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"Corporate Governance after *Citizens United*"
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Chairman Kanjorski, Congressman Garrett, and Members of the subcommittee, I want to thank you for the opportunity to testify on an aspect of the *Citizens United* decision that merits your attention. Prior to this sweeping decision, the law allowed a corporation to promote federal candidates with money that was voluntarily contributed by shareholders and employees to the corporation's political action committee (PAC). In other words, a corporation had to rely on limited voluntary contributions from willing donors to finance the corporation's campaign activities. After this decision, however, a corporation may tap its corporate treasury funds *without limitation* to communicate its support or opposition to a candidate. It can do so without informing or receiving the approval of its shareholders or even its board of directors.

The Court's decision makes an immense difference in the resources that corporate management will have at its disposal to engage in politics. The four largest high tech companies, Google, Microsoft, Apple and Intel, alone have more than $100 billion in cash on hand. The two largest energy companies, Exxon Mobil and Chevron, made more than $120 billion in profits in the last election cycle. If Exxon's CEO decided to use one week's worth of profits to spend on political campaigns, he would have over $800 million to spend. Compare that to the $950,000 that Exxon's PAC raised in voluntary contributions. In fact, one week of Exxon's profits is twice the amount that all corporate PACs raised during the last election cycle. The amount of corporate money now available simply dwarfs what was previously available to corporations and what will continue to be available in voluntary contributions to candidates, political parties and other political committees. I cite these figures not to suggest that corporations are intending to devote huge sums to politics, but to illustrate how corporations could vastly increase their spending in elections without it being visible on their financial statements.

We do not know how corporations will use their new right. Most troubling, however, is that under present federal statutory law, we will not be able to find out. The Court, with only Justice Thomas dissenting, did hold that Congress had the authority to bring greater transparency

and accountability to corporate political spending. Writing for the majority, Justice Kennedy found:

> "With the advent of the Internet prompt disclosure of expenditures can provide shareholders and citizens with 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.'"

Of course, this is only true if disclosure is timely, meaningful and not easily evaded. Current federal disclosure requirements are woefully inadequate, a subject that I will return to later in my testimony.

The Court also found that the government had a legitimate interest in protecting shareholders and that interest could best be advanced through the procedures of corporate democracy. Notwithstanding the Court's endorsement, current law provides virtually no opportunity for shareholders or their representatives to check or influence corporate political behavior. This is most decidedly true when it comes to large publicly traded companies.

Nearly seventy percent of the common stock of publicly traded companies is held by institutional investors. Institutional shareholders such as Vanguard, Calpers, TIAA-CREF and the Federal Thrift Plan represent the interests of tens of millions of ordinary citizens who are the beneficial owners of the stock these institutions hold. If you participate in the Federal Thrift Plan, you probably own Exxon stock. In fact, there are probably more beneficial shareholders of Exxon stock than there are voters in California. Beneficial shareholders have no means to register their dissent from a corporate political program. Institutional shareholders on the other hand, even if they are so motivated, have little opportunity to express themselves on the political decisions made by management. In its current form, corporate governance is a weak check against corporate political misadventures.

Current law treats political expenditures as an ordinary business activity and vests in corporate management vast authority to spend politically, with little or no accountability to shareholders. Shareholders are extremely skeptical of political spending. In a 2006 survey by Mason-Dixon Polling & Research, nearly three-quarters of shareholders respondents agreed that corporate political spending advances the private political preferences of executives rather than the interests of the company and its shareholders. Traditionally, boards of directors have assumed little responsibility for overseeing management in this area. Absent a change in the law, there is little reason to believe that shareholders will have a voice or directors will assume responsibility for corporate political activity.

To protect the interests of shareholders, Congress must mandate effective disclosure by corporate management. As it currently stands, companies themselves often are unaware how company funds are being put to political use. Many large companies lack internal procedures for approving and tracking political spending. This is almost universally true when it comes to the funds that companies contribute to outside organizations. Disclosure by politically engaged organizations, including 527s, c(4) social welfare organizations and c(6) trade associations, regularly fails to identify the true source of the funds. Consequently, a corporation can fund a political expenditure *without being identified with it*, either because the corporation is ignorant of the expenditure or because the law does not require full disclosure. If the interests of shareholders are to be protected, enhancing disclosure is an essential first step.

Historically, companies have funded political expenditures, by contributing to a third party organization that actually makes the expenditure. Sometimes, companies know how their money will be spent; often, they do not. For disclosure to be effective, a company needs to know whether the money that it contributes to another organization will be used for a political purpose and what that purpose is. The company, in turn, needs to make that information available to its shareholders. The information needs to be specific, identifying the amount of the political expenditure and any candidate(s) who will be supported or opposed. Without that level of disclosure, shareholders will be deprived of the information that they need to monitor the political use of their corporate resources and to hold management accountable.

Disclosure should not end there. Persons using corporate funds to make political expenditures should be required to disclose the source of those funds to the appropriate governmental agencies and affirm that the donating corporations have been informed and have approved of the use of the funds for that political purpose. Any public political communication financed with corporate funds, other than those made by candidates and political parties, should include a disclaimer identifying major corporate underwriters of the communication.

Transparency should be accompanied by accountability. Shareholder or at least director approval should be required for significant corporate expenditures. Furthermore, approval should be specific; mere authorization of a general budget item should not suffice. Managers should not be permitted to pursue their own personal political agendas with corporate funds. Substantial corporate political expenditures also pose significant reputational, regulatory and legal risks outside the normal course of business. Before a corporation assumes those risks, a line of accountability needs to be established.

If shareholder approval is required, institutional shareholders should not be permitted to stay on the sidelines. As fiduciaries, institutional shareholders should be required to vote for or against the proposed spending. Institutional shareholders should not be able to shirk their responsibility to the people whose interests are entrusted to them. Because of the diverse political interests of its beneficiaries, an institutional shareholder should be allowed to veto a management request without having its fiduciary duty called into question. An institutional shareholder should be permitted to vote for a political expenditure only if the shareholder has been provided with sufficient information and has independently determined that the proposed expenditure is in the best interest of its beneficiaries.

The Court recognized that the activating purpose of corporate political spending is to maximize profits. We do not expect corporations to be motivated by altruism, mercy or justice unless it is good for their bottom line. Questions of war and peace, civil rights, gay marriage and abortion rights can be, and are expected to be, ignored by corporate spenders. There is no religious, ethical or moral duty to take notice, to consider, or to act on these matters. The duty is to abide by the law and earn profits.

This is not a bad thing. Corporate pursuit of profit is the engine that drives our economy and our continued prosperity depends upon it. Unfortunately, this same drive leads companies to try to secure through the political marketplace what they have been unable to attain in the economic marketplace. Experience teaches us that corporations will spend politically to stifle competition, to privatize public goods, to impede regulation, and to enrich managers at the expense of shareholders. Undisclosed, unaccountable corporate political involvement is bad for shareholders *and* the economy. This Congress would do well by both if it takes up the challenge laid down by the Court and brings transparency and accountability to corporate political spending.