

D.C. Circuit Denies Petition for Rehearing in *Van Hollen v. FEC*; Electioneering Communication Rules Defended with Assistance from Wiley Rein Intervention

November 2016

On September 26, the D.C. Circuit denied Rep. Chris Van Hollen's (D-MD) petition to rehear *en banc* a panel's decision upholding a Federal Election Commission (FEC) regulation governing disclosure of donors to corporations and labor unions that make electioneering communications. The regulation at issue requires corporations and labor unions to disclose the identities of donors who contribute \$1,000 or more "for the purpose of furthering electioneering communications." Rep. Van Hollen argued that this regulation was too restrictive and that the FEC should require disclosure of all donors who contributed \$1,000 or more. Earlier this year, the D.C. Circuit held in *Van Hollen v. FEC*, 811 F.3d 486 (D.C. Cir. 2016), that this regulation was based on a permissible interpretation of the Federal Election Campaign Act of 1971 (FECA), as amended. The rejection of the Congressman's petition for rehearing means that the FEC's regulation stands and is now in effect.

The FEC regulation has its roots in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2010), in which the Supreme Court held that the federal prohibition on electioneering communications made by corporations and labor unions was unconstitutional. In the wake of this decision, the FEC had to address how corporations and labor unions that make electioneering communications would report their funding sources. The Bipartisan Campaign Reform Act of 2002 (BCRA), which imposed restrictions for the first time on electioneering communications, did not contemplate corporations and labor unions having to report such funding sources since they could not make electioneering

Authors

Caleb P. Burns
Partner
202.719.7451
cburns@wiley.law

Practice Areas

Election Law & Government Ethics

communications under the BCRA. The FEC, after soliciting comments and holding a hearing on how to address this issue, promulgated a regulation that required corporations and labor unions to disclose only those donors who contributed for the purpose of furthering electioneering communications.

Rep. Van Hollen sued the FEC in federal court, arguing that the regulation was too restrictive in not requiring disclosure of all contributors. He maintained that the regulation was based on an impermissible interpretation of FECA and that the FEC's rationale was arbitrary and capricious. The district court agreed with Rep. Van Hollen and held that the regulation was inconsistent with the statutory language of FECA. On appeal, the D.C. Circuit reversed the district court, holding that the text of FECA is not unambiguous and allows for a "purpose" element with respect to disclosure requirements. The court remanded the case for the district court for further proceedings.

On remand, the district court again held that the regulation was unlawful. This time, the court held that the regulation was not a reasonable interpretation of federal law because it allegedly undermined BCRA's purpose of increasing disclosure. On appeal, the D.C. Circuit again reversed the district court, holding that the regulation was a reasonable balance of the public's interest in disclosure and the imposition of unduly burdensome reporting requirements on regulated parties. Accordingly, the court concluded that the regulation was permissible.

The recent rejection of Rep. Van Hollen's petition for rehearing means that the regulation is now fully effective. Although Rep. Van Hollen may seek Supreme Court review, his attorney indicated that he would not. Wiley Rein represented one of the appellants in this case, the Center for Individual Freedom. Because the FEC did not appeal either district court decision, intervention by private parties in the case was crucial to defending the legality of the regulation. Wiley Rein has extensive experience intervening in cases on behalf of private parties defending favorable actions of the FEC.

For more information, please contact one of the authors listed.