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November 8, 2012

Ms. Elizabeth Murphy, Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Via electronic mail (rule-comments@sec.gov)

Re: File Number 4-637, Petition to Require Public Companies to Disclose to Shareholders the Use of Corporate Resources for Political Activities

Dear Ms. Murphy:

On behalf of the over three million members of the National Education Association (NEA), the nation's largest employee association, we are writing to endorse without reservation the above-referenced Petition for Rulemaking ("Petition") filed by the Committee on Disclosure of Corporate Political Spending ("Committee"). At the 2011 NEA Representative Assembly, our voting delegates called for a "fair and reasonable system of campaign disclosure that would increase public accountability for corporations that attempt to influence elections."¹ By proposing that the Securities and Exchange Commission ("Commission") require corporations to publicly disclose their political spending, the Petition requests Commission action that would further this NEA goal. Accordingly, the NEA urges the Commission to promptly initiate the rulemaking process requested in the Petition.

In support of the NEA's position, this Comment begins with a brief discussion about the history of federal campaign spending laws and the ramifications of the recent Supreme Court decision *Citizens United v. FEC*,² including the Court's assertion that disclosure requirements are necessary for preserving democratic processes. Second, the Comment will highlight the negative consequences of the current lack of corporate disclosure of political spending. Next, the Comment will discuss how labor unions already are mandated to disclose political spending under the Labor Management Reporting and Disclosure Act of 1959 (LMRDA)³ and its implementing regulations.⁴ Lastly, the Comment will urge the Commission to follow the LMRDA template and use its authority under the Securities

¹ See NATIONAL EDUCATION ASSOCIATION, 2012 HANDBOOK 377 (2012).

² 558 U.S. 310 (2010).

³ 29 U.S.C. § 401 *et. seq.*

⁴ 29 C.F.R. §§ 403, 408.

Exchange Act⁵ to protect the interests of investors by implementing similar disclosure rules for corporations.

I. While *Citizens United* Overturned Federal Laws Limiting Corporate Political Spending, It Also Emphasized the Importance of Disclosure Requirements.

Prior to the *Citizens United* ruling, federal law banned both unions and corporations from using general treasury funds to make direct contributions to federal candidates or to make certain independent expenditures in connection with federal elections.⁶ Despite this general ban, federal law gave both unions and corporations several alternative methods through which to engage in political speech.⁷ In *Citizens United*, the Supreme Court struck down the preexisting ban on certain independent union and corporate political expenditures, but it upheld the constitutionality of federal disclosure requirements.⁸ In fact, the Court highlighted the importance of disclosure requirements for unions and corporations:

“[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 [D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”⁹

For the reasons discussed below, the NEA believes that Commission action on the petition is critical to achieve these important disclosure objectives.

II. The Current Lack of Corporate Political Spending Disclosure Requirements Has Injected Millions of Dollars Into Elections from Undisclosed Sources And Left Stockholders Uninformed of Corporate Political Spending When Making Investment Decisions.

The immediate impact of *Citizens United* has been an explosion in corporate political spending. A recent study found that in 2010, the first mid-term election cycle after *Citizens United*, spending by outside groups totaled \$294.2 million dollars compared to \$68.9 million just four years earlier when federal corporate spending regulations were still in place.¹⁰ Over 77% of that money was spent by groups accepting contributions in excess of

⁵ 15 USCA § 78b.

⁶ See Tillman Act, Pub. L. No. 59-36, 34 Stat. 864 (1907) (imposing corporate spending limits); Taft-Hartley Act, Pub. L. No. 80-101 (1947) (imposing union spending limits). See also, Federal Election Campaign Act, 2 U.S.C. § 431 *et. seq.* (1972), amended by Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 81 (2002).

⁷ See, e.g., 2 U.S.C. §§ 441a(a), 441(b), 441b(b)(2)(A) (2002) (allowing, *inter alia*, corporations and unions to communicate political messages to stockholders and members, to fund “issue ads,” and to establish political action committees (PACs) which can make direct contributions to political parties and candidates).

⁸ *Citizens United v. FEC*, 558 U.S. 310, 320.

⁹ *Id.* at 365.

¹⁰ PUBLIC CITIZEN, 12 MONTHS AFTER: THE EFFECTS OF *CITIZENS UNITED* ON ELECTIONS AND THE INTEGRITY OF THE LEGISLATIVE PROCESS 9 (Jan. 2011).

the previous federal limit, which was overturned by *Citizens United*.¹¹ Despite the Court's proclamations that disclosure of these donations would guard against any risks presented by unlimited political spending, over 46% of these outside groups did not release any information about the source of their funding prior to the election, a figure representing over \$135 million in campaign spending.¹²

This explosion in spending by outside groups with no or limited disclosure requirements is no accident. As the Petition notes, some information on corporate political spending is already subject to mandatory disclosure both at the state and federal levels.¹³ Although this information is decentralized and difficult for investors to collect, corporations have found ways to circumvent even these weak disclosure requirements by funneling political donations through outside groups organized under Section 501(c) of the Internal Revenue Code that do not have to disclose the identities of their political donors.¹⁴ As a *New York Times* analysis found, "large corporations are trying to influence campaigns by donating money to tax-exempt organizations that can spend millions of dollars without being subject to the disclosure requirements that apply to candidates, parties and PACs[,] . . . mak[ing] a full accounting of corporate influence on the electoral process impossible."¹⁵ Already by July of this year in the 2012 election cycle, there was a \$115 million "disclosure gap" between the \$12 million that these groups had actually reported to the Federal Elections Commission (FEC) and the estimated \$127 million they had spent on political advocacy.¹⁶ Undoubtedly, that gap has increased significantly since that date as election spending has skyrocketed, leading experts to conclude that the 2012 election cycle will be the most expensive on record with total election spending reaching nearly \$6 billion.¹⁷ Of that total, Super PACs, a post-*Citizens United* creation, have already spent over \$392 million,¹⁸ and outside groups are expected to spend an additional \$400-\$570 million in the closing month of the campaign.¹⁹

Beyond the serious risks that these secret corporate political donations present to this country's democratic processes, investors face significant financial risks when corporations do not disclose all of their political spending. As supporters of the Petition have noted, corporations' undisclosed political spending can have serious negative ramifications if, and when, it comes to light.²⁰ It is unsurprising, then, that opinion polls show that both

¹¹ *Id.*

¹² *Id.* at 10.

¹³ The Committee on Disclosure of Corporate Political Spending, *Petition for Rulemaking* 8 (Aug. 3, 2011) [hereinafter Petition], available at <http://blogs.law.harvard.edu/corpgov/files/2011/08/SEC-Petition.pdf>.

¹⁴ *Id.*; see Lee Drutman, *Dark money in the 2012 elections (so far)*, SUNLIGHT FOUNDATION BLOG (July 16, 2012, 4:00 AM), <http://www.sunlightfoundation.com/blog/2012/07/16/dark-money/>.

¹⁵ Mike McIntire & Nicholas Confessore, *Tax-Exempt Groups Shield Political Gifts of Businesses*, N.Y. TIMES, July 7, 2012, at A1.

¹⁶ Drutman, *supra* note 14.

¹⁷ *2012 Election Will Be Costliest Yet, With Outside Spending a Wild Card*, CENTER FOR RESPONSIVE POLITICS/OPENSECRETS.ORG (Aug. 1, 2012, 10:45 AM), <http://www.opensecrets.org/news/2012/08/2012-election-will-be-costliest-yet.html>.

¹⁸ *Super PACs*, CENTER FOR RESPONSIVE POLITICS/OPENSECRETS.ORG (Oct. 18, 2012), <http://www.opensecrets.org/pacs/superpacs.php>.

¹⁹ Alex Seitz-Wald, *Super PAC Spending Is About to Explode*, SLATE (Oct. 9, 2012, 3:00 PM), http://www.salon.com/2012/10/09/super_pac_spending_is_about_to_explode/.

²⁰ See, e.g., Comments of American Federation of State, County, and Municipal Employees, et. al., Comment on File Number 4-637, at 2-3, available at <http://www.sec.gov/comments/4-637/4-637.shtml> (July 16, 2012) [hereinafter AFSCME Supplemental Comments] (citations omitted) (recounting the effects on corporations of

stockholders and corporate executives alike favor increased disclosure requirements.²¹ Since *Citizens United*, shareholders have begun introducing resolutions demanding full corporate disclosure of political spending.²² Support for these proposals increased in the 2011 proxy season. Such shareholder activity is the type of activity to which the Commission previously has pointed to support initiation of the rulemaking process.²³ The rise in that activity, coupled with the amount of undisclosed spending at issue, make Commission action in this area critical. As Commissioner Luis Aguilar has aptly summarized the current situation: “[w]hen it is clear that investors are in the dark and not receiving adequate disclosures, the Commission should act, and act swiftly, to ensure that investors have the information they require.”²⁴

III. Labor Union Disclosure Requirements Under the Labor Management Reporting and Disclosure Act Provide a Template for Corporate Political Spending Disclosure Requirements.

As noted above, federal campaign spending laws generally treat corporations and labor unions the same. Unlike corporations, however, unions have long been required to disclose political spending to not just members but to the general public. Under the Labor Management Reporting and Disclosure Act of 1959 (LMRDA),²⁵ covered unions (including the NEA) must file annually with the Department of Labor (DOL) a detailed financial report disclosing all assets and liabilities, receipts, and disbursements.²⁶ As a result of DOL’s regulatory authority under the LMRDA, the reporting requirements include information about unions’ political activities and spending.²⁷ Unlike corporate political donations to tax-exempt 501(c) organizations, a union donation to one of these outside groups will appear on the union’s annual DOL disclosure form.²⁸ In the over 50 years since LMRDA became law, labor organizations like the NEA have incorporated the LMRDA disclosure

secretive political donations, including a boycott on Target after the retailer’s support of an anti-gay-rights candidate was revealed, embarrassment for Aetna after it inadvertently reported a previously-undisclosed political donation, and outrage directed at WellPoint from policyholders upset with the company’s use of premiums to fund political donations).

²¹ See Comments of American Federation of State, County, and Municipal Employees, Comment in File Number 4-637, at 5, *available at* <http://www.sec.gov/comments/4-637/4-637.shtml> (Feb. 1, 2012) [hereinafter AFSCME Original Comments] (noting a Mason-Dixon poll that found 87% of shareholders surveyed would have more confidence in investing in companies that adopted stricter disclosure requirements); AFSCME Supplemental Comments, *supra* note 20, at 4 (discussing a 2010 report that found two-thirds of surveyed corporate chief executive officers worried about the risks of undisclosed corporate political spending).

²² See Ronald D. Orol, *More boardrooms targeted for political spending*, MARKETWATCH (April 19, 2012, 12:01 AM), <http://www.marketwatch.com/story/more-boardrooms-targeted-for-political-spending-2012-04-19?pagenumber=2> (identifying disclosure proposals at large corporations like IBM, Boeing, and Bank of America).

²³ See Petition, *supra* note 13, at 2–3.

²⁴ Luis A. Aguilar, Comm’r, Sec. & Exch. Comm’n, *Shining a Light on Expenditures of Shareholder Money*, address at the Practicing Law Institute’s SEC Speaks in 2012 Program (Feb. 24, 2012), *available at* <http://www.sec.gov/news/speech/2012/spch022412laa.htm>.

²⁵ 29 U.S.C. § 401 *et. seq.*

²⁶ *Id.* § 431(b).

²⁷ Labor Organization Annual Financial Reports, 29 C.F.R. §§ 403, 408. The report is filed on Form LM-2. See 29 C.F.R. § 403.3 (1993). The current version of the form includes several references to unions’ “political activities and lobbying.” See U.S. Dept. of Labor, Form LM-2 Labor Organization Annual Report, No. 1215-0188, *available at* www.dol.gov/olms/regs/compliance/lm2_blankForm.pdf.

²⁸ See McIntire & Confessore, *supra* note 15.

requirements into their routine business practices. Contrary to the supposed hardships that corporations fear similar disclosure requirements would bring, it is the NEA's experience that the current LMRDA disclosures are neither disruptive nor difficult to comply with. Instead, the current LMRDA disclosure requirements promote transparency and accountability to union members and the public at large without undue burden to the reporting entities.

The NEA urges the Commission to use its regulatory authority under the Securities Exchange Act²⁹ to impose similar political spending disclosure requirements on corporations. Just as the Secretary of Labor has broad authority under the LMRDA to compel certain disclosures from unions,³⁰ the Commission has authority under the Securities Exchange Act to promulgate regulations that would require corporations to provide shareholders with the information they need about corporate political expenditures.³¹ As the Petition notes, the Commission has used this authority to change and increase corporate disclosure requirements over time.³²

Like the reporting requirements for labor unions under the LMRDA, the Commission's corporate political spending disclosure regulations need not be overly burdensome on corporations. Rather, subject to a reasonable *de minimis* exception, the Commission should require corporations to disclose annually all political spending, including direct contributions, spending on ballot initiatives, and contributions made to trade associations and nonprofit organizations for political purposes. As other commenters have noted, this likely would not require new corporate accounting systems to achieve compliance because corporations already track political spending for tax reasons.³³ Furthermore, in order to facilitate investors' access to this important information, the Commission should post corporate political spending disclosure forms to a centralized website, using DOL's www.unionreports.gov website as a model for making disclosure reports easily accessible to the public. While some corporations may object to these basic disclosure proposals, the significant number of corporations that already disclose all or part of their political spending evinces the feasibility of such requirements. A recent study showed that 47% of the top 200 companies on the Standard and Poor's 500 index already disclose some information about their direct political contributions.³⁴ In fact, of the corporations surveyed for two consecutive years, over 85% of companies actually improved their political disclosure and accountability in the second year of the study.³⁵ Through its rulemaking authority, the Commission should build on this progress by standardizing political disclosure requirements and making them mandatory for all corporations.

²⁹ 15 U.S.C.A. § 78b.

³⁰ See 29 U.S.C. § 431(b).

³¹ See 15 U.S.C.A. § 78b.

³² See Petition, *supra* note 13, at 2–3.

³³ See AFSCME Original Comments, *supra* note 21, at 6.

³⁴ THE CTR. FOR POLITICAL ACCOUNTABILITY & THE ZICKLIN CTR. FOR BUS. ETHICS AT THE WHARTON SCH. OF THE UNIV. OF PENN., 2012 CPA-ZICKLIN INDEX OF CORPORATE POLITICAL ACCOUNTABILITY AND DISCLOSURE: HOW LEADING COMPANIES NAVIGATE POLITICAL SPENDING IN THE WAKE OF *CITIZENS UNITED* 13 (September 25, 2012), available at <http://politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/6903>. An additional 11% of surveyed corporations abstain from making direct political contributions. *Id.* The report also notes the percentage of surveyed corporations that disclose their payments to trade associations (36%), ballot initiative committees (36%), direct independent expenditures (18%), and 501(c)(4) organizations (16%). *Id.* Over 56% of the surveyed companies also provide full political spending policies on their websites. *Id.* at 14.

³⁵ *Id.* at 10.

IV. Conclusion

For the reasons stated above, the NEA, on behalf of its members, urges the Commission to act promptly on the Petition for Rulemaking by promulgating regulations that protect investors by requiring corporations to disclose their political spending. Such disclosure both promotes an open and fair democratic process and protects investors and shareholders from economic harm resulting from corporations making unfettered secret political donations. The NEA and other unions already publicly disclose such expenditures. Corporations should be held to the same standards of transparency. In the words of Commissioner Aguilar, “arming investors with the information they need to facilitate informed decision-making is a core responsibility of the [Commission].”³⁶ The NEA strongly believes it is time for the Commission to fulfill this core responsibility by acting on the Petition.

Respectfully submitted,



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³⁶ Aguilar, *supra* note 24.

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