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CAMPAIGN FINANCE LAW DEVELOPMENTS

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"With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests – including foreign corporations – to spend without limit in our elections. I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities. They should be decided by the American people. And I'd urge Democrats and Republicans to pass a bill that helps to correct some of these problems."

January 27, 2010, President Obama's
First State of the Union Address

I. CAMPAIGN FINANCE LAW BASICS

A. LOBBYING COMPARED TO CAMPAIGN FINANCE

1. Lobbying Regulation

Lobbying restrictions cover activities directed at influencing a government official to take certain action concerning legislation, regulation, or other governmental matters. *See* 2 U.S.C. §1601 *et seq.* (requiring registration and disclosures of lobbying activities); *United States v. Harriss*, 347 U.S. 612, 625-626 (1954)(finding lobbying disclosure regulations constitutional because "Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much.").

2. Campaign Finance Regulation

Campaign finance restrictions cover activities directed at influencing voters in the outcome of an election of a candidate for public office. *See* 2 U.S.C. §431 *et seq.*; 11 C.F.R. §100.1 *et seq.* *See also Buckley v. Valeo*, 424 U.S. 1, 19-108 (1976)(approving most of the Federal Election Campaign Act of 1971, including the campaign contribution restrictions and required disclosures, because they safeguard the integrity of elections from improper influence; invalidating expenditure limits as contrary to the First Amendment).

B. FEDERAL RESTRICTIONS COMPARED TO STATE RESTRICTIONS

1. This Outline focuses primarily on Federal campaign finance regulation. However, the recent Supreme Court decision will impact New York State law.

2. New York State Lobbying Regulation

New York's lobbying restrictions are governed by the New York State Ethics Commission. See N.Y. Legis. Law §1-A; http://www.nyintegrity.org.

3. New York State Campaign Finance Regulation

New York's campaign finance restrictions are governed by the New York Board of Elections. See N.Y. Election Law §§14-101; 6214.0; http://www.elections.state.ny.us.

C. TYPES OF CAMPAIGN CONTRIBUTIONS

1. "Hard Money" – the actual money donated to a candidate's campaign: (i) $2,000 per election (primary or general election; so $4,000 per 2-year election cycle); and (ii) $25,000-$95,000 total contribution per 2-year election cycle. *See* 2 U.S.C. §441a; 11 C.F.R. §110.1(b). These limits are indexed for inflation. *See* 2 U.S.C. §441a(c); 11 C.F.R. §110.17.

2. "Soft Money" – financial contributions to political parties or groups that provide financial assistant to candidates. *See* 2 U.S.C. §441i(a)(1)(defining "soft money or political parties" as "funds or any other thing of value" that is donated or transferred to "a national committee of a political party").

3. "Coordinated Expenditures" are treated as "in-kind" contributions to a candidate's campaign. *See* 2 U.S.C. §441a(a)(7)(B) ("Coordinated Expenditures" are expenses paid to make communications to the general public in concert with a candidate); 11 C.F.R. §109.20(a)("Coordinated means made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee"). "Coordination" is determined under a three part test: (a) the source of payment; (b) the content of the communication; and (c) the conduct of the person paying for the communication and the candidate or political party. *See* 11 C.F.R. §109.21(a).

4. "Independent Expenditures" are disbursements of any kind for the cost of electioneering communications. *See* 2 U.S.C.

§434(b)(describing reports required for independent expenditures); 11 C.F.R. §104.4(b) (describing reports required for independent expenditures).

D. TAX CONSEQUENCES OF CAMPAIGN CONTRIBUTIONS

1. Unless campaign expenditures are made from a separate Political Action Committee ("PAC"), a tax may be imposed on certain entities for political expenditures to influence or attempt to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local office. *See* 26 U.S.C. §527(f); *Alaska Public Service Employees local 71 v. Comm'r*, 1991 Tax Ct. Memo LEXIS 692, *9-11 (1991)(labor organization that transferred $25,000 of union assets to PAC was liable for $11,454 in tax concerning the transaction).

2. PAC taxes are generally limited to net investment income, so long as they satisfy the Treasury Department regulations concerning filing and operational restrictions. *See* 26 C.F.R. §1.527-2(a) and 4(a); Rev. Rul. 2004-6, 2004-4 I.R.B. 328 (January 26, 2004) (stating in regard to union's full page newspaper advertisement supporting increased spending on law enforcement that "when an advocacy communication relating to a public policy issue does not explicitly advocate the election or defeat of a candidate, all the facts and circumstances need to be considered to determine whether the expenditure is for an exempt function").

3. PACs have become an integral part of the campaign finance process, and the campaign finance regulations are designed for labor organization to use these separate funding vehicles. *See* 2 U.S.C. §441b(b)(2)(C)(describing "separate segregated fund to be utilized for political purposes"); 11 C.F.R. §114.5(b)(describing use of funds for PACs); *Pipefitters Local 562 v. U.S.*, 407 U.S. 385, 401 (1972)(noting that "a labor organization [is permitted to make], through the medium of a political fund organized by it, contributions or expenditures in connection with federal elections, so long as the monies expended are in some sense volunteered by those asked to contribute").

E. PROHIBITIONS COMPARED TO DISCLOSURE REQUIREMENTS

1. Some campaign activity is strictly prohibited. For instance, campaigns may not use contributions for home mortgage, rent, or utility payments; clothing purchases; country club memberships; vacations or other noncampaign-related trips; household food items; tuition payments; or admission to a sporting event, concert, theater, or other form of entertainment not associated with an election

campaign. *See* 2 U.S.C. §439a(b)(2).

2. Other activities are permissible, but the parties must report them to the Federal Election Commission. *See FEC Campaign Guide for Corporation and Labor Organizations*, reprinted at http:://www.fec.gov.

   a. PACs and unions must file FEC reports related to "Independent Expenditures" over $1,000 made less than 20 days before an election, and over $10,000 made at any time. *See* 2 C.F.R. §§100.19(d)(3); 104.4(b) and (c); 109.10(c) and (d).

   b. PACs and unions also file reports about "Electioneering Communications" over $10,000 with the FEC within 24 hours of the first date on which the "Electioneering Communication" is publicly distributed. *See* 11 C.F.R. §104.20(a)(1)(i).

F. FOREIGN NATIONALS

1. It is unlawful for a foreign national to make directly or indirectly: (A) a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election; (B) a contribution or donation to a committee of a political party; or (C) an expenditure, independent expenditure, or disbursement for an electioneering communication. *See* 2 U.S.C. 441e(a)(1); *United States v. Kanchanalak*, 192 F.3d 1037, 1047-49 (D.C. Cir. 1999)(describing legislative history related to ban)

2. The *Citizen United* case did not decide whether the "Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process." *See Citizens United v. FEC*, 558 U.S. ___, Slip Op. 46-47 (2010). However, it invalidated the portion of the campaign finance law that restricted these individuals and associations

II. CAMPAIGN FINANCE LAW BACKGROUND

A. LEGISLATIVE PERSEPECTIVE

1. Since the later part of the 19th century, Congress has restricted corporate involvement with political campaigns. *See* B. Smith, *Unfree Speech: the Folly of Campaign Finance Reform* (2001); Hayward, Revisiting the Fable of Reform, 45 *Harv. J. Legis.* 421, 463 (2008).

2. In 1907, Congress passed the Tillman Act to limit campaign spending by corporations. *See* 59 Pub. L. 36, §420 (January 26, 1907).

3. In 1925, Congress passed the Federal Corrupt Practices Act, which made it unlawful for corporations to make contributions in connection with any election to any political office. *See* 68 Pub. L. 506, §313 (February 28, 1925).

4. In 1947, Congress passed the Labor Management Relations Act, including an amendment to these provisions making it unlawful for unions or corporations to make any expenditures in connection with elections, primaries, or events to select candidates for office. *See* 80 Pub. L. 101, §304 (June 23, 1947).

5. In 1972, Congress passed the Federal Election Campaign Act that established the Federal Election Commission requiring the various reports, setting the contribution limits, and imposing various taxes and penalties for violations. *See* 92 Pub. L. 225, §§101-309 (February 7, 1972).

B. THE McCAIN-FEINGOLD, OR BCRA, ADJUSTMENTS

1. The Bipartisan Campaign Reform Act of 2002 ("BCRA"), 107 Pub. L. 155, §307 (March 27, 2002), primarily revised the "Hard Money" limits on campaign contributions and restricted influences in the campaign process. *See* 2 U.S.C. §441a(a)(1) and (2).

2. Prohibitions on "Soft Money" Contributions

   a. For federal elections, unions, corporations and incorporated non-profits cannot give and national parties cannot receive "Soft Money" beyond the regulatory limits. *See* 2 U.S.C. §431(20); 11 C.F.R. §§300.10; 300.50-52.

   b. For voter mobilization and party promotional activities within 120 days of a federal election, state and local parties may not refer to federal candidates in public communications, host joint fund raisers, or spend "Soft Money" in ratios beyond those set by the FEC. *See* 2 U.S.C. §441i(b)(2); 11 C.F.R. §300.65(c).

   c. Two exceptions exists for this rule. Federal candidates can (1) raise funds in connection with state and local elections up to federal "Hard Money" limits; and (2) raise unlimited money from non-profit groups whose principal purpose is

not to engage in voter mobilization and solicit up to $20,000 per year from individuals or mobilization organizations. *See* 11 C.F.R. §§300.52; 300.65(b) and (c).

3. Prior to the *Citizens United* Case, the Prohibitions on Certain "Electioneering Communications" and "Coordinated Communications"

   a. Section 203 prohibits unions, corporations and unincorporated non-profit groups from using their treasuries to engage in "Electioneering Communications," generally defined as statements about a federal candidate made within 60 days before a general election, 30 days before a primary or convention, where the audience includes 50,000 of the relevant electorate. *See* 2 U.S.C. §441b(b)(2)(c). While the post-BCRA regulations limit the restrictions on "Electioneering Communications" to paid programming, the regulations make clear that unions must not provide funds to any person if they know, have reason to know, or are willfully blind to the fact that the funds are for the purpose of "Electioneering Communications." *See* 11 C.F.R. §§100.29(b)(3); 114.14(a) and (c).

   b. Groups that are permitted to make such communications, like PACs or individuals, must file certain disclosure statements with the FEC, including a statement about the source of funds that provided for the disbursement of the communications. *See* 2 U.S.C. §434(f).

   c. Beside these disclosures, such communications are considered "Coordinated Expenditures," and they are equivalent to contributions to a candidate's campaign. *See* 2 U.S.C. §441a(a)(7)(B); 68 Fed. Reg. 421 (January 3, 2003).

4. Voter Mobilization Prior to the *Citizens United* Case

   As always, a union may encourage its members and employees to register and vote. *See* 11 C.F.R. §114.3(c)(4). For activities directed at the general public, however, such programs could not under BCRA be partisan, must not expressly advocate the election or defeat of any candidate or political party, and must not be targeted at people who favor a particular candidate or party. *See* 11 C.F.R. §§110.24(a); 114.4(d).

III. JUDICIAL TREATMENT OF CAMPAIGN FINANCE LAWS

A. PRE-FECA DECISIONS

1. *United States v. CIO*, 335 U.S. 106, 122 (1948)(holding that union endorsement in weekly periodical violated LMRA restrictions on campaign contributions because the restrictions were limited to "the misuse of aggregated funds gathered into the control of a single organization").

2. *United States v. Automobile Workers*, 352 U.S. 567, 592 (1957)(permitting further criminal proceedings against union that used union dues to sponsor television commercials to influence the election of candidates for Congress)

3. *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 439 (1972)(reversing conviction because jury need instruction that donations to separate PAC were actual or effective union monies).

B. POST-FECA DECISIONS

1. *Buckley v. Valeo*, 424 U.S. 1, 19-108 (1976)(upholding portions of the FECA because of compelling government interest in regulating campaign contributions and ensuring the legitimacy of elections. Striking down portions of FECA that limited the amounts campaigns could spend in an election, and stating there "is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate").

2. *Buckley v. Bellotti*, 435 U.S. 765, 787 (1978)(invalidating Massachusetts law prohibiting independent campaign expenditures by banks and corporations because the violation of free speech rights could not be justified by seeking to prevent the diminution of the citizen's confidence in government).

3. *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249-50 (1986)(holding that preparation and distribution of newsletter for members could not be prohibited under the First Amendment and finding that FECA restrictions were unconstitutional as applied to this non-profit organization, Otherwise, the campaign restrictions were up-held).

4. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990)(holding that Michigan's Campaign Finance Act did not violate the First Amendment by prohibiting corporate expenditures in support of candidates in election for state office and noting that "corporate wealth can unfairly influence elections when it is

deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions. We therefore hold that the State has articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations").

C. POST-BCRA DECISIONS

1. *McConnell v. FEC*, 540 U.S. 93, 218 (2003)(upholding most of the BCRA revisions to the FECA because of the need to prevent the actual or apparent corruption of the electoral process. The limits on independent expenditures in BCRA Section 315(d) were invalidated because giving parties a choice between increased coordinated spending or making independent expenditures infringed on independent expenditure prerogative).

2. *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 478-79 (2007)(holding that, as applied in this case, the BCRA violated the First Amendment by prohibiting issue advertisements expressing objections to the filibuster of judicial nominations during a short time period before a primary election).

IV. CITIZENS UNITED V. FEC, 558 U.S. ___ , 187 L.R.R.M. (BNA) 2961 (2010)

A. THE COURT'S DECISION

1. Facts:

a. Citizens United is a nonprofit corporation with an annual budget of $12 million, and it release a film in January 2008 called *Hillary: the Movie*.

b. The movie and advertisements for it included pejorative statements about Hillary Clinton during her campaign for President, and it directly urged viewers to vote against her as a candidate for public office.

c. Citizens United sued the Federal Election Commission claiming that its prohibition on distributing the movie using a video-on-demand cable television service violated the corporation's First Amendment rights to free speech.

d. The District Court denied these challenges, and the Supreme Court granted review of that decision.

2. Holding: The First Amendment prevents governmental restrictions on corporations, non-profit groups, and unions spending their regular treasury funds for independent public communications that "expressly advocate" the election or defeat of particular federal candidates. *Contributions to candidates and political parties were not at issue in the case, and current restrictions on them remain in effect.*

3. Reasoning:

    a. First Amendment protections are the most vital in the realm of political speech because it "is an essential mechanism of democracy."

    b. First Amendment protection cannot depend on the speaker, and corporations are entitled to the same freedom of speech rights enjoyed by other individuals.

    c. Free speech cannot depend on the medium that is used; internet and cable communications are entitled to the same robust political debate in the "marketplace of ideas."

    d. Wealthy individuals and unincorporated associations are entitled to unlimited independent expenditures on elections, so corporations should enjoy the same freedom of expression.

    e. It is necessary to overrule *Austin* and *McConnell* because they were not well reasoned and the Court's experience since their announcement has undermined their value.

4. Dissent (Justices Stevens, Ginsburg, Breyer, and Sotomayor):

    a. "The Court's ruling threatens to undermine the integrity of elected institutions across the Nation." By allowing corporations and unions to make direct communications with the public about elections for public office, the Court undermines the legitimacy of the electoral process.

    b. Corporations are not people. Although corporations amass considerable wealth and influence, they do not vote, and they do not hold political office. Consequently, the legislature has a legitimate interest in restricting their undue influence in political discourse surrounding elections as it does with other aspects of corporate activity.

c. The decision undermines the legitimacy of the Court by abandoning settled precedent. To abandon *Austin* and *McConnell* merely because the composition of the Court has changed is imprudent from an institutional perspective.

5. Dissent (Thomas): "The Court's constitutional analysis does not go far enough. The disclosure, disclaimer, and reporting requirements are also unconstitutional."

B. IMPLICATIONS

1. **Express Advocacy.** *Citizens United* eliminates the restrictions on corporations, non-profit groups, and unions from spending their treasury funds for independent public communications, including election-related messages.

2. **Effect on State Laws.** Half of the states (including CA, IL, OR and VA) permit unlimited spending on general-public express advocacy and other electoral speech. Restrictions in the other states on such express advocacy are endangered. New York officials are reviewing its laws to determine whether any adjustment is required.

3. **Endorsement Announcements.** *Citizens United* does not change the right of a labor organization to endorse candidates in their own publications and use brief quotes from a candidate's publications as part of the union's expression of its own views about a candidate so long as it does not reproduce the candidate's materials. *See* 11 C.F.R. §114.3(c)(1)-(6).

   a. *Citizens United* expands the ability of Unions to make public announcements about an endorsement for a candidate, so long as the communication is not coordinated with announcements from the candidate. *See* 11 C.F.R. §114.4(c)(6)(ii).

   b. Unions may sponsor appearances with the candidate, so long as the union does discriminate in terms of the news media entitled to participate. *See* 11 C.F.R. §114.3(c)(2).

   c. Unions may prepare voter guides even for the general public, so long as the documents are not coordinated with the candidate's campaign. *See* 11 C.F.R. §114.3(c)(4).

4. **Independent "527" Groups**. These IRS-registered (but not FEC-registered) political groups can still take unlimited individual, union, and corporate money. Now, they can make unlimited independent public communications including express advocacy, so long as their

donors and spending is disclosed in accordance with the Treasury regulations.

5. **Federal Taxation of Political Spending.** There is no change to the taxation principles. If a union, advocacy group, or trade association spends its regular treasury funds for partisan purposes among the public, it's usually subject to a thirty five (35%) tax on that spending. Business corporations cannot deduct their partisan spending.

6. **Contribution Limits.** Federal and state campaign contribution regulations are *not affected* by *Citizens United*. Corporations, unions, and advocacy groups still must rely on their federal or other voluntary PACs alone to contribute to candidates and parties.

7. **Contributions to and by Federal PACs.** Restrictions on contributions to and by federal PACs that contribute to candidates and parties are *not affected* by *Citizens United*. The impact on federal PACs that only undertake independent expenditures is unclear – a pending lower court case is considering this. Still to be resolved: can contributions to speech-only federal PACs be limited, and can groups contribute to them?

8. **Disclosure and Disclaimer Requirements.** *Citizens United* upheld current federal requirements that anyone who spends for either express-advocacy independent expenditures or broadcast "electioneering communications" must promptly file FEC reports that itemize their spending and list anyone who contributed for that purpose. *Citizens United* also upheld current federal requirements that independent expenditure and "electioneering communication" messages themselves state who paid for them and that no candidate authorized them.

9. **Coordination with Candidates and Parties.** If a group coordinates its public electoral communications with a federal candidate or political party, it's treated as an in-kind contribution to that candidate or party. *Citizens United* does *not affect* that rule, and since the contribution rules also remain intact, such coordination by unions, corporations, and other groups remains unlawful.

10. **Membership Communications.** Unions and other groups can still communicate express advocacy to their members, but they must still file FEC reports that disclose much of that spending. The same rules continue to apply to business corporations that make express-advocacy communications to their executives and shareholders.

11. **Lobbying, Issue Advocacy and Ballot Measures.** Unions, corporations, and other groups remain subject to all related registration and other disclosure laws related to such activity.