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MEMORANDUM

TO: Tiffany Aurora
Michigan Nonprofit Association

FROM: Jason T. Hanselman

RE: *Citizens United v. Federal Election Commission*
Impact on Michigan Nonprofit Association Members

DATE: January 22, 2010

You have asked us what impact yesterday's United States Supreme Court decision in *Citizens United v. Federal Election Commission* may have for the Michigan Nonprofit Association and its members. We anticipate the decision will open new doors for many for-profit and non-profit entities to participate in the political process in a manner they previously could not participate. Of course, for non-profit corporations recognized under Section 501(c)(3) of the Internal Revenue Code, the decision has no impact because those entities still may not directly or indirectly participate in any political campaign on behalf of or in opposition to any candidate for public office.

For 501(c)(3) entities, contributions to political campaign funds or public statements of position made on behalf of such organizations in favor of or in opposition to any candidate for public office continue to violate the prohibition against political campaign activity. Violating that prohibition may result in denial or revocation of tax-exempt status and the imposition of certain excise taxes. The general prohibition does not, however, limit 501(c)(3) organizations from conducting certain voter education activities, voter registration, and get-out-the-vote drives, if conducted in a non-partisan manner. This ruling does not appear to have any impact on those activities.

Although the ruling in *Citizens United* does not impact 501(c)(3) entities, it could represent a dramatic shift in corporate political activity by allowing other corporate entities to pay for unlimited "independent expenditures" directly from their general treasuries. Independent expenditures are expenditures made without a candidate's cooperation, approval, or direct knowledge that assist or oppose that candidate. Those independent expenditures generally are

advertisements, but may also include paying for newsletters, rallies, or phone banks, as long as they are not coordinated with a candidate's campaign.

The decision does not permit corporations to make contributions directly to candidates and leaves intact applicable "disclosure and disclaimer" provisions. This means corporations making independent expenditures must still report their spending and identify themselves in all advertisements. In other words, the Court's ruling does not give free rein for corporations to spend and contribute on political campaigns, so they must still carefully craft a political activity strategy that may include corporate independent expenditures as well as political action committees and other tools.

Although the limits and prohibitions on contributions to candidates remain, this decision opens the door to much more spending by outside groups recommending or criticizing candidates. Because many entities may be hesitant to disclose their support for or opposition to particular candidates though, the most likely outgrowth of this decision may be the increase of trade associations (organized under 501(c)(6)) and other groups (such as those organized under 501(c)(4)) that aggregate resources and use the funds collected to support or oppose candidates to further their members' interests.

Below is a quick analysis of what the decision means for key players in the political process:

501(c)(3) Organizations. The U.S. Supreme Court's ruling does not impact the ability of charities to participate in the political process. Their role remains limited to non-partisan voter education, voter registration, and get-out-the-vote activities.

501(c)(4) and 501(c)(6) Organizations. Because some corporations may be hesitant about publicly declaring their support or opposition to candidates, it is possible that ideological groups and trade associations will see the greatest uptick in political activity. If structured properly, they may be permitted to raise money anonymously and spend that money on advertisements in support or opposition of candidates.

Corporations and Unions. Corporations and unions can now engage more fully in the political process by using their corporate treasuries to advocate for or against candidates. Their spending in this regard is not limited, however, they must comply with applicable disclosure and disclaimer requirements. Corporations still cannot contribute directly to candidates.

Political Action Committees. Because corporations still cannot contribute directly to candidates, political action committees (PACs) will continue to play an important role in the political process. For certain PACs, corporations can pay their establishment, administration, and solicitation costs, allowing those PACs to solicit funds from employees and others within the solicitable class for use as "hard money" contributions directly to candidates.

Candidates. Contribution limits may have the result of disadvantaging candidates compared to corporations and unions that now will be able to spend unlimited amounts on express

advocacy. Candidates may find themselves fighting to avoid their message from being diluted by advertisements from corporations and unions.

Political Parties. Political parties will continue to serve an important, albeit potentially diminished, role for candidates and supporters. Although they will continue to be able to raise money, make independent expenditures, conduct voter contact programs, and GOTV programs, limits on their contribution and expenditures will make political parties less relevant vis-à-vis corporations and unions.

527 Organizations. 527s have been a popular mechanism for independent communications during recent election cycles. The Court's decision may have the greatest impact on these entities, whose importance may decrease in light of the elimination of the corporate expenditure ban.

If you have any other questions regarding this case or campaign finance issues generally, please feel free to call me or any other member of the firm's political compliance team.

JTH

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