

POLITICAL LAW UPDATE

July 1, 2010

Notwithstanding the Supreme Court's landmark decision in *Citizens United*, our clients are finding that the election law landscape is increasingly subject to more -- not less -- regulation. In June, for example, President Obama announced a formal policy prohibiting new appointments and reappointments of lobbyists to federal advisory committees. Many states have begun passing laws to increasingly regulate electioneering organizations and corporations wishing to fund independent expenditures. Meanwhile, the DISCLOSE Act is making its way through Congress. In this issue of our Political Law Update, we discuss these and other examples of this trend. We also introduce a new feature, "What's New at the FEC?," where we highlight important recent advisory opinions and other developments at the Commission. Finally, we try to look around the corner, addressing federal and state legislative efforts to respond to *Citizens United* and the impact of the Supreme Court's recent honest services fraud decisions.

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BULLETS

- **Lobbyists Lose Their Seat At the Advisory Committee Table.** In June, President Obama sent a memorandum to the heads of executive departments and agencies announcing the Administration's "formal policy" of no longer placing federally registered lobbyists on the advisory boards of federal agencies. This policy could have wide-ranging implications. There are thousands of advisory committees and boards throughout the federal government, advising the executive branch on everything from international trade to energy policies. The President instructed the Director of the Office of Management and Budget to issue proposed guidance implementing the policy within 90 days. We will continue to monitor and report on developments.
- **California Regulates Contributions to Non-Profit Organizations.** California law limits gifts to elected officials from a "single source" to \$420 per calendar year. Because nonprofits can pay for certain official travel expenses, until recently, officials could get around this \$420 limitation by setting up a non-profit organization and encouraging contributors to support that organization, which, in turn, would pay for the official's travel expenses. As long as the gift-giver did not direct and control the use of the payment to benefit the official, the nonprofit (as opposed to the person who funded the nonprofit) was deemed the source of the gift. Recently, however, the

California Fair Political Practices Commission amended these regulations to provide that a person is deemed the source of a gift if, among other things, the person identifies the official as the intended beneficiary prior to making the gift to the nonprofit or the nonprofit identifies the official to the gift-giver as the intended beneficiary.

- **Florida Passes New Electioneering Communications Laws.** In 2008, a federal judge threw out Florida's Electioneering Communication Organization law as unconstitutional. In May, Governor Crist signed into law a revamped bill aimed at once again regulating these organizations. The new law imposes registration and reporting obligations on organizations that make ads communicated via TV, radio, newspaper, magazine, direct mail, or the telephone that do not expressly advocate the election or defeat of the candidate but that are susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. Among other things, these groups must now report the identity of every contributor. In addition, a little-noticed provision apparently aimed at reducing out-of-state influence in Florida elections requires that these organizations maintain an office and registered agent in the state.
- **Maryland Election Officials Propose Regulating Facebook and Twitter Use.** Could that Tweet or Facebook status update land you in jail? Not quite, but under new rules supported by the Maryland State Board of Elections, Maryland candidates may soon be required to include disclaimers on their social networking sites or risk a \$1,000 fine or up to a year in jail. The rules await the approval of state legislators.
- **Minor Changes to the House and Senate Lobbying Guidance.** The Clerk of the House and Secretary of the Senate have issued minor revisions to their published lobbying guidance to clarify two points. First, the guidance emphasizes that while filers must initially list a new lobbyist's previous covered executive or legislative branch positions, the filer does not have to list those positions again on subsequent reports for the same client. Second, the guidance makes clear that both registrants and lobbyists must file LD-203 reports for each semiannual period in which they remain active.

WHAT'S NEW AT THE FEC?

These last couple months have been busy ones for FEC Commissioners. Among other things, they have issued the following notable advisory opinions and are currently grappling with an important expedited advisory opinion request.

- In the **National Democratic Redistricting Trust** advisory opinion, the Commission concluded that contributions to a trust set up to pay for the litigation costs related to the upcoming redistricting battles are not subject to the limitations and prohibitions of federal election law. The Commission therefore held that Members of Congress could solicit unlimited funds on behalf of the trust. However, in the **Yes on FAIR** advisory opinion, the Commission deadlocked over whether a federal candidate could solicit funds for a state ballot initiative committee that were outside the limits and prohibitions of federal election law. The exact scope of the general prohibition on federal candidates soliciting soft money remains a matter of case by case analysis.
- The Commission provided additional guidance on who falls within a company's restricted class in an advisory opinion sought by convenience store operator **Wawa**. In that opinion, the Commission held that five Wawa employees were members of the restricted class even though two of them directly supervised only hourly employees. The employees' exercise of discretion and independent judgment on matters of significance, rather than their supervision of hourly employees, was the critical factor in the Commission's determination that they were members of the company's restricted class.

- Chalk up another win for **Citizens United**. In its most recent advisory opinion, the FEC held that Citizens United's documentary movies were exempt from the Federal Election Campaign Act's disclosure, disclaimer, and reporting requirements because Citizens United was a "press entity" and acting in its legitimate press function by producing the movies. Because Citizens United produces documentaries on a regular basis, the FEC held that it was a press entity. And, because the conservative group's documentaries were available to the general public and were comparable to the films it had previously produced, the Commission held that it was acting within its legitimate press function.
- Two recent advisory opinion request merits a mention. In a request for an expedited opinion filed with the Commission on June 11, **Commonsense Ten**, a non-connected political committee asked the FEC to confirm that, in the wake of *Citizens United* and recent courts of appeals decisions, an independent-expenditure only committee may accept unlimited funds from corporations and individuals. This follows a request in May by **Club for Growth** to establish a connected political committee that would raise funds only from individuals, but in unlimited sums, and spend those funds exclusively on independent expenditures. These requests are significant in that they asks the FEC to formally reject certain pre-*Citizens United* regulations applying source and/or amount restrictions to independent expenditure committees. Although the FEC is considering changing those regulations through the rulemaking process, they technically are still on the books.

ARTICLES

Supreme Court Guts Honest Services Fraud Statute

Federal prosecutors bringing public corruption charges have lost an arrow in their quiver. A long-time favorite of public corruption prosecutions, the honest services fraud statute, passed in 1988, declares that a "scheme or artifice to deprive another of the intangible right of honest services" constitutes a scheme or artifice to defraud under mail and wire fraud statutes. In a trio of cases penned by Justice Ginsburg, the Supreme Court substantially narrowed the statute's reach, but stopped short of calling the statute unconstitutionally vague, as Justices Scalia, Thomas, and Kennedy wished.

In *Skilling v. United States*, the centerpiece of the honest services trilogy of cases, the Court construed the statute as reaching only those schemes to defraud that involve bribes or kickbacks. *Skilling* arose out of the conviction of former-Enron CEO Jeffrey Skilling on charges that he conspired to prop up Enron's stock prices by misstating the company's financial condition. Skilling challenged his conviction for conspiracy to commit honest-services wire fraud. According to the majority opinion, the honest services fraud statute was intended to prohibit only conduct which the courts of appeals had declared unlawful in cases preceding the Supreme Court's 1987 *McNally* decision. Those cases, at their "solid core," the Court held, were prosecutions involving bribes and kickbacks. The Court therefore pared the statute down so that it covers only cases involving bribes or kickbacks. Conduct that extends beyond bribes or kickbacks, the Court held, cannot be the basis for prosecution under the honest services fraud statute.

It is difficult to overstate the significance of this decision for public corruption prosecutions. In addition to casting doubt on existing honest services fraud convictions, these decisions will now require prosecutors in public corruption cases to prove bribery or a kickback, which in turn would require a *quid pro quo*. Previously, prosecutors using the honest services fraud statute could get by on a lot less. While Congress may try to revive the honest services fraud statute in some fashion, the

Supreme Court warned Congress that any remedial legislation "would have to employ standards of sufficient definiteness and specificity to overcome due process concerns."

Additional analysis of these landmark decisions can be found [here](#).

States Creative in Response to *Citizens United*

Prior to *Citizens United v. Federal Election Commission*, almost half of the states in the country had laws prohibiting independent expenditures by corporations or unions — laws similar to what the Supreme Court found unconstitutional on the federal level.¹ Though the *Citizens United* decision did not directly address state campaign finance laws, several state legislatures have been quick to respond to the Court's decision. In the months following *Citizens United*, Alaska, Arizona, Colorado, Connecticut, Iowa, Minnesota, South Dakota, Tennessee, and West Virginia have all passed laws repealing prohibitions on independent expenditures by corporations or unions.

While repeal of these prohibitions is the common thread throughout the new laws, each state has responded to the post-*Citizens United* landscape in a different way. Most of these states have used the political opportunity to regulate independent expenditures by corporations and unions under existing reporting regimes, or add new disclosure and disclaimer requirements to independent expenditure activity. A few states have gone a step further and passed more stringent requirements for independent expenditures by corporations and labor organizations. For example, on April 8, 2010, Iowa led the way with a law that requires a corporation's board of directors to authorize its independent expenditures. On June 1, 2010, the Alaska governor signed into law a bill that requires the disclosure of the top contributors to organizations making independent expenditures, requires approval of the content of the expenditure by the top officer of the corporation or labor organization, and requires a statement in political communications that the content is not authorized by a candidate.

In Minnesota, corporations are permitted to make independent expenditures, but must first create a committee and register with the state. Corporations must use these committees to make all independent expenditures. Tennessee did not repeal its prohibition on corporate independent expenditures, but rather amended the law so that it only applied to foreign corporations that do not have authority to transact business in the state.

The response to *Citizens United* comes not only from the twenty-four states that had relevant prohibitions on independent expenditures. In Washington, where corporations were already permitted to make independent expenditures, the legislature passed more stringent independent expenditure disclaimer requirements. Washington's new law requires political advertisements to identify any corporation that establishes, maintains, or controls the political committee sponsoring the ad. California and New York also already allowed corporate independent expenditures, but both states have bills pending granting shareholders more rights and control over this type of corporate political activity.

Although legislative sessions have ended in most states—ending many attempts to respond to *Citizens United*—there are still a few states where legislative efforts continue. There are bills pending in Michigan, New Hampshire, North Carolina, and Ohio.

¹ The National Conference of State Legislatures is tracking this information about state legislative efforts and other responses to *Citizens United* [here](#).

Meanwhile, in Montana, the attorney general has taken a different approach. A strong defender of the state's current prohibition on corporate and union independent expenditures, he has stated that he plans to enforce the law until it is challenged. A grassroots organization and a local paint store have done just that, filing suit in state court to challenge the constitutionality of the state law.

DISCLOSE Act Makes Its Way Through the House

As we explained in our last [update](#), Democratic congressional leaders recently introduced the creatively-titled "Democracy is Strengthened by Casting Light on Spending in Elections Act" (the DISCLOSE Act), a bill crafted in response to the Supreme Court's January decision in *Citizens United*. The proposed bill passed the House 219-206 on a largely party-line vote last Thursday, June 24. The political battle over the proposed law will now move to the Senate.

Several changes were made to the bill as initially introduced during the committee mark-up process and on the House floor. For example:

- The threshold at which government contractors are prohibited from making election expenditures was raised to \$10 million.
- The bill was amended to provide that automated political telephone calls (often referred to as "robo calls") must include a statement at the beginning of the call disclosing the name of the individual or organization responsible for the call and an indication that they approve of the forthcoming message.
- In its initial form, the bill required mandatory disclaimers in all radio or television electioneering communications; the bill was subsequently amended to allow an exemption for particular communications of such "short duration" that the disclaimer would constitute a "disproportionate amount of the communication's content." The Federal Election Commission would be left with the difficult task of drawing this line.
- Under an amendment passed on the House floor following the Gulf oil spill, those entities who are negotiating over or have obtained leases on the Outer Continental Shelf are prohibited from making campaign-related expenditures.
- Notably, in response to initial opposition from the National Rifle Association, the House exempted nonprofit groups that (1) have been operating as a 501(c)(4) organization for at least a decade, (2) have more than 500,000 dues paying members, with at least one member in each of the 50 states, the District of Columbia and Puerto Rico, and (3) do not obtain more than fifteen percent of their funds from corporations or unions. The exclusion was plainly tailored to prevent opposition from the NRA, although a final version of the carve-out potentially also encompasses certain other groups.
- The definition of a foreign national prohibited from engaging in political activity was expanded to include subsidiaries of state sponsored entities as well as companies where over 50% of the voting stock is held by a set of foreign nationals, each of whom has at least a 5% interest. In addition, the bill now explicitly protects the right of U.S. subsidiaries of these newly designated foreign nationals to operate a federal PAC, so long as only U.S. citizens contribute to and operate the PAC.

In a letter to House leaders urging passage of the Act, Senator Schumer (D-NY) and Senate Majority Leader Harry Reid (D-NV) expressed a desire for this legislation to be enacted in time to take effect

for the 2010 midterm elections, but it remains unclear whether this ambitious goal can be met. Only two Republicans in the House voted for the bill and, although Senator Reid has stated that fifty senators support passage, he will need to win the support of at least one Republican Senator to defeat a likely filibuster. Two potential Republican swing voters, Senator Olympia Snowe (R-ME) and Scott Brown (R-MA), have already spoken out against the bill and Senator John McCain (R-AZ), who has in the past been a voice of strong support for campaign finance measures, is currently locked in a primary battle and has criticized the bill for treating corporations and labor unions differently. Meanwhile, Democratic Senators Frank Lautenberg (D-NJ) and Dianne Feinstein (D-CA) have expressed disapproval of the NRA-inspired exemption and the American Civil Liberties Union has spoken out against the bill. Finally, the Senate already faces a busy legislative calendar in the weeks before its August recess and it is unclear how quickly leaders can move the bill to a final vote.

These hurdles, while substantial, may nonetheless not be insurmountable. Although supporters of the bill have previously targeted Congress's Fourth of July recess as a date by which the bill must be passed, the Act's principal disclosure obligations automatically take effect within thirty days after passage, regardless of whether the FEC promulgates implementing regulations. Thus, the Act is likely to have a major impact on election-related activities even if it is enacted just before Congress recesses in August.

Should the Act become law in its current form, its opponents can be expected to raise a variety of legal challenges. Opponents of the proposed law will likely assert, for example, that the law unconstitutionally differentiates between different types of groups (such as Fortune 500 companies that likely have large government contracts and smaller companies) and impermissibly burdens the First Amendment rights of groups like government contractors and U.S. subsidiaries of foreign corporations. Certain portions of the Act may also be vulnerable to challenge under the void for vagueness doctrine because the Act in its current form criminalizes a wide range of activities that implicate the First Amendment without requiring the FEC to first implement regulations clarifying the Act's scope.

Who We Are

Covington's Election and Political Law practice is one of the oldest in the Nation. In addition to our high-profile election law litigation and FEC enforcement practice, we advise numerous Fortune 500 corporations, trade associations, financial institutions, political party committees, PACs, candidates, and lobbying firms concerning compliance with the increasingly complex array of laws governing the political process. These include federal and state campaign finance, lobbying disclosure, and government ethics laws.

For more information about Covington's Election and Political Law Practice Group and to access previous political law updates and client advisories, please click [here](#).

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