

E-ALERT | Election and Political Law

February 17, 2010

CITIZENS UNITED: WHAT IT MEANS FOR TRADE ASSOCIATIONS

TRADE ASSOCIATIONS MAY NOW USE CORPORATE FUNDS TO ENGAGE IN EXPRESS ADVOCACY

In the wake of the United States Supreme Court's decision in *Citizens United v. Federal Election Commission*, trade associations are now free to use corporate money to fund advertising campaigns, up to the eve of an election, that expressly advocate the election or defeat of specific candidates at the federal, state, and local levels ("election advertising"). This landmark ruling provides new opportunities for trade associations to influence the political process – but those opportunities come with risks and caveats that associations should carefully consider.

First, the good news. In *Citizens United*, the Supreme Court held that the First Amendment protects the right of corporations to spend unlimited sums on advertising and other forms of communication that focus on candidates and elections. In the past, corporate funds could only be used for so-called "issue ads," which typically focused on a public policy issue (rather than a candidate), and included some call to action (i.e., "Call Congressman Smith and tell him to support H.R. 1000"). Now, trade associations may solicit corporate contributions to fund election advertising that freely advocates for or against candidates and their policy positions.

"COORDINATION" MAY BECOME THE NEW ENFORCEMENT FOCUS

While the *Citizens United* decision opened the door for trade associations to spend unlimited corporate funds on election advertising, that advertising must remain wholly independent of any candidate, campaign, or political party. Direct corporate contributions to candidates – including in-kind contributions of goods or services – remain prohibited even after *Citizens United*. Corporate-funded expenditures made in coordination with a candidate, campaign, or political party may amount to such an illegal in-kind corporate contribution.

Coordination occurs when an entity, such as a trade association, makes a decision about spending on election advertising in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's campaign, or the candidate's agents or a political party committee. In some circumstances, discussions about the content, intended audience, means of communication, specific media outlets used, the timing or frequency, or size or prominence of an advertisement between a campaign and a trade association may constitute coordination. Use of a common vendor or employment of a former campaign staffer may also lead to allegations of coordination.

Trade associations engaged in election advertising should take steps to avoid any potential for coordination with a candidate, campaign, or political party. For example, association employees and other representatives of the association should avoid discussions with candidates and their campaigns or political parties about advertising being run by the association or by the candidate. Furthermore, employees of an association's member companies may be viewed as conduits for

information between the trade association and the candidate, and may also need to avoid discussions about advertising plans or programs with campaigns and political parties if those employees communicate with the association about the association's advertising efforts. Failure to maintain a firewall between an association's election advertising and that of a candidate or political party may lead to allegations of illegal coordination that typically are time-consuming and costly to defend. Associations that engage in election advertising will need to put in place thoughtful and effective policies to prevent illegal coordination, including appropriate training for association staff and board members.

DISCLOSURE REQUIREMENTS REMAIN IN PLACE

Election advertising by a trade association remains subject to the disclaimer and disclosure requirements of federal election law. While striking down the prohibitions on spending, the *Citizens United* Court upheld existing disclosure provisions as constitutional.

First, the Federal Election Commission ("FEC") requires that all election advertisements must include a clear and conspicuous disclaimer identifying the entity "responsible for the content of the advertising," as well as the physical address or website of that entity.¹ True "issue ads" that do not advocate the election or defeat of a specific candidate, and that do not meet the definition of an "electioneering communication," do not require a disclaimer under federal election law. However, the Federal Communications Commission ("FCC") has sponsorship identification requirements that would be relevant to issue ads.

Second, trade associations funding certain kinds of ads, and reaching certain spending thresholds, are also required to file publicly available disclosure reports with the FEC:

- *Electioneering Communications.*² An association spending more than \$10,000 on electioneering communications within a calendar year must file reports identifying the amounts spent and the names of certain donors who contributed \$1,000 or more toward electioneering communications.
- *Independent Expenditures.*³ An association spending more than \$250 in a calendar year on independent expenditures must file reports that (1) certify, under penalty of perjury, that the expenditures made were independent of any candidate or campaign; (2) identify the amounts spent; (3) identify the candidate supported or opposed; and (4) identify each person or entity who contributed more than \$200 for the purpose of furthering the reported independent expenditures. An association spending an aggregate of \$1,000 or more in independent expenditures for any one election may also be required to file certain 24-hour and 48-hour reports of spending.

¹ There are additional disclaimer requirements, some of which vary depending on the type of media and the content of the election advertisement. Trade associations that want to sponsor ads should consult counsel or the FEC's rules to ensure that appropriate disclaimers are used.

² An "electioneering communication" is any broadcast, cable, or satellite communication that (1) refers to a clearly identified federal candidate; (2) is aired in the district (for House candidates) or state (for Senate candidates) where the identified candidate is running for election; (3) is publicly distributed by a television station, radio station, cable television system, or satellite system for a fee; and (4) is distributed within 60 days prior to a general election or 30 days prior to a primary election for federal office.

³ An "independent expenditure" is any expenditure for a communication that expressly advocates the election or defeat of a clearly identified candidate that is not coordinated in any way with a candidate, campaign, political party, or their agents.

These reporting obligations may require that a trade association engaged in certain election advertising disclose payments from its member companies that are used to fund the election advertising. The obligation to disclose member company payments may depend on whether a solicitation explicitly states or even suggests that some portion of the payment will be used to fund election advertising. For example, if a trade association levies a “special assessment” on member companies specifically to fund an advertising campaign against candidates opposed to its interests, the amounts paid by each member company likely must be disclosed in the trade association’s disclosure report. On the other hand, if a portion of general dues payments is used for an election advertising campaign, it is less likely that a member company’s dues payment was made for the purpose of furthering the advertising. Associations should consult counsel to determine the precise disclosure requirements applicable in their particular circumstances.

True issue advertising (advertising that does not expressly advocate any candidate’s election or defeat, and that does not qualify as “electioneering communications”) does not require disclosure with the FEC.

DON’T FORGET POTENTIAL TAX IMPLICATIONS

Citizens United removed restrictions on trade associations using corporate funds for election advertising under federal election law, opening the door for associations to fund advertising campaigns that expressly advocate the election or defeat of specific candidates at the federal, state, and local levels. In addition, post-*Citizens United*, it is unclear if the IRS will strictly construe the existing tax rules and view a trade association’s significant election advertising as a sign that the association is operating outside of its exempt function, and thereby put its tax status in peril, or if, instead, it will take a more liberal reading of the law and conclude that political advertisements are a legitimate method by which an association may further its exempt purpose. If the latter is the case, an association could arguably engage in unlimited election advertising without jeopardizing its federal income tax exemption. We will be following this issue closely.

Regardless of how the IRS interprets the effect that significant spending on election advertisements may have on the tax status of trade associations, trade associations need to also bear in mind the tax consequences to their dues-paying members. Dues spent on political campaign activities (such as election advertisements) are not deductible by trade association members as a business expense. Trade associations are required to issue a notice to each member identifying the percentage of dues payments (or of any special assessment or voluntary payment) used for such non-deductible activity, or to pay a proxy tax. *Citizens United* seems unlikely to change this.

In addition, expenditures made by a trade association for political activities may be subject to a “political tax.” The tax may apply whether the expenditure is made directly or through another organization. The post-*Citizens United* outlook for the political tax is less clear. At least for the time being, the IRS can be expected to continue to enforce it.

WHAT *CITIZENS UNITED* DOES NOT SAY, BUT WHICH WILL LIKELY FOLLOW

FEC regulations continue to restrict the ability of a trade association to communicate about candidates with individuals outside of its “restricted class,”⁴ but in the wake of *Citizens United*, it is

⁴ For purposes of communications, a trade association’s restricted class includes (1) the association’s executive and administrative employees and their families; (2) the association’s non-corporate members and their families; and (3) in the case of the association’s corporate members, the individual corporate representatives with whom the trade association normally conducts the association’s activities.

likely that the FEC will abandon these restrictions. The consequence will be an opportunity for trade associations to partner with their member companies for a more robust communications program with member companies' employees, customers, and vendors about candidates, even on the eve of an election. The fall of the restricted class regulations on independent speech about candidates could also potentially enable trade associations to engage in fundraising efforts in support of candidates that reach beyond the restricted class, so long as the efforts are undertaken independently of the candidate, his or her campaign, and a political party. However, the restrictions that limit a trade association's solicitations for its PAC to its restricted class are more likely to remain in place.

WHAT'S NEXT?

Many campaign finance reform advocates have expressed disappointment with the Supreme Court's decision to allow corporate funding of election advertising and have been urging Congressional Democrats to seek legislative "fixes" to limit the impact of this decision. On February 11, 2010, Senator Schumer and Congressman Van Hollen issued a press release detailing the restrictions that they will introduce shortly. These will include prohibitions on certain types of corporations paying for election ads (corporations with some foreign ownership or control, government contractors, and TARP recipients) and impose burdensome disclosure rules. We will be closely monitoring developments in this area and are available to discuss with trade associations the opportunities created by this change to the law.

UNDER IRS STANDARDS OF PROFESSIONAL PRACTICE, CERTAIN TAX ADVICE MUST MEET REQUIREMENTS AS TO FORM AND SUBSTANCE. TO ASSURE COMPLIANCE WITH THESE STANDARDS, WE DISCLOSE TO YOU THAT THIS COMMUNICATION IS NOT INTENDED OR WRITTEN TO BE USED, AND CANNOT BE USED, FOR THE PURPOSE OF AVOIDING PENALTIES.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our election and political law practice group:

Robert K. Kelner	202.662.5503	rkelner@cov.com
Bob Lenhard	202.662.5940	rlenhard@cov.com
Kevin Shortill	202.662.5113	kshortill@cov.com
Scott Gast	202.662.5533	sgast@cov.com

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.

© 2010 Covington & Burling LLP, 1201 Pennsylvania Avenue, NW, Washington, DC 20004-2401. All rights reserved.