LEGAL UPDATES

PUBLISHED: FEBRUARY 9, 2010

Corporations and Unions Have the Right to Speak In Federal Elections

Professional

HARVEY M. TETTLEBAUM
JEFFERSON CITY:
573.761.1107
HARVEY.TETTLEBAUM@
HUSCHBLACKWELL.COM

On January 21, 2010, the U.S. Supreme Court invalidated the federal statute prohibiting independent expenditures by corporations in federal elections (*Citizens United v. Federal Election Commission*, U.S. Supreme Court Case No. 08-205). A non-profit corporation (Citizens United) had produced a movie critical of Hillary Clinton, which it wanted to distribute before the 2008 presidential primary elections. Under the Bipartisan Campaign Reform Act, such "electioneering communications" were generally prohibited if they were financed with corporate funds. Violating the prohibition constituted a federal felony.

In a broad opinion, the Court reasoned that the First Amendment guarantees individuals' rights to free speech and to associate to engage in that speech. The Court further held that the federal government may not prohibit a particular kind of private association of individuals (a corporation) from making independent expenditures for political speech. The Court's 5–4 decision overturned recent cases that had upheld the ban and signaled a shift in the Court's campaign finance jurisprudence. The decision is not limited to not-for-profit advocacy groups, but also applies to for-profit corporations, incorporated trade or business associations and labor unions. Nor is the decision limited to "electioneering communications." Rather, the Court also invalidated the broader federal ban on corporate expenditures in federal elections.

In addition to permitting corporations to speak directly to the voting public about candidates for federal office, the decision will increase their ability to freely communicate with their own employees, stockholders and customers. In an 8–1 portion of decision, however, the Court re-affirmed the constitutionality of disclosure requirements for corporate electioneering communications. Thus, those requirements are still in effect. The Court's

decision also does not affect the general ban on corporate *contributions* to federal candidates and federal political committees or the rules governing reporting, registration and disclosure requirements of political action committees. The opinion is explicitly limited to *independent* expenditures. Therefore, the general prohibition on coordinating expenditures with federal candidates and federal political parties is not affected. Other laws, like Internal Revenue Service requirements and state disclosure requirements, will also continue to impact how corporations spend in elections

What This Means to You

Since the Bipartisan Campaign Reform Act was passed in 2002, each successive federal election cycle has been conducted under a different set of rules. 2010 will be no different. A ban on corporate expenditures in federal elections has been a part of federal law since 1947. This ruling has a significant impact on the legal landscape, and the rules will continue to evolve over the course of the campaign season. The Federal Election Commission will likely issue administrative guidance, to be followed by new regulations and new advisory opinions. Additional court cases will test the decision's application to other fact scenarios. Finally, Congress may pass new legislation to respond to the decision. Indeed, immediately after the decision was issued and in his State of the Union address, President Obama expressed his dismay and called on Congress to take action "to develop a forceful response" to the decision. Corporations need to be aware of the C*itizens United* decision and the likelihood of additional changes to the law as they gear up for the 2010 elections.

Contact Info

If you have any questions about this or any other governmental affairs or ethics matter, please contact your Husch Blackwell Sanders attorney.

Husch Blackwell Sanders LLP regularly publishes updates on industry trends and new developments in the law for our clients and friends. Please contact us if you would like to receive updates and newsletters, or request a printed copy.