Supreme Court Opens the Way to Expanded Advertising Revenues by Invalidating Limits on Corporate Political Ad Spending

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Disclosure and Disclaimer Requirements Retained. Decision Likely Invalidates Identical Political Ad Restrictions on Labor Unions.

On January 21, 2010, the Supreme Court of the United States issued its long-awaited decision in *Citizens United v. Federal Election Commission*, a case challenging limits on political speech by corporations.

The decision specifically holds that:

1. While corporations **are prevented** from making contributions from their corporate treasuries directly to candidates, corporations **are not prevented** from using funds from their corporate treasuries to fund advertisements that expressly advocate for or against an identified candidate for federal elective office.

2. Corporations **are not prevented** from using funds from their corporate treasuries to fund "electioneering communications," which are materials aired on terrestrial broadcast radio or television, or cable or satellite television, during the 30 days prior to a primary election or 60 days prior to a general election, which merely **refer to** (as opposed to advocate for or against) an identified candidate for federal elective office. Note that this second ruling may be somewhat academic given the breadth of the first ruling regarding direct advocacy for or against candidates.

3. All such ads must comply with the disclaimer and disclosure requirements of the Bipartisan Campaign Reform Act ("BCRA"), which the Court left intact.

For broadcasters, as well as cable and satellite television systems, the decision means:

Corporations can now purchase airtime at any time during the election cycle to directly advocate for or against candidates for federal elective office.

Stations themselves, to the extent they are corporate actors, may also be able to use their own facilities and funds to directly advocate for or against candidates for federal elective office.

While the decision specifically addresses only restrictions on political speech by corporations, those same restrictions also apply to labor unions. Given the sweeping First Amendment language in the decision, it will be difficult to continue to apply such restrictions to labor unions in the future, making it likely that political ad spending by labor unions will also increase dramatically in the near future.

While many states have similar restrictions on political ad spending by corporations and/or labor unions, and the Court's analysis focused only on provisions of federal law, the breadth of the Court's First Amendment interpretation implicitly raises questions regarding the continued validity of those state restrictions as well. As a result, broadcasters and cable/satellite television systems may see increased political ad buys from corporations and labor unions at the state and local level.

The ramifications of the Court's decision are significantly magnified by this week's Senate election in Massachusetts, which made clear the national legislative implications a single election can have. It won't be lost on corporations that the Court's decision clears the way for stakeholders in major legislation to pour money into advocacy ads in distant states seeking to tip the legislative balance in their favor. The immediate beneficiaries of this increased ad spending are broadcast television and radio stations, as well as cable and satellite television systems, who will certainly welcome the added revenue given the recent slowdown in the advertising market. Rather than waiting for newly-liberated corporations to arrive at their doorstep, aggressive sales managers will likely be meeting with their staffs to map out sales calls strategy to make potential corporate advertisers aware of the opportunity.

In selling these ads, stations should keep in mind that independent political ads purchased by corporations would not qualify for Lowest Unit Rate under Section 315 of the Communications Act of 1934. The ads must also comply with the disclaimer and disclosure requirements contained in BCRA. These require that a corporation spending more than $10,000 in a year to produce or air ads covered by federal restrictions file a report with the Federal Election Commission indicating the names and addresses of those who contributed $1,000 or more to the preparation or distribution of the ad, and, where the ad is not authorized by a candidate or political committee, the ad must state who is responsible for its content, as well as the name and address of the group behind the ad.

While the Court's decision opens up tremendous revenue opportunities for broadcasters and others in the advertising community, political ads continue to be subject to complex federal and state regulations. Compliance with these restrictions is challenging, and counsel should always be consulted as opportunities and issues arise.

Should you have any questions regarding this Alert or political advertising in general, please feel free to contact us.

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