Corporate Political Spending: What Boards Should Know

by Cleta Mitchell and David Ralston

With the November U.S. elections just around the corner, political debate—and political spending—have become crucial governance concerns. This first presidential election since the Supreme Court's *Citizens United* decision puts corporations on the spot when it comes to political contributions. What are the new rules of corporate political spending?

In January 2010, the United States Supreme Court recognized the First Amendment rights of corporations to make political expenditures, not just about issues, but also about candidates for office. That decision, *Citizens United v. Federal Election Commission,* has been widely discussed, largely misunderstood and sometimes deliberately misinterpreted.

The actual holding of the Supreme Court in *Citizens United* was that neither Congress (nor state legislatures) may constitutionally ban corporations from spending money in support of political candidates and parties, provided that such expenditures are independent of the campaigns and candidates. The court's reasoning was that since individuals have long had First Amendment rights to make independent political expenditures, the Constitution affords similar protections to other political "speakers," including corporations.

Should corporations be involved in the political process? Corporations are impacted in countless ways by government decisions at every level.

Citizens United relied upon and reaffirmed the standard first articulated by the Supreme Court in 1976, in the landmark campaign finance case *Buckley v. Valeo.* Here, the court held that laws burdening political speech are subject to strict scrutiny review, and the only permissible constitutional grounds for prohibiting such speech is to avoid corruption or the appearance of corruption.

Citizens United made *no* changes in the federal statutes that prohibit corporate contributions to candidates and national party committees, nor did the court invalidate other sections of the federal law that still prohibit foreign corporations and federal contractors from making contributions or expenditures.

Since the ruling, business corporations have been under tremendous pressure not to make political expenditures, either directly or indirectly. Efforts have been mounted to force corporations to disclose their political expenditures, and business leaders and companies making such expenditures have been attacked by critics of *Citizens United* who believe that any business involvement in politics should be illegal.

Should corporations be involved in the political process? It is indisputable that corporations are impacted in countless ways by government decisions at every level. It is also true that corporate interaction with politics and government officials is subject to strict regulation by the government.

The pressure tactics against corporate political spending since *Citizens United* have been fairly successful. For example, an analysis of contributions to SuperPACs established to support the eight prominent Republican candidates for president in 2011 and 2012 reveals that not a single Fortune 100 company contributed to any of the PACs. On June 25, 2012, the Supreme Court issued a summary reversal of a 2011 Montana Supreme Court decision that corporate political expenditures in Montana could still be banned notwithstanding the Supreme Court's holding to the contrary in *Citizens United (American Tradition Partnership v. Bullock).*

Among the several briefs filed in support of, or

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opposition to, the petition for *writ of certiorari* in the case was one by Sen. Mitch McConnell (R-KY), minority leader of the United States Senate. In that brief, Sen. McConnell argued that, despite the opponents' hysterical predictions concerning "billions of dollars that would pour into the political system from corporations" as a result of *Citizens United,* the experience to date has been quite the opposite.

Of the $96,410,614 contributed to all eight of the Republican SuperPACs combined, $83,220,167 (86.3 percent) was contributed by individuals, and $13,190,447 (13.7 percent) by corporations. The data further reveal that, of the 13.7 percent contributed by corporations, 12.9 percent was contributed by privately held corporations, and less than one percent (0.8 percent) by public companies.

It is vital for business and corporate leaders to be actively engaged with and attuned to candidates, platforms and the issues that will affect the future of American business.

In this fall's U.S. elections, voters will be deciding not only the next president, but also selecting the members of Congress, one-third of the United States Senate, numerous governors, thousands of state legislators and local officials, and a plethora of ballot issues across the nation. It is vital for business and corporate leaders to be actively engaged with and attuned to candidates, platforms and the issues that will affect corporations and entire industries, as well as the future of American business.

For companies, that means identifying the legal and compliance issues that could be triggered by corporate involvement in the political and policy process.

The following provides an overview of the do's and don'ts for corporations on political law compliance issues. Hopefully this will encourage, rather than to discourage, corporations and business leaders to exercise the First Amendment rights the U.S. Supreme Court has recognized.

☐ *Corporate contributions to candidates for office.* Whether or not a corporation is permitted to make a direct contribution to a candidate or political party varies based on the jurisdiction. Federal law prohibits contributions (including both direct and in-kind contributions) to candidates for president, vice-president, and the United States House and Senate.

State and local candidates in many states, however, are permitted to accept contributions directly from corporate treasury funds; the balance of the states mirror federal law and prohibit such contributions. Corporate contributions to political party committees also vary depending on whether the committee is a local, state or national party, or a "federal account" of a state or local party committee.

Before making a contribution to a candidate for office or party committee, confirm whether the entity is permitted to accept contributions from corporate funds. One important point to note is that it is illegal in every jurisdiction to reimburse another person for a political contribution. Corporate policies on political activities should always make clear that no one will ever be reimbursed by the company for any political contribution.

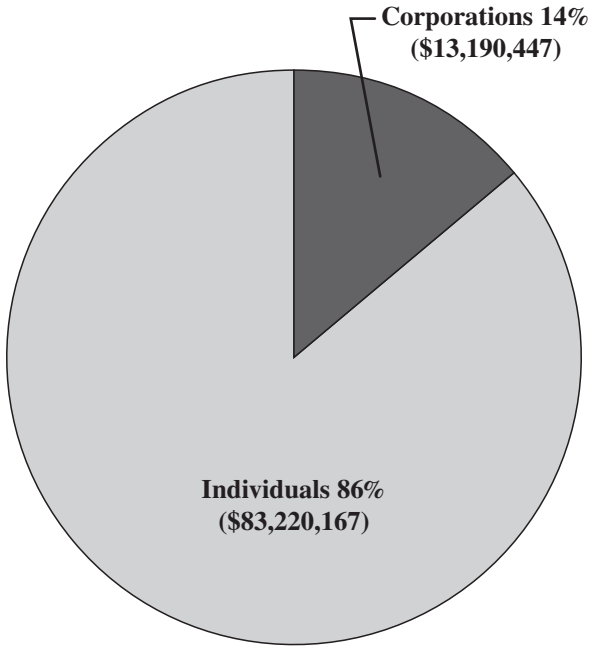
☐ *Contributions to candidates from a corporate PAC.* For jurisdictions in which corporate contributions are prohibited, there are laws which allow corporations to establish political action committees (PACs). PACs are legal entities separate from their sponsoring corporation, with separate federal employer identification numbers, separate bank accounts, and they must file tax returns separate from the corporation.

Both federal and state laws detail the manner in which PACs are to operate: who can be solicited, what disclosures and disclaimers must be provided to potential donors, and the applicable reporting regime to which the PAC is legally subject. Many corporations prefer to establish one PAC at the federal level and to make contributions to both federal and state candidates from the federal PAC. The PAC would then be subject not only to federal law governing solicitations and reporting, but also state law governing contributions to state candidates from federal PACs.

Prior to making a contribution from a federal PAC

Corporations On The Sidelines

Individuals Remain The Biggest Contributors



Percentage of all contributions to 2012 Republican SuperPacs

to state candidates, it is important to be aware of the registration and reporting requirements of the state. Some states require the registration of the federal PAC with the state reporting agency prior to making the contribution.

☐ *Contributions to non-candidate/non-party organizations.* Because business corporations are usually not in the political business, most prefer not to make political expenditures on their own, despite the Supreme Court's determination that such expenditures are protected First Amendment activity. Rather, corporations are more likely to contribute to candidates and party committees in states where such contributions are allowed.

Corporations may also make corporate contributions to trade associations (such as the Chamber of Commerce or other business groups), nonprofits that promote issues of importance to the company, or to organizations established to elect state and local officials, such as the Democratic and Republican Governors Associations. Each of those types of entities may accept unlimited corporate contributions, which may in turn be used for both issue and candidate advocacy expenditures.

☐ *Contributions to and expenditures for ballot issues.* The Supreme Court's decision in *Citizens United* followed and relied upon an earlier decision in which the Court determined that corporations cannot be prohibited from making contributions and expenditures about ballot issues, *First National Bank of Boston v. Bellotti.*

Again relying on the anti-corruption rationale as the only basis for regulating political speech, the Supreme Court concluded that a ballot issue is not capable of being "corrupted." Accordingly, corporations may not constitutionally be prohibited from contributing to or making expenditures for ballot issues and referenda.

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☐ *Pay-to-play restrictions.* For a number of years, the Municipal Securities Regulatory Board (MSRB) has strictly regulated contributions to certain state and local officials and candidates from broker-dealers engaged in the securities and bond underwriting business.

With enactment of Dodd-Frank, Congress expanded the restrictions on contributions to additional covered officials from firms and individuals in the investment banking business. Many states have also enacted prohibitions and restrictions on campaign contributions from companies and people with state or local government contracts.

It is essential for companies in those areas to be familiar with the particular rules and regulations governing political contributions from the company and its officers and employees. Even inadvertent mistakes by employees of the company (and in some cases, their family members) can result in a debarment of the company from doing business with the government for a period of time.

☐ *Lobbying registration and reporting.* Besides campaign finance restrictions, activities directed at officeholders, legislative and executive branch staff members and employees are also regulated. The Lobbying Disclosure Act of 1995, as amended, defines lobbying at the federal level, and requires registration and reporting of lobbying activities and expenditures when certain thresholds are met. Every state (and many local jurisdictions) also defines the triggers for lobbying registration and reporting.

While the federal law allows a lobbying registrant a 40-day period to file as a lobbying entity, many states require registration prior to the first meeting with a covered government employee. Some require registration within a scant five days following such a communication to influence official action.

Too many corporations fail to supervise the compliance procedures and filings of contract lobbying firms and lobbyists, relying on the lobbyists themselves to handle the company's compliance obligations. A far better practice is for public filings on behalf of the company to follow a company-dictated standard protocol, including review to ensure compliance with applicable law. Any report available to a newspaper reporter should be maintained in a system approved by, and under the control of, the corporate counsel.

A rule for companies is that any "thing" of value—in any amount, no matter how small—is a "gift" when provided to an officer, employee or official of any unit of government.

☐ *Gifts and entertainment rules related to government officials and employees.* While hard to fathom, there are continuous reports of indictments of government officials for soliciting or accepting gifts and gratuities from sources prohibited by law—and of corporate officials providing them.

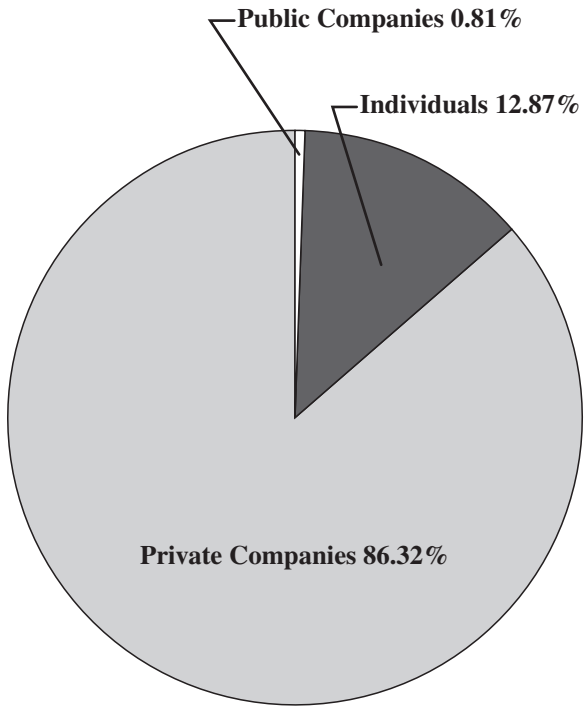
The basic rule for companies is that any "thing" of value—in any amount, no matter how small—is a "gift" when provided to an officer, employee or official of any unit of government. Virtually every unit of government has its own rules and regulations on this, such as which *de minimis* amounts are permitted. For some officials and employees, meals consumed at one sitting are permissible; for others, they are strictly prohibited when paid for by a registered lobbyist or lobbying entity.

The rules of the United States House of Representatives contain 23 exceptions to the rule that prohibits gifts from lobbyists to members, officers or employees of the House; the Senate rules contain 24 such exceptions. Under the Honest Leadership and Open Government Act of 2007, all lobbyists and lobbying registrants must certify under penalty of perjury twice annually that neither the individual lobbyist nor the entity employing the lobbyist has provided any prohibited gift to any member, officer or employee of the Congress.

With regard to the complexities of state and local law, the general rule of thumb is to be aware of the nature of the interactions of the company with any and all units of government, their employees

Public Companies Say No

A Vanishingly Small Share Of Primary Giving



Percentage of all contributions to 2012 Republican SuperPacs

and officials. Become familiar with the laws of the jurisdictions where such interactions may or do occur. Institute policies that reflect compliance with the rules on gifts, entertainment and travel paid for by persons other than the government.

☐ *Restrictions on federal contractors and grantees.* Firms and individuals with federal contracts must comply with specific political law rules laid out in their federal contacts. Prime contractors are required to "flow-down" certain of these requirements in their subcontracts over $150,000.

As to lobbying, federal contractors and their subcontractors are prohibited from using federal appropriated funds for federal lobbying. This does not apply, however, if the contractor or subcontractor has profits or a source of funds other than its federal contracts to pay its federal lobbying expenditures. Contractors and subcontractors must also disclose a broad category of lobbyist contacts with federal officials when these concern federal contracts.

Gratuities to federal officials are generally prohibited except for *de minimis* items and those in connection with events such as industry-type functions. Offering or giving a gratuity regarding a contract can be grounds for contract termination, and suspension or debarment from new federal contracts.

As to campaign contributions, the long-standing prohibition against federal contractor contributions directly to candidates for federal office (or their political parties) remains in effect. The *Citizens United* decision concerned independent corporate expenditures supporting or opposing candidates, not direct contributions to candidates, and did not impact the prohibition.

An effort to lift the prohibition as to *individuals* holding federal contracts, based on an attempt to extend the rationale of the *Citizens United* decision, has been rejected by the U.S. District Court in Washington in *Wagner v. FEC*. On the other hand, an executive order has been proposed that would require federal contract bidders, and their executives and affiliates, to disclose campaign contributions over $5,000, including contributions made through trade groups such as the U.S. Chamber of Commerce. This has drawn strong opposition in Congress, and has not been issued by the administration.

Federal grantees and their sub-grant recipients face similar prohibitions. In addition, they are required to disclose all of their federal lobbying expenditures, including those paid from sources besides federal appropriated funds.

Corporations should not be intimidated by political law or those trying to silence the political voice of American business.

The ever-expanding role of government in every business in America should be sufficient reason for the private sector to realize that sitting on the political sidelines is no longer a viable option.

Corporations should not be intimidated either by the complexities of political law and regulation or by those determined to silence the political voice of American business. There is ample expertise, experience and knowledge available to corporate leaders to guide them through the political maze…and to help them effectively exercise the First Amendment rights reinforced so firmly in *Citizens United*. ■

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