Citizens United: The Decision and the Legislative Response

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Introduction

The U.S. Supreme Court's ruling in *Citizens United v. Federal Election Commission* dramatically reshaped campaign finance law by empowering corporations and unions to spend unlimited amounts from their general treasuries for independent expenditures expressly supporting or opposing federal candidates. Congress and many state legislatures have responded to the decision by taking up legislation that would tighten disclosure requirements for corporate and union expenditures in election campaigns and would implement other reforms.

Federal Law Before *Citizens United*

Corporate Expenditures

Direct corporate contributions to federal candidates have been prohibited since 1907.[1] In 1947, Congress also banned corporations (and unions) from making independent expenditures supporting or opposing federal candidates.[2] The prohibition on corporate independent expenditures was narrowly construed by the Supreme Court in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 469 U.S. 238 (1986) (*MCFL*) to apply only to independent expenditures that expressly advocate the election or defeat of a clearly identified federal candidate.[3]

In the Federal Election Campaign Act of 1971, Congress allowed corporations to make contributions to candidates and express advocacy independent expenditures through a separate segregated fund, commonly known as a political action committee (PAC).[4] Corporate federal PACs are subject to a variety of restrictions. A corporate PAC may solicit voluntary donations only from the corporation's stockholders, executives and administrative personnel, and their families.[5] Twice yearly, the PAC may also solicit all other employees of the corporation and their families.[6] Contributions to a corporate PAC are limited to $5,000 annually from any one contributor.[7] PAC donations to federal candidates are subject to certain limits,[8] but a PAC may

[1] *Citizens United v. Federal Election Commission*, No. 08-205, slip op. at 26-27 (January 21, 2010) (Kennedy, J.).

[2] *Id*. at 43.

[3] Daniel Hays Lowenstein, Richard L. Hasen & Daniel P. Tokaji, Election Law: Cases and Materials 827-828 (4th ed. 2008).

[4] *Id.* at 823.

[5] Federal Election Commission, *Campaign Guide for Corporations and Labor Organizations*, 20 (2007), at http://www.fec.gov/pdf/colagui.pdf.

[6] *Id*. at 21.

[7] *Id.* at 10.

make unlimited express advocacy independent expenditures.[9] Periodic reports of receipts and disbursements must be made to the Federal Election Commission.[10]

Relying on its earlier ruling in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court held in *MCFL* that only communications that utilize words such as "vote for," "elect," "support," "vote against," "defeat," or "reject" constitute express advocacy and may not be paid for with corporate general treasury funds.[11] Consequently, corporations were free to use their general treasury funds to finance independent advertising campaigns that attacked or praised a clearly identified candidate shortly before an election, provided they did not explicitly urge a vote for or against the candidate.[12] The quantity of this so-called "issue advertising" grew exponentially in the elections from 1996 to 2000.[13]

Acting out of concern that corporations were evading the ban on the use of general treasury funds to influence federal elections, Congress passed the Bipartisan Campaign Reform Act of 2002 (BCRA), commonly known as McCain-Feingold.[14] BCRA prohibited a corporation from using general treasury funds to finance an "electioneering communication," defined as a broadcast, cable, or satellite communication that refers to a federal candidate 30 days before a primary election or 60 days before a general election and is targeted to the relevant electorate but does not expressly advocate the election or defeat of that candidate.[15] Electioneering communications must be financed with PAC money instead.[16] A subsequent Supreme Court decision in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (*WRTL*) limited the reach of this provision. In that case, the court held that only communications that cannot be reasonably interpreted except as an appeal to vote for or against a specific candidate may not be funded with general treasury funds.[17] Consequently, at the time *Citizens United* was decided, corporations were forbidden only from using general treasury funds to finance express advocacy and its "functional equivalent," as defined in *WRTL*.

Disclosure of Independent Expenditures

BCRA also included several important provisions requiring persons to disclose information about independent expenditures they finance. Electioneering communications, as defined above, must contain a disclaimer notice identifying the person who financed the communication.[18] In addition, a person who spends more than $10,000 in a calendar year on electioneering communications must file a report within 24 hours with the Federal Election

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[8] *Id.* at 11.
[9] *Id.* at 32.
[10] *Id.* at 45-51.
[11] Lowenstein et al. at 828, 851.
[12] *Id.* at 851.
[13] *Id.*
[14] *Citizens United v. Federal Election Commission*, No. 08-205, slip op. at 49 (January 21, 2010) (Stevens, J., dissenting).
[15] Lowenstein et al. at 851.
[16] *Id.*
[17] *Id.* at 859.
[18] 2 U.S.C.A. § 441d.

Commission that includes certain information.[19] The report must identify the person making the disbursements for electioneering communications, the amount of each disbursement of more than $200 during the calendar year and the person to whom each disbursement was made, and the election and candidate to which each electioneering communication pertains.[20] In addition, if the disbursements were made out of a segregated bank account consisting solely of contributions from certain individuals for the purpose of making electioneering communications, the names of all individuals who contributed $1,000 or more to this account during a certain period must be disclosed.[21] If the disbursements were not made out of such a segregated bank account, the names of all contributors who contributed $1,000 or more to the person making the disbursement during a certain period must be disclosed.[22] However, under a Federal Election Commission regulation, corporations and labor unions are only required to disclose donations that were made for the purpose of furthering electioneering communications under this provision of the statute.[23] General, unrestricted contributions to corporations and labor unions do not have to be disclosed. An additional report must be filed within 24 hours once a person makes additional disbursements for electioneering communications aggregating to more than $10,000 since the previous report.[24]

Under federal law, "independent expenditures" are expenditures that, unlike electioneering communications, expressly advocate the election or defeat of a federal candidate.[25] Communications defined as independent expenditures must also include a disclaimer identifying the person who paid for the communication.[26] Within 48 hours of a person making independent expenditures aggregating $10,000 or more, a report must be filed with the Federal Election Commission including information similar to that required in an electioneering communications report.[27] The independent expenditure report must disclose only the name of each person who contributed more than $200 to the person filing the report "for the purpose of furthering an independent expenditure."[28] An additional report must be filed within 48 hours each time a person makes independent expenditures aggregating to $10,000 since the previous report.[29] However, if independent expenditures aggregating $1,000 or more are made after the twentieth day before an election, a report must be filed within 24 hours, and additional

[19] 2 U.S.C.A. §434(f)(1).
[20] 2 U.S.C.A. §434(f)(2).
[21] 2 U.S.C.A. §434(f)(2)(E).
[22] 2 U.S.C.A. §434(f)(2)(F).
[23] 11 C.F.R. 104.20(c)(9). In addition, three members of the Federal Election Commission stated in August 2010 that they interpret this provision even more narrowly, as requiring disclosure only of donors who intended to fund the particular electioneering communications being reported, not just electioneering communications in general. Statement of Reasons in MUR 6002, available at http://eqs.sdrdc.com/eqsdocsMUR/10044274536.pdf. Since these commissioners control three votes on the six member commission, they have the power to block enforcement of a more expansive interpretation of the donor disclosure requirement.
[24] 2 U.S.C.A. §434(f)(4)(B).
[25] 2 U.S.C.A. § 431(17).
[26] 2 U.S.C.A. § 441d.
[27] 2 U.S.C.A. § 434(g)(2) and (3).
[28] 2 U.S.C.A. § 434(c)(2)(C).
[29] 2 U.S.C.A. § 434(g)(2)(B).

reports are required each time independent expenditures aggregate to $1,000 since the previous report, until the day before the election.[30]

Citizens United v. Federal Election Commission

Background

Citizens United is a nonprofit corporation that produced a film during the 2008 presidential campaign critical of Senator Hillary Rodham Clinton called *Hillary: The Movie*.[31] *Citizens United* wished to distribute the film through Video on Demand on digital cable television within 30 days of the presidential primary elections, and also produced advertisements promoting the film to run on broadcast and cable television.[32] These communications, financed by *Citizens United's* general treasury funds, arguably fit the definition of prohibited corporate "electioneering communications."[33] Fearing prosecution, *Citizens United* filed suit against the FEC, claiming that the ban on corporate electioneering communications and the disclaimer and reporting requirements were unconstitutional as applied to the movie and the advertisements.[34] Relying on Supreme Court precedents, the federal district court rejected the constitutional challenge and found that the film and the advertisements were in fact electioneering communications that could not be paid for by corporate treasury funds.[35]

The Supreme Court agreed to hear the case, and oral arguments were held in March 2009.[36] However, instead of focusing on the specific facts of the case, several members of the court expressed interest in the more fundamental question of whether restrictions on corporate campaign spending are compatible with the First Amendment guarantee of free speech.[37] In a highly unusual move, the court postponed a decision in the case at the end of its term in June and set new oral arguments for September on the issue of whether the court ought to overturn two previous decisions upholding the power of government to restrict corporate spending on elections.[38] Those precedents were *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), (upholding a Michigan law that prohibited corporations from using general treasury funds to make independent expenditures supporting or opposing candidates) and *McConnell v. FEC*, 54 U.S. 93 (2003), (upholding BCRA).[39]

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[30] 2 U.S.C.A. § 434(g)(1).

[31] *Citizens United v. Federal Election Commission*, No. 08-205, slip op. at 2 (January 21, 2010) (Kennedy, J.).

[32] *Id.* at 3.

[33] *Id.* at 4.

[34] *Id.*

[35] *Id.* at 4-5.

[36] Robert Barnes, *Supreme Court to Revisit Election Financing in Potential Landmark Case*, *The Washington Post*, September 5, 2009, at http://www.washingtonpost.com/wp-dyn/content/article/2009/09/04/AR2009090402497.html.

[37] *Id.*

[38] *Id.*

[39] *Id.*

The Court's Ruling

The court delivered its ruling in January 2010.[40] Justice Kennedy delivered the opinion of the court for a majority of five justices, which also included Justice Scalia, Justice Thomas, Justice Roberts, and Justice Alito.[41] Justice Stevens filed a dissenting opinion that was joined by Justice Ginsburg, Justice Breyer, and Justice Sotomayor.[42]

As a preliminary matter, the majority rejected several possibilities for deciding the case on narrow grounds, such as finding that the film and advertisements did not fit the definition of an electioneering communication.[43] The court found it necessary to consider the constitutionality of the prohibition on corporate independent expenditures and to reconsider *Austin*, which had upheld such a restriction.[44] The majority rejected the argument that the ability to form a PAC gives corporations an adequate opportunity to express political views.[45] A PAC is separate from a corporation and does not allow the corporation itself to speak, the court said.[46] Moreover, PACs are burdensome and expensive to operate.[47]

The majority argued that prior to *Austin*, the Supreme Court had consistently rejected the idea that corporate speech could be subjected to greater restrictions than the speech of individuals.[48] In *Austin*, however, the court had departed from this position, upholding a state prohibition on corporate independent expenditures as a permissible effort by the government to combat "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form …".[49] The majority contended that this reasoning in *Austin* effectively allowed the government to suppress corporate speech in order to give less wealthy speakers greater influence in elections.[50] But that approach is inconsistent with the First Amendment principle that "political speech cannot be limited based on a speaker's wealth".[51] The government may not make "judgments about which strengths should be permitted to contribute to the outcome of an election" or "use the election laws to influence the voters' choices."[52] Moreover, *Austin* would seem to permit Congress to prevent media corporations from speaking about politics, a "dangerous and unacceptable" result, although

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[40] *Citizens United v. Federal Election Commission*, No. 08-205, slip op. at 1 (January 21, 2010) (Kennedy, J.).

[41] *Id.*

[42] *Citizens United v. Federal Election Commission*, No. 08-205, slip op. at 1 (January 21, 2010) (Stevens, J., dissenting).

[43] *Citizens United v. Federal Election Commission*, No. 08-205, slip op. at 5-12 (January 21, 2010) (Kennedy, J.).

[44] *Id*. at 19-20.

[45] *Id*. at 21.

[46] *Id*.

[47] *Id*.

[48] *Id*. at 26, 30.

[49] *Id*. at 31 (quoting *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990)).

[50] *Id*. at 34.

[51] *Id*.

[52] *Id.* (quoting *Davis v. Federal Election Commission*, No. 07-320, slip op. at 16 (June 26, 2008) (Alito, J.)

federal law presently exempts media corporations from the ban on corporate political expenditures.[53] The majority declared that the restriction on corporate independent expenditures is an unlawful attempt by government to "control thought" by determining "where a person may get his or her information or what distrusted source he or she may not hear…"[54] "The First Amendment confirms the freedom to think for ourselves," the court concluded.[55]

The majority also rejected the government's argument that the prohibition on corporate independent expenditures was a legitimate means of preventing corruption. In *Buckley*, the court held that large contributions to candidates may be limited to prevent their being used to secure a corrupt *quid pro quo*.[56] But the *Citizens United* majority said this reasoning does not apply to independent expenditures, which may not be coordinated with a candidate and consequently are less likely to be made as part of an improper *quid pro quo* arrangement.[57] Therefore, regulation of independent expenditures, including corporate independent expenditures, may not be justified as an effort to prevent corruption or the appearance of corruption.[58] Independent expenditures on behalf of a candidate might earn a candidate's gratitude and enhance access to the candidate, but that is not "corruption" and is not a valid basis for limiting independent expenditures.[59]

Finally, the majority rejected the argument that corporate independent expenditures may be prohibited to ensure that shareholders are not compelled to fund political speech they oppose.[60] This rationale would allow the government to ban the political speech of media corporations.[61] Furthermore, this problem may be adequately addressed through the normal remedies available to objecting shareholders.[62]

Having rejected all the arguments advanced to support *Austin*, the court found that *stare decisis* was not sufficient to justify continued adherence to that decision.[63] The court overruled *Austin* and the part of *McConnell* that had relied on *Austin* in upholding BCRA's prohibition on corporate electioneering communications.[64] Consequently, the federal statutes prohibiting the use of corporate general treasury funds for express advocacy independent expenditures and electioneering communications were invalidated and could not be applied to *Citizens United's* film and advertisements.[65]

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[53] *Id*. at 35.
[54] *Id*. at 40.
[55] *Id*.
[56] *Id*. at 41.
[57] *Id*.
[58] *Id*. at 41-42.
[59] *Id*. at 45.
[60] *Id*. at 46.
[61] *Id*.
[62] *Id*.
[63] *Id*. at 47-50.
[64] *Id*. at 50.
[65] *Id*.

The majority strongly affirmed the constitutionality of the disclaimer and reporting requirements for electioneering communications, however.[66] Disclosure requirements "do not prevent anyone from speaking" the court noted, and may be justified as a means of providing information to voters.[67] Even commercial advertisements, such as *Citizens United's* ads promoting its film, may be required to include a disclaimer identifying the person who funded the ads because that information is relevant to the electorate.[68] Inclusion of the disclaimer also does not impose an undue burden on the sponsor.[69] In addition, the government may require reports of contributions and expenditures for political speech even if that speech is not express advocacy or its equivalent.[70] The court concluded that the public's interest in "knowing who is speaking about a candidate shortly before an election" was sufficient to justify the application of disclaimer and reporting requirements to both *Citizen's United's* film and its ads.[71] Effective disclosure of corporate political speech also enables shareholders to "hold corporations…accountable for their positions" through "the procedures of corporate democracy."[72] Disclosure also benefits citizens by allowing them to make "informed decisions and give proper weight to different speakers and messages."[73] However, the court noted that requiring disclosure of donors' names could be unconstitutional in some cases if "there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed."[74] *Citizens United* had provided no evidence that its members risked such retaliation, however.[75]

Response to the Decision

Citizens United provoked a strong political reaction. In his State of the Union address in January, President Obama strongly denounced the decision as opening the "floodgates for special interests – including foreign corporations – to spend without limit in our elections" and called for a congressional response.[76] Republican congressional leaders, however, praised the decision as rightfully vindicating the free speech rights of corporations.[77] A public opinion poll showed overwhelming opposition to the ruling, with 80% saying they disagreed with it, and 65% saying

[66]The court voted 8 to 1 to uphold the disclosure and disclaimer requirements. Only Justice Thomas dissented from this holding. *Citizens United v. Federal Election Commission*, No. 08-205, slip op. at 1 (January 21, 2010) (Thomas, J.).

[67]*Id*. at 51 (quoting *McConnell v. Federal Election Commission*, 54 U.S. 93 (2003)).

[68]*Id*. at 52-53.

[69]*Id*. at 53.

[70]*Id*.

[71]*Id*. at 54-55.

[72]*Id*. at 55.

[73]*Id*.

[74]*Id*.

[75]*Id*. at 54-55.

[76]President Barack Obama, State of the Union Address (January 27, 2010) (transcript available at www.whitehouse.gov/the-press-office/remarks-president-state-union-address).

[77]Robert Barnes & Dan Eggen, *Court Rejects Corporate Political Spending Limits*, *The Washington Post*, January 22, 2010 at A1.

they disagreed strongly.[78] Opposition also cut across political party lines, with large majorities of Democrats, Republicans, and independents expressing disapproval.[79]

Federal Response

Federal legislation mitigating the impact of the ruling became a high priority for President Obama and congressional Democrats.[80] In April, Sen. Charles Schumer (D-NY) and Rep. Chris Van Hollen (D-MD) introduced the congressional leadership's proposal, the "Democracy is Strengthened by Casting Light on Spending in Elections Act" or the DISCLOSE Act.[81] The House of Representatives passed the bill on June 24 by a vote of 219 to 206, with the support of two Republican and most Democratic members.[82] As passed by the House, the bill included three major reforms of federal election law pertinent to this report: (1) a prohibition on independent political expenditures by government contractors; (2) tighter restrictions on the electoral activity of domestic subsidiaries of foreign corporations; and (3) increased disclosure by entities that make independent expenditures for political advertising.

Federal law currently prohibits government contractors from making campaign contributions, although they may form political action committees.[83] The DISCLOSE Act would have prohibited federal contractors with contracts larger than $10 million from making independent expenditures or electioneering communications in federal elections.[84] While this provision might appear incompatible with the broad endorsement of corporate free speech in *Citizens United*, the risk that independent expenditures may be used to corrupt the procurement process arguably provides a special constitutional justification for banning such expenditures by government contractors.[85] The bill also would have banned recipients of assistance under the Troubled Asset Relief Program and holders of leases for oil and gas drilling in the Outer Continental Shelf from making contributions, independent expenditures, or electioneering communications in federal elections.[86]

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[78]Dan Eggen, *Corporate Sponsorship Is Campaign Issue on Which Both Parties Can Agree*, *The Washington Post*, February 18, 2010 at A15.

[79]*Id*.

[80]Dan Eggen, *Top Democrats Seek Broad Disclosure on Campaign Financing*, *The Washington Post*, April 29, 2010.

[81]*Id*.

[82]Information on H.R. 5175, 111th Cong., available at http://thomas.loc.gov.

[83]2 U.S.C.A. § 441c.

[84]H.R. 5175, 111th Cong. § 101 (2010).

[85]*See* Letter to the Honorable Saqib Ali from Assistant Attorney General Sandra Benson Brantley, dated March 9, 2010.

[86]H.R. 5175 § 101.

Federal law prohibits foreign nationals from making contributions or expenditures in federal, state, and local elections.[87] This prohibition includes corporations that are incorporated under the laws of another country.[88] The DISCLOSE Act would have significantly strengthened the application of this prohibition to the domestically incorporated subsidiaries of foreign corporations that are subject to substantial control by foreign nationals. A corporation in which foreign nationals control specified percentages of voting shares, in which a majority of the board of directors are foreign nationals, or in which a foreign national has power to direct the decision making process of the corporation would be prohibited from making contributions, independent expenditures, or electioneering communications.[89] This provision was in response to concerns such as those expressed by President Obama in his State of the Union Address that *Citizens United* could open the door to direct participation of foreign-influenced corporations in U.S. elections.

The most important provisions of the DISCLOSE Act would have provided additional information about political expenditures to the public. The bill expanded the definition of "independent expenditure" to include the functional equivalent of express advocacy, thereby subjecting more political advertising to the stringent reporting requirements applicable to independent expenditures.[90] Under current law, electioneering communications are broadcast, cable, and satellite communications that refer to a clearly identified federal candidate within 30 days of a primary election and 60 days of a general election, but do not expressly advocate the election or defeat of that candidate.[91] The bill expanded the definition of "electioneering communications" to include communications made up to 120 days before an election, thereby significantly increasing the amounts of communications about candidates that must be reported.[92]

The DISCLOSE Act also required entities that make political expenditures to disclose additional information about their donors. These provisions were intended to prevent corporations, unions, and other persons from keeping their role in funding political advocacy secret by funneling their money through nonprofit organizations that may make political expenditures without disclosing the source of the funds.[93] The donor reporting requirements apply to "covered organizations" including corporations, labor organizations, and various tax

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[87] 2 U.S.C.A. § 441e.

[88] L. Paige Whitaker, *et al.* Congressional Research Service, Legislative Options After *Citizens United* v. FEC: Constitutional and Legal Issues 9 (2010) *at* http://www.fas.org/sgp/crs/misc/R41096.pdf. Domestic subsidiaries of foreign corporations are allowed to form political action committees to make contributions and expenditures, but there are restrictions on the involvement of foreign nationals in the activities of such committees. *Id*.

[89] H.R. 5175 § 102. Unlike electioneering communications, all independent expenditures must be reported, whether or not they are made shortly before an election. In addition, independent expenditures made within 20 days of an election must be reported each time expenditures aggregate to $1,000. 2 U.S.C.A. § 434(g). Electioneering communications must be reported each time they aggregate to $10,000. 2 U.S.C.A. § 434(f).

[90] H.R. 5175 § 201.

[91] 2 U.S.C.A. § 434(f)(3)(A).

[92] H.R. 5175 § 202.

[93] R. Sam Garrett, L. Paige Whitaker, Erika K. Lunder, Congressional Research Service, The DISCLOSE Act (H.R. 5175): Overview and Analysis 12 (2010) at http://electionlawblog.org/archives/CRS_Disclose.pdf.

exempt organizations,[94] including social welfare organizations,[95] trade associations (including chambers of commerce),[96] and political organizations not subject to regulation as a political committee.[97] Covered organizations that make independent expenditures of $10,000 or more in a calendar year would be required to report the name of each donor who gave $600 or more to the organization during a specified period either for the purpose of political activity or without specifying how the money could be used.[98] Covered organizations that make electioneering communications exceeding $10,000 in a calendar year would be required to report all donors who gave $1,000 or more to the organization during a specified period either for the purpose of political activity or without specifying how the money could be used.[99] Under the bill, a covered organization that wished to limit its obligation to disclose donors to only those who give to the organization explicitly for political purposes could utilize a "campaign related activity account." If a covered organization used the campaign related activity account as its exclusive vehicle for funding independent expenditures and electioneering communications, the organization would generally have to disclose only the donors to that account who contributed at least a specified amount.[100] All donors to the account must intend that their money be used for political activity.[101]

Another important provision of the DISCLOSE Act would enhance the disclaimers that independent expenditures and electioneering communications must include. In addition to identifying themselves in these political communications, covered organizations would also have to include statements identifying persons who made large donations that funded their communications.[102] Under current law, independent expenditures and electioneering communications are only required to include the name of the organization that funded the communication, specified contact information for that organization, and a statement that the communication was not authorized by any candidate.[103] In addition, radio and television communications must include a spoken statement identifying the person who paid for the communication as being responsible for its content.[104] This message must be read by a "representative" of the payor.[105] The DISCLOSE Act would require an individual or the highest ranking official of a covered organization that makes independent expenditures or electioneering communications to personally deliver a spoken statement or appear on camera to identify themselves or their organization as approving the communication.[106] In addition, if an individual or covered organization made a specified large donation that funded the communication, that individual or the highest ranking official of that organization would have to personally deliver a

[94]H.R. 5175 § 211.
[95]Organized under § 501(c)(4) of the Internal Revenue Code.
[96]Organized under § 501(c)(6) of the Internal Revenue Code.
[97]Organized under § 527 of the Internal Revenue Code.
[98]H.R. 5175 § 211.
[99]*Id*.
[100]H.R. 5175 § 211 and 213.
[101]H.R. 5175 § 213.
[102]H.R. 5175 § 214.
[103]2 U.S.C.A. § 441d(a)(3).
[104]2 U.S.C.A. § 441d(d)(2).
[105]*Id*.
[106]H.R. 5175 § 214.

similar disclaimer statement.[107] Finally, if several individuals or covered organizations made specified large donations that funded the communication, the five largest donors (or in the case of a radio communication, two largest donors) would have to be identified in the communication, together with the amount each donated.[108] This "top five funders list" would not have to be read personally by the donors, however (except in the case of a radio communication).[109]

The DISCLOSE Act also included two other noteworthy provisions. If a covered organization provides a regular, periodic report on its finances or activities to its shareholders, members, or donors, it would have to include information about the independent expenditures and electioneering communications it finances in that report.[110] The report would have to disclose the date and amount of each independent expenditure or electioneering communication, the candidate identified in the communication, and the source of the funds.[111] A covered organization that maintains a website would also have to post a hyperlink on the website to the page on the Federal Election Commission website where the organization's independent expenditure and electioneering communications reports are available.[112]

An important substantive amendment to the DISCLOSE Act was adopted during its passage through the House. This amendment exempted certain large nonprofit corporations from the Act's requirements. The exemption applied to organizations that (1) were organized under § 501(c)(4) of the Internal Revenue Code for the previous 10 years; (2) have at least 500,000 dues-paying members, with at least one dues-paying member from each state; (3) receive less than a specified amount of their funds from corporations and labor unions; and (4) do not use any funds from corporations or labor unions for independent expenditures or electioneering communications.[113] This exemption was designed to apply to the National Rifle Association, which had vowed to oppose the bill unless it was exempted from its requirements.[114] However, several other large groups, such as the American Association of Retired Persons, would also qualify for the exemption.[115]

The DISCLOSE Act failed to advance in the Senate on July 27 when Republicans unanimously opposed the measure, preventing the Democratic leadership from obtaining the 60 votes required to end debate and proceed to a vote.[116] The Senate took up the bill again on September 23, but it stalled a second time when it failed to attract any Republican support and thus fell short of the 60 vote threshold needed to advance.[117] Republicans opposed the bill

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[107] *Id*.
[108] *Id*.
[109] *Id*.
[110] H.R. 5175 § 301.
[111] *Id*.
[112] *Id*.
[113] H.R. 5175 § 211.
[114] Dan Eggen, *Another Victory for the Bulletproof NRA*, *The Washington Post*, June 17, 2010 at A19.
[115] *Id*.
[116] Dan Eggen, *Bill on Political Ad Disclosures Falls Short in Senate*, *The Washington Post*, July 28, 2010 at A3.
[117] Information on S. 3628, 111th Cong., available at http://thomas.loc.gov.

because they said it was a partisan effort to suppress the speech of corporations and other groups that oppose Democratic policies by burdening them with onerous disclosure requirements.[118]

The issues the DISCLOSE Act was intended to address were the subject of considerable attention and controversy in the 2010 congressional elections. An analysis by *The Washington Post* published on October 4 showed that at that time independent groups (not including candidates or the Democratic and Republican parties) had already spent five times more on the 2010 congressional elections than they had spent on the 2006 congressional elections.[119] Equally significantly, 55% of that spending in 2010 was by independent groups that did not disclose their donors.[120] In contrast, in the 2006 congressional elections, only 6% of spending by independent groups was from undisclosed sources.[121] According to the analysis, this independent spending was overwhelmingly in favor of Republican candidates.[122] However, a subsequent analysis by the *Post* published on October 28 found that independent groups supporting Democrats, including some that do not disclose donors, were ramping up their spending and narrowing the disparity.[123]

The wave of independent campaign expenditures was the target of sustained attacks by the White House and its Democratic allies who alleged that corporate "special interests" were mounting a "stealth campaign" against them.[124] By secretly channeling their funds through nonprofit organizations, corporations were influencing the elections without disclosing their role, thereby preventing the voters from properly weighing the credibility of their claims, Democrats said.[125] One of the groups spending the most on the congressional elections was the U.S. Chamber of Commerce, which heavily favored Republican candidates and does not have to disclose its donors.[126] President Obama attacked the chamber for failing to disclose the sources of its campaign spending and suggested it might be using foreign funds from its overseas affiliates for that purpose.[127] The chamber strongly denied that foreign money is used for its political advertising.[128] Republicans also noted that Democrats were benefiting from spending by some groups that do not disclose their donors.[129]

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[118]Dan Eggen, *Bill on Political Ad Disclosures Falls Short in Senate*, *The Washington Post*, July 28, 2010 at A3.

[119]T. W. Farnam & Dan Eggen, *Outside Spending Up Sharply for Midterms*, *The Washington Post*, October 4, 2010 at A1.

[120]*Id.*

[121]*Id.*

[122]*Id.*

[123]T. W. Farnam & Dan Eggen, *Democratic Donors Catch Up*, *The Washington Post*, October 28, 2010 at A4.

[124]David Axelrod, *The Election Campaigners We Can't See*, *The Washington Post*, September 23, 2010 at A27.

[125]*Id.*

[126]Dan Eggen, *U.S. Chamber Puts Millions Into GOP Ads*, *The Washington Post*, October 9, 2010.

[127]Dan Eggen & Scott Wilson, *Obama Steps Up Attack on Chamber*, *The Washington Post*, October 11, 2010 at A1.

[128]*Id.*

[129]Dan Eggen, *U.S. Chamber Puts Millions Into GOP Ads*, *The Washington Post*, October 9, 2010.

State Responses

Citizens United also roiled state legislatures, many of which had to decide how to amend laws that were effectively rendered invalid by the decision. While *Citizens United* dealt directly only with federal law, its reasoning meant that the laws of 24 states that prohibited corporate or union independent expenditures supporting or opposing candidates were highly vulnerable to a court challenge.[130] Of those 24 states, 14 prohibited independent expenditures by both corporations and unions, 9 prohibited independent expenditures by corporations only, and 1 prohibited independent expenditures by unions only.[131] In addition, 23 states prohibit direct corporate contributions to candidates, but these prohibitions were not called into question by *Citizens United*, which dealt only with independent expenditures.[132]

Of the 24 states whose laws were affected by *Citizens United*, 17 considered legislation in 2010 that would change those laws.[133] In other states, regulatory actions were taken in response to the decision.[134] Several states, including Maryland, whose laws were not affected by the decision, considered legislation tightening regulation of independent expenditures by corporations and unions.[135] Developments in Maryland will be discussed separately below. **Exhibit 1** summarizes the action in the 15 states that have enacted laws or regulations in response to *Citizens United* to date. As shown in the exhibit, states have overwhelmingly focused on enhancing disclosure of independent expenditures. Although bills requiring shareholder or board approval of independent expenditures were introduced in 10 states,[136] in only 1 state, Iowa, has such a requirement been enacted.

[130]Ian Urbina, *24 States' Laws Open to Attack After Campaign Finance Ruling*, *The New York Times*, January 23, 2010.

[131]National Conference of State Legislatures, http://www.ncsl.org/default.aspx?tabid=19607.

[132]*Id*.

[133]*Id*.

[134]State & Federal Communications, *Citizens Unite*d Update, last updated October 6, 2010, available at http://www.ncsl.org/default.aspx?tabid=19607.

[135]These states included California, New York, and Washington. National Conference of State Legislatures, http://www.ncsl.org/default.aspx?tabid=19607.

[136]National Conference of State Legislatures, http://www.ncsl.org/default.aspx?tabid=19607.

Exhibit 1

State Legislative and Regulatory Responses to *Citizens United* in 2010

State	Bills or Regulations Enacted
Alaska	**SB 284:** Requires corporations, unions, and other entities to report independent expenditures they make and contributions made to them for the purpose of influencing an election. Also requires disclaimers on communications to be read by the funding organization's principal officer and include identification of the organization's top three funders.
Arizona	**HB 2788:** Requires corporations and unions to file reports when they make independent expenditures exceeding certain amounts in candidate elections.
Colorado	**SB 203:** Prohibits foreign corporations from making independent expenditures. Requires persons making independent expenditures over $1,000 to (1) file reports concerning the expenditures; (2) disclose donations made to the person for the purpose of making independent expenditures; (3) establish a separate account for the purpose of receiving all contributions and making all disbursements for independent expenditures.
Connecticut	**HB 5471:** Requires corporations and unions to file reports on their independent expenditures. Requires 501(c) and 527 organizations to disclose their top 5 funders in their political communications.
Iowa	**SF 2354:** Requires entities making independent expenditures to have the approval of a majority of the board of directors for the expenditure. Prohibits foreign nationals from making independent expenditures. Requires entities making independent expenditures to file reports and include disclaimers in communications. Only contributions to an entity for the purpose of making independent expenditures must be disclosed. The names of dues paying members of a labor union or other organization or the stockholders of a corporation are not required to be disclosed.
Massachusetts	**HB 4800:** An amendment to the FY 2011 budget (Section 34) requires a disclaimer on independent expenditures and electioneering communications transmitted through television, radio, or the internet. For radio and television advertisements, the disclaimer must be personally read by the highest ranking official of the corporation, labor union, or organization that paid for the communication. The state Office of Campaign and Political Finance also issued emergency regulations applying existing requirements for reporting of independent expenditures to corporations and other entities.

Minnesota	**SF 2471:** Requires an "association," including a corporation or other membership organization that wishes to make independent expenditures to do so by contributing to an "independent expenditure political committee" or "independent expenditure political fund." The association must report to the treasurer of the committee or fund the names and amounts contributed by certain persons whose membership dues or contributions to the association were used to make the contribution to the committee or fund. Independent expenditure political committees and funds must file reports that include information on persons who contributed to associations that have contributed to the committee or fund.
North Carolina	**HB 748:** Requires reporting of independent expenditures and electioneering communications by corporations, labor unions, and other persons. Donations to a person for the purpose of furthering an independent expenditure or electioneering communication must be disclosed. Political advertisements that are independent expenditures or electioneering communications must include disclaimers. The disclaimers must identify the persons making the five largest donations to fund the advertisement, if those donors intended to fund political advertising. The disclaimer must be spoken by the highest ranking officer a corporation or other organization that funded the advertisement.
Oklahoma	The Oklahoma State Ethics Commission adopted regulations removing restrictions on corporate and union independent expenditures.
Rhode Island	The Rhode Island Board of Elections issued regulations imposing reporting and disclaimer requirements for independent expenditures.
South Dakota	**HB 1053:** Requires persons making independent expenditures to file reports and include disclaimers in their communications. Organizations making independent expenditures that have majority ownership of less than 20 persons must disclose the name of each person who owns more than 10 % of the organization.
Tennessee	**HB 3182:** Removes restrictions on corporate independent expenditures and requires a corporation making such expenditures to file reports in the same manner as a political committee.
Texas	The Texas Ethics Commission adopted regulations clarifying the reporting requirements applicable to corporations and unions that make independent expenditures.
West Virginia	**HB 4647:** Repeals former prohibition on corporate independent expenditures and requires reporting of independent expenditures. Contributions made to persons for the purpose of furthering independent expenditures must be reported.

Wisconsin	The Wisconsin Government Accountability Board adopted emergency regulations requiring organizations making independent expenditures to file reports and include disclaimers on political communications. Contributions made to organizations for the purpose of making independent expenditures must be reported.

Source: National Conference of State Legislatures, http://www.ncsl.org/default.aspx?tabid=19607; *Citizens United* Update, State & Federal Communications, last updated October 6, 2010, available at www.stateandfed.com; and Department of Legislative Services.

Maryland Response

Maryland campaign finance law was not affected by the *Citizens United* decision. Corporations, unions, and other organizations are free to make independent expenditures from their general treasuries to support or oppose candidates or ballot issues in Maryland without the need to form a political action committee for this purpose.[137] In addition, corporations, unions, and other organizations may make contributions from their general treasuries directly to candidates' campaign finance entities and other campaign finance entities, subject to the same limits that are generally applicable to contributions to campaign finance entities.[138]

Corporations, unions, and other organizations that make independent expenditures in Maryland elections are not required to file any reports concerning those expenditures.[139] However, the State did require persons making independent expenditures for and against the constitutional amendment legalizing video lottery terminals that was submitted to voters in 2008 to file reports.[140] When a person made cumulative expenditures exceeding $10,000, the law required that person to file a report within seven days with the State Board of Elections.[141] Subsequently, the person was required to file campaign finance reports on the same dates and in the same manner as a ballot issue committee.[142] The law applied only to expenditures relating to that one ballot question.[143]

[137]Maryland State Board of Elections, Summary Guide to Maryland Candidacy and Campaign Finance Laws, § 5.1 (revised August 2010), available at http://www.elections.state.md.us/summary_guide/index.html.

[138]*Id*. While an organization is not required to form a political action committee to make independent expenditures or contributions to campaign finance entities, there are advantages to doing so. A political action committee may transfer a maximum of $6,000 in an election cycle to any one other campaign finance entity, with no aggregate limit on such transfers. Contributions from the organization's general treasury, however, are limited to $4,000 to any one campaign finance entity in an election cycle, with an aggregate limit of $10,000 on contributions to all campaign finance entities. *Id*.

[139]The one exception to this rule applies to political committees formally organized under the laws of another state. Such committees must report independent expenditures they make in Maryland to the State Board of Elections. *Id*. at § 6.1.

[140]2008 Maryland Laws Chapter 620.

[141]*Id*.

[142] *Id*.

[143] *Id*.

Maryland does require persons who make independent expenditures for campaign material to identify themselves on the campaign material. State law requires that all "campaign material" contain an "authority line" indentifying the person responsible for the material.[144] "Campaign material" is defined broadly to include material that "relates to a candidate, prospective candidate, or the approval or rejection of a question" and "is published or distributed."[145] The authority line requirement applies generally to "persons" who publish or distribute campaign material, not just campaign finance entities.[146] The authority line on campaign material distributed by a person other than a campaign finance entity must include the name and address of the person responsible for the campaign material.[147] In addition, if the campaign material supports or opposes a candidate, but is not authorized by the candidate, the authority line must also include a statement that the material "has not been authorized or approved by any candidate."[148]

Although *Citizens United* did not change Maryland law, several bills introduced in the 2010 session of the General Assembly were intended to address concerns about corporate election expenditures that were heightened by the decision.[149] The most significant proposals concerned increased disclosure of independent expenditures, shareholder approval of corporate independent expenditures, a prohibition on independent expenditures by state contractors, and a prohibition on direct contributions by business entities. **Exhibit 2** summarizes these proposals, none of which advanced out of a legislative committee.

Exhibit 2

Maryland Legislative Responses to *Citizens United* in 2010

Reporting and Disclaimer Requirements	**HB 1029/SB 543:** These bills would have required business entities and nonprofit organizations that make independent expenditures for campaign material to file campaign finance reports on the same dates as a campaign finance entity. An entity would only have to report independent expenditures, not contributions to the entity used to fund the expenditures. **HB 616:** This bill would have required a business entity or nonprofit organization that made an independent expenditure of $10,000 or more for campaign material to file a report within 12 hours describing the expenditure.

[144]Md. Code Ann., Election Law Article § 13-401.

[145]Md. Code Ann., Election Law Article § 1-101(k).

[146]Md. Code Ann., Election Law Article § 13-401(a)(1)(ii). However, this requirement cannot be applied to an individual who uses personal funds to independently produce campaign material. 80 Op. Att'y Gen. 110 (1995).

[147]*Id.*

[148]Md. Code Ann., Election Law Article § 13-401(b).

[149]Julie Bykowicz, *Court Ruling Sparks Bid to Curb Business Spending on Politics*, *The Baltimore Sun*, January 27, 2010 at 1.

HB 1087: This bill would have required a subsidiary of a foreign-owned business entity to include a statement on campaign material it distributes that identifies the nationality of the entity that paid for the material.

HB 1225: This bill would have required a business entity or nonprofit organization that makes an independent expenditure for campaign material to include its logo on the campaign material, if it has one.

Shareholder Approval

HB 986/SB 570: These bills would have prohibited a corporation from distributing campaign material unless (1) the material is true; (2) the board of directors determined that it is in the best interests of the corporation to distribute the material; and (3) the content of the material and expenditure of funds was approved by two-thirds of the shareholders. A stockholder alleging a violation of the bill would be authorized to sue the board of directors directly.

HB 616 This bill would have required a business entity that has stockholders to obtain the approval of a majority of the stockholders before making an independent expenditure for campaign material.

State Contractors

HB 690/SB 691: These bills would have prohibited persons "doing public business" from making independent expenditures for campaign material that supports or opposes a candidate or political party. In HB 690, "doing public business" is defined as making, during a 12-month period, one or more contracts with one or more governmental entities involving cumulative consideration of at least $100,000. In SB 691, "doing public business" is defined as making, during a 12-month period, one or more contracts with one or more governmental entities involving cumulative consideration of at least $5,000.

HB 616: This bill contained a prohibition on independent expenditures by persons "doing public business" identical to that contained in HB 690 above.

Prohibiting Business Contributions

HB 917/SB 601: These bills would have prohibited a business entity from making contributions to a campaign finance entity, except for a ballot issue committee.

Source: Department of Legislative Services

Exhibit 3 summarizes and compares federal law before and after *Citizens United*, changes in federal law proposed by the DISCLOSE Act, comparable provisions of Maryland law, and related changes in Maryland law proposed in 2010.

Exhibit 3

Overview of Federal and Maryland Law and Proposed Changes Relating to *Citizens United*

	Federal Law Before *Citizens United*	Federal Law After *Citizens United*	Changes Proposed by DISCLOSE Act	Maryland Law (and Proposed Changes)
Direct Corporate and Union Contributions to Candidates	Prohibited. Corporations and unions may contribute to candidates through a political action committee only.	No change.	No change.	Allowed. Corporations and unions (and other organizations) may contribute directly to candidates (and ballot issues) from their general treasuries. (HB 917/SB601 would have banned contributions from business entities to candidates.)
Corporate and Union Independent Expenditures	Corporations and unions were prohibited from making independent expenditures from their general treasuries for (1) communications expressly advocating the election or defeat of a clearly identified candidate, or (2) communications that are the functional equivalent of such express advocacy.	Corporations and unions may use unlimited general treasury funds to expressly advocate the election or defeat of candidates.	No change.	Corporations and unions may use general treasury funds for independent expenditures expressly advocating the election or defeat of candidates (and ballot issues).

	Federal Law Before *Citizens United*	Federal Law After *Citizens United*	Changes Proposed by DISCLOSE Act	Maryland Law (and Proposed Changes)
Disclosure of Independent Expenditures	Independent expenditures (defined as express advocacy) and electioneering communications (defined as broadcast, cable, and satellite communications mentioning candidates shortly before an election) aggregating to $10,000 must be reported within 24 or 48 hours.[150]	No change.	The functional equivalent of express advocacy would have to be reported as independent expenditures. The period of time before an election when electioneering communications would have to be reported would be increased to 120 days.	No requirement. (HB 917/SB 543 would have required entities making independent expenditures to file reports on the same dates as campaign finance entities. HB 616 would have required independent expenditures above $10,000 to be reported in 12 hours.)
Disclaimer Requirements for Independent Expenditures	Independent expenditures and electioneering communications must identify the person who paid for the communication. Radio and television communications must include a statement read by a "representative" of the payor.	No change.	The highest ranking official of a corporation, union, or other specified organization would have to personally read a statement identifying themselves as responsible for the communication. In addition, up to five persons who made specified large donations that funded the communication would have to be identified in the communication.	Any person who publishes or distributes campaign material must identify themselves on the campaign material. This requirement applies to persons who make independent expenditures for campaign material. (HB 1225 would have required use of logos on campaign material. HB 1087 would have required foreign subsidiaries to identify their country of origin on their campaign material.)

[150]For independent expenditures made after the 20th day before an election, the aggregate expenditure amount that triggers the reporting requirement is $1,000. Electioneering communications must be reported within 24 hours. Independent expenditures must be reported within 48 hours, except during the 20 days before an election, when they must be reported in 24 hours.

	Federal Law Before *Citizens United*	Federal Law After *Citizens United*	Changes Proposed by DISCLOSE Act	Maryland Law (and Proposed Changes)
Disclosure of Contributors to Persons Making Independent Expenditures	Contributors who give more than $200 for the purpose of funding an independent expenditure must be reported. Contributors who give more than $1,000 to a person who makes an electioneering communication must be reported, unless the person is a corporation or a union, in which case only contributors who intended to fund electioneering communications must be reported.[151]	No change.	Corporations, unions, and other specified organizations making independent expenditures or electioneering communications would have to reveal donors who gave more than specified amounts for the purpose of political activity or without specifying the use of the funds.[152] If a separate campaign activity account is used to fund the communications, only donors to that account would have to be revealed.	No requirement.
Foreign Nationals and Domestic Subsidiaries	Foreign nationals, including corporations incorporated in another country, are prohibited from making contributions or independent expenditures in federal, state and local elections.	All domestically incorporated corporations, including subsidiaries of foreign corporations, are allowed to make express advocacy independent expenditures supporting or opposing candidates.	Domestic subsidiaries of foreign corporations would be prohibited from making contributions or independent expenditures if they are subject to substantial foreign control.[153]	The federal prohibition on contributions and expenditures by foreign nationals applies to state and local elections.

[151]If the electioneering communication is paid for out of a separate bank account consisting solely of contributions made for the purpose of electioneering communications, only contributors to that account need to be disclosed.

[152]For independent expenditures, donors who give more than $600 would have to be reported. For electioneering communications, donors who give more than $1,000 would have to be reported.

[153]Foreign control would be defined as foreign nationals controlling specified percentages of voting shares, a majority of the board of directors consisting of foreign nationals, or a foreign national having power to direct the decision making process of the corporation.

	Federal Law Before *Citizens United*	Federal Law After *Citizens United*	Changes Proposed by DISCLOSE Act	Maryland Law (and Proposed Changes)
Government Contractors	Federal contractors are prohibited from making direct contributions to candidates, but may form political action committees.	All corporations and unions, including those holding government contracts, may make express advocacy independent expenditures supporting or opposing candidates.	Federal contractors with contracts larger than $10 million would be prohibited from making independent expenditures or electioneering communications in federal elections.	There is no restriction on contributions or independent expenditures by government contractors.[154] (HB 690/691/616 would have prohibited persons holding government contracts over certain threshold amounts[155] from making independent expenditures for campaign material.)
Shareholder Notification or Approval of Independent Expenditures	No requirement.	No change.	Corporations, unions, and other specified organizations would have to provide information on independent expenditures and electioneering communications to shareholders or members in any regular report they distribute concerning their finances or activities.[156]	No requirement. (HB 896/SB 570 would have prohibited a corporation from making an independent expenditure for campaign material unless the expenditure was approved by two-thirds of stockholders.)

Source: Department of Legislative Services

[154]However, persons "doing public business" with the State or local governments, defined as making contracts in a 12-month period worth $100,000 or more, must report the contributions they make to candidates. Md. Code Ann., Election Law Article, Title 14.

[155]HB 690/HB 616 would have applied to persons making contracts over $100,000 in a 12-month period. SB 691 would have applied to persons making contracts over $5,000 in a 12-month period.

[156]These organizations would also have to post a link on their website (if they maintain a website) to the page Federal Election Commission website where information on the independent expenditures may be accessed.

Information developed by Stanford D. Ward. For additional information or questions on this matter, please either contact Stan or Ted E. King.