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## Campaign Law Update

On January 21, 2010, the United States Supreme Court released a landmark ruling that could change the landscape of campaign finance nationwide. The case at issue is *Citizens United v. FEC*, which focused on whether a film produced by a corporation violated federal campaign finance laws. The Supreme Court ultimately held that prohibitions on corporations spending money, independent of candidates, was an unconstitutional limitation on free speech. Please [click here](#) for our analysis of this case.

In Texas, the campaign finance statutes set out reporting requirements for individuals and PACs that make direct campaign expenditures (campaign expenditures made without the prior consent or approval of a candidate), while simultaneously prohibiting such expenditures by corporations, labor organizations, and other types of entities, such as partnerships. However, because the U.S. Constitution prohibits such limitations on the use of corporate funds for campaign advertising independent of candidates, it was unclear how Texas law operates with regard to those expenditures.

The Texas Ethics Commission, which oversees Texas campaign finance matters, discussed the issue at their February meeting. The Commission established a subcommittee to study the issue and, at its April meeting, the Commission adopted an opinion on the matter. The opinion discussed three things: whether the statutory prohibition was enforceable; whether political advertising disclaimers were required; and what, if any, reporting requirements applied. The opinion also clearly stated that the prohibition on corporations and labor organizations making contributions to candidates remained enforceable.

### Statutory Limitation on Direct Campaign Expenditures

Texas statutes provide a blanket prohibition on all direct campaign expenditures (expenditures made without the prior consent or approval of candidates), with specific exceptions for individuals and PACs. This means that, under the statute's plain words, corporations, labor organizations, and other types of entities, such as partnerships, are prohibited from making direct campaign expenditures. In its opinion, the Texas Ethics Commission said this blanket prohibition was unconstitutional and, therefore, unenforceable. In other words, corporations, labor organizations, and other types of entities, such as partnerships, as well as individuals and PACs, may now make direct campaign expenditures on Texas elections.

### Political Advertising Disclaimers

As defined in Texas law, political advertising is a communication supporting or opposing a candidate that, in return for consideration, is published in a newspaper, magazine, or other periodical, or is broadcast by radio or television. Political advertising also includes a communication supporting a candidate that appears in a pamphlet, circular, flier, billboard, sign, bumper sticker, or similar form of written communication, or that appears on an Internet website. Political advertising does not include a communication made by e-mail, or a spoken communication, such as a recorded telephone message.

Texas law requires all political advertising to contain a disclaimer statement. The required disclaimer statement must contain the phrase "political advertising" (or an abbreviation of the phrase, such as "pol. ad.") and the name of the person who made the expenditure or the PAC or candidate who authorized the expenditure. This statement must appear on the face of the political advertising. In the *Citizens United* case, the U.S. Supreme Court said requiring such disclaimer statements is constitutionally permissible. Based on the Supreme Court's holding, the Texas Ethics Commission said any political advertising made as a direct campaign expenditure must include the required disclaimer. In other words, corporations, labor organizations, and other types of entities, such as partnerships, as well as individuals and PACs, must have a disclaimer on the face of all political advertising.

### Reporting Requirements

As discussed, Texas statutes, on their face, only allow individuals and PACs to make direct campaign expenditures. However, in order for those expenditures to be legally permissible, the person making the expenditure must meet certain reporting requirements. A PAC must, in its campaign finance reports to the Texas Ethics Commission, disclose the expenditure and the name of the candidate the expenditure supported or opposed, and also must provide notice to the candidate the expenditure supported (when the expenditure supports a candidate). Similarly, an individual making a direct campaign expenditure must file a report with the Texas Ethics Commission disclosing the expenditure and the name of the candidate the expenditure supported or opposed, and the individual must provide notice to the candidate the expenditure supported (when the expenditure supports a candidate). However, since Texas statutes, on their face, prohibit a corporation, labor organization, or other entity, such as a partnership, from making direct campaign expenditures, there were no similar reporting requirements for any direct campaign expenditures they make.

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**Campaign Law Update** (cont'd.)

Because of the U.S. Supreme Court's holding in *Citizens United*, which now allows corporations, labor organizations, and other entities, such as partnerships, to make direct campaign expenditures, the Texas laws have a loophole that treats those persons differently than it treats individuals and PACs with regard to reporting requirements. In its opinion, the Texas Ethics Commission examined this loophole. Ultimately, the Commission decided that those non-PACs making direct campaign expenditures must comply with the reporting requirements established for individuals. PACs have a slightly different reporting requirement, since they already file regular reports with the Commission, and those were left untouched by the opinion. In other words, if a corporation, labor organization, or other type of entity, such as a partnership, makes a direct campaign expenditure, it must file a report with the Texas Ethics Commission disclosing the expenditures and the name of the candidate the expenditure supported or opposed, and the entity must provide notice to the candidate the expenditure supported (when the expenditure supports a candidate).

**Other Issues**

The *Citizens United* opinion did not discuss whether prohibitions on corporations contributing to candidates are unconstitutional, and the Texas Ethics Commission included a statement in its opinion that unambiguously stated that contributions from corporations and labor organizations remain illegal in Texas. It is an open question whether corporations may work with another person (including an individual, a PAC, or another corporation, labor organization, or other type of entity, such as a partnership) to make direct campaign expenditures. In Texas, if two persons work together with a primary purpose of making direct campaign expenditures, they form a PAC. However, once a PAC is formed, all expenditures made on behalf of the PAC are simultaneously in-kind contributions to the PAC and direct campaign expenditures by the PAC. This poses a problem; Texas statutes prohibit PACs from using corporate funds to make campaign expenditures supporting or opposing candidates. While this provision may be constitutionally unenforceable with regard to direct campaign expenditures, the Texas Ethics Commission decided not to examine the issues. Therefore, a corporation or labor organization making direct campaign expenditures with another person risks violating the law, and, at this time, such expenditures are highly likely to result in a civil or criminal complaint.

**Summary**

Based on the United States Supreme Court's ruling in *Citizens United v. FEC*, the Texas Ethics Commission adopted an opinion interpreting Texas law to clear ambiguity between the statutory language and the constitutional restrictions. The opinion states corporations,

labor organizations, and other entities, such as partnerships, may now make direct campaign expenditures in Texas elections. The opinion states that all political advertising, including those paid for by corporations, labor organizations, and other entities, such as partnerships, must include the political advertising disclaimer. The opinion states that corporations, labor organizations, and other entities, such as partnerships, who make direct campaign expenditures must file disclosure statements with the Texas Ethics Commission and, when applicable, must notify the candidate the expenditures supported. Finally, the opinion reiterated that the statutory ban on corporations making contributions to candidates remains enforceable, and the opinion did not discuss whether corporations could make expenditures with another person.

**About Locke Lord Bissell & Liddell LLP**

Locke Lord has experience working with campaign finance laws and regulations, ranging everywhere from local and state-wide political campaigns to groups providing pure issue advertising. The firm currently represents political campaigns, political committees, and prominent consultants and lobbyists. In addition to working with our clients to comply with the campaign finance laws, Locke Lord also monitors activities at the Texas Ethics Commission to keep our clients updated on proposed rules. During the legislative session, Locke Lord monitors campaign finance legislation, letting our clients know of potential statutory changes they may wish to comment on.

**About the Authors**

Robert D. Miller is chair of Locke Lord's Public Law section. Listed in Best Lawyers in America for Government Relations Law in 2007 and named one of the Top 12 lobbyists in Texas by Capitol Inside, he has demonstrated his skill and dedication by lobbying local, state, and federal governments on behalf of public and private concerns for more than twenty years.

James E. Davis is a partner in Locke Lord's Litigation department in the Austin office. Mr. Davis has broad experience in government, political and commercial litigation matters. He has substantial experience in representing businesses in disputes with state and local government entities.

Gardner Pate is an associate in Locke Lord's Public Law group. He has extensive experience in the areas of Texas campaign finance laws and Texas lobbyist regulations, and consults clients ranging from local and state-wide political campaigns and political committees to political consultants and trade groups.