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Analysis
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'Citizens United' Will Affect Corporate Spending—But How?

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On Jan. 21, 2010, the Supreme Court of the United States issued its decision in *Citizens United v. Federal Election Commission* (25 CCW 25, 1/27/10). A closely divided Court struck down laws that banned corporations from directly making ''independent expenditures''—public communications that expressly advocate the election or defeat of a candidate—and ''electioneering communications''—television or radio issue ads that refer to a federal candidate on the eve of an election. For the first time in more than a century, corporations—whether for-profits, non-profits, trade associations, or membership organizations—may now pay for advertisements that tell the audience to vote for or against a federal candidate.

Background

In 2002, Congress passed the Bipartisan Campaign Reform Act, popularly known as ''McCain-Feingold.'' Among the central provisions of McCain-Feingold was a restriction on corporate- and union-financed ads that mention federal candidates. The law barred corporations and labor unions from spending treasury funds on electioneering communications—broadcast, cable, or satellite communications that refer to candidates within 60 days of their general election, or within 30 days of their primary. To sponsor such ads, a corporation or union would have to use voluntary contributions raised by a political action committee (''PAC''), within federal limits and restrictions.

The McCain-Feingold restrictions were the most recent in a long history of federal laws restricting corporate election spending. Since the Tillman Act's passage in 1907, federal law has been understood to prohibit corporations from spending treasury funds to urge the public to vote for or against particular federal candidates. In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the Court affirmed that the state could prohibit corporations from spending treasury funds on independent expenditures.

In *McConnell v. FEC*, 540 U.S. 93 (2003) (18 CCW 386, 12/17/03), the Court relied on *Austin* to uphold McCain-Feingold's restrictions on electioneering communications. But in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (22 CCW 203, 7/4/07), the Court narrowed the McCain-Feingold restrictions, holding that they could only apply to ads that contained ''the functional equivalent of express advocacy.''

'Citizens United'

The action in *Citizens United* was brought by an ideological nonprofit corporation that wanted to offer and promote a documentary attacking Hillary Rodham Clinton during the 2008 presidential primaries. Citizens United claimed that, because they would distribute the movie through video-on-demand, they would violate McCain-Feingold because the movie would qualify as a ''broadcast, cable or satellite communication,'' and hence as an electioneering communication. The group also claimed that, to sponsor television ads promoting the movie and referring to Clinton, it would have to violate the law and expose itself to prosecution.

In a 5–4 decision, the Court ruled for Citizens United, and held that the First Amendment protected the right of corporations to spend independently in federal elections.

In a majority opinion authored by Justice Anthony Kennedy, the Court overruled part of *McConnell*, striking down McCain-Feingold's restrictions on electioneering communications. The Court went further and overruled *Austin*, striking down the portion of 2 U.S.C. § 441b that preceded McCain-Feingold and prohibited corporations from making independent expenditures. The Court declined to decide the case on narrower grounds, saying that to do so would leave a chill on protected political speech. The Court rejected arguments that corporations have unfair advantages because of their vast wealth accumulated in the marketplace, or that it was enough to allow corporations to speak through their PACs.

Provisions Left Standing

While the case overturned prior decisions and statutes on constitutional grounds, the Court left standing several provisions of the current law:

1. Corporations still cannot make direct or indirect (in-kind) contributions to federal candidates, federal political committees, and the federal accounts of party committees. Such contributions must still be made through their PACs.

2. Corporations still cannot coordinate their spending for public communications with candidates or party committees. All expenditures, whether for issue advertising or for express advocacy communications, must be independent of the candidate's campaign. Determining whether a communication is coordinated requires a complex analysis under Federal Election Commission regulations.

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Currently, a communication is considered ''coordinated'' with a candidate when it is made in cooperation, consultation or concert with, or at the request or suggestion of the candidate, the candidate's committee or an agent of the candidate or the committee.

The coordination rules are based on a content standard and a conduct standard, both of which must be satisfied for a communication to be considered ''coordinated.'' The cost of a coordinated communication is considered an in-kind contribution to the benefiting candidate. If paid by a corporation, the contribution would be prohibited.

In brief, the law asks several questions to determine whether the conduct necessary for coordination occurs:

- Was the communication created, produced, or distributed **at the request, suggestion, or with the assent** of the candidate?
- Was the candidate or were his or her agents **materially involved** in decisions over the content, intended audience, means or mode of communication, media outlets for distribution, timing or frequency or size, or prominence of duration of the advertising?
- Had there been one or more **substantial discussion(s)** between the sponsor of the communication and the candidate or one of his or her agents where material information about plans, projects, or needs was conveyed?
- Was a **common vendor, or former employee, or independent contractor** used?

3. Corporations must still comply with the disclaimer requirements with respect to public communications, such as the ''stand-by-your-ad'' requirements and ''paid for by'' requirements, in which the sponsor must identify itself and take responsibility for the content of the ad.

4. Corporations must still file reports when making independent expenditures or when paying for issue ads that refer to candidates within the 30- and 60-day windows. Independent expenditure reports and electioneering communication reports required by the FEC must be filed for each expenditure, including information about the candidate supported or opposed, the amount of the expenditures and, in some cases, any donors who contributed funds for the purpose of making the expenditure.

State Law

Because the Supreme Court decided *Citizens United* on First Amendment grounds, it overturned any state laws that barred corporations from paying for issue ads or independent expenditures. Almost half the states had bans similar to the federal prohibition on corporate spending in connection with elections. Without these state bars, corporations will be able to pay for advertising supporting or opposing state and local candidates, such as state legislators, city council members, and judiciary candidates.

States are now assessing the impact of the case, and their initial responses have differed. For example:

- Montana has indicated that it will maintain its ban on corporate spending until a court finds the laws unconstitutional.
- In Iowa, the director of the Ethics and Campaign Board has stated publicly that the ruling overturns existing state law.
- In Colorado and Minnesota, lawsuits have been filed in state court to strike down state provisions banning corporate spending.
- In Wyoming and Minnesota, bills have been introduced to repeal the statutes affected by *Citizens United*.

The impact of *Citizens United* on state elections will continue to unfold as states address the effects on their statutes in the coming months.

On-Going Litigation

Citizens United has already had a direct impact on cases pending in the courts. Relying on *Citizens United*, a district court in California struck down provisions of a San Diego campaign finance law that limited corporate contributions to entities making independent expenditures, allowing instead unlimited corporate contributions to such entities (*Thallheimer v. City of San Diego*, S.D. Cal., No. 09–2862, 2/16/10). In addition, a D.C. Circuit panel in *SpeechNow.org v. FEC*, D.D.C., C.A. No. 08-CV-00248 (JR), 2/14/08, is weighing whether corporations may make unlimited contributions to entities making independent expenditures in connection with federal elections. Another D.C. panel is considering, in *RNC v. FEC*, D.D.C., C.A. No. 08-1953, 11/13/08, whether to lift the ban on corporate contributions to national party committees. Both D.C. panels have asked for additional briefing on the impact of *Citizens United* on the cases.

Federal Action

Several bills have been introduced in Congress to deal with the impact of *Citizens United*. The leading proposal was announced by Senator Charles Schumer (D-N.Y.) and Congressman Chris Van Hollen (D-Md.) on Feb. 11 (25 CCW 52, 2/17/10). According to a summary released by the sponsors, the bill would:

- prohibit corporations from spending money in connection with U.S. elections if they have foreign ownership of 20 percent or more, if a majority of the board is foreign, or if U.S. operations or decisions on political activities are controlled by a foreign entity;
- prohibit spending by government contractors or by beneficiaries of TARP;
- require corporate CEOs to appear on camera in any advertisement;
- require disclosure of the top five contributors to a group sponsoring independent expenditures or electioneering communications;
- enhance public disclosure of spending for political activities by requiring the establishment of separate ''political broadcast spending'' accounts that would be disclosed on the public record;
- require shareholders to be notified directly and through SEC filings of political spending; and
- increase disclosure by lobbyists of political communication spending.

Also, the White House has proposed other reforms to limit the influence of ''special interests.'' These proposals include similar efforts to restrict activities of foreign corporations, increase limits on contributions and bundling by lobbyists, and tougher, more detailed lobbying disclosure rules.

In short, while the immediate impact of *Citizens United* on corporations has already been profound, the coming months will see further, critical developments.

Besides the prospect of legislation, the FEC is now in the process of rewriting its coordination rules to comply with a court order; it has also announced its intention to consider other new rules to comply with *Citizens United*.

It remains to be seen exactly how corporations will organize their po-

litical spending in a post-*Citizens United* world.

Where to Go From Here

Some of the key questions facing a politically active corporation—likely to be affected by future developments—will include:

Should the company conduct independent political activity with treasury funds—or should it continue to use voluntary funds? The current, dominant model for corporate political activity, at least federally, is to have the corporation pay to administer a PAC, and then to conduct political activity out of the PAC. Many companies budget their political activity in accordance with this model. A corporation that wants to make direct contributions or hold political events that are coordinated with candidates must still use a PAC. But *Citizens United* now allows the corporation to pay for independent expenditure communications directly with treasury funds, requiring a reassessment (not to mention budget adjustment) of what political activities will be part of the corporation's game plan. Direct corporate spending is only the first step—it is also likely in the near future that corporations will be asked to donate corporate funds to third-party entities that are making independent expenditures.

Should a company inform shareholders or the public about political spending? An increasing number of companies were the subject of shareholder initiatives seeking more disclosure of political spending with corporate funds even before *Citizens United*. With this decision, and the possibility of even greater amounts of corporate funds being used for political activity, companies may now come under even greater pressure to include shareholders or the public in the process.

Should the company adopt a 'wall' policy? In federal elections, a third-party sponsor of an independent expenditure or issue advertisement can create a legal presumption against a finding of coordination by adopting and enforcing a ''firewall,'' to ensure that nonpublic information about a candidate or party's plans, projects, activities, or needs do not affect its independent communications. Such policies are increasingly common in the political world; they are less so in the for-profit, corporate world. A corporation with direct contacts with members of Congress—through, for example, attendance at government affairs meetings or participation on a host committee for a fundraising event for a candidate—faces the question of when that contact becomes ''coordination,'' and prevents the corporation from making independent expenditures.

How will 'Citizens United' affect the rules governing corporate fundraising activity? Since 1996, FEC rules have expressly prohibited the practice of corporate ''bundling,'' or the facilitation of the making of contributions to federal candidates and committees. Most generally think of corporate facilitation as involving coordination with the benefiting candidates. But there are some types of now-prohibited activity—for example, using company staff and resources to solicit contributions to a campaign—that, at least theoretically, could be done independently. The FEC's corporate facilitation rules remain on the books, and the Commission has not listed them as among those specifically to be reviewed in the wake of *Citizens United*. But future Commission rulemakings and advisory opinions could touch on these practices, and may affect the ways in which companies may seek financial support for candidates.

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