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Hindering the S.E.C. From Shining a Light on Political Spending

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Lucian A. Bebchuk, a professor at Harvard Law School, and Robert J. Jackson Jr., a professor at Columbia Law School, served as the principal drafters of the rule-making petition submitted to the S.E.C. by the Committee on Disclosure of Corporate Political Spending and are the co-authors of the study "Shining Light on Corporate Political Spending."

The omnibus budget agreement adopted by Congress includes a provision that prevents the Securities and Exchange Commission from issuing a rule next year that would require public companies to disclose their political spending.

This unusual Congressional intervention in S.E.C. rule-making is a troubling development both for investors and for the agency.

The S.E.C. has long had broad authority to decide what information public companies must disclose to their investors. When Congress first mandated such disclosure authority in 1934, it expressly chose to give the agency wide discretion to make such decisions.

In the decades since, the agency has adjusted disclosure requirements to respond to the evolving needs of investors.

In recent years, investor interest in receiving information regarding whether, and how, public companies spend shareholder money on politics has been growing. Shareholder proposals requesting disclosure of such information have been the most common type of shareholder proposal at public companies.

In response to investor concerns, many companies in the Standard & Poor's 500-stock index have begun to disclose information on their political spending voluntarily. Still, for investors to obtain information about the large number of existing public companies, and to receive such information in a uniform and consistent manner, an S.E.C. rule would clearly be necessary.

In July 2011 we were co-chairmen of a bipartisan committee of 10 corporate and securities law professors that considered this issue and submitted a rule-making petition to the S.E.C. The petition urged the agency to develop rules requiring public companies to disclose their spending on politics.

To date, the agency has received more than 1.2 million comments on the proposal—far more comments than those submitted on any rule-making petition in the history of the agency.

An overwhelming majority of comments, including from a large number of institutional investors, supported the petition.

To be sure, some opponents of disclosure, such as the United States Chamber of Commerce, have provided the S.E.C. with detailed submissions in opposition to rule-making, but they have failed to articulate persuasive reasons for a lack of transparency.

For example, the chamber has argued that requiring disclosure of corporate political spending would be unconstitutional. But in the 2010 Citizens United ruling, which said that the government may not ban political spending by corporations, the Supreme Court upheld the disclosure rules challenged in that case. In a recent article, we reviewed the full range of objections that have been raised in the S.E.C. file and concluded that, either individually or collectively, they do not provide an adequate basis for keeping investors in the dark about corporate political spending.

Nonetheless, there has been political pressure to keep the commission from considering such rules on the merits.

In 2013, the S.E.C placed the consideration of the subject on its regulatory agenda. But Mary Jo White, the commission chairwoman, encountered significant to remove the petition from the agenda during her first major hearing on Capitol Hill. The S.E.C. subsequently delayed consideration of rule-making in this area. Now, opponents of transparency have succeeded in using the budget process to keep the S.E.C. from issuing such a rule for another year.

The rider included in the omnibus budget bill reflects opponents' interest in avoiding a debate on the merits of disclosure to investors. Although the S.E.C. file includes numerous detailed submissions, the rider was added in a quick, back-room move without any hearing or adequate consideration of these arguments.

The rider also undermines the standing of the S.E.C. It reflects a judgment that the commission and its staff, which have served the investing public well for generations, cannot be trusted to reach an appropriate decision about whether and how to develop rules in this area. Legislators should not tie the hands of independent and expert regulators and prevent them from doing their job.

And the rider undermines the critical premises on which the Supreme Court has relied in its Citizens United decision. In this consequential decision, the court reasoned that “the procedures of corporate democracy” would ensure that political spending by public companies does not depart from shareholder interests. Without disclosure to investors, however, such procedures cannot be expected to limit or prevent such departures.

In a recent talk, Justice Anthony M. Kennedy, the author of the Citizens United decision, expressed a concern that disclosure of corporate political spending was “not working the way it should.”

The omnibus agreement’s rider, however, seeks to maintain this sorry status quo, preventing the S.E.C. from issuing a rule ensuring that disclosure works the way it should.