

Supreme Court Loosens Restrictions on Corporate Political Expenditures

On January 21, 2010, the Supreme Court issued a widely anticipated decision that will re-shape corporate political activities for the 2010 elections and beyond. In *Citizens United v. FEC*, the Court overturned the federal ban on independent campaign spending by corporations, including the provision of the McCain-Feingold campaign finance law that prohibited corporate-sponsored “issue” ads close to an election. The decision will also apply to independent campaign spending by labor unions, but it leaves intact the prohibition on direct contributions to candidates by corporations or labor unions.

Federal election laws, as amended by the Bipartisan Campaign Reform Act of 2002, prohibit corporations and labor unions from using their general treasury funds to make independent expenditures for “express advocacy” of the election or defeat of a candidate for federal office or “electioneering communications.” Electioneering communications include any publicly distributed broadcast, cable, or satellite communication that refers to a candidate for federal office and is made within 30 days of a primary election or 60 days of a general election. *Citizens United*, a nonprofit corporation, challenged application of the corporate ban on independent campaign expenditures to a documentary that *Citizens United* released in 2008, and to television ads for the documentary. The documentary was critical of Hillary Clinton, then a candidate for president. The U.S. District Court for the District of Columbia ruled for the Federal Election Commission (FEC), but the Supreme Court has now invalidated the restriction.

Overtaking past Supreme Court precedent, the Court held that, under the First Amendment, political speech may not be banned solely based on the speaker’s corporate status. Moreover, the Court determined that concern about corruption or the appearance of corruption (the established justification for prohibiting corporate contributions to candidates) did not justify a restriction on independent expenditures by a corporation. As a result, the Court struck down the ban on independent advocacy by corporations, including express advocacy and electioneering communications.

At the same time, the Court upheld the disclosure requirements applicable to independent ads by corporations, as applied to *Citizens United*. Federal law requires that televised electioneering communications by anyone other than a candidate identify the sponsor of the communication and indicate that the communication is not authorized by any candidate. The Court found that these requirements do not impose any limit on speech, and characterized disclosure as a “less restrictive alternative to more comprehensive regulations of speech.” The Court left open the door, however, to challenges to the disclosure requirement in the event that its application contained a reasonable probability of subjecting contributors to threats or harassment.

Implications

In significantly expanding political speech for corporations and labor unions, *Citizens United v. FEC* has significant implications for political activity during the 2010 election cycle and beyond:

- Corporations and labor unions may now make independent expenditures for or against a candidate using their general treasury funds, and can raise money for such activities without regard to the contribution limits imposed on their political action committees (“separate segregated funds”).
- Corporations and labor unions may participate in or contribute to coalitions or associations that sponsor independent political ads or other campaign expenditures.
- State bans on independent expenditures by corporations and labor unions are likely to be invalid as a result of this decision, but will need to be analyzed on a case by case basis.
- It can be expected that candidates and other political stakeholders will look to corporations and labor unions to take advantage of their right to engage in independent expenditures, subject to the ongoing prohibition on coordination with campaigns.

Despite these changes, other restrictions continue to apply. In particular:

- Corporations and labor unions are still prohibited from making contributions to candidates or parties, except through their separate segregated funds. Moreover, separate segregated funds are still subject to the existing limits on contributions and expenditures.
- The prohibition on coordinating expenditures with candidates’ campaigns remains in place.
- The disclaimer and disclosure requirements applicable to independent advertisements and other communications remain in effect.
- Corporations may still be subject to other limitations on their election activities, such as the limitations applicable to tax exempt organizations and limits imposed by a corporation’s articles and bylaws.

It remains to be seen if this decision leads to further loosening of restrictions on corporate political activity. For example, the Court left open the possibility that the disclaimer and disclosure requirements for independent advertisements could be unconstitutional in certain circumstances. The FEC may also react to this decision by attempting to impose additional disclosure requirements on a corporation’s independent expenditures or its contribution to the independent expenditures of an association or coalition.

Moreover, the Securities and Exchange Commission (SEC) is currently considering a proposed rule that would prohibit an investment adviser from providing advisory services to a government client if the adviser or certain of its employees and executives made a contribution to certain elected officials related to that governmental entity. Although this decision would not appear to call the constitutionality of such a rule into question, it may prompt the SEC to revisit the proposal.

If you have any questions about this alert, please contact your regular Ropes & Gray attorney or Nathan Brown.