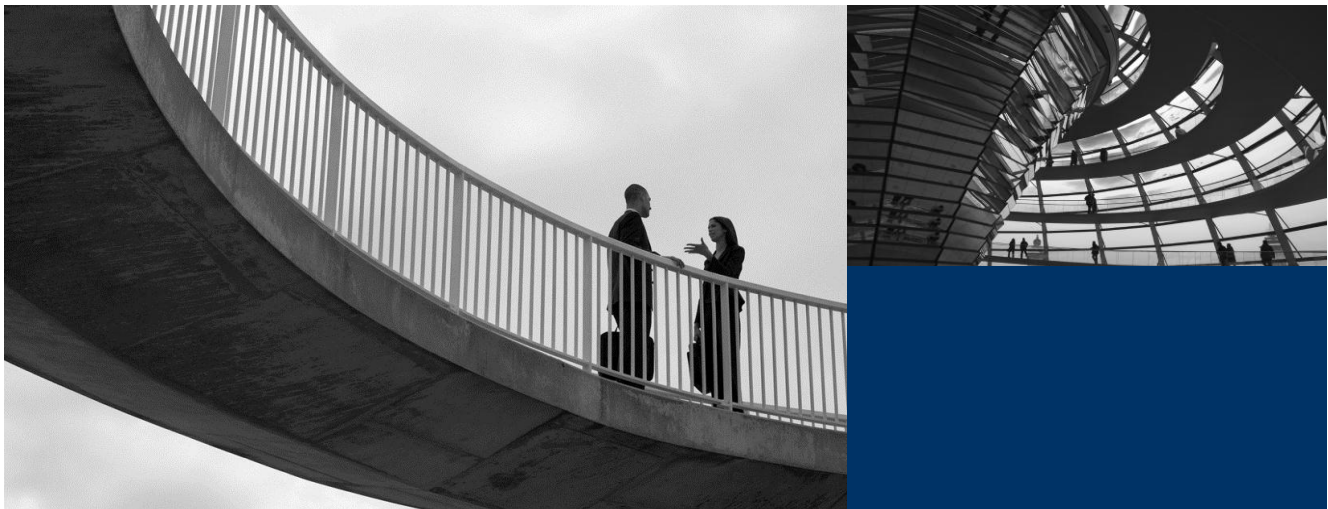


A Philanthropist's Guide to Political Activity 101

By: Laurence D. Laufer

Director of the Corporate Political Activity Law and
Non-Profit & Tax Exempt Organizations Practice Groups

SPRING 2012



WWW.GENOVABURNS.COM

THIS ARTICLE IS PROVIDED FOR EDUCATIONAL AND INFORMATIONAL PURPOSES ONLY AND IS NOT INTENDED AND SHOULD NOT BE CONSTRUED AS LEGAL ADVICE. IT IS RECOMMENDED THAT READERS NOT RELY ON THIS PUBLICATION BUT THAT PROFESSIONAL ADVICE BE SOUGHT FOR INDIVIDUAL MATTERS.

494 BROAD STREET ■ NEWARK, NJ 07102
TELEPHONE 973-533-0777 FACSIMILE 973-533-1112

NEW YORK, NY ■ CAMDEN, NJ ■ RED BANK, NJ ■ PHILADELPHIA, PA

A Philanthropist's Guide to Political Activity 101

By: Laurence D. Laufer¹

Independent Expenditures ... Super PACs ... *Citizens United*... it is an evolving lexicon that evokes new trends in the financing of political speech in the 2012 Presidential and Congressional elections. Individuals and groups that seek to influence public policy have a broader range of options for political activity, but also face a regulatory environment that remains complex and unstable. Effective political activity requires planning and a legal strategy for compliance.

Compliance is essential, not simply to do good but to do well. Nothing undermines respect for an advocate faster than a perception that he or she is cheating -- not playing by the rules, to say nothing of the potential for civil liability or even criminal prosecution. Before you write that first check, do you have a strategy for compliance? And before you formulate your strategy for compliance, do you know what questions you should ask?

We briefly recount the dramatic developments in federal campaign finance law since the landmark Supreme Court decision, *Citizens United v. FEC*.¹ Because the 50 states and many municipalities also regulate political campaign financing – regulations that draw upon but do not necessarily mimic the structure and foibles of federal law – our focus then shifts to the fundamentals you need to know to plan for compliance.² We conclude by returning to the *Citizens United* decision for general observations about its broader meaning for your place in American democracy.

I. Recent Developments

Campaign finance regulations come in a many forms: prohibitions, limitations, reporting, recordkeeping, disclaimers, restrictions on doing business with government entities, as well as curbs on coordination between spender and beneficiary. In interacting with candidates and public officials, regulation of lobbying activity and restrictions on gifts may also come into play. State and local governments are now responding to new doctrines and phenomena so prominent in federal elections, a full gamut of developments that runs from new legislation, regulations and opinions, to unresolved litigation, and to inaction and erosion of existing laws.

The sea-change at the federal level began in January 2010. To recap:

¹ Partner, Genova Burns Giantomasi & Webster, New York, New York.

GENOVA BURNS GIANTOMASI & WEBSTER

ATTORNEYS - AT - LAW

- In its *Citizens United* decision, the U.S. Supreme Court held that laws prohibiting expenditures by corporations in federal elections were unconstitutional under the First Amendment. By sweeping this longstanding prohibition into the dustbin, the decision extended to corporations (and labor unions) the right to make unlimited independent expenditures in federal elections – a right individuals have been assured since the 1976 Supreme Court decision, *Buckley v. Valeo*.³
- Later that year, the Federal Election Commission (FEC) opined that contributions to political committees that make independent expenditures (but not contributions) in federal elections would not be subject to corporate source restrictions or contribution limits.⁴ In other words, individuals and corporations may make unlimited contributions to what are now known as Super PACs. Super PACs may not coordinate their expenditures with federal candidates and remain subject to federal PAC registration and disclosure requirements.
- Super PACs were formed in connection with certain IRC 501(c) organizations. Within the parameters of federal tax law, these 501(c) organizations may make unlimited donations to a Super PAC including from funds raised from sources not subject to public disclosure requirements. In addition, again within the parameters of tax law, these 501(c) entities may make independent expenditures that support or oppose federal candidates in a manner that does not trigger federal PAC registration and disclosure requirements.
- Other Super PACs were created to independently support a specific candidate. Many of these Super PACs have been created and run by associates or former campaign staffers of the candidate. According to the FEC, candidates may solicit contributions for these Super PACs in accordance with federal limits and source prohibitions, but “coordination” between the candidate’s campaign and the Super PAC is prohibited.⁵
- In sum, new opportunities have arisen for the donation or expenditure of unlimited sums, including from corporate sources, to independently support or oppose federal candidates, including in tandem with like-minded individuals and organizations. The level of transparency is currently as much a province of the spender’s preference as of narrowly-construed legal obligations.

WWW.GENOVABURNS.COM

NEWARK, NJ ■ NEW YORK, NY ■ CAMDEN, NJ ■ RED BANK, NJ ■ PHILADELPHIA, PA

GENOVA BURNS GIANTOMASI & WEBSTER

ATTORNEYS - AT - LAW

II. The Fundamentals

A. Political Contributions

A political contribution is a monetary or in-kind gift to support a candidate's campaign, a political party or other political committee. While volunteering to help a candidate is generally not regulated as a contribution, advertising expenditures to promote a candidate may be if the ad was prepared or placed in "coordination" with the candidate or his or her agents. Check writers should therefore first understand whether their check will be treated as a contribution.

It matters whether the check is written from a personal or business account. Some jurisdictions prohibit contributions by corporations or subject these to reduced limits. *Citizens United* did not address the constitutionality of corporate contribution restrictions, lower federal courts have divided on this issue, and the question may ultimately be settled by the Supreme Court. Even where corporations are permitted to contribute, a "single source" rule may bring contributions by affiliated entities under a single, aggregate limit.

You need to know, for example:

- What contribution limit is applicable to the recipient?
- Is the limit set on a per-election basis or does it cover the entire election cycle (primary and general election together)?
- Is it an annual limit, as is often the case for donations to political parties or political action committees?
- Is the recipient in a special category to which no limit is applicable (e.g., a party building or "housekeeping" fund; a legal expense fund)?
- Are the total contributions by the contributor subject to an aggregate cap?

In some jurisdictions, additional restrictions may be triggered based on the business of the contributor. For example, "pay-to-play" rules restrict a firm's eligibility for government contracts due to political contributions made by the firm or associated persons. You should be aware when a political contribution by you, a family member, or business associate may disqualify your firm from receiving government contracts. Other special restrictions may curb contributions by businesses and principals in highly regulated industries and by registered lobbyists. These individuals and firms may also encounter restrictions on soliciting contributions and/or public disclosure requirements for soliciting or bundling contributions.

WWW.GENOVABURNS.COM

NEWARK, NJ ■ NEW YORK, NY ■ CAMDEN, NJ ■ RED BANK, NJ ■ PHILADELPHIA, PA

GENOVA BURNS GIANTOMASI & WEBSTER

ATTORNEYS - AT - LAW

Generally, contributions are reported to the public by the recipient – a candidate or political committee. These disclosures may require details, such as the contributor’s home address or employment information. Media scrutiny giving patterns may give rise to speculation that contributions were bundled or, even worse, illegal straw donations – contributions funded or reimbursed by an unreported source.

Other laws prescribe offering of gifts to public officials and their acceptance, at least in circumstances in which the gift could have the appearance of influencing the public official. Political contributions are usually beyond the scope of these restrictions. Likewise, public official attendance at political events typically is not treated as an improper gift, regardless of the value of the meal and entertainment provided.

B. Advocacy Expenditures

Advocacy expenditures are direct speech by the advocate – a highly-protected constitutional right. (By comparison, contributions are generally made in a response to a request; in First Amendment terms, political contributions are seen as a moderately-protected associative act aligning the contributor with the voice of the recipient.) The amount spent determines amplification but the voice remains that of the advocate. As a constitutional matter, *Citizens United* rejected distinctions between the exercise of this right by individuals and by corporations.

Campaign finance laws generally regulate public communications that contain “express advocacy” of the election or defeat of the candidate (so-called “magic words”, such as “vote for” and “vote against”). Express advocacy expenditures may trigger public disclosure requirements, such as a duty to register as a political committee, and disclaimer requirements to publicly identify the source of the expenditure. But, pursuant to multiple U.S. Supreme Court decisions (from *Buckley v. Valeo* through *Citizens United*), express advocacy expenditures are not subject to restriction if made independently of any candidate.

Federal courts have identified “issue advocacy” as a category apart from express advocacy, recognizing that the former may not be regulated to the same extent as political campaign speech. For example, federal law (and imitative states and localities) extend disclosure requirements only to that portion of issue ads that falls within its definition of “electioneering communications:” radio and television ads which clearly identify a candidate and target the relevant electorate within a short-time period before an election. Prior to *Citizens United*, the Supreme Court narrowed this regulated category to ads that are the functional equivalent of express advocacy.⁶ *Citizens United* struck down restrictions on corporate spending for electioneering communications but sustained disclosure and disclaimer requirements.

WWW.GENOVABURNS.COM

NEWARK, NJ ■ NEW YORK, NY ■ CAMDEN, NJ ■ RED BANK, NJ ■ PHILADELPHIA, PA

GENOVA BURNS GIANTOMASI & WEBSTER

ATTORNEYS - AT - LAW

Coordination with a candidate or political party (or their representative) is the key factual issue that determines whether an advertising expenditure is unlimited or treated as an in-kind contribution subject to limitation. For example, at the federal level, coordination negates independence: the statute treats express advocacy expenditures as independent only if these are “not made in concert or cooperation with or at the request or suggestion of” the candidate, his or her campaign committee or their agents (or a political party committee or its agents).⁷ FEC rules distill the statute to treat as coordinated only those advertisements that meet at least one of four specified content standards and one of five specified conduct standards.⁸ Thus, at the federal level, if the advertisement does not meet a content standard or the interaction between candidate and spender does not fit within a conduct standard, the “independence” of the expenditure will not be compromised.

Of course neither federal statutes nor regulations govern how states and localities may choose to design, interpret and enforce coordination standards for their elections. In any given jurisdiction, the test for coordination may be substantively broader and enforcement more vigorous. Thus, it is important to understand local law and circumstance, and to adhere to procedures that are sufficiently protective to ensure compliance.

C. Funding an Advocacy Organization

In between donating funds to a candidate and directly making political expenditures in your own name, lies the strategy of forming and/or funding an organization that makes election- or issue- related expenditures. What kind of organization might you set up?

The Internal Revenue Code permits the formation of a tax-exempt political organization for the exempt function of influencing or attempting to influence the election of candidates to public office.⁹ The organization must notify the IRS of its “section 527” status. If funded in excess of \$25,000 per year, the organization must disclose the contributions it accepts and the expenditures it makes to the IRS, the FEC, or State or local authority.

Federal or state law governs whether a “527 organization” must additionally register and report as a political committee with respect to federal, state or local elections. If regulated as a political committee, dollar limits and source restrictions may be applicable to the contributions it receives.

As discussed above, however, recent developments in federal law have identified a sub-species of political committee – the Super PAC – which is exempt from federal contribution limits and corporate source restrictions, provided that the organization makes independent expenditures and does not make contributions to or coordinate its expenditures with federal

GENOVA BURNS GIANTOMASI & WEBSTER

ATTORNEYS - AT - LAW

candidates or party committees. Super PACs remain subject to federal registration and reporting requirements.

It is hard to overstate the power of a Super PAC as a device for amassing funds to influence federal elections. For example, under federal law, an individual may contribute no more than \$5,000 per year to an ordinary federal PAC and an aggregate total of \$117,000 in the current two-year election cycle to federal candidates, PACs and political party committees. In contrast, a recent study found that 15 individuals had contributed \$1,000,000 or more to Super PACs as of December 31, 2011.¹⁰ And that's just the beginning.

How will the Super PAC be greeted at the state and local level? Given the scope of the First Amendment, certainly some allowance will be made for nullifying limits for contributions to political committees that make independent expenditures only. But will these 527 organizations otherwise be regulated as political committees (typically subject to registration and comprehensive disclosure requirements) or more narrowly covered as entities making independent expenditures (generally no registration and more limited disclosure)? In New Jersey, for example, this question turns on the "major purpose" of the entity.¹¹

Encouraged by bipartisan stasis at the FEC, Super PACs have pushed the envelope of permissible coordination – evolving to single-candidate-oriented organizations, under the leadership of the candidate's former aides, associates and relatives, and with the participation of candidates in fundraising. But there is little to ensure that states and localities will follow suit.

Remember, a finding of coordination is fatal to an independent expenditure, removing its cloak of First Amendment protection. A coordinated expenditure is generally regulated as an in-kind contribution, subject to the limitations and disclosure requirements that govern contributions. The spender risks civil liability and criminal prosecution for improper coordination. And if an investigation is triggered, how do you demonstrate there was no coordination? Do not mistake the generous manner in which broad constitutional concepts have been applied to federal law as necessarily controlling how analogous local requirements will be implemented. In other words, when acting in state and local elections, do not rely on federal practices: learn the local rules and the attitude of the local enforcement authority.

Legal questions have also been raised concerning the sources of Super PAC funding. For example, most jurisdictions prohibit "straw" donations: contributions made in the name of another or reimbursed after the fact. If a Super PAC regulated as a political committee reports donations as received from closely held corporations and limited liability companies, in order to conceal their true source, election law violations could result.

WWW.GENOVABURNS.COM

NEWARK, NJ ■ NEW YORK, NY ■ CAMDEN, NJ ■ RED BANK, NJ ■ PHILADELPHIA, PA

GENOVA BURNS GIANTOMASI & WEBSTER

ATTORNEYS - AT - LAW

An IRC §501(c) not-for-profit organization poses a different set of opportunities and risks. A social welfare organization under 501(c)(4), for example, may advocate for legislative changes and generally is not required to disclose its donors. But to preserve its section 501(c)(4) tax-exempt status, election campaign activity may not be its primary activity.

As a result, a 501(c)(4) or other 501(c) organization may make independent expenditures using donations from unlimited and undisclosed sources, provided these election campaign activities are not its primary activity. Similarly, following the same IRS standards, not-for-profit corporations may make unlimited donations to Super PACs which then fund independent expenditures. The funding sources underlying the not-for-profit corporation's donations need not be disclosed. Super PACs and 501(c)(4)s also may be affiliated and work together to advance a common public policy agenda.

But 501(c) organizations may be more effective in running issue ads that promote or attack particular candidates, which are not treated as independent expenditures because they lack “magic words”. Indeed, issue advertising may not be regulated in any manner under campaign finance laws if it avoids identifying specific candidates or otherwise falls outside the parameters of “electioneering communications”¹² or other election-related activities that local law may subject to disclosure requirements.

Advocates should also be aware of when a public communication is subject to disclaimer and disclosure requirements under FEC, Federal Communication Commission (FCC), or state and local standards. In addition, some jurisdictions may treat communications to the general public as “grassroots lobbying”, subject to the lobbyist registration and reporting requirements.

III. Seize Your Independence

Citizens United kicked off a rapid and continuing evolution of campaign finance standards in federal elections, and the ripple effect at the state and local level is under way. But perhaps even more meaningful than specific rules is the majority decision's faith that independent voices play a key role in a democratic political process.

The decision recognizes that political debate is fueled by much more than merely giving in response to candidate or political party, to enable *their* speech. The Court instead extols the constitutional value of other voices – *independent* voices – *your* voice. Thus, unlike direct contributions, the Court declares that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”¹³

WWW.GENOVABURNS.COM

NEWARK, NJ ■ NEW YORK, NY ■ CAMDEN, NJ ■ RED BANK, NJ ■ PHILADELPHIA, PA

GENOVA BURNS GIANTOMASI & WEBSTER

ATTORNEYS - AT - LAW

The Court does not rest on this negative affirmation. It states that independent expenditures are a positive democratic force because “an independent expenditure is political speech *presented to the electorate* The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials.”¹⁴

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.... The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.¹⁵

This is a ringing declaration of the value to America of every citizen’s independent voice, the value of *e pluribus unum*.

Where will *Citizens United* ultimately lead – to democracy or plutocracy? This likely will remain a highly contentious debate. For now, you need to know it as a foundation that frees your independent voice to be politically active, to advocate effectively for or against particular candidates and public policies, and to try to unite citizens in support of your vision.

¹ 558 U.S. ___, 130 S. Ct. 876 (2010).

² The law differs in each state and in many localities; the goal of this article is to stimulate thinking about issues relevant in most jurisdictions; seek legal counsel as to the particular requirements in your jurisdiction.

³ 424 U.S. 1 (1976).

⁴ F.E.C. Advisory Opinion 2010-11 (July 22, 2010).

⁵ F.E.C. Advisory Opinion 2011-12 (June 30, 2011).

⁶ Federal Election Commission v. Wisconsin Right to Life, Inc., 551 U.S. 449, 469-70 (2007).

⁷ 2 U.S.C. 431(17).

⁸ 11 C.F.R. 109.21.

⁹ 26 U.S.C. 527.

¹⁰ Blair Bowie & Adam Lioz, Auctioning Democracy: The Rise of Super PACs and the 2012 Election (2011), http://www.demos.org/sites/default/files/publications/Auctioning_Democracy_SuperPACs-Demos-USPIRG.pdf.

¹¹ See NJ ELEC Advisory Opinion 2011-1, http://www.elec.state.nj.us/pdf/ao/ao_012011.pdf.

¹² A recent federal district court ruling invalidated FEC rules that had narrowed disclosure requirements for the funding of electioneering communications. Van Hollen v. FEC, 20 U.S. Dist. LEXIS 44342 (D.C. Cir, March

GENOVA BURNS GIANTOMASI & WEBSTER

ATTORNEYS - AT - LAW

30, 2012). Unless overturned on appeal, 501(c) and other organizations will be required to disclose all sources of funding for electioneering communications in federal elections.

¹³ 130 S. Ct. at 884.

¹⁴ 130 S. Ct. at 910 (emphasis added).

¹⁵ 130 S. Ct. at 898.

WWW.GENOVABURNS.COM

NEWARK, NJ ■ NEW YORK, NY ■ CAMDEN, NJ ■ RED BANK, NJ ■ PHILADELPHIA, PA