Nonprofit Alert - February 2012

February 8, 2012

When the U.S. Supreme Court issued its 5-4 opinion in Citizens United v. FEC, it fundamentally altered the landscape of federal campaign finance law. The opinion will undoubtedly have far reaching effects on state campaign finance laws, including those in Minnesota.

Most importantly, the opinion removes longstanding prohibitions on the ability of corporations to spend general treasury funds on independent communications advocating for or against particular candidates. Although the case did not directly address a similar prohibition on union financing of such communications, its reasoning applies with equal force to those restrictions.

Although it found that Congress cannot prohibit corporations from spending general treasury funds on campaign communications, the Court upheld the disclosure and disclaimer requirements that apply to such communications. Additionally, laws that prohibit corporations from directly contributing goods or valuable services to candidates or political parties remain unchanged after Citizens United.

Citizens United addressed only the constitutionality of federal election laws. Although it did not directly rule on any state laws, the opinion explicitly reversed a 1990 Supreme Court opinion that upheld the constitutionality of a state prohibition on corporate election spending. Thus, it is virtually certain that in a post-Citizens United world, any state law that prohibits corporations from spending general treasury funds on independent election-related communications would also be considered unconstitutional.

Minnesota's Prohibition on Corporate Spending

Historically, Minnesota laws generally have prohibited corporations from spending any money "for the purpose of influencing elections." Although often referred to as a prohibition on corporate election spending, these prohibitions have applied equally to business corporations, nonprofit corporations, and limited liability companies.

As a result of Citizens United, it is likely that Minnesota's prohibition on corporate spending for the purpose of influencing elections, at least as it applies to independent communications advocating for or against candidates, is unconstitutional. This prohibition—found in Minnesota Statutes Section 211B.15, subdivision 3—is part of the Fair Campaign Practices Act, and it is enforced by local county attorneys. Until the Legislature acts to change the law, the law will remain on the books, and enforcement decisions under the

law will continue to be made at the local level.

Effect on Campaign Finance Reporting

Minnesota's campaign finance reporting rules are built around the now invalid assumption that corporations are prohibited from spending on campaign-related communications. Until the Legislature acts to change the laws, corporations and the Campaign Finance Board, which enforces the state's campaign finance reporting laws, will be left to interpret how the existing rules should apply to this new area of corporate spending. During a February 2 meeting, the Board's staff observed that it has applied the existing rules to corporate spending in the context of ballot initiatives for many years, and that framework could apply equally to corporate spending in the context of election campaigns.

If the Campaign Finance Board applies its past ballot-initiative approach to independent corporate spending on candidate-related communications, corporations could spend general treasury funds on such communications, but they would have to report their expenditures either by: (1) registering as a political committee or political fund and reporting directly to the Board; or (2) making contributions to a political committee or fund, which in turn would make the expenditures and report to the Board.

A corporation that accepts contributions for the purpose of influencing elections, or that has a primary purpose of influencing elections, would have to report under the first option by registering as a political committee or fund and reporting directly to the Board. Political committees and political funds must file regular reports with the Board identifying the source of all receipts, from contributions or otherwise, over $100.

Corporations could report under the second option by making contributions to a political committee or political fund, which in turn reports the corporation's contribution to the Campaign Finance Board. This option is only available if the political committee or fund only engages in independent activities and does not in turn make contributions to candidates, because corporations are still prohibited from contributing to candidates, directly or through an intermediary.

Special Considerations for Nonprofits

From a tax-exemption standpoint, however, the rules have not changed—nonprofit tax-exempt organizations still face limitations on their campaign-related activity because of their tax-exempt status. Charitable organizations under Section 501(c)(3) of the Internal Revenue Code still are prohibited from intervening in any campaign for or against a candidate and are therefore prohibited from making the types of independent communications at issue in Citizens United. Social welfare organizations under Code Section 501(c)(4) still must have social welfare activities other than influencing elections as a primary purpose, and they remain subject to tax under Code Section 527(f) on certain political expenditures. Trade associations under Code Section 501(c)(6) face similar limitations.

Conclusion

The full impact of Citizens United on Minnesota election law remains to be seen. Corporations and nonprofits interested in funding independent expenditures should continue to monitor developments in this area. In addition, if you have specific questions, please don't hesitate to contact:

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