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December 21, 2011

*Via Electronic Mail: rule-comments@sec.gov*

Ms. Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F. Street, Northeast  
Washington, DC 20549

Re: *Petition to Require Public Companies to Disclose Corporate Political Spending*  
*File No. 4-637*

Dear Ms. Murphy,

The Brennan Center for Justice at N.Y.U. School of Law<sup>1</sup> respectfully submits these comments on the pending petition to require disclosure of corporate political spending, File No. 4-637 (the “Petition”). For the reasons set forth in the Petition, and outlined in the numerous comments submitted to the Commission, the Brennan Center urges the Commission to use its authority to bring transparency and accountability to corporate political spending by public companies.

There has long been intense pressure on the business community to provide the funds that fuel our ever more expensive elections, and this pressure increased after the U.S. Supreme Court’s landmark decision in *Citizens United v. Federal Election Commission*<sup>2</sup> expanded the scope of permissible corporate political activity. According to a Zogby International survey of business opinion leaders conducted in 2010, three in five respondents said that corporate leaders are pressured to contribute to political candidates, and nearly half reported that the

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<sup>1</sup> The Brennan Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Brennan Center’s Money and Politics project works to reduce the real and perceived influence of special interest money on our democratic values. Project staff defend federal, state, and local campaign finance and disclosure laws in court around the country, and provide legal guidance to campaign finance reformers through counseling, testimony, and public education.

<sup>2</sup> 130 S. Ct. 876 (2010).

level of pressure placed on business leaders has increased since 2008.<sup>3</sup> Business leaders “are also asked to make contributions to [non-candidate] organizations and political groups that are allowed to spend corporate money on election related activities.”<sup>4</sup>

The demand for corporate political dollars has mushroomed in tandem with the dramatically increasing costs of recent American political campaigns. According to Federal Election Commission data, Congressional fundraising has more than doubled since 1998. That year, “candidates for the House and Senate raised a total of \$781 million. By 2008, campaign receipts had grown to \$1.4 billion and in 2010 soared to almost \$1.9 billion.”<sup>5</sup> Election spending by non-candidate groups has also soared. Spending by outside groups in the 2010 elections grew by more than 400 percent compared to the previous mid-term election cycle; if such spending increased at the same rate in the 2012 election cycle, we would see more than \$1 billion in outside money.<sup>6</sup>

Corporate decision-makers feel compelled to be active players in this campaign finance arms race. Business leaders fear that if they refuse entreaties for political dollars, they will be at a competitive disadvantage, and that “competing interests who do contribute generously will have an advantage in gaining access to and influencing [policymakers] on matters of importance to the company.”<sup>7</sup>

Given the widespread pressure on corporate leaders to make political expenditures—and the millions of corporate dollars that have flowed into politics in recent years as a result<sup>8</sup>—it is not surprising that there is significant public interest in the details of corporate political spending. Shareholders and potential investors have a particularly strong interest in this information, because informed investment decisions require an assessment of whether a corporation’s political spending advances its interest in profit making.

Data on corporate political spending is important to shareholders because “[p]olitical activity . . . exposes companies to substantial reputational and legal risks that endanger enterprise and shareholder value.”<sup>9</sup> The shareholder interest in robust disclosure of corporate political activity is strengthened by the fact that “managerial and shareholder interests are not well

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<sup>3</sup> Committee for Economic Development, *After Citizens United: Improving Accountability in Political Finance* 3 (2011).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 1.

<sup>6</sup> Public Citizen, *12 Months After: The Effects of Citizens United on Elections and the Integrity of the Legislative Process* 9 (2011).

<sup>7</sup> Declaration of Gerald Greenwald, former Chairman, United Airlines, *McConnell v. Federal Election Commission*, No. 02-0582, Sept. 24, 2002, available at [http://www.campaignlegalcenter.org/attachments/BCRA\\_MCCAIN\\_FEINGOLD/McConnell\\_v\\_FEC\\_District\\_Court/708.pdf](http://www.campaignlegalcenter.org/attachments/BCRA_MCCAIN_FEINGOLD/McConnell_v_FEC_District_Court/708.pdf).

<sup>8</sup> See, e.g., Michael Beckel, *Influx of Corporate Political Cash Followed Pivotal Federal Court Decision*, OpenSecretsBlog, March 25, 2011, at <http://www.opensecrets.org/news/2011/03/influx-of-corporate-political-cash.html> (noting that “corporate treasury money accounted for about \$15.5 million of the cash donated to so-called ‘super PACs’—more than 17% of the groups’ receipts—in the year after *Citizens United* was decided).

<sup>9</sup> Committee for Economic Development, *supra* note 3, at 5.

aligned” with respect to corporate political spending.<sup>10</sup> If such spending is not fully transparent, shareholders lack the ability to hold corporate managers accountable for political spending decisions.

Accordingly, to protect the integrity of the nation’s capital markets and to ensure that investors have full and accurate information about the companies they invest in, the Commission should develop rules that require public companies to disclose to shareholders the use of corporate resources for political expenditures.

### **Public Companies Are Already Responding To Investor Interest In Corporate Political Spending.**

Particularly in the two years since *Citizens United* opened the door to more extensive corporate political spending, the interest in robust disclosure of that spending has increased among shareholders and the broader public. During that time, and even before *Citizens United*, a substantial number of leading American companies have voluntarily agreed to provide shareholders with information on corporate political spending.

At least three major studies, released in the months after the Petition was filed, have documented the growing interest in transparency in corporate political spending:

- *First*, in September 2011, researchers from the Robert Zicklin Center for Corporate Integrity at Baruch College issued the Baruch Index of Corporate Political Disclosure, which measures companies’ willingness to disclose their corporate political activity; what companies say about the candidates and political groups they give to; and how those donations are made.<sup>11</sup> The Baruch Index ranked the S&P 100 companies and found that while 22 of the S&P 100 companies disclose little or nothing about their corporate political activities, many companies have adopted strong disclosure policies. The Index suggested that many companies with high levels of spending on political activities disclose little information about their spending—suggesting that the lack of transparency in some politically active companies hinders shareholders from evaluating the significance of those companies’ political activities.
- *Second*, in October 2011, the nation’s leading advocate for transparency in corporate political spending, the Center for Political Accountability, teamed with the Carol and Lawrence Zicklin Center for Business Ethics Research at the Wharton School of the University of Pennsylvania to release the CPA-Zicklin Index of Corporate Political Accountability and Disclosure.<sup>12</sup> The CPA-Zicklin Index emerged from a comprehensive examination of the activities of the S&P 100 companies, and noted that disclosure of political spending is becoming a mainstream corporate practice: 57 of the S&P 100 companies disclose their direct corporate political spending and

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<sup>10</sup> John C. Coffee, Jr., *Testimony Before the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises of the Committee on Financial Services*, United States House of Representatives (Mar. 11, 2010).

<sup>11</sup> See <http://www.baruch.cuny.edu/baruchindex/index.htm>.

<sup>12</sup> See <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/5800>.

have adopted board oversight, or they prohibit spending corporate cash on politics. Forty-three companies disclose some information about their indirect spending through trade associations or other tax-exempt groups.

- *Finally*, in November 2011, the IRRC Institute, a non-profit organization that focuses on corporate ethics and the informational needs of investors, released a report by the Sustainable Investment Institute (“Si2”) entitled *Corporate Governance of Political Expenditures: 2011 Benchmark Report on S&P 500 Companies*.<sup>13</sup> The Si2 report examined a larger group of companies than the prior reports, and revealed that, overall, disclosure among S&P 500 firms lags behind that of the S&P 100 companies—though even in the larger universe of companies, the trend is toward greater disclosure and greater transparency about who has decision making authority on political spending. Disclosure of political spending through intermediary groups like trade associations has also increased.

The release of three major reports on corporate political spending in the months since the Petition’s filing is itself proof of substantial investor interest in the scope and nature of corporate political spending. And the reports’ collective conclusions establish beyond doubt that corporate disclosure of both direct and indirect political spending is well within the mainstream of corporate governance practice—and is increasingly the norm.

The substantial number of companies that have embraced disclosure vary significantly in their political spending policies: some prohibit political spending entirely; some forbid contributions made directly to parties or candidates but allow corporate dollars to fund the political activities of non-profit groups or trade associations; and some embrace political spending in all its forms but ensure that this spending is done in the open. While these companies have come to different conclusions on whether corporate political spending enhances shareholder value, they are unanimous in seeing the value in transparency and recognizing shareholders’ vital interest in data on corporate political activity.

Moreover, even companies that have not yet adopted robust disclosure policies are increasingly exposed to shareholder demands for transparency. As the Petition correctly notes, the high number of shareholder proposals on political spending filed in the 2011 proxy season reflects the intensity of shareholder interest in corporate political spending. The number of proposals on corporate political spending rose by more than 50 percent in 2011, and average support for these proposals increased to 33 percent (a significant tally for an independent proposal).<sup>14</sup> In one case, at Sprint Nextel, support for a political spending resolution reached 53 percent.<sup>15</sup>

Even in cases where shareholder proposals have not yet garnered majority support, the level of support is rising consistently—as is the number of companies whose shareholders are offering proposals on corporate political activity. In 2011, of the S&P 100 companies that do not currently provide shareholders with information on corporate political spending, half

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<sup>13</sup> See Heidi Welsh and Robin Young, *Corporate Governance of Political Expenditures: 2011 Benchmark Report on S&P 500 Companies* (Sustainable Investments Institute 2011).

<sup>14</sup> *Id.* at 3.

<sup>15</sup> *Id.*

held a vote on a shareholder political spending proposal.<sup>16</sup> Political spending proposals are now included in public-company proxy statements more frequently than any other type of proposal.<sup>17</sup>

### **Transparency In Corporate Political Spending Is Vitally Important To Shareholders And The Public.**

That shareholder interest in disclosure of corporate political spending is as high as it is should come as no surprise. Investors have a series of incentives to monitor the political spending decisions of corporate managers at the companies they invest in. While an individual investor may strongly wish to avoid investing in a company whose political spending advances causes or candidates with which that investor disagrees, there are broader, systemic reasons for monitoring corporate political spending. These include:

- Tracking corporate spending in the context of a network of complex, detailed, and sometimes contradictory federal, state, and municipal campaign finance laws and regulations, to ensure that corporate political spending does not run afoul of campaign finance rules and risk corporate liability.
- Ensuring that political spending decisions do not further interests of corporate managers at the expense of shareholder interests. Because the interests of corporate managers and owners are not always perfectly aligned, some political spending decisions by managers may not further shareholder value. Disclosure allows for any such conflicts of interest to be detected—and addressed.
- Detecting “rent-seeking” and preventing corporate decision makers from obtaining advantages through political favor-seeking, rather than through effective competition in the marketplace. When corporations are able to obtain favorable conditions through political influence, rather than added value, it distorts the operation of the marketplace, resulting in sub-optimal distribution of capital. Thus, even where rent-seeking conduct produces apparent short term gains for a particular market participant, its longer term effects are destructive to a well-functioning free market.
- Preventing officials that direct the use of public funds from effectively extorting corporations through pay-to-play tactics. Nearly half the states have adopted pay-to-play bans after corruption scandals revealed government officials demanding corporate payoffs in exchange for public contracts.<sup>18</sup> At the federal level, the potential costs of pay-to-play corruption are enormous, as hundreds of billions of dollars are handed out in federal contracts every year, many of them with little to no meaningful competition. A 2007 Congressional report, for example, reported that more than half of annual federal procurement spending—over \$200 billion in new contracts—was awarded without full and open competition, and about half of that

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<sup>16</sup> See Petition at 5.

<sup>17</sup> *Id.*

<sup>18</sup> See, e.g., Karl J. Sandstrom and Michael T. Liburdi, *Overview of State Pay-to-Play Statutes* (Perkins Coie 2010), available at [http://www.perkinscoie.com/files/upload/WP\\_10-05\\_Pay-to-Play.pdf](http://www.perkinscoie.com/files/upload/WP_10-05_Pay-to-Play.pdf).

amount, \$103 billion, was spent on no-bid contracts, which have no competition at all.<sup>19</sup> When pay-to-play tactics create a system in which taxpayer dollars are doled out in exchange for political contributions, the incentive to use corporate resources to compete for contracts can substantially undermine corporate and shareholder value. The Commission itself has provided leadership in this area, adopting rules last year that address pay-to-play in the context of registered investment advisors. In announcing those rules, Commission Chairman Mary L. Schapiro correctly observed that pay-to-play is “corrupt and corrupting” and that it may “pave the way to outright fraud.”<sup>20</sup> Like the Commission’s investment advisor rules, rules mandating disclosure of corporate political spending would strike a blow against corruption by shining disinfecting sunlight on corporate political contributions extorted through pay-to-play tactics.

The U.S. Supreme Court—which has consistently recognized the value of disclosure, repeatedly upholding laws and regulations designed to bring transparency to political spending—recognized the shareholder interest in disclosure of corporate political spending in *Citizens United*. Writing for the Court’s majority, Justice Anthony Kennedy posited the existence of a campaign funding environment that “pairs corporate independent expenditures with effective disclosure” and extolled the virtue of such a system:

[P]rompt 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. The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.<sup>21</sup>

Members of the public who are not shareholders in a given company also have an informational interest in knowing about the company’s political spending; voters have a vital interest in knowing which individuals and entities seek to influence elections through political spending, whether or not they are corporations. The Supreme Court has regularly recognized this broader interest in disclosure, which allows citizens to make informed decisions in the political marketplace. Justice Kennedy described this informational interest in *Citizens United*:

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right

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<sup>19</sup> Majority Staff of H. Comm. on Oversight and Gov’t Reform, 110<sup>th</sup> Cong., *More Dollars, Less Sense: Worsening Contracting Trends Under the Bush Administration*, at i (Comm. Print 2007), *available at* <http://oversight-archive.waxman.house.gov/features/moredollars/moredollars.pdf>.

<sup>20</sup> Speech by SEC Chairman: Opening Statement at the SEC Open Meeting, June 30, 2010, *available at* <http://www.sec.gov/news/speech/2010/spch063010mls.htm>.

<sup>21</sup> *Citizens United*, 130 S. Ct. at 916 (quotation marks and citation omitted).

of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.<sup>22</sup>

Perhaps the most well known example of a public response to corporate political spending involved Target, a company whose political donations were disclosed because of Minnesota disclosure requirements stronger than the federal rules. In 2010, Target donated \$100,000 in cash and \$50,000 in in-kind services to MN Forward, a political committee that spent most of its funds supporting Republican gubernatorial candidate Tom Emmer.<sup>23</sup> Advocates who opposed Emmer's stance against gay marriage used this disclosure to challenge an apparent inconsistency regarding Target's stated support of gay rights (and appeals to gay and lesbian consumers) and its support of Emmer.<sup>24</sup> Ultimately, Target's CEO issued a statement saying that the company endorsed MN Forward's economic policies but supported the gay and lesbian community.

The Target incident revealed the strong public interest in the political spending of corporations; indeed, the U.S. Court of Appeals for the Ninth Circuit cited the Target episode as a textbook illustration of the "corporate accountability" called for in *Citizens United*.<sup>25</sup> That Target's political spending sparked a backlash underscores the extent to which corporate political spending can impact a company's bottom line. As with other corporate activities, corporate political activity may prompt consumer boycotts and undermine profits. Potential investors seeking to make fully-informed decisions therefore require information about a company's past and present political activity.

Some opponents of transparency in corporate political spending argue that proponents of disclosure do not, in fact, seek transparency as an end in itself, but rather, aim to use it as a Trojan Horse to discourage corporate political spending. These critics theorize that disclosure will discourage companies from exercising their political speech rights, for fear of backlash like that faced by Target. This cynical view is misguided, and fundamentally mischaracterizes the First Amendment's role in fostering a dynamic marketplace of ideas.

In case after case, the Supreme Court has upheld political disclosure laws, and it has repeatedly recognized voters' interest in knowing which individuals and entities provide the funding that enables political speech. More than three decades ago, in an early case striking limits on corporate political activity, the Court observed that "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of

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<sup>22</sup> *Id.* at 898 (citations omitted). See also *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential.").

<sup>23</sup> See John Gibeaut, *A Cautionary Tale of Corporate Political Spending Emerges in Minnesota*, ABA Journal, October 22, 2010.

<sup>24</sup> See Joe Kimball, *Target CEO Addresses MN Forward Contribution, Says Company Supports GLBT Community*, MinnPost.com, July 27, 2010.

<sup>25</sup> *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1017 n.6 (9th Cir. 2010).

conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate.”<sup>26</sup>

Under the First Amendment as construed by *Citizens United*, corporations enjoy the right to political speech. The Constitution likewise protects voters’ right to know the identity of the corporations funding such political speech (just as it protects voters’ right to know the sponsors of non-corporate political speech). The Supreme Court has noted that groups which abuse loopholes in the disclosure rules to make anonymous expenditures to influence elections can distort the political marketplace. In *McConnell v. FEC*, for example, the Court observed that disclosure opponents “never satisfactorily answer the question of how uninhibited, robust, and wide-open speech can occur when organizations hide themselves from the scrutiny of the voting public.”<sup>27</sup>

Corporate decision makers may choose to participate in the political debates that shape our democracy, but in doing so, they should be prepared to stand behind the ideas they advocate. Where the causes a corporation espouses attract widespread public support, this accountability may increase a company’s profitability. In other cases, the reverse may obtain. This is how democracy functions. As Justice Antonin Scalia has explained, “Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which . . . campaigns anonymously . . . and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.”<sup>28</sup>

Corporate political spending may further the profit-making interests of corporations under certain circumstances. Under other circumstances—whether it involves wasting of corporate assets; exposing companies to liability for campaign finance or pay-to-play expenditures; or risking consumer backlash—it may undermine those interests. When political expenditures that may threaten shareholder value are not disclosed, investors lack access to all the relevant information about public companies, and capital is not optimally distributed. Accordingly, to ensure that those considering investing in politically-active companies are able to make fully informed decisions—and thereby to protect the integrity of the market—transparency in corporate political spending is necessary.

### **The SEC Should Require Disclosure Of Political Spending By Public Companies.**

For all the foregoing reasons, the Commission should adopt rules that require public companies to disclose corporate political spending in all the forms it takes, including expenditures that directly advocate the election or defeat of political candidates, and contributions, dues, or other payments to independent groups that, in turn, make political expenditures (whether or not these groups themselves report their donors).

Insofar as details of corporate political expenditures are of material interest to investors—to say nothing of the public at large—the Commission plainly has the authority to do so.

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<sup>26</sup> *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 (1978) (footnotes omitted).

<sup>27</sup> 540 U.S. 93, 197 (2003) (quotation marks and citation omitted).

<sup>28</sup> *Doe v. Reed*, 130 S. Ct. 2811, 2837 (2010) (Scalia, J. concurring).

Under the Securities Exchange Act of 1934, the Commission “is given complete discretion . . . to require in corporate reports . . . such information as it deems necessary or appropriate in the public interest or to protect investors.”<sup>29</sup> The Supreme Court “repeatedly has described the fundamental purpose of the [Securities Exchange] Act as implementing a philosophy of full disclosure,” since “[t]here cannot be honest markets without honest publicity. Manipulation and dishonest practices of the market place thrive upon mystery and secrecy.”<sup>30</sup> Thus, disclosure of corporate political spending is necessary “to achieve a high standard of business ethics in the securities industry.”<sup>31</sup>

Investor interest in corporate political spending has reached a high water mark. Because there is a substantial likelihood that reasonable shareholders would consider it important in their decision making, information regarding political expenditures is undoubtedly material, and the Commission should mandate its disclosure.<sup>32</sup> As the Supreme Court made clear in *Citizens United*, a Commission rule requiring public companies to disclose political expenditures would rest on firm constitutional ground.<sup>33</sup>

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As we approach the most expensive election in our nation’s history, the pressure on public companies to spend money on politics is at an all time high. The amount these companies spend to influence elections in the months and years ahead will shatter historic records. To protect the public’s interest in making informed choices in the political marketplace, and to ensure that market participants can make fully informed investment decisions, the Commission should adopt rules that bring transparency to the nation’s exploding corporate political spending.

Respectfully submitted,



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Democracy Program

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<sup>29</sup> *Nat’l Resources Defense Council v. SEC*, 606 F.2d 1031, 1051 (D.C. Cir. 1979). See also, e.g., Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a). This is just one facet of the Commission’s general power to “make such rules and regulations as may be necessary or appropriate to implement the provisions” of the Act. 15 U.S.C. § 78w(a)(1).

<sup>30</sup> *Basic Inc. v. Levinson*, 485 U.S. 224, 230 (1988) (quotation marks and citation omitted).

<sup>31</sup> *Id.* at 234 (quotation marks and citation omitted).

<sup>32</sup> *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

<sup>33</sup> See *Citizens United*, 130 S. Ct. at 917. See also Roy A. Schotland, *The Post-Citizens United Fantasy-Land*, 20 Cornell J.L. & Pub. Pol’y 753, 755 (2011) (“The majority’s opinion makes unarguably clear that disclosure of funding sources will . . . continue to be constitutional.”).