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Who decides when a corporation spends money in politics?

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1 WHO DECIDES WHEN A CORPORATION SPENDS MONEY IN POLITICS?

In *Citizens United v. FEC*, the U.S. Supreme Court held that corporations were free to use money from the corporation's treasury on political activity.[1] Setting aside for a moment the many criticisms of the decision, *Citizens United* left open a number of questions about who at a corporation should get to decide when a corporation spends money on politics. It has fallen to our system of corporate law to provide an answer.

Corporations are set up using a legal structure, created by state law, which enables individuals to contribute and pool resources, capital, and labor in order to generate a profit. Corporations are made up of management, a board of directors, shareholders, bondholders, and employees. All of these stakeholders—and society at large—have an interest in how the corporation uses the resources invested. Under existing corporate law, however, the decision to spend money in politics has been entrusted almost entirely to management and directors.[2] The shareholder accountability mechanisms that the Supreme Court relied on in *Citizens United* do not exist in law.

2 CAN SHAREHOLDERS CHALLENGE THE DECISION TO SPEND MONEY IN POLITICS?

Not really. Current law does not provide shareholders a meaningful opportunity to contest how the money they have invested is spent in politics or whether it should be spent on politics at all.[3]

Corporate directors do have fiduciary duties that they owe to the corporation and its shareholders. These duties generally require corporate leadership to avoid conflicts of interest and to oversee the corporation's affairs with care. Because corporate political activities can create reputational risks, diverge from shareholders' interests, and must comply with any applicable campaign finance laws, political spending should be held to the high standards of fiduciary responsibility.[4] However, at present, these duties are unlikely to provide shareholders much recourse, since decisions by management and directors to spend money in politics currently enjoy a high degree of legal deference from courts.[5]

Shareholders also have a right to vote on a number of matters that affect the corporation, particularly on issues where the interests of managers, directors, and shareholders may diverge. For example, shareholders must approve changes in the articles of incorporation or bylaws and must agree, often by a supermajority (e.g. 75%), before a merger or sale of corporate assets can occur; and, because of Dodd-Frank, shareholders can also vote on executive pay packages, though it is non-binding.

Despite the potential conflicts-of-interest arising out of political spending, shareholders do not currently have a right to vote on corporate political spending under U.S. law. This problem is further complicated by the fact that under current law corporate leadership is not even required to disclose its political spending to shareholders.

3 SO WHAT CAN SHAREHOLDERS DO ABOUT CORPORATE POLITICAL SPENDING?

Shareholders may seek to introduce proxy proposals, which, if successful, would allow shareholders to request disclosure or ask the corporation to refrain from political activity. Shareholder resolutions relating to corporate political spending are by far the largest and fastest growing categories of proxy proposals.[6] At present, proposals on political spending are not binding on management or directors.[7] Nonetheless, shareholder proposals have proven an effective way to communicate the importance of the issue and encourage corporations to adopt more transparent and accountable practices.

Managers and directors at several corporations have sought to block these proposals by arguing under Rule 14a-8 that shareholder requests relating to political spending are either vague or are ordinary business decisions that shareholders do not need to be involved in.[8] The SEC has rejected both arguments. In a series of "no-action" letters, the SEC has indicated that shareholders could not be denied the opportunity to indicate their views on a corporation's political spending and made clear that corporate political activity is not an ordinary business decision.[9]

4 WHO ELSE CAN CHALLENGE MANAGERS AND DIRECTORS WHO SPEND MONEY IN POLITICS?

Corporate law gives other stakeholders in a business, such as bondholders and employees (not to mention the larger community) even less of an opportunity to challenge political spending decisions. These constituencies, under current law, are not owed even the basic fiduciary duties that shareholders are owed, nor do they have any opportunity to vote on corporate policies. This means, to borrow a phrase from Justice Louis Brandeis, that corporate leadership is virtually unchecked in its use of "other people's money" to engage in corporate political spending.[10]

5 WHAT ABOUT THE FREE SPEECH INTERESTS OF SHAREHOLDERS, EMPLOYEES, AND OTHER STAKEHOLDERS WHO DISAGREE WITH THE CORPORATION'S POLITICAL SPENDING?

One of the ironies of the *Citizens United* decision is that in attempting to address one First Amendment issue, it gave rise to another. Taking at face value for a moment the idea that money is speech, giving managers and directors unchecked authority over undisclosed corporate political spending should give us pause. Money in a corporation's treasury is owned by a web of individuals with different legal claims on that money. Corporate managers who choose to spend that money on political expenditures are, under the logic of *Citizens United*, exercising other individuals' rights and speaking on behalf of others.

The Supreme Court has recognized that there are important First Amendment interests at stake when one person or group speaks on behalf of another. In the public-sector union context, for instance, the Supreme Court held that union members must be given opt-out rights when the union conducts political activities.[11] The Court's failure to recognize First Amendment opt-out rights for corporate shareholders highlights an important asymmetry in current law.[12]

This problem is highlighted where corporate political spending is directed to candidates or causes that contradict official corporate policies or which run counter to a company's long-term interests.[13] Investors who want to put their money in businesses whose values they share should have some assurance that a company is not engaging in political spending that runs contrary to those policies. The same can be said of employees who want to invest their time in a corporation whose values they share. Viewed in this light, the real effect of *Citizens United* was to amplify the speech rights of corporate managers and directors and to weaken the rights of everyone else.

6 DO CORPORATIONS HAVE TO DISCLOSE HOW THEY SPEND CORPORATE MONEY ON POLITICS?

No. Despite a long line of Supreme Court cases stating that disclosure requirements are constitutional, current law does not require management or directors to disclose how they spend corporate money on politics. They are not required to disclose the information either to the public or even to the corporation's shareholders.

This information is crucial both for citizens trying to make informed decisions about politicians and for investors seeking to make informed decisions about where to invest. *Citizens United* actually relied on the assumption that corporate political spending would be disclosed. As Justice Kennedy wrote,

> "... prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests.'"[14]

7 CAN CORPORATE LAW HELP ADDRESS ANY OF THESE ISSUES?

Yes. Corporate law is becoming increasingly vital to a number of public-interest reforms, and a number of proposals have been made that would help restore a legal balance between corporate leadership, shareholders, and other stakeholders. Imbalances in current corporate law as it relates to political speech could also be addressed by increasing the role of independent directors on corporate boards, requiring approval of a supermajority of shareholders, or otherwise enhancing shareholder involvement in corporate governance.[15] Other corporate stakeholders could similarly be given a larger role in decisions relating to political activity.[16]

The government could increase transparency and accountability by enacting laws or adopting regulations that would require management and directors to disclose corporate political spending to other stakeholders in the corporation. Disclosure standards could be improved in a number of other ways as well. The Securities & Exchange Commission (SEC) has the authority to require public companies to disclose their political expenditures and is currently considering a petition, which is now the most commented-on and most supported petition in the agency's history.[17] Congress could fix the lack of transparency immediately by enacting legislation such as the DISCLOSE Act.[18] As described above, shareholders may also submit proxy proposals so that they can vote to demand greater transparency from management and directors.[19] And the number of companies who voluntarily disclose their political spending continues to grow.[20]

Because of the important First Amendment values at stake when corporate leadership spends money belonging to a variety of stakeholders, the courts should ensure that corporate law does not simply subordinate the speech rights of these stakeholders to those of managers and directors. Whichever solutions emerge, the need for more transparent, accountable, and representative corporate decision making is nowhere more pressing than when it comes to corporate spending in politics. ■

ENDNOTES

1. *Citizens United v.* FEC, 130 S. Ct. 876 (2010).
2. *See* Lucien A. Bebchuk and Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides*, 124 Harv. L. Rev. 83 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1670085. Under current law, directors may and often do delegate the decision to spend money in politics to management. *See id*., at 88.
3. *See* Ciara Torres-Spelliscy, *Corporate Campaign Spending: Giving Shareholders a Voice*, (Feb. 3, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1550990.
4. Handbook on Corporate Political Activity: Emerging Corporate Governance Issues, The Conference Board (Nov. 2010), available at http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/id/4084.
5. *See* Ciara Torres-Spelliscy, *Testimony for the House Subcommittee on Corporate Governance after Citizens United*, Brennan Center for Justice (Mar. 11, 2010), available at http://www.brennancenter.org/analysis/testimony-house-subcommittee-corporate-governance-after-citizens-united.
6. *See Corporate Political Spending, Climate Risks Are Major Focus of 2013 Shareholder Resolutions, Says New Report*, Sustainable Investment Institute (Si2) (March 7, 2013), available at http://siinstitute.org/press/2013/ProxyPreview2013_pr_20130307.pdf; James Morphy, *2012 Proxy Season Review: Overall Trends in Shareholder Proposals*, Harvard Law School Forum on Corporate Governance and Financial Regulation (July 21, 2012), available at http://blogs.law.harvard.edu/corpgov/2012/07/21/2012-proxy-season-review-overall-trends-in-shareholder-proposals/.
7. *See* Jonathan Romiti, *Playing Politics with Shareholder Value: The Case for Applying Fiduciary Law to Corporate Political Donations Post-Citizens United*, 53 B.C.L. Rev. 727, 753 (2012), available at http://bclawreview.org/files/2012/10/08_romiti.pdf. A recent proposal presented to Starbucks shareholders, for instance, requested that the board adopt a policy against making direct or indirect contribution that is intended to influence the outcome of an election or referendum. *See* Starbucks 2013 Proxy Statement (Jan. 25, 2013).
8. While ordinary business decisions may be excluded from annual proxy statements, the SEC has indicated that a shareholder proposal that raises "significant social policy issues" and does not micromanage the company should not be excluded under the ordinary business rule. For an overview of the types of shareholder proposals that may be excluded from a company's proxy statement, see David Lynn, *Frequently Asked Questions about Shareholder Proposals and Proxy Access*, Morrison & Forrister LLP (2012), available at http://www.mofo.com/files/Uploads/Images/Frequently-Asked-Questions-about-Shareholder-Proposals-and-Proxy-Access.pdf.
9. *See* Home Depot, Inc., SEC No Action Letter, 2011 WL 291324 (March 25, 2011), available at http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2011/northstarasset032511-14a8.pdf; Bank of America, SEC No Action Letter (Feb. 15, 2013), available at http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/stephenjohnson021513-14a8.pdf.
10. Louis D. Brandeis, *Other People's Money and How the Bankers Use It*, (1914), available at http://www.law.louisville.edu/library/collections/brandeis/node/191.
11. *Knox v. Service Employees Int'l Union, Local 1000*, 132 S.Ct. 2277 (2012).
12. *See* Benjamin Sachs, *Unions, Corporations, and Political Opt-Out Rights after Citizens United*, 112 Columbia L. Rev. 800 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1924916; Ciara Torres-Spelliscy, *Taking Opt-In Rights Seriously: What* Knox v. SEIU *Could Mean for Post-*Citizens United *Shareholder Rights*, 74(1) Montana L. Rev. 101 (2013).
13. *See* Handbook on Corporate Political Activity, *supra* note 4; Press Release: Northstar Asset Management, *Intel Becomes First Company to Commit to Political Giving Alignment Review* (March 27, 2013).
14. *Citizens United v. FEC*, 130 S. Ct. at 916.
15. *See* Lucien A. Bebchuk and Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides*, 124 Harv. L. Rev. at 97-111.
16. *See* Kent Greenfield, *The Stakeholder Strategy*, The Democracy Journal, Issue No. 26,(Fall 2012), available at http://www.democracyjournal.org/26/the-stakeholder-strategy.php?page=all.
17. *Comments on Rulemaking Petition: Petition to require public companies to disclose to shareholders the use of corporate resources for political activities [File No. 4-637]*, U.S. Securities and Exchange Commission, available at http://www.sec.gov/comments/4-637/4-637.shtml; *see also Corporate Donations and the Securities and Exchange Commission*, The New York Times (Apr. 24, 2013), available at http://www.nytimes.com/2013/04/25/opinion/corporate-donations-and-the-securities-and-exchange-commission.html.
18. *See* Lisa Rosenberg, *What You Should Know about the DISCLOSE Act Part 1: What is the DISCLOSE Act?*, Sunlight Foundation Blog (July 12, 2012), http://sunlightfoundation.com/blog/2012/07/12/what-you-should-know-about-the-disclose-act-part-1-what-is-the-disclose-act/.
19. *See* Press Release, *New SEC Decision Gives Shareholder Activists the Right to Seek a Vote on Political Contributions*, NorthStar Asset Management, Inc., (March 30, 2011), available at http://northstarasset.com/articles/new_sec_decision_gives_shareholders_right_to_vote_on_political_contributions.
20. *See*, *e.g.*, Bruce F. Freed, *Political Disclosure Hits 100 Companies*, Center for Political Accountability (March 21, 2012) http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/6224; Jackie Cook, *Corporate Political Spending and the Mutual Fund Vote Mutual Fund Support Reaches a New High in 2011*, Center for Political Accountability (Dec. 2011), available at http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/5990.

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