

Shining a Light on Expenditures of Shareholder Money

by

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Good morning. It is my pleasure to be here today. This is my fourth SEC Speaks and my first after being sworn-in for a second term as an SEC Commissioner. I can report that the issues before the Commission and the magnitude of what is at stake remain of top concern, just as they have throughout my tenure. Before I begin, let me start by issuing the standard disclaimer that the views I express today are my own, and do not necessarily reflect the views of the Securities and Exchange Commission, my fellow Commissioners, or members of the staff.

In thinking through how to use my time with you today, many issues immediately came to mind. To name just a few, I thought of discussing:

- The SEC's work on Title VII to regulate the security-based derivatives industry – what has been proposed and the longer list of what has yet to be adopted;
- The SEC's new no admit/no deny policy involving parallel criminal proceedings,¹ and how it applies in so few situations that it needs to be revised to be more useful and effective; and
- The lengthy delay in re-establishing the Investor Advisory Committee, a committee required by Dodd-Frank to amplify the voices of investors and ensure that the Commission is carrying out its core mission.

However, I decided to focus my time today on one issue – an issue that highlights the Commission's fundamental responsibilities as a regulator.

The Commission's core mission is to protect investors. William O. Douglas, a former chairman of the Securities and Exchange Commission, who went on to serve as a Supreme Court Justice, described the SEC's role by contrasting it with a well-represented industry. Chairman Douglas said: "We've got broker's advocates, we've got exchange advocates, we've got investment banker advocates, and we [the SEC] are the investor's advocate."²

Not much has changed since Chairman Douglas spoke those words at his first press conference as SEC Chairman in 1937. The industry, with its lobbyists and spokespeople, remains the loudest voice – in fact, one could say that things have gotten much worse. As a result, investors need an advocate today more than ever.³

Given that this is so, a true investor’s advocate would be focused on whether shareholders and investors receive adequate disclosure about the companies they own or may buy. In serving as an investor advocate, it is the responsibility of the Commission to promulgate rules to make sure that investors are armed with the appropriate information they need during each step of their investment decision – whether it is to buy, sell, or hold their securities, or to vote their securities. When it is clear that investors are in the dark and not receiving adequate disclosures, the Commission should act, and act swiftly, to ensure that investors have the information they require.

Background of Citizens United

I want to illustrate this point by looking at an issue that dominates the headlines on a daily basis. And that is the undisclosed corporate campaign spending arising from the Supreme Court’s decision in *Citizens United v. Federal Election Commission*.⁴ In January 2010, the Supreme Court struck down federal restrictions on the ability of corporations “to use general treasury funds to make campaign expenditures defined as an ‘electioneering communication’ or for speech expressly advocating the election or defeat of a candidate.”⁵ The Court was quick to also say “[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress speech altogether.”⁶

Fundamental Deprivation

The ramifications of this decision and its resulting impact on campaign finance laws and practices have been significant and swift.

For example, it has been reported that outside groups spent four times as much in 2010, after the Citizens United decision, as compared to in 2006.⁷ A recently released poll found Americans across all parties oppose the ruling; and among all voters, 62% oppose the decision.⁸ President Obama described the impact of the Supreme Court’s decision as

... dealing a huge blow to [our] efforts to rein in this undue influence. In short, this decision gives corporations and other special interests the power to spend unlimited amounts of money – literally millions of dollars – to affect elections throughout our country. This, in turn, will multiply their influence over decision-making in our government.⁹

As to whether or not corporations should be making political contributions at all, that is a question I will leave to other agencies, corporations, institutions, and to the American public at large.

I want to focus on the shareholders of corporations and how they are often in the dark as to whether the companies they own, or contemplate owning, are making political expenditures. Withholding information from shareholders is a fundamental deprivation that undermines the securities regulatory framework which requires investors receive adequate and appropriate information, so that they can make informed decisions about whether to purchase, hold, or sell shares – and how to exercise their voting rights. Investors are not receiving adequate disclosure, and as the investor’s advocate, the Commission should act swiftly to rectify the situation by requiring transparency.

Many interested parties have weighed in and enumerated significant reasons for requiring these disclosures.¹⁰ These reasons include, but are not limited to, the following:

- Investors may not want to invest in companies that engage in any political expenditure.
- Individual investors may want to avoid investing in a company whose political spending advances causes or candidates with which that investor disagrees.
- To ensure that political spending decisions do not further the interests of corporate managers at the expense of shareholder interests. On this topic, John Bogle, founder of Vanguard, has stated, “corporate managers are likely to try to shape government policy in a way that serves their own interests over the interests of their shareholders.”¹¹
- The view that when corporations are able to obtain favorable conditions through political influence, rather than meritoriously adding value through a better product or service, it distorts the operation of the marketplace, which undercuts capital formation.
- A lack of transparency regarding political expenditures directly fosters destructive pay-to-play corruption. As just one example, nearly half the states have adopted pay-to-play bans, after corruption scandals revealed government officials demanding corporate payoffs in exchange for public contracts.¹²

Despite the abundance of reasons investors have for requiring this information and the transparency it would provide, the fact remains that no comprehensive disclosure framework exists.

There are tens of thousands that have urged the Commission to address this issue, ranging from investors, academics, non-profits, state treasurers, and businesses.¹³ To highlight just a few of the requests, in August 2011, ten law professors from distinguished universities across the country filed a petition for rulemaking requesting that the Commission promulgate rules to require that public companies disclose political expenditures.¹⁴ The Commission has also received letters from Members of Congress,¹⁵ from elected government officials with fiduciary responsibility for nearly one trillion dollars in pension fund assets,¹⁶ and from a coalition of United States Senators.¹⁷ Each of

these letters asked the Commission to take action to require public disclosure of corporate political spending.

In November 2011, a coalition of asset managers and investment professionals representing over \$690 billion in assets wrote to the SEC to express their strong support for the SEC to promulgate rules requiring corporate political transparency. This coalition lamented that corporate political expenditures “may be subject to a variety of state and federal rules, but there are no current rules that require that companies disclose this spending to their shareholders, and there are significant gaps in the type of spending that is required to be disclosed to anyone.”¹⁸

In a separate letter, the Council for Institutional Investors described the fundamental issue as

Shareowners have a right to know whether and how their company uses its resources for political purposes. Yet the existing regulatory framework creates barriers to this information. Disclosure is either dispersed among several regulatory authorities or entirely absent in cases where political spending is channeled through independent organizations exempt from naming donors.¹⁹

Ted Wheeler, the State Treasurer of Oregon, and a vocal advocate for rules regarding corporate disclosure of political donations, stated “[c]ompanies have the ability to spend heavily on political causes and they have the right to do so. However, corporations also have the ability to obscure that spending from shareholders, such as Oregon beneficiaries of trust funds . . . That’s wrong.”²⁰ It is troubling that many companies are funding political campaigns without their shareholders’ consent or even knowledge.

Evidence of Investors Trying to Obtain the Information

The importance of this topic to shareholders is evident. The Commission itself has received tens of thousands of letters requesting that it take action.²¹ The record is replete with examples and evidence of investors trying to obtain information regarding corporate political expenditures.

For example, in 2011, out of the 465 shareholder proposals appearing on public company proxy statements, 50 proposals were related to political spending.²² In fact, more proposals of this type were included in proxy statements than any other type of proposal.²³ During the 2011 proxy season, 25 of the companies in the S&P 100 included proposals on their proxy statements requesting disclosure of corporate spending on politics.²⁴

The demand from investors has been so significant that large public companies have increasingly agreed to adopt policies requiring disclosure of companies’ political expenditures. In the S&P 100, this number has risen from a trivial level in 2004 to close to 60% by 2011. However, it is important to keep in mind that while some companies are

voluntarily providing disclosures, many others are not. In addition, the disclosure that is provided is not uniform and may not be adequate.

Unfortunately, there is no comprehensive system of disclosure related to corporate political expenditures – and that failure results in investors being deprived of uniform, reliable, and consistent disclosure regarding the political expenditures of the companies they own.

This is a Core Responsibility of the SEC

Arming investors with the information they need to facilitate informed decision-making is a core responsibility of the SEC. In fact, it is one of the factors that led to the creation of the SEC. It is one of the SEC's core functions to identify gaps in information that investors require, and then close that gap as quickly as possible.

Shareholders require uniform disclosures regarding corporate political expenditures for many reasons, including that it is impossible to have any corporate accountability or oversight without it. The Supreme Court recognized that need. For example, even as it struck down restrictions on corporate campaign contributions, the Supreme Court cited “[s]hareholder objections raised through the procedures of corporate democracy”²⁵ as a means through which investors could monitor the use of corporate resources on political activities. The Court envisioned that

... prompt disclosure of expenditures can provide shareholders and citizens with 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 interest.²⁶

Unfortunately, the Court envisioned a mechanism that does not currently exist.

This is not the first time that the Commission has been faced with a lack of transparency regarding political expenditures. In 1999, the Commission proposed a pay-to-play rule in direct response to egregious pay-to-play conduct by investment advisers that had harmed investors with sweetheart deals and bribes.²⁷ The egregiousness of the conduct and the need for new rules was clear. It was obvious that depending solely on the SEC's ability to use its anti-fraud authority would be too little, too late. However, the pay-to-play rule was shelved – lost to the wasteland where un-adopted SEC rule proposals go. It took a decade of scathing scandals, egregious fraud, and significant harm, before the Commission made pay-to-play a priority, and acted on it in 2010.²⁸ If the Commission had adopted new rules in 1999, it is likely that much of the tremendous harm of the pay-to-play scandals from the last decade could have been averted. The cost of Commission inaction – particularly in the face of compelling evidence for the Commission to act – can be devastating, as we have seen over and over again.

Requiring transparency for corporate political expenditures cannot wait a decade. It is the Commission's responsibility to rectify this gap and ensure that investors are not left in the dark while their money is used without their knowledge or consent. The Commission should provide for disclosure of corporate political expenditures that results in uniform and consistent disclosure.

Conclusion

As Commissioners, it is crucially important that we listen, and respond, to the needs of investors. The Commission receives investor input in various forms, from comment letters on proposed rulemakings, to formal rulemaking petitions. Unfortunately, the voices of investors are often drowned out by the louder, better-funded, and often better-connected voices of issuers, financial institutions, and corporate lawyers. When that happens, it is incumbent upon us to not only remember, but also make evident by our actions, that the fundamental mission of the SEC is to protect investors.

In closing, I want to thank you for your kind attention.

I also want to thank the many SEC staffers who are participating at this year's SEC Speaks – as well as the many others who devote themselves to the protection of investors. I am proud to work at their side.

Thank you.

¹See, David S. Hilzenrath, *SEC Changes Settlement Rules for Companies Found Guilty of Crimes*, The Washington Post, January 6, 2012, available at http://www.washingtonpost.com/business/economy/sec-settlements-with-companies-found-guilty-of-crimes-will-acknowledge-wrongdoing/2012/01/06/gIQAf9yRfP_story.html.

²See, Joel Seligman, *The Transformation of Wall Street 157* (2d ed. 1995), citing the Transcript of Douglas's press conference, September 22, 1937, Douglas Papers, container No. 21, Library of Congress. See also, *Douglas Wants A Free Market, He Tells Press*, The Washington Post, September 23, 1937, at 3.

³ Congress has recognized the need to ensure that investor voices are heard at the SEC. The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) amended the Securities Exchange Act to establish within the Commission an Investor Advisory Committee, an Office of the Investor Advocate, and an Ombudsman to act as liaison between the Commission and retail investors. See, Dodd-Frank Sections 911, 915 and 919D.

⁴ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

⁵ *Id.* at 886.

⁶ *Id.*

⁷ J. Crewdson, A. Fitzgerald, J. Salant and C. Babcock, *Secret Donors Multiply in U.S. Election Spending*, Bloomberg, May 19, 2011, <http://www.bloomberg.com/news/2011-05-19/secret-donors-multiply-in-u-s-with-finances-dwarfing-watergate.html>.

⁸ *Two Years After Citizens United, Voters Fed Up with Money in Politics*, January 19, 2012, <http://www.democracycorps.com/strategy/2012/01/two-years-after-citizens-united-voters-fed-up-with-money-in-politics/#ftn1>, citing a national survey of 1000 likely 2012 voters conducted January 8-11, 2012 by Greenberg Quinlan Rosner Research for Democracy Corps and Public Campaign Action Fund.

⁹ Weekly Address: *President Obama Calls on Congress to Enact Reforms to Stop a "Potential Corporate Takeover of Our Elections"*, May 1, 2010, <http://www.whitehouse.gov/the-press-office/weekly-address-president-obama-calls-congress-enact-reforms-stop-a-potential-corporate>.

¹⁰ Letter from Brennan Center for Justice, SEC File No. 4-637 (December 21, 2011).

¹¹ Letter from John Bogle, SEC File No. 4-637 (January 17, 2012).

¹² See e.g., Karl J. Sandstrom and Michael T. Liburdi, *Overview of State Pay-to-Play Statutes* (Perkins Coie 2010), http://www.perkinscoie.com/files/upload/WP_10-05_Pay-to-Play.pdf.

¹³ See, Comments on Rulemaking Petition: Petition to require public companies to disclose to shareholders the use of corporate resources for political activities, SEC File No. 4-637, <http://www.sec.gov/comments/4-637/4-637.shtml>.

¹⁴ Petition to require public companies to disclose to shareholders the use of corporate resources for political activities, submitted by Lucian A. Bebchuk, Co-Chair, Bernard S. Black, John C. Coffee Jr., James D. Cox, Jeffrey N. Gordon, Ronald J. Gilson, Henry Hansmann, Robert J. Jackson Jr., Co-Chair, Donald C. Langevoort, Hillary A. Sale, The Committee on Disclosure of Corporate Political Spending, August 3, 2011, SEC File No. 4-637, <http://www.sec.gov/rules/petitions/2011/petn4-637.pdf> (hereafter, "Petition").

¹⁵ See, Letter from Rep. Michael E. Capuano, U.S. House of Representatives, SEC File No. 4-637 (January 18, 2012). Representative Capuano's letter states, "I joined with 42 of my colleagues in writing to you in October 2011, urging the Securities and Exchange Commission ... to promulgate rules requiring public disclosure of corporate spending in elections."

¹⁶ Letter from Governor Pat Quinn, State of Illinois; State Treasurer Janet Cowell, North Carolina; State Comptroller Tom DiNapoli, New York; State Treasurer Bill Lockyer, California; State Treasurer Rob McCord, Pennsylvania; Public Advocate Bill De Blasio, New York City; City Controller Wendy Greuel, Los Angeles; Rep. William A. Current, Sr., North Carolina House of Representatives; Rep. James Pilliod, New Hampshire House of Representatives; Commissioner Toni Pappas, Hillsborough County, New Hampshire, SEC File No. 4-637 (January 19, 2012).

¹⁷ Letter from U.S. Senators Robert Menendez, Jeff Bingaman, Sherrod Brown, Tom Udall, Patrick Leahy, Sheldon Whitehouse, Dick Durbin, Jeanne Shaheen, Tom Harkin, Mark Begich, Richard Blumenthal, Jeffrey Merkley, Frank R. Lautenberg, Bernie Sanders, and Al Franken, to SEC Chairman Mary Schapiro, dated January 19, 2012, available at <http://www.votesmart.org/public-statement/663201/letter-to-chairwoman-schapiro-us-securities-and-exchange-commission>.

¹⁸ Letter from coalition of investment professionals, SEC File No 4-637 (November 1, 2011).

¹⁹ Letter from Council for Institutional Investors, SEC File No. 4-637 (Oct. 19, 2011).

²⁰ Raju Chebium, *Wheeler Presses for Additional Corporate Disclosures of Political Activity*, The Statesman Journal, January 19, 2011, <http://www.statesmanjournal.com/article/20120119/UPDATE/120119068/Wheeler-presses-additional-corporate-disclosures-political-activity>.

²¹ *See*, Comments on Rulemaking Petition: Petition to require public companies to disclose to shareholders the use of corporate resources for political activities, SEC File No. 4-637, <http://www.sec.gov/comments/4-637/4-637.shtml>

²² Petition, at 4, citing a July 25, 2011 search of the Sharkrepellent Dataset of Factset Research Systems, Proxy Proposals, *available at* <http://sharkrepellent.net>.

²³ *Id.*

²⁴ *Id.* at 5.

²⁵ 130 S. Ct. 876, 916, *citing* First Nat'l Bank v. Bellotti, 435 U.S. 765, 794, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978).

²⁶ 130 S. Ct. 876, 916, *citing* McConnell v. Federal Election Comm'n, 540 U.S. 93, 259, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003).

²⁷ *Political Contributions by Certain Investment Advisers*, Release No. IA-1812, File No. S7-19-99, *available at* <http://www.sec.gov/rules/proposed/ia-1812.htm>.

²⁸ *Political Contributions by Certain Investment Advisers*, Release No. IA-3043, File No. S7-18-09, *available at* <http://www.sec.gov/rules/final/2010/ia-3043.pdf>.