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To: Interested Parties  
From: Bryan Cave Election Law Group  
Date: February 3, 2010  
Re: Citizens United v. FEC Supreme Court Ruling: Analysis and Potential Implications

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On January 21, 2010, the U.S. 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.

In Citizens United, the Supreme Court, in a 5-4 ruling, struck down the decades-old prohibition on corporate expenditures in connection with federal elections as unconstitutional under the First Amendment. The Court also invalidated the McCain-Feingold campaign finance law's restrictions on certain corporate and union advertising paid for out of general treasury funds referencing federal candidates in the last 60 days before a general election and the last 30 days before a primary. Justice Kennedy authored the controlling opinion for the Court in Citizens United and was joined by Chief Justice Roberts and Justices Alito, Scalia, and Thomas. Justice Stevens authored the lead dissenting opinion in the case, and was joined by Justices Breyer, Ginsburg, and Sotomayor.

Below is an overview of the Citizens United ruling as well as a preliminary analysis of the potential impact of the decision for the midterm elections and beyond.

## **I. 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.

### **A. Content Restrictions on Advertising**

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.<sup>1</sup> In practical application, these statutory provisions prohibited

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<sup>1</sup> This statutory restriction did not apply to funds raised by corporations, incorporated trade associations, and unions through their connected political action committees ("PACs"). Individuals within the solicitable class of connected

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.<sup>2</sup>

However, in Citizens United the Court struck down the restriction on corporate expenditures in connection with a federal election as unconstitutional on its face. 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.

#### **B. Time Restrictions on Advertising**

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. Specifically, corporations, trade associations, and unions were prohibited from using their general treasury funds to finance electioneering communications. An electioneering communication is defined as any broadcast, cable, or satellite communication that:

- (1) Refers to or depicts a clearly identified federal candidate;
- (2) Is publicly distributed;
- (3) Is distributed within 60 days prior to a general election or 30 days prior to a primary election; and
- (4) Can be received by 50,000 or more people in the U.S. House district or state that the candidate seeks to represent, or in the case of presidential primaries, in a state holding a presidential primary within 30 days of the date of the communication.<sup>3</sup>

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PACs sponsored by corporations, trade associations, and unions may contribute up to \$5,000 per calendar year to the PAC.

<sup>2</sup> The Federal Election Commission (“FEC” or “Commission”) has promulgated detailed regulations concerning what types of communications expressly advocate the election or defeat of a clearly identified federal candidate. Please let us know if you would like detailed guidance on the scope of express advocacy communications pursuant to FEC regulations.

<sup>3</sup> The McCain-Feingold law’s electioneering communications restrictions applied to corporate, trade association, and union advertising paid for out of their general treasury funds; the law’s restrictions did not apply to communications paid for out of PAC funds.

The Supreme Court in Citizens United likewise invalidated the McCain-Feingold law's electioneering communications restrictions as unconstitutional under the First Amendment. Accordingly, 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.

## **II. Election Law Restrictions and Requirements that Remain in Effect After Citizens United**

Following the Citizens United ruling, 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. It is important to note that 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,<sup>4</sup> and the federal accounts of other political parties. Accordingly, corporate and trade association PACs remain an important vehicle for making contributions at the federal level.

### **A. Coordination Prohibition**

The Citizens United case involved expenditures and communications that were done independently of federal candidates and political parties. Accordingly, 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.<sup>5</sup> Because source restrictions under federal law prohibit corporations, trade associations, and unions from making contributions to federal candidates and national party committees, 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.

### **B. Disclaimer Requirements**

The Citizens United ruling also preserved certain disclaimer requirements for public communications disseminated by corporations, trade associations, and labor unions.<sup>6</sup> Accordingly, if

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<sup>4</sup> The national political parties include the Democratic National Committee, the Republican National Committee, and the Congressional and Senatorial committees of each political party.

<sup>5</sup> FEC regulations contain detailed provisions identifying categories of public communications that are and are not coordinated with a federal candidate or other federal political committees. The FEC has recently initiated a rulemaking to revise its coordination regulations which may be completed later this year.

<sup>6</sup> Disclaimer requirements do not apply to communications that a corporation or incorporated trade association distributes solely to its restricted class. Please let us know if you would like further guidance regarding the scope of the restricted class for a corporation or trade association under FEC regulations.

a corporation uses its general treasury funds to pay for a public communication<sup>7</sup> that expressly advocates the election or defeat of a federal candidate, the communication must include a “paid for by” disclaimer which also must contain the corporation’s permanent website or mailing address and a statement indicating that the communication was not authorized by any candidate. For example, such an advertisement paid for by ABC Corporation would need to include a disclaimer stating “Paid for by ABC Corporation, [www.ABCCorp.com](http://www.ABCCorp.com), not authorized by any candidate or candidate’s committee.”

### **C. Disclosure Requirements**

Although Citizens United invalidated longstanding restrictions on the use of corporate general treasury funds to make expenditures in connection with federal elections, important FEC reporting requirements continue to apply to certain public communications. 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. In addition, Congress may take action to expand or alter the applicable reporting requirements. Further information on the reporting requirements that apply to different types of public communications, which may be modified by the FEC or Congress at a later date, is provided below.

#### **1. Reporting Requirements for Electioneering Communications**

Under FEC regulations that existed prior to the Citizens United decision, any person that makes disbursements for electioneering communications aired in the last 30-60 days before an election that aggregate in excess of \$10,000 in a calendar year is required to file FEC Form 9 within 24 hours of disseminating the communication. Form 9 must include:

- A list of persons sharing or exercising control over the disbursements for the communication;
- Information regarding contributions made to the reporting entity for the purpose of financing electioneering communications, as follows:
  - If a corporation or labor organization creates a separate bank account established to pay for electioneering communications, the report must disclose the name and address of each donor who donated an amount aggregating \$1,000 or more to the segregated bank account since the first day of the preceding calendar year.

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<sup>7</sup> FEC regulations define a public communication as a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising. Under FEC regulations, communications over the Internet are not treated as public communications unless the communications are placed for a fee on another person’s web site.

- If a corporation or labor organization does not establish a separate bank account to pay for electioneering communications, it must disclose the name and address of each donor who donated an amount aggregating \$1,000 or more to the corporation or labor organization specifically for the purpose of furthering electioneering communications since the first day of the preceding calendar year;<sup>8</sup> and
- Information regarding each disbursement made for the communication.

## 2. Reporting Requirements for Express Advocacy Communications to the General Public

Any person, entity, or group that makes independent expenditures is also subject to special reporting requirements. An independent expenditure is defined as an expenditure for a communication expressly advocating the election or defeat of a clearly identified federal candidate that is not made with the cooperation or prior consent of, in consultation with, or at the request or suggestion of, a federal candidate or an agent or authorized committee of a federal candidate or a political party committee or its agents.<sup>9</sup>

An entity making independent expenditures is required to file FEC Form 5 for each quarterly reporting period in which the entity makes independent expenditures in excess of \$250 with respect to a given election.

In addition, the entity must file Form 5 as a 48-hour report if the entity makes independent expenditures aggregating \$10,000 or more with respect to a given election up to and including the 20<sup>th</sup> day before an election. An entity that crosses this threshold must file Form 5 within 48 hours of disseminating the communication. Further, an entity that makes independent expenditures aggregating \$1,000 or more with respect to a given election after the 20<sup>th</sup> day but more than 24 hours before the election is required to file Form 5 as a 24-hour notice within 24 hours of disseminating the communication.

FEC Form 5 must include information regarding each contribution over \$200 given to the entity for the purpose of furthering the independent expenditures and information regarding each disbursement made in connection with the independent expenditures once the total of disbursements made exceeds \$250 per election in the calendar year. This information must be

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<sup>8</sup> FEC regulations provide that donations made for the purpose of furthering electioneering communications include funds received in response to solicitations specifically requesting funds to pay for electioneering communications as well as funds specifically designated for electioneering communications by the donor.

<sup>9</sup> As was noted above, corporations, incorporated trade associations, and labor unions are legally prohibited from coordinating public communications that expressly advocate the election or defeat of federal candidates, and this prohibition was not disturbed by the Citizens United ruling.

provided regardless of whether FEC Form 5 is filed as a quarterly report or as a 24- or 48-hour notice.

### **3. Reporting Requirements for Express Advocacy Communications to the Restricted Class**

Corporations and incorporated trade associations that make communications containing express advocacy to their restricted classes are required to file FEC Form 7 for each quarterly or pre-general reporting period in which the cost of such communications exceed \$2,000 per election. Form 7 must include information regarding the type of communication, the group of individuals receiving the communication, and the disbursements made for the communication.

### **III. Potential Impact of the Citizens United Ruling**

In the aftermath of the Citizens United decision, corporations, incorporated trade associations, and labor unions have much broader latitude to spend their general treasury funds for public communications in connection with federal elections. These entities now have the ability to disseminate advertisements at any time expressly advocating the election or defeat of federal candidates, provided that the advertisements are not coordinated with any candidate or political party and provided that the disclaimer and disclosure requirements outlined above are satisfied. If history is any guide, we can expect a substantial increase in such advertising in connection with the 2010 midterm elections and the 2012 presidential election.

In the wake of Citizens United, 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.

Numerous states currently restrict corporate, trade association, and labor union expenditures in connection with state elections. Given that Citizens United invalidated similar restrictions at the federal level, there likely will be litigation at the state level seeking to invalidate analogous restrictions under state law. Please let us know if you would like additional information on those jurisdictions that currently restrict corporate, trade association, and labor union expenditures in connection with state elections.

It is unclear at this time the extent to which corporations and incorporated trade associations are going to take advantage of the new opportunities that have been afforded them to influence federal elections under the Citizens United ruling. In the months ahead, these organizations will

likely be deciding how active they wish to be in this area. In addition, President Obama and Congress may seek to enact legislation responding to the Citizens United ruling and have the new legislation in place in time for the upcoming midterm elections.

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As always, if you have any further questions concerning the scope and potential impact of the Supreme Court's ruling in Citizens United v. FEC, please do not hesitate to contact the Bryan Cave Election Law Group for assistance.