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How does dark money stay dark?

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After the U.S. Supreme Court Citizens United case invalidated certain prohibitions in the Federal Election Campaign Act (FECA), the campaign finance world saw an influx of “dark money” groups. Following the Citizens United decision, these groups were permitted to use corporate funds and could spend an unlimited amount of money on electioneering communications and independent expenditures without the disclosure requirements imposed on candidates, PACs and political parties. The ability to “anonymously” influence the political process has proved to be very attractive, and the number of dark money groups — and their expenditures — have blossomed.

In the 2012 presidential election, dark money groups reported $300 million in independent expenditures. Many of these groups are Internal Revenue Code section 501(c)(4) organizations and are often established and highly respected trade associations, like the U.S. Chamber of Commerce.

A 501(c)(4) organization is a tax-exempt, nonprofit entity operating to promote social welfare. Because 501(c)(4) social welfare organizations operate to promote “the common good and general welfare of the community,” they can be useful tools for influencing public policy. They are permitted to engage in lobbying and campaign intervention, as long as such activities are not the primary purpose of the organization. Most significantly, 501(c)(4) organizations can raise money without

publicly disclosing their donors. However, in order to effectively maintain donor anonymity, 501(c)(4) organizations must adhere to complex and ever-changing tax and election laws and follow strict filing and reporting guidelines.

Since their primary purpose is social welfare, 501(c)(4) organizations do not fall under the Federal Election Commission's (FEC) standard definition of a political committee. Provided they avoid political activity, as interpreted by the FEC, they are not required to comply with the reporting requirements of political committees and only have to disclose donors that contribute funds earmarked for political advertisements. 501(c)(4) organizations can also create electioneering communications, deemed "issue ads," and are not required to disclose their donors when engaging in this activity.

Social welfare organizations must identify their donors to the Internal Revenue Service (IRS) when filing annual tax returns. However, names and addresses of contributors are not public information and must not be disclosed by the IRS.

With the rapid influx of this new money into the political process, it is not surprising that various regulators are looking for ways to shine the spotlight on dark money. The IRS attempted to issue new rules governing the political activity of 501(c)(4) organizations in 2013. After a record number of comments were filed opposing the proposed rules, the IRS withdrew and is currently working on a new version of the rules.

The FEC has also wrestled with this issue, but it has failed to resolve several complaints that have been filed since Citizens United was announced. Lawsuits against the FEC about this issue were filed and remain pending. Congress has also tried, and failed, to regulate the arena. In the absence of federal regulation of dark money, a growing number of states have entered the fray and are introducing legislation to address the issue. And in the corporate world, more and more publicly traded companies are responding to investor demands for transparency by voluntarily disclosing at least some details about corporate political expenditures.

Federal, state and local election and tax laws pose complicated reporting and disclosure requirements for 501(c)(4) organizations. And as outlined above, the requirements are under tremendous scrutiny and pressure. Whether they are motivated to keep dark money dark or simply want to exercise their political rights, it is imperative for organizations to understand these ever-changing rules to avoid adverse legal consequences.

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