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To: Clients

Re: Decision in *CREW v. Federal Election Commission* (D.C. Cir. August 21, 2020)

Federal Appeals Court Rules That 501(c)(4)s and Other Groups That Make Independent Expenditures in Federal Elections Must Disclose Their Donors

What the Court Decided

A federal appeals court on Friday, August 21, invalidated a 40-year-old Federal Election Commission ("FEC") rule and decided that an Internal Revenue Code Section 501(c)(4) organization, and any other group that is *not* an FEC-registered PAC, must publicly disclose certain of its donors if it undertakes "independent expenditures" for or against federal candidates.

The U.S. Court of Appeals for the D.C. Circuit held the FEC's rule didn't reflect the full requirements imposed by the Federal Election Campaign Act ("FECA"), because the rule required an organization to disclose only contributions that were earmarked to be used for the *particular* independent expenditure that it disclosed in its special quarterly FEC Form 5 independent-expenditure report. As a result, few 501(c)(4)s and other groups have had to report their donors when filing FEC Form 5. (Most such groups have been able to lawfully make independent expenditures only since the Supreme Court's 2010 *Citizens United* decision.)

Friday's court decision means that organizations that make independent expenditures are required to disclose *all* donors who contributed more than $200 during the reporting period *for the purpose of supporting the organization's attempts to influence federal elections*. It will be left to the FEC and further litigation to clarify what that actually means. The court's decision also requires these same organizations to identify which of *those* donors gave for the more specific purpose of financing independent expenditures (and not just any particular one).

Impact on Current 2020 Election Cycle
The court's decision affirmed a district court decision issued two years ago – so, while likely final now, these interpretations of FECA have factored into knowledgeable groups' strategy since then. The FEC issued some guidance in October 2018 about the decision's impact on different stages of the 2018 election cycle, but the FEC has been silent about its impact on the current 2020 cycle. And, no further guidance is likely forthcoming before the November 3 election because the FEC now lacks an operating quorum.

Disclosure Applies Only to Donors During the Same Quarter as Independent Expenditures
Importantly, these donor disclosure obligations appear to pertain only to contributions received *during* the quarterly reporting period covered by the Form 5 independent-expenditure report. Donors who give during reporting periods before and after that quarter are *not* subject to disclosure by the recipient group, *if* the group makes no independent expenditures during the period in which the donors contributed. This holds true even if the donors give for the purpose of influencing a federal election, because the group doesn't have to file Form 5 for quarterly periods when it does not make independent expenditures. (And, to be clear, the group that makes independent expenditures doesn't have to disclose these donors on its 24- or 48-hour reports that are triggered by certain independent-expenditure spending levels, only on the report covering the calendar quarter.)

Which Communications Are, and Aren't, Independent Expenditures
Importantly too, Form 5 is triggered only by making *independent expenditures*, *not* other public communications that influence federal elections. An independent expenditure is a communication that *expressly advocates* for or against the election of a clearly identified federal candidate, and isn't coordinated with a candidate in the race or a political party. Express advocacy includes language such as "elect," "defeat," "support," "oppose" or "Say NO on November 3" in reference to a candidate's name, nickname or image. It also includes repetition of a candidate's slogan or name that in context demonstrates support or opposition, such as "Biden/Harris 2020." Express advocacy does *not* include language that *otherwise* criticizes or praises federal candidates without clearly urging people to vote for or against a candidate – such communications don't trigger spending or donor disclosure to the FEC.

Groups Should Review Their Fundraising and Communications Strategies
Many donors to 501(c) groups value their privacy and play no active role in how the groups they support choose to politically participate. For organizations with such donors, this decision may prompt review of their approach to fundraising. A solicitation that previously would not have triggered donor disclosure now may require the organization to publicly identify all who contribute in response. Groups also may want to modify their approach to public communications by avoiding express advocacy, or relying solely on a separate PAC (including a "super" PAC) for express advocacy; PACs disclose all contributions received, so there is no ambiguity for their donors. (There are also often compelling federal tax reasons for 501(c) groups to avoid or minimize their own partisan political activities among the general public.)

All entities that aren't federal PACs and make federal independent expenditures should determine how the court's ruling could affect their donor-disclosure obligations.