Supreme Court Rocks Campaign Finance Boat

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Triad Business Journal
February 19, 2010

The Supreme Court's groundbreaking decision in *Citizens United v. FEC* opens the door for corporations and labor unions to make unlimited independent expenditures to advocate for the election or defeat of a federal candidate. The decision was a watershed moment in both First Amendment and campaign finance law.

Prior to the Court's decision, federal election law limited corporate political expenditures to so-called "issue advertising" that did not expressly advocate for the election or defeat of a federal candidate. The law also banned "electioneering communications"—defined as advertisements that merely referred to a federal candidate, were made within 30 days of a primary election or within 60 days of a general election, and were publicly distributed by broadcast, cable, or satellite.

The Supreme Court struck down both of these prohibitions on political speech using a simple, yet fundamental, First Amendment principle: The Government cannot suppress political speech based on the identity of the speaker.

The impact of the Court's decision on corporate political advocacy is breathtaking.

First, the content of political expenditures by corporations and unions is no longer an issue. The distinction between "issue advocacy" and "express advocacy" by corporations and unions—which had muddled campaign finance law for decades—is dissolved.

Second, the timing of political expenditures by corporations and unions is no longer an issue. The ban on corporate and union "electioneering communications" made within 30 days of a primary or 60 days of a general election is no longer in force.

Third, the number of entities that may potentially benefit from the decision is enormous. The Court's decision applies to all corporations and unions—large and small, for-profit and non-profit. It also includes trade associations. All of these organizations may make unlimited political expenditures to expressly advocate for the election or defeat of a federal candidate without violating federal election laws.

Fourth, North Carolina's state laws prohibiting corporate expenditures for election-related advocacy are likely unenforceable since the Court's ruling vested corporations with a federal First Amendment right.

What is the practical impact of the decision for the North Carolina business community?

Corporations, trade associations, and labor unions can now use their general treasury funds to publicly support or oppose a specific candidate in a variety of ways, including advertising, public endorsements or oppositions, Internet platforms, telephone banks, or direct mail.

But a number of restrictions still apply to corporations considering taking advantage of this new opportunity. To ensure that corporate expenditures are independent and transparent, federal law still requires that (1) corporate expenditures may not be “coordinated” with any federal candidate or political party, (2) corporate expenditures must contain appropriate sponsorship disclaimers, and (3) corporations must disclose certain information relating to the amount, content, and/or timing of their independent expenditures to the FEC and the North Carolina State Board of Elections.

The disclosure obligations, and in particular the forms for disclosure, may well be modified and streamlined by federal and state regulators to assure full transparency with respect to corporate expenditures. The disclosure obligations were originally designed to apply to individuals, political committees, and unincorporated organizations that made electionrelated communications. The entry of corporations into the independent expenditure arena may well generate modified disclosure obligations.

State privacy and defamation laws also may come into play depending on the content and method of the communication at issue. Communications that level charges about a candidate’s character or behavior can often lead to defamation claims, even though public figures face a heightened standard of proof in defamation cases. Additionally, telemarketing laws that impose restrictions or obligations on corporations need to be consulted because those laws do not necessarily contain exceptions for political speech by corporations.

Finally, there may be tax implications associated with political expenditures, especially for non-profits whose status may prevent or limit their lobbying and political activities. Corporations will need to consider those implications as well.

The Court’s decision allows election-related expenditures by corporations, but it does not allow corporate contributions to candidates and PACs. As a consequence, corporations seeking to participate in election-related advocacy must do so through direct expenditures rather than through contributions. Corporations can, however, provide financial support to trade associations and other corporate organizations that make electionrelated expenditures.

It is not clear how corporations will respond to this new opportunity. Many observers believe that trade associations will play a larger role in election-related activities, advocating for industry-related policies and candidates on behalf of a group of like-minded businesses—and thereby reducing the costs of the communications and preventing any one business from having to be identified as the “sponsor.” Disclosure laws, however, may be applied or modified

to require trade associations to identify the member corporations responsible for funding the advertisement in public filings.

Some corporations may by-pass traditional media advertising and simply become more aggressive in speaking out on issues or endorsing/opposing candidates through digital media platforms like the Internet or other public communications. Corporations already engaged in "issue advocacy" through grassroots marketing efforts may be able to simply incorporate election-related messaging into those ongoing issue advocacy efforts.

Campaign finance reform advocates are understandably disheartened by the Court's decision. Already, there have been calls to blunt the Court's ruling by amending corporate and tax laws to prevent—or at least restrict or dissuade—corporations from engaging in election-related speech. Whether those reform ideas, which are still in their infancy, will gain any traction or pass constitutional muster remains to be seen.