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## DISCLOSURE OF CORPORATE POLITICAL SPENDING: PROBLEMATIC OR PRAGMATIC?

In the Supreme Court's landmark decision, *Citizens United v. Federal Election Commission*, the Court ruled that corporate funding of independent political broadcasts in candidate elections could not be limited.<sup>1</sup> In response to this decision, reformers have called for the implementation of rules that would require public companies to seek approval from shareholders, or, at the very least, disclose to shareholders all corporate political contributions.<sup>2</sup> Despite several proposals at both the federal<sup>3</sup> and state<sup>4</sup> level, there is currently no law that requires disclosure of corporate political spending to shareholders.<sup>5</sup> Though debates about corporate political spending often devolve into political fights over the reach of the First Amendment, the importance of shareholder access to information and increasing popular opinion suggest that corporations should publicly disclose their political contributions to their shareholders. Corporations, on the other hand, have put forward counterarguments for maintaining the status quo.

As of now, the push for total shareholder disclosure or approval of corporate political spending is embodied in the Shareholder Protection Act (SPA), a proposed federal act that aims to amend the Securities Exchange Act of 1934.<sup>6</sup> In §14C(b)(1) of the “act,” it requires “each solicitation of proxy, consent or authorization by an issuer with a class of equity securities” contain “a description of the specific nature of any expenditure for political activities proposed” and the “total amount of expenditures for political activities proposed to be made by the issuer for the forthcoming fiscal year.”<sup>7</sup> Further, §14C(c)(2) would require a vote of the majority of the outstanding shareholders to make expenditures for political activities.<sup>8</sup> According to

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<sup>1</sup> See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

<sup>2</sup> CENTER FOR POLITICAL ACCOUNTABILITY  
<http://www.politicalaccountability.net/index.php?ht=d/sp/i/870/pid/870/pid/190> (last visited February 8, 2014).

<sup>3</sup> See Govtrack.us, *Shareholder Protection Act of 2013*, <https://www.govtrack.us/congress/bills/113/s824> (last visited November 1, 2013).

<sup>4</sup> See, e.g., 2011 Me. Laws House Paper 1120, 2013 N.Y. Laws Senate Bill 2952, 2013 Pa. Laws House Bill 462, 2013 W.V. Acts House Bill 3098.

<sup>5</sup> Center for Political Accountability, *supra* note 2.

<sup>6</sup> See Shareholder Protection Act of 2013, S.B. 824, 113th Cong. (2013).

<sup>7</sup> See *id.*

<sup>8</sup> See *id.*

§14C(e), “each institutional investment manager shall disclose . . . at least annually . . . how it voted on any shareholder vote.”<sup>9</sup> If it does so, §14C(f) provides a safe harbor against civil, criminal, or administrative actions.<sup>10</sup> According to the author Sen. Robert Menendez from New Jersey, the SPA would “give shareholders a voice over how their corporate dollars are spent on elections.”<sup>11</sup>

The demand for shareholder disclosure of corporate political spending is high and continues to grow. A rulemaking petition filed with the S.E.C. by a coalition of law professors seeking public disclosure of such payments has received over 380,000 letters of support.<sup>12</sup> The petition also received more than 600,000 comments, the most comments received on a petition or rule in the agency’s history.<sup>13</sup> Moreover, an analysis by Institutional Shareholder Services found that the number of shareholder proposals demanding more transparency has been steadily rising, increasing from eighty-eight in 2011 to 126 in 2013.<sup>14</sup> In 2012, investors representing more than \$300 billion in assets under management signed an open letter to S&P 500 companies asking them to disclose their political spending.<sup>15</sup> Supporters of disclosure note that in the 2012 federal elections alone, more than \$1 billion was spent by outside groups with minimal disclosure.<sup>16</sup>

Proponents of the SPA argue that corporate governance is more effective when shareholders have access to all pertinent information regarding their investments. A lack of disclosure is risky for investors. Shareholders and potential shareholders need to know about risky corporate business behaviors

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<sup>9</sup> *See id.*

<sup>10</sup> *Id.*

<sup>11</sup> Press Release, Rep. Michael Capuano, Rep. Capuano and Sen. Mendez Reintroduce Shareholder Protection Act (April 25, 2013), <http://www.house.gov/capuano/news/2013/pr042513.shtml>.

<sup>12</sup> *See* Commissioner Luis A. Aguilar, *Shareholders Need Robust Disclosure to Exercise Their Voting Rights as Investors and Owners*, U.S. SECURITIES AND EXCHANGE COMMISSION, (Feb. 20, 2013), [http://www.sec.gov/News/PublicStmnt/Detail/PublicStmnt/1365171492322#P66\\_20759](http://www.sec.gov/News/PublicStmnt/Detail/PublicStmnt/1365171492322#P66_20759).

<sup>13</sup> *See* N. Y. Times Editorial Board, *Keeping Shareholders in the Dark*, N.Y. TIMES (Dec. 3, 2013), <http://www.nytimes.com/2013/12/04/opinion/keeping-shareholders-in-the-dark.html>.

<sup>14</sup> *See* Dina ElBoghdady, *Some public companies are divulging more details about their political contributions*, THE WASH. POST, (Sept. 24, 2013), [http://www.washingtonpost.com/business/economy/companies-beefing-up-their-political-spending-disclosures/2013/09/24/3531a21c-252b-11e3-b3e9-d97fb087acd6\\_story.html](http://www.washingtonpost.com/business/economy/companies-beefing-up-their-political-spending-disclosures/2013/09/24/3531a21c-252b-11e3-b3e9-d97fb087acd6_story.html).

<sup>15</sup> *See* Letter from Ian Vandwalker, Counsel, Democracy Program, Brennan Center for Justice at New York University School of Law, to Elizabeth M. Murphy, Sec’y Securities and Exchange Comm (Aug. 19, 2013), <http://www.brennancenter.org/analysis/brennan-center-submits-comments-sec-corporate-political-spending-requirement>.

<sup>16</sup> *See* Press Release, Rep. Michael Capuano, *supra* note 11.

in order to make well-informed investment decisions.<sup>17</sup> Without disclosure, “shareholders have no way to assess whether corporate political spending benefits them, and have every reason to believe it is fraught with risks to the corporate brand, business reputation, the bottom and, by extension, shareholder returns.”<sup>18</sup> Disclosure ensures that corporate money that is donated to candidates, issues and activities aligns with the company’s publicly stated values, policies, and practices.<sup>19</sup> Demonstrating greater disclosure and accountability can help corporations build public trust and investor confidence.<sup>20</sup>

Moreover, there is empirical evidence that politically connected, yet secretive firms have lower value, show worse financial performance, and are more likely to need government bailouts.<sup>21</sup> One study examined almost a thousand S&P 1500 firms for ten years and found a negative correlation between political spending and both market and accounting performance.<sup>22</sup> William S. Laufer, a professor at the Wharton School and director of its Zicklin Center for Business Ethics Research found that “corporate political disclosure and accountability . . . [are] powerful proxies of good governance and . . . competitive advantage.”<sup>23</sup> Some of America’s most successful companies, including Qualcomm, United Parcel Service, Conoco Phillips and JPMorgan Chase have joined the ranks of firms with the best corporate disclosure policies.<sup>24</sup> In fact, the Center for Political Accountability (CPA) found that 78 percent of the 195 corporations it tracks have improved their political spending disclosures in 2013 compared with 2012.<sup>25</sup>

The SPA is not without critics, and one of the most outspoken opponents is the U.S. Chamber of Commerce. According to Thomas Quaadman, vice president of the Chamber’s Center for Capital Markets, “[t]his bill dangerously exposes corporate directors to outside influencers and could put companies at

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<sup>17</sup> See Letter from Ian Vandwalker to Elizabeth M. Murphy, *supra* note 15

<sup>18</sup> New York Times Editorial Board, *supra* note 4.

<sup>19</sup> See CENTER FOR POLITICAL ACCOUNTABILITY, *supra* note 2

<sup>20</sup> *See Id.*

<sup>21</sup> See Letter from Ian Vandwalker to Elizabeth M. Murphy, *supra* note 15..

<sup>22</sup> *See Id.*

<sup>23</sup> Ctr. for Political Accountability, *New CPA-Zicklin Index Reveals Surge in Number of Top Companies with Strong Political Disclosure Policies*, CENTER FOR POLITICAL ACCOUNTABILITY, (last accessed Feb. 10, 2014), <http://www.politicalaccountability.net/index.php?ht=d/sp/i/8051/pid/8051>.

<sup>24</sup> *See Id.*

<sup>25</sup> See Dina ElBoghdady, *supra* note 14.

the mercy of special interests.”<sup>26</sup> Currently, corporate directors have a fiduciary duty to act in the best interests of the corporations.<sup>27</sup> Thus, when special interests, such as political interests, interfere with directors’ decisions, the best interests of the corporation can be jeopardized. Typically, corporate directors are “best equipped and able to make the complex day-to-day decisions,” so they should not be hampered by “constant and unwarranted second-guessing from outside forces.”<sup>28</sup> Overall, the Chamber believes the SPA would leave the United States as at a competitive disadvantage in the worldwide business arena, because corporate directors from most countries are not burdened by shareholder disclosure or approval requirements.<sup>29</sup>

Critics of the SPA believe that the bill unduly impinges upon directorial discretion, and they believe that the business judgment rule is a sufficient check on a director’s decision making.<sup>30</sup> These critics argue that the business judgment rule gives directors the latitude to make good faith, disinterested decisions that are in the best interest of the corporation.<sup>31</sup> Thus, expanding shareholder disclosure or approval powers would lead to a “great deal of inefficient and counterproductive interference in corporate decision-making by shareholders and other interest groups.”<sup>32</sup> Such inefficiencies include the second-guessing and micromanagement of business directors’ decisions.<sup>33</sup>

In addition, there may be a very reasonable disconnect between what one believes in and what one supports for financial reasons. Corporate political speech does not suppress or prevent the individual expression of political speech.<sup>34</sup> For example, if a shareholder invests in a corporation that supports a Republican candidate *for financial reasons*, that shareholder is not restricted

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<sup>26</sup> Press Release, U.S. Chamber of Commerce, U.S. Chamber Expresses Strong Opposition to Shareholder Protection Act, (Nov. 1, 2013), <http://www.uschamber.com/press/releases/2010/july/us-chamber-expresses-strong-opposition-shareholder-protection-act>.

<sup>27</sup> See Joseph M. McLaughlin, Corporate Litigation, SIMPSON THATCHER & BARTLETT LLP, [http://www.stblaw.com/google\\_file.cfm?TrackedFile=4B46116601DFEBD896B179&TrackedFolder=585C1D235281AED996A07D5F9F9478AB5A90188899](http://www.stblaw.com/google_file.cfm?TrackedFile=4B46116601DFEBD896B179&TrackedFolder=585C1D235281AED996A07D5F9F9478AB5A90188899) (citing MacKenzie-Childs, LLC v. MacKenzie-Childs, 262 F.R.D. 241, 249 (W.D.N.Y. 2009)).

<sup>28</sup> Press Release, U.S. Chamber of Commerce, *supra* note 26.

<sup>29</sup> See *id.*

<sup>30</sup> See David A. Katz, *Limitations on Contributions Would Undercut Directors*, HARVARD L. SCHOOL FORUM ON CORPORATE GOVERNANCE & FIN. REGULATION (Nov. 8, 2011), <http://blogs.law.harvard.edu/corpgov/2011/08/11/limitations-on-contributions-would-undercut-directors/>.

<sup>31</sup> See *id.*

<sup>32</sup> See *id.*

<sup>33</sup> See *id.*

<sup>34</sup> See Roger Coffin, *A Responsibility to Speak: Citizens United, Corporate Governance and Managing Risks*, 8 HASTINGS BUS. L.J. 103, 150 (2012).

from supporting Democratic candidates *for political reasons*. It would take a “leap of faith” to believe that the corporation’s political position could rationally be attributed to the shareholder simply because of a financially motivated investment.<sup>35</sup>

Finally, corporate directors have fiduciary responsibilities to the corporation and its shareholders with regard to numerous corporate decisions outside the scope of political spending. If the duties of care, loyalty, and good faith are sufficient to prevent a director from ignoring these responsibilities in other contexts, they should be sufficient in the context of political spending.<sup>36</sup> Professor Roger Coffin of the University of Delaware found that the market’s perception of value (seen through stock prices) is unrelated to a firm’s decision to either engage in or refrain from corporate political speech.<sup>37</sup> Therefore, *Citizens United* and corporate political speech may be nonfactors in financial markets.<sup>38</sup>

Undoubtedly, until Congress or the SEC takes a firm stance on shareholder disclosure of corporate political spending, this debate will continue. There are many compelling empirical and normative reasons to implement corporate political disclosure policies. On the other hand, perhaps we should leave it to a company’s board and its directors to promote the well-being of the corporation and make their own decisions. Regardless of which side prevails, hopefully the decision is made with the focus on sound corporate governance and economic principles, and not on the political powers who have caused this debate in the first place.

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<sup>35</sup> *See id.*

<sup>36</sup> *Id.*

<sup>37</sup> *See id.*

<sup>38</sup> *Id.*

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