



PUBLIC POLICY AND GOVERNMENT AFFAIRS

Citizens United v. FEC Campaign Finance Webinar February 25, 2010

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Citizens United v. FEC

- The Bryan Cave Election Law Group has prepared a detailed guidance memorandum on the Citizens United Supreme Court decision, which can be found on the Bryan Cave website.
- To access the memorandum:
 - Go to www.bryancave.com
 - On the left, click on “News and Events”
 - Click on “Events”
 - Click on “Landmark Supreme Court Ruling on Citizens United v. FEC”
 - Scroll to the bottom of the page
 - Click on “MEMO-Citizens United v. FEC Supreme Court Ruling”

Citizens United v. FEC

- On January 21, 2010, the Supreme Court issued a landmark ruling in the Citizens United v. FEC case which could significantly transform the campaign finance system at the federal level.
- The Supreme Court in a 5-4 ruling struck down the decades-old prohibition on corporate expenditures out of general treasury funds in connection with federal elections as unconstitutional under the First Amendment.
- The Court also invalidated the McCain-Feingold law's restrictions on certain corporate and union advertising out of their general treasury funds depicting federal candidates in the last 60 days before a general election and the last 30 days before a primary.

Election Law Restrictions Struck Down in Citizens United

- The Supreme Court's decision in Citizens United invalidated a number of key restrictions on corporate advertising to the general public regarding federal candidates and officeholders and other corporate expenditures in connection with federal elections.
- In the aftermath of Citizens United, legal restrictions on the content and timing of such advertisements by corporations, trade associations, and labor unions no longer exist.

Election Law Restrictions Struck Down in Citizens United: Content Restrictions

- For decades, the federal election laws prohibited corporations, incorporated trade associations, and labor organizations from making expenditures from their general treasury funds in connection with federal elections.
- These statutory provisions prohibited corporations, trade associations, and unions from using their general treasury funds to disseminate public communications that expressly advocated the election or defeat of clearly identified federal candidates because such communications were deemed to be prohibited corporate expenditures in connection with a federal election. This restriction did not apply to PAC funds.
- However, in Citizens United the Court struck down the restriction on corporate expenditures in connection with a federal election as unconstitutional on its face.

Election Law Restrictions Struck Down in Citizens United: Content Restrictions, Cont.

- As a result, corporations, incorporated trade associations, and labor unions now have the legal ability to disseminate public communications concerning federal candidates and officeholders without any content restriction at all – even corporately funded express advocacy communications are permissible.
- These entities are still prohibited from coordinating communications with federal candidates or other federal political committees. The FEC is currently conducting a rulemaking proceeding on coordination.

Election Law Restrictions Struck Down in Citizens United: Time Restrictions

- Under the McCain-Feingold campaign finance law enacted in 2002, corporations, incorporated trade associations, and labor unions were also subject to an advertising blackout period in the last 60 days before a general election and the last 30 days before a primary election.
- Communications that are aired during these time frames, refer to or depict a clearly identified federal candidate, and meet certain other conditions are electioneering communications and general treasury funds could not be used to finance such communications.

Election Law Restrictions Struck Down in Citizens United: Time Restrictions, Cont.

- The Supreme Court in Citizens United likewise invalidated the McCain-Feingold law's electioneering communications restrictions as unconstitutional under the First Amendment.
- As a result, corporations, incorporated trade associations, and labor unions are now able to disseminate advertisements paid for out of their general treasury funds concerning federal candidates and officeholders at any time — even in the final weeks and days before an election.

Legal Requirements that Remain in Effect After Citizens United

- There remain a number of important legal restrictions and requirements that apply to corporate, trade association and union advertising and other expenditures that are made in connection with federal elections.
- The Citizens United decision did not disturb the prohibition on direct corporate, trade association, and union contributions to federal candidates, federal PACs, national political parties, and the federal accounts of other political parties.
- Accordingly, corporate, trade association, and labor union PACs remain an important vehicle for making contributions at the federal level.

Requirements that Remain in Effect After Citizens United: Coordination Prohibition

- The Court's ruling does not affect the FEC's longstanding treatment of certain coordinated communications as in-kind contributions that are subject to the contribution limits and source prohibitions of federal law.
- Source restrictions under federal law prohibit corporations, trade associations, and unions from making contributions to federal candidates and national party committees.
- Accordingly, it is critical that any advertising in connection with federal elections that is done by corporations, trade associations, and unions not be coordinated with federal candidates and other federal political committees.

Requirements that Remain in Effect After Citizens United: Disclaimer Requirements

- The Citizens United ruling also preserved certain disclaimer requirements for public communications disseminated by corporations, trade associations, and labor unions.
- If a corporation, trade association, or labor organization uses its general treasury funds to pay for a public communication that expressly advocates the election or defeat of a federal candidate, the communication must include a disclaimer which contains:
 - a “paid for by” statement with the entity’s name;
 - the entity’s permanent website or mailing address; and
 - a statement indicating that the communication was not authorized by any candidate.

Requirements that Remain in Effect After Citizens United: Disclosure Requirements

- Important FEC reporting requirements continue to apply to certain public communications made by corporations, trade associations, and unions.
- We anticipate that the FEC will initiate a rulemaking soon in response to Citizens United, which likely will provide further guidance on the reporting requirements that remain in effect.
- Reporting requirements vary based on the type of communication.
 - Electioneering communications aired in the last 30-60 days before an election that aggregate in excess of \$10,000 in a calendar year must be disclosed within 24 hours of dissemination.

Requirements that Remain in Effect After Citizens United: Disclosure Requirements

- Advertisements to the general public that expressly advocate the election or defeat of a clearly identified federal candidate must be disclosed on a quarterly basis. In some cases, these communications must also be disclosed to the FEC within 24 or 48 hours of dissemination.
- Under certain circumstances, donations made to a corporation, trade association, or labor union for the purpose of funding public communications must also be disclosed to the FEC.
- Communications that a corporation, trade association, or labor union makes to its restricted class must be disclosed if disbursements for the communications exceed \$2,000 per election within a quarterly or pre-general election reporting period.

Potential Impact of the Citizens United Ruling

- If history is any guide, we can expect a substantial increase in corporate-funded advertising in connection with the 2010 midterm elections and the 2012 presidential election.
- Some corporations may choose to make contributions to other entities to finance advertisements on their behalf concerning federal candidates and officeholders.
 - For example, a number of corporations may choose to provide funds to trade associations and other tax-exempt organizations and have the outside organizations air the advertisements themselves.
 - Under the Internal Revenue Code, 501(c)(6) trade associations and 501(c)(4) social welfare organizations are not required to disclose their donors to the Internal Revenue Service, while Section 527 organizations are required to do so.
 - In light of these disparate disclosure requirements, we may witness a notable increase in federal election-related advertising sponsored by trade associations and social welfare organizations following the Citizens United ruling.
- There will likely be litigation at the state level seeking to invalidate restrictions under state law that are analogous to the restrictions on corporate, trade association, and labor union expenditures under federal law that were invalidated in Citizens United.

Potential Impact of the Citizens United Ruling: Possible Legislative Responses

- President Obama in his State of the Union address proposed a number of changes to the federal election and lobbying laws, including:
 - A legislative response to the Citizens United decision, including a strengthening of the foreign national ban in connection with U.S. elections;
 - Strict limits on contributions and bundling by federal lobbyists;
 - Revisions to the Lobbying Disclosure Act (“LDA”), which would require more people to register as federal lobbyists and more detailed lobbying disclosure reports; and
 - Disclosure of all earmark requests.

Potential Impact of the Citizens United Ruling: Possible Legislative Responses, Cont.

- Senator Schumer and Congressman Van Hollen have released a summary of proposals for a legislative response to Citizens United.
- No formal legislation has been introduced at this time.
- Proposals include:
 1. Strengthening the long-standing prohibition on foreign corporations spending funds in connection with U.S. elections;
 2. Preventing government contractors and corporate beneficiaries of the Troubled Asset Relief Program (TARP) from spending funds in connection with elections;

Potential Impact of the Citizens United Ruling:

Possible Legislative Responses, Cont.

3. Enhanced disclaimer requirements, including “stand by your ad” requirements for corporate CEOs and top corporate donors to outside advocacy groups;
4. Enhanced disclosure obligations, including:
 1. Requiring social welfare organizations, labor unions, trade associations, and 527 organizations to establish separate bank accounts for political expenditures;
 2. Requiring these entities to publicly disclose to the FEC all funds received and disbursed through these accounts to the FEC, including identifying the donors and the person who controls the account;
 3. Requiring disclosure of corporate political expenditures both on a corporation’s website and through SEC filings; and
 4. Additional disclosure requirements for political expenditures made by registrants under the Lobbying Disclosure Act (LDA).

Potential impact of the Citizens United Ruling: Legislative Responses, Cont.

5. Broader access to “lowest unit rate” for candidates and political parties as well as reasonable access to airtime; and
 6. Provisions prohibiting corporations and other entities from coordinating election-related activities with candidates and parties within certain time frames before an election.
- We anticipate that a bill containing these provisions will be formally introduced very soon in the U.S. House and U.S. Senate and legislative action is possible between now and the Memorial Day recess.

Conclusion

- The Citizens United case could significantly transform the campaign finance system at the federal level.
- Corporate, trade association, and labor union spending in connection with federal elections will likely increase for the 2010 midterm elections.
- It is possible that Congress will enact new legislation in this area in time to affect the midterm elections.

Questions?



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