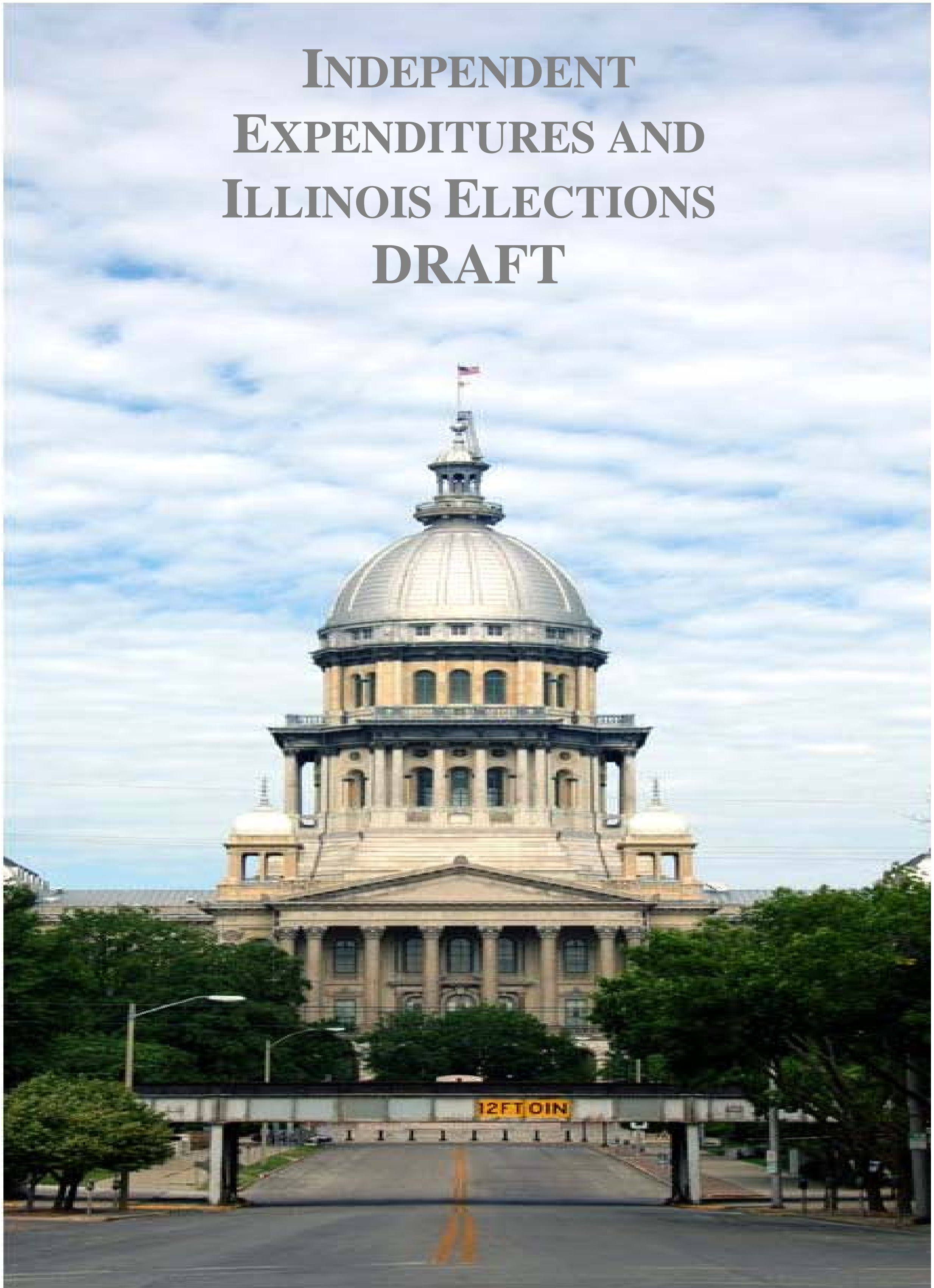
INDEPENDENT EXPENDITURES AND ILLINOIS ELECTIONS DRAFT



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INDEPENDENT EXPENDITURES AND ILLINOIS ELECTIONS

January ___, 2013

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I. Introduction

The landscape of campaign financing has changed dramatically in the wake of the United States Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*. In *Citizens United*, the Court held that federal limits on independent expenditures by corporations violate the First Amendment. The *Citizens United* decision and other subsequent decisions, including the decision of the United States Court of Appeals for the District of Columbia Circuit in *SpeechNow.org v. Federal Election Commission*, gave rise to a new breed of political committees known as independent-expenditure-only committees or "Super PACs," which have quickly come to occupy a major place in federal and state elections. As one indication, the 2012 general election saw outside spending groups compete for supremacy in political spending with the candidates and with national political parties. The $1.28 billion in independent expenditures at the federal level exceeded independent expenditures in the four previous election cycles combined.

Illinois has amended its campaign finance and disclosure laws in response to these developments. After a lower court decision interpreting *Citizens United* and *SpeechNow* held that Illinois's campaign finance limits could not be applied to independent expenditure committees, the General Assembly responded by passing Public Act 97-766 (the "Act") on July 6, 2012. The Act permits independent expenditures to be made in connection with Illinois elections in a manner that protects First Amendment rights consistent with *Citizens United* and subsequent cases. The Act also lifts the political contribution limits applicable to candidates if certain levels of independent expenditures are made in a particular race.

Illinois's 2012 general election provides the first opportunity to assess the efficacy of the State's new rules on independent expenditures. The Act itself directs the Illinois Campaign

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Finance Task Force to examine and make recommendations regarding the provisions of the Act to the Governor and the Illinois General Assembly by February 1, 2013. In preparing this report, the Act directs the Task Force to take into account "case law concerning independent expenditures, the manner in which independent expenditures are handled in the other states and at the federal level, independent expenditures made in Illinois during the 2012 general primary and, separately, the 2012 general election, and independent expenditures made at the federal level during the 2012 general election."[1] Accordingly, this Report provides an overview of legal developments after *Citizens United*; surveys changes in federal and state regulation of independent expenditures; summarizes expenditures in the 2012 election at both the state and federal level; and, finally, sets forth potential areas for further legislative and administrative actions related to independent expenditures.

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[1] 10 ILCS 5/9-8.5(h-5).

II. Background on Regulation of Independent Expenditures

Part II of this Report provides an overview of the history of independent expenditure regulations in Illinois culminating in Public Act 97-766. It also provides an overview of the current regulatory regime and surveys independent expenditures during the most recent state elections.

A. History of Independent Expenditure Regulation

Prior to 2011, Illinois had no restrictions on the size or source of campaign contributions to candidates for office.[2] The enactment of Public Act 96-832 introduced contribution limits effective January 1, 2011 and created a new category of spending called "independent expenditures." An independent expenditure is any expenditure expressly advocating for or against a candidate (or making any other electioneering communication), provided the payment is not coordinated, in any way, with the candidate or candidate committee.[3]

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[2] Illinois had and continues to have specific political contribution prohibitions related to State contractors. *See* 30 ILCS 500/50-37.

[3] *See* 10 ILCS 5/9-1.15. As amended by Public Act 97-766, the statutory definition of an "independent expenditure" is:

> any payment, gift, donation, or expenditure of funds (i) by a natural person or political committee for the purpose of making electioneering communications or of expressly advocating for or against the nomination for election, election, retention, or defeat of a clearly identifiable public official or candidate or for or against any question of public policy to be submitted to the voters and (ii) that is not made in connection, consultation, or concert with or at the request or suggestion of the public official or candidate, the public official's or candidate's designated political committee or campaign, or the agent or agents of the public official, candidate, or political committee or campaign.

Id. An electioneering communication is roughly defined as any broadcast, advertisement or communication that (1) refers to a clearly identified candidate, political party or public policy question, (2) is made in the 60 days before a general or consolidated election, or 30 days before a primary election, (3) is targeted to the relevant electorate, and (4) is clearly an appeal to vote for or against the candidate or question. *See* 10 ILCS 5/9-1.14(a) (definition). *See also id.* at 5/9-1.14(b) (exclusions from definition).

Public Act 96-832 brought independent expenditures directly into the existing disclosure regime.[4] The law obligates individuals making more than $3,000 in aggregate annual independent expenditures to disclose their identity, occupation and employer; the candidate supported or opposed; and the date, nature and amount of each independent expenditure to the State Board of Elections.[5] Public Act 96-832 made clear that any entity making over $3,000 in annual independent expenditures must organize as a political committee and it provided that all political committees making independent expenditures must report all such expenditures.[6] Public Act 96-832 also amended reporting requirements such that political committees must file reports on a quarterly basis disclosing information about contributions and contributors to the committee and independent expenditures by the committee.[7]

Although an independent expenditure "is not considered a contribution to a political committee,"[8] Public Act 96-832 also attempted to limit contributions to committees formed for the exclusive basis of making independent expenditures by treating them like any other political committees.[9] Effectively, independent expenditure committees were required to organize as political action committees. Contributions to political action committees as of January 1, 2011 were limited to no more than $10,000 from any individual, $20,000 from any corporate entity, or

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[4] Prior to the effectiveness of Public Act 96-832, all expenditures in connection with a candidate were reported to the candidate; the candidate in turn had the obligation to disclose the expenditures as in-kind contributions.

[5] 10 ILCS 5/9-8.6(a) (disclosure must occur within two business days of the expenditure that meets or exceeds the $3,000 threshold). Public Act 97-766 also imposed ongoing reporting obligations on such an individual in $1,000 increments for the remaining duration of the election cycle. *Id.*

[6] 10 ILCS 5/9-8.6(b),(c). Organization as a political committee requires certain disclosures and recordkeeping. *See* 10 ILCS 5/9-3, 5/9-6, 6/9-7.

[7] *See* 10 ILCS 5/9-10, 5/9-11.

[8] 10 ILCS 5/9-8.6(a).

[9] The distinct category of independent expenditure committee did not exist until the enactment of Public Act 97-766.

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$50,000 from any other political committee or candidate committee during a calendar year. On March 13, 2012, in the wake of the *Citizens United* decision,[10] the U.S. District Court for the Northern District of Illinois in *Personal PAC v. McGuffage* permanently enjoined enforcement of these contribution limits with respect to political committees formed for the exclusive basis of making independent expenditures.[11] Illinois did not appeal the court's decision; instead, it amended the Election Code via Public Act 97-766 to create the specific category of an independent expenditure committee as a political committee that is formed for the "exclusive purpose of making independent expenditures"[12] and to make clear that "[a]n independent expenditure committee may accept contributions in any amount from any source, provided that the committee . . . files the disclosure reports required by the provisions of this Article."[13] To date, Illinois's disclosure requirements for independent expenditure committees have not been challenged in court.

B. Summary of Current Provisions

After the *Personal PAC* decision and enactment of Public Act 97-766, Illinois law generally imposes four areas of requirements related to independent expenditures:

1. *Entities that make more than $3,000 in annual independent expenditures must organize as independent expenditure committees.*[14]

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[10] *See* Part III.A, *infra*.

[11] *Personal PAC v. McGuffage*, 858 F. Supp. 2d 963 (N.D. Ill. 2012).

[12] 10 ILCS 5/9-1.8(f).

[13] 10 ILCS 5/9-8.5(e-5). Also per the *Personal PAC* order, Illinois exempted independent expenditure committees from the restriction that "no natural person, trust, partnership, committee, association, corporation or any other organization or group of persons forming a political action committee shall maintain or establish more than one political action committee." 10 ILCS 5/9-2(d) ("This subsection does not apply to independent expenditure committees.").

[14] *See* 10 ILCS 5/9-8.6(b) ("Any entity other than a natural person that makes expenditures of any kind in an aggregate amount exceeding $3,000 during any 12-month period supporting or opposing a public official or candidate must organize as a political committee in accordance with this Article."). Political committees that are not formed exclusively for the purpose of making independent expenditures and are thus not independent expenditure

An independent expenditure committee is a species of political committee[15] that includes:

> any trust, partnership, committee, association, corporation, or other organization or group of persons formed for the exclusive purpose of making independent expenditures during any 12-month period in an aggregate amount exceeding $3,000 in support of or in opposition to (i) the nomination for election, election, retention, or defeat of any public official or candidate or (ii) any question of public policy to be submitted to the electors.[16]

The obligation to organize as an independent expenditure committee imposes some immediate obligations on entities making significant independent expenditures.[17] For example, as a political committee, the Election Code requires that an independent expenditure committee designate a chairman and treasurer.[18] Like any other political committee, an independent

committees and therefore remain subject to contribution limits must nonetheless disclose all independent expenditures in the same manner as is required by independent expenditure committees. *See* 10 ILCS 5/9-8.6(c) ("Every political committee that makes independent expenditures must report all such independent expenditures as required under Section 9-10 of this Article.").

[15] 10 ILCS 5/9-1.8 ("'Political committee' includes . . . an independent expenditure committee.").

[16] 10 ILCS 5/9-1.8(f) (the definition also includes "any trust, partnership, committee, association, corporation, or other organization or group of persons that makes electioneering communications that are not made in connection, consultation, or concert with or at the request or suggestion of a public official or candidate, a public official's or candidate's designated political committee or campaign, or an agent or agents of the public official, candidate, or political committee or campaign during any 12-month period in an aggregate amount exceeding $3,000 related to (i) the nomination for election, election, retention, or defeat of any public official or candidate or (ii) any question of public policy to be submitted to the voters.").

[17] An individual making independent expenditures does not have to organize as an independent expenditure committee, but nonetheless must comply with significant disclosure obligations. *See* 10 ILCS 5/9-8.6(a) (disclosure obligations for individuals making more than $3,000 in aggregate annual independent expenditures). As noted in Part II.C.2, *infra*, individuals are not currently a significant source of independent expenditures. Similarly, political committees that are not organized as independent expenditure committees may also make independent expenditures, but they also are a less significant source of independent expenditures. *See* Part II.C.2, *infra*.

[18] 10 ILCS 5/9-2(f). The Election Code notes that the chairman and treasurer of a political committee can be the same person, but the Code assigns responsibility for the required recordkeeping and reporting to the individual in the treasurers role. *Id.*

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expenditure committee cannot accept contributions until such individuals have been designated, and the chairman and treasurer (or their designated agents) must authorize every expenditure.[19]

Similarly, like every other political committee, an independent expenditure committee must file a verified statement of organization with the State Board of Elections that includes: (1) the committee's name and address; (2) the committee's scope, area of activity, party affiliation and purpose; (3) the names, addresses and positions of the custodians of the committee's records; (4) the names, addresses and positions of the committee's officers; (5) the name and address of any person or entity who contributes at least 33 percent of the committee's total funding; (6) a disclosure of how unspent funds will be dissipated if the committee dissolves; (7) a list of all banks or other custodians of committee funds and (8) the amount of funds available for campaign expenditures as of the date of filing.[20] The statement of organization for an independent expenditure committee must additionally include a signed verification by the chairman of the committee that:

> (i) the committee is formed for the exclusive purpose of making independent expenditures, (ii) all contributions and expenditures of the committee will be used for the purpose described in the statement of organization, (iii) the committee may accept unlimited contributions from any source, provided that the independent expenditure committee does not make contributions to any candidate political committee, political party committee, or political action committee, and (iv) failure to abide by these requirements shall deem the committee in violation of this Article.[21]

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[19] 10 ILCS 5/9-2(g) (a political committee cannot make any expenditures without designating a chairman and treasurer).

[20] 10 ILCS 5/9-3(a) (this filing must be made within ten business days of committee formation or two business days if there is an election within 30 days), 5/9-3(b). Changes in the information previously submitted in a statement of organization must be reported within 10 days of that change. *Id.* at 5/9-3(a).

[21] 10 ILCS 5/9-3(d-5).

The Election Code creates a public and private right of action for injunctive relief to enforce these registration and disclosure requirements.[22]

In addition, the treasurer of an independent expenditure committee (like the treasurer of any other political committee) must "keep a detailed and exact account of" (1) the total of all contributions to the committee; (2) the name and address of each contributor; (3) the date and amount of each contribution; (4) the total of all expenditures by the committee; (5) the name and address of each recipient; (6) the date and amount of each expenditure and (7) proof of payment for each committee expenditure.[23]

Unlike other political committees, however, independent expenditure committees are specifically exempt from the prohibition on any person or entity forming more than one political committee.[24] In addition, an independent expenditure committee's name does not have to include the name of the entity that formed the committee.[25]

2. *There are no limits or restrictions on contributions that an independent expenditure committee can accept from individuals, entities or political action committees.*

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[22] 10 ILCS 5/9-28.5(c) ("Whenever the Attorney General, or a State's Attorney with jurisdiction over any portion of the relevant electorate, believes that any person, as defined in Section 9-1.6, is engaging in independent expenditures, as defined in this Article, who has not first complied with the registration and disclosure requirements of this Article, he or she may bring an action in the name of the People of the State of Illinois or, in the case of a State's Attorney, the People of the County, against such person or persons to restrain by preliminary or permanent injunction the making of such expenditures until the registration and disclosure requirements have been met."); *id.* 5/9-28.5(d) ("Any political committee that believes any person, as defined in Section 9-1.6, is engaging in independent expenditures, as defined in this Article, who has not first complied with the registration and disclosure requirements of this Article may bring an action in the circuit court against such person or persons to restrain by preliminary or permanent injunction the making of independent expenditures until the registration and disclosure requirements have been met.").

[23] 10 ILCS 5/9-7(1). The treasurer must preserve these records for at least the last two years. *Id.* The treasurer may also be relieved of these recordkeeping requirements for certain types of fundraising activities. *See id.* at 5/9-7(2).

[24] 10 ILCS 5/9-2(d).

[25] 10 ILCS 5/9-2(d).

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After the *Personal PAC* decision, the General Assembly amended the Election Code to state that:

> An independent expenditure committee may accept contributions in any amount from any source, provided that the committee files the document required by Section 9-3 of this Article and files the disclosure reports required by the provisions of this Article.[26]

Although the contribution limits that apply to other political committees do not apply to independent expenditure committees, certain additional contribution regulations apply to independent expenditure committees simply by virtue of being a political committee. For example, on all literature and advertisements soliciting contributions, an independent expenditure committee must notify readers as to how to find the committee's reports with the State Board of Elections.[27] In addition, certain contributors must provide the committee treasurer with specific information for his or her records.[28]

3. *There are no limits on independent expenditures by an independent expenditure committee.*

There are no limitations on the size of independent expenditures by an independent expenditure committee. However, if an independent expenditure committee in support of or in opposition to a particular candidate makes independent expenditures on behalf of or opposition

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[26] 10 ILCS 5/9-8.5(e-5). The Election Code specifically prohibits political committees from accepting anonymous contributions or contributions made by one person in the name of another. *See* 10 ILCS 5/9-25. This older prohibition is in literal tension with the recently added permissive language that "[a]n independent expenditure committee may accept contributions . . . from any source," but the Election Code also clearly requires an independent expenditure committee to disclose information about its contributors in various reports, including the contributors' names. *See* 10 ILCS 5/9-8.5(e-5), 5/9-10(c), 5/9-11(a)(4).

[27] *See* 10 ILCS 5/9-9. In addition, if an independent expenditure committee solicits contributions to support or oppose a candidate, the committee must include a notice on the front of all literature or advertisements or following all commercials that mention that candidate stating that "that the committee is not authorized by such candidate and that such candidate is not responsible for the activities of such committee." *See* 10 ILCS 5/9-8 (imposing the same obligation on independent expenditures by an independent expenditure committee to support or oppose a candidate that mention the candidate).

[28] *See* 10 ILCS 5/9-6 (requirements for persons collecting contributions on the committee's behalf and in-kind contributors).

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to that candidate that are in aggregate more than (i) $250,000 for statewide office or (ii) $100,000 for all other elective offices in an election cycle, then the limits on direct contributions to all candidates in that race are lifted.[29] Within two business days of making an expenditure that exceeds one of these thresholds, the committee is required to file a written disclosure with the State Board of Elections. The Election Code provides that the State Board of Elections shall assess a civic penalty of $500 for the first failure to file this disclosure and $1,000 for each subsequent failure to file.[30]

Further, although there is no limit on the size of an independent expenditure, there are limits on the purpose for which an independent expenditure can be made. As a matter of statutory definition, an independent expenditure must be "for the purpose of making

[29] 10 ILCS 5/9-8.5 (h-5) ("If a natural person or independent expenditure committee makes independent expenditures in support of or in opposition to the campaign of a particular public official or candidate in an aggregate amount of more than (i) $250,000 for statewide office or (ii) $100,000 for all other elective offices in an election cycle . . . then the State Board of Elections shall . . . give official notice . . . to each candidate for the same office as the public official or candidate for whose benefit the natural person or independent expenditure committee made independent expenditures. Upon receiving notice from the Board, all candidates for that office in that election, including the public official or candidate for whose benefit the natural person or independent expenditure committee made independent expenditures, shall be permitted to accept contributions in excess of any contribution limits imposed by subsection (b)."). Subsection 5/9-8.5(b) would ordinarily impose the following limits on contributions to a candidate political committee:

> During an election cycle, a candidate political committee may not accept contributions with an aggregate value over the following: (i) $5,000 from any individual, (ii) $10,000 from any corporation, labor organization, or association, or (iii) $50,000 from a candidate political committee or political action committee. . . . During an election cycle in which the candidate seeks nomination at a primary election, a candidate political committee may not accept contributions from political party committees with an aggregate value over the following: (i) $200,000 for a candidate political committee established to support a candidate seeking nomination to statewide office, (ii) $125,000 for a candidate political committee established to support a candidate seeking nomination to the Senate, the Supreme Court or Appellate Court in the First Judicial District, or an office elected by all voters in a county with 1,000,000 or more residents, (iii) $75,000 for a candidate political committee established to support a candidate seeking nomination to the House of Representatives, the Supreme Court or Appellate Court for a Judicial District other than the First Judicial District, an office elected by all voters of a county of fewer than 1,000,000 residents, and municipal and county offices in Cook County other than those elected by all voters of Cook County, and (iv) $50,000 for a candidate political committee established to support the nomination of a candidate to any other office.

10 ILCS 5/9-8.5(b).

[30] 10 ILCS 5/9-10(e-5).

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electioneering communications or of expressly advocating for or against the nomination for election, retention, or defeat of a clearly identifiable public official or candidate or for or against any question of public policy to be submitted to the voters."[31] An expenditure for any other purpose is not an independent expenditure and may be specifically prohibited by the Election Code.[32]

An independent expenditure also cannot be "made in connection, consultation, or concert with or at the request or suggestion of the public official or candidate, the public official's or candidate's designated political committee or campaign, or the agent or agents of the public official, candidate, or political committee or campaign."[33] A coordinated expenditure is not considered to be an independent expenditure. Instead it is treated as "a contribution to the public official's or candidate's political committee" and is subject to applicable contribution limits. Furthermore, to the extent an independent expenditure committee makes a contribution to any other political committee other than an independent expenditure committee or a ballot initiative committee, the State Board of Elections is required to assess a fine equal to the amount of any contribution received by the independent expenditure committee in the last two years that exceeded the limits for a public action committee set forth in the Election Code.[34]

Finally, an independent expenditure committee may have to append certain notices to some independent expenditures. If an independent expenditure committee makes an independent

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[31] 10 ILCS 5/9-1.15.

[32] Like any other expenditure by any other political committee, an independent expenditure committee could also not make an expenditure to, for example, pay expenses relating to a personal residence or put up collateral for a home mortgage. *See* 10 ILCS 5/9-8.10 (enumerating prohibited uses of campaign funds and political committee expenditures).

[33] 10 ILCS 5/9-1.15.

[34] 10 ILCS 5/9-8-6(d).

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expenditure to support or oppose a candidate, the committee must include a notice on the front of all literature or advertisements that mention the candidate (or following all commercials that mention the candidate) stating that "that the committee is not authorized by such candidate and that such candidate is not responsible for the activities of such committee."[35] Similarly, an independent expenditure committee (like any other political committee) that pays for a pamphlet, circular, handbill, Internet or telephone communication, radio, television, or print advertisement, or other communication directed at voters and mentioning the name of a candidate must also disclose itself in the electioneering communication as the payor.[36]

4. *Each independent expenditure committee must make certain disclosures about contributions to it, its contributors and independent expenditures by the committee.*

By virtue of being a political committee, contributions to, and independent expenditures by, an independent expenditure committee must be disclosed in several reports to the State Board of Elections. First, independent expenditure committees must file quarterly reports.[37] These quarterly reports must include a disclosure of, *inter alia*, (1) the amount of funds on hand at the beginning of the reporting period; (2) the full name and mailing address of every person that contributed in aggregate more than $150 to the committee or received in aggregate more than $150 in committee expenditures during the reporting period; (3) the dates and amounts of those contributions or expenditures; (4) the occupation and employer of any contributor who gave in aggregate over $500 during the reporting period; (5) the purpose of each disclosed expenditure

[35] *See* 10 ILCS 5/9-8 (imposing the same obligation on solicitations that mention the candidate for contributions to an independent expenditure committee to support or oppose a candidate).

[36] *See* 10 ILCS 5/9-9.5.

[37] 10 ILCS 5/9-10(b). The quarters coincide with the fiscal year and reports are due no later than the 15th of the month following the close of the quarter. *Id.* A report must be filed each quarter regardless of whether the committee received any contributions or made any expenditures during that period. *Id.*

and the question of public policy or the name and address of, and the office sought by, each candidate on whose behalf each disclosed expenditure was made; (6) the name and address of each political committee from which the reporting independent expenditure committee received or to which that committee made any transfer in excess of $150; and (7) the total amount of proceeds received by the committee from tickets sales to each fundraising event or the sale of campaign merchandise.[38] The quarterly report must also include, *inter alia*, a certification under penalty of perjury that independent expenditures were uncoordinated and must set out the total amount of all independent expenditures during the reporting period, with a breakout of the total sum of all individual undisclosed independent expenditures.[39]

Second, independent expenditure committees must make an interim contribution report to the State Board of Elections each time they receive a contribution of more than $1,000.[40] The interim contribution report must disclose the full name and mailing address of each person who made a contribution of $1,000 or more.[41]

Similarly, independent expenditure committees must make an interim report of independent expenditures of $1,000 or more during the period 30 days prior to an election.[42] The interim expenditure report must contain (1) the full name and mailing address of each person to whom an expenditure in excess of $150 was made in connection with the triggering

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[38] 10 ILCS 5/9-11(a) (setting out the full list of contribution and expenditure disclosure items for quarterly reports).

[39] 10 ILCS 5/9-11(c) (setting out the full list of independent expenditure disclosure items for quarterly reports).

[40] 10 ILCS 5/9-10(c). This interim report must ordinarily be made within 5 business days of the triggering contribution. *Id.* *See also* 10 ILCS 5/9-10(d) (defining when a contribution is considered received). The interim report must be made within 2 business days of the triggering contribution if the contribution is received 30 days or less before an election in which the committee supports or opposes a candidate or ballot question and has made more than $500 in expenditures in support or opposition of that candidate or ballot question. *Id.* at 5/9-10(c).

[41] 10 ILCS 5/9-11(b).

[42] 10 ILCS 5/9-10(e). This disclosure must be made to the State Board of Elections within 5 business days of the independent expenditure.

independent expenditure; (2) the amount, date and purpose of such expenditure; (3) a statement of whether the independent expenditure was in support of or in opposition to a particular candidate; (4) the name of the candidate; (5) the office and district of the candidate; and (6) a certification that the independent expenditure was uncoordinated.[43]

Failure to file any of the disclosures described above may result in the imposition of fines as provided for in the Election Code.

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[43] 10 ILCS 5/9-11(c) (these requirements are consistent with disclosures regarding independent expenditures that must be made in quarterly reports).

C. Independent Expenditures in the 2012 Election Cycles

1. *Independent Expenditures in the 2012 Primary Election*

Several groups engaged in independent expenditures during the 2012 primary election; however, the *Personal PAC* decision came down only a week before the March 20, 2012 primary election and the General Assembly only amended the Election Code later that Spring to make clear that independent expenditure committees are not subject to contribution limits. As such, independent expenditures during the 2012 primary election cycle did not, for the most part, occur under the current legal regime governing independent expenditures and are not examined in depth as part of this Report.

2. *Independent Expenditures in the 2012 General Election*

According to the Illinois Campaign for Political Reform, during the 2012 general election, political committees reported a total of $1.7 million in independent expenditures. The vast majority ($1.6 million) was spent in legislative races to support or oppose candidates running for seats in the General Assembly. Of these independent expenditures, almost all ($1.5 million) came from independent expenditure committees. Other types of political committees reported negligible independent expenditures ($219,000) and no individual reported making any independent expenditure during the 2012 general election.[44]

In context, the $1.6 million in independent expenditures in legislative races during the 2012 general election was targeted to relatively few races. Independent expenditures were not a factor in most legislative races. Moreover, candidates in the 29 targeted legislative races (15 House races and 14 Senate races) raised a total of $29.47 million, rendering independent

[44] Note that this is not the same as saying that no individual made any independent expenditure. The lack of reported independent expenditures by any individuals in the 2012 general election only indicates that no individual reported that he or she made independent expenditures exceeding $3,000 as an annual aggregate, the threshold triggering disclosure obligations.

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expenditures just 5.5 percent of the total raised by candidates in targeted races from all sources. A high level assessment, however, is misleading given the large variation in the amount and number of independent expenditures in particular races.[45] Looking at individual races, independent expenditures ranged from less than 1 percent to nearly 13 percent of fundraising by both candidates. Comparing independent expenditures to the fundraising of particular targeted candidates shows that in some instances, independent expenditures were more than 40 percent of all other monies raised by a candidate.

In terms of frequency, independent expenditures were equally likely to support as oppose a candidate (37 reported independent expenditures supporting a candidate versus 40 opposing). But in terms of dollars spent, independent expenditures were more likely to be negative ($760,609.70 spent in support versus $941,642.61 in opposition).

Without base rate polling information on each race, it is very difficult to determine the impact of the independent expenditures on the outcome of targeted races, but it appears that independent expenditures, at least for legislative races in the last general election, typically did not achieve their desired electoral outcome. That is to say, a defeat followed independent expenditures opposing a candidate or a victory followed independent expenditures supporting a candidate in only 19 instances. The other 58 times, the desired result did not follow the independent expenditure.

Finally, of the 29 legislative races in which independent expenditures were made during the 2012 general election, there is only one instance in which a particular independent

[45] An uncontested Chicago Senate race (5th District: Patricia Van Pelt Watkins) included only a single $636 independent expenditure by one group while a contested Quad Cities Senate race (36th District: Mike Jacobs v. Bill Albracht) saw $252,141 in independent expenditures by six different groups.

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expenditure committee filed a disclosure[46] that it spent more than $100,000 supporting or opposing a particular candidate. This lone instance occurred during the District 31 Senate Race when Personal PAC spent $159,000 to oppose Republican Joe Neal's candidacy. Although this expenditure lifted the contribution limits on all candidates in the District 31 Senate race by operation of section 5/9-8.5(h-5) of the Election Code, neither candidate subsequently reported receiving a contribution in excess of the candidate contribution limits set out in section 5/9-8.5(b) of the Election Code.[47]

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[46] After the election, the Republican State Leadership Committee revised their reported independent expenditures in the 111th District House race between Democrat Dan Beiser and Republican challenger Kathy Smith, disclosing an increase in independent expenditures over that which had been previously reported. All these expenditures by the Republican State Leadership Committee supported Smith or opposed Beiser. Had the revised independent expenditure totals been reported during the general election cycle, they would have triggered section 5/9-8.5(h-5).

[47] Notably, if candidate contribution limits could be lifted by $100,000 in aggregate independent expenditures from all sources—not solely by a single individual or independent expenditure committee—there would have been four additional legislative races during the 2012 general election where candidate contribution limits would have been lifted.

III. Case Law on Independent Expenditures

Part III of this Report provides an overview of the Supreme Court's decision in *Citizens United* and lower court decisions interpreting this ruling. It considers a new generation of legal challenges to pay-to-play schemes, which prohibit entities doing business with the state or federal government from making political contributions.

A. Overview of *Citizens United* And Its Progeny

Citizens United considered the constitutionality of a federal election law that prohibited corporations and unions from using their treasury funds to make independent expenditures in federal elections. It concluded that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption" and that therefore the government did not have a compelling interest in restricting the political speech of corporations. In reaching the conclusion that independent expenditures by corporations posed no danger of *quid pro quo* corruption, the Court relied heavily on the argument that the lack of coordination between a candidate and the individual making the independent expenditure "alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."[48] The Court also rejected the government's argument that its interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form" was sufficiently compelling to justify imposition of limits on independent expenditures by corporations.[49] Finding no compelling

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[48] *Citizens United v. Federal Election Commission*, 558 U.S. 310, __, 130 S. Ct. 876, 908 (2010) (internal quotation marks omitted).

[49] *Id*. at 903 (internal quotation marks omitted).

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government interest in barring independent expenditures by corporations, the Court declared such prohibitions to be a violation of the First Amendment.[50]

The United States Court of Appeals for the District of Columbia Circuit later extended the holding of *Citizens United* to apply not only to prohibitions on independent expenditures, but also to *limits* to contributions to committees formed exclusively for the purpose of making independent expenditures. The court invalidated federal limits on contributions to independent-expenditure-only committees, finding that the government lacked any anti-corruption interest in imposing such limits.[51] The government had argued that limits on contributions to independent expenditure-only groups prevented individuals making large donations from having undue influence over candidates, but the court firmly rejected this argument, reasoning that an interest in preventing undue influence was insufficient to sustain limits on independent expenditures post-*Citizens United*. One federal district court has observed that the D.C. Circuit's opinion "creates substantial doubt about the constitutionality of any limits on Super PAC contributions—including [the federal] ban on contributions by federal contractors."[52]

Significantly, however, the D.C. Circuit found constitutional the various reporting and disclosure requirements imposed on independent-expenditure-only committees by federal law. While acknowledging that these requirements do burden an independent-expenditure-only committee's First Amendment interests, the court found that the requirements "'impose no ceiling on campaign related activities'" and "'do not prevent anyone from speaking.'" Given the public interest in knowing who is speaking about a candidate and who is funding that speech, the

[50] *Id*. at 913.

[51] *See Speechnow.org v. Federal Election Commission*, 599 F.3d 686, 695 (D.C. Cir. 2010).

[52] *See Wagner v. Federal Election Commission*, No. 11-Cv-1841 (JEB), 2012 WL 5378224, at *5 (D.D.C. Nov. 2, 2012).

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court found this interest sufficiently important to justify the additional reporting and registration burdens on independent-expenditure-only committees that federal law imposes.

The United States Court of Appeals for the Seventh Circuit later invalidated state law limits on contributions to political committees to the extent that they restrict contributions to political committees formed for the sole purpose of making independent expenditures. In a 2011 decision, the court held that Wisconsin's application to independent-expenditure-only committees of its aggregate $10,000 cap on contributions to political committees violated the First Amendment.[53]

B. Challenges to Campaign Finance Restrictions Post-*Citizens United*

Following the decision in *Citizens United* and the lower federal court rulings that interpreted that decision as calling into doubt any limits on independent expenditures, a new wave of challenges has arisen with respect to so-called "pay-to-play" laws. These laws generally restrict or prohibit contributions by specific categories of donors who are presumed to be contributing to candidates in order to attract or retain government business. These laws may apply even when the contributions are unrelated to the business being sought, and they may also encompass contributions by those related to the entity doing business or seeking to do business with the government, including affiliated corporate entities, owners and executive employees and children and spouses of such owners and employees. Thus far the federal appellate courts have upheld these laws, citing extensive records of outsize influence by government contractors. But they have yet to consider the constitutionality of a law banning independent expenditures by

[53] *See Wisconsin Right to Life State Political Action Committee v. Barland*, 664 F.3d 139, 154-55 (7th Cir. 2011).

those doing business with the government, and at least one court has expressed skepticism regarding the constitutionality of such a law.

The Court of Appeals for the Second Circuit has upheld the constitutionality of pay-to-play laws on two recent occasions. First, it considered Connecticut's ban on contributions by any contractor or prospective contractor doing business with the state to candidates from the specific government branch with which the contractor was doing business. The ban also included contributions by the spouse and dependent child of such a contractor. The ban on contractor contributions was enacted in 2005 response to several corruption scandals in Connecticut, including allegations that former Governor John Rowland had accepted over $100,000 worth of gifts and services from state contractors in return for his assistance in securing lucrative state contracts. The Second Circuit upheld the ban, noting that the Connecticut legislature "had good reason to be concerned about both the 'actuality' and the 'appearance' of corruption involving contractors" because the state's "recent corruption scandals showed that contributions by contractors could lead to corruption."[54] The Second Circuit also upheld New York City's pay-to-play scheme, which reduced below the generally-applicable campaign contribution limits the amounts that entities who have business dealings with the city, including lobbyists, can contribute to political campaigns.[55] In doing so the Court cited evidence of large donations by city contractors and noted that the city experienced "actual pay-to-play scandals in the 1980s." In addition, the United States Court of Appeals for the Fourth Circuit upheld a North

[54] *Green Party of Conn. v. Garfield*, 616 F.3d 189, 200 (2d Cir. 2010).

[55] *See Ognibene v. Parkes*, 671 F.3d 174, 179 (2d Cir. 2011).

Carolina law prohibiting lobbyists from contributing to the campaign of any candidate for the legislature.[56]

Most recently, a federal district court in the District of Columbia upheld the constitutionality of a federal ban on campaign contributions by federal contractors, considered one of the most stringent contribution restrictions in federal law. The federal provision prohibits anyone who contracts with the federal government from making "any contribution of money or other things of value . . . to any political party, committee, or candidate for public office or to any person for any political purpose or use."[57] While acknowledging that this language arguably encompassed independent expenditures by federal contractors in addition to direct campaign contributions, the district court declined to address the constitutionality of the provision as applied to independent expenditures because the plaintiffs did not challenge the law on that basis. As applied only to direct contributions, the district court found the law constitutional.[58]

These recent decisions raise questions about the constitutionality of pay-to-play laws as they apply to independent expenditures, as well as to direct contributions, particularly where the law was passed without a substantial record of corruption or similar factual evidence supporting its adoption.

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[56] *See Preston v. Leake*, 660 F.3d 726, 741 (4th Cir. 2011).

[57] 2 U.S.C. § 441c(a).

[58] *See Wagner*, 2012 WL 5378224, at *5.

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IV. Survey of Independent Expenditure Regulation Outside of Illinois

Part IV of this Report briefly discusses new developments at the state and federal level in the regulation of independent expenditures following the decision in *Citizens United*. This topic is also explored in Part VI of the Report in terms of the discussion of potential additional legislative or administrative actions related to Illinois's regulatory scheme.

A. At the Federal Level

Following the D.C. Circuit's 2010 decision invalidating federal contribution limits as applied to independent-expenditure-only committees, the Federal Election Commission ("FEC") has not enforced these restrictions. This has resulted in the proliferation of Super PACs at the federal level.

As a general matter, neither Congress nor the FEC has adopted additional requirements related to the regulation of independent expenditures and Super PACs since the *Citizens United* decision. However, Super PACs at the federal level are subject to reporting requirements and regulations related to the definition of coordination pre-dating *Citizens United* that apply to independent expenditures.[59] These FEC regulations provide that when an individual or political committee pays for a communication that is coordinated with a candidate or party committee, the communication is considered an in-kind contribution to that candidate or party committee and is subject to the limits, prohibitions and reporting requirements of the federal campaign finance law.[60]

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[59] These requirements are summarized generally at http://www.fec.gov/pages/brochures/indexp.shtml.

[60] *See* 11 C.F.R. § 109.21(b).

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The FEC regulations establish a three-prong test to determine whether a communication is coordinated. A contribution is considered "coordinated" when it is (1) "paid for, in whole or in part, by a person other than [the political] candidate, authorized committee, or political party committee,"; (2) "[s]atisfies at least one of the content standards" further elaborated in the regulation; and (3) "[s]atisfies at least one of the conduct standards" set forth in the regulation.[61] The following types of "content" satisfy the regulation's requirement: (1) electioneering communications; (2) a public communication "that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate or the candidate's authorized committee"; (3) a public communication "that expressly advocates . . . the election or defeat of a clearly identified candidate for public office"; (4) a public communication that clearly refers to an identified House or Senate candidate, an identified Vice Presidential or Presidential candidate, or an identified political party; or (5) a public communication "that is the functional equivalent of express advocacy."[62] Any of the following types of conduct satisfy the requirement: (1) where the communication is prepared at the "request or suggestion" of the candidate; (2) where the candidate is "materially involved in decisions regarding" the communication; (3) where the "communication is created, produced, or distributed after one or more substantial discussions about the communication" between the donor and the candidate; (4) the person paying for the communication contracts with a common vendor also employed by the candidate currently in the prior 120 days; or (5) a person previously employed by or acting as independent contractor to a candidate's political committee in the prior 120 days uses or conveys material information

[61] *Id*. § 109.21 (a).

[62] *Id*. § 109.21 (c).

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related to the communication.[63] All three prongs of the test—payment, content and conduct—must be met for a communication to be deemed coordinated and thus an in-kind contribution by the FEC. Certain safe harbors also exist that will exempt certain communications from the coordinated communications requirements. Among these is the establishment of a firewall by a commercial vendor, former employee or political committee to prevent the sharing of information.[64]

B. By Other States

At the time of the decision in *Citizens United*, twenty-two states prohibited independent expenditures by corporations. All of those states no longer enforce those prohibitions. In most of the states the prohibitions were repealed by the legislature, but in states where the legislature failed to act, the attorneys general or other enforcement officials have declared that the bans will no longer be enforced.[65]

As of the date of this Report, at least seven states in addition to Illinois, as well as the District of Columbia, have either legislatively removed limits on contributions to independent expenditure committees or are subject to a court order preventing such limits from being enforced. These states are Connecticut, Vermont, Alaska, Hawaii, New Jersey, New Mexico and Wisconsin.[66] For example, in addition to repealing its ban on corporate expenditures,

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[63] *Id*. § 109.21 (d).

[64] *Id.* § 109.21 (h).

[65] *See* Robert M. Stern, *Sunlight State By State After* Citizens United (Corporate Reform Coalition 2012).

[66] Office of the Attorney General of the State of Vermont, Attorney General Issues Guidance Regarding Independent Expenditure PACs (July 25, 2012) (announcing that the Vermont Attorney General will no longer enforce the state's $2,000 statutory contribution limit), available at http://www.atg.state.vt.us/news/attorney-general-issues-guidance-regarding-independent-expenditure-pacs.php; *Yamada v. Weaver*, 872 F. Supp. 2d 1023, 1039 (D. Hawaii 2012) (permanently enjoining the state from enforcing contribution limits against independent-expenditure-only committees);Alaska Public Offices Commission, Approved Advisory Opinion Request AO 12-09-CD (June 6, 2012) (advising that state contribution limits will not be applied to independent-expenditure-only groups), available at http://aws.state.ak.us/ApocInterimFiles/AO%2012-09-CD%20McKeever%20-%20ADB%20-%20APPROVED.pdf;

Connecticut revised its election code to provide that "[a]ny individual, entity or committee acting alone may make unlimited independent expenditures."[67] These independent expenditures remain subject to disclosure requirements if they exceed one thousand dollars.[68] In addition, Connecticut specifically provides that independent expenditures do *not* include expenditures based on information provided by a consultant of a candidate or expenditures for communications prepared by a consultant of a candidate or for consultant services related to a candidate's election if the consultant is also providing services to the candidate.[69]

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State of New Jersey Election Law Enforcement Commission, Advisory Opinion 01-2012 (June 26, 2012) (same), available at http://www.elec.state.nj.us/pdffiles/ao/ao012012.pdf; *Republican Party of New Mexico v. King*, 850 F. Supp. 2d 1206, 1215 (D. New Mexico 2012) (preliminarily enjoining enforcement of state contribution limits against independent-expenditure only committees); District of Columbia Office of Campaign Finance, Interpretative Opinion 12-01 (Feb. 22, 2012) (advising that state contribution limits will not be applied to independent-expenditure-only groups), available at http://ocf.dc.gov/intop/opinions/op_12-01.shtm.

[67] CT ST Section 9-612(e)(1).

[68] *Id.*

[69] CT ST Section 9-601c(b).

V. Independent Expenditures in the 2012 Election

Part V of this Report provides an overview of independent expenditures in federal elections and in other states outside of Illinois.

A. At the Federal Level

Outside spending groups reported a record $1.28 billion in federal election expenditures through the end of the 2012 election cycle. Of this $1.28 billion, approximately 47 percent, or roughly $656 million, came from Super PACs. 60.4 percent of the $656 million raised by Super PACs came from just 132 donors giving at least $1 million each. The main pro-Obama Super PAC, Priorities USA Action, reported making $65,166,914 in independent expenditures[70]; the Romney group Restore Our Future, Inc., spent $142,097,462.42.[71] By comparison, the Obama campaign reported direct contributions of $733 million, while the Romney campaign reported total direct contributions of $479 million.[72] The two major party presidential nominees reported raising a combined total of $313 million from small donors giving less than $200, which came from at least 1,425,500 individuals. Just 61 donors (individuals and institutions) giving an average of $4.7 million each to Super PACs matched the total contributions of these small donors. Of the $1.28 billion raised by outside groups in the 2012 federal election cycle, nearly one-quarter was so-called "dark money" that cannot be traced to an original source.[73]

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[70] *See* Sunlight Foundation Reporting Group Report on Priorities USA Action, available at http://reporting.sunlightfoundation.com/outside-spending/committee/priorities-usa-action/C00495861.

[71] *See* Sunlight Foundation Reporting Group Report on Restore Our Future, Inc., available at http://reporting.sunlightfoundation.com/outside-spending/committee/restore-our-future-inc/C00490045.

[72] *See* 2012 Presidential Campaign Finance Explorer, Wash. Post (last updated Dec. 7, 2012), available at http://www.washingtonpost.com/wp-srv/special/politics/campaign-finance.

[73] Demos, Election Spending 2012: Post-Election Analysis of Federal Election Commission Data (Nov. 9, 2012), available at http://www.demos.org/publication/election-spending-2012-post-election-analysis-federal-election-commission-data.

An examination of outside spending in the three election cycles preceding the 2012 election reveals just how pronounced the growth in outside spending has been. In the 2006 midterm election, which predated *Citizens United*, outside groups spent a total of only $68 million. In the 2010 midterm election, which followed directly on the heels of the Supreme Court's decision, outside spending totaled roughly $295 million. Compare this with a total of $1.28 billion in outside spending during the 2012 general election. Even more striking is the fact that the top 10 outside spenders in the 2012 election accounted for more than 54 percent of all outside spending.

For the first time, spending by outside groups in federal elections is approaching the level of spending by national party committees. In the 2004 general election, prior to *Citizens United*, national party committees spent a total of $1.23 billion—five times more money than outside groups. In 2012, by contrast, national party spending was on parity with that of outside groups, with a reported $1.31 billion in national party spending compared to $1.28 billion in outside spending. Thus, while national party spending has remained nearly constant, outside groups have increased their spending significantly.[74]

B. Expenditures in Other States During the 2012 General Election

There is anecdotal evidence of a large increase in spending by independent expenditure committees at the state level which mirrors spending at the federal level. Most states have yet to publicly release official data on outside spending in their 2012 races, however, and therefore this Report does not treat spending outside of Illinois in depth.

[74] Public Citizen, *Outside Money Takes the Inside Track* (Dec. 19, 2012), available at http://www.citizen.org/documents/outside-spending-dominates-2012-election-report.pdf.

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VI. Discussion

Part VI of this Report discusses possible areas of legislative and administrative action related to independent expenditures.

A. Permitting Candidate Political Committees to Accept Unlimited Contributions if Independent Expenditure Committees Exceed Statutory Thresholds

As noted in Part II of the Report, the statutory threshold was exceeded only once in the 2012 general election cycle[75] in Illinois, in the 31st District Senate Race. In the 31st District race, the independent expenditure committee Personal PAC spent $159,000 in opposition to Republican Joe Neal's candidacy. Although this expenditure lifted the contribution limits on all candidates in the District 31 Senate race by operation of section 5/9-8.5(h-5) of the Election Code, neither candidate subsequently reported receiving a contribution in excess of the candidate contribution limits set forth in section 5/9-8.5(b) of the Election Code. Given this limited experience with the thresholds being exceeded, there is insufficient data to determine the efficacy of this provision. It is also premature to assess this provision because of the lack of data from elections for statewide office or from consolidated primary elections.

The 2012 election, however, brought to the surface an issue with respect to the allocation of independent expenditures among candidates. Currently the statute does not prescribe a mechanism for allocating expenditures made by one independent expenditure committee on behalf of or against multiple candidates. For example, if an independent expenditure committee distributes a flier advocating for or against multiple candidates, it is unclear whether for reporting and threshold purposes the funds expended for the flier should be divided amongst the

[75] After the general election cycle, as part of a quarterly report filed with the State Board of Elections information was disclosed that indicated that the statutory threshold was exceeded in one other legislative race. *See supra* note 46.

candidates or applied in full to each candidate. If the funds are to be allocated amongst the candidates, the statute currently does not prescribe a manner for doing so. One possibility would be to allocate to each candidate the full amount of the expenditure and another possibility would be to prorate the expenditure between each candidate. Another option is to allocate the expenditure in specific amounts if such an allocation can be made based on the facts (for example, a single $50,000 expenditure is made for three different mailings in three different races, but the specific mailings cost $25,000, $15,000 and $10,000 respectively. This is an issue that will presumably arise frequently and deserves further attention.

B. Disclosure Requirements

The 2012 general election saw a large increase in spending by non-profit organizations, most of them classified by the IRS under section 501(c)(4) of the Internal Revenue Code as social welfare organizations or under section 501(c)(6) as trade associations and chambers of commerce. Collectively, such nonprofits spent over $300 million in the 2012 general election, roughly four times as much as in the 2008 presidential election.

The proliferation of these nonprofit spending groups can be attributed to the fact that most business corporations prefer not to spend directly in their own names, but rather to donate to intermediary entities which can pool donations, thereby magnifying their influence. These nonprofit groups often combine electoral advocacy with other forms of political action, including legislative lobbying, public education, and issue advocacy. As a result, they can claim that they are not "political committees" under federal election law and are therefore not subject to the general disclosure requirements applicable to such committees. Some state legislatures, however, have been urging the passage of new laws requiring that nonprofits making expenditures in state elections disclose the identity of their donors.

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In New York, for example, Attorney General Eric T. Schneiderman recently proposed new regulations requiring any tax-exempt group that does business in the state to disclose the portion of its total spending that went to political campaigns.[76] The proposed regulation would require any organization making expenditures of over $10,000 in any given election year to disclose information related to each of its election expenditures, including the amount and purpose of the expenditures.[77] Further, groups spending over $10,000 would have to disclose the identity of each donor contributing more than $10,000 in donations during the reporting period.[78] Specifically, the proposed regulation requires that organizations disclose the following: "(i) the name and address of each donor who made covered donations in an aggregate amount of one hundred dollars or more during the reporting period; (ii) the employer of each such individual donor, if reasonably available; and (iii) the date and amount of each such covered donation."[79] "Covered donation" is defined as "any contribution, gift, loan, advance, or deposit of money or any thing of value made to a covered organization that is available to be used for a New York election related expenditure."[80] Outside spending groups are covered by the regulation to the extent that they are registered with the New York Attorney General and are not prohibited by Internal Revenue Code 501(c) from participating in, or intervening in, any political campaign on behalf of or against a candidate.[81]

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[76] *See* New York Attorney General Proposed Regulation 91.6(b)(1) (Dec. 12, 2012) ("The annual financial report filed by any covered organization shall include the amount and the percentage of total expenses during the reporting period that are election related expenditures."), available at http://www.ag.ny.gov/sites/default/files/press-releases/2012/Text_of_Proposed_Rule.pdf.

[77] *Id*. (b)(2).

[78] *Id*. (c)(1).

[79] *Id.*

[80] *Id*. (a)(9).

[81] *Id*. (a)(2).

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New York's proposed regulation contains at least two provisions for protection of the identity of donors to 501(c)(4) organizations. First, the regulation does not require organizations to include information about donors whose donations are restricted so that funds cannot be used for electioneering. So long as organizations keep earmarked funds in separate bank accounts from funds that are used for electioneering, information on that donor need not be disclosed. Second, the regulation provides that if public disclosure of a contribution or a donor's identity could cause undue harm, threats, harassment or reprisals, the organization or the donor can apply to the Attorney General's office for a waiver from disclosure of information concerning that donor.[82]

Following New York's lead, California state legislators have introduced bills in the State Assembly with virtually identical language. The Los Angeles Times reported that the bills were prompted by an $11 million donation by an Arizona independent-expenditure-only committee to a California campaign committee. The campaign used the donation to oppose Governor Jerry Brown's tax-increase initiative, among other initiatives. When state election officials sued the Arizona group to force disclosure of the identity of the donors behind the $11 million donation, they discovered that the money had been contributed by two other 501(c)(4) organizations, which under federal law are not required to disclose the identity of their donors. This failed attempt at disclosure was the impetus to the effort to strengthen California's disclosure regime.[83]

The constitutionality of these proposals to require the disclosure of donor identity is very much an open question. There is Supreme Court authority on both sides of the issue. In a 1958 case involving the state of Alabama's attempt to determine whether the NAACP was conducting

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[82] *Id*. (h).

[83] *See* Michael J. Mishak, *Lawmakers Try to Curb Anonymous Political Donations in California*, L.A. TIMES, Dec. 29, 2012, available at latimes.com/news/local/la-me-secret-donors-20121230,0,2074161.story.

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business in the state and so required to register with the state as a foreign corporation, the Court found that the State's forced disclosure of NAACP's membership constituted a violation of the Due Process Clause of the Fourteenth Amendment.[84] In doing so, the Court recognized the "vital relationship between freedom to associate and privacy in one's associations."[85] It reasoned that "compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective [] restraint on freedom of association."[86] Opponents of heightened disclosure rely heavily on this precedent for the proposition that disclosure requirements can so burden rights of association and speech that they violate the First Amendment.

More recently, however, the Supreme Court has approved disclosure regimes in the election context. In *Citizens United* itself, the Court rejected a challenge to federal disclosure requirements, emphasizing that "disclosure is a less restrictive alternative to more comprehensive regulations of speech."[87] The Court did address allegations that "disclosure requirements can chill donations to an organization by exposing donors to retaliation," stating that an exception to disclosure could be warranted if a specific group presented evidence of harassment, but it concluded that the record before the Court did not support an exception for Citizens United itself.[88]

Also, in *Doe #1 v. Reed*, decided six months after *Citizens United*, the Supreme Court upheld the disclosure of the names and addresses of individuals who had signed a referendum

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[84] *Nat'l Ass'n for the Advancement of Colored People v. State of Ala*., 357 U.S. 449, 462 (1958).

[85] *Id.*

[86] *Id.*

[87] *Citizens United*, 130 S. Ct. at 915.

[88] *Id.* at 916.

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petition in Washington State.[89] The petitioners sought to bring a law recently passed in the State extending "everything but marriage" benefits to same sex couples to a voter referendum; they contended that state disclosure of their identities would violate the First Amendment. The Court first considered the application of the state disclosure rules to voter referendums generally, finding the disclosure of the referendum's signatories to be justified by the State's constitutionally substantial interest in "preserving the integrity of the electoral process" by combating fraud, "ferret[ing] out invalid signatures caused . . . by simple mistake," and "more generally [in] promoting transparency and accountability in the electoral process."[90] The Court left open the possibility that the signatories could raise an as-applied challenge to the disclosure regime, but did not specify how that would be accomplished.[91]

In sum, the Supreme Court in recent years has looked favorably on disclosure requirements in both state and federal election law. Perhaps because the Court has invalidated limits on independent expenditures as a source of regulation of campaign spending, it has appeared more willing to endorse strict disclosure regimes. But it has yet to be confronted with a measure on a par with that most recently proposed by New York or California.

Illinois law previously required that any not-for-profit corporation that "accepts contributions or makes expenditures during any 12-month period in an aggregate amount exceeding $5,000" register with the State Board of Elections and comply with disclosure requirements.[92] This requirement was repealed as part of Public Act 96-832 on the basis that not-for-profit corporation contributions to candidate political committees would be limited to

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[89] *See Doe # 1 v. Reed*, 130 S. Ct. 2811, 2815 (2010).

[90] *Id*. at 2819.

[91] *Id*. at 2821.

[92] 10 ILCS 5/9-7.5, which was repealed by Public Act 96-832.

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$10,000 in an election cycle. As a result of the court decisions and statutory amendments after the enactment of Public Act 96-832, not-for-profit corporations can make unlimited contributions to independent expenditure committees. The re-enactment of this requirement[93] is a method that could be utilized to promote greater disclosure of not-for-profit corporation political activity.

C. Coordination Between Candidates and Independent Expenditure Committees

A third area for possible legislative or administrative action relates to further definition of coordination between candidates and independent expenditure committees. Currently, Illinois law provides that an expenditure is considered "independent" if "it is not made in connection, consultation, or concert with or at the request or suggestion of the public official or candidate, the public official's or candidate's designated political committee or campaign, or the agent or agents of the public official, candidate, or political committee or campaign."[94] No further definition or regulation related to the meaning of this provision has been adopted in statute or by rule.

At the federal level, regulations pre-dating *Citizens United* provide some regulatory framework related to the meaning of coordination as it relates to independent expenditures.[95] In addition, a bill has been introduced in the United States House of Representatives that would effectively prohibit the type of candidate-specific Super PACs as they existed in the 2012 presidential campaigns. The Empowering Citizens Act, H.R. 6448, introduced on September 20, 2012, provides the first comprehensive federal proposal post-*Citizens United* related to the

[93] The requirement could be tailored in such a way that it would only encompass not-for-profit corporations that engage in independent expenditure activity (for example by not applying to not-for-profit corporations that solely make contributions to political committees subject to contribution limits) and the requirement could include certain donor identity opt-out provisions similar to the New York Attorney General's proposal described above.

[94] 10 ILCS 5/9-1.15.

[95] *See supra* Section IV.4.

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coordination regulations now in place. The Act defines a candidate and Super PAC to be coordinated where:

- The Super PAC is directly or indirectly established by or at the request or suggestion of, or with the encouragement of, or with the express or tacit approval of, the candidate or the agents of the candidate it supports; or
- The candidate or the candidate's agents solicit funds or engage in other fundraising activity for the Super PAC, including by providing or sharing fundraising lists with the Super PAC; or
- The Super PAC is established, directed or managed by former political, media or fundraising advisers or consultants to the candidate or entities controlled by the candidate; or
- The Super PAC has had more than incidental communications with the candidate or the candidate's agents about the candidate's campaign needs or activities or about the Super PAC's possible or actual campaign activities with respect to the candidate or the candidate's campaign; or
- The Super PAC has retained the professional services of any person who during the same election cycle has provided or is providing professional services relating to the campaign to the candidate or the candidate's campaign.

If the Super PAC is deemed "coordinated" with the candidate's campaign under the definitions in the law, then its expenditures are treated as direct contributions to the campaign and as such are subject to existing limits on direct contributions.

D. Disclosures by Federal Super PACs

A fourth area for potential legislative or administrative action lies in revising administrative regulations that provides that compliance with the state's disclosure requirements is satisfied if a independent expenditure committee submits proof that it has satisfied the FEC's disclosure requirements. Currently, Illinois State Board of Elections Rule 110.60(b) permits any political committee filing FEC reports to "choose to comply with the provisions of Article 9 of the Election Code by so indicating on a Statement of Organization (Form D-1) filed with the State Board of Elections." If a political committee registered with the FEC and the State Board

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of Elections chooses to comply solely with FEC filing requirements, it is not subject to Illinois's requirements to disclose contributions of $1,000 or more within five business days or within two business days in the 30 days before an election. At the federal level, no reporting of contributions made in the last 20 days before an election is required by independent expenditure committees until after the election.[96] An independent expenditure committee registered solely in Illinois and not with the FEC is required to disclose any contribution of $1,000 or more within two business days during this period. Legislative or administrative action could be taken to require independent expenditure committee reporting in this instance or more generally to require that any Illinois reporting requirements that are more stringent than federal reporting requirements must be followed by any political committee that is registered both with the FEC and the State Board of Elections.

E. Public Financing of Elections

Another method of addressing unlimited independent expenditures in elections is through the adoption of one more methods of promoting public financing of elections. The Election Code required the Task Force to issue a report in 2011 regarding public financing of Illinois elections.[97] That report described several potential public financing alternatives for Illinois, including (1) a comprehensive or hybrid public finance system providing grants or grants and matching funds to eligible candidates who choose to participate in the system; (2) a hybrid public financing system implementing matching funds for small-dollar contributions to eligible candidates who choose to participate in the system; (3) a public finance system that provides matching funds for small dollar contributions to every eligible candidate in certain elections; and

[96] Principal campaign committees of candidates are required to disclose contributions of $1000 or more received after the 20th day and prior to 48 hours before an election but this requirement does not apply to independent expenditure committees.

[97] 10 ILCS 5/9-40(d).

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(4) offering tax incentives for small-dollar political donations.[98] A public financing system in which candidates choose to participate has the ability to promote public perceptions related to the integrity of the political process, however, even if a candidate chooses to participate in a public financing system, unlimited independent expenditures may still be made by outside parties to support the candidate or oppose the candidate's opponents. A public financing system in which small dollar donations are matched or donors receive a tax incentive for small dollar contributions has the ability to promote more public involvement in the political process. While independent expenditure spending will far exceed small dollar donations, even with a public match or tax incentive, expanded public involvement in the political process has the ability to expand the number of voices in the process and the impact of those voices.

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[98] *See* Part VI, Public Campaign Financing and Illinois Elections, Illinois Campaign Finance Reform Task Force, December 30, 2011.

APPENDICES

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