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'Citizens United' and Minnesota campaign finance law

by Reid LeBeau and David Asp Guest Commentary

The U.S. Supreme Court's recent decision in *Citizens United v. FEC* changes the rules for corporate participation in federal elections by allowing corporations to make independent expenditures advocating the election or defeat of a candidate. The high court's ruling affects state laws as well, and has caused state legislatures and regulators across the country to revise their rules for corporate participation in state elections.

In Minnesota, the Supreme Court's decision invalidates at least one section of state law and has led the Minnesota Campaign Finance and Public Disclosure Board to take action that will regulate corporate participation in political campaigns. However, the board's action may itself violate the rule set forth in *Citizens United*.

Citizens United involved a ban on corporate independent expenditures in federal elections.¹ A corporation makes an independent expenditure when it advocates for the election or defeat of a candidate, but is created without the candidate's knowledge or involvement. To reach its conclusion, the Supreme Court overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which held that the state of Michigan could ban independent expenditures by corporations.² By overturning *Austin*, the high court took away the authority upon which 24 state governments either limited or completely prohibited independent expenditures by corporations in state elections.³

In Minnesota, the Supreme Court's decision invalidates a provision in state law that bans independent expenditures by corporations.⁴ Corporations have been allowed to run independent expenditures in the past under an exception in the statute allowing corporations to spend money in support of or opposition to ballot questions.⁵ But even in these instances, a corporation could not spend funds in excess of \$100 unless it did so out of a separate "political fund."⁶

Recently, the Minnesota campaign finance board considered how to apply *Citizens United* to the rules governing Minnesota elections. The board seemed inclined to adopt a proposal that would expand the exception for ballot question expenditures to all independent expenditures. Any corporation wishing to make an independent expenditure would be required to register a political fund with the board and file statutorily mandated reports just as it would for a ballot question committee.

The board's guidance is based upon its attempt to reconcile the provisions of existing Minnesota campaign finance law with *Citizens United*. The board seeks to graft the provisions applicable to ballot question committees onto a new entity it would dub an "independent expenditure fund." The board believes that this is necessary because Minn. Stat. sec. 10A.12 prohibits an association, including a corporation, from engaging in independent expenditure activity in excess of \$100 unless it is registered as a political fund.

The board's proposed guidance is problematic for a few reasons. First, requiring corporations to register political funds is impermissible under *Citizens United*. The court expressly disapproved of regulations requiring a corporation to form a federal PAC in order to speak. The court explained that the requirement that a corporation form a PAC to engage in independent expenditures presented an unconstitutional burden on speech and, even if it adequately allowed a corporation to speak, "the option to form PACs does not alleviate the First Amendment problems [with the federal corporate expenditure ban]." The board's insistence that Minn. Stat. sec. 10A.12 is still applicable seemingly ignores this portion of the opinion.

Second, requiring corporations to register as political funds is inconsistent with the statutory definition of a political fund. Minnesota Stat. Chap. 10A defines a political fund as "an accumulation of dues or voluntary contributions by an association other than a political committee, principal campaign committee, or party unit, if the accumulation is collected or expended to influence the nomination or election of a candidate or to promote or defeat a ballot question."⁷

A corporation that uses treasury funds to make a directly financed independent expenditure would likely never fall under the Chapter 10A definition of a political fund. There are no dues or voluntary contributions; there are only direct expenditures from the general treasury.

Even if the board's action fit within the current statutory scheme, it would seem to create a conflict with another provision of Minnesota law. Minnesota law bans corporate contributions to individuals, organizations or committees in order to promote or defeat a candidate for political office.⁸ The board's proposal would require a corporation to make independent expenditures through a committee – that is, a separate political fund – despite Minnesota's corporate contribution ban.⁹ A political committee set up solely to run independent expenditures is still a "committee," and any money received by a political committee is deemed a contribution under Minnesota law.¹⁰ Thus, the board's proposal seems poised to sanction a form of political committee that would accept contributions from a corporation in violation of Minnesota law.

Citizens United changes the way that corporations may participate in political campaigns. While the board's action is an attempt to fill a hole in Minnesota law, trying to create new guidance that is consistent with both the Supreme Court's decision and the current regulatory regime is very much like pushing a square peg into a round hole. It would be better for the board to issue guidance, consistent with *Citizens United*, providing that the provisions of Minn. Stat. sec. 10A.12 do not apply to corporations seeking to create independent expenditures directly from their treasury funds.

¹ See 2 U.S.C. sec. 441b.

² *Citizens United v. FEC*, 558 U.S. ___ (2010) (slip op. at 49 – 50).

³ See *Citizens United*, 558 US ___ (dissent at 20, fn 20) (citing Supp. Brief for Senator John McCain et al. as Amici Curiae).

4 Minn. Stat. sec. 211B.15, subd. 3

5 Minn. Stat. sec. 211B.15, subd. 4.

6 Minn. Stat. sec. 10A.12, subd. 1. A political fund is marginally distinguishable from a political committee, but both are commonly understood to be PACs.

7 The definitions of "committee" contained in Minn. Stat. secs. 211A.01, subd. 4 and 211B.01, subd. 4 include a corporation.

8 Minn. Stat. sec. 211B.15, subd. 2.

9 The Campaign Finance Board does not have jurisdiction over Minn. Stat. Chpt. 211B. Chapter 211B creates a cause of action for individuals to bring a complaint with the Office of Administrative Hearings.

10 Minn. Stat. sec. 10A.01, subd. 10, Minn. R. 4503.0500, subp. 1.

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