January 21, 2010

MEMORANDUM TO CLIENTS

Re: Supreme Court Ruling Clears the Way For Corporations to Directly Sponsor Election Advertisements

The Supreme Court today ruled, by a margin of 5-4, that corporations will be able to directly pay for independent advertisements in support of, or against, candidates for federal office. The Court's decision in *Citizens United v. Federal Election Commission* invalidates parts of federal law that previously governed political advertisement expenditures and overturns parts or all of several previous Supreme Court cases dealing with the subject.

The Court's decision invalidated a statutory provision that prohibited corporations and labor unions from "using their general treasury funds to make independent expenditures for speech defined as an 'electioneering communication' or for speech expressly advocating the election or defeat of a candidate." The prohibition on "electioneering communications" was added by the Bipartisan Campaign Reform Act of 2002 (BCRA), commonly referred to as the "McCain-Feingold Act."

BCRA made it a felony for a corporation or union to use broadcast, cable or satellite communications that referred to a candidate for federal office within 30 days of a primary election or 60 days of a general election. Before the Court's ruling, corporations and unions could only indirectly sponsor political advertisements through the creation and use Political Actions Committees (PACs). According the Court's majority, the restriction amounted to a "ban" on political speech and an unconstitutional prior restraint under the First Amendment. PACs, according to the Court's ruling, do not allow corporations to speak.

The ruling will now enable corporations and unions, to *independently* produce and air advertisements supporting or opposing a federal candidate. Corporations and unions will still be restricted in the amount of money that they may donate directly to candidates, and may not formally coordinate their independent advertisements with those of the candidate. The decision also does not impact BCRA's restrictions on corporate and union candidate contributions, made indirectly to candidates through political parties, donations that are often referred to as "soft money."

A second part of the Court's decision determined, by an 8-1 margin, that BCRA's political advertising disclaimer and disclosure requirements are constitutional. These rules requires televised advertisements funded by any party other than the candidate to include a visual disclaimer for at least four seconds identifying the name and address of the third party "responsible for the content of this advertisement." A related rule requires persons spending more than $10,000 on "electioneering communications" to file a disclosure statement with the

Federal Election Commission (FEC) identifying the person making the expenditure, the election involved, and the names of contributors. The Court's ruling left both requirements intact.

In sum, after the Court's decision in *Citizens United*, the law on corporate sponsored political advertisements is as follows:

- Corporations and labor unions may now independently sponsor and produce political ads that support or oppose a federal candidate without the use of a PAC;
- Such advertisements may air at any time before the election;
- Corporations and unions must still abide by federal limits on direct contributions to federal candidates and indirect "soft money" contributions to candidates through political parties;
- Advertisements sponsored by corporations or unions must include a four second visual disclaimer revealing the identify of the advertisement's sponsor; and
- If the corporation or union spends more than $10,000 on political advertisements, a disclosure statement must be filed with the FEC.

Today's decision will likely boost political advertisements on both broadcast stations and cable systems. The decision also has no direct legal impact on either the FCC's broadcast or cable political advertising rules. Under those rules, cable operators are not required to accept advertisements from or otherwise allow the use of their facilities by legally qualified candidates, but broadcasters are required to do so under certain circumstances with respect to candidates for federal offices. If a cable operator or broadcaster accepts political advertisements, it generally must afford the same opportunities to the opponents of the candidate whose advertisements the broadcaster or cable operator has chosen to accept. Even though the decision in *Citizens United* will now allow corporations to directly advocate for or against specific federal candidates, the equal opportunity rules apply only to activities by the candidates themselves. Therefore, broadcasters and cable operators will remain free to reject any political advertisement from any third party as been the case in the past.

We would be pleased to respond to any questions regarding these matters.

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