

Telecommunications Alert: Supreme Court Case Allows Corporate Political Advertising, but Some Restrictions Remain; Disclosure Requirements Also Apply

1/26/2010

In a landmark 5-4 decision, the Supreme Court overturned a federal ban on corporate and union spending on political advertisements. The *Citizens United v. FEC* case allows corporations and labor unions to use unlimited general treasury funds to directly support or oppose candidates for federal office. Until now, corporations and unions could only spend political money through their Political Action Committees (PACs) to fund issue ads (“Call Senator Jones to support the stimulus package.”). The Court’s decision does not eliminate all restrictions on corporate political spending, however, and it specifically upholds disclosure requirements in connection with the political expenditures it did authorize. Corporations considering such expenditures must continue to be mindful of these restrictions and requirements.

Scope of Permissible Corporate Political Activity after *Citizens United*

Beginning immediately, both for- and non-profit corporations may use unlimited general treasury funds for electioneering purposes.¹ They can make expenditures for express advocacy, including television advertisements. Ads may directly support a candidate. Acceptable language includes “Re-elect Senator Jones” or “Vote against Congressman Jones.”

Continuing Restrictions on Corporate Political Activity

Corporations and labor unions still may *not* use general treasury funds to donate directly to federal candidates.

Companies also may not coordinate the funding of election advertisements in cooperation, consultation, or in concert with, or at the request or suggestion of, a candidate, the candidate’s campaign, the candidate’s agent, or a political party committee.

Companies cannot engage in discussions with a candidate or campaign concerning an advertisement’s content, message, intended audience, method of communication, intended media outlets, timing, placement, frequency, size, or prominence.

Corporations cannot use a candidate or campaign's vendor or consultant, and should not employ former campaign staff to avoid appearances of impropriety.

FEC Oversight

The Federal Election Commission (FEC) will provide guidance to the public regarding compliance, but enforcement will likely focus on allegations of coordination, not on the ad's content. Companies wishing to take advantage of the *Citizens United* opportunity should consider corporate firewalls and should scrutinize interaction with elected officials, candidates, and campaigns to stave off potential liability.

Disclaimer and Disclosure Requirements

Corporations must disclose funding for the electioneering communication and include a disclaimer stating “___ is responsible for the content of this advertisement.” The required statement must be made in a “clearly spoken manner” and displayed on the screen for at least four seconds in a “clearly readable manner.” It must state that the communication “is not authorized by any candidate or candidate's committee.” The disclaimer must display the name and address (or website address) of the entity that funded the ad.

Additionally, any person or entity spending more than \$10,000 on electioneering communications within a calendar year must file disclosure reports with the FEC. The reports must identify the entity responsible for the expenditures, the expenditure amount, the election to which the communications were directed, and the names of certain donors. The disclosure reports will be publicly available.

Future Implications of the Court's Decision

Many state and local laws ban corporate financing of election ads. These laws are now unconstitutional and will likely be repealed. Congress and states will likely enact legislation testing the limits of the ruling by banning certain groups from corporate political spending—foreign corporations in particular.

Shareholders will likely compel increased oversight of corporate political spending, and may attempt to require corporations to obtain approval from shareholders before spending money on political advertisements or require CEOs to appear as the sponsor in the company's political ads. The Court's decision does not include these types of restrictions on corporate political spending.

Mintz Levin is available to provide counsel concerning the decision and will continue to provide updates as the 2010 election approaches.

Endnote

¹ The FEC defines electioneering communications as broadcast, cable, or satellite communications that a) refer to a clearly identified federal candidate; 2) are publicly distributed by a television station, radio station, cable television system, or satellite system for a fee, 3) can reasonably be received by 50,000 or more people in the district (in the case of a U.S. House candidate) or state (in the case of a Senate candidate) that the candidate seeks to represent; and 4) are distributed within 60 days prior to a general election or 30 days prior to a primary election for the federal office sought by the candidate, including elections in which the candidate is unopposed. The following are not considered electioneering communications: 1) printed media - including newspapers, magazines, bumper stickers, yard signs, and billboards; 2) telephone or electronic communications (however, the exemption does not apply to unsolicited electronic mail of more than 500 substantially similar communications); 3) a news story, commentary, or editorial broadcast by a television station, radio station, cable television system or satellite system (however, if the facilities are owned or controlled by a political party, committee, or candidate, other regulations apply); 4) a candidate debate, forum, or communication that solely promotes a debate or forum (communications promoting the debate or forum must be made by or on behalf of the sponsor), and 5) communications by state or local candidates that do not promote, support, attack or oppose federal candidates.

For assistance in this area please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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