One Thing Can Stop Corporations From Buying the 2012 Election: Transparency

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By James Kwak
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As the 2012 campaign season draws near, one of the major questions is what impact corporate spending will have on the balance of power in Washington and around the country. Money has been an increasingly important factor in American politics in the last 50 years, as big businesses ramped up their campaign contributions and lobbying to fight off a perceived wave of liberal, union-backed legislation that crested during the Nixon administration. But the past three years have shown the naked face of corporate money in politics, as businesses have come out swinging against financial reform, health care reform, climate change legislation, and just about anything else proposed by the Obama administration.

Thanks to the proliferation of gray-area organizations that are not required to disclose where they get their money from, corporations were already able to spend large amounts of money on politics essentially in secret. The Citizens United decision, which overturned federal restrictions on corporate spending, only opened the door further to corporate influence in elections.

One partial solution is to require public corporations to disclose how much money they are spending on politics and where it is going. After all, in Citizens United, the Supreme Court relied on shareholders to monitor corporate political spending and ensure that directors and officers are only engaging in political activity that is in the company's (and the shareholders') interests. Last month, an all-star committee of corporate law professors* petitioned the Securities and Exchange Commission to write rules requiring corporate disclosure of political activities.

Although political contributions may not seem as important to investors as, say, a company's income statement and balance sheet, the SEC certainly has the power to require their disclosure. The Securities Exchange Act of 1934 authorizes the SEC to write regulations that are "necessary or appropriate in the public interest or for the protection of investors." There is a strong argument that mandatory disclosure is in the public interest, since it helps voters know who is paying for the attack ads they see on TV. In addition, disclosure also helps investors make ordinary investing decisions. The more money a company spends on politics, the lower the profits available for shareholders--unless it is earning a positive rate of return on its political spending.

Now, public companies don't have to disclose how they spend every single dollar. To a large extent, what they do is left up to the judgment of executive managers, who are periodically evaluated by the board of directors, who are nominally elected by shareholders. This is to protect companies from having to disclose huge amounts of information and from being micromanaged by their shareholders. So arguably the board could monitor political spending and make sure it is in the shareholders' interests. But that argument, as people say in law school, "proves too much." If we could always trust boards to ensure that companies only act in the shareholders' interests, then we would hardly need any disclosures at all.

There are certainly other areas where disclosures are already required in a level of detail out of proportion to their immediate economic significance. The most obvious is compensation of directors and officers. Here, the fear is that the directors and officers have a conflict of interest--their bank accounts versus the shareholders' bank accounts--and that therefore the usual mechanisms of corporate governance may not work.

The exact same thing is true of political spending. Corporations certainly do spend money on political activities that they expect to improve their bottom lines: hence the hundreds of millions of dollars financial institutions spent on lobbying against financial reform. But if their political spending is left solely up to executives and maybe directors, those people also have personal interests that they can advance by directing money to their preferred political organizations. For example, corporate executives often own a lot of stock, so they have an incentive to support politicians who will be friendly to their companies. But they are also rich people, so they have an incentive to support politicians who will reduce taxes on the rich (and especially taxes on gains from stock)--even though lower taxes mean less money for the infrastructure spending that many businesses want and even the Chamber of Commerce wants. (For more on this topic, see Part II.C of this paper by Lucian Bebchuk and Robert Jackson.)

Even in Citizens United, eight justices assumed (in Part IV of Justice Kennedy's opinion) that "corporate democracy" would enable shareholders to ensure that public companies' political activities are in their interests, not their executives' interests:

"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."

But democracy requires information, and our corporate democracy, such as it is, has no equivalent to the Freedom of Information Act. If shareholders are supposed to prevent corporate political power from being abused, at a minimum they need information. And if Congress won't give it to them, then the SEC is the only thing standing between a real democracy and government by the incorporated and for the incorporated.

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*That committee includes Lucian Bebchuk, director of the Harvard Law School Program on Corporate Governance, with which I am affiliated (I am an unpaid fellow for this academic year).