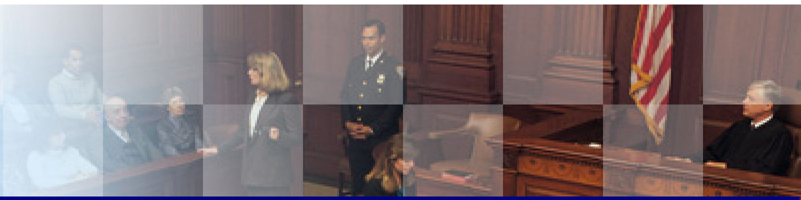

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Political Law

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Citizens United Supreme Court Decision Changes Rules of Road for Political Participation with Corporate and Labor Funds

On Thursday, January 21, a divided (5 to 4) United States Supreme Court issued an important and broad

ruling in *Citizens United v. FEC* that reinforces the First Amendment rights of corporations and labor unions to participate in the political process through independent communications expressly advocating the election or defeat of clearly identified candidates. Justice Kennedy's opinion for the Majority, citing the Court's recent *FEC v. Wisconsin Right to Life* ruling, emphasizes that, "because speech is an essential mechanism of democracy - it is the means to hold officials accountable to the people - political speech must prevail against laws that would suppress it by design or inadvertence," and then continues that, "There is no basis for the proposition that, in the political speech context, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead to this conclusion."

The landmark development represented by Citizens United is a recognition that corporations, tax exempt groups, and unions have a First Amendment right to use unlimited corporate funds for independent expenditures that expressly advocate the election or defeat of a clearly identified federal candidate. By predicating its ruling on rights reserved under the Constitution's Bill of Rights, the Court implicitly invalidated any and all state constitutional and statutory prohibitions on such expenditures as well.

Much of the public attention regarding this opinion to date has been focused on the Court's overturning the twenty-year old precedent from *Austin v. Michigan Chamber of Commerce*, which upheld Michigan's state law limitations on direct corporate spending to support or oppose candidates. For organizations that already participate in the political process through issue and express advocacy, however, the more important practical result of the *Citizens United* Opinion is the Court's invalidating of the more recent electioneering communications "black out period" from the McCain-Feingold law (or "BCRA"), which required that communications that referenced a clearly identified Federal candidate within 30 days prior to a primary election, or 60 days prior to a general election, could not be paid for with corporate or labor union general treasury funds. This means that campaign finance laws will no longer restrict the type of entity, and funds used, to independently run advertising or distribute mailings that identify candidates or expressly advocate their election or defeat up until election day.

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The *Citizens United* ruling emphasizes that this ability to speak out about candidates right up until election day is a Constitutional right, so can not be prohibited by state law, state constitution, or Federal law. It is important to note, however, that this right to advocate the election or defeat of candidates does not supersede

certain other organizational regulations, including those found in the Internal Revenue Code, which must continue to be considered. For example, the IRS "major purpose" test for 501(c)(4) and 501(c)(6) organizations will continue to limit the percentage of those organizations' funds that may be used for a political purpose, such as running these newly Constitutionally-protected direct candidate advocacy advertisements. In addition, IRS Regulations continue to prohibit tax-exempt 501(c)(3) charitable organizations from spending funds on political candidate advocacy efforts.

As in the past, Section 501(c) organizations will have to carefully craft their public communication programs in order to satisfy the several different facts and circumstances tests that the IRS employs to measure the political activities of not-for-profit organizations. Even though they are now authorized to do so, a Section 501(c)(4) and 501(c)(6) organization may not wish to expand its communications to include independent expenditures with express advocacy, since such communications may subject the organization to taxes on the amount of such expenditures (or its investment income, if less). Member dues and contributions that are used to fund such communications also will not be tax-deductible. Section 527 organizations will continue to be valuable tools to take full advantage of the *Citizens United* decision, while avoiding unintended taxes and possible loss of tax-exempt status.

Coordination Restrictions Remain

It is important to note that while *Citizens United* allows independent corporate spending to advocate for or against federal candidates at any time leading up to an election, corporations and labor unions continue to be prohibited from contributing directly to Federal candidates, as well as from coordinating advocacy activity with Federal candidates and national political party committees such as the RNC and DNC. Corporations and labor unions must continue to be vigilant to comply with Regulations regarding a candidate's use of facilities or treasury funds for advocacy in coordination with Federal candidates. Similarly, federal candidates must note that *Citizens United* does not alter any of the previously imposed source and amount limitations on fundraising, bundling reporting, or coordination concerns. By this opinion, the Supreme Court has recognized no additional freedoms for Federal candidates, their campaign committees, political parties, and groups seeking to coordinate their efforts with those entities.

With respect to coordinated expenditures, the law was thrown into a state of flux when the FEC's post-BCRA coordination regulations were struck down in Federal Court. As a consequence the FEC is now working on new regulations, expected to be completed in late-Spring 2010, to clarify what constitutes coordinated activity "in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, the candidate's campaign, the candidate's agents, or a political party committee."

From a practical perspective, this suggests that corporations - including Section 501(c) and 527 organizations - will need to be extra careful to isolate individuals who will be crafting and approving expanded political communications programs authorized by *Citizens United* from lobbyists and PAC representatives who maintain regular communications with candidates.

Disclaimer and Disclosure Requirements Upheld

While freeing corporations and unions to engage in political speech, the Court in *Citizens United* left intact several key provisions of campaign finance law pertaining to disclosure of those making independent expenditures. Noting that, "[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way," the Court in *Citizens United* upheld two of the McCain-Feingold law's key disclaimer requirements, both for "electioneering communications," which are television and radio advertisements that refer to a clearly identified federal candidate in the period 30 days prior to a primary election or 60 days prior to a general election. The first requirement upheld requires that such advertisements include the name and address (physical or web) of the responsible entity (the so-called "stand by your ad" requirement). The second requirement upheld is that an individual or entity spending more than $10,000 in a calendar year on such electioneering communications must file disclosure reports with the FEC, which identify the amount of the expenditures, as well as the sponsoring entity, the election the expenditures are directed at, and the name of certain donors who contributed $1,000 or more toward the electioneering communications. FEC Regulations also compel similar disclosure for independent expenditures. For entities such as 501(c)(4) and 501(c)(6) organizations that are provided donor confidentiality under IRS Regulations, we recommend careful analysis of how such competing FEC and IRS provisions interact.

A Web of Regulations Continues to Govern Political Activity

Much of the commentary issued immediately following the publication of the *Citizens United* opinion has focused on the “winners and losers” from the ruling, ranging from President Obama declaring the ruling a “major victory for Big Oil, Wall Street banks, health insurance companies and other powerful interests,” to pundits declaring the ruling a boon for certain entities such as 501(c)(6) trade associations and 501(c)(4) organizations and a death knell for political party committees and so-called “527” organizations. For candidates and national party committees, it is correct that they will face increased competition in delivering their message in a more-crowded political and issue environment. For other types of organizations, we urge each individual and entity to do an analysis of what their specific priorities are, and how the changes resulting from *Citizens United*, as well as existing FEC, state law, and IRS regulations, will effect potential new activities.

What is very clear is that there remains a complex web of Federal and state regulations in the political law arena. In fact, the *Citizens United* Court, in order to emphasize the “complexity of the regulations,” explained that, "[c]ampaign finance regulations now impose 'unique and complex rules' on '71 distinct entities.' These entities are subject to separate rules for 33 different types of political speech. The FEC has adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since 1975." Parts of this voluminous body of law will no doubt be rewritten in light of the *Citizens United* decision. In addition, the IRS is expected to step up enforcement of its own myriad of regulations and rulings in reaction to not-for-profit organizations increasingly engaging in protected political speech resulting from this landmark Supreme Court Case.

We urge individuals and entities planning to exercise their First Amendment protected rights to remain vigilant for changes in statutes and regulations, as well as in the interaction between different enforcement regimes, as they approach the important 2010 and 2012 election cycles.

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