



215 E Street, NE, Washington, DC 20002 * 202-737-2200 * www.campaignlegalcenter.org

THE CAMPAIGN LEGAL CENTER GUIDE TO THE CURRENT RULES FOR FEDERAL ELECTIONS

What Has Changed in the 2012 Election Cycle

As much as \$6 billion will be spent on the 2012 federal races, but the rules governing how that money is raised and spent have changed dramatically in the last several years. The following is a basic primer on the current campaign finance landscape.

The primer first outlines three major developments in campaign finance law in recent years: namely, the Supreme Court decision in *Citizens United v. FEC*, the failure of the disclosure laws and the growing power of “Super PACs.” This is followed by brief summaries of current campaign finance law and the federal tax laws that influence election spending. [Click here](#) for a chart defining the types of outside groups (527s and the various 501(c) organizations) and outlining their tax status, permitted activities, and disclosure requirements under federal tax and election laws.

THE CHANGES

The *Citizens United* Decision

- [2010 Developments](#)
- [2012 Developments](#)

The Failure of the Disclosure Laws

- [2010 Developments](#)
- [2012 Developments](#)

The Creation of the Super PAC

- [2010 Developments](#)
- [2012 Developments](#)

CURRENT CAMPAIGN FINANCE LAWS

- [Contributions](#)
- [Expenditures](#)
- [Disclosure](#)
- [Enforcement](#)

THE NEXUS BETWEEN TAX LAW AND ELECTIONS

- [Section 527 groups](#)

- [Section 501\(c\) groups](#)

[HOW IT WORKS](#)

THE CHANGES

The *Citizens United* Decision

In its 2010 decision in *Citizens United v. FEC*, the Supreme Court struck down the decades-old federal ban on **independent expenditures** by corporations (and unions) to influence federal elections. To reach this holding, the Court first announced the new principle that the First Amendment does not permit laws to differentiate between corporations and individuals. The Court then reasoned that because past cases had recognized a right of individuals to make unlimited expenditures that are independent of candidates and political parties, it followed that corporations likewise have a right to spend independently without limit.

Citizens United allows corporations and unions to spend their treasury funds on advertisements expressly advocating the election or defeat of a candidate—for the first time in over 60 years. A corporation or union can either spend itself on such express advocacy or it can support the advocacy of an outside group, such as one of the tax-exempt vehicles described in the sections below. It is important to note, however, that *Citizens United* did not consider the federal ban on direct corporate and union contributions to candidates and parties and thus this ban remains in effect.

The practical impact of this decision is a vast change in the magnitude of the political money available—the difference between a corporate political action committee (“PAC”) spending perhaps hundreds of thousands of dollars that were voluntarily donated by corporate employees and a corporation spending millions of dollars out of its multi-billion dollar treasury.

With the release of this massive stream of new political money, *Citizens United* also indirectly created new incentives to find vehicles that would allow anonymous independent spending. Although corporations and unions are now free to engage in campaign spending, they may wish to avoid openly advocating the election or defeat of candidates. In particular, corporations may be reluctant to be publicly associated with express campaign advertisements, because overt political advocacy can alienate their shareholders and customers and complicate their marketing strategies. Beginning in the 2010 elections, it appeared that corporations and other wealthy interests sought to shield their spending from public accountability by funneling their campaign dollars through groups organized under section 501 of the Internal Revenue Code (IRC) that are not required to publicly disclose their donors.

- **2010 Developments**

The 2010 midterm election, the first federal election to follow *Citizens United*, saw a precipitous rise in independent spending. According to the Center for Responsive Politics (CRP), independent campaign-related spending in the 2010 election topped out at nearly \$300 million—more than a fourfold increase from the total independent spending in the immediately-preceding midterm election in 2006. The extent to which this surge in spending was attributable to corporate and union expenditures legalized by *Citizens United* is unclear, however, because much the independent spending in 2010 was by non-profit groups that provided little or no disclosure of their donors.

- **2012 Developments**

The case *American Tradition Partnership (ATP) v. Bullock* gave the Supreme Court a chance to reconsider its far-reaching holding in *Citizens United*. In December 2011, a state court in Montana upheld the state’s corporate expenditure ban, finding that Montana had a unique history of state electoral corruption that distinguished its law from the federal restriction at issue in *Citizens United*. As Justices Ginsberg and Breyer noted in in issuing a stay in the case, *ATP* provided “an opportunity to consider whether, in light of the huge sums currently deployed to buy candidates’ allegiance, *Citizens United* should continue to hold sway.” But the Supreme Court chose not to hear the case, instead summarily reversing the Montana court’s decision, and thus closed the door on a reassessment of *Citizens United*.

Predictably, independent spending in the 2012 elections has soared, totaling over \$700 million as of October 23, 2012, according to the Center for Responsive Politics, more than double the \$301 million of independent spending in the entirety of the 2008 election. As was the case in 2010, much of this spending has been conducted by anonymous outside groups: political spending by outside groups that do not disclose any donors exceeded \$200 million by two weeks before the election, according to CRP.

The Failure of the Disclosure Laws

As described in the foregoing section, following *Citizens United*, wealthy interests increasingly turned to 501(c) groups to conduct their election spending. Both federal tax law and federal campaign finance law govern the disclosure of expenditures to influence federal elections. But both have failed to ensure meaningful disclosure from these newly-active 501(c) groups. Although these disclosure laws were not altered by *Citizens United*, the inherent limitations of the tax law and a **2007 FEC rule** interpreting federal campaign finance law have led to an unprecedented lack of political transparency following the Supreme Court’s decision.

Tax law does not require certain non-profit groups organized under **Section 501(c)** of the Internal Revenue Code (IRC) to publicly disclose their donors—even if the group engages in explicit election advocacy. The only limitation on these 501(c) groups is the requirement

that such election advocacy not be these groups' "primary activity." These groups include "social welfare organizations" organized under section 501(c)(4) of the IRC, labor organizations organized under section 501(c)(5), and trade associations organized under section 501(c)(6). This aspect of the tax law is not new; it has just become more salient in light of the surge in spending by outside groups following *Citizens United*, which legalized political expenditures by corporations—including 501(c) nonprofit corporations.—that had previously been prohibited by federal campaign finance law.

Federal campaign finance law requires all persons and groups that run "electioneering communications,"¹ or advertisements expressly advocating the election or defeat of a federal candidate, to file disclosure reports with the FEC. In the case of electioneering communications, the law requires a group spending \$10,000 or more on such communications to disclose all its contributors of \$1,000 or more (or to use a segregated fund). Unfortunately, however, this electioneering communications disclosure law was gutted by a regulation adopted by the FEC in 2007. The rule, as explained by the FEC, requires groups running electioneering communications to disclose only those contributors of \$1,000 or more who specifically designated their contributions for such communications. This narrow interpretation of the law allows contributors to such groups to avoid disclosure by simply refraining from designating their contributions in this manner. Further, three members of the six-member Commission stated in an enforcement action that the only circumstance in which they believe disclosure is required is when a donor specifically designates her contribution for a particular advertisement: this is a nearly impossible standard to meet, given that fundraising usually occurs before any particular ads are created.

- **2010 Developments**

The key development in the 2010 election was the shift in independent political spending from relatively transparent vehicles to 501(c) groups that are not legally required to provide donor disclosure. To illustrate this trend: in the 2006 midterm election 501(c) groups conducted virtually no independent spending, whereas in 2010, 501(c) groups accounted for approximately 42% of independent spending, according to CRP. Thus, independent spending not only surged following *Citizens United* but became significantly less transparent.

Given the lack of disclosure, it is difficult to quantify the degree to which the surge in anonymous spending by outside groups was specifically fueled by *Citizens United* and the corporate and union expenditures that the decision authorized. However, the largest spender in 2010 was the U.S. Chamber of Commerce, a 501(c)(6) group closely affiliated with corporate interests, which strongly suggests a significant corporate role.

¹ Electioneering communications are defined as: (1) broadcast, cable, or satellite communications that clearly identify a candidate for federal office; (2) air within thirty days of a primary election or convention or sixty days of a general election; and (3) are targeted to the relevant electorate.¹

- **2012 Developments**

Section 501(c) non-profit groups are again major players in this election cycle. An analysis by NPR and PBS found that between April 10 and October 10 of this year, groups that did not disclose their donors were responsible for 13% of the independent spending for President Obama and 44% of the spending for Governor Romney.

In light of the active role played by 501(c)(4) and (c)(6) groups in the 2010 and 2012 elections, several legal commentators questioned whether some of these groups have been engaging in more campaign activity than their tax status allows. Beginning in the 2010 election, the Campaign Legal Center and Democracy 21 have filed complaints with the IRS alleging that Crossroads GPS, Priorities USA and other 501(c)(4) groups appeared to have campaign activity as their primary, if not exclusive, activity, and therefore are likely in violation of federal tax law.

Federal campaign finance disclosure law has been in flux during the 2012 election cycle due to conflicting decisions in an ongoing lawsuit, *Van Hollen v. FEC*. The case was brought by Representative Chris Van Hollen (D-MD) in April 2011 to challenge the 2007 FEC regulation that requires groups making electioneering communications to disclose only those donors who specifically designate their donations for electioneering communications.

In March of 2012, a federal district court in D.C. held that this regulation was contrary to the law, and effectively reinstated the broad statutory reporting requirement that groups making more than \$10,000 in electioneering communications disclose all donors of \$1,000 or more. This decision had the unintended consequence of pushing groups, such as the Chamber of Commerce and Crossroads GPS, from funding “electioneering communications” to funding express advocacy, a category of advertising that is more explicitly campaign related, but ironically, subject to less rigorous disclosure. On September 18, 2012, the Court of Appeals reversed the district court, and resurrected the 2007 FEC rule, again rendering the electioneering communications disclosure law ineffective. Many groups immediately announced that they would shift back to electioneering communications following this decision. The district court is unlikely to make any further ruling prior to the election.

The Creation of the Super PAC

An unexpected repercussion of *Citizens United* was the deregulation of federal political committees that make only independent expenditures.

As explained in the sections below, federal political committees have long been subject to amount limits and source restrictions on the contributions they raise, although they always could spend such funds without limit provided they did so independently of candidates and parties. In 2010, however, the D.C. Circuit Court of Appeals relied upon *Citizens United* to strike down the contribution limits as applied to groups that make only independent expenditures and do not coordinate with, or contribute to, candidates. The Court of

Appeals highlighted that *Citizens United* found that independent expenditures pose no threat of actual or apparent corruption, and extending this principle, reasoned that contributions to groups making only independent expenditures also could not be corruptive.

The FEC clarified the impact of this decision by issuing two advisory opinions in July of 2010 finding that political committees that make only independent expenditures are not bound by the federal contribution limits or the ban on corporate and union contributions. This was the genesis of the “independent expenditure-only committee,” or “**Super PAC.**”

It is important to note, however, that Super PACs are still registered federal political committees and thus remain subject to the comprehensive disclosure requirements applicable to political committees under federal campaign finance law. Most importantly, political committees must file regular reports with the FEC disclosing all contributions received and expenditures made over \$200.

- **2010 Developments**

“**Super PACs**” were very active in the 2010 elections, although they were authorized only months before Election Day. Eighty-three Super PACs formed between July and November, and were responsible for over twenty percent of the total independent spending, according to CRP. The largest Super PAC in 2010 was the Karl Rove-created American Crossroads, which spent over \$21 million on express advocacy advertising.

Although Super PACs are subject to much more extensive disclosure requirements than their 501(c) counterparts, federal law requires only that PACs disclose their immediate sources of funding—not that those funders in turn disclose their own donors. Consequentially, if a 501(c)(4) makes a contribution to a Super PAC, the Super PAC need only report the 501(c)(4)’s name, not the 501(c)(4)’s contributors. Thus the interests funding that 501(c)(4)’s contribution remain hidden. In 2010, several Super PACs were funded almost exclusively by 501(c)(4) or 501(c)(6) organizations that did not themselves disclose their donors; for instance, the National Association of Realtors Congressional Fund attributed 100 percent of its funding to its affiliated 501(c)(6) trade association; and ProgressOhio was funded almost entirely by the 501(c)(4) group ProgressOhio.org.

- **2012 Developments**

Super PAC activity has exploded in this election cycle. As of mid-October, over 900 Super PACs had formed and had raised over \$500 million dollars, according to CRP.

This growth has been fueled by several developments that have all but erased the legally-required, but often-ignored requirement that Super PACs maintain independence from candidates and parties. Beginning in the Republican presidential primary race, a new type of group emerged: the candidate-specific Super PAC. Unlike the Super PACs of 2010, which typically had supported a number of candidates, these PACs openly acknowledge that their mission is to advocate election of a single

candidate and to operate as a shadow campaign for such candidate. Examples of candidate-specific Super PACs include Restore Our Future, associated with Republican Presidential nominee Mitt Romney, and Priorities USA Action, associated with President Obama.

Furthermore, the FEC ruled in June 2011 that candidates could raise money for their associated Super PACs – although only up to the \$5,000 federal limit applicable to conventional PACs. More importantly, the FEC also allowed candidates to attend, speak and be featured guests at Super PAC fundraising events so long as the candidate does not actually ask for unlimited contributions.

The disclosure gap arising from 501(c) contributions to Super PACs remains a problem—particularly, in the context of advocacy efforts involving multiple affiliated groups. For instance, Priorities USA Action has received in-kind donations from its associated nonprofit, Priorities USA, a 501(c) group that does not disclose its donors. The major donor of FreedomWorks for America, a Super PAC associated with the Tea Party movement, is the 501(c) organization FreedomWorks.

CURRENT CAMPAIGN FINANCE LAWS

Contributions

An **individual** can contribute \$2,500 to a candidate for the primary election, and \$2,500 for the general election (a total of \$5,000 per person). Individuals can also give \$30,800 to a national political party committee per year; and \$10,000 to the federal account of a state party committee per year. The aggregate amount an individual can give is \$117,500 for the two-year cycle (\$46,200 to all candidates and \$70,800 to all PACs and parties). Any expenditure made in “coordination” with a candidate or political party is considered an in-kind contribution to such candidate or party subject to these limits.

The **national party committees** (e.g., **RNC, DNC**) can give \$5,000 to candidates per election, but in addition, can make far larger expenditures in coordination with their candidates. The parties are subject to **coordinated party expenditure limits** that vary between \$45,600 for expenditures coordinated with House candidates to over \$21 million for expenditures coordinated with presidential candidates.

A **multi-candidate political committee** (or “PAC”) (e.g., **EMILY’s List**) can give \$5,000 to a candidate for each election, and \$15,000 to a national political party committee a year. If a PAC makes contributions to candidates or parties, it can only accept contributions subject to a \$5,000 contribution limit and the ban on corporate and union contributions. A **Super PAC** is a PAC that makes only independent expenditures and consequently is not required to comply with these contribution limits and restrictions. A Super PAC can accept unlimited contributions from individuals, corporations and unions.

Corporations and **labor unions** are prohibited from using treasury funds to make a contribution to candidates, political parties, and many types of PACs. A corporation or union also may not coordinate its expenditures with a candidate or political party

because coordinated expenditures are deemed to be contributions. If a corporation or union wants to make a contribution, it must establish its own PAC (*i.e.*, “**separate segregated fund**”) (e.g., **Exxon Mobil PAC**, **Int’l Brotherhood of Electrical Workers PAC**). A corporate/union PAC can solicit only voluntary contributions from members of its “restricted class” (corporate shareholders and executives / union members) subject to the federal contribution limits. A corporation or union may pay the administrative costs of running their PACs with treasury funds, however.

Expenditures

Candidate campaigns may make unlimited expenditures of the money they raise under the federal contribution limits and source restrictions. Individual candidates may make unlimited expenditures of their own money to promote their election.

In addition to making coordinated expenditures subject to the coordinated expenditure limits, **political parties** also may spend an unlimited amount to support their party nominees if they do so **independently** of their candidates.

An **individual, corporation, labor union or PAC** can also make expenditures to influence a federal election without limit provided that they do so **independently** of candidates or political parties. If, however, an expenditure by an individual or PAC is **coordinated** with a candidate or political party, then it is considered an in-kind contribution subject to the contribution limits and source restrictions.

Disclosure

All of the contributions and expenditures listed above must be **reported** to the FEC.

All **federal political committees**—including candidate campaign committees, party committees and PACs—must report all contributions and disbursements exceeding \$200 in regular reports to the FEC. Political committees also must include disclaimers on their communications.

Individuals and groups that are not political committees are subject to more limited disclosure. They are not required to report their contributions to candidates, parties or PACs; instead, the reporting burden is on the recipient committees. These individuals and groups, however, must file disclosure reports with the FEC in connection to two types of **independent spending**:

- (1) “**express advocacy**” expenditures (*i.e.*, ads that expressly advocate the election of a federal candidate) exceeding \$250, and
- (2) “**electioneering communications**” disbursements (*i.e.*, broadcast ads that mention a federal candidate, and run within 30 days of a primary election and 60 days of a general election) exceeding \$10,000.

Enforcement

The **FEC** is responsible for enforcing federal campaign finance law. It is a six-member commission, no more than three members of which can be from the same political party, who, despite the statutory requirement that they be nominated by the President, are

usually hand-picked by the Congressional leadership of the respective parties. Due to its structure, the FEC often ends in deadlock on any significant questions.

THE NEXUS BETWEEN TAX LAW AND ELECTIONS

Non-profit groups are becoming increasingly influential in federal races. Typically these groups organize under certain sections of the federal tax law in order to enjoy tax-exempt status. Depending on the tax-exempt vehicle a group chooses, it will potentially be subject to limitations on its political campaign activities, as well as to some measure of disclosure.

Section 527 groups

A **Section 527 group** is a tax-exempt group organized under section 527 of the Internal Revenue Code “for the function of influencing or attempting to influence the selection, nomination, election or appointment of any individual to any Federal, state, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors.”

Federal, state and local candidate campaign committees; federal, state and local political party committees; and most other political committees, including Super PACs, are typically organized under section 527. It is important to emphasize that not all 527 groups are **federal political committees**. Only those 527 groups that accept contributions or make expenditures to influence federal elections of over \$1,000 in a calendar year, and that have as their major purpose the nomination or election of one or more federal candidates, are required to register with the FEC as federal political committees.

527s groups are required to publicly disclose their donors. If a 527 registers as a federal political committee with the FEC, then it is subject to comprehensive disclosure requirements under the federal campaign finance laws. Subject to certain exceptions, a 527 group that is not registered as a federal political committee is required to file with the IRS an annual information return and regular reports disclosing publicly its contributions and expenditures. If a 527 does not disclose a contribution, it must pay tax on the amount of that contribution.

Section 501(c) groups

A **501(c)(3)** organization is a public charity or private foundation (e.g., **Boy Scouts of America, Heritage Foundation, churches**). Donations to a public charity are tax deductible and donors need not be publicly disclosed under the tax law. A 501(c)(3) is prohibited from participating or intervening in any political campaign for a candidate for public office, and thus these groups have not been major players in federal elections.

A **501(c)(4)** is a social welfare organization (e.g., **NRA, Sierra Club**). Contributions to a (c)(4) are not tax deductible, and may be subject to a gift tax. Donors need not be publicly disclosed under the tax law. Unlike (c)(3)s, these groups can participate in

political campaign activity for candidates for public office, provided that this is not their **primary activity**. 501(c)(4) groups have been particularly active since *Citizens United*, as they represent a convenient way to avoid donor disclosure while engaging in substantial campaign advocacy. Examples of (c)(4)s are **Crossroads GPS** and **Priorities USA**.

501(c)(5)s are labor organizations and **501(c)(6)s** are trade associations. They are also not required to publicly disclose their donors under the tax law. Similarly to 501(c)(4)s, these groups can engage in political campaign activity provided that it is not their primary activity. Both of these types of groups have been very involved in federal elections; to date in 2012, according to CRP, the most active (c)(5) has been the **AFSCME** and the most active (c)(6) has been the **U.S. Chamber of Commerce**.

HOW IT WORKS

When it comes to influencing public policy in the U.S., many corporations, unions and ideological groups can use several organizational forms:

- ✓ A group can create a **(c)(3)** organization to do its research, public education and policy work.
- ✓ It can also have a **(c)(4)** to head up its lobbying and to run election ads, provided that the latter activity is not the “primary activity.” The (c)(4) can provide cover for those donors that do not want to be publicly associated with the group’s election advocacy.
- ✓ A group can also establish a **527** if it wishes to do unlimited independent spending on election ads. If the 527 has as its major purpose the election of a federal candidate, then it must register with the FEC as a **federal political committee**. However, even if the 527 registers as a political committee, if it engages only in independent spending (*i.e.*, a **Super PAC**), it no longer has to comply with the federal contribution restrictions in terms of its fundraising.
- ✓ If the group wishes to make direct contributions to candidates, then it can establish a **PAC**, which can only raise contributions subject to the federal limits, as well as to the ban on corporate and union contributions.
- ✓ Finally, the group can also **bundle** individual contributions to a candidate as well as urge its members and executives to make individual contributions.