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E-ALERT | Election and Political Law

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CITIZENS UNITED: SUPREME COURT OPENS THE DOOR FOR UNLIMITED CORPORATE ELECTION SPENDING

In a very significant ruling, the United States Supreme Court today opened the door to unlimited spending by corporations for election related advertising -- including ads that expressly advocate the election or defeat of specific candidates -- at the federal, state, and local levels. The Court upheld the provisions in the law that required disclosure of funding for the ad and inclusion of a "disclaimer" in the ad.

Calling it a "ban on speech" inconsistent with the First Amendment, the 5-to-4 *Citizens United* decision struck down federal statutes that prohibit corporations from making independent expenditures in support of (or in opposition to) federal candidates. In the wake of this ruling, a corporation may spend unlimited sums on advertising or other forms of communication that expressly advocate for or against the election of a candidate, provided that the corporate spending is wholly independent from the candidate and his or her campaign or political party committee. These expenditures may be made either directly, by paying for the ad itself, or indirectly, by contributing to a trade association or outside-advocacy group. In the past, corporations were only permitted to fund so-called "issue ads," which typically focused on a public policy issue important to the corporation and included some call to action (*i.e.*, "Call Congressman Smith and tell him to support H.R. 1000").

The federal ban on direct corporate contributions to candidates, political parties or PACs, and on coordinating ads with a candidate or political party, remain in effect.

The biggest winners in the wake of *Citizens United* will be trade associations and outside interest groups, which will be able to solicit corporate contributions to fund ads that freely advocate for or against candidates and their policy positions. In some circumstances, corporations will be able to fund these groups, and the ads they run, without being disclosed as the source of those funds.

The biggest losers are the political parties. The McCain-Feingold law's ban on soft money contributions to, and spending by, political parties remains in place. This will result in a significant shift of money and power away from the parties to outside organizations, accelerating a trend that was already in place. Attention may now turn to restoring some authority to the parties, either by reversing the soft money ban or lifting the limits on the amount of funds that a political party may spend in coordination with its candidates.

Given the new state of the election law rules and the new opportunities for corporate spending, a thorough understanding the rules regarding coordination of expenditures with candidates and their campaigns, and the rules regarding disclosure, has become critical.

Coordination

In the wake of *Citizens United*, corporate election spending is only permitted if the spending is truly independent of the candidate and his or her campaign or political party. Corporations are still

prohibited from making contributions to a federal candidate, and corporate expenditures made in coordination with a candidate's campaign may constitute an illegal corporate contribution.

Coordination occurs when an individual or entity makes a decision about spending on election advertising in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, the candidate's campaign, the candidate's agents or a political party committee. In some circumstances, discussions about the content, intended audience, means of communication, specific media outlets used, the timing or frequency, or size or prominence of an advertisement between a candidate's campaign and an outside group may constitute coordination. Use of a common vendor or employment of former campaign staff may also lead to allegations of coordination.

Enforcement likely will now focus not on the *content* of corporate-funded ads but on whether ads have been *coordinated* with a candidate. This heightened attention on coordination comes at a time when there is great uncertainty as to what counts as coordination; a federal district court threw out the coordination regulations initially enacted by the Federal Election Commission, and the FEC has yet to formally replace those regulations. Corporations that wish to take advantage of the *Citizens United* opportunity will have to scrutinize their interactions with public officials, campaigns, and parties, to avoid allegations of illegal coordination.

Disclosure

While the Supreme Court's decision allows corporations to make unlimited election advertising expenditures, it also upheld two disclosure requirements. The first provision, known as the "stand-by-your-ad" provision, requires that any broadcast advertisement include a disclaimer identifying the entity "responsible for the content of the advertising," as well as the physical address or website of that entity. Corporate advertising, whether focused on issues or on candidates, that meets the definition of an electioneering communication must include these disclaimers.

The second provision requires that any person or entity spending more than $10,000 on electioneering communications[1] within a calendar year must file certain disclosure reports with the FEC, identifying the entity making the expenditures, the amount of the expenditures, the election to which the communications were directed, and the names of certain donors who contributed $1,000 or more toward the electioneering communications. Similar disclosure requirements exist for independent expenditures.

These disclosure requirements mean that information about a corporation's sponsorship of or involvement in election advertising could be publicly available depending on the facts and circumstances.

Because corporations seeking to take advantage of the *Citizen's United* decision are likely to direct funds through tax-exempt associations that are organized under Section 501(c) of the federal tax code, we expect increased attention on compliance with the Internal Revenue Service rules governing such entities. It is also possible that there will be efforts by campaign finance reform advocates to use the tax laws as an end-run around *Citizen's United* and a means of curtailing corporate speech. For now, however, there is no question that the Supreme Court has opened a broad, new path for corporate spending in elections.

[1] An "electioneering communication" is any broadcast, cable or satellite communication that (1) refers to a clearly identified federal candidate; (2) is publicly distributed by a television station, radio station, cable television system or satellite system for a fee; and (3) is distributed within 60 days prior to a general election or 30 days prior to a primary election to federal office.

We are available to answer clients' questions and to provide further, more detailed analysis of the Supreme Court's decision.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our election and political law practice group:

Robert K. Kelner	202.662.5503	rkelner@cov.com
Bob Lenhard	202.662.5940	rlenhard@cov.com
Scott Gast	202.662.5533	sgast@cov.com