Campaign Finance Policy After *Citizens United v. Federal Election Commission*: Issues and Options for Congress

R. Sam Garrett
Analyst in American National Government

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Summary

Following the Supreme Court's January 21, 2010, ruling in *Citizens United v. Federal Election Commission*, questions have emerged about which policy options could be available to Congress. This report provides an overview of selected campaign finance policy options that may be relevant. It also briefly comments on how *Citizens United* might affect political advertising. A complete understanding of how *Citizens United* will affect the campaign and policy environments is likely to be unavailable until at least the conclusion of the 2010 election cycle.

If Congress pursues additional legislation, at least two broad choices could be relevant. First, Congress could provide candidates or parties with additional access to funds to combat corporate influence in elections. Second, Congress could restrict spending under certain conditions or require those making expenditures post-*Citizens United* to provide additional information to voters or regulators. Options within both approaches could generate substantial debate. Some may contend that the only way to provide Congress with the power to directly affect the content of the ruling would be to amend the Constitution.

Bills introduced as of this writing that may be relevant for legislative responses to *Citizens United* include, but are not necessarily limited to H.J.Res. 13, H.J.Res. 68, H.R. 158, H.R. 1826, H.R. 2056, H.R. 3859, H.R. 4487,H.R. 4511, H.R. 4517, H.R. 4522, H.R. 4523, H.R. 4527, H.R. 4537, H.R. 4540, S. 752, S. 2954, and S. 2959. Given the pace of developments since the ruling, this report is not intended to be exhaustive. Relevant legislation that has been introduced thus far is reflected through selected examples. Additional legislation will be included in future updates. This report is not intended to provide a legal analysis of *Citizens United* or of legal issues that might affect the policy options discussed here. CRS Report R41045, *The Constitutionality of Regulating Corporate Expenditures: A Brief Analysis of the Supreme Court Ruling in Citizens United v. FEC*, by L. Paige Whitaker discusses legal aspects of the decision.

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Introduction

On January 21, 2010, the Supreme Court issued a 5-4 ruling in *Citizens United v. Federal Election Commission*. The ruling has the potential to reshape the campaign finance environment politically and legislatively because previously restricted political advertising is now apparently permissible. This report provides an overview of selected campaign finance policy issues that may be relevant for Congress as the House and Senate consider how or whether to respond to the ruling.

At least two broad approaches may be available. First, Congress could raise limits on contributions or coordinated party expenditures to increase the amount of money available to candidates facing advertising aired by corporations or opponents. Second, Congress could restrict spending under certain conditions or require those making expenditures to provide additional information to voters or regulators. Options within both approaches may generate debate and would entail advantages and disadvantages. Some may argue that the only way to provide Congress with the power to directly affect the content of the ruling would be to amend the Constitution—an option that is likely to be controversial and laborious.

This report is intended to respond to Congress's rapidly developing and ongoing interest in campaign finance policy options following *Citizens United*. Given the pace of developments since the ruling, the report is not intended to be exhaustive. Rather, it provides an overview of those issues and options that appear thus far to be potentially relevant; it will be updated regularly as developments warrant. Relevant legislation that has been introduced, as of this writing, is reflected through selected examples. Additional legislation will be reflected in future updates. This report does not provide—nor is it intended to provide—a legal analysis of *Citizens United* or of legal issues that might affect the policy options discussed here. CRS Report R41045, *The Constitutionality of Regulating Corporate Expenditures: A Brief Analysis of the Supreme Court Ruling in Citizens United v. FEC*, by L. Paige Whitaker discusses legal aspects of the decision.

Background on Key Issues

From a campaign finance policy perspective, *Citizens United* appears to be most relevant for political advertising funded by corporate treasuries. Two issues are particularly noteworthy. First, corporations (and presumably unions) now appear to be permitted to fund advertising explicitly calling for the election or defeat of federal (or state) candidates. Second, previous restrictions on corporate-funded broadcast ads known as *electioneering communications* have been eased. Despite these changes, corporate and union advertising purchases must be made independently—meaning that the advertising may not be coordinated with the campaigns that are supported or opposed in the advertising. The ban[1] on corporate or union contributions to political committees (candidate committees, party committees, and political action committees (PACs)), remains in effect.

[1] 2 U.S.C. § 441b.

Before *Citizens United*, the Federal Election Campaign Act (FECA)[2], as amended, generally prohibited corporations and unions from using their treasury funds for making expenditures influencing federal elections—including political advertising known as *express advocacy*, which explicitly calls for election or defeat of federal candidates.[3] Corporations and unions could, however, establish *separate segregated funds* (PACs) to fund express advocacy or make contributions to candidate campaigns, political party committees, or other PACs. Following *Citizens United*, corporations may now fund unlimited express advocacy messages—provided that the advertisements are *independent expenditures*, meaning that they are uncoordinated with the campaign that is supported or opposed.

Also before *Citizens United*, the 2002 Bipartisan Campaign Reform Act (BCRA) prohibited corporate and union treasuries from funding broadcast advertisements known as *electioneering communications* that mention clearly identified federal candidates (but not necessarily calling for their election or defeat) within 60 days of a general election or 30 days of a primary election.[4] As a result, corporations that wanted to air at least some messages referring to federal candidates during periods preceding elections either had to establish a PAC to receive voluntary contributions to fund the ads or forgo the advertising altogether.[5] Now, however, corporations appear to be free to fund electioneering communications from their treasuries at any time.

Given these developments, questions have emerged about how the political advertising might be affected and whether the airwaves will be flooded with corporate express advocacy. The answers to those questions are currently unknown, but they have implications for how campaigns at the federal (and state) levels will be waged. Depending on the outcome—or potential outcome—Congress might choose to enact legislation restricting political advertising or other aspects of federal election policy. Because this is the first time in modern history that such expenditures have been permitted at the federal level, it remains to be seen how much additional money, if any, might flow into the political system. A more complete understanding of how *Citizens United* will affect the political environment, including campaign spending, will likely be unavailable until after the 2010 election cycle.

Selected Campaign Finance Policy Options for Congress

In the wake of *Citizens United*, Congress must contend with how, or whether, to respond. This section provides an overview of various issues and options that have emerged thus far and that might be relevant. The discussion here emphasizes those options most closely related to campaign finance policy, such as restrictions on spending, advertising, or fundraising. Additional options,

[2] 2 U.S.C. § 431 *et seq.*

[3] 2 U.S.C. § 441b.

[4] 2 U.S.C. § 434(f)(3). It appears that *Citizens United* upheld disclosure and disclaimer requirements for electioneering communications. For additional discussion, see CRS Report R41045, *The Constitutionality of Regulating Corporate Expenditures: A Brief Analysis of the Supreme Court Ruling in Citizens United v. FEC*, by L. Paige Whitaker.

[5] The Supreme Court arguably relaxed corporations' abilities to fund electioneering communications in its 2007 decision in *Wisconsin Right to Life v. Federal Election Commission*. For additional discussion, see CRS Report RS22687, *The Constitutionality of Regulating Political Advertisements: An Analysis of Federal Election Commission v. Wisconsin Right to Life, Inc.*, by L. Paige Whitaker.

legislation, or discussion will be reflected in future updates to this report as warranted. Constitutional or legal issues that are beyond the scope of this report may be relevant for the policy options discussed here; other CRS products provide relevant analysis.[6]

Maintain the Status Quo

If Congress chooses to take no action, the *Citizens United* decision would presumably be unaffected. As noted above, corporations would be permitted to make independent expenditures, including airing express advocacy messages, as much or as little as they chose. For those who believe that *Citizens United* correctly strengthens corporate abilities to participate in federal elections, or those who otherwise believe that a congressional response is unnecessary, maintaining the status quo could be a preferred option. Those who believe that additional regulation is necessary, however, may choose to pursue legislation.[7]

Amend the Constitution

Both before and after *Citizens United*, proposals have emerged to amend the Constitution to permit Congress to further regulate campaign finance. In fact, proposals to amend the Constitution to give Congress more power to regulate political spending have been regularly introduced since at least the 1970s. As of this writing, at least two relevant constitutional amendments have been introduced during the 111th Congress (H.J.Res. 13 (Kaptur) and H.J.Res. 68 (Boswell)). These two measures illustrate that there are potentially multiple ways in which Congress could frame a constitutional amendment, such as by providing additional leeway to regulate campaign spending (or contributions) generally, or specifically with respect to corporate campaign activities. Amending the Constitution, however, would likely be controversial and time-consuming.

Enact Public Financing

Public financing of campaigns has long been seen as a potential solution to "big money" in politics, including following *Citizens United*. Proponents argue that public financing would reduce or eliminate candidates' dependence on private funds, thereby limiting the potential for conflicts of interest and permitting candidates more time to focus on policy matters. Public financing of presidential campaigns has been in place since 1976, and 16 states offer public financing of state legislative or executive campaigns.[8] Several attempts to enact public financing of U.S. House and Senate campaigns have been unsuccessful, although proposals have been introduced regularly since the 1970s.

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[6] See, for example, CRS Report RL30669, *The Constitutionality of Campaign Finance Regulation: Buckley v. Valeo and Its Supreme Court Progeny*, by L. Paige Whitaker.

[7] In addition, the Federal Election Commission has stated that it will issue guidance to the regulated community. See Federal Election Commission, "Supreme Court Issues Opinion in Citizens United v. FEC," press release, January 21, 2010, http://www.fec.gov/press/press2010/20100121CitizenUnited.shtml.

[8] For additional detail on the presidential public financing program, see CRS Report RL33814, *Public Financing of Congressional Campaigns: Overview and Analysis*, by R. Sam Garrett. On proposals for public financing of congressional campaigns and discussion of state programs, see CRS Report RL33814, *Public Financing of Congressional Campaigns: Overview and Analysis*, by R. Sam Garrett.

Traditionally, public financing programs offer grants or matching funds designed to cover full campaign costs. In exchange for receiving public funds, candidates must usually agree to limit their private fundraising and spending. Two public financing measures introduced in the 111th Congress—H.R. 158 (Obey) and H.R. 2056 (Tierney)—would take such an approach (although the two bills differ substantially). Also in the 111th Congress, two similar measures—H.R. 1826 (Larson) and S. 752 (Durbin)—would not require candidates to limit their spending, provided that campaign funds came only from public funds and small, private contributions (i.e., $100 or less).

Enacting public campaign financing could arguably achieve various policy goals, such as enhancing the role of small contributions and grassroots donors—potentially an attractive alternative for those who feel that the status quo unduly focuses on large contributions. Some candidates may also view participating in public financing as a way to deemphasize corporate money in politics following *Citizens United* (although, as noted previously, the ban on corporate campaign contributions remains in place).

On the other hand, publicly financed candidates may face challenges following *Citizens United* if they encounter high levels of outside advertising targeting their campaigns. For example, even if two competing candidates had roughly equal resources based on participation in public financing, their abilities to raise funds in response to outside political advertising would be limited to public financing amounts or additional "small dollar" fundraising (depending on the public financing mechanism Congress adopted). Regardless of *Citizens United*, however, these same obstacles could occur even without corporate express advocacy if a publicly financed candidate were the object of high levels of opposition spending by privately financed opponents, parties, or interest groups.

Provide Campaigns or Parties With Additional Access to Funds

If political advertising increases following *Citizens United*, political campaigns may feel additional pressure to raise funds to counter outside advertising. At least two options exist for providing additional resources to campaigns, parties, or both. First, contribution limits could be increased. This option could allow those who wish to give more to do so, thereby increasing the funds available to candidates or parties waging campaigns.[9]

Second, the existing caps on party coordinated expenditures could be raised or eliminated. Coordinated expenditures allow parties to buy goods or services on behalf of a campaign—in limited amounts—and to discuss those expenditures with the campaign.[10] In recent years, some Members of Congress have called for increasing or repealing the caps on coordinated party expenditures to provide parties with greater flexibility to support their candidates.[11] In a post-*Citizens United* environment, additional party coordinated expenditures could provide campaigns

[9] For the 2010 election cycle, individuals may contribute no more than $2,400 per candidate, per election (for a combined primary and general election limit of $4,800). Individuals may contribute no more than $5,000 to multicandidate PACs (which includes most PACs) annually, and no more than $30,400 to a national party committee annually. Contribution limits for 2010 are available on the FEC website at http://www.fec.gov/ans/answers_general.shtml#How_much_can_I_contribute.

[10] Coordinated party expenditures are subject to limits based on office sought, state, and voting-age population (VAP). Exact amounts are determined by formula and updated annually by the FEC.

[11] For additional information, including a discussion of legislation introduced in the 110th Congress to lift the caps on party coordinated expenditures, see CRS Report RS22644, *Coordinated Party Expenditures in Federal Elections: An Overview*, by R. Sam Garrett and L. Paige Whitaker.

facing increased outside advertising with additional resources to respond. Permitting parties to provide additional coordinated expenditures may also strengthen parties as institutions by increasing their relevance for candidates and the electorate. A potential drawback of this approach, however, is that some campaigns may feel compelled to adopt party strategies at odds with the campaign's wishes in order to receive the benefits of coordinated expenditures.[12]

Those concerned with the influence of money in politics may object to any attempt to increase contribution limits or coordinated party expenditures, even if those limits were raised in an effort to respond to corporate-funded advertising. Additional funding in some form, however, may be attractive to those who feel that greater resources will be necessary to compete in a post-*Citizens United* environment, or perhaps to those who support increased contribution limits as a step toward campaign deregulation.

Restrict Certain Types of Expenditures

Following *Citizens United*, some debate has focused on whether Congress could restrict independent expenditures, particularly if a potential risk of corruption—a historic rationale for campaign finance regulation—could be established. At least three areas appear to be particularly relevant: (1) spending restrictions on foreign corporations, (2) restrictions on government contractors, and (3) shareholder protection issues.

First, foreign nationals — including companies incorporated or having principal places of business in foreign countries — already appear to be prohibited from making expenditures (including independent expenditures and electioneering communications) in federal or state elections.[13] Congress may choose, however, to pursue additional restrictions concerning U.S. subsidiaries of foreign corporations, such as amending FECA's current definition of "foreign national" to include additional types of corporations. Congress could also clarify restrictions on PAC activity by U.S. subsidiaries of foreign corporations.[14] In the 111th Congress, for example, H.R. 3859 (Kaptur) would prohibit PACs affiliated with organizations or corporations controlled by foreign entities from making expenditures or contributions. Other bills, such as H.R. 4540 (DeLauro), H.R. 4517 (Hall), H.R. 4522 (Pascrell), H.R. 4523 (Perriello), S. 2954 (Menendez), and S. 2959 (Franken) could extend contribution or expenditure restrictions to corporations owned or controlled by foreign principals.

Second, Congress could pursue restrictions on the amount of independent expenditures made by firms that hold government contracts.[15] FECA already prohibits individual government contractors from making campaign contributions or from soliciting campaign funds. Government

[12] The long-running debate about relationships between parties and candidates is well documented. For a brief overview, see, for example, Marjorie Randon Hershey, *Party Politics in America*, 12th ed., pp. 65-83; and Paul S. Herrnson, *Congressional Elections: Campaigning at Home and in Washington*, 4th ed., pp. 86-128.

[13] 2 U.S.C. § 441e; and 11 C.F.R. § 110.20.

[14] The FEC has determined through the advisory opinion process that U.S. subsidiaries of foreign companies may form PACs under certain circumstances. For an overview, see Federal Election Commission, *Corporate and Labor Organizations*, Campaign Guide, Washington, DC, January 2007, p. 17, http://www.fec.gov/pdf/colagui.pdf. In general, however, the issue of PACs among U.S. subsidiaries of foreign corporations appears not to be addressed in detail in FECA or FEC regulations.

[15] On constitutional issues, see, for example, pages 21-30 in CRS Report RL34725, *"Political" Activities of Private Recipients of Federal Grants or Contracts*, by Jack Maskell.

contractors may, however, form PACs.[16] In addition to these measures, the House and Senate could consider restricting the ability of firms with government contracts from funding express advocacy messages, either in general or at certain monetary thresholds. In the 111th Congress, several bills reportedly being developed would restrict independent expenditures or contributions from firms holding government contracts.[17] Some legislation also proposes restricting political advertising by companies that employ lobbyists.[18]

Third, some advocates of additional campaign finance regulation have proposed that Congress consider measures to give shareholders additional voice in corporations' political spending decisions. Examples include requiring corporations to obtain permission from a majority of shareholders before engaging in political spending (such as express advocacy) or requiring corporations to provide advance notice of political expenditures.[19] Both options could be applied in general or with respect to particular levels of spending (or perhaps in certain races, at specific times, etc.). As of this writing, various shareholder protection measures are reportedly under development. Relevant measures already introduced include H.R. 4487 (Grayson) and H.R. 4537 (Capuano).

Shareholder protection measures could have the advantage of increasing the likelihood that corporations' political spending decisions will be consistent with a majority of shareholders' wishes—or at least that shareholders will have notice of those decisions in advance. Notice or permission requirements that are perceived as burdensome might also discourage corporations from making political expenditures. This scenario, however, could raise questions about whether the requirements were essentially stifling corporate political speech—a topic that is beyond the scope of this report but may, nonetheless, be controversial.

Revisit Disclosure or Disclaimer Requirements

Congress might also wish to require corporations to provide information about political advertising or other independent expenditures. Additional *disclosure* would likely entail reporting information about political spending to government regulators. By contrast, additional *disclaimers* would likely entail including identifying information within the advertising itself. These two approaches could be pursued separately or jointly.

Disclosure, as the term is understood in campaign finance terminology, refers to reporting certain information about contributions or expenditures, typically to the FEC. Political committees and certain other individuals or organizations regulated under FECA must already file regular disclosure reports with the FEC (or, in the case of Senate campaign committees, with the Secretary of the Senate).[20] Currently, independent expenditures aggregating at least $10,000 must

[16] 2 U.S.C. § 441c.

[17] For example, H.R. 4434 (Grayson) would prohibit corporations receiving government funds from making contributions (which is still barred under FECA). The bill would also limit contributions from employees of such companies from contributing more than $1,000 annually.

[18] See, for example, H.R. 4511 (Grayson).

[19] The Brennan Center for Justice at New York University, which generally advocates for greater campaign finance regulation, has proposed both approaches. See, for example, Ciara Torres-Spelliscy, *Corporate Campaign Spending: Giving Shareholders a Voice*, Brennan Center for Justice, New York University, New York, NY, January 2010, http://brennan.3cdn.net/0a5e2516f40c2a33f6_3cm6ivqcn.pdf.

[20] 2 U.S.C. § 432(g).

be reported to the FEC within 48 hours; 24-hour reports for independent expenditures of at least $1,000 must be made during periods immediately preceding elections.[21] The existing disclosure requirements concerning electioneering communications mandate 24-hour reporting of communications aggregating at least $10,000.[22] Both the independent expenditure disclosure requirements and the electioneering communication requirements cover any "person," including corporations and labor unions.[23] Therefore, it is possible that no legislative action is required to extend the current requirements to corporations following *Citizens United*. Legislative action could, however, be required to amend those requirements if Congress wished to do so.

The term *disclaimers* generally refers to identifying information that must be included in the content of political advertising. Perhaps most relevant for the purposes of this report, FECA requires that express advocacy messages funded by any "person" include

- the name of the person (including a corporation or union) who paid for the communication;[24]
- the permanent street address, telephone number, or website address of the person who paid for the communication;[25]
- if applicable, that the communication "is not authorized by any candidate or candidate's committee."[26]

If Congress determines that existing requirements, such as these, are sufficient, it is possible that no additional legislative action will be necessary. If, however, Congress wanted corporations engaging in express advocacy to provide additional indentifying information to the public, one option could be to extend a model akin to the "stand by your ad" disclaimers currently required in candidate advertising. These provisions, enacted in the Bipartisan Campaign Reform Act, require candidates to appear in broadcast advertising and state their approval of the ad.[27] Thus far, at least one bill (H.R. 4527, Driehaus) that appears to require additional identification of sponsors of corporate or union advertisers has been introduced following *Citizens United.*

Disclosure or disclaimer requirements could have the advantage of increasing transparency surrounding corporate political advertising. Some corporations might also be unwilling to engage in certain advertising if they do not wish to be publicly identified with particular political positions. Although the effect of a possible extension of the stand by your ad requirement to corporate advocacy is unclear, it might or might not affect the tone of such advertising.

Concluding Comments

Whether or how Congress chooses to respond to *Citizens United* will become clearer over time, as will the decision's impact on the political or policy environments. Corporations (and

[21] See, for example, 2 U.S.C. § 434(g).

[22] 2 U.S.C. § 434(f).

[23] 2 U.S.C. § 431(11).

[24] 2 U.S.C. § 441d(a)(3).

[25] Ibid.

[26] Ibid.

[27] 2 U.S.C. § 441d(d).

presumably unions) now appear to be free to use their treasury funds to use political ads to call for election or defeat of federal (or state) candidates as often as they wish. If corporations choose to do so extensively, such spending could dramatically affect the campaign environment by increasing the amount of money in politics—some argue potentially overshadowing candidates and parties. On the other hand, some potential safeguards appear to remain in effect. First, the ban on corporate contributions in federal elections remains. Second, the fact that corporations *can* spend political money in new ways does not necessarily mean that they will choose to do so. Finally, it is possible that the corporations interested in spending money on politics are already doing so to the extent they wish by supporting PACs, engaging in issue advocacy, or making contributions to 527 or 501(c) groups.[28]

As the 2010 and 2012 election cycles unfold, Congress may wish to monitor various questions about how the political spending appears to be affected by *Citizens United*. One of the most fundamental questions may be whether *Citizens United* will, indeed, spur substantial new levels of corporate advertising surrounding elections. If so, will that advertising—particularly express advocacy—be funded directly by corporations? Or, will indirectly funded advertising, such as commercials already funded by 527 and 501(c) organizations, continue to be prominent? Similarly, will new advertising occur nationally or be targeted to specific races? How will affected campaigns respond, and how will the relative power of campaigns, parties, and other actors be affected? Will corporations continue to form PACs, pursue express advocacy alone, or both? The answers to these and other questions, which are not yet available, may help Congress determine how or whether to respond through public policy over the long term.

Author Contact Information

R. Sam Garrett
Analyst in American National Government
rgarrett@crs.loc.gov, 7-6443

[28] For an overview of 527s and 501(c) organizations, including a discussion of disclosure requirements, see, for example, CRS Report RS22895, *527 Groups and Campaign Activity: Analysis Under Campaign Finance and Tax Laws*, by L. Paige Whitaker and Erika K. Lunder; and CRS Report R40141, *501(c)(3) Organizations and Campaign Activity: Analysis Under Tax and Campaign Finance Laws*, by Erika K. Lunder and L. Paige Whitaker.