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CENTER *for* COMPETITIVE POLITICS

Congress shall make no law...

Corporate Governance

&

Campaign Finance

Supplemental Readings

Center for Competitive Politics
124 S. West Street, Suite 201
Alexandria, Virginia 22314
http://www.campaignfreedom.org

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Introduction

By Allen Dickerson

Corporations, like unions and other organizations, have a constitutional right to discuss politics. The Supreme Court has explicitly welcomed corporate speech on political topics, including the qualifications of officeholders and candidates. Yet many people would prefer to see corporate political speech excluded from the public debate.

Having lost the constitutional battle, reformers who oppose corporate speech have tried to pass legislation or enact regulations that would make it more difficult for corporations to participate in our political discussions. Those efforts have largely failed.

Some of these individuals have instead approached corporations directly, on behalf of a (usually small) number of shareholders. They ask that corporations voluntarily relinquish their constitutional rights, arguing that political speech carries outsized risks to shareholder value.

"But where unions and other associations may speak without restraint, there may be a solid business case supporting a corporate decision not to withdraw from the public square."

There is no evidence for such an assertion. Of course corporate political spending, like all corporate expenditures, must be directed toward maximizing shareholder value. But where unions and other associations may speak without restraint, there may be a solid business case supporting a corporate decision not to withdraw from the public square.

The Center for Competitive Politics believes that all individuals and groups, regardless of viewpoint, should inform America's political debate. This includes businesses, whose economic position gives them a vital perspective on the pressing political questions of our time. The enclosed materials help explain not only the current attempt by shareholding activists to force corporate silence, but also the comparatively-minor amounts of money spent on politics by American corporations and the lack of any evidence that these expenditures negatively impact share prices.

Ultimately, corporations and their shareholders must compose and fund their political speech with an eye toward shareholder value. But corporate management owes a fiduciary duty to all shareholders, not merely the politically vocal.

The First Amendment For Public Companies

Companies must be able to support political campaigns that are in its best interest – not necessarily the interest of its executives or shareholders.

By Roger Coffin

This article appeared on Directorship.com on April 5th, 2011

The highly publicized ruling of the United States Supreme Court in *Citizens United v. Federal Election Commission* removed a critical barrier to corporate spending in federal elections. The decision was controversial when decided, and remains so today. The media and commentators who would portray it as a dramatic and dangerous extension of corporate power have largely misunderstood the decision. It is, in reality, a natural extension of a Constitutional right, and presents corporations with opportunities for value creation.

> "...stock prices were not statistically impacted by the decision in Citizens United."

Importantly, the decision has not had a negative effect on firm value. My research shows that the stock prices of numerous companies surveyed at several points around the decision and leading to the mid-term November 2010 elections were not statistically impacted by the decision in *Citizens United*. Moreover, several stocks that signed an "anti-*Citizens United* pledge" in the aftermath of the decision did not see a material increase in firm value. Nor did the value of several industry-specific indexes go down. This represents good news for shareholders and the companies themselves. Policy makers and reformers seeking additional restrictions on speech post-*Citizens United* should consider these findings in balancing free speech rights against perceived corporate governance issues relating to shareholder voting rights.

How does a company assess this new right? Some academics and policymakers have suggested that shareholders be given enhanced sovereignty rights through corporate governance mechanisms – including the ability to make binding shareholder resolutions, the right to prior approvals and control over budgeting, and the adoption of federal corporate governance codes which would explicitly vest political speech power in the hands of shareholders as opposed to the board or management.

These proposals are unnecessary, impractical and potentially damaging. The modern era of corporate governance is characterized by an increase in shareholder rights. The ability of shareholders, acting individually or in groups, to influence the corporation is at its zenith. New mechanisms, including changes to the director nominating process, say on pay, elimination of broker voting, reduction of staggered boards and plurality voting, give the modern shareholder a much louder voice than the shareholder of a generation ago.

Nor does corporate political activity impinge upon a shareholder's ability to exercise his or her own political beliefs. To argue that a corporation must not take a position that could run contrary to the personal political beliefs of an individual shareholder would open the lid on shareholder and stakeholder derivative interests, none of which should assume, on balance, primacy over the First Amendment right of the corporation. Tying the corporate hands with these interests would be tantamount to stripping the right to speak from the firm, which *Citizens United* makes clear is prohibited by the Constitution. Corporate governance should not be allowed to do what direct legislation is prohibited from doing — suppress the right of an association of persons to speak. In this sense, a shareholder's personal political beliefs are as unimportant to the primary goal of a corporation as are the shareholder's tastes in other personal items, such as art, movies or clothing.

It has also been argued that there exists a potential agency problem if the corporation's managers substitute their own personal beliefs for those of the corporation. This risk is not unlike any other agency issue and must be evaluated in the context of the rise of the institutional shareholder armed with a new toolkit of governance mechanisms — all of which strengthen, rather than weaken, board and management accountability to shareholders.

These dangers, while real, are nonetheless outweighed by the corporations' interest and need to participate in political speech. Statutes create corporations. Governments, through statutes, regulate the business affairs of corporations in ways that can affect the strategy and economic success of the venture. In some industries, government regulation can be a primary driver in decisions relating to new products, markets and costs. Engaging in political speech is a risk, but a risk like any other facing the corporate body.

Going forward, policy makers, such as Congress or state legislatures, and the judiciary should make it explicit that a board of directors, in compliance with applicable laws regarding independence and subject to an election process enhanced by a system of proxy access or reimbursement, have the authority, and duty, to manage political speech. Shareholders will benefit by the ability of the corporation to advance its economic interests in a critical arena, and the public at large will benefit from the enhanced political discourse that will result from broader participation.

Roger Coffin is the associate director of the Weinberg Center for Corporate Governance and associate professor of the practice at the Lerner College of Business at the University of Delaware.
This is an excerpt from a forthcoming article in the Hastings Business Law Journal, entitled A Responsibility To Speak: Citizens United, Corporate Governance and Managing Risks

Practical Problems with Shareholder Approval for Corporate Discretionary Spending

Including Spending on Policy Issues and Politics

1. **Only some shareholders will be interested in controlling corporate spending; a minority will dictate the result for the entire corporations**
   - This is a classic collective action problem, where a small, well-organized minority can overrule a large but poorly organized majority
   - Directors have duty to shareholders to act in the best interest of the corporation, but shareholders have no duty to other shareholders to do likewise.
   - Evidence suggests that empowering these activist minority interests can reduce shareholder value.

2. **Conducting shareholder voting is expensive**
   - Proxy delivery can cost companies anywhere from 50 cents to $5 per proxy (postage alone averages $1.26 according to Broadridge)
   - Admittedly these costs are reduced for companies that can distribute materials electronically
   - Nevertheless, this is capital that could be used for investment, dividends, or to further other important corporate interests

3. **Shareholder "democracy" is not like voting in public elections**
   - No secret ballot
   - No assurance "true" beneficial owner of shares is casting the votes. Hedge funds and short-term shareholders might be better off if corporation is unable to maximize shareholder value
   - "Retail" voting by ordinary investors can be drowned out by special interest investors, such as union and public sector pension funds
   - Presently only about 1 on 20 individual retail investors returned proxies.

4. **Prior approval erodes flexibility, telegraphs corporate intentions to adverse interest groups**
   - Unfair to require advance notice of stock corporation, but not of non-stock corporations and other entities active in policy and politics

5. **There is no one approach that is appropriate for the roughly 12,000 public traded corporations in the United States.**

Corporate Money in Politics:

Some Perspective

$245 billion — amount paid to banks through the Troubled Asset Relief Program (TARP)

$227.9 billion — value of assets under CalPERS management

$140.63 billion — value of New York State Common Retirement Fund (12/2010)

$30.74 billion — gross U.S. casino gambling revenue in 2009 (a 5.5% drop from 2008 due to the recession)

$20 billion — losses associated with Bernie Madoff's Ponzi scheme.

$18.76 billion — amount spent on pet food in US in 2010.

$9 billion — 2011 operating budget for the State of Alaska.

$1.86 — Facebook 2010 advertising revenue

$1.52 billion — 2011 Vermont state education budget.

$745.7 million — Total raised by Barack Obama (primary and general elections) in 2008.

$483 million — total spending by all "outside groups" in 2010 election cycle (including party committees).

$200 million — total annual budget of the US Chamber of Commerce, according to internet sources.

$140 million — total political spending by nonprofit groups (independent expenditures, electioneering communications and internal communications with members) in 2010 election cycle.

$85 million — Charlie Sheen's net worth.

$65 million — amount spent by all Super PACs on independent expenditures in 2010 election cycle.

$34 million — Annual revenue of the Haas Avocado Board (projected 2011).

$28 million: Amount raised by American crossroads (the largest "Super PAC") in 2010 election cycle.

$20 million — value of marijuana seized in a New York indoor-cultivation bust (March 2010).

$15.1 million — spending by SEIU in 2010 elections

$15.5 million — estimated total in corporate funds donated to all federal independent expenditure" super PACs" in the 2010 election cycle.

$6 million — budget for the Atlanta GA ballet.

$150,000 — controversial donation made by Target Corp to Minnesota Fonnard in 2009, criticized because group supported Tom Emmer for Governor.

Political Activity

By the Numbers

900 million — number of users of Internet Explorer
90,682,968 — Total national turnout to vote in 2010
89.5 million — population of Vietnam
45.5 million — number of active Facebook Mafia Wars accounts, August 2010
13.5 million — unemployed workers in March 2011, according to BLS
47%: number of Americans who owe no federal income tax, according to an April 2010 Tax Policy Center report.
40.9% The percent of the voting eligible population that turned out to vote in 2010
34%: the percent of Americans age 20 and over who are obese, according to the CDC
28% - number of Americans who visited a casino in 2009.
26.2% - adult population in America suffering from a mental disorder, according to the NIMH

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The Center for Competitive Politics (CCP) is a 501(c)(3) nonprofit organization based in Washington, DC. CCP's mission, through legal briefs, studies, historical and constitutional analyses, and media communication is to promote and defend citizens' first amendment political rights of speech, assembly, and petition, and to educate the public on the actual effects of money in politics and the benefits of a more free and competitive election and political process. Contributions to CCP are tax deductible to the extent allowed by law.

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