

# Legal Update

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## Supreme Court Overrules Restrictions on Corporate Political Speech but Some Limits Remain

By Damon E. Dunn and Seth A. Stern

The United States Supreme Court recently held in *Citizens United v. Federal Election Commission* that a federal law restricting political spending by corporations and labor unions violates the First Amendment.

The now-overturned provision of the Bipartisan Campaign Reform Act of 2002 (BCRA) – commonly known as the McCain-Feingold Act – barred corporations from using their treasury funds for “electioneering communications” that refer to a particular candidate for federal office and are distributed within 30 days of an election. Corporations are now also permitted – for the first time in 63 years – to use their general treasury funds to produce their own campaign ads. Prior to the *Citizens United* decision, corporations or unions wishing to create or fund such communications had to create a separate Political Action Committee (PAC) to do so, and PACs were subject to various restrictions.

The 1990 Supreme Court case *Austin v. Michigan Chamber of Commerce* upheld limitations on corporate campaign spending by holding that such spending could be restricted to prevent distortion of political discourse by corporations putting their vast wealth behind a particular message and drowning out opposing views. In *Citizens United*, the Supreme Court overruled *Austin* and others that had relied on it.

The Court, in its 5-4 opinion, held that *Austin*’s rationale could not stand in light of prior precedent prohibiting the government from restricting speech – including corporate speech – based on the identity of the speaker. In doing so, the Court reversed a lower court decision holding that the BCRA restrictions could be applied to a 90-minute video critical of Hillary Clinton produced by Citizens United, a nonprofit corporation, to air through Video on Demand services during the 2008 Democratic presidential primary.

Though *Citizens United* and the BCRA involve financing of federal elections, the Court’s decision leaves the enforceability of similar state laws in question. As many as 24 states have laws on the books regulating spending by corporations in state elections. Illinois Governor Pat Quinn signed a new campaign finance law in December of 2009, scheduled to take effect in 2011. Though it does not contain specific restrictions on corporations and unions, some commentators have speculated that challenges to the new law will nonetheless be brought in light of the Supreme Court’s decision in *Citizens United*.

President Obama, who opposes the Supreme Court’s decision, said his administration would “get to work immediately with Congress” on a “forceful response” to the Supreme Court’s ruling. He stated that the decision “opens the floodgates” for unlimited corporate funds to flow “into our democracy.” Senator John McCain, who co-sponsored the legislation that the Court overturned, has reportedly stated that efforts to reform campaign financing are now “dead” in light of the Supreme Court’s decision.

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## Limitations Still Exist and More Could be on the Way

Though statements like those quoted above may lead one to believe that corporations can now spend at will on their political efforts, the Supreme Court upheld several limitations. Restrictions on direct contributions from corporations to candidates or “soft money” contributions to political parties – as opposed to money spent on speech advocating for candidates’ election – are not affected by *Citizens United*. The Supreme Court upheld past decisions finding that direct contributions could be restricted to prevent the appearance of a “quid pro quo” arrangement between corporations and politicians.

The Court also upheld the BCRA’s disclaimer and disclosure requirements because they prevent creators of campaign ads from “hiding behind dubious and misleading names” and “do not prevent anyone from speaking.” For instance, any organization spending more than \$10,000 per year on a federal campaign ad must file a report with the Federal Election Commission (FEC) identifying those who contributed to the ad. The Court rejected arguments that such requirements expose donors to “threats or reprisals.”

Additionally, a corporate ad, like others, must include a disclaimer identifying who is behind it, created according to the BCRA’s specifications. The Federal Communications Commission (FCC) and Federal Trade Commission (FTC) impose additional disclosure requirements potentially affecting corporate political spending that were not at issue in *Citizens United*. For instance, the FCC has recently stepped up its enforcement efforts against corporations that attempt to disguise their advertisements – political or otherwise – as objective news. The FTC recently extended its disclosure requirements to bloggers who are paid for their blog posts and continues to regulate numerous areas of false or misleading advertising. Many state laws regulating consumer fraud and deceptive business practices contain similar regulations.

The Court also declined to decide whether restrictions limited to political activity by foreign corporations operating in the United States would be constitutional (the overturned restrictions applied to both foreign and domestic corporations). Another BCRA provision which was not at issue in *Citizens United* restricts political spending by “foreign nationals” in American elections.

It is possible that future legislation aiming to cut back on the *Citizens United* decision’s reach will specifically limit political activity by foreign corporations operating in the United States. Commentators have also suggested the possibility of future legislation requiring corporations to obtain shareholder approval before making political expenditures. Such approval is currently required by British law. Another possibility that has been discussed is legislation limiting political spending by companies receiving government contracts.

Please contact us if you have any questions regarding the *Citizens United* case and its implications for your business.

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