Supreme Court Decision Opens New Doors for Chambers

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There has been a tremendous change in how chambers of commerce can be involved in the political process. In January, the U.S. Supreme Court decided *Citizens United v. FEC*, striking down long-standing prohibitions on "independent expenditures" and "electioneering communications" made by for-profit and nonprofit corporations (such as a chamber of commerce.) The restrictions at issue were federal laws, but a number of states have similar restrictions on corporate advocacy that are now also unconstitutional (in fact, *Citizens United* overturned a Supreme Court decision from 1990 that upheld state restrictions on the Michigan Chamber of Commerce's political activity.)

The decision did *not* impact direct giving to federal candidates, political action committees (PACs), or parties. Thus, chambers still may not use their general funds to make contributions to federal candidates (some states allow corporations to contribute to state candidates). Accordingly, individuals and PACs will be the only entities allowed to make direct contributions in federal elections.

Although for-profit companies and chambers alike are now free to engage in political speech, because for-profit entities may not be willing to engage in public candidate-advocacy directly, it is likely that much of the work will be done by chambers and other associations on behalf of their members. This article explains the *Citizens United* decision and how it may benefit chambers.

BRIEF LEGAL BACKGROUND

The laws at issue in *Citizens United* prohibited two types of corporate expenditures:

1. ***Independent Expenditures***: any expenditure — at any time, through any medium — that expressly advocates the election or defeat of a clearly identified candidate for federal office. Examples include television advertisements, newspaper advertisements, and postings on corporate blogs, which contain phrases such as "Reelect Congressman Jones" or "Vote Against Smith."
2. ***Electioneering Communications***: expenditures made within 60 days of a general election or 30 days of a primary election if the expenditure is used to fund a communication that is made by broadcast, cable, or satellite, and refers to a clearly identified candidate for federal office. Prior to *Citizens United*, the Supreme Court had already narrowed this definition to include communications that are the "functional equivalent" of express advocacy, and the FEC has adopted a complicated 11-factor test to make such a determination.

Before *Citizens United*, a chamber could make these two types of communications only through its PAC. In reality, this was a major limit on funding such expenditures, given the rules restricting how chambers solicit PAC contributions and the relatively low limits on contributions to a PAC ($5,000 per year). Now, however, chambers will be able to fund these expenditures from their general treasury funds, using contributions from for-profit corporations in any amount.

CONDUCT PERMITTED BY THE DECISION

One direct impact of this decision is that for-profits may engage directly in independent expenditures. More important for chambers, however, is that for-profit companies may now donate to them for the specific purpose of having the chamber make independent expenditures. In addition, chambers may use their general funds, even if those include payments from corporations, to make independent expenditures.

As a result of the *Citizens United* decision, there are a number of specific activities in which a chamber may now engage — some obvious, some not so obvious:

1. Paying for print, internet, radio, television, satellite, and cable advertising
2. Placing endorsements on chamber websites
3. Placing advertisements on chamber websites
4. Using chamber email lists to support candidates
5. Using chamber blogs to post messages of support for candidates
6. Paying for phone banks to support candidates
7. Conducting candidate-specific get-out-the vote and voter registration efforts
8. Preparing voter guides and candidate score cards that include messages of express advocacy.

COORDINATION NOT PERMITTED

Any such activity, however, may not be coordinated with a candidate; coordinating such activity would change the independent expenditure into an in-kind contribution, which is still prohibited. The FEC is currently revising regulations defining what it means to coordinate with a candidate. The definitions are broader and much more complex than what many might consider to be "coordinating" with another entity. The regulatory framework is complicated by the fact that the Court of Appeals for the District of Columbia Circuit has struck down the FEC's two previous attempts to create such regulations.

Under the original and revised rules, promulgated in 2002 and 2006, a public communication is coordinated (and thus a contribution) if:

1. Someone other than the candidate, party, or official campaign pays for it

2. The communication itself meets specified "content standards"
3. The payer's interaction with the candidate/party satisfies specified "conduct standards."

The FEC has proposed a number of ways to satisfy the content and conduct prongs, several of which have been the subject of court challenges over the years. In October 2009, the FEC issued a Notice of Proposed Rulemaking to revise the content and conduct standards to satisfy the court. The full contours of the proposal are beyond the scope of this article; the proposed rule can be found on the FEC's website: www.fec.gov/law/law_rulemakings.shtml.

DISCLOSURES, DISCLAIMERS, AND TAX ISSUES

While it overturned a number of restrictions, the Supreme Court did uphold certain disclosure obligations that apply to electioneering communications. "Disclaimer and disclosure requirements may burden the ability to speak," the Court reasoned, "but they 'impose no ceiling on campaign-related activities,. . .' and 'do not prevent anyone from speaking.'"

Electioneering Communications: To the extent a chamber spends over $10,000 during any calendar year to fund communications through broadcast, radio, satellite, or cable that refer to clearly identified candidates within 30 days of a primary election or 60 days of a general election, it will have to file disclosures with the FEC revealing the corporation making the communication, the amount spent, and certain contributors (the Court did note that disclosure requirements could be unconstitutional in a specific case if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed.)

Each electioneering communication must include certain specified disclaimers. Communications not authorized by the candidate — as would almost certainly be the case for an independent expenditure or electioneering communication not coordinated with the candidate — must provide a name and address (or web address) for the entity making the communication, state that the communication is not authorized by any candidate, and include the following audio statement: "___ is responsible for the content of this advertising." If transmitted through television, this statement must also appear on screen in accordance with specifications set forth in FEC regulations.

Express Advocacy: Expenditures for express advocacy must be reported to the FEC when they aggregate more than $250 for an election. This includes information about the amount of the expenditures and information about contributors who gave more than $200 if the contribution to a chamber "was made for the purpose of furthering the reported independent expenditure." If the independent expenditures exceed $10,000, then reports must be filed with the FEC within two days of the expenditure (one day for expenditures that exceed $1,000 made within 20 days of the election.)

Independent expenditures must include disclaimers that are similar to those required for electioneering communications.

Tax Concerns: In addition to the disclosure and disclaimer rules, it is also important to remember that the Internal Revenue Code imposes a very high tax on political expenditures if they are not funded through a separate segregated fund. Thus, a chamber must be cautious about how it funds independent expenditures and electioneering communications, or it may face significant taxes on either its net investment income or its political expenditures, whichever is lower.

To minimize the tax, a chamber must deposit funds for independent expenditures into a segregated account (the chamber will then pay tax only on the investment income — likely small — for the segregated account.) The downside to using a segregated account is that contributions for independent expenditures from members may have to be disclosed to the FEC. Using general, unsegregated funds may not trigger the same disclosure requirements.

STATE LAW

The Supreme Court's decision specifically applied to federal law. Most states with bans on corporate independent expenditures have acknowledged that their laws are also unconstitutional under *Citizens United*. However, some states have stated that although corporations may fund their own independent expenditures, corporations may not give to other entities to fund independent expenditures. For example, the Michigan Secretary of State has ruled that the Michigan Chamber of Commerce may not solicit or receive funds for the purpose of making independent expenditures in state elections. This includes special dues or assessments for making independent expenditures. In contrast, the Ninth Circuit has held that entities may raise unlimited sums for independent expenditures in local elections. Thus, chambers must be very careful when making independent expenditures in state elections to determine whether and how they are allowed to solicit contributions to fund those expenditures.

CONCLUSIONS

Citizens United has already sparked a great deal of controversy. There is legislation pending before Congress to impose additional disclosure and disclaimer requirements on corporate-funded independent expenditures. If enacted, this legislation could require greater disclosure of chamber funding if the chamber makes independent expenditures. Nonetheless, a chamber of commerce may be the perfect organization to engage in independent expenditures: it is trusted by its members, it is a trusted voice in the community, and now it can pay for independent expenditures using contributions and/or dues payments from business members.

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