



# Political Law Alert

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

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## **Recent Developments Affecting Donor Disclosure by 501(c)(4) and 501(c)(6) Nonprofit Organizations**

This mailing summarizes two recent developments, a federal court decision increasing donor disclosure requirements for 501(c)(4) and 501(c)(6) nonprofit organizations on Federal Election Commission (FEC) filings, and a separate development under Internal Revenue Service (IRS) rules eliminating the requirement that such organizations identify donors on their annual tax returns.

### ***CREW v. FEC* and Increased Disclosure under Federal Election Law**

On September 18, 2018, the U.S. Supreme Court declined to stay an August 3, 2018 order (order) issued by the D.C. District Court in *CREW v. FEC* striking down a long-standing FEC regulation that limited the responsibility of a 501(c)(4) or 501(c)(6) nonprofit that makes federal independent expenditures to publicly disclose its donors. This decision is currently on appeal to the D.C. Circuit, which denied a motion for a stay pending appeal. The U.S. Supreme Court declined to overrule the D.C. Circuit's denial. As a result, the order is currently in effect, pending the outcome of such appeal.

### **State of Play Before the Order**

Prior to the order, FEC rules required nonprofits, such as 501(c)(4) or 501(c)(6) organizations, that made independent expenditures to disclose their donors if their donation was “for the purpose of furthering the reported independent expenditure.” In other words, the donation had to be earmarked for a specific independent expenditure advertisement, which rarely, if ever, occurred. This rule implemented and clarified the broader and more amorphous statutory requirement under the Federal Election Campaign Act (FECA) that such nonprofits disclose donors who merely contribute “for the purpose of furthering an independent expenditure.”

### **Impact of the Order**

Through the order, the district court vacated the FEC rule described above, holding that it impermissibly narrowed FECA's donor disclosure requirement. The district court did not specify which donors nonprofits would have to disclose or clarify the meaning of FECA's statutory requirement. Rather, the district court stayed its order for 45 days to allow the FEC to promulgate interim regulations. The FEC, however, has not acted and it is uncertain how quickly it will act, if at all.

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As a result, as of September 19, 2018 (the 45-day stay having lapsed), nonprofits must rely solely on the statutory language (*i.e.*, whether the “purpose” of a donation is to further an independent expenditure) in deciding whether to disclose donors. Although the district court’s decision indicates that politically active nonprofits will be required to disclose more donors than merely disclosing those who earmarked their contribution for a specific independent expenditure, the statutory requirement’s exact scope is currently unclear. Indeed, FEC Chairwoman Caroline Hunter stated that the names of certain contributors who give money to nonprofit groups to use in political campaigns beginning Wednesday [September 19] will have to be publicly reported.

FEC Vice Chairwoman Ellen Weintraub also has indicated that the FEC would like to provide guidance before the midterm elections in November, but did not specify when.

We are monitoring the ongoing litigation and potential rule-making or guidance. If you are concerned that the ruling will complicate your donations to 501(c)(4) or 501(c)(6) nonprofit organizations, please contact us. We can recommend practical measures to avoid inadvertent disclosure under the new regime.

## Revenue Procedure 2018-38 and Decreased Disclosure under Federal Tax Law

On July 16, 2018, the Treasury Department and the IRS announced Revenue Procedure 2018-38 (Revenue Procedure), which will reduce the amount of donor information 501(c)(4) nonprofit organizations must disclose on their annual returns filed with the IRS. Currently, 501(c)(4) and 501(c)(6) nonprofit organizations, among others, must report the names and addresses of donors who contribute \$5,000 or more on their annual returns, although such donor information is not publicly available.

Once the Revenue Procedure takes effect, it will eliminate this requirement. For tax years ending on or after December 31, 2018, such organizations will no longer be required to report the names and addresses of their donors. Please note that the Revenue Procedure will have no effect on the reporting of information that is open to public inspection, such as the amount contributed. Moreover, organizations must continue to collect and retain information on the identity of their donors, making it available to the IRS upon request.

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