FOLEY HOAG LLP

Business Alert

# Supreme Court Decision in Citizens United v. Federal Election Commission Changes the Landscape for Corporate Funding of Election Communications

Written by Dean Richlin, Paul T. Kim, Tad Heuer, Zachary Gerson

*February 19, 2010*

The Supreme Court's recent decision in the *Citizens United* case has focused widespread public attention on the issue of corporate and union spending in federal election campaigns. On January 21, 2010, the Court ruled that corporations and labor unions will now be allowed to use general treasury funds to promote or oppose electoral candidates — a decision that has elicited strong reactions from the President, legislators, and the general public.

For companies themselves, the ramifications of this decision on their government relations strategies will be substantial, regardless of industry or company size. Furthermore, this decision will impact companies regardless of their previous levels of political engagement — from those that are already sponsoring political action committees ("PACs") to those that are now considering becoming involved in federal elections for the first time.

It is therefore essential that all companies understand the intricacies — and the potential pitfalls — of the post-*Citizens United* campaign finance landscape, particularly given the significant legal and public relations issues involved. With congressional action already being proposed to limit the scope of *Citizens United*, keeping abreast of this rapidly-moving issue must be a top priority as companies develop and refine their overall government relations strategies.

## Background: "Electioneering Communications" and the Campaign Finance Framework

Prior to *Citizens United*, corporations and unions were prohibited under federal law from making direct contributions to candidates, and from making "independent" expenditures (i.e., those that were not coordinated with a campaign) that expressly advocated or opposed the election of a particular candidate. They were also prohibited from making "electioneering communications" – broadcasts that named a candidate for federal office, occurred within a set number of days from the election, targeted the relevant electorate, and were unmistakably "appeal[s] to vote for or against a specific candidate."

However, corporations and unions were (and remain) able to sponsor political action committees, or "PACs," that engage in electioneering communications. While corporations and unions may not donate directly to PACs, PACs can collect contributions from individuals, often employees of a given company or members of a particular union, and use those contributions to influence elections by making independent expenditures, electioneering communications, or direct donations to candidates. Federal regulations restrict who may donate to PACs, and the amounts that PACs may contribute to campaigns.

## The *Citizens United* Decision

In its 5-4 decision, the Supreme Court held unconstitutional the section of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), often referred to as the McCain-Feingold Act, that prohibited corporations and labor unions from using general treasury funds either for "electioneering communications" or for activities expressly advocating the election or defeat of a candidate.

- **Authorized Use of General Treasury Funds.** The immediate effect of this ruling is to allow corporations and labor unions to begin using general treasury funds to promote or oppose electoral candidates via election advertisements and other "electioneering communications." Notably, however, *Citizens United* did not change the prohibition on direct corporate or union donations to candidates or campaigns, which remains in effect.

- **Political Action Committees.** To the extent that corporations or unions have previously sponsored PACs that funded election advertisements or electioneering communications (with the PACs spending funds donated by individuals), *Citizens United* now makes it unnecessary for a corporation or union to sponsor a PAC to achieve such purposes. However, the ruling did not address the law governing the operation of PACs themselves. Thus, PACs can continue to make direct donations to campaigns (still a prohibited activity for corporations and unions) and can continue to fund both election advertisements and electioneering communications.
- **State-Level Laws.** Because the *Citizens United* case concerned only the federal campaign finance laws, it does not automatically invalidate state-level election laws that still prohibit direct corporate or union expenditures on election communications. However, it is highly likely that where such state laws exist, they will be challenged as unconstitutional in the near future, with challengers relying on the *Citizens United* precedent.
- **Disclaimers and Disclosures.** *Citizens United* also upheld two portions of BCRA. First, all televised electioneering communications, including those that do not expressly advocate voting for or against a candidate, must continue to include a "disclaimer" identifying the entity responsible for the content. Second, any entity spending more than $10,000 on such electioneering communications annually must file a disclosure statement with the Federal Election Commission ("FEC") that identifies the entity making the expenditure, the amount, the affected elections, and donors of more than $1,000.
- **Enforcement.** FEC enforcement of campaign finance laws in the wake of *Citizens United* is likely to focus on disclaimers, on disclosure, and on whether corporate or union spending is actually independent of (and not coordinated with) campaigns. By statute, "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized [PACs], or their agents" are considered contributions to the candidate, and therefore remain subject to the existing contribution restrictions.

## Future Outlook

The *Citizens United* decision has generated significant and powerful reactions across the political spectrum. In his dissent, Justice Stevens attacked the majority opinion for abandoning long-held precedents, failing to respect the political branches of government, and ignoring the reality of the political system. President Obama criticized the opinion strongly in his State of the Union address, and several legislators, including Senator Charles Schumer and Representative Chris Van Hollen, have begun drafting bills that seek to limit the impact of *Citizens United*.

Potential legislative proposals in this regard include requiring shareholder or union member votes to authorize expenditures on election communications, barring the federal government from contracting with corporations or unions that make direct expenditures on election communications, and banning expenditures by companies with more than twenty percent foreign ownership. Clearly, while the current state of the law allows direct corporate and union spending on federal election communications, the potential for substantial statutory changes in the near future makes it imperative that companies monitor this issue closely.

RELATED INDUSTRIES

- Healthcare
- Life Sciences

RELATED PRACTICES

- Business Counseling
- Federal Government Strategies

---