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CORPORATE LAW UPDATE

Supreme Court Lifts Ban on Corporate Independent Expenditures

The decision of the United States Supreme Court in *Citizens United v. Federal Elections Commission* (the “FEC”) now permits corporations to expend unlimited amounts of general treasury funds to advocate the election or defeat of a federal candidate, so long as the communications are produced independently and not in coordination with the candidate’s campaign (i.e., independent expenditures). Corporations have long been permitted to make independent expenditures advocating the passage or defeat of particular ballot issues. This decision, however, is the first that extends First Amendment protection to corporations and labor organizations seeking to advocate for or against candidates.

BAN ON DIRECT CONTRIBUTIONS REMAINS FOR NOW

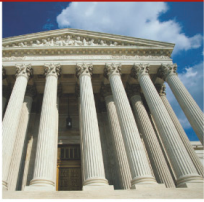
The Supreme Court did not lift the ban on a corporation’s or labor organization’s direct contributions to a candidate. Although the Court stated that limits on contributions to candidates can be justified to prevent political *quid pro quo* and the appearance of corruption, that same justification does not apply in the context of independent expenditures. Given the Court’s rejection of “the argument that political speech of corporations or other associations should be treated differently under the First Amendment,” it is likely that the Court will be asked at a future date to revisit the complete ban on corporate contributions to federal candidates in light of an individual’s ability to contribute within dollar limits.

COURT RETAINS DISCLOSURE AND DISCLAIMER REQUIREMENTS

Federal disclosure requirements were upheld. Thus, sponsors of independent political ads must still clearly state the name and permanent street address, telephone number or internet address of the entity paying for the communication and include a disclaimer that “_____ is responsible for the content of this advertisement.” Depending on the amount spent and the timing of the expenditure, the entity may have to file a disclosure with the FEC.

DECISION LIKELY EVISCERATES STATE LAW INDEPENDENT EXPENDITURE BANS

While the Court’s decision only explicitly overturned federal law, by also overruling one of its prior decisions, *Austin v. Michigan Chamber of Commerce*, which upheld a similar state law prohibition on corporate independent expenditures, *Citizens United* implicitly eviscerates state laws that prohibit corporate independent expenditures in support of candidates. While the state laws are not wiped off the books by the Supreme Court’s decision, they are readily susceptible to constitutional challenge. The Court’s decision likely prohibits the application or enforcement of state law prohibitions in 24 states, including Connecticut, Massachusetts, New York, Ohio, Pennsylvania and West Virginia.



PACs STILL PERMITTED TO MAKE DIRECT CONTRIBUTIONS TO CANDIDATES

Lost in much of the Court's decision is the potential impact on corporate political action committees (PACs). PACs funded by corporate employees may contribute directly to candidates who support the goals of the corporation. Corporate PACs have long been able to make both independent expenditures and direct contributions to candidates. Corporations may wish to avoid independent expenditures and continue to rely on their associated PAC to fund candidates' campaigns.

CAMPAIGN FINANCE LAW EVEN MORE TANGLED

Federal campaign finance law has always been a highly technical, complicated and comprehensive regulatory system with various rules for individuals, corporations, nonprofit corporations and labor organizations. The broader implications of this decision leave the web a bit more tangled. For example, it is not clear whether the election activity prohibition in the Internal Revenue Code on 501(c)(3) nonprofit corporations survives *Citizens United*. Prohibitions on their activities have often been justified by the substantial benefit they receive from tax-exempt status, but some question whether such a statutory ban can withstand a constitutional challenge.

Similarly, *Citizens United* did not offer guidance in relation to the ban on contributions and/or independent expenditures and other election activity by non-U.S. citizens. It is not clear when a corporation is a non-U.S. citizen for purposes of that broad ban. Proposals in Congress include a ban on independent expenditures by companies that have more than 20 percent "foreign ownership."

POTENTIAL LEGISLATIVE RESPONSES

Congress may attempt to limit the impact of the Court's decision. One possibility is a broadened ban on direct contributions from federal contractors to include a similar ban on independent expenditures by federal contractors. Other possibilities include greater disclosure requirements or mandating greater shareholder input on corporate political expenditures. Campaign finance legislation is likely to be a topic of hot debate in the coming months.

FOR MORE INFORMATION

For more information, please contact:

Alan F. Berliner 614.469.3268 Alan.Berliner@ThompsonHine.com
Peter E. Jones 614.469.3257 Peter.Jones@ThompsonHine.com

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