Center for Political Accountability Newsletter July/August 2012

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Founder's Column: Another Phony Argument against Political Disclosure

By Bruce Freed, CPA President

The defenders of secret corporate spending on politics have trotted out another phony argument: Materiality. This one flies in the face of the Supreme Court's overwhelming support for corporate political disclosure as spelled out in *Citizens United*.

"Under long established law,

Investors: Drug Companies, Trade Group Not Aligned in Political Spending

Investors have written letters of protest to four drug companies over their membership in PhRMA, a trade group for the drug industry, and its spending millions in 2010 that helped elect Republican members of Congress who support restricting access to contraceptives. The four companies sell contraceptives.

Each company "is financing candidates that are actively working against its shareholders' interests," said the letters, address to Merck & Co., Pfizer Inc., Johnson & Jonson and Bayer AG. A Bloomberg blog post reported Aug. 8 on the letters, prompted by a Bloomberg report May 30 on the companies' membership in PhRMA, the Pharmaceutical Research and Manufacturers of America.

"[We have consistently raised concerns when trade associations take actions that are contrary to their members' interests. The Bloomberg story presents a case in point – perhaps the clearest case of a trade association using its members' payments against those same members' best interests," the letters said.

The signers were investors holding about $155 billion in assets. They included Trillium Asset Management, New York State Common Retirement Fund (among the largest of the public pension funds), Domini Social Investments, Zevin Asset Management, Nathan Cummings Foundation, The Sustainability Group, First Affirmative Financial Network, The Christopher Reynolds Foundation, and Newground Social Investment.

PhRMA funneled $4.8 million in 2010 to two non-profits that helped elect 23 lawmakers, and all of the lawmakers later voted in Congress to limit access to birth control and cut federal funds for it. Merck gave $7 million to PhRMA in 2010.

any corporate expenditure or category of expenditures must be disclosed if it is material," Allen Dickerson, legal director of the Center for Competitive Politics, wrote recently at the group's web site. When advocates "demand more corporate disclosure, they're demanding disclosure of *immaterial* expenditures," he reasoned.

"*Immaterial*?" That's not the phrase that Justice Anthony Kennedy used in the 8-1 *Citizens United* majority endorsing disclosure. Here are Justice Kennedy's own words, and they focus on accountability:

> **"With the advent of the Internet, prompt 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, and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests."**

When a distinguished group of legal academics asked the Securities and Exchange Commission last year (see petition here) to require public companies to disclose their political spending, it pointed to the Supreme Court's discussion of accountability in *Citizens*

Shareholder Group Protests to Aetna Over Undisclosed Political Spending

A shareholder group contends Aetna violated its political disclosure policy by making undisclosed payments of $7.8 million to a Republican-leaning advocacy group and to the U.S. Chamber of Commerce.

A letter from Mercy Investment Services Inc. and the Sisters of Charity of Saint Elizabeth to Aetna CEO and President Mark Bertolini stated, "We believe Aetna is not in compliance with its corporate political and lobbying disclosure policy, a policy which we negotiated and expected would be met in spirit and in letter."

Sister Valerie Heinonen, director of shareholder advocacy for Mercy Investment Services Inc., told Roll Call newspaper (subscription-only) that investors were "dismayed" at Aetna's failure to comply with its policy.

"We negotiated a policy, and it apparently was ignored or not followed," she said. "Certainly, everybody has the right to make these kinds of corporate contributions. However, as investors we wanted to know what corporate money was being spent."

It was recently disclosed by a financial publication that Aetna contributed more than $3.3 million in 2011 to American Action Network, a 501(c)(4) advocacy group that is not required by law to disclose its donors, and $4.5 million to the U.S. Chamber. Aetna made the disclosures inadvertently.

The Catholic investors said in their complaint to Aetna that the insurer had stated in a 2007 letter of agreement that it would disclose all payments for lobbying and political purposes, all trade association payments and all grass-roots spending. In 2006, a shareholder resolution had urged Aetna to make its political spending public.

"We, investors, withdrew the resolution in good faith expecting that the resolution establishing oversight and transparency would be followed, revised as best practices evolved and in place for reference by the members of the committee preparing the annual reports," the letter said.

Aetna officials did not make themselves available to comment to Roll Call. Bertolini said in a letter to a watchdog group that Aetna had made an "error" in reporting the payments as intended for lobbying activities, and that the payments actually were made for educational activities.

United:

> **"Disclosure of corporate political spending is necessary not only because shareholders are interested in receiving such information, but also because such information is necessary for corporate accountability and oversight mechanisms to work. The Supreme Court has often recognized, and indeed relied upon, these accountability mechanisms, particularly when corporations use shareholder resources for political purposes. In particular, in its 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. 'Shareholders,' the Court hoped, could 'determine whether their corporation's political speech advances the corporation's interest in making profits,' and discipline directors and executives who use corporate resources for speech that is inconsistent with shareholder interests."**

The legal experts made a strong case that shareholders are entitled to information about public companies' political spending, and that it is

The donations by Aetna have drawn extensive news media attention. A New York Times article said American Action Network said American Action Network "spent millions of dollars attacking lawmakers who voted for President Obama's health care bill — even as Aetna's president publicly voiced support for the legislation." The Washington Post discussed Aetna's giving in an article about secrecy in political expenditures.

The Center for Political Accountability has launched a review of corporate compliance with disclosure policies. Initial findings suggested that most companies have complied; some gaps were found, however, between best practices and key disclosure indicators.

CPA Spotlighted in New York Times, Washington Post

Two leading national newspapers, the New York Times and the Washington Post, spotlighted the Center for Political Accountability in articles about secrecy in political spending by tax-exempt nonprofit advocacy organizations.

"So many of these ads are cloaked in secrecy," CPA President Bruce F. Freed told the Post about the third-party groups' spending for political attack ads. The groups are not required to disclose their political spending.

"In a democracy, the public needs to know who is providing the funding, who the players are, whether you have folks engaging in duplicity or hypocrisy. Are the companies saying one thing but doing the opposite secretly?"

The Times article was headlined, "Tax-Exempt Groups Shield Political Gifts of Businesses." The article drew on voluntary corporate disclosure data, some of it collected by CPA, to report on corporations' multimillion-dollar giving to the U.S. Chamber of Commerce, which spends heavily on political advertising and is not required to disclose its donors.

The secret spending of the tax-exempt groups also was the topic of a Chattanooga Times Free Press editorial, "Worse than superPACs," that mentioned CPA.

CPA Engages 86 Companies for Disclosure Index

In the process of compiling the second annual CPA-Zicklin Index of Corporate Political Accountability and Disclosure, CPA interacted with 86 companies belonging to the S&P 200 by Aug. 6.

for the SEC to determine what information is "material."

The Supreme Court had it right when it affirmed corporate political disclosure. On this I agree with Justice Antonin Scalia; in a CNN interview that touched upon *Citizens United*, he recently underscored the bedrock importance of disclosure:

"I think, as I think the framers thought, that the more speech, the better," Justice Scalia said. "Now, you -- you are entitled to know where the speech is coming from, you know, information as -- as to who contributed what. That's something else."

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Most companies provided clarification of their publicly available information; some pointed to additional information that CPA may have missed, and helped make corrections where necessary. Release of the report is expected in September.

Debating Corporate Political Spending, Disclosure

Leo Hindery Jr., CEO of InterMedia Partners, a venture capital firm, examined in an opinion piece for Reuters the broader implications of corporate political spending. The essay was headlined, "We need to make campaign finance a civil rights issue."

Lawrence Gostin of Georgetown University Law Center wrote a commentary for the Journal of the American Medical Association Forum entitled, "The Perverse Effects of Corporate 'Speech' on the Health Reform Debate."

Bloomberg Reports on Rising Political Disclosure

Thirty-eight companies in the S&P 500 Index have adopted policies to reveal to investors whether they donated political money to super PACs and other outside groups, up from five in 2010, according to a Bloomberg article. All of the companies made their pledges after engagement by CPA partners.