FOLEY
FOLEY & LARDNER LLP

ATTORNEYS AT LAW
WASHINGTON HARBOUR
3000 K STREET, N.W.
SUITE 600
WASHINGTON, D.C. 20007-5109
202.672.5300
202.672.5399
WWW.FOLEY.COM

202.295.4081

MEMORANDUM

CLIENT-MATTER NUMBER
999100-0130

TO: Clients & Friends

FROM: Cleta Mitchell, Esq.
Foley & Lardner, LLP

DATE: January 21, 2010

RE: Supreme Court Decision in *Citizens United v. Federal Election Commission*: Impact and Implications

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The Supreme Court today issued its long-awaited ruling in the case of *Citizens United v. Federal Election Commission* ("Citizens United"). The wait was well worth it!

The primary ruling of the Court was that it overruled the Court's earlier decisions in *Austin v. Michigan Chamber of Commerce* ("Austin") and *McConnell v. Federal Election Commission* ("McConnell") with respect to the following points:

- Laws (both federal and state) prohibiting *independent* expenditures by corporations and labor unions regarding candidates for office violate the First Amendment;

- Disclosure of donors to such expenditures by corporations and labor unions are *not* automatically invalid, but are still subject to scrutiny by the Court to protect donors from potential harassment and retribution

There are a myriad of practical implications from the decision, which opens the door both for non-profit *and* for-profit corporations to involve themselves in the political / electoral and policy debates during 2010.

However, it is important not only to understand what the decision changed, but also what parts of the law were / are left intact.

The following is a quick summary.

Who is impacted and how?

1) **For-profit corporations**: Corporations will now be permitted to make direct expenditures for communications related to candidates for office, both at the federal *and* state level, as long as such expenditures are *independent* from the candidates and their campaigns. Some of the types of communications that have previously been prohibited that are now allowable include (but aren't limited to):

- **Public Communications.** Public communications expressing support for / against candidates. Most people automatically think only of television and radio ads sponsored by corporations. While those are now permissible, it is likely that such advertising will not be the only or even the primary type of communications in which corporations may now participate.

- As (and maybe *more*) importantly, corporations will now be able to spend company funds to engage in communications such as:
  - Sending communications to *all* employees (not just the management level), advising employees of the positions that candidates and officeholders have taken with respect to the company's business or industry and letting employees know which candidates / officeholders have taken positions or cast votes *for* or *against* the company's (and employees') interests
  - Communicating with customers and vendors about candidates and issues
  - Contributing to trade associations and advocacy groups to make public communications regarding candidates and issues using corporate contributions
  - Welcoming candidates and officeholders to meet with *all* company employees, not just with management level employees – *NOTE: The decision did not change the prohibition on corporate contributions to candidates, which are still illegal*

2) **Nonprofit Corporations.** Nonprofit corporations such as 501(c)(6) trade associations and 501(c)(4) grassroots lobbying, social welfare organizations, will now be permitted to spend corporate treasury funds to fund public communications that support and oppose candidates as well as legislation, government policies and proposals. Public communications that discuss issues can also tie those specific policies and issues to specific candidates or officeholders proposing / opposing the policies, even within the period of time just prior to an election – and may spend corporate treasury funds for such purposes.

Some of the types of communications that have been prohibited under FEC (and many state) regulations but which will now be allowed include:

- **Voter Guides / Candidate questionnaires**. It has been illegal (until now) for corporations, including non-profit corporations, to use organization (rather than PAC) funds to pay for dissemination, posting on a website or publishing / printing a voter guide or results of candidate questionnaires that discuss / reflect candidates' positions on specific issues of interest to the organization, if the publication includes any indication of what is the 'correct' or 'incorrect' position on the issues. Now, organizations may freely develop and disseminate such voter guides, using the association's treasury funds, and may indicate which candidates have the 'good' responses' and which candidates have 'bad' positions, from the organization's perspective
- **Voting Records.** Like the voter guide example, nonprofit corporations may now publicly disseminate information regarding voting records of candidates and officeholders, indicating which officeholders have good and bad records according to the organization, and urging support of and opposition to candidates/officeholders based on their voting records.
- **Public advertising.** Nonprofit associations may now solicit and receive contributions not only from individuals but also corporations that can be used to publicly support / oppose candidates for office, including making both express advocacy ("vote for / against Candidate X") and issue communications ("this candidate is bad for agriculture") and using any medium desired by the organization, including tv, radio, print, internet, mail, phones, etc.

3. **Labor Unions.** The opinion applies to candidate-related independent labor union expenditures, not just candidate expenditures by corporations. Chief Justice Roberts wrote in his concurring opinion, "Congress may not prohibit political speech, even if the speaker is a corporation or labor union."

4. **Qualified Nonprofit Corporations.** Based on the Court's decision today, there is no longer the requirement for establishing a 'qualified nonprofit corporation' in order for a 501c4 organization to make independent expenditures expressly advocating election or defeat of candidates. A 501c4 organization (and other types of nonprofits) may accept corporate contributions *and* use such contributions to fund public communications related to candidates. The "*MCFL"* exception to the prohibition against corporate candidate-related expenditures is no longer necessary, because the rule has now changed.

What is *not* changed by the Court's decision?

As important to understanding what *has* changed under the *Citizens United* decision is a keen understanding of what has *not* changed.

1. **Disclosure of donors still required.** The Court left intact the requirements for disclosure of donors to independent expenditures and electioneering communications. The current FEC regulations require that the identity of donors who were solicited to and whose contributions are used to pay for independent expenditures and electioneering communications are subject to disclosure to the FEC. It remains to be seen whether the FEC will deem it necessary to rewrite

the regulations regarding disclosure of donors under specific circumstances. Bottom line: Disclaimers and disclosures are still required.

2. **IRS Regulations still apply.** While the campaign finance restrictions on use of corporate funds for candidate-related expenditures have been invalidated, the tax code provisions *still* apply. The basic requirements under the tax code that are still effective include:

- **501c3 organizations may *not* spend treasury funds for intervention in a partisan political campaign.** Charitable and educational organizations, exempt from taxation under Section 501(c)(3) of the Internal Revenue Code are *unaffected* by the Supreme Court's ruling. ***No* funds of a 501(c)(3) organization may be used for candidate-related expenditures.**
- **The major purpose test still applies for nonprofit organizations.** The majority of the expenditures of a 501(c)(4) or 501(c)(6) organization must be primarily for the organization's exempt purpose and *not* for political or candidate-related expenditures. In other words, the fact that a social welfare / grassroots lobbying organization is now permitted to spend its treasury funds for candidate-related expenditures does NOT mean that a majority of its funds can be spent for that purpose. In any fiscal year, the organization must be able to demonstrate to the IRS that *most* of its funds were spent for programs and purposes in support of its exempt purpose.
- **Candidate-related expenditures by nonprofit organizations are taxable.** The IRS regulations require that non-profit organizations making political or candidate-related expenditures pay taxes on such expenditures. That is unchanged by this decision.
- **For-profit corporations may not deduct political or candidate-related expenditures.** While corporations may now make expenditures related to candidates and elections, the longstanding rule that political expenditures are not deductible as ordinary and necessary business expenses from the corporation's tax liability remains intact.

3. **Corporate contributions to PACs and Candidates are still prohibited.** The Supreme Court's decision applies to independent *expenditures* by corporations, and does not change the law regarding contributions TO federal candidates, political parties and political action committees. All the FEC regulations and restrictions governing contributions from corporations and labor unions to federally regulated committees still apply.

4. **The Court's decision applies only to *independent* expenditures: the 'coordination' regulations that separate 'independent' from 'coordinated' expenditures are still applicable.** The decision presupposes that the expenditures by corporations are made independently of candidates and political parties. The FEC is currently involved (again) in an ongoing rulemaking to define 'coordinated public communications', the third time since BCRA was enacted in 2002 that it has engaged in such a rulemaking. It is possible that the FEC will seek guidance from the Court with respect to the current or a future rulemaking. However, suffice to say that the *Citizens United* decision rests on the understanding that a corporation's candidate-related expenditures are made independent of the candidate, campaign or political party.

5. **Laws and regulations governing reporting by candidates, political parties and PACs are unchanged.** There is nothing in the Court's decision that changes the fundraising and reporting obligations imposed by law on candidates, campaign committees, PACs, and political parties.

Foley & Lardner LLP will conduct a free webinar on February 3, 2010 for a more in-depth discussion of the implications of the Supreme Court's decision.

Cleta Mitchell, partner in Political Law and Dick Riley, Jr., partner in Tax and Exempt Organizations will conduct the webinar.

"Citizens United: What the Supreme Court Decision Means to Organizations and Corporations from both the FEC and IRS Perspectives"

2 – 3:30 pm – Wednesday, February 3, 2010

If you are interested, please email me at cmitchell@foley.com and I will forward to those handling the sign-up. Thanks!

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