

POLITICAL LAW UPDATE

March 10, 2010

The U.S. Supreme Court's *Citizens United* decision was only one of several important court decisions that conclude the First Amendment places real and powerful limits on the capacity of the government to regulate political speech. In this Political Law Update, we highlight consequences of that decision that are being felt at the state and local level, as well as the Colorado Supreme Court's recent decision striking down that state's "pay-to-play" law on First Amendment grounds. We also report on other developments that are of interest particularly to our corporate and trade association clients, including a House Ethics Committee report that appears to reflect the first, albeit limited, enforcement action related to the Honest Leadership and Open Government Act ("HLOGA").

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BULLETS

- **President Obama Proposes New Lobbying Policies.** In his first State of the Union address, President Obama offered several new proposals for further regulating the activities of lobbyists. Among other things, the President proposed to (i) limit the amount lobbyists may contribute to federal candidates; (ii) limit the ability of lobbyists to collect and deliver (that is, "bundle") campaign contributions to federal candidates; (iii) require lobbyists to specifically disclose "when, where, and what the substance of the contact was" for each and every lobbying contact, and (iv) require every person who makes lobbying contacts to disclose his or her activities (not just those who spend 20% or more of their time on lobbying activities). These new proposals come on top of other initiatives by the President to increase transparency in government. For example, the Obama Administration has pushed federal departments and agencies to no longer allow registered lobbyists to serve on federal advisory boards. The President has also imposed restrictions on how individuals seeking TARP or stimulus funds may lobby for those funds. Finally, in an executive order last year, the President set a requirement for all executive branch appointees to sign an ethics pledge that, among other things, prohibits those appointees from accepting gifts from lobbyists and prevents appointees from participating in certain matters on which they worked before entering government.

- **New York’s Ethics Commission Concludes Governor Lied During Investigation into Illegal Gifts.** Last week, the New York State Commission on Public Integrity announced that it found reasonable cause to believe that New York Governor David Paterson violated state ethics laws by accepting free tickets to the 2009 World Series (see press release [here](#)). The Commission also concluded that there was reasonable cause to believe the Governor falsely testified under oath during the investigation and referred the case to the New York State Attorney General and the Albany County District Attorney, so that they can investigate possible criminal charges.
- **Colorado Pay-to-Play Law Ruled Unconstitutional.** As we reported in our recent e-alert (see [here](#)), last month the Colorado Supreme Court held that state’s “pay-to-play” law unconstitutional in its entirety. Colorado’s law banned contributions from contractors holding certain non-competitively bid contracts with the State of Colorado or its localities from contributing to any state or local candidate for office or political party in Colorado. Despite the demise of the Colorado law, we expect that states will continue to enact and enforce pay-to-play laws. Other state and federal pay-to-play laws have withstood First Amendment challenges in locations reeling from scandal and where the law was more narrowly drawn to target a more limited set of potential contributors and recipients of political contributions.
- **Citizens United Makes its Mark in California Federal Courts . . .** The U.S. District Court for the Southern District of California relied on the U.S. Supreme Court’s recent *Citizens United* decision to strike down elements of San Diego’s local campaign finance law. *Thalheimer v. City of San Diego*, No. 09-2862 (S.D. Cal. Feb. 16, 2010). Specifically, the court struck down a provision limiting the amount that could be contributed to political action committees that make independent expenditures. The court subsequently clarified that its decision did, in fact, apply to corporate contributions to independent expenditure committees in addition to individual contributions. *Thalheimer*, No. 09-2862 (S.D. Cal. Feb. 19, 2010).
 - **. . . and in State Legislatures.** Numerous state legislatures are considering legislation in response to *Citizens United*, and in some states the proposal has already passed at least one house. Arizona, Connecticut, Iowa, Maryland, Minnesota, New Hampshire, New York, South Dakota, Tennessee, Washington, West Virginia, Wisconsin, and Wyoming are among the states currently considering new legislation. In some states, the proposed legislation merely repeals state bans on independent expenditures by corporations, while in other states the proposed legislation would create new requirements for corporations (such as a reporting or disclosure requirements for corporations that make independent expenditures). For example, on March 1, the Iowa Senate overwhelmingly approved a bill that would require corporations to include “paid for” statements on all published and electronic communications, require corporations to report independent expenditures within 48 hours, bar corporations from using an advertising or consulting firm that also is being used by a campaign or committee that will benefit from a political advertisement, and requiring board approval of independent expenditures. The bill (which is available [here](#)) has been sent to the Iowa House of Representatives.
 - **. . . and in State Agencies.** State officials in numerous other states – including Alaska, Colorado, Massachusetts, Michigan, Montana, North Carolina, and Oklahoma – have issued guidance about the constitutionality of state laws in light of the new decision or have publicly indicated that they are evaluating their state laws. For example, the Alaska Attorney General issued a legal opinion to the Governor’s Office, which concluded that Alaska’s laws prohibiting independent expenditures by corporations and labor unions in a candidate election are likely unconstitutional in light of *Citizens United*. The opinion also concluded that some of the state’s disclaimer and disclosure statutes did not cover corporate or union

ads because at the time they were written, the legislature did not envision that corporations or unions could lawfully make such expenditures. (The opinion is [here](#).)¹

- **Get Out Your Scissors—The Federal Election Commission Repeals Regulations in Response to *Emily's List*.** Last Friday, the FEC issued draft final rules removing three provisions from the FEC's regulations. The first, 11 CFR 100.57, provided that funds received in response to solicitations are political contributions regulated by the FEC when the solicitation communication indicates that any portion of the funds would be "used to support or oppose the election of a clearly identified Federal candidate." The other two, 11 CFR 106.6(c) & (f), provided guidance regarding how PACs that engage in combined federal and non-federal activities, such as generic get-out-the vote drives, should allocate their expenses and costs for such activities. In September 2009, the U.S. Court of Appeals for the District of Columbia Circuit affirmed a trial court's decision that these provisions were unconstitutional and exceeded the scope of the FEC's authority. See *Emily's List v. FEC*, 571 F.3d 1304 (D.C. Cir. 2009) (available [here](#)). The FEC is expected to vote to finalize its revocation of these rules at an open meeting on March 11.

ARTICLES

Recent House Ethics Investigations

The House Ethics Committee recently released two very important ethics investigation reports. In the first report, the Ethics Committee closed its investigation of earmark lobbying associated with the now defunct PMA Group lobbying firm. Although the Office of Congressional Ethics had requested further action against two Members of Congress, the Ethics Committee rejected that recommendation and found no violations of House Ethics rules. The central question in the Ethics Committee's investigation of earmark lobbying was whether Members of Congress had inappropriately tied the granting of earmarked appropriations to campaign contributions by targeting companies in particular industries while they had earmark requests pending and legislative action was imminent.

The Committee's decision to take no action makes clear that in the Committee's current view, a violation of House Ethics rules does not occur unless there is a clear link between the solicitation of a campaign contribution and a congressional earmark. This decision may indirectly make it harder for criminal prosecutors to bring cases against lobbyists and their clients in connection with earmarks.

In a second major case, the House Ethics Committee closed its investigation of a Caribbean conference held by the Carib News Foundation and attended by Members of Congress, including Rep. Charlie Rangel. The Committee stated that it intended its report as an admonishment of Rep. Rangel, imputing to him his staff's alleged knowledge that corporate money was used to help fund the conference. Interestingly, this appears to be the first publicly reported enforcement matter related to the new gift and travel rules imposed in the Honest Leadership and Open Government Act. The Ethics Committee made a referral to the U.S. Department of Justice, although the referral was limited to false statements allegedly made to the Committee by officers of the Carib News Foundation. The Committee's report reflects the fact that the Committee had actually pre-approved the Caribbean travel at issue in the case. There is some discussion in the report of the need to review and improve the House travel regulations and the Committee's own process for reviewing travel requests.

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

In the Wake of *Citizens United*: A Possible Legislative Response

Less than two months after the ruling, the effects of the Supreme Court's decision in *Citizens United* are being felt on Capitol Hill. On February 10, Representative Chris Van Hollen and Senator Charles Schumer unveiled a legislative framework (see [here](#)) for campaign finance reforms that might, in Rep. Van Hollen's words, "mitigate the damage this ruling could do to our democracy."

The Schumer-Van Hollen framework includes the following elements:

- **Ban on expenditures from foreign interests:** U.S. corporations would be prohibited from making political expenditures if (i) the corporation is more than 20% foreign-owned, (ii) if foreign principals make up a majority of the board of directors, or (iii) if either its U.S. operations or political activity decisions are controlled by a foreign entity.
- **Federal "pay-to-play" ban:** Government contractors would be barred from making political expenditures and corporate recipients of TARP funds would face a more limited ban on using taxpayer dollars to make political expenditures.
- **Enhanced disclosure:** Corporations and other organizations would be required to set up separate "political broadcast spending" accounts to make and receive expenditures. Funds moving into or out of these accounts must be reported to the FEC. Corporations must disclose political expenditures on their websites within 24 hours, to their shareholders quarterly, and in their annual report. Registered lobbyists must also disclose campaign expenditures over \$1,000.
- **Stand by your ad:** Enhanced disclaimers would require CEOs to appear in any political ads that their corporations fund. In addition, top corporate contributors to groups producing political ads would be required to appear or be listed in the ads.
- **Lowest unit rate for opposed candidates:** Broadcasters would be required to offer the lowest airtime unit rate to candidates who are the subject of ads purchased from the broadcaster by corporations.
- **Expanded coordination rules:** The restrictions on coordinated communications would be changed in two ways. First, the current rule that regulates communications that feature a House or Senate candidate in the 90 days before a primary or general election would be expanded to cover the entire period from 90 days before the primary until general election day (currently, the timing of some states' elections create a brief unregulated window between the two 90 day periods). Second, prior to the beginning of that period (i.e., earlier than 90 days before a primary), the coordination rules would apply to most advertisements that promote, support, attack or oppose a federal candidate.

More than a dozen other legislative responses to *Citizens United* have been introduced, most of which contain elements that are addressed within the Schumer-Van Hollen plan. Although legislation based on the Schumer-Van Hollen framework has not yet been introduced in the House or Senate, this more expansive proposal has received the most attention. The details of the Schumer-Van Hollen proposal will not be clear until actual legislative language is drafted and introduced as a bill.

Many States Make Moves Towards Government Ethics Reforms

Heading into an election cycle where public trust in government is low and a recent Gallup poll (see [here](#)) shows that a majority of Americans believe car salesmen are more honest and ethical than elected officials, ethics reform is an important issue to both parties. Many states are proposing to strengthen ethics laws and close loopholes with new legislation, executive orders, and regulations.

Among the states currently tackling government ethics issues are Alaska, Georgia, Indiana, Missouri, Nevada, New Mexico, New York, North Carolina, Oklahoma, Utah, and Virginia.

Common trends across state proposals include limiting (or even banning) political contributions from lobbyists, tightening rules governing political contributions from public contractors (that is, “pay-to-play” rules), and placing new restrictions on gifts to state and local officials. For example, two weeks ago the New Mexico House of Representatives passed a bill banning political contributions to statewide candidates and political parties from lobbyists, as well as state contractors with contracts worth over \$250,000. Although that bill died in the New Mexico Senate, another ethics package is expected in the upcoming special session.

In February, both the Utah House of Representatives and the Utah Senate passed legislation banning gifts over \$10.00 from lobbyists to legislators. The exceptions to the ban vary in meaningful ways (for example, only the Senate substitute provides exceptions for travel), but the bills are currently being reconciled. (In fact, the Utah Senate passed a substitute bill this week.)

Meanwhile, in New York, Governor Paterson vetoed an ethics reform package because it was not strong enough. While the New York law would have increased penalties for violating some existing campaign finance laws, created new penalties (such as a \$10,000 fine for accepting a contribution above the statutory limit), and created three new panels within existing state agencies to oversee ethics and lobbying, it also increased campaign contribution limits. The Governor says the reform effort fell short because the legislation did not create an *independent* ethics body to oversee the Legislature or *decrease* campaign contribution limits. The New York legislature failed to override the veto and is now negotiating a stronger package with the Governor.

Other common themes in ethics legislation currently under consideration in multiple states include the creation of independent ethics commissions, or revamping existing oversight panels, with greater tools to enforce existing ethics laws (recent proposals have arisen in Missouri, New York, Utah, and Virginia) and mandatory cooling off periods—ranging from 180 days to two years—before elected officials or sometimes even staff can lobby the state (recent proposals have arisen in Georgia, Indiana, Missouri, Nevada, and Utah). Keeping up to date with these evolving rules can be challenging. We will continue to monitor these developments across the states for clients.

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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