

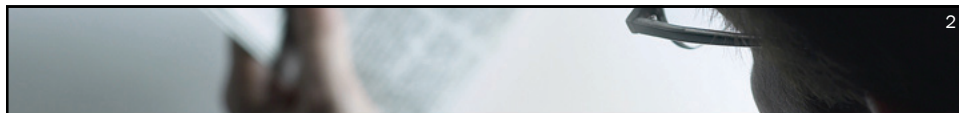


Citizens United: What the Supreme Court Decision Means for Companies and Nonprofits



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Citizens United: What the Supreme Court Decision Means for Companies and Nonprofits



Citizens United v. FEC: What the SCOTUS Decision Means for Companies & Nonprofits

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Citizens United: What the Court DID Say

- Candidate related expenditures by corporations (and labor unions) are permissible
- Such expenditures must be independent of candidates where corporate contributions are prohibited
- Federal and state laws prohibiting such expenditures violate First Amendment

Citizens United: What the Court DID Say

- What is permitted
 - Independent expenditures:
 - Candidate-related public communications expressly advocating their election or defeat
 - Vote for Jane Doe for Senate, support John Smith, oppose Hugo Chavez for President
 - Any medium: tv, radio, phones, print, mail, internet, email (NOT just radio/tv)
 - Permissible by every type of corporation, not just media corporations

Citizens United: What the Court DID Say

- What is permitted
 - Electioneering communications
 - Federal definition: TV & Radio Ads
 - Reference or depict a clearly identified federal candidate
 - Within 30 days of primary / 60 days of general election
 - Capable of being received by 50,000 voters in a state or congressional district
 - Do not expressly advocate election or defeat
 - Issue advocacy communications tied to officeholders and candidates
 - State definitions vary: often include additional types of communications, not just radio & television ads

Citizens United: What the Court DID Say

Disclosure Requirements Upheld:

- Disclosure of donors to candidate-related expenditures by corporations and labor unions are *not* invalid
- Donor disclosure *may* be subject to scrutiny by the Court to protect donors from potential harassment and retribution
- Federal & state disclosure laws vary, enforceable

Citizens United: What the Court DID Say

Disclaimer Requirements Upheld

- Federal and state disclaimer requirements for candidate-related communications not invalid
- Communications not authorized by a candidate may be required to state in the communication:
 - Who is responsible for content of communication
 - Address or web address
 - Statement that it is not authorized by candidate

Citizens United: What the Court DID NOT Say

- Corporate **contributions** to **candidates** are still **prohibited** under federal law and laws of half the states
- Corporate contributions to **political parties** are still **prohibited** under federal law and laws of half the states
- Public communications by corporations that are **coordinated** with candidates and parties are still prohibited

Citizens United: What the Court DID NOT Say

Foreign nationals are still **prohibited** from US political involvement

- Federal law governing a **foreign national's** involvement in US elections, federal, state & local, unchanged by SCOTUS
- 2 U.S.C. s 441e and 11 C.F.R. s 110.20 **prohibit** “contributions, donations, expenditures, independent expenditures, and disbursements by **foreign nationals**”, directly or indirectly.
- FEC regulations have long recognized that **US domestic subsidiaries** of foreign corporations **may participate** in US election-related activities, where **only** US citizens or foreign nationals with US permanent resident status are involved in such activities
 - PACs permitted for US subsidiaries of foreign corporations
 - Lobbying by foreign corporations permitted

Citizens United Foreign Corporations Debate

- SCOTUS concluded:

“We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process.”
(citing 2 USC s441e)

Getting Specific: What does ‘independent’ mean?

- Where corporate contributions are prohibited, corporate expenditures must be **independent** of candidate to be permitted under *Citizens United*
- Expenditures not independent if made in ‘cooperation with or consent of’ a candidate or agent (*Buckley* in 1976)
- Congress in 1976 amended definition:
 - In concert, cooperation or consultation with a candidate or agent
 - At the request or suggestion of a candidate or agent

Getting Specific: What does 'independent' mean?

- If an expenditure is not independent, then it is coordinated and becomes an **in-kind contribution**
- *Post-Christian Coalition (2000)* FEC regulations:
 - Not independent if paid by 3d party and created, produced or distributed
 - 1) at candidate or party's request or suggestion,
 - 2) after material discussions or negotiations, or
 - 3) candidate or party committee or agent exercised control or decision-making regarding communication

Getting Specific: What does 'independent' mean?

- BCRA (McCain-Feingold, 2002):
 - Struck FEC definition of 'coordinated public communications'
 - Directed FEC to promulgate *new* regulations governing 'coordinated communications'
 - Required FEC to develop standards for:
 - Republication of campaign materials
 - Common vendors
 - Common employees
 - Substantial discussions

Getting Specific: What does 'independent' mean?

- Since BCRA in 2002:
 - *Shays v. FEC* – multiple lawsuits since 2002
 - FEC has promulgated coordination regulations twice, last in 2006, now a 3d time
 - FEC current rulemaking
 - Comment period closed Jan. 19, 2010
 - FEC announced January 28 it may reopen comments after *Citizens United* decision
 - 'unambiguously campaign-related'

Getting Specific: What does 'independent' mean?

- Three-prong test for communications to be deemed 'coordinated' and, thus, in-kind contributions:
 - 1) Payment Prong (paid for by person other than candidate or political party)
 - 2) Content Prong (four standards)
 - 3) Conduct Prong (five standards)

Getting Specific: What does 'independent' mean?

Content Standards:

- 1) Republishes campaign materials of candidate or political party
- 2) Expressly advocates election or defeat
- 3) Electioneering communication, or
- 4) Refers to party or candidate within certain number of days preceding an election and targeted to voters in state or district (# of days challenged in *Shays III*)

Getting Specific: What does 'independent' mean?

Conduct Standards:

A communication created, produced or distributed

- 1) at request or suggestion of,
 - 2) after substantial discussion with, or
 - 3) with material involvement of
- candidate, candidate's agent, political party or agent, or...

Getting Specific: What does 'independent' mean?

Conduct Standards (subject of current rulemaking):

- 4) **Common vendor**: a communication produced, created or disseminated by **commercial vendor** who has also provided services during certain period of time during **current election cycle** to candidate or party committee, and the communication is based on the '**needs, activities, plans or projects**' of the candidate or campaign and information is **material** to communication

Getting Specific: What does 'independent' mean?

Conduct Standards (subject of current rulemaking):

- 5) **Former employee**: a communication produced, created or disseminated by person formerly employed by candidate or party during certain period of time within current **election cycle**, and the communication is based on the '**needs, activities, plans or projects**' of the candidate or campaign and information is **material** to communication

Getting Specific: What does 'independent' mean?

- Beware the 'coordination' trap'...
- Coordination renders permissible corporate independent expenditures **in-kind** excessive and/or prohibited corporate contributions
- Watch for new rules from FEC

Getting Specific: What can corporations do?

- For-profit companies
 - Publicly held
 - Privately owned
- Nonprofit organizations
 - 501(c)(4) social welfare / advocacy groups
 - 501(c)(6) trade associations
 - 501(c)(5) labor unions
 - 527 political organizations

For-Profit Companies: Permissible Expenditures

- Corporate funds paid or contributed to nonprofit advocacy organizations and trade associations:
 - Organization’s general funds
 - Specific communications related to candidates and issues, including grassroots lobbying efforts
 - Dues to membership organizations

For-Profit Companies: Disclosure of Permissible Expenditures

- Dues and/or payments to **general funds** of nonprofit advocacy or trade association
 - Generally, **not** subject to public disclosure *if*:
 - *Not* contributed for specific lobbying communication (HLOGA Disclosures)
 - Contributed to or paid for a specific lobbying communication but corporate ‘member’ or ‘donor’ doesn’t ‘direct, supervise, control or direct’ lobbying activities
 - *Not* contributed for a specific candidate-related communication or expenditure

For-Profit Companies: Permissible Expenditures

- Direct expenditures
 - Public communications
 - General public
 - Relationship communications:
 - Customers
 - Shareholders
 - Vendors
 - Employees

For-Profit Companies: Permissible Expenditures

- Communications to employees, vendors, customers & stockholders via:
 - Mail (included in invoices, payments, paychecks, etc.)
 - Phone calls, postcards, general advertising means
 - Emails both inside / outside company
 - Website – internet and intranet
 - Hosting candidates on company premises to discuss issues and indicate support for candidates and policies (**NOTE:** fundraising rules and prohibitions have not changed and **remember coordination rules**)

Nonprofit Organizations: Permissible Expenditures

- Express advocacy and electioneering communications using corporate treasury funds
 - Field organizers paid by organization, not PAC (**must stay away from candidates and campaign headquarters!**)
 - Candidate endorsements on publicly accessible website
 - Mail, phones, emails, web and print ads

Nonprofit Organizations: Permissible Expenditures

- Voter Guides / Candidate Questionnaires that indicate **right/wrong** issue positions
- Voting records that contrast candidate records and indicate **right/wrong** votes
- Candidate related communications no longer limited to “restricted class” ...but PAC rules re: **solicitations** are **unchanged**
- FEC rulemaking requested to repeal and amend 11 C.F.R. §§ 114.2, 114.4, 114.9, 114.10, 114.14, and 114.15 – the FEC’s restrictions on corporate and labor union expenditures using treasury funds

Disclosure of Permissible Expenditures

- Independent express advocacy communications:
 - Disseminated via any means expressly advocating election or defeat of a candidate is subject to disclosure
 - Timing – proximity to election
 - Amount of expenditure / donors to expenditure
 - Specific reporting defined by the jurisdiction of the candidate supported or opposed
 - FEC Form 5

Disclosure of Permissible Expenditures

- Electioneering communications (federal):
 - A television or radio ad that meets the definition of ‘electioneering communication’
 - If \$10,000 or more, must disclose donors to THAT communication who give more than \$1,000 to pay for costs of communication
 - FEC Form 9

Check State law: Communications may trigger registration and onerous reporting for corporations

Citizens United: What the Supreme Court Decision Means for Companies and Nonprofits



Citizens United v. FEC: Tax Issues and Questions

Richard Riley

Partner, Tax and Tax-exemption Law

Tax Issues In General

- IRS officials stated (the day after Citizens United was issued) that IRS saw no direct impact on the tax treatment of political and advocacy activities and expenditures.
- Nevertheless, the opinion raises questions.

Tax Issues: For-profit Companies

- No tax deduction is allowed for:
 - Political campaign contributions or other campaign expenditures
 - Expenditures to influence public opinion in connection with political campaigns
 - Lobbying expenditures
 - Expenditures to influence the official actions of high-level executive branch officials

Tax Issues: Trade Association Dues

- Trade association dues are nondeductible if used for political or lobbying purposes as identified above.
- Trade association making political or lobbying expenditures must either:
 - Notify members of portion of their dues that is nondeductible, when dues are billed; or
 - Pay 35% tax on political or lobbying expenditures.

Tax Issues: Tax-exempt 501(c)(4) social welfare organizations

- Usual tax-exemption category for advocacy-oriented nonprofit organizations – for example, Citizens United. (Also NRA, Sierra Club, AARP, many others.)
- 501(c)(4) organizations must have “social welfare” mission as their primary purpose. Legislative lobbying is part of “social welfare.” Political campaign activity is not treated as “social welfare.”
- IRS rulings acknowledge that 501(c)(4) advocacy organizations can permissibly engage in political campaign activity as long as it is not “primary.” 51-49? How measured?
- Distinguishing political campaign advocacy from issue advocacy is a constant question, since it can be crucial for tax treatment.

Tax Issues: Tax-exempt 501(c)(6) trade associations

- Tax rules on political and lobbying expenditures essentially the same as for 501(c)(4) organizations – unlimited lobbying; but political campaign activity cannot be “primary.” How to measure?
- Remember nondeductibility of dues allocated to lobbying/political activity.

Tax Issues: Section 527 Tax

- In the case of 501(c)(4) and 501(c)(6) organizations that are allowed to engage in political campaign activity as long as it is not their “primary” purpose, section 527(f) imposes 35% tax on lesser of political campaign expenditures or investment income.
- Again, distinguishing political campaign advocacy from issue/public policy advocacy is always a crucial tax question.

Tax Issues: Tax-exempt 501(c)(3) charitable/educational organizations

- Political campaign activity strictly prohibited. No leeway.
- Legislative lobbying permitted to a limited degree.

Tax Issues: 527 political organizations

- Section 527 provides separate tax-exemption for organizations dedicated to political campaign activities.
- Receipts are tax-exempt only if used for political campaign purposes.
- Tax-exemption category for SSF's ("PAC's"), and candidate and party organizations.

Tax Issues: Multi-entity tax-exempt groups

- Common structure for advocacy or policy oriented groups:
 - 501(c)(4) or 501(c)(6) social welfare or trade association for advocacy and lobbying
 - 501(c)(3) charitable & educational affiliate
 - 527 PAC (must be controlled by non-(c)(3))
- Supreme Court effectively blessed this structure in 1983 Taxation with Representation case, as long as careful financial segregation of the entities is maintained

Tax Issues: What will Citizens United mean?

- Immediate impact? Not much. Case is virtually silent on tax and tax-exemption issues, despite the many tax-driven distinctions in this area. Citizens United's 501(c)(4) status is mentioned and that's about it.
- As noted above, IRS disclosed no immediate tax-law impact.

Tax Issues: What will Citizens United mean?

- Medium to long term?
 - Possible impact on 527(f) tax. IRS regs exclude from tax activities that FEC excludes from “political” activity under FECA. Does CU change that analysis?
 - From First Amendment perspective, will the Tax'n with Representation multi-entity “escape valve” be enough to save tax-based restrictions on political advocacy?

Questions and Answers

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