Authors:

Tim Peckinpaugh
tim.peckinpaugh@klgates.com
+1.202.661.6265

Stephen P. Roberts
steve.roberts@klgates.com
+1.202.778.9357

Campaign Finance Overhaul: Corporations May Now Make Direct Political Expenditures

Today, the Supreme Court issued a long-awaited decision that allows a corporation to use its general treasury funds to make independent expenditures that directly advocate in support of or opposition to a federal candidate. These expenditures may be unlimited and may be made at any point, right up to Election Day.

In *Citizens United v. FEC*, a 5-4 majority of the Court overturned its earlier decisions in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) and *McConnell v. FEC*, 540 U.S. 93 (2003). In *Austin*, the Court held that a state law that prohibited the use of general corporate treasury funds for expenditures directly supporting or opposing state candidates for election did not violate the First or Fourteenth Amendments. Similarly, in *McConnell*, the Court upheld the constitutionality of a portion of the Bipartisan Campaign Reform Act ("BCRA") that prohibited expenditures by corporations and unions for "electioneering communications."

In its opinion today, the Court held that the "prohibition on corporate independent expenditures is a ban on speech" in violation of the First Amendment. "Were the Court to uphold these restrictions [on speech], the Government could repress speech by silencing certain voices at any of the various points in the speech process." Notably, it dispensed with the government's argument that contributions by corporations gave rise to corruption – or the appearance of corruption – holding that simply because "speakers may have influence over or access to elected officials does not mean that those officials are corrupt."

This marks a major transformation in campaign finance law. Corporations, and likely, labor unions now have the ability to fund the production and distribution of television, radio and web ads traditionally limited to political committees.

This decision will likely have ramifications on dozens of state and local jurisdictions that currently have similar restrictions on corporate or labor union spending for non-federal elections.

The case reached the Supreme Court on an appeal of the narrow question of whether "Hillary: The Movie" and related advertisements produced and distributed by Citizens United, a non-profit corporation, fell under the definition of "electioneering communication." However, after the Court held its initial arguments on the case, it called the parties back to the Court for a rare reargument to specifically address the issue of whether these precedents limiting corporate speech were still relevant.

Answering the question of whether such a sweeping decision was necessary, in its opinion the Court claimed that it "cannot resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment."

It is important to understand that the Court did *not* address corporate campaign donations. A corporation's PAC accounts are still the only method by which a corporation may directly contribute to a federal candidate. In addition, while the Court's decision clears the way for corporate funds to be spent on express advocacy on behalf of or against a federal candidate, any corporate advocacy must be made **independent** of the campaign. In short, corporations won't suddenly be able to write a million dollar check to a Senate campaign from their general revenues. Direct contributions to federal candidates still must be made through the corporation's PAC.

A corporation looking to act with the freedom granted by this decision should proceed cautiously. The Federal Election Commission may still consider issuing regulations implementing the Court's holding which could take several months. If so, the specifics of compliance may not be decided until late into the 2010 election cycle.

Finally, the decision did uphold certain disclosure requirements on these ads. A corporation spending over $10,000 in a year to produce or air election advertisements as regulated by the Federal Election Commission will still be required to file a report with that body disclosing the names and addresses of anyone who contributed $1,000 or more for production or distribution expenses. Additionally, the advertisement must contain a disclaimer stating who is responsible for its content, along with the name and address of the group airing the ad.