How the U.S. Securities and Exchange Commission Could Require Transparency for Corporate Political Expenditures

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Ever since the Supreme Court ruled in *Citizens United v. FEC* that corporations can spend an unlimited amount of money on political ads, policy makers have struggled to find workable ways to address the new influx of money into U.S. elections. Short of the arduous process of amending the United States Constitution, it may not be possible to ban or strictly limit big money contributions in politics, including from corporations. But what about making corporate contributions much more transparent, easily seen by the public? Both good government advocates and investors, the people who own publicly traded companies, find this idea attractive. Currently, even though corporations have a constitutional right to make political expenditures they have no duty to report such spending to the voting public or investors. But there may be a way to enforce transparency for corporate political expenditures through regulations issued by the U.S. Securities and Exchange Commission (SEC), which already requires various disclosures by publicly traded firms.

The Commission's Existing Authority

The Securities and Exchange Commission already enforces regulations in the area of money in politics, under the authority granted to it by two rules (MSRB Rule G-37 and Rule 206(4)-5) and under the Foreign Corrupt Practices Act of 1977 (FCPA). The Foreign Corrupt Practices Act was a reform that was crafted at the request of officials who then led the Securities and Exchange Commission, after the Watergate investigation revealed that several publicly traded companies had given illegal campaign contributions to the Nixon campaign and other election campaigns. The SEC also found that these contributions were not properly recorded in the books and records of the offending corporations. These revelations troubled the Securities and Exchange Commission and prompted it to launch a wide-ranging investigation into the political spending of U.S. corporations both domestically and abroad. After the results documented many previous illegal contributions in the United States by hundreds of firms, as well as instances of bribery abroad, the Securities and Exchange Commission urged Congress to enact the Federal Corrupt Practices Act. Under the authority of that law, the Commission fines corporations for bribing foreign officials to obtain or keep business.

Bribery abroad is not the only sort of political transgression regulated. The Securities and Exchange Commission has also been a leader in battling so-called pay to play schemes in both the U.S. municipal bond market and the public pension fund market. "Pay to play" is the catch phrase that captures the *quid pro quo* variety of corruption that can occur between governmental officials and governmental contractors. In a typical pay to play scenario, a government contractor gives campaign contributions to an elected official who has the power to grant a government contract – thus the contractor uses election campaign cash to pay to play with the elected official, to get profitable business from public decisions that official can influence.

Since the mid-1990s, the Municipal Securities Rulemaking Board has used Rule G-37 to regulate pay to play in the municipal securities market by limiting the size of contributions that professionals in the municipal

securities business can give to state and local officials who are issuing municipal bonds. The rule also requires a cooling off period if the contribution limits are exceeded. In this way, businesses that want to contract with municipal governments face a choice: they can either give big campaign contributions or underwrite municipal bonds, but they cannot do both at the same time under Securities and Exchange Commission rules.

Finally the Commission also regulates pay to play in the public pension fund market. Public pension funds invest money for the benefit of retired governmental workers. Typically these investments are done by financial advisers who charge commissions, a process that makes them in essence government contractors. Like the underwriters in the municipal bond market, investment advisers to public pension funds may be enticed to give campaign contributions in the hopes of securing more business from the funds. Under the Securities and Exchange Commission's Rule 206(4)-5, campaign contributions from investment advisers to elected officials who control public pension funds are limited in size. Again, the investment adviser is given a choice of either giving large campaign contributions or doing business with public pension funds, but they may not do both at the same time.

The Next Step is Easy to Take

These precedents show that the Securities and Exchange Commission is perfectly capable of regulating campaign spending. In fact, it has tackled complex issues in this area – foreign bribery and the building of barriers between elected officials and companies that stand to benefit from decisions they influence about public financial investments. How hard would it be for the Commission to tackle issues of transparency in the new corporate campaign finance environment?

In 2011, a group of corporate law professors petitioned the Commission to ask it to define and implement a new rule requiring transparency for corporate political spending. This would be straightforward, easier to execute than current kinds of investigations and regulatory enforcement actions the Commission now undertakes, because publicly traded corporations would simply be required to inform their shareholders how much they are spending, and where, for election campaigns. The Securities and Exchange Commission would institute and oversee a new step in corporate record-keeping and reporting – one that, by the simple fact of happening in a prompt way after campaign contributions are given, would enlighten both investors in publicly traded firms and the American public overall.

Over one million public comments have urged the Securities and Exchange Commission to adopt this common sense reform. This is the natural next step in SEC's already well established tradition of regulating political behaviors of U.S. corporations that have the risk of facilitating corruption.

Read more in Ciara Torres-Spelliscy, "Safeguarding Markets from Pernicious Pay to Play: A Model Explaining Why the SEC Regulates Money in Politics." *Connecticut Public Interest Law Journal* 12, no. 2 (2012-2013).