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Vote for this and we will support you! How the new definition of coordinated communications affects political speech in the wake of Citizens United.

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Summary: As we previously noted, the Supreme Court has ushered in a new dawn on corporate political spending in its recent decision in *Citizens United v. Federal Election Commission*. *Citizens United* reverses decades of statutory and case law that prohibits corporations from using their general treasuries to fund independent political advertising supporting or opposing candidates for local, state or federal office, or what it is termed "express advocacy". 558 U.S. 50 (2010). It also removes restrictions on independent advertising done within close proximity to either a primary or general election, and which refers to a clearly identified candidate for federal office (known as "electioneering"). We continue to monitor Federal Election Commission ("FEC") efforts to implement the Court's decision in *Citizens United,* including the announcement on February 5, 2010 that it will no longer enforce provisions prohibiting corporations and labor unions from making either direct expenditures or electioneering communications. The latest development is a notice in the *Federal Register* from the FEC of revisions to the regulations concerning "coordinated communications" i.e., political advertising paid for by an entity that is coordinated with either a federal candidate, political campaign or political party. 75 FR 55947. These rules will take effect on December 1, 2010.

For those navigating the post-*Citizens United* campaign finance world, these revised regulations on coordinated communications are highly relevant. While Citizens United lifts prohibitions on direct corporate and labor communications, the Court's decision only applies to those communications that are made *independently* from a federal candidate, campaign, or political party. Contributions that are coordinated with a federal candidate, campaign or political party are considered a direct, in-kind contribution, and remain illegal in the case of corporations or labor unions. 2 U.S.C. § 441b(a). Understanding the revised test for coordinated communications is

vital to any corporation or labor union seeking to run political advertisements supporting or opposing a candidate for federal office.

This alert discusses the revised test proposed for coordinated communications in order to analyze the limitations on political speech by corporations and labor unions that remain after the Court's decision in *Citizens United*.

I. What is a "Coordinated Communication"? FEC regulations look to both the content of the communication and the conduct that initiated it.

Congress regulated independent communications and those communications coordinated with a candidate, campaign, or political party in the Federal Election Campaign Act of 1971. 2 U.S.C. § 431 *et seq.* ("FECA"). Under 2 U.S.C. § 431(17)(B), independent communications are defined as those "not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents". Further, any expenditure made (i) "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents"; (ii) "in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political party"; or (iii) by reproducing "in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents" shall be considered a direct, in-kind contribution. 2 U.S.C. § 441(a)(7)(B)(i-iii).

The question that arose since FECA is how to define a coordinated contribution. In response, the FEC has developed a two-part test, which has been modified over the years, which looks at (i) the content of the communication, and (ii) whether the federal candidate, campaign committee, or political party either initiated it or consented to it. 11 C.F.R. § 109.21. One element of the content test and a separate element of the conduct test must be met for a communication to be considered coordinated.

Content Test

Under 11 C.F.R. § 109.21(c)(1-4), a communication must currently meet one of four standards related to its content in order to be considered coordinated:

1. It is an "electioneering communication", as defined under 11 C.F.R. § 100.29: Electioneering communications are those distributed within 60 days of a general election or 30 days of a primary election via broadcast, cable or satellite, which clearly identify a candidate for federal office. Note that the definition of electioneering communication is much narrower than that of a "public communication" defined under Number 4 below.?

2. It "disseminates, distributes, or republishes" campaign material prepared by a candidate, in whole or in part. Note that not all reproductions of campaign material are included here. 11 C.F.R. § 109.239(b), for example, provides exceptions for (a) opposition materials that reproduce a candidate's position in order to call for the defeat of the candidate; (b) news stories on the candidate; (c) brief quotes used to highlight a candidate's position in order to express one's own views; and (d) materials disseminated by a national or state political party using federal campaign funds.

3. It "expressly advocates the defeat of clearly identified candidate for federal office"; or?

4. It is a "public communication" made within 120 days of a primary, general, special or runoff election and directed to voters in the same jurisdiction as the candidate. A public communication is defined under means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. This does not include Internet communications.

Conduct Test

Under 11 C.F.R. §109.21(d), the conduct that resulted in the communication must currently meet one of four standards in order for the communication to be considered coordinated:?

1. The communication is requested, suggested, or created by the candidate, campaign, or political party

2. The communication is created, produced, or distributed with the agreement of the candidate, campaign or political party

3. The communication is made with the "material involvement" of the candidate, campaign, or political party

4. The communication is created as a result of one or more substantial discussions between the candidate, campaign, or political party and the person paying for the communication

This would apply to communications produced by a "common vendor"; e.g., those in the business of making political ads that then provide this same information to another entity for use. 11 C.F.R. § 109(d)(4). It would also apply to those communications made by a former employee or independent contractor of a candidate who uses campaign information to reach others. 11 C.F.R. §109(d)(5).

II. Change in the Standard for Coordinated Communication proposed in the final rule

With the final rule cited above, the FEC will change the test for a coordinated communication by adding (1) a new content standard and (2) a safe harbor for certain business and commercial communications.

The New Content Standard: If it walks like a duck....

The FEC adds a fifth standard to the existing four in place, for a "public communication" that is the "functional equivalent of express advocacy if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate." 75 FR 5593 (2010). The FEC notes that the communication at the heart of *Citizens United*, a documentary about then-Senator Hillary Clinton released while she was running for president, was seen by the Supreme Court as having no other interpretation as an appeal to vote against her. *Id.* It adopted the same standard in determining that a public communication, regardless of when it is released, would meet the content test for a coordinated communication. In other words, it is adopting the old adage: if it walks like a duck, and talks like a duck, it must be a duck.

A Safe Harbor for certain business and commercial communications

The FEC also adds a safe harbor for business and commercial communications made about a federal candidate that discuss him or her in a prior capacity as an owner of a business. 75 FR 55959 (2010). It noted that there were those with a bona fide reason to issue these types of advertisements. As long as the advertisements in question were (1) consistent with the method and medium for previous communications and (2) did not advocate the election or defeat of any candidate, they deserved a "safe harbor" from coordinated communications regulation. *Id.*

III. Post-Citizens United: What if a corporation promises "Vote for our legislation and we will support you"?

We note that the coordinated communications regulations were not initiated in response to the Supreme Court's decision in *Citizens United* to allow corporations and labor unions to fund direct political advertising against candidates for local, state or federal office. However, the regulations do impact the potential creation and distribution of any political advertisements by corporations or labor unions in a post-*Citizens United* world, and thus these new regulations need to be considered before undertaking any lobbying strategy.

Vote for our legislation and we will support you. It would be especially important for a corporation or labor union not to make any decision regarding a political advertisement in conjunction with a candidate, campaign, or political party lest it be considered coordinated with that candidate, campaign, or political party. If, for example, a corporation promises a candidate that it will pay for advertisements in support of his/her re-election in response for a favorable vote on legislation, this could likely be construed as meeting the assent element of the FEC's conduct standard. Further, if the content standard was also met, the advertisement would then meet the definition of coordinated. Contributions that are coordinated with a federal candidate, campaign or political party are considered a direct, in-kind contribution and remain illegal in the case of corporations or labor unions. 2 U.S.C. § 441b(a). For corporations and labor unions wishing to make these types of advertisements or other types of direct, in-kind contributions, the only option is to create "separate segregated funds" (known as a political action committee, or "PAC") for these purposes. 2 U.S.C. § 441b(b)(2).

In other words, the unlimited playing field many envisioned after the Court's decision still faces a number of restrictions, one that any corporation and labor union must be aware of and should analyze in this post-*Citizens United* era.

More to come. Additional regulations dealing with content of advertising, additional disclosure requirements, and contribution limits are still expected from the FEC as a result of *Citizens United*. We will continue to monitor these developments and provide updates and comments.