“The Perils of *Citizens United*”

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It’s a Monday morning in October, two weeks before the election. On the previous Friday, an obscure political group financed by your company’s trade association launched an advertisement against a prominent senator, who is embroiled in a tight reelection race. Both your company and the trade association oppose a key piece of legislation that the senator supports.

This advertisement, however, does not ask voters to oppose him for this reason. Instead, it attacks the candidate for his support for immigration reform, which your company publicly supports.

Due to the prominence of the campaign and the nature of the message, the advertisement is triggering a firestorm of controversy. You search for the ad on YouTube and, to your mortification, you find that your company’s name is plastered across the screen, because your company is one of the outside group’s five largest donors.

You spend the rest of the week fending off angry directors, shareholders and customers. By Thursday, your company is forced to issue a public apology and disassociate itself from the ad and the group.

Ironically, this nightmare scenario is more likely to occur after the Supreme Court’s decision in *Citizens United v. Federal Election Commission*. Since the decision, the press has focused on its potential benefits for corporations, and there is no question that there are significant advantages. By authorizing corporations to fund advertisements that “expressly advocate” for or against candidates for elected office, the Court has allowed corporations to play a more direct role in influencing election outcomes.

Yet, by unleashing a strong public backlash against corporate election spending and spurring Congress and states to consider new disclosure regimes, this decision likely will change the legal and political environment in which corporations operate. Even as corporations have been given the legal authority to fund more effective political messages, there is a far greater chance that they will be held responsible for these messages by their customers, their shareholders, their directors, and most likely the federal and state governments.

Many corporations are not ready for this new environment. For years, politically active corporations have carefully avoided public attention by giving money to trade associations and other outside groups who, in turn, created and sponsored the “issue advertisements” allowed under federal law. Because federal law did not require trade associations and outside groups to publicly disclose their donors, corporations could avoid being publicly associated with political messaging that they underwrote.

As a result, senior executives and directors of these corporations had little incentive to control or even closely monitor the resulting spending. Instead, lower-level officers decided which outside groups received money and how much of it they received.

Even before *Citizens United*, there were hints that this approach entailed significant risk. In 2004, a large transportation company donated money to the leadership PAC of a prominent Republican congressman. The PAC used the funds to underwrite groups with social agendas that were at odds with the company’s progressive policies on gay and lesbian rights. After a spate of bad press, the company publicly distanced itself from these groups.

Furthermore, as a result of high-profile scandals that led to the passage of the Honest Leadership and Open Government Act in 2007, prosecutors started looking closely at the relationship between political contributions and legislative actions, raising the possibility that corporations could face criminal liability for their political activity. Even the assurance of secrecy was not guaranteed.

In 2005, the Ohio Elections Commission threatened to fine the Ohio Chamber of Commerce, unless it revealed its corporate donors for an illegal corporate-funded campaign against a sitting state supreme court justice. Under pressure, the Chamber revealed the names, exposing companies that believed their contributions would remain secret.

In important ways, the *Citizens United* decision changed the political environment for corporations. In a recent poll conducted by Democrat Stan Green-

berg and Republican Mark McKinnon, voters said that they opposed the decision by a more than two-to-one margin (64 percent to 27 percent), including nearly half (47 percent) who strongly opposed it. A similar poll by the Washington Post triggered an even stronger response; 80 percent opposed the Court's decision, including nearly two-thirds who opposed it strongly.

Voters are calling on Congress to respond with legislative action. Nearly three-quarters (72 percent) of voters support an effort by Congress to reinstate limits on corporate and union spending. Furthermore, a large majority (80 percent in support, with 56 percent in strong support) believes that corporations should have to obtain shareholder approval before spending money on elections.

As a result of the public's interest in the decision, there will likely be dozens of political reporters (and even more internet bloggers) monitoring the political activity of corporations and their trade associations this cycle. A recent example is instructive. To draw attention to the Court's decision, a Maryland-based public relations firm (which is organized as a corporation) recently announced that it was running for the congressional seat held by Congressman Christopher Van Hollen (a leading Democratic critic of *Citizens United*).

Through this stunt, the firm was trying to show the Court's error in recognizing the First Amendment rights of corporations. In the pre-*Citizens United* world, such a stunt might have garnered a favorable post on liberal blogs. In this environment, however, the Washington Post decided to cover the stunt on its front page, generating several days of publicity.

Negative press coverage, in turn, may lead to greater pressure on corporations from directors, shareholders, and consumers to refrain from any political spending. It will undoubtedly lead to calls upon corporations to be more open and responsible in their spending. Surveys taken by the non-partisan Mason Dixon firm show that 95 percent of shareholders believe that corporations should be required to publicly disclose all political contributions, while 88 percent of corporate directors believe that corporations should be required to publicly disclose all corporate funds used for political purposes.

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Yet these surveys also show that shareholders (55 percent) and directors (73 percent) believe that corporations are already required to publicly disclose their political spending. When these stakeholders realize that corporations do not have to disclose their political spending, they may start demanding it. In recent years, as shareholders have become more aware of the lax disclosure regime, they have pushed for more transparency. In the 2009 proxy season, for example, average support for political disclosure resolutions rose to 29 percent, triple the 2005 average. Due to *Citizens United*, this trend is likely to accelerate.

Furthermore, corporations are likely to come under increasing pressure from politicians to underwrite political ad campaigns. Candidates will quietly deploy political surrogates to make the case for contributions to friendly outside groups. Responding favorably to those overtures poses legal risks. The absence of good internal procedures for reviewing, approving and disclosing such requests will expose companies to unwanted legal exposure and harm to their reputations.

Finally, corporations may soon be operating under a more stringent regulatory regime. Congress is considering a proposal that would require the CEO of a corporation to appear in any ad sponsored by the corporation and attest that he or she "approved" of the message. If a trade association or other outside group sponsored the advertisement, the CEO of the biggest corporate donor to that trade association would have to appear in the advertisement and the names of the top five corporate donors would be displayed. Finally, the bill would require the disclosure of all corporate donors to these entities.

Another bill, introduced in the House, would require a corporation to obtain shareholder approval of its election advertising budget and board approval of any individual expenditure, above a certain level. Similar proposals are pending in numerous state legislatures. The Securities and Exchange Commission is also being pushed by shareholder groups to require publicly traded companies to disclose political spending.

If new regulations are enacted, every corporation will have to scramble to protect itself against scenarios similar to the one described at the beginning of this article. To better equip their companies for this post-*Citizens United* environment, senior executives and directors should consider changing the way that their companies approve election spending.

First, senior executives and directors need to take more ownership over election spending decisions. Senior managers have the deepest understanding of their company's long-term interests and the largest stake in its long-term success. Like any deci-

sion that risks harming the company's relationship with key stakeholders or its image with the general public, decisions on election spending should be overseen by management. At the beginning of each cycle, senior executives and directors should sit down with their government affairs and legal departments and craft a detailed election spending plan.

This plan should include specific funding levels, criteria for identifying the candidates that the company will support or oppose and directions about the types of advertisements that the company is willing to fund (particularly, whether it is willing to pay for negative attacks that do not focus on specific legislative issues).

In addition, the bylaws should require that a specific corporate officer approve of and provide a written justification for every election expenditure. Finally, the bylaws should also require that the board approve every election expenditure over a certain threshold level. This process will help ensure that a company's election spending reflects its interests.

Second, every corporation needs to determine to what extent it will allow trade associations and outside groups to use its funds to finance political programs that it has not specifically approved. A company's position on an issue or on a candidate may be different than a trade association in which it is a member. Even if a company is aligned with a group on 90 percent of issues, the group may choose to advertise on a divisive social issue that falls within the remaining 10 percent.

Furthermore, a company may have an important relationship with the individual that the group wants to oppose. In 2005, for example, the Center for Political Accountability asked sixty board members of the National Association of Manufacturers whether they had specifically approved NAM's efforts to promote the Bush Administration's judicial nominees. The responses to the inquiry made it clear that many corporations were unaware of NAM's activities. Soon after the Center made its inquiry, NAM backed away and announced it would focus on state judicial races.

In an ideal world, outside groups would solicit corporate funds for specific campaign expenditures and corporations could then choose which expenditures it wanted to fund. Under current law, however, such an approach could trigger greater disclosure requirements. Still, corporations need to investigate how their funds are going to be used and check with counsel to formulate an appropriate plan to deal with this issue. Developing good internal procedures for reviewing and approving political spending will likely become a business necessity if, as expected, Congress and state legislatures enact more stringent disclosure regimes.

Third, corporations should actively consider disclosing their political priorities and programs to shareholders. If they do, they will be able to deflect unwarranted criticism if they later find themselves under attack. This exercise will also force corporations to put together a detailed and credible election plan, which in turn will help discipline their political activities.

Even before *Citizens United*, many Fortune 100 companies had begun implementing some of these recommendations. In 2007, the Center for Political Accountability polled the Fortune 100 companies regarding their practices for approving and reporting political spending. Among the findings:

- 57 companies required prior approval of political contributions by management, legal counsel, or the board of directors;
- 34 companies said that boards exercised oversight over political contributions; and
- 17 companies disclosed political contributions on their websites.

These figures, though relatively low, actually represented a significant increase from two years earlier, demonstrating that corporations were beginning to recognize the risks entailed by the traditional approach to election spending.

After *Citizens United*, every corporation should assume that it will be held responsible for the political messages that it funds. Corporations that adapt to the new environment will be able to take advantage of the benefits of *Citizens United*, while avoiding its perils.

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