

# FEC Opens Rulemaking on Corporate Election Activity with Possible Far-Reaching Implications for Politically Active Entities

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Corporations and trade associations that are active in the federal political arena should pay close attention to a new rulemaking begun recently by the Federal Election Commission (FEC or Commission). This rulemaking opens up for discussion and possible revision the FEC regulations specifically applicable to corporate and labor union activity and could result in changes that become applicable before the 2012 general election. Initial comments on the rulemaking are due on February 3, 2012, and reply comments are due on February 17.

On December 15, 2011, the FEC agreed to begin a rulemaking on Part 114 of its regulations in light of the 2010 Supreme Court decision in *Citizens United v. FEC*, which permitted corporations to make unlimited independent expenditures expressly advocating the election or defeat of federal candidates. Part 114 governs the specific campaign finance rules applicable to corporations, trade associations and labor unions, among others. The Notice of Proposed Rulemaking was published in the *Federal Register* on December 27, 2011, and is available [here](#).

The rulemaking proposes to amend the rules to specifically allow the activities that the Court found to be constitutionally protected in *Citizens United*. Although the FEC had declared on February 5, 2010, that it would not enforce the rules against corporate or union independent expenditures, this action would clean up the regulations and bring them up-to-date with the constitutional precedent. The new regulations also would make it clear that corporations may engage in electioneering communications near elections, meaning that they

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may run television and radio ads mentioning or featuring a candidate right before elections. There are no proposals to remove the reporting obligations on those entities that engage in independent expenditures or electioneering communications.

The rulemaking proposes several alternatives implementing *Citizens United* in other areas of the FEC's regulations as well. In short, there are alternative proposals as to how to address independent expenses incurred by a corporation that do not include a public communication. An example of such non-communicative activities is paying the salary of employees to drive volunteers around to do partisan canvassing on election day without coordinating such activity with the campaign or a political party. One regulatory approach would be to permit corporations to engage in such independent, non-communicative activities just as they may engage in public communications that are independent. An alternate approach would permit independent communications as required by *Citizens United* but would stop short of permitting independent, corporate non-communicative expenses. The FEC asks for comment on all of its proposals. The proposals also extend into the areas of voter guides, GOTV and voter registration drives.

Among other areas of discussion, the FEC asks for comments about section 114.9 of its regulations which covers the use of corporate facilities for political activity. This regulation addresses, among other things, the one-hour-per-week/four-hours-per-month safe harbor permitting employees to use their company offices for election activity without such activity becoming an impermissible in-kind contribution from the company to the campaign. The FEC wants to know if these rules should be amended given that *Citizens United* allows corporations to engage in independent election-related speech, and such employee activities, if independent, might fall within constitutional protections.

In a section that discusses the possible regulatory demise of the Qualified Nonprofit Corporation, a type of nonprofit permitted to engage in express advocacy before *Citizens United*, the Commission seeks comment on a requirement that all corporations and labor organizations inform their contributors or donors (or perhaps customers?) that their funds may be used for political purposes. Such a requirement would be new and far-reaching.

Although the rulemaking does not propose to revisit the issue of the impermissibility of corporate contributions or the ban on independent expenditures and electioneering communications by foreign nationals, government contractors and federally chartered organizations, the rulemaking addresses most of the baseline rules applicable to corporations and trade associations today.

Accordingly, politically active corporations, trade associations and other incorporated nonprofits and those with politically active personnel should analyze how these rules might affect them and be prepared to comment by February 3 if necessary. Wiley Rein would be happy to assist in this process.