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The Supreme Court Decision in *Citizens United v. Federal Election Commission*: Impact on Nonprofit Corporations

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On January 21, 2010, the Supreme Court ruled 5-4 in Citizens United v. Federal Election Commission. *This decision changes the way in which corporations (including both for-profit and nonprofit organizations) may spend money to support or oppose federal candidates. It should be made clear at the outset, however, that this decision does not give these organizations the ability to contribute* ***directly*** *to federal candidates, it merely gives them the ability to make unlimited independent expenditures and partake in electioneering communications. For contributions to state and local candidates, the campaign finance laws of the state or local jurisdiction must be followed. However, we expect challenges to state and local laws which impose independent expenditure restrictions similar to the ones struck down in Citizens United.*

Brief History

The Federal Election Campaign Act of 1971, as amended (the "Act"), prohibits, among other things, any corporation (whether for-profit or nonprofit) from making contributions or expenditures, which includes independent expenditures, in connection with any federal election. The Bipartisan Campaign Reform Act of 2002 ("BCRA") amended the Act to extend the prohibition to any electioneering communication. An electioneering communication is a broadcast, cable or satellite communication which refers to a clearly identified federal candidate and is made within 60 days before a general election, or 30 days before a primary election, for the office sought by the candidate. BCRA also amended the Act by imposing disclaimer and disclosure requirements on electioneering communications.

The Supreme Court's Opinion

In *Citizens United,* the Court overruled the holding in the U.S. Supreme Court case, *Austin v. Michigan Chamber of Commerce.* In the *Austin* case, restrictions on independent expenditures by corporations were upheld to prevent corporations from having an unfair advantage in the political marketplace based on resources amassed in the economic marketplace. According to the Court, however, such speech restrictions based on the speaker's corporate identity are contrary to the dictates of the First Amendment. The Court noted that all speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech, and the First Amendment protects the resulting speech. Differential treatment of media corporations and other corporations (including for-profit and nonprofit) cannot be squared with the First Amendment.

The Court rejected the FEC's argument that corporate political speech can be banned to prevent corruption or the appearance of corruption. The Court concluded that independent expenditures, including those made by corporations and unions, do not give rise to corruption or the appearance of corruption. The fact that speakers may have influence over or access to elected officials does not mean that those officials are corrupt. The Court also rejected the FEC's argument that corporate independent expenditures can be limited in the interest of protecting dissenting shareholders from being compelled to fund corporate political speech. Such an interest would allow the government to ban the political speech of media corporations, and the First Amendment does not allow that power.

In overruling *Austin*, the Court stated that it is returning to the principle established in prior cases that the government may not suppress political speech based on the speaker's corporate identity and that no sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations. The Court also stated that there is no longer any basis for allowing the government to limit corporate independent expenditures and held that Section 441b's restrictions on such expenditures are invalid. The Court also overruled that portion of the U.S. Supreme Court case, *McConnell v. Federal Election Commission*, that upheld BCRA's extension of Section 441b's restrictions on corporate and union independent expenditures to electioneering communications.

What The Supreme Court’s Decision Means for Nonprofit Corporations

- Nonprofit corporations are still prohibited from making contributions **directly** to federal candidates, political committees, PACs and national political parties from their organization funds.

Tax-Exemption-Related Issues

The decision does **not** change any of the federal tax restrictions applicable to campaign activities by nonprofit organizations. Thus, for example:

- The decision **does not** change the restriction on engaging in partisan political activities applicable to 501(c)(3) tax-exempt organizations.

- The tax rules relating to deductibility of dues payments to trade or membership organizations are **not** impacted by the decision.

Independent Expenditures

- Nonprofit corporations may now use unlimited organization funds to make independent expenditures to expressly advocate the election or defeat of federal candidates. Such communications may not be coordinated with a candidate or a candidate's committee.
- Organization funds can be used to communicate to the public and organization employees and members about federal candidates (e.g., to send out brochures or fliers supporting or opposing specific federal candidates).
- Organization funds can be used to sponsor advertisements to expressly advocate the election or defeat of a federal candidate, subject to all applicable disclaimer requirements.
- Independent expenditures will be subject to reporting under the Act.

Electioneering Communications

- Nonprofit corporations may now use organization funds close in time to an election for advertisements which refer to a federal candidate but do not expressly advocate the election or defeat of the candidate.
- Such advertisements must comply with the disclaimer and disclosure requirements in the Act and BCRA.

Important Note

The Court's decision does not directly impact federal PACs. Federal PACs will continue to function as they did before. Federal PACs can still make contributions directly to federal candidates, other political committees and national political parties (within the same limits). *Caution*: A nonprofit corporation's PAC activities, particularly those involving sponsorship of events featuring a federal candidate, could be used as evidence of coordination if the nonprofit organization makes independent expenditures in support of the same candidate.

If you have any questions about the content of this alert please contact the Pillsbury attorney with whom you regularly work, or the authors below:

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