



# Government Affairs Brief

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MOORE & VAN ALLEN PLLC—GOVERNMENT, POLICY & REGULATORY AFFAIRS NEWSLETTER



## Restoring the Right of Corporations to Participate in Political Speech: *Citizens United v. Federal Election Commission*

by Todd Muldrew and Ann McMillin

On January 21, 2010, the United States Supreme Court issued its opinion in *Citizens United v. Federal Election Commission*, overturning its 1990 decision in *Austin v. Michigan Chamber of Commerce*, and striking down the federal prohibition against independent expenditures on political communications by corporations as a violation of the First Amendment right to freedom of speech.

Prior to *Citizens United*, federal law prohibited corporations from making independent expenditures in connection with any federal election. Essentially, corporations could not spend money to expressly advocate for or against a candidate for federal office—no paying for ads that said “vote for,” “oppose,” “Smith for Congress,” or any other message that clearly intended to influence the election of a specific person.

In addition, the 2002 Bipartisan Campaign Reform Act (BCRA) prohibited corporations from paying for “electioneering communications,” which are broadcast, cable, or satellite communications that are targeted to the voters for a clearly identified candidate shortly before his or her election. The key difference between electioneering communications and other election-related expenditures is that the former do not have to include express advocacy.

In *Citizens United*, the Court declared both of these prohibitions unconstitutional as a restriction on political speech based on the speaker’s identity. Therefore, corporations may now spend corporate funds to pay for explicit advocacy for and against candidates for federal office. Although not addressed by the Court, this also raises serious doubts about the constitutionality of similar state prohibitions in regards to candidates for state office.

Corporations should note that the Court upheld the disclosure and disclaimer requirements of BCRA. Certain communications may require a disclaimer announcing the sponsors and the filing of a report with the Federal Election Commission (FEC) indicating anyone who contributed \$1,000 or more to the preparation or distribution of the communication.

It is also important to note that several key restrictions still remain on the ability to spend corporate funds in the context of elections. Federal law still prohibits corporations from making contributions to candidates for federal office. Contributions include not only monetary campaign contributions, but any number of actions that may qualify as “in-kind contributions.”

In the wake of *Citizens United*, corporations should still avoid coordinating with candidates or parties to run ads. This and other types of coordination with a candidate, a political party, or their agents are still prohibited as an in-kind contribution. The Federal Election Commission has established a complicated three-prong test to determine whether a communication is “coordinated.” Before a corporation considers communicating with any candidate or party committee, we recommend consulting with counsel regarding whether such collaboration is acceptable.

For those wishing to weigh in on the rules implementing this decision, the FEC has issued a supplemental notice of proposed rulemaking to take comments on the impact of *Citizens United*. These comments are due February 24, 2010.

One of the biggest questions remaining is how the ruling will effect corporate political involvement. Rather than ushering in an era of corporations running political attack ads in their names, it is more likely that corporate government affairs strategists will look to policy groups and trade associations with which to coordinate. Additionally, many corporations are already heavily involved in issues campaigns. To the extent we see an increase in expenditures on ads for or against specific candidates, we expect the majority of that funding will be shifted from traditional issue advertising. Corporations may be legally free to speak their minds now, but they still must weigh the political and public relations consequences of visibly engaging in American elections.

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# It's the Economy, Stupid

by Jennifer Diggins

The U.S. Senate may consider cap-and-trade legislation some time this year, following the U.S. House's passage of a similar bill last June. At one time this issue appeared to be on the fast track. Now, given the economic downturn, record unemployment, and a prolonged fight on healthcare reform, timing is anything but certain.

The last two Congresses made several attempts at creating a cap-and-trade regime to deal with the regulation of greenhouse gas emissions. The debate on this issue and the pending legislation before Congress only reinforces the belief that this is certainly easier said than done. There are studies on both sides arguing for and against the climate change bills. Both effectively argue the bill being



both a job killer and a job creator. What both sides can agree on is the amount of uncertainty that continues to linger as Congressional leadership plot their strategy.

Healthcare is the issue that sucked all the air out of Washington DC. The bruising the leadership and Administration have taken in recent months leave many pundits believing there is simply no appetite for another massive bill. Congress does have several options for addressing climate concerns, and we may see a pivot to something less comprehensive than the establishment of a cap-and-trade regime. This could take the form of a renewable energy standard coupled with efficiency incentives, research-and-development funding for clean coal and sequestration, and/or greater capital investment in energy infrastructure to bring "greener fuels" to the grid.

Congress' ability to tackle this issue will be defined by the economy and its ability to bounce back. Timing and scope are very much up in the air. What is certain though is whether you make stuff, consume stuff or move stuff, the cost of doing business will change. Stay tuned for developments on this critical issue.

# All Politics is Local

by John Hofland

For several years, advocates of climate change legislation focused their efforts on state legislatures in an effort to force the federal government to take action. Following the election of President Obama, the conventional wisdom was that passage of federal climate change legislation was imminent. As a result, activity on state climate change policy was put on hold.

However, the recent failure to produce a meaningful global agreement at the U.N. Climate Change Conference in Copenhagen, coupled with comments by key members of the U.S. Senate indicating they are unlikely to pass a bill this year, means that activity will likely move back to state legislatures.

Already we are seeing action in several states. At the end of 2009, the governors and legislatures of 11 northeastern states committed to develop a low carbon fuel standard (LCFS) for their region. These states make up the Regional Greenhouse Gas Initiative (RGGI), which has already imposed a cap-and-trade program for electric utilities.

The Midwest Governors Association (MGA) has made design recommendations for a cap-and-trade system and is preparing recommendations for an LCFS for the six states participating in its Greenhouse Gas Emissions Accord. Meanwhile, Minnesota and Michigan have introduced LCFS legislation, while Wisconsin has begun debating an Omnibus Climate Change bill. Western states are pursuing similar policies, both on a regional level and individually. Oregon passed LCFS legislation last year and now Washington is also considering establishing one.

Finally, there is California, the state responsible for initiating many of these policies. California's LCFS goes into effect next year and its cap-and-trade program starts in 2012. Those two policies are the flagship programs for the Golden State's climate change efforts, and the success or failure of these actions in California will influence state-level activity across the country.

State and regional climate change policies pose many challenges for businesses. A patchwork of different state climate change regulations will create compliance issues for businesses with operations in multiple states and increase compliance costs. Businesses may also face competitive disadvantage if their competitors are located in states or countries without similar regulations.

Businesses need to follow climate change policy activities in the states where they have operations, including legislation, rule makings and Executive Orders. Where policies are being considered, businesses need to engage with their elected officials and regulatory staff to explain the economic impact these proposals could have on their companies and the communities where they are located.



## Green Development Projects— *Not Always a Walk in the Park*

by Peter Allen

In the midst of the Great Recession, there remains a glimmer of hope for investors and developers. Green projects—specifically renewable and clean energy—have been given high priority by federal, state and local elected officials who continue to try to address challenging energy and environmental issues. Governments are using both the carrot and the stick to try to move the electricity grid towards renewable sources. Twenty three states currently have renewable portfolio standards, requiring a certain percentage of energy to come from renewable sources, and a federal standard is likely in 2010 even if climate change legislation otherwise stalls. In addition to extending the Production Tax Credit for renewables, which provides a 2.1-cent per kilowatt-hour benefit for the first 10 years of a renewable energy facility's operation, the American Recovery and Reinvestment stimulus package included \$6 billion to support loan guarantees for renewable energy power generation and transmission projects.

For those venturing into green development, the support is encouraging. But developers must be cautious not to presume that political rhetoric has translated into a more relaxed permitting process. There have been a number of high-profile projects recently halted by legal and regulatory challenges. In December, a federal judge halted the Beech Ridge wind farm project in West Virginia because the developers failed to secure a federal "incidental take permit" for endangered bats. And just last month, the embattled Massachusetts Cape Wind Project was delivered yet another setback when the Mashpee and Aquinnah Wampanoag tribes objected to the project, asserting that the project will interfere with their spiritual rituals and ancestral grounds. The National Park Service's Keeper of the National Register of Historic Places determined that the Nantucket Sound

is eligible for listing in the National Register of Historic Places "for its significance as a traditional cultural property and as a historic and archeological property."

The Beech Ridge and Cape Wind projects are just two in a series of green projects that have been significantly delayed by community and NGO opposition. In the case of the Cape Wind project, developers have faced nine continuous years of challenges, ranging from Not In My Back Yard arguments, to environmental impact arguments, and now historical landmark arguments. The latest is another significant setback for those who would like to see more renewable energy online; the 130 wind turbines planned for the Cape Wind project will produce up to 420 megawatts of clean energy.

Opponents of development projects use the "kitchen sink approach" to throw all available challenges—credible or otherwise—at developers. There are some obvious changes to the permitting process that will make the process more fair and efficient. Until then, developers need to start early to broadly identify potential issues and setbacks. From there you can work through issues with stakeholders before they cause costly delays. Developers should look to help in understanding both the regulatory system as well as the wide variety of stakeholders who may introduce themselves into the process. Building relationships in the community with key leaders and identifying conflicts before they arise is a must. In the end, it pays to be proactive and assume the worst about the potential challenges you will face even when you are doing something everyone can support, like going green.



## Eye on 2010:

### *Winds of Change Continue to Blow*

by Michael Rentiers

If one were to look back to the news headlines from the aftermath of the 2008 elections and compare them to headlines from the recent elections in Virginia, New Jersey and Massachusetts, they would be almost identical just by reversing the political fortunes of the Democrats and Republicans. Similarly, it is not the mood of the electorate that has changed so much as it is the target of their disdain. As the 2010 midterm election season draws near, one thing is for certain, the same winds of change that forced the GOP from power are still blowing strong. This time however, the 2010 the forecast calls for the Democrats to have that wind in their faces.

Taking into account recent polling and the results of the stunning elections that have happened over the course of the past year, it is becoming increasingly clear that the electorate is still hungry for a change in government and is willing to vote out the party in power to prove it. Approval numbers for Congress as a whole are stuck in the basement, and party identification is down on both sides of the aisle. The Republican brand has not made a resurgence from 2008, yet the generic ballot tests gives them their widest lead since 1994. Going into the 2010 election cycle, most analysts are predicting a number of seat pick-ups for the Republicans in the House (with another score being viewed as toss-ups) and at least a three-seat pick-up in the Senate.

The American public fundamentally distrusts its government. And rather than focus on the economy, deficit spending and other kitchen table issues, the Democrats, buoyed by their vast majorities, have seemingly overreached their mandate and taken on unpopular issues like cap-and-trade, government-driven health care reform and big business bailouts. It seems the electorate is poised to once again teach the party in power a stiff lesson. The American public didn't elect them because they wanted the Democrats' most left-leaning policies; they were elected because the previous party in power abused the trust of the people.

Now the shoe is on the other foot and the Republicans stand a chance of being swept back into power on the same winds of change, but the lesson remains the same. The public is not necessarily clamoring for Republicans. They are clamoring for an open and honest government that does not overreach; one that addresses the issues that are pertinent to everyday lives. If the Republicans can't produce a campaign platform based on that premise and deliver on time, then the electorate will continue to keep shopping.

If one spends time working at the grassroots level as our team regularly does, it is easy to see that an increasing number of voters are acutely aware of what is going on in government. Unlike any time in recent memory, the general public is actively engaged on the issues and is taking note of what their representatives are doing. It should be a clear signal to elected officials, advocacy groups, and other grassroots organizations that the public is paying attention and is a powerful force for change. If they would take the time to educate those individuals and deliver on their promises, a chance to truly shape the public conversation is real. This emerging grassroots force may spell trouble for entrenched politicians; it also presents a golden opportunity for businesses and organizations that have an interest in communicating with the public. This election cycle represents a perfect time for those groups with issues that intersect between the government and the people to speak and work directly at the grassroots level. The public is listening and is motivated to act if they are engaged properly. Using the right strategy and message is key to success this year.

The 2010 election cycle is already shaping up to be historical on many fronts, the first of which will be the power of the independent-thinking grassroots movements already shaping the political landscape.

# New FEC Rules on Campaign Air Travel Released

by Stephen Gerko

On January 6, 2010 the Federal Election Commission published its final rules on non-commercial air travel in connection with a federal election. These new rules came about from the relevant sections of the Honest Leadership and Open Government Act of 2007.

## House Rules

There were two sets of rules that came out of HLOGA. The rules dealing with candidates for the U.S. House of Representatives were rather cut and dried: no travel on non-commercial aircraft. This restriction covers House candidates, along with any individuals traveling on behalf of the candidate, when they are traveling in connection to an election. It does not apply for personal travel or official Congressional travel. This broad prohibition makes no exception for travel paid by the candidate's committee, leadership PAC or personal funds.

## Presidential and Senate Travel

The new rules governing Presidential, Vice Presidential and Senate travel are not nearly as strict, but lay out clear reimbursement rates for non-commercial air travel. Candidates must pay for themselves and any "Campaign Travelers" that accompany the candidate or travel on his or her behalf for campaign purposes. Again, the pay-to-fly rule is only for campaign-related travel, and not for official or personal flights.

If a candidate in this category does fly to a campaign event in a jet not owned by one of the airlines, he or she must pay the pro rata share of the fair market value of cost of a non-commercial flight. This amount is determined by dividing the fair market value of the "normal and usual" charter fare or rental charge for a comparable aircraft by the number of travelers flying representing the candidate. Non-campaign flyers do not factor into this formula. If the representatives of only one campaign are on the flight, the campaign must pay for the entire cost of the charter, regardless of the number of additional flyers not related to the campaign. Payment for this flight must be made within seven calendar days to avoid being considered as an in-kind contribution made by the campaign travelers.

If non-commercial travel occurs on behalf of a candidate (but does not include the candidate), the rates fall into three categories:

- For travel between cities with regular first class commercial air service, the lowest first class ticket cost.
- For travel between cities with regular non-first class commercial air service, the lowest coach class ticket cost.
- For travel between cities without regular commercial air service, the normal charter fare or rental cost.

For more details or questions on this rulemaking, contact the FEC or Moore & Van Allen.



## Mullikin's Expedition to South Pole to Study Climate

GPRA Team Leader Tom Mullikin early this year participated in an expedition to the South Pole as part of his ongoing study of the impact of global climate change.

Tom's travels have led him to the deserts of Namibia, Africa, the tropical rain forests of Peru, Australia's Great Barrier Reef, and now to the frozen continent for a second time. At each location, Tom has lectured about anthropogenic climate change and the ongoing scientific debate about a global climate solution. Tom will travel later this year to the North Pole and Mount Kilimanjaro to further his knowledge of the issue and its effects on mankind.

# Spotlight on GPRA

## *The Whole Truth* to air on Halogen

GPRA is proud to announce that *The Whole Truth*, a documentary produced in-house by the GPRA's Creative Department, has been accepted to be aired by Halogen, a national television network available in 12 million households. *The Whole Truth* examines mankind's role in the climate change phenomenon and discusses the need for a solution that is both environmentally and economically responsible, and has already won a Telly Award in both the Social Issues and Feature Documentary categories. Halogen will host a Premiere of *The Whole Truth* on March 2 at the Booth Playhouse in Charlotte, North Carolina.

In addition, *The Whole Truth* will be screened at the Charleston Film Festival, being held March 11 - 14, at the Terrace Theaters in Charleston, South Carolina.



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The Government, Policy & Regulatory Affairs team of Moore & Van Allen, PLLC, uses a strategic approach to help our clients reduce regulatory costs, shape public opinion, participate in the legislative process and build community equity, significantly enhancing their bottom lines.

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