

Client Alert

Government Advocacy & Public Policy Practice Group

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Super PACs in Spotlight Once Again During Presidential Primary Season

As in the 2014 mid-term election season, Super PACs once again are attracting a great deal of attention in this Presidential Primary season. Although criticized by many, they are a legal, and many believe effective, way to promote political speech protected by the First Amendment. Although Super PACs have been in existence for almost five years, they are often misunderstood. For example, many critics allege that they are sources of “dark money” and unregulated. Neither of these characterizations are accurate; in fact, the opposite is true.

How Did We Get Here?

Prior to the *Citizens United* decision in 2010, corporations could neither make contributions nor expenditures in federal elections. In *Citizens United v. Federal Election Comm’n*, 558 U.S. 310 (2010), the Supreme Court struck the prohibition on expenditures by corporations and labor unions while leaving in place the ban on contributions by both of those groups.

The distinction between expenditures and contributions is important. A contribution is money or services or other things of value provided to a candidate or political committee. An expenditure, on the other hand, is typically the payment for a communication, *e.g.*, a newspaper or television advertisement, advocating the election or defeat of a candidate.

It is important to note that individuals have always had the legal authority to expend unlimited amounts of their personal funds to run ads or otherwise communicate for or against a candidate.

Citizens United allows corporations and labor unions to expend their treasury funds to support or oppose candidates for federal office. They may only do so, however, if the activity is not coordinated with any federal candidate.

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What Is Coordination?

Corporate or labor union expenditures must be independent of the candidate they seek to benefit. An independent expenditure is an expenditure used for a communication that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents. If there is, for example, consultation—"What would you like our advertisements to say?"—the expenditure becomes a contribution which a corporation may not make. There are serious penalties for illegal corporate or labor union contributions.

In practice, few corporations directly make political expenditures; it is unlikely to see a political advertisement that says, "Paid for by Acme Corporation". This is generally because independent expenditures by a corporation, just as for individuals, have to be disclosed to the Federal Election Commission ("FEC"). That information is publicly available. In addition, the advertisement would have to carry a disclaimer disclosing the sponsor who paid for the advertisement. Since many corporations either have shareholders and/or must appeal to consumers, taking overt public political positions could alienate certain shareholders and/or customers of the corporation.

The Birth of the Super PAC

Soon after the *Citizens United* decision, Super PACs were born. They are a logical extension of *Citizens United's* rationale. If a corporation or labor union can expend unlimited amounts of treasury funds on political speech, may a political committee collect such funds from a number of entities (including individuals) and use them to sponsor their own expenditures? This question was presented to the FEC and federal courts which answered in the affirmative.

Unlike a typical political committee which collects funds from only individuals subject to contribution limits, a Super PAC may collect unlimited funds from individuals, corporations and labor unions.

Super PACs Are Registered with and Regulated by the FEC

Any U.S. corporation or labor union may give any amount to a Super PAC. All contributions to a Super PAC must be reported to the FEC. The expenditures of a Super PAC also must be reported, which includes disclosing the candidate for or against a communication may be made.

Dark Money

As stated earlier, Super PACs are not a source of dark money. The source of all of a Super PAC's money is reported. Anyone can go to the FEC's website and view who gave money to any Super PAC.

Many confuse Super PACs with other entities that are engaged in the political arena. These include tax exempt entities such as IRC § 501(c)(4) "social welfare organizations" and IRC § 501(c)(6) trade associations, and, more recently, limited liability corporations ("LLCs"). Generally speaking, these organizations are not registered with the FEC as political committees; their expenditures but, importantly, not

their donors have to be disclosed to the FEC. For numerous reasons, the sources of funding for these organizations are opaque.

Although these entities are often conflated with Super PACs in the press, these organizations are distinct and are the subject by government investigations in ways that are not relevant to Super PACs.

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Lawyers in King & Spalding's Political Law Practice Group regularly counsel individuals; corporations; partnerships; trade associations; nonprofit organizations; and political committees, parties and candidates in complying with all aspects of campaign finance, ethics and lobbying activities.

Although the laws and regulations that govern these areas are altered frequently, our Political Law team members are committed to ensuring that our clients are kept abreast of all changes to campaign finance, ethics and lobbying laws at the federal, state and local levels, so that clients may engage in these activities without negative or adverse repercussions.

Among the many services that we provide clients to help them avoid these potential pitfalls are compliance training and record-keeping programs. Since most of our clients' political activities simultaneously fall under the jurisdiction of federal, state and local government laws and regulations, these services are particularly invaluable to our clients in helping them maintain their political security.

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