March 23, 2012

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

Via Electronic Mail: rule-comments@sec.gov

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:

We, the undersigned, are scholars with extensive knowledge and experience in corporate governance, campaign finance, or constitutional law. We are moved to write because we think it inappropriate for the Securities and Exchange Commission (SEC) to open a rulemaking on corporate political spending, and its disclosure, as requested by the Committee on Disclosure of Corporate Political Spending, dated August 3, 2011.

Demands for such a rulemaking are misguided, for the following reasons:

* Genuine political expenditures are currently disclosed.

* Shareholders are not demanding more disclosure, have already rejected such proposals, and will likely not find this additional information useful.

* Additional requirements will burden political expression without sufficient justification.

* This rulemaking will jeopardize the SEC's nonpartisan reputation, and decrease confidence in its regulatory integrity.

I. Current Disclosure Requirements Cover Genuine Political Expenditures

None of the calls for this rulemaking acknowledge that disclosure of corporate political expenditures is already mandated by law. Under campaign finance law, any person or entity (including a corporation) that makes an expenditure must report that expenditure to the Federal Election Commission (FEC) or where appropriate in state and

local elections, to the regulators in those jurisdictions.[1] Expenditures coordinated with a candidate are treated like contributions, and are forbidden altogether. (The Federal Election Campaign Act preempts conflicting local laws with regard to federal campaign finance).

Specifically, federal law requires that a corporation file FEC Form 5 and report any independent expenditures once spending exceeds $250 in the aggregate with respect to a given election.[2] Once a corporation spends $10,000 in the aggregate, reports must be filed within 48 hours of making additional expenditures.

Admittedly, the FEC's regulations have not been revised to reflect changes in the law required by the *Citizens United*, *EMILY's List*, *SpeechNow.org*, and *Carey v. FEC* decisions.[3] However, the Commission has issued guidance, and continues to require the reporting of all independent expenditures, including those made by corporations.[4]

Yet relatively little of the independent spending at the federal level comes directly from corporations. Instead, as of this writing, political committees are the chief sources of independent spending.[5] This only makes sense, as these committees are dedicated to political communications and activism. Committees accepting corporate (or labor) money for independent expenditures must report those receipts, and their subsequent expenditures.[6] Violations can be pursued by the FEC, or in the case of "knowing and willful" violations, can be criminally prosecuted.[7] Interested individuals can easily find the sources and uses of money on the FEC's webpage, or can consult one of the several specialized research organizations dedicated to campaign finance information.[8]

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[1] Federal reporting requirements are at 2 U.S.C. 432, 433, and 434; organizational requirements at 2 U.S.C. 431(4) and 431(8). An example of a similar state law is A.R.S. §§ 16-914.02, 16-919, 16-920 (Arizona).
[2] Form 5 is available at www.fec.gov/pdf/forms/fecfrm5.pdf. Instructions detailing the thresholds and filing requirements are available at www.fec.gov/pdf/forms/fecfrm5i.pdf.

[3] Citizens United v. FEC, 130 S. Ct. 876, 913 (2010); EMILY's List v. FEC, 581 F.3d 1 (D.C. Cir. 2010) SpeechNow.org v. FEC, 599 F.3d 686, 689 (D.C. Cir. 2010) (en banc); Carey v. FEC, Civ. No. 11-259-RMC (D.D.C. 2011).

[4] *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).

[5] Electronically filed independent expenditure reports are listed at www.fec.gov/finance/disclosure/ie_reports.shtml. Running totals are tracked at Opensecrets.org, www.opensecrets.org/pres12/indexp.php.

[6] Political committees use Form 3X, available at http://www.fec.gov/pdf/forms/fecfrm3x.pdf, instructions at http://www.fec.gov/pdf/forms/fecfrm3xi_06.pdf.

[7] United States Department of Justice, Federal Prosecution of Election Offenses 178-79 (2007).

[8] *See* www.fec.gov/disclosure.shtml; *see also* Center for Responsive Politics Opensecrets.org, www.opensecrets.org.

The rulemaking petition asserted that present disclosure requirements still permit secret campaign expenditures. It stated that secret campaign expenditures had been made through "intermediaries" such as industry groups and other associations. However, there is no evidence that these groups in fact served as conduits for members' expenditures, or even that they specially assessed members for its expenditures. No one has asserted that industry groups worked in tandem with members to plan or produce political communications.

Moreover, to the extent commenters are concerned about corporations constructing "shell" entities to thwart disclosure, under current law any such entity with a major purpose of influencing federal elections becomes a political committee.[9]

In short, the real effect of the disclosure rule proposed by the Committee may be simply to require member corporations to report all funds paid to any corporate trade association or group that makes any political expenditures. But this requirement provides limited useful information, as there is no link between a corporation's payments to a trade group and the independent use of those funds by the group. Instead, it clouds the issue, conflating disclosure of political spending by the groups actually doing the spending (which already exists) with the simple payment of membership dues or other funds to an association. Put simply, corporate payments to trade associations or similar groups are not political spending, because the corporations do not control the spending decisions of the organization, just as a union member may provide dues to a labor organization, but does not control how those funds are used.

Such obvious over-reporting would be confusing and misleading to shareholders. It would be akin to requiring members of an activist group, like the National Rifle Association, to be publicly linked with every expenditure that organization makes, or investors in a company that makes expenditures to claim those activities as their own, or attribute an employee's individual campaign activities to his or her employer. There would be no logical reason to stop at that step, of course, and one could argue that more disclosure of the source behind the source that gave to the speaker is fair game. If commenters are sincere in their quest for transparency, they must acknowledge that reporting bad information creates fog, not clarity.

II. Contrary to Assertions Made by Petitioners, Shareholders Reject Their Disclosure Demands

[9] Federal law defines the term "political committee" to mean 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). The terms "contribution" and "expenditure," in turn, are defined to include the receipt or payment of anything of value "for the purpose of influencing any election for Federal office." 2 U.S.C. §§ 431(8)(A) and (9)(A). The Supreme Court construed the term "political committee" to "only encompass 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); *see also McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003).

Commenters should also be more candid with the SEC about the lack of enthusiasm most shareholders feel for this disclosure proposal. When political disclosure proposals come before shareholders, they fail.[10] After SEC staff insisted Home Depot include a political spending proposal on its annual proxy, Home Depot shareholders promptly rejected it.[11] There is no justification for the SEC to permit an end-run around these proxy results by imposing the rejected requirement by rule.

In the past two years, no less than fifty-three shareholder proposals concerning political spending by corporations have come to a vote. Without exception, they were defeated, many by large margins. The mechanisms of corporate democracy have been in motion, and are already working. And they inform the Commission that this proposal is simply not something investors desire.

Rejection by shareholders of these proposals should come as no surprise. When the SEC mandates disclosure, it should be because the information is material to the investment decisions of shareholders and the market. This initiative perverts that mission, by demanding disclosure of information that is immaterial to a company's financial prospects. Once the SEC starts demanding disclosure of information without regard to its investment importance, there will be no logical endpoint.

This is especially true as a rule would impose a one-size-fits-all requirement on corporations. The dismal record of shareholder proposals for limits on, or disclosure of, political spending by their corporations shows that shareholders have generally agreed with corporate managements' policy decisions in this area. To state the obvious, corporations can be vastly different from each other. Like individuals, their vulnerability to political decision making, need for brand protection, level of diversification, and the like all vary enormously. These factual differences suggest the need for varying approaches to political speech – which is precisely what we see in the market, and precisely what shareholders have consistently endorsed. This is not an area where the sledgehammer of regulation should displace the scalpel of business judgment.

Commenters also should admit that the social science record they claim shows that political expenditures erode shareholder value is nowhere near as clear as they contend. Numerous studies have arrived at contrary conclusions. For instance, a study utilizing "event study" methodology concluded that data "reflected no negative effect" upon a public corporation's value due to its engagement in political speech.[12]

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[10] None of the 53 proposals in 2011 were adopted. *See* www.proxymonitor.com (visited February 14, 2012).

[11] *See* SEC No Action Letter, www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2011/northstarasset032511-14a8.pdf; *Political Spending Proposal Defeated at Home Depot*, June 2, 2011, business-ethics.com/2011/06/02/7198-political-spending-proposal-defeated-at-home-depot-as-larger-debate-continues.

[12] Roger Coffin, *A Responsibility to Speak:* Citizens United*, Corporate Governance and Managing Risk*, 8 Hastings Bus. L.J. 103 (2011).

On the general issue of whether proxy access should be easier, the literature shows that the proxy voting process can be captured by shareholders with "idiosyncratic objectives," and result in reduced shareholder wealth *contrary* to the interests of shareholders generally.[13]And another study found that SEC changes to proxy rules intended to facilitate challenges to incumbent board members in fact *cost* shareholders more than a half-billion dollars – and the study considered only small-cap firms.[14] In short, as one paper recent put it, "[t]he empirical literature in economics and finance is to a large degree descriptive and has produced few conclusive findings, and the underlying theoretical literature is small."[15] There is no empirical consensus sufficient to support an SEC rule.

The movement toward corporate disclosure of "political" spending is the project of certain activist shareholders, who pursue their own agendas and may not have the corporation's profitability as their first priority.[16] As noted in a recent study,

> [S]hareholder proposal rights can be helpful or harmful depending on the context. When managers are inclined to pursue value maximization, activists are extreme, and there is significant uncertainty about how shareholders will vote, proposal rights can be harmful.[17]

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[13] Joseph Grundfest, *Measurement Issues in the Proxy Access Debate*, Rock Center for Corporate Governance at Stanford University Working Paper, No. 71 at 34 (January 2010), papers.ssrn.com/sol3/papers.cfm?abstract_id=1538630.

[14] Thomas Stratmann and J.W. Verret, *Does Shareholder Proxy Access Damage Share Value in Small Publicly Traded Companies?,* 64 Stan. L. Rev. ___ (2012), papers.ssrn.com/sol3/papers.cfm?abstract_id=1960792.

[15] John G. Matsusaka and Oguzhan Ozbas, *Shareholder Empowerment:The Right to Approve and the Right to Propose,* USC Legal Studies Research Paper Series No. 12-3 (January 2012), http://www-bcf.usc.edu/~matsusak/Papers/Matsusaka_Ozbas_Shareholder_Empowerment(2012).pdf.

[16] There is considerable evidence that nearly all of the relevant shareholder proposals submitted during 2010-2011 were proposed by written by activist groups coordinating with the Center for Political Accountability.

For example, Trillium Asset Management, one such activist organization, brought four proposals to the boards of three different companies during the period in question; CPA's Board of Directors includes Shelley Alpern, its Secretary, who is also VP and Director of Social Research and Advocacy at Trillium Asset Management. http://www.politicalaccountability.net/index.php?ht=d/sp/i/864/pid/864.

By its own account in February 2007, CPA provided "model proposals" for other "institutional investors" to bring to shareholder vote. "The CPA is leading a nationwide effort to bring transparency and accountability to corporate political spending." CPA provided on its website a list of its partner organizations, including Walden Asset Management, Sisters of Mercy, Green Century Capital Management, Domini, the Teamsters, Firefighters Pension of Kansas City, MO, Nathan Cummings Foundation, Trillium Asset Management, AFL-CIO, NorthStar, Calvert and others, all of whom are listed as having submitted shareholder proposals in the past year. *See,supra,* n. 10; http://www.politicalaccountability.net/index.php?ht=d/ReleaseDetails/i/342.

[17] *Id*. at 33. In this study, "uncertainty" meant the likelihood shareholders would vote an agenda for reasons other than maximizing shareholder value.

Moreover, the United States Court of Appeals for the District of Columbia Circuit highlighted the SEC's deficient appreciation of certain shareholders' motives in their recent *Business Roundtable v. SEC* opinion.[18]

> [T]he Commission failed to respond to comments arguing that investors with a special interest, such as unions and state and local governments whose interests in jobs may well be greater than their interest in share value, can be expected to pursue self-interested objectives rather than the goal of maximizing shareholder value, and will likely cause companies to incur costs even when their nominee is unlikely to be elected.[19]

Yet an SEC rulemaking along the lines proposed would implement a rule that imposes a one-size-fits all remedy, which has been rejected by shareholders, that empowers certain special interests with independent agendas.

III. The Petition Seeks a Rule that Would Burden Important Protected First Amendment Rights

The proposed rulemaking may not be about transparency at all, but instead be intended as a disincentive for corporations to participate in associations that, among other missions, make political expenditures. That is an illegitimate goal. Political speech is at the core of First Amendment, and the Supreme Court has stated clearly and repeatedly that the corporate source of the speech is not relevant when assessing its protection from regulation. The Court summed up this record in *Citizens United*:

> Under the rationale of these precedents, political speech does not lose First Amendment protection "simply because its source is a corporation." *Bellotti, supra,* at 784; see *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.* , 475 U.S. 1, 8 (1986) (plurality opinion) ("The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster" (quoting *Bellotti,* 435 U. S., at 783)). The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not "natural persons."[20]

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[18] 647 F. 3d 1144 (D.C. Cir. 2011).

[19] *Id.* at 1152.

[20] 130 S. Ct. at 900.

Corporate political activity is constitutionally protected, and the SEC cannot institute a rule that indirectly does what the Constitution forbids.

IV. The Proposed Rule Would Force the SEC to Wade into Political Waters

One would have to be naïve to miss the partisan implications of this initiative.[21] This is an election year, and much has already been made about the role corporations play in politics. Campaigns and elections offer the opportunity for focused debate, which should be vibrant and open. The proposed rule asks the SEC to enter into a political debate that is not in keeping with its traditional mission, with great risks to the agency.

The proposed rule would injure the SEC's credibility, and make it more difficult for it to succeed in its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.[22] A better choice would be to leave campaign finance rules to Congress and the Federal Election Commission. Both Congress and the FEC are charged with articulating general rules, with the effects on the entire political landscape in mind. The SEC necessarily can reach only a subset of corporate activity, with likely damaging unintended consequences.

We believe reform in corporate governance should serve to better align the interests of managers with the interests of shareholders – all shareholders – and serve primarily to create durable wealth for investors and the economy at large. This proposal does nothing toward that goal. Instead, it distorts political debate, burdens protected speech, and generates misleading information. One scholar has deemed similar poorly justified initiatives "quack corporate governance" and we agree with that sentiment.[23] Accordingly, there is no justification for moving forward on this petition for rulemaking, and good reason to disavow it.

Respectfully submitted,

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[21] *Shutting Up Business*, Wall St. J. December 29, 2011, available at online.wsj.com/article/SB10001424052970204224604577030260580411048.html

[22] Statement of Mission, www.sec.gov/about/whatwedo.shtml. The Commission has been criticized for reacting to political pressure, see Jonathan R. Macey, *The Politicization of American Corporate Governance,* Faculty Scholarship Series Paper 1379 (2006), digitalcommons.law.yale.edu/fss_papers/1379. It would be far worse for the Commission to allow itself to serve as a tool of partisan political power.

[23] Stephen Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II* 95 Minn L. Rev 1779 (2011); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance,* 114 Yale L.J. 1521 (2005).

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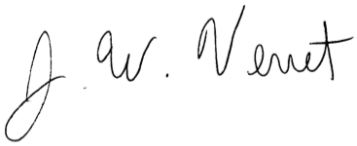

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