

Frequently Asked Questions on *Citizens United v. Federal Elections Commission*

While the full impact of the Supreme Court's decision in *Citizens United v. Federal Elections Commission* will not be known until after the 2010 election cycle, many nonprofit organizations trying to navigate this new legal landscape are wondering how the *Citizens United* decision affects their day-to-day work. For more background information on *Citizens United*, visit our *Citizens United* resource page at: <http://www.afj.org/connect-with-the-issues/citizens-united-overview.html>.

The following questions and answers explore what the decision means to you.

***Citizens United* – the Basics**

- Q: Did the decision differentiate between nonprofit corporations and for-profit corporations?**
- A: No. The decision is predicated on an entity's corporate status only; it did not differentiate between nonprofits and for-profits, nor between types of nonprofits.
- Q: Can corporations now make contributions (cash or in-kind) to federal candidates?**
- A: No. *Citizens United* does not permit corporations to make cash or in-kind contributions (including mailing lists, polling data, or other valuable resources) to candidates or to make communications that have been coordinated with a candidate for federal office or a political party.¹
- Q: What impact does *Citizens United* have on 501(c)(3)s, including public charities and private foundations?**
- A: The decision does not change the electoral activities permitted by 501(c)(3)s. Regardless of the changes *Citizens United* made to election law, federal tax law still absolutely prohibits 501(c)(3)s from supporting or opposing candidates for public office. 501(c)(3)s cannot endorse candidates or make independent expenditures suggesting who is the "better" candidate without jeopardizing their tax-exempt status.

¹ The Federal Elections Commission Regulations define "coordinated communications" (11 CFR 109.21). The FEC is in the process of revising some parts of the definition of "coordinated communications." For more information on the status of this rulemaking go to: http://www.fec.gov/law/law_rulemakings.shtml.

Nonetheless, 501(c)(3)s play a very important role in the electoral process by engaging in nonpartisan get out the vote activities, educating candidates about the issues, and engaging in nonpartisan issue advocacy. Go to: <http://www.afj.org/assets/resources/resource1/Electoral-Activities-Checklist.pdf> for more information on how 501(c)(3)s can safely participate in elections.

Q: Did *Citizens United* change the federal tax rules regulating our 501(c)(4)'s partisan electoral activities?

A: No. The court's opinion in *Citizens United* deals **only** with campaign finance laws – not federal tax law.

Federal tax law requires that partisan activity, including those communications at issue in *Citizens United*, may not be the “primary activity” of a 501(c)(4), 501(c)(5) or 501(c)(6) organization. Additionally, under some circumstances, these organizations must pay a tax on political expenditures.² These tax laws are unchanged by *Citizens United*.

Q. What is an “Electioneering Communication?”

A. The *Citizens United* case did not change the definition of an “Electioneering Communication.” Under federal election law, an electioneering communication is a broadcast, cable, or satellite communication that (1) refers to a clearly identified federal candidate; (2) is distributed within 60 days of a general election or 30 days of a primary; and (3) is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives (11 CFR 100.29).

Q: What is an “Independent Expenditure?”

A. Under federal election law, an independent expenditure is any communication to the public that (1) “expressly advocates” the election or defeat of a clearly identified federal candidate, and (2) is not “coordinated” with any candidate or political party.

² An organization may be subject to a tax on expenditures made for political activities. Under section 527(f) of the Internal Revenue Code, the tax is imposed at the highest corporate rate on the lesser of: 1) the organization's annual net investment income; or 2) the aggregate amount expended on political activities during that year. For more information about this tax, see page 14 of *The Connection: Strategies for Creating and Operating 501(c)(3)s, 501(c)(4)s, and Political Organizations (Alliance for Justice)*.

Q. What is “Express Advocacy?”

A. The FEC defines express advocacy as “[u]nambiguously advocating the election or defeat of a clearly identified federal candidate.” It includes “magic words” such as “support,” “oppose,” “elect,” “defeat,” or “vote for,” and according to the FEC, express advocacy also includes a communication that, when taken as a whole and with limited reference to external events, can only be interpreted by a “reasonable person” as advocating the election or defeat of one or more clearly identified candidates (11 CFR 100.22).³

Q. What is a “Coordinated Communication?”

A. The *Citizens United* case left open the possibility for regulation of communications that are “coordinated” with a candidate. Under current FEC regulations, a communication is coordinated with a candidate when (1) it is paid, in whole or in part, by a person other than the candidate; (2) satisfies at least one content standard; and (3) satisfied at least one conduct standard (11 CFR 109.21). For more information about what constitutes a coordinated communication, see *Avoiding Coordinated Communications* (http://www.afj.org/connect-with-the-issues/avoiding_coordinated_communications.pdf), a fact sheet by Harmon, Curran, Spielberg & Eisenberg LLP.

Q. Does the decision allow Social Welfare Organizations, Labor Unions and Trade Associations to engage in any new types of political activities?

A: Yes. All corporations, including 501(c)(4) social welfare organizations, 501(c)(5) labor unions⁴ and 501(c)(6) trade associations, may now make “independent expenditures” and “electioneering communications” in federal and state elections. Doing so will trigger disclosure and disclaimer requirements; see below for information about those rules. Of course, as described above, organizations must comply with applicable federal tax rules (including the primary purpose test).

³ Many legal scholars believe that after *Citizens United* a communication must contain “magic words” to be considered “express advocacy.”

⁴ While this opinion addresses corporations only, the holding applies equally to unions. On Friday, February 5, 2010, the Federal Election Commission issued an announcement making that clear.

Q: Does the decision affect state and local election laws?

A: This opinion applies equally to state and local election laws as well as federal elections. States and localities with laws that prohibit “independent expenditures” or “electioneering communications” by corporations will need to change their rules to comply with the Supreme Court’s directive.

Q: What does our organization need to know before we make independent expenditures or electioneering communications?

A: Although corporations and unions may now make independent expenditures and electioneering communications, they must:

- Comply with Federal tax law rules, including the primary purpose test and the tax on political expenditures, and
- Include “Paid for by” disclaimers and may need to file disclosure reports with the FEC.

When deciding whether to make a particular independent expenditure or electioneering communication, your organization should take into account its obligation to comply with the FEC’s disclaimer and disclosure rules. These rules are explained in *FEC Disclaimer and Disclosure Requirements* (http://www.afj.org/connect-with-the-issues/fec_disclaimer_and_disclosure_requirements.pdf), produced by Harmon, Curran, Spielberg & Eisenberg LLP.

Q: Our organization is a Qualified Nonprofit Corporations (QNC), is there any reason we should stay a QNC?

A: Qualified Nonprofit Corporations (QNCs), also known as MCFLs, are a special class of 501(c)(4) corporations that did not accept any business or labor contributions and met several other criteria. Prior to *Citizens United*, they were the only type of corporation that could make Independent Expenditures in support of/opposition to federal candidates. Now, QNCs are no longer unique in their ability to do so.

Existing QNCs should consult with their counsel before beginning to accept corporate and union money. There are some technical issues that remain unclear regarding FEC reporting and disclosure requirements for QNCs and the FEC has indicated its intent to initiate a rulemaking on this topic.

Q: Now that our organization can make independent expenditures to the general public, are there any benefits of communicating only with our members?

A: Yes, there are still benefits of having members and communicating exclusively with members:

- While member communications count as partisan political activity under the IRC's "primary purpose test," communications to an organization's members do not require payment of tax under 527(f).
- Disclosure requirements for communications to members are simpler than the rules that govern communications to the general public.
- No disclaimers are required for membership communications.
- Membership communications may, under some circumstances, be coordinated with a candidate or political party (though, if the organization is also making communications with the public, it will need to avoid having this coordination "taint" their public communications.)
- Membership communications may be cheaper and more effective because of the relationship between your members and the organization.

Q: Is there any reason we should keep our connected federal PAC?

A: Yes. A federal PAC will continue to be useful because a PAC:

- May make direct and in-kind contributions to federal candidates (which may not be made from general corporate treasury funds); and
- Unlike a 501(c)(4), labor union or trade association, a connected federal PAC is not limited in the amount of partisan electoral activity it may conduct. However, existing federal election law limits the source and amount of contributions to a federal PAC and imposes complex disclosure rules.

Citizens United – Examples

The following examples are applicable only to 501(c)(4) social welfare organizations, labor unions, and trade associations – not 501(c)(3)s – and all of the answers are based upon federal election law. Prior to engaging in these activities, the organization would also want to consider federal tax law.⁵ Note that if your organization is attempting to influence state candidate campaigns, the

⁵ An organization may be subject to a tax on expenditures made for political activities. Under section 527(f) of the Internal Revenue Code, the tax is imposed at the highest corporate rate on the lesser of: 1) the organization's annual net investment income; or 2) the aggregate amount expended on political activities during that year. For more information about this tax, see page 14 of *The Connection: Strategies for Creating and Operating 501(c)(3)s, 501(c)(4)s, and Political Organizations (Alliance for Justice)*.

answers may be different under state campaign finance laws and you should visit AFJ's State Law Resources (<http://www.afj.org/for-nonprofits-foundations/state-resources/>) or go to: <http://www.ncsl.org/default.aspx?tabid=19607> for updates from the National Conference of State Legislatures.

Q: Can our organization's executive director speak at a public press conference in support of our endorsed candidates for US House and US Senate?

A: Yes, a 501(c)(4), labor union or trade association may spend general treasury funds to communicate its endorsement of candidates to the general public, including through a press conference, so long as the announcement is not coordinated with the candidates. The organization would need to:

- Include appropriate "Paid for by" disclaimers on communications, consistent with FEC regulations (11 CFR 110.11), and
- May need to disclose the expenditures on FEC Form 5 (11 CFR 109.10).

The FEC has indicated it will initiate a rulemaking to consider changes to the disclosure and disclaimer rules that will apply to this type of communication.

Organizations seeking to avoid the FEC's disclosure and disclaimer rules may limit the announcement to the organization's regular press list and spend only a *de minimus* amount of money from the corporation or union's general treasury on the event.

Q: Can we use our corporation's general treasury funds to pay for signs that say "Brown for Congress 2010?"

A: Yes. All corporations (and labor unions) may now use general treasury funds to make this type of communication, so long as the communication is not coordinated with the candidate. A connected PAC is no longer necessary to make such communications. The organization would need to:

- Include appropriate "Paid for by" disclaimers on communications, consistent with FEC regulations (11 CFR 110.11), and
- Disclose the expenditures on FEC Form 5 (11 CFR 109.10).

The FEC has indicated it will initiate a rulemaking to consider changes to the disclosure and disclaimer rules that will apply to this type of communication.

Q: Our organization does not endorse candidates, but we want to engage in issue advocacy that references candidates for federal office. Is that allowed?

A: Yes, your organization can now use general treasury funds to pay for issue advocacy communications that talk about your issue in a way that encourages the general public to vote for or against a candidate. If the communication is: (1) broadcast on network or cable television or on the radio; (2) and is distributed during the period close to an election; (3) and refers to a federal candidate (without using any “express advocacy”), the organization will need to:

- Include “Paid for by” disclaimers on their communications, consistent with FEC regulations (11 CFR 110.11);
- Disclose the communication on FEC Form 9 (11 CFR 104.20).

The information contained in this fact sheet and any attachments is being provided for informational purposes only and not as part of an attorney-client relationship. The information is not a substitute for expert legal, tax, or other professional advice tailored to your specific circumstances, and may not be relied upon for the purposes of avoiding any penalties that may be imposed under the Internal Revenue Code. Alliance for Justice publishes plain-language guides on nonprofit advocacy topics, offers educational workshops on the laws governing the advocacy of nonprofits, and provides technical assistance for nonprofits engaging in advocacy. For additional information, please feel free to contact Alliance for Justice.

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