

Corporate and M&A Law

Political Contributions

Political Activity and the Board Room: Limiting Corporate Political Expenditures Through Disclosure, Corporate Law, and Shareholder Proposals



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We are now two years out from the Supreme Court's landmark decision, *Citizens United v. Federal Election Comm'n*,¹ and well into the 2012 Presidential campaign. With two full years of experience, we now have a sense of what a world with unlimited personal and corporate giving looks like.

We first provide brief background on the legal framework for independent expenditures. With the year-end reports now on file with the Federal Election Commission (FEC) and several studies

out on that data, we then discuss how independent expenditure committees have raised their funds. As we will discuss, for-profit corporations gave less than 20 percent of the total contributions.

Yet, as we discuss in the final section, there have been many efforts to limit how corporations may be involved in the political process through forced disclosure, shareholder initiatives, and even efforts to get the Securities and Exchange Commission (SEC) to impose regulations. These proposals, which attack the perceived problem from the corporate law perspective rather than the campaign finance perspective, have been pushed by organizations that either oppose virtually all money in the political process, are opposed to corporations, or who believe that corporations will contribute only to Republican causes. Although cloaked in language about protecting shareholders, these efforts really seem to be an effort to hamstring effective government relations efforts.

The Landscape: How Super PACs Came to Be

Corporate Speech: The Federal Election Campaign Act (FECA) has long distinguished between contributions of either money or in-kind services to candidates and expenditures made independently of a candidate. An individual is subject to strict limits on the former, but faces no limit on the latter. Prior to *Citizens United*, however, corporations and unions could engage in independent expenditures of "express advocacy"² or "electioneering communications"³ only through a Political Action Committee (PAC). *Citizens United* of course, changed this and allowed both for- and nonprofit corporations to spend their

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treasury funds on messages expressly advocating the election or defeat of a candidate for federal office, as long as they made these communications independently from candidates.

Group Speech: Even with *Citizens United*, there was still a hurdle for individuals who wanted to support independent expenditures. Individuals could not work with other like-minded individuals because groups that raised or spent more than \$1,000 in a year were considered to be “political committees” subject to a contribution limit of \$5,000.⁴ The Club for Growth and others settled cases with the FEC on this issue from prior elections.⁵ In other words, although the Court had long held that individuals had the right to engage in unlimited speech in support of candidates,⁶ they could not join together without becoming a political committee subject to limits. This meant that an individual would have to hire a media consultant, sign contracts directly with vendors, and take other steps difficult for an individual, who may not have wanted to get into the political business.

But, in March 2010, three months after *Citizens United* was decided, the D.C. Circuit struck down the FECA’s contribution limits on independent expenditure committees, allowing individuals and both for- and nonprofit corporations to contribute unlimited funds to an organization for the purpose of making independent expenditures.⁷ The Super PAC was born.⁸

A Super PAC’s proper name is an independent expenditure committee. These independent expenditure committees may not make contributions to a candidate. Rather, they can raise and spend unlimited funds in support of or opposition to federal candidates so long as they do so independently of the candidates. Although much has been made about the various candidate advisors who have gone to work for Super PACs and what many perceive to be “coordination,”⁹ the legal standard is actual fairly narrow.

A coordinated communication—the key legal term—applies only to certain types of communications when certain conduct is present. Any message that expressly advocates the election or defeat of a candidate is within the content standards.¹⁰ The conduct standards are very specific:

1. The communication is made at the request or suggestion of the candidate or the candidate assents to the communication being made;
2. The candidate is materially involved in the content, means, mode, audience, media outlet, and timing of the communication;
3. There is a substantial discussion with the candidate about the candidate’s plans, needs, or projects, unless that information is publicly available; or
4. A common vendor or former employee is involved and uses information about the campaign’s plans, projects, activities, or needs, which the vendor learned from the campaign within 120 days of working for the independent expenditure committee, unless the information was publicly available.¹¹

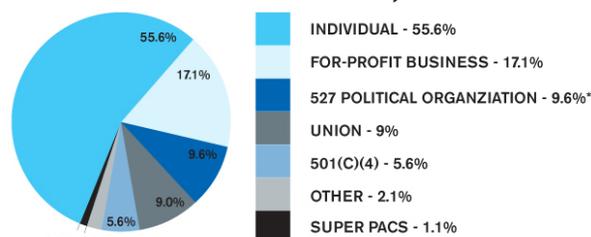
Thus, in many cases, it is very easy for former consultants to go to work on a Super PAC and not cross any coordination lines.

Super PACs in Action

With that background in place, we now turn to what the FEC reports reveal about how Super PACs raised their money. Super PACS, like traditional PACs, are required to report their receipts and disbursements with the FEC either monthly or quarterly in election years, and monthly or semi-annually in non-election years. The 2011 year end reports were filed on January 31, and provided insight into how the Super PACs have been raising and spending money.

A closer look at the reports filed by Super PACs reveal that the vast majority of donations made to Super PACS were made by individuals—not corporations. According to a study of FEC data on Super PACs from 2010 through the end of 2011, donations to Super PACs were from the following sources:¹²

PERCENT OF SUPER PAC FUNDRAISING FROM VARIOUS SOURCES, 2010-2011



Adds to 100.1% due to rounding
*527 Political Organizations includes PACs
SOURCE: Demos and U.S. PIRG analysis of FEC and Sunlight Foundation data

Much has been made of the 5.6 percent of contributions from 501(c)(4) organizations, because they do not have to disclose their donors. In other words, a contribution from a 501(c)(4) cannot be further traced back. Many critics of Super PACs believe this is a back-door and secret way for additional corporate money to flow into Super PACs. Of course, even if all of the 501(c)(4) money was from corporations, the amount of corporate money would still be half that of individual funding. In addition, at less than 6 percent of all contributions, this may be a healthy outlet for donors who fear retribution to be involved in the process.¹³

For all of the talk about extremely large donors, the studies show that most contributions are between \$5,000 and \$20,000.¹⁴ In fact, only 35 donors gave more than \$1 million to Super PACs. However, these incredibly large contributions amounted to 40 percent of the contributions to Super PACs. Interestingly, most of the large donors were individuals, not corporations.¹⁵

The most recent filings showed that Republican-leaning Super PACs raised about four times more than top Democratic Super PACs in 2011. However, given that there is no Democratic primary, this is not surprising. The disparity in fund raising will probably diminish as Super PAC funds are expended during the primaries to support Republican candidates, who do not go on to the

general election. Moreover, in early February, President Obama's campaign announced that it would reverse its position on Super PACs and support Priorities USA, the leading pro-Democratic party Super PAC.

Efforts to Limit or Undo *Citizens United*

Critics of *Citizens United* have tried to restrict how corporations may be involved in the political process in several ways. First, they have tried to impose additional, burdensome disclosure obligations on donors and recipients through legislation (i.e., through lobbying efforts that they seek to limit for corporations) and regulation. Second, advocacy groups have tried to force corporations to adopt policies to limit their political activity and to disclose political activities. Third, shareholders (primarily pension funds of labor organizations, public pension funds, and other activist shareholders), have launched similar efforts through the proxy process. These efforts have morphed from disclosure obligations into restrictions on corporate political activities.

Disclosure Legislation: A few months after the *Citizens United* decision was issued, Senator Charles Schumer (D-N.Y.) and Representative Chris Van Hollen (D-Md.) introduced the DISCLOSE Act seeking to impose additional disclosure requirements on entities making independent expenditures and electioneering communications by requiring organizers involved in political campaign to disclose the identity of large donors and to identify such donors in any political ads they fund.¹⁶ The proposed law also would have restricted election spending by government contractors and corporations with foreign ownership. Although the bill passed the House, it failed in the Senate.

A new version of the DISCLOSE Act was recently introduced by Representatives Van Hollen and Robert Brady (D-Pa.), along with other House members.¹⁷ This version mirrors the original DISCLOSE Act bill in many ways. However, unlike the original bill, the DISCLOSE 2012 Act would not limit spending by particular groups, but only require more robust disclosure. The bill would require (1) enhanced public reporting by all groups, including Super PACs; (2) political advertisements to disclose the top funders during the actual broadcast and include a statement from the head of the group endorsing the message, (3) lobbyists to disclose campaign-related expenditures on their Lobbyist Disclosure Act reports, and (4) unions and corporations to disclose political spending to their members or shareholders.

State legislatures have followed suit. In Iowa, for example, the legislature passed a law in 2010 requiring the leadership of a corporation to approve political expenditures before the company makes them.¹⁸ More recently, the California legislature considered the California Disclose Act, which failed to pass the state Assembly in early February of this year. The California Disclose Act would have required political advertisements to identify the three largest funders of the ads by name.¹⁹ Such measures are ardently supported by left-leaning advocacy organizations and will likely continue to pop up in state legislatures across the country.

Corporate Governance Legislation: Another effort to curtail corporate political activities has come in the form of the Shareholder Protection Act of 2011.²⁰ This bill would regulate independent expenditures, electioneering communications, and dues or other payments to 501(c) organization that "are, or could reasonably be anticipated to be, used or transferred to another association or organization for the purposes" of making independent expenditures or electioneering communications.²¹ Specifically, it would require public companies to include in their proxy statements a description of the political activities planned for the fiscal year and an affirmative vote of a majority of the shareholders to approve the political spending.²² In addition, it would require the SEC to issue rules requiring a board vote on any political expenditures of \$50,000 or any expenditure that would result in the total amount spent by the issuer for a particular election in excess of \$50,000.²³ Finally, the bill would require regular reporting of political activity by publicly traded companies.²⁴ Supporters of this legislation recently called on the Senate Banking Committee to hold hearings to move the legislation forward.²⁵

SEC Regulation: There has also been an effort to get the SEC to issue rules governing political activities. In August 2011, a group of academics filed a petition for rulemaking asking the SEC to require disclosure of corporate political activities.²⁶ Specifically, the petition asks the SEC to create rules that would:

- Provide for a very low *de minimis* level of spending that does not have to be disclosed;
- Establish an appropriate frequency for disclosure (with the suggestion that it be tied to current proxy disclosure cycles); and
- Determine which payments would have to be disclosed, with an emphasis on determining when payments to intermediaries, such as trade associations and other nonprofits would have to be disclosed.

In the petition, the authors point to growing shareholder efforts to impose disclosure obligations on companies as a basis for the SEC to do so by rule. In other words, they have attempted to create a feedback loop: those who want disclosure file shareholder initiatives and, regardless of the outcome of those initiatives, supporters of such efforts then ask the SEC to impose the same obligations by rule.²⁷

Advocacy Organizations: In addition to legislative and regulatory efforts, advocacy groups, led by the Center for Political Accountability ("CPA"), have pursued campaigns to encourage corporations to increase disclosure and oversight of their political spending. In the fall of 2011, the CPA released a report ranking 99 companies based on their political disclosure and accountability.²⁸

Shareholder Efforts: The Manhattan Institute's Center for Legal Policy's Proxy Monitor project, which tracks shareholder proposals submitted to public companies, identified 36 political spending proposals introduced in the 2011 proxy season (up from 27 in 2010, 20 in 2009, and 14 in 2008).²⁹ According to the Proxy Monitor, the majority of these proposals are supported

by labor-affiliated and social-investing funds.³⁰ Although none of these proposals were adopted, the number of such proposals is expected to rise in the upcoming proxy season.

Political spending proxy measures already have been introduced this year at Apple, AT&T, Ford and Pepsi. These measures seek to require management to disclose to investors how much it spends on lobbying and political campaigns. For instance, the proposal submitted to Apple, which will be voted on at the annual shareholder meeting on February 23, would require the company to submit semi-annual reports disclosing its policies and procedures for political contributions and expenditures made with corporate funds.

In addition to disclosure efforts, there have now been shareholder efforts to prohibit companies from engaging in political spending. On January 17, 2012, Trillium Asset Management and Green Century Capital Management announced that they had filed shareholder resolutions with Bank of America, 3M, and Target, that would urge these companies to refrain from making political contributions.³¹ These efforts follow a letter-writing campaign by US PIRG and Common Cause seeking to have all 500 companies in the S&P 500 “sign a public pledge renouncing the use of funds from their corporate treasuries for political purposes.” They also asked the companies to specify that their trade association dues should not be used for political purposes.³²

Conclusions

The initial data on independent expenditures shows that corporations are definitely becoming involved in the process, having funded about 17 percent of the contributions to Super PACs. Of interest, few of these corporate contributions appear to be from public companies, but rather from privately held companies. In addition, although some money has come from 501(c)(4) organizations (which could mask contributions from publicly traded companies), the overall amount is relatively small.

Yet, the reaction to *Citizens United* has been long and loud. The effort to force disclosure obligations on companies has been intense. Moreover, these efforts are morphing from simple disclosure of political contributions to restrictions on political giving. In addition, the effort is spreading from a focus on just political contributions to payments to trade associations and other organizations that *might* use those funds for political activity. Yet the train has not stopped there. The newest shareholder efforts have continued to expand and now reach disclosure of funds spent on lobbying activities.

Keep in mind that direct corporate contributions to candidates have been legal in many states for years (and that companies tended not to spend large sums on these efforts) and that independent expenditure efforts by corporations were also legal in many states (and, again, that companies tended not to spend large sums on these efforts). Also remember that political contributions to candidates are fully disclosed in every state. Thus, much of this information is publicly available and centralized disclosure may make sense.

However, the efforts to limit what companies may do could harm shareholders in the long run. The amounts involved are often trivial in the scope of the corporate budget. Their impact, however, may be very beneficial to corporations. Not through the perceived *quid pro quo* that some worry about, but rather through electing officials who understand the companies involved and their issues. Such candidates are more likely to create an environment that will allow the business to thrive (whether through more expansive regulation or through less regulation—the impact likely will be bipartisan, depending on the corporate interests at stake).

Moreover, as the disclosures expand to reach contributions to trade associations and other nonprofits, the only vehicle for shielding companies from potential backlash is limited. Anonymous speech has a role in a democracy, and by requiring further disclosures by companies of information that is not already disclosed, there may be limits on when a company is willing to get involved in the process to stand up for its shareholders.

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¹ *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2010).

² Express advocacy is a communication that expressly advocates the election or defeat of a clearly identified candidate for federal office. 11 C.F.R. § 100.22. This is further defined in the FEC's regulations as any communication that, when taken as a whole, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate.

³ Electioneering communications are communications made on television or radio that refer to a clearly identified candidate for federal office if they air 30 days before a primary election or 60 days before the general election and are targeted to the relevant electorate. 2 U.S.C. § 434(f)(3). The FEC's regulations further define an electioneering communication as a communication that is “publicly distributed.” 11 C.F.R. § 100.29(a)(2). According to the regulations, “publicly distributed” means that the communication can be received by 50,000 or more persons in a state where a primary election is being held within 30 days. 11 C.F.R. § 100.29(b)(3)(ii). Congress sought to regulate such electioneering communications in the McCain-Feingold law to deal with ads that were couched as issue ads (e.g., “Call Senator Joe Blow and tell him to make America stronger” would be the tag line to an ad criticizing Senator Blow's record on defense issues).

⁴ 11 C.F.R. §§ 100.5(a) (defining a political committee), 110.1, and 110.2 (setting contribution limits for political committees).

⁵ Matter Under Review No. 5365, Stipulation for Entry of Consent Judgment at 7-8, Aug. 22, 2007, available at www.fec.gov.

⁶ *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁷ *Speechnow.org v. Federal Election Comm'n*, 599 F.3d 686 (D.C. Cir. 2010).

⁸ The FEC essentially blessed the Super PAC in July 2010 when it issued two advisory opinions—Advisory Opinions 2010-09 and 2010-11—concluding

that that Commonsense Ten and the Club for Growth, the two groups seeking the advisory opinions, could establish political committees that would solicit unlimited contributions from individuals, unions, and corporations to fund independent expenditures.

⁹ See, e.g., Dan Eggen, [Obama Gives Blessing to a Super PAC](#), Wash. Post, Feb. 7, 2012; Lloyd Grove, [Super PAC Adviser Rick Tyler is Newt Gingrich's Mini-Me](#), Daily Beast, Jan. 31, 2012; Andy Kroll, [Candidates and the Totally Unrelated Super-PACs That Love Them](#), Mother Jones; Nicholas Confessore & Jim Rutenberg, [Group's Ads Rip at Gingrich as Romney Stands Clear](#), N.Y. Times, Dec. 30, 2011; Tom Hamburger, [Gingrich, Romney Rip Super PACs While Reaping Benefits](#), L.A. Times, Dec. 20, 2011; Jim Rutenberg, [Huntsman Campaign Gets Aid from Group Tied to Father](#), N.Y. Times, Dec. 3, 2011; Ross Ramsey, [Another Super PAC Run by Close Perry Associates](#), Tex. Trib., Aug. 8, 2011.

¹⁰ 11 C.F.R. § 109.21(c).

¹¹ 11 C.F.R. § 109.21(d). There are a few other issues to consider, but these are the most relevant for the discussion.

¹² Demos & U.S. PIRG Education Fund, [Auctioning Democracy: The Rise of Super PACs & the 2012 Election 2010](#).

¹³ [Citizens United](#), 130 S. Ct. at 981-82 (Thomas, J., concurring in part and dissenting in part).

¹⁴ Demos, [Large Donor Funding of Super PACs, 2011](#).

¹⁵ [Who's Financing the 'Super PACs'](#), N.Y. Times, Feb. 1, 2012.

¹⁶ H.R. 5175, 111th Cong. (2010); S. 3628, 111th Cong. (2010).

¹⁷ H.R. 4010, 112th Cong. (2012).

¹⁸ Iowa Code § 68A.404.

¹⁹ AB 1148, 2011-2012 Session.

²⁰ S. 1360, 112th Cong. (2012).

²¹ *Id.* § 3(a)(1)(A)(iii).

²² *Id.* § 3(b) and (c).

²³ *Id.* § 4(c).

²⁴ *Id.* § 5.

²⁵ The Campaign Legal Center, [Broad Coalition Calls for Senate Hearings on Corporate Governance Solutions in the Wake of Citizens United](#) (Feb. 14, 2012).

²⁶ [Petition for Rulemaking by the Committee on Disclosure of Corporate Political Spending, Before the Securities and Exchange Commission](#) (Aug. 3, 2011).

²⁷ *Id.* at 5.

²⁸ The Center for Political Accountability & Zicklin Center for Business Ethics Research, University of Pennsylvania, [The CPA-Zicklin Index of Political Accountability and Disclosure](#) (2011).

²⁹ James R. Copland, [Proxy Monitor Report, A Report on Corporate Governance and Shareholder Activism](#), September 2011.

³⁰ *Id.*

³¹ Common Cause, Trillium Asset Management, Green Century Funds, Press Release, [On 2nd Anniversary of Citizens United, Shareholders File Resolutions, Advocates Launch to Stem Corporate Political Spending](#) (Jan. 17, 2012).

³² *Id.*