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