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September 4, 2012

Ms. Elizabeth Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: File No. 4-637, Petition to Require Public Companies to Disclose to Shareholders the Use of Corporate Resources for Political Activities.

Dear Ms. Murphy,

This letter is submitted by the American Petroleum Institute ("API"), the largest trade association for the oil and natural gas industry in the United States. We represent more than 500 corporate members, from the largest major oil companies to the smallest of independents, from all segments of the industry. Our members are producers, refiners, suppliers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of the oil and natural gas industry.

We write in opposition to the petition for rulemaking from the Committee on Disclosure of Corporate Political Spending of August 3, 2011 (File No. 4-637) (the "Petition"), asking that the Securities and Exchange Commission (the "Commission") develop rules requiring public companies to disclose to shareholders the use of corporate resources for political activities. We believe that such disclosure rules are neither necessary nor desirable and would burden corporations without benefiting shareholders. The Petition's proposed disclosure rules would effectively duplicate or excessively complicate existing regulatory requirements, negate shareholders' private ordering preferences on the issue, chill fundamental freedoms of association and expression and force the Commission to enter into a partisan political arena. For these reasons, which we explain further below, we urge the Commission to refrain from pursuing the rulemaking requested by the Petition.

I. Existing Disclosure Requirements on Political Expenditures are Adequate

The Petition fails to acknowledge the extent to which corporate political expenditures are already required to be disclosed by law.¹ Congress, state legislatures and local government bodies have adopted comprehensive regulatory regimes, including disclosure obligations, for political spending by corporations, as well as individuals, unions, trade associations, partnerships, candidates, political party committees and political action committees. Congress and state legislatures have tasked agencies or a branch of state government to develop the expertise to administer these statutory disclosure regimes. In addition, at the federal and state levels, legislative bodies and regulatory agencies have weighed the effect of *Citizens United v. FEC*² on existing law and either amended relevant laws, regulations or policies, or decided not to do so. Generally, reform groups have been unsatisfied with the results in those fora, and now petitioners ask the Commission to adopt a regulatory regime that Congress and the Federal Election Commission (“FEC”) have declined to embrace. The task is complicated, involves strongly competing political interests and presents difficult constitutional concerns involving core First Amendment rights.

Briefly, therefore, we believe it would be inappropriate for the Commission to step into an arena which has traditionally been regulated by other, more specialized agencies. In support of this submission, we summarize below the numerous ways in which corporate political activity is already regulated at both the federal and state levels, before going on to note the ways in which the Petition also ignores the complexities involved in any rulemaking on political spending by intermediaries.

¹ The Petition treats the information to be disclosed as easy to discern, if not self-evident. Yet this is an area where difficult line drawing is the rule, not the exception. Does the term “politics” include lobbying? International as well as domestic? State and local? Campaign contributions? Speech on issues? Broader forms of “political speech”? For example, does “political spending” consist only of communications that contain words that advocate a candidate’s election or defeat? *Buckley v. Valeo*, 424 U.S. 1, fn. 52 (1976). Does it also encompass speech that can reasonably be understood in no other way than as such a communication? *See, e.g.*, 11 C.F.R. 100.22(b). The former standard is used in federal law and all state statutes of which we are aware. The latter standard exists in the FEC’s regulations, though it has recently been called “statutorily infirm” by three FEC Commissioners and is frequently omitted from state disclosure statutes. *See*, Statement on Advisory Opinion 2012-11 (Free Speech) by FEC Chair Caroline Hunter and Commissioners Donald McGahn and Matthew Petersen. If it embarks on this rulemaking, these are the sorts of questions the Commission will be expected to ask and answer.

² 558 U.S. 50 (2010).

A. Federal Regulation of Corporate Political Activity

Existing federal campaign finance laws already regulate corporate political activity in federal elections. Congress regulates corporate political spending and has mandated that any “independent expenditure” or an “electioneering communication” by a corporation must be reported to the FEC, which posts that data on the Internet.³

Corporations that make or contract to make independent expenditures aggregating in excess of \$250 in any given election in a calendar year must report such expenditures by submitting FEC Form 5 or a signed statement satisfying requirements of 11 CFR §109.10. Corporations which make independent expenditures in excess of \$10,000 during an election year must report such expenditures within 48 hours of incurring them.⁴ In addition, a corporation that pays more than \$10,000 for a broadcast, cable or satellite advertisement that refers to a clearly identified federal candidate that airs within 30 days of a primary or preference election, or a convention or caucus, or within 60 days of a general election, must file a report detailing its spending with the FEC on Form 9 within 24 hours of airing the advertisement. An entity that reports making an independent expenditure, such as an “intermediary” referred to in the Petition, is obligated to disclose persons, including corporations, that have provided it with funding for the purpose of making that independent expenditure. More expansively, an entity that reports making an electioneering communication, such as an “intermediary” referred to in the Petition, must either disclose all donors to a segregated account used to pay for the electioneering communication or must disclose all its donors (including any corporate donors) dating back to the beginning of the year before the year in which the communication is made.⁵ To the degree a corporation makes such a contribution, its identity will be disclosed. These extensive disclosure requirements are adequate. New layers of reporting, such as those advocated by the rulemaking petitioners, are simply not necessary in light of these existing disclosure requirements.

After the Supreme Court’s recent decision in *Citizens United*, Congress considered, but decided not to adopt legislation that would enhance the disclosure of political spending around

³ See 2 U.S.C. 432, 433 and 434; organizational requirements at 2 U.S.C. 431(4) and 431(8). In fact, in passing the Bipartisan Campaign Reform Act of 2002, Congress specified that the FEC would be the repository of public information on “all publicly available election-related reports and information” and instructed other federal agencies to work with the FEC in achieving that goal. §502 (Maintenance of Website of Electronic Information).

⁴ This information is aggregated and made available over the internet not only by the FEC (www.fec.gov) but by a number of not-for-profit groups. See, e.g., Center for Responsive Politics, www.opensecrets.org.

⁵ 2 U.S.C. 434(f).

federal elections, including corporate spending.⁶ This is at least the second time Congress has considered, but not amended, existing disclosure laws in light of the decision in *Citizens United*.⁷ Similarly, the FEC has considered the implications of *Citizens United* and continues to require the reporting of all independent expenditures and electioneering communications, including those made by corporations.⁸

B. State Laws Regulating Corporate Political Activity

There also is substantial state law governing corporate political activity. All but four states impose significant limits on corporate political contributions to candidates in state or local elections.⁹ As many as 25 states have limits on the amounts corporations may contribute to candidates and 21 states ban corporate contributions outright.¹⁰ Most importantly, all states, even those which do not limit corporate political contributions, have some form of disclosure requirement for corporate political contributions.

C. The Petition Does Not Adequately Acknowledge the Complexities Involved in Further Regulating Political Spending by Intermediaries

The Petition argues that existing disclosure requirements for corporate political spending are inadequate because “a substantial amount of corporate spending on politics is conducted through intermediaries not required to disclose the sources of their contributions to the public.”¹¹ The petitioners provide little evidence for this claim, but even if true, it is the responsibility of Congress and the agencies that manage those disclosure regimes to evaluate this issue.¹² As the

⁶ “Senate fails to move DISCLOSE campaign transparency bill for second day in a row,” by Rosalind S. Helderma *Washington Post*, July 17, 2012. http://www.washingtonpost.com/blogs/2chambers/post/senate-fails-to-move-disclose-campaign-transparency-bill-for-second-day-in-a-row/2012/07/17/gJQA7RDdrW_blog.html

⁷ Roll Call vote on DISCLOSE Act, July 27, 2010.

http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=0020

⁸ See Reporting Guidance, October 5, 2011, at www.fec.gov/press/Press2011/20111006postcarey.shtml; see also FEC Advisory Opinion 2010-09 (Club for Growth); Advisory Opinion 2010-11 (Commonsense Ten). Note also that entities classified under Section 501(c)(6) of the Internal Revenue Code, must report the sums received as membership dues and total expenditures for non-exempt political expenditures on IRS Form 990. Such forms are available for public scrutiny.

⁹ This information is reported by the National Conference of State Legislatures. See

<http://www.ncsl.org/legislatures-elections/elections/campaign-finance-an-overview.aspx>. In the 2011-12 election cycle, only Missouri, Oregon, Utah and Virginia place no limits on corporate political contributions to candidates.

¹⁰ See “Contribution Limits” at www.ncsl.org/legislatures-elections/elections/campaign-finance-an-overview.aspx.

¹¹ See Petition at 8.

¹² For example, one type of intermediary entity which the petitioners may contemplate is an organization classified under Section 501(c)(4) of the Internal Revenue Code. Congress requires such entities to disclose their donors to the



foregoing discussions on federal and state laws on corporate political spending suggest, an extensive regulatory system is already in place. Any regulatory changes regarding political spending by intermediaries are best handled by those agencies expert in regulating the electoral process, rather than the Commission.

As an example of how the Petition fails to acknowledge the complexity of the regulatory changes it seeks, we note that the Petition is silent on what is to be included as corporate “political” spending.¹³ As noted above, to the degree corporations are funding independent expenditures or electioneering communications through intermediaries in federal races, the FEC already administers a disclosure regime. To the extent that the Petition fears that intermediaries could be created solely to funnel political contributions from corporations to candidates in specific federal elections, this is already prohibited and punishable by civil and criminal penalties.¹⁴ We also note that the Federal Election Campaign Act would treat an entity organized to accept contributions and make expenditures in federal elections as a political committee and would compel it to disclose its donors as such.¹⁵

Further, the Petition fails to acknowledge the difficult line-drawing that the Commission would face in requiring disclosure of corporate payments for “politics” to intermediaries such as trade associations. Must all dues be included in calculating “political spending,” even if political advocacy is only one of several services offered by a trade association?

Trade associations use membership dues and member contributions for various purposes—only some of which are political. It is therefore misleading to suggest that individual

IRS, but has decided that this information is not required to be made public. 26 U.S.C. 6104(b). Shouldn’t a balancing of the competing interests and reevaluation of this decision be made by the Congress, instead of the Commission? Should the Commission take on the decision of whether corporate donors to such entities must disclose their contributions, but leave non-corporate donors undisclosed, as Congress now provides?

¹³ In this section of the Petition, the petitioners’ example of political spending includes lobbying. Congress has created two distinct lobbying disclosure regimes that presumably would need to be woven into any Commission rule under this broader reading of “political activity.” One regulates lobbying by domestic corporations and trade associations—the Lobbying Disclosure Act of 1995, as amended. 2 U.S.C. 1601, *et seq.* The disclosure rules under this statute are managed by the Clerk of the House and the Secretary of the Senate. The second, the Foreign Agents Registration Act, covers foreign corporations and is administered by the Justice Department. 22 U.S.C. 611, *et seq.*

¹⁴ 2 U.S.C. 437g(d).

¹⁵ Under federal law, a “political committee” is any “group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year.” 2 U.S.C. §431(4) In *Buckley v. Valeo*, the Supreme Court has interpreted “political committee” to only cover organizations “that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.” 424 U.S. 1, 79 (1976). Thus, entities created by a corporation to funnel funds towards a particular election or a candidate would constitute political committees and would be regulated as such.

members pay annual dues or make contributions to trade associations solely or even primarily for the purpose of making political contributions. If a narrower, and more accurate figure is required, how would the Commission define “political” activity? Does the Commission’s expertise put it in the best position to make these determinations?

The regulatory regime advocated in the Petition would result either in duplication of existing legal requirements or a burdensome and complex regulatory system to scrutinize the ways in which intermediaries play a role in the political process. In either case, shareholders would not benefit. Congress has invested the FEC with responsibility for managing the disclosure regime for spending in federal elections, the Clerk of the House, Secretary of the Senate, and the Justice Department with responsibility for managing the disclosure regimes for lobbying, and state law has similarly invested that responsibility in state agencies for state and local elections. We recommend against the Commission creating a new and broader regulatory disclosure regime for corporate political spending.

II. The Basis for the Request for Rulemaking is Unclear and the Petition is Silent on Potential Costs and Consequences for Corporations

Existing precedents under the Administrative Procedure Act¹⁶ require that an agency “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made.”¹⁷ In addition, the Commission also has a “statutory obligation to determine as best as it can the economic implications of the rule.”¹⁸ Indeed, as the D.C. Circuit Court of Appeals has recently noted,¹⁹ the Commission has a unique obligation to consider the effect of a new rule upon “efficiency, competition and capital formation.”²⁰

We acknowledge that the Commission has not yet proposed rules on the disclosure of corporate political spending. We note, however, that the Petition has not provided the Commission with any rational connection between economic facts and the disclosures proposed. The Petition also entirely omits any discussion of the potential economic costs and consequences of the proposed disclosures. In the absence of further information regarding: (i) the impact of corporate political spending on corporate financial performance; and (ii) the costs and

¹⁶ 5 U.S.C. §500 *et seq.*

¹⁷ *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹⁸ *Chamber of Commerce v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005).

¹⁹ *Business Roundtable v. SEC*, 647 F.3d 1144, 1150 (D.C. Cir. 2011).

²⁰ 15 U.S.C. §§78c(f), 78w(a)(2), 80a-2(c).



consequences of disclosure of political spending upon corporations, we submit that it would be premature and inappropriate for the Commission to embark upon a rulemaking exercise.

A. The Connection between Corporate Political Spending and Financial Performance is Not Established

The petitioners readily concede that they do not agree on the effect of corporate political spending on shareholder interests.²¹ This significant concession is inevitable because there is no academic or regulatory consensus on the effect, or the relevance, of corporate political spending on shareholder value.²² The Petition could have sought to show that there is, in fact, a correlation between political spending and financial performance—but the Petition does not even attempt to prove the existence of such a relationship. By failing to establish the correlation between political spending and corporate financial performance, the Petition fails to provide the Commission with adequate information about the economic implications of a proposed rule. More importantly, in the absence of clear, compelling support for this proposition, we believe that the Commission would unnecessarily subject itself to judicial scrutiny if it were to use this proposition as support for rulemaking in this area.²³

Having conceded that the connection between corporate political spending and shareholder interests is unclear, the Petition instead suggests that disclosure would allow shareholders to monitor whether their corporation's political spending advances the corporation's interest in making profits.²⁴ However, this presupposes that there is a relationship between corporate political spending and corporate profits which can be monitored—and it is precisely this relationship that the Petition acknowledges it cannot establish.

²¹ Petition at 1.

²² For instance, one recent publication utilizes “event study” methodology to conclude that existing data reflects no negative effect upon a public corporation's value due to its engagement in political speech. Roger Coffin, *A Responsibility to Speak: Citizens United, Corporate Governance and Managing Risk*, 8 Hastings Bus. L. J. 103 (2011). Yet another study finds that corporate political spending tends to raise share prices - see Robert J. Shapiro and Douglas Dowson, *Corporate Political Spending: Why the New Critics are Wrong*, Manhattan Institute for Legal Policy Research, June 2012.

²³ *Business Roundtable*, 647 F.3d at 12 (“In view of the admittedly (and at best) “mixed” empirical evidence, id. at 56,761/1, we think the Commission has not sufficiently supported its conclusion that increasing the potential for election of directors nominated by shareholders will result in improved board and company performance and shareholder value, id. at 56,761/1; see id. at 56,761/3”).

²⁴ Petition at 7.



B. The Petition Does Not Discuss the Potential Costs and Consequences of Disclosure of Corporate Political Spending

Although the Commission is not subject to an express statutory requirement to conduct cost-benefit analyses for its rulemakings, it is subject to statutory requirements to consider factors such as the effects on competition, capital formation and the needs of small entities.²⁵ The Commission's duty to consider and quantify the costs of a proposed rule to corporations was recently discussed by the D.C. Circuit Court of Appeals in *Business Roundtable v. SEC*²⁶ where the court noted, *inter alia*, that the Commission must consider the consequences of the use of a rule by special interests whose objectives do not include shareholder value maximization.

The Petition is entirely silent on the costs of the proposed disclosure rules for corporations. However, in the absence of a clear evidentiary basis for the disclosure of corporate political spending, disclosure could have serious adverse consequences. Mandatory disclosure necessarily imposes a greater cost on smaller entities, eroding their ability to compete. As academic studies have noted in the context of other mandatory compliance and disclosure requirements, small public companies, which "generally have more limited financial staffs (frequently with less public company experience)" may find their management spending a disproportionate amount of time on Commission disclosure and compliance rather than operations and profitability.²⁷ To the extent political spending by such companies is already regulated by existing federal and state laws, fresh rulemaking by the Commission risks duplicating or excessively complicating existing regulatory arrangements.²⁸ Any such duplication or complication of existing regulatory arrangements may very well duplicate or compound the compliance costs of smaller cap issuers—a possibility the Petition does not address.

A uniform disclosure requirement that covers contributions to entities such as trade associations risks confusing shareholders into thinking that membership fees made to trade associations are in reality political spending. If contributions made to trade associations are incorrectly viewed as political spending, members of such associations may run the risk of unwarranted political or economic retaliation for expenditures unrelated to political activity.

²⁵ See 15 U.S.C. §77b(b), 15 U.S.C. §78c(f), 15 U.S.C. §80a(2), 15 U.S.C. §80b-2(c), 15 U.S.C. §78w(a)(2), 5 U.S.C. §§603(a), 604(a), 605(b).

²⁶ 647 F.3d at 1152.

²⁷ Marc Morgenstern & Peter Nealis, *The Impact of Sarbanes-Oxley on Mid-Cap Issuers* at 14, available at the Commission's website at <http://www.sec.gov/info/smallbus/mmorgensternmidcap.pdf>.

²⁸ As discussed earlier in Section I.C of this letter.

In addition to our other concerns about the Petition, we also ask, as a matter of administrative law, that the Commission carefully consider the precedent that this Petition may set. The Petition appears to suggest that certain disclosures may be required solely because specific groups of shareholders make repeated demands for such disclosures over a period of time—not because the information is actually material to reasonable investors as they make investment decisions. Requiring the mandatory disclosure of political spending in the absence of financial or economic justifications appears to create a new and problematic standard for disclosure. As the D.C. Circuit noted in *Business Roundtable v. SEC*, there exist certain special interest groups which may not share other shareholders' interests in value maximization.²⁹ These special interest groups could, in the future, mount similar concerted campaigns to compel the disclosure of information they consider relevant for their particular interests but that is immaterial to reasonable investors.³⁰ Thus, if the Petition's claim is followed to its logical conclusion, there is little that proponents with special interests might not obtain through persistent demands upon the corporation.

None of the economic costs and possible consequences discussed above are addressed by the Petition, which, in our view, means that the Commission should not act on the Petition unless it has considered and, to the extent possible, quantified, such costs and consequences. At the very least, the petitioners should be required to submit this information for the Commission's consideration.

III. Shareholders Do Not Support These Proposals

The apparent absence of any correlation between corporate political spending and financial performance is supported by the lack of shareholder support for proposals for disclosure of corporate political spending. In 2011, 53 shareholder proposals concerning political spending by corporations came to a vote.³¹ Not a single proposal received the support of a majority of outstanding shares.³² So far in 2012, 26 shareholder proposals concerning political spending have come to a vote.³³ Only one proposal has received votes representing a

²⁹ 647 F.3d at 1152. For instance, as the D.C. Circuit noted, some groups may have greater interests in job creation than in maximizing shareholder value.

³⁰ In this regard, see also Roberta Romano, *Less Is More: Making Shareholder Activism A Valued Mechanism Of Corporate Governance*, 18 Yale J. Reg. 174, 231-32 (2001).

³¹ See www.proxymonitor.com (visited on July 8, 2011).

³² *Id.*

³³ As of June 1, 2012. See <http://blogs.law.harvard.edu/corpgov/2012/06/01/2012-proxy-season-political-spending-shareholder-resolutions> (visited on July 8, 2012).

majority of outstanding shares.³⁴ Indeed, in five cases—including at corporations such as PepsiCo., IBM and Goldman Sachs Group—proposals on political spending garnered votes representing less than ten percent of the outstanding shares.³⁵ No proposal related to political spending or participation has garnered 40 percent support at a Fortune 200 company in 2012.³⁶

The Petition argues that “[I]nvestors have increasingly expressed significant interest in obtaining information on corporate spending on political activity.”³⁷ In fact, as the trends described above indicate, shareholders have shown a consistent lack of support for such initiatives.

The Petition suggests that proposals on political spending are popular among shareholders because a number of these proposals have been introduced in the recent past. The Petition fails to mention, however, that the increasing volume of proposals concerning corporate political participation emanate from a small group of academics, non-profit organizations and institutional investors.³⁸ Indeed, certain shareholder groups have proposed identically worded resolutions across a range of corporations.³⁹

Finally, the Petition also appears to suffer from the judgmental error induced by “the law of small numbers”—i.e., it assumes that characteristics of a large group can be extrapolated from a small number of observations or examples. By one recent count, there were approximately 17,000 public companies in the United States that file reports with the Commission.⁴⁰ Shareholder interest simply cannot be determined across this very large group from approximately 50 shareholder proposals.

If it were successful, the Petition would frustrate shareholders’ private ordering preferences and would instead impose a single, one-size-fits-all rule upon corporations of differing sizes and structures, operating in vastly different sectors of the economy. Although shareholders have repeatedly deferred to managements’ policy judgments on political spending,

³⁴ At Wellcare Health Plans, Inc., a resolution proposed by Amalgamated Bank and New York City Pension Funds received 52.7% of the vote.

³⁵ See <http://proxymonitor.org/ScoreCard2012.aspx> (visited on July 8, 2011).

³⁶ See <http://proxymonitor.org/Forms/2012Finding3.aspx> (visited on July 8, 2011).

³⁷ Petition at 3.

³⁸ See <http://blogs.law.harvard.edu/corpgov/2012/06/10/shareholder-activism-focused-on-political-spending-and-lobbying/> (visited on July 8, 2012).

³⁹ For example, thus far in 2012, a single labor association, the American Federation of State, County and Municipal Employees (AFSCME) has proposed near-identical resolutions at five different corporations including the Bank of America, Kraft Foods, Inc., and Verizon Communications, Inc.

⁴⁰ See <http://www.publicoversightboard.org/about.htm> (visited on July 18, 2012).

the Petition seeks to achieve through rulemaking what a small group of proponents has consistently failed to achieve through democratic means. Congress and the Commission's long-standing commitment to "fair corporate suffrage"⁴¹ suggests that the Commission should decline to act on the Petition, thus upholding the judgment of the significant majority of shareholders who, when given the opportunity, have voted against proposals regarding political spending.

IV. The Petition Seeks to Erode Established Rights of Expression and Association

A. Engaging in the Rulemaking Sought by the Petition will Compel the Commission to Decide the Degree to which Corporations Have a Constitutional Right to Speak and Associate

The Supreme Court has recently affirmed that "political speech does not lose First Amendment protection 'simply because its source is a corporation.'"⁴² Corporate political speech thus enjoys constitutional protection from rulemaking that would curtail or chill such speech. There is also a clear Constitutional tradition of protecting anonymous political speech or assuring anonymity for persons involved in political speech.⁴³ Congress has balanced these interests in the context of campaign finance and lobbying disclosure, and existing law has survived constitutional challenge. As petitioners urge the Commission to expand disclosure rules in ways existing law does not, the Commission must confront these concerns, and evaluate their effect on the First Amendment advocacy rights of corporations.

At times, the anonymity of corporate political spending is vital, not merely desirable. This principle was recognized by the Supreme Court in *Buckley v. Valeo*, where the Court noted that the cost of disclosure in certain cases might invite consequences such as "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."⁴⁴ Most significantly, in *Buckley*, Chief Justice Burger explicitly acknowledged that one of the most

⁴¹ H.R. Rep No. 1383, 73d Cong. 2d Sess. 2, 13-14 (1934); see Securities Exchange Act of 1934, §14(a), 15 U.S.C. §78n(a) (1970).

⁴² 558 U.S. at 576.

⁴³ For instance, in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 338 & fn.3 (1995), the Supreme Court invalidated an Ohio state law which required that election-related communications include the sponsor's name and address. This is one of several cases which have upheld the right to anonymous political speech. In *Talley v. California*, 362 U.S. 60 (1960), the Supreme Court invalidated a Los Angeles ordinance banning distribution of leaflets that did not bear the names and addresses of the people responsible for their distribution. More recently, in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), the Supreme Court found that a Colorado statute requiring that door-to-door solicitors wear identification badges violated the First Amendment.

⁴⁴ 424 U.S. at 69.



obvious penalties for disclosure might be that known contributors to a losing cause could face denials of access or other unfavorable treatment by the ultimate winner.

The Petition proposes that the Commission go beyond what Congress has so far sanctioned and eliminate anonymous corporate political spending completely. This proposal ignores important constitutional concerns. In fact, the Petition goes further by seeking to eliminate even the right to contribute anonymously to entities such as trade associations. The importance of the right to anonymously belong to an association was expressly affirmed by the Supreme Court more than fifty years ago in *NAACP v. Alabama ex Rel. Patterson*.⁴⁵ Revealing an association's membership, the Supreme Court held, "is likely to affect adversely the ability of [the association] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure."⁴⁶

Forced disclosure of political contributions to intermediaries such as trade associations could chill a corporation's rights of association. Corporations might decline to contribute to or become members of trade associations that periodically took controversial political positions, even if they stood to benefit otherwise from membership, for fear of having the trade association's views incorrectly attributed to the member corporations. We therefore urge that the Commission reject the Petition's attempt to recast First Amendment law.

B. The Citizens United Decision does not Support the Petition

The Petition seeks constitutional support for mandatory disclosure of corporate political spending by noting that in the U.S. Supreme Court's recent decision in *Citizens United v. FEC*, "the Court relied upon '[s]hareholder objections raised through the procedures of corporate democracy' as a means through which investors could monitor the use of corporate resources on political activities."⁴⁷

By seeking to rely on the decision in *Citizens United*, the Petition blurs an important distinction. What the Supreme Court relied upon in *Citizens United* was a shareholder's right to object to a corporation's political activities through mechanisms of corporate governance such as shareholder proposals. We agree that shareholders and corporations should remain free to decide

⁴⁵ 357 U.S. 449 (1958).

⁴⁶ *Id.* at 462-63. The principle was subsequently upheld in *Bates v. City of Little Rock*, 361 U.S. 516 (1960).

⁴⁷ Petition at 7, citing *Citizens United v. FEC*, 550 U.S. at 83.



whether and how to disclose corporate political spending by voting on resolutions and through other mechanisms of corporate suffrage. However, what the Petition seeks is the opposite of corporate suffrage—it seeks to mandate the disclosure of corporate political spending, whether shareholders want it or not.⁴⁸ Accordingly, *Citizens United* is at odds with, and provides no constitutional support for, the Petition.

Nearly forty years ago, in *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court said that “[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say.”⁴⁹ That principle remains true today, notwithstanding the Petition’s efforts to prove the contrary.

V. The Petition Seeks to Force the Commission into a Partisan Political Role

The Petition seeks to force the Commission into taking action in a political cause in an election year, during a time when the issue of corporate political spending is under discussion in Congress. If the Commission were to agree to the Petition’s request for rulemaking, the Commission would risk strong criticism as acting for politically partisan ends. Equally significantly, the Commission’s actions could easily be deemed premature in the context of evolving legislative activities.

We note, in particular, that the Shareholder Protection Act, which aims to regulate political speech by requiring prior shareholder approval of political spending has been introduced in both the House of Representatives and the Senate.⁵⁰

We believe it would be inappropriate for the Commission to intervene at a time when Congress is still debating the wisdom of laws regulating corporate political spending. Accordingly, we urge the Commission to exercise restraint and to refrain from taking action on the issue.

⁴⁸ Nor does it follow that the Court’s affirming the disclosure requirements at issue in that case means that all disclosure requirements are constitutional.

⁴⁹ 418 U.S. 241, 257 (1974). The Court subsequently quoted this with approval in *Pacific Gas & Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 2 (1986).

⁵⁰ H.R. 2517, sponsored by Rep. Michael Capuano (D-Mass.) was introduced in the House of Representatives on July 13, 2011 and was referred to the House Committee on Financial Services on the same day, where it now stands. See <http://www.govtrack.us/congress/bills/112/hr2517>. S. 1360, sponsored by Sen. Robert Menendez (D-N.J.) was introduced in the Senate on July 13, 2011 but has not yet been referred to the Senate Committee on Banking, Housing and Urban Affairs. See <http://www.govtrack.us/congress/bills/112/s1360>.



* * *

We recognize that the Commission has a proud tradition of protecting investors, maintaining fair, orderly and efficient markets and facilitating capital formation. We believe that the rulemaking requested by the Petition bears no relation to the Commission's traditional mandate, serves no identifiable shareholder interests beyond those of certain special interest groups and calls into question established rights of expression and association. We therefore ask that the Commission refrain from pursuing the rulemaking requested by the Petition.

API appreciates the opportunity to submit these comments, and welcomes the opportunity to meet with any of the Commissioners or their staff to discuss these issues or any other issues of interest to the Commissioners. Please direct inquiries to Peter Tolsdorf, Counsel, at (202) 682-8074.

Respectfully submitted,

A handwritten signature in black ink that reads "Harry M. Ng". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

Harry M. Ng
Vice President, General Counsel
& Corporate Secretary
American Petroleum Institute