



# Activist Investing in Post-*Citizens United* America

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## Introduction

In the wake of last year's U.S. Supreme Court decision in *Citizens United v. Federal Election Commission*, the scope of political speech protected under the First Amendment has substantially expanded. Whereas corporations and unions were previously prohibited from directly advocating for and against political candidates by spending funds from their general treasury, the Supreme Court has now recognized that those viewpoints are important components of the national debate by which we Americans govern ourselves, and that the First Amendment does not permit the government to suppress or stifle those voices.

But this decision has been controversial. Many object to the *Citizens United* decision because of a general view that money spent in the political process is somehow inherently corrupting or distorting. Others – especially those from within the environmental and labor movements – see for-profit corporations as their political enemy and seek partisan or ideological advantage by squelching corporate political speech while their own speech remains unencumbered.

As a result, there have been two parallel attempts to water-down the impact of *Citizens United*. The first has been through legislation and political action. Last year, the DISCLOSE Act, which would have placed burdensome requirements on

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corporate political speech, failed to secure passage in Congress. Similar actions have included a draft executive order that would require government contractors to publicly report their political spending, including support for trade associations and 501(c)(4) non-profit organizations, regulatory efforts such as recent SEC rules effectively prohibiting most state and local political contributions by investment advisors, and an Securities and Exchange Commission petition by certain law professors requesting regulations requiring additional disclosure of political activity.<sup>1</sup>

The second track, however, is ongoing: the attempt by politically-active, mostly left-leaning groups to engage in “activist investing” with the aim of limiting corporate political speech. These shareholding activists are, essentially, lobbyists for political causes.

This paper provides a brief review of “activist investing,” whereby politically-concerned individuals and groups purchase a minimum number of shares in a company, not solely or principally with the intention of maintaining those shares for their wealth-generating potential, but largely to ensure that they can force corporate votes on political initiatives concerning global warming, labor

<sup>1</sup> [http://www.washingtonpost.com/politics/obama-weighs-disclosure-order-for-contractors/2011/04/20/AFBw7qEE\\_story.html](http://www.washingtonpost.com/politics/obama-weighs-disclosure-order-for-contractors/2011/04/20/AFBw7qEE_story.html); <http://www.sec.gov/rules/final/2010/ia-3043.pdf>; <http://www.sec.gov/rules/petitions/2011/petn4-637.pdf>.

relations, and political spending. We are not discussing “activist investors” who seek changes to management, strategy, or governance in an attempt to increase the value of their own (usually substantial) investments.<sup>2</sup>

## I. What *Citizens United* actually says

*Citizens United*<sup>3</sup> held that independent political speech by corporations, unions, and similar associative entities is protected by the First Amendment. Of course, the usual rules of corporate law apply to political speech: the same actors, duties, laws and regulations apply to decisions concerning political spending as apply to all other corporate decisionmaking. But the Supreme Court clearly believes that corporate participation in the nation’s political debates is a positive outcome. In the Court’s words “[p]olitical speech is indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.”<sup>4</sup>

Corporate speech is not an evil to be merely tolerated in pursuit of a higher good: rather, it is a good thing that plays an important role in our national conversation. One reason the Court ruled that corporations and unions should be allowed to speak is simply that “[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content.”<sup>5</sup> Where unions and advocacy groups have a constitutional right to engage in unlimited speech, corporations should not self-censor in responding. As Justice Scalia has noted, “to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate.”<sup>6</sup>

**“Americans are entitled to have their political choices informed by a broad range of interests, including those of corporations.”**

The trouble with corporate self-censorship is that it silences an array of viewpoints, while allowing others to flourish. Allowing unlimited political speech by unions or

environmental advocacy groups, while silencing business organizations and industry advocates, creates an unbalanced and misleading public conversation on issues vital to American politics. Where more than half of Americans own shares of publicly traded companies, and many more owe their income to corporate employment (and, by extension, a healthy corporate balance sheet), corporations represent a vital economic viewpoint. Americans are entitled to have their political choices informed by a broad range of interests, including those of corporations. That is the lesson of *Citizens United*.

2 Carl Icahn is a prominent example. See <http://www.icaahnreport.com>.

3 *Citizens United v. FEC*, 558 U.S. 50, 130 S. Ct. 876 (2010).

4 130 S. Ct. at 904.

5 130 S. Ct. at 899.

6 130 S. Ct. at 929 (Scalia, J., concurring).



## II. When social values trump shareholder value

This paper aims to explain what is happening with modern shareholding activists who are attempting to suppress the political speech of corporations using the guise of protecting shareholder interests to advance a partisan and ideological interest. The paper does not, however, take the position that social values have no role in the investment process, or that shareholders should not decide that certain social values are more important than maximizing profits.

The practice of shareholders or outside activists trying to convince corporations to adopt practices that might limit profits is nothing new. A 1998 paper begins:

It seems that socially activist shareholder pressure on corporations has become a fact of life. In 1987, the *American Medical Association* called on medical schools and their parent companies to divest tobacco holding stocks...<sup>7</sup>

Perhaps the most notable example of activists pressuring companies to allow social values to trump profit seeking was the movement to pressure U.S. companies to stop doing business in South Africa during the apartheid era, while also forcing pension funds (primarily public) to divest themselves of companies that did business in South Africa. As the above-referenced report documents:

In the spring of 1980, the Protestant and Roman Catholic Churches threatened to divest \$250 million from banks doing business in South Africa... The Catholic, Episcopal, Lutheran, and Methodist churches subsequently divested themselves of firms with operations in South Africa or firms not adhering to anti-Apartheid principles.<sup>8</sup>

As a result of a widespread campaign urging divestment of corporations doing business in South Africa, driven by activist shareholders among others, many corporations ceased to do business in South Africa or wound up selling their operations to other investors. The effect on profits appears to have been negligible, but any investment losses were viewed, explicitly, as an acceptable cost to pay for a morally-preferred outcome.<sup>9</sup>

The anti-Apartheid campaign was clearly an example of social values trumping shareholder value, whereby profit opportunities were passed over in favor of promoting moral goals. This practice is

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7 Teoh, Siew Hong; Welch, Ivo; and Wazzan, C. Paul. *The Effect of Socially Activist Investment Policies on the Financial Markets: Evidence from the South African Boycott*, p. 2, March 1998. UCLA Working Paper #16-94.

8 *Id* at page 22

9 *Id* at page 33. See also Ngassam, Christopher. *An Examination of Stock Market Reactions to U.S. Corporate Divestitures in South Africa*. March 1992, College of Business Administration, Department of Finance, University of Delaware.

**“While there is nothing inherently objectionable about investors choosing to place moral, social, and political considerations over profits, it is problematic when it is disguised.”**

often called socially responsible investing.

Socially responsible investment is not a new phenomenon either. Generally it refers to funds that, while trying to generate a

return for investors, do not invest in companies that engage in what the fund believes are either unacceptable practices or questionable lines of business. Examples include LKCM Aquinas Funds, which adheres to the United States Conference of Catholic Bishops Socially Responsible Investment Guidelines and, among other criteria, does not invest in companies connected to abortion, contraception, or embryonic stem cell research,<sup>10</sup> and PAX World Investments, which avoids “investing in companies that are significantly involved in the manufacture of weapons or weapons-related products, manufacture tobacco products, or engage in unethical business practices.”<sup>11</sup>

The modern practice of “activist shareholders” can be distinguished from these past practices in two significant ways:

1. Prior efforts to pressure corporations to change their practices to align with the social, political, and ideological goals of activists recognized that their aim was not the maximizing of profits, but instead to forego profits in pursuit of moral objectives. Today’s “activist shareholders” rarely admit that they are seeking to use their investment in order to advance a particular social, political, or ideological agenda. Instead they often claim that adopting their preferred policies will aid in profit maximization, and thus it is in the interest of shareholders seeking the best returns to support their agenda.
2. Socially responsible investment in the past generally meant divesting from companies engaging in practices or lines of business that investors objected to (the South Africa boycott), or investing in companies that already were aligned with the social, moral, political, and ideological principles of the investor (LKCM’s refusal to invest in companies connected with abortion, for instance). Today, investment is made in companies known not to align with an investor’s principles, with the goal of trying to get the company to change its practices.

While there is nothing inherently objectionable about investors choosing to place moral, social, and political considerations over profits, it is problematic when it is disguised. While presenting themselves as trying to maximize shareholder returns, “shareholder activists” are instead pushing corporations to adopt policies in order to advance social, moral, political, and ideological agenda that is often unconnected to or even damaging to a company’s profit-maximizing efforts.

<sup>10</sup> [http://www.aquinasfunds.com/catholic\\_value\\_investing.php](http://www.aquinasfunds.com/catholic_value_investing.php).

<sup>11</sup> <http://www.paxworld.com/about/welcome-from-the-president/>



Today, one of the primary foci of these “shareholder activists” is the silencing of a political voice they find unwelcome, that of the for-profit firm.

### **III. Modern shareholding activists are driven by partisan and ideological considerations.**

As noted previously, corporate officers are often confronted with shareholding activists who claim to represent the interests of a company’s shareholders but are actually pursuing a partisan or ideological agenda that is unrelated or contrary to the actual, profit-maximizing interest of shareholders. To highlight this difference in interest between economically-motivated shareholders and politically-motivated shareholders, we will refer to the latter group as “shareholding activists.”

This paper examines three groups that are central to the effort to silence the political voices of corporations through shareholder resolutions and public pressure.

#### **A. The Center for Political Accountability**

The Center for Political Accountability (CPA or “the Center”) holds itself out as a “non-partisan organization... formed to address the secrecy that cloaks much of the political activity engaged in by companies and the risks this poses to shareholder value.”<sup>12</sup> In actuality, a review of the Center’s activities discloses a concern not for the health of American corporations, but for the content of corporate political speech. Consider the much-touted example of Target Corporation.

During the 2010 election cycle, Target gave \$150,000 to an organization called MN Forward. That group was formed to advocate a business-friendly policy climate in Minnesota, and supported candidates on that basis. This support was extended to Rep. Tom Emmer, the Republican candidate for governor. Representative Emmer had made lower corporate tax rates a central theme in his campaign, and as Target was headquartered in the state, his election would have directly benefitted Target shareholders.

Emmer also opposed gay marriage. In a March, 2011 editorial in the Huffington Post,<sup>13</sup> the Center’s founder, Bruce Freed, noted that Target Corporation was “Target-ed” by activists for supporting Emmer’s candidacy, ostensibly for this reason. A predictable campaign was organized against Target, largely centering on accusations that Target’s behavior was hypocritical since its internal company policies were friendly to gay rights. Target retreated, voluntarily agreeing to changes in its political spending policies, including a requirement of approval by senior corporate officers and regular reports to a committee of the Target Board of Directors.

But note Target’s defense of its actions. As its CEO noted, Target’s contribution had nothing to do

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12 <http://www.politicalaccountability.net/index.php?ht=d/sp/i/870/pid/870/pid/190>

13 [http://www.huffingtonpost.com/bruce-freed/how-companies-can-limit-p\\_b\\_836088.html](http://www.huffingtonpost.com/bruce-freed/how-companies-can-limit-p_b_836088.html).



with gay rights: it was intended to support “a business climate conducive to growth.”<sup>14</sup> Moreover, while Target’s CEO apologized to the company’s employees for any offense given, he did not seek a return of the questioned contribution or pledge to avoid political spending in the future

A look at those pushing back against Target’s donation reveals, unsurprisingly, a distinctly partisan agenda. The liberal-leaning group MoveOn.org and gay rights advocacy group Human Rights Campaign (who gave \$150,000 to Emmer’s opponent) took the lead. Moreover, another Minnesota based retailer – Best Buy – also donated \$100,000 to MN Forward, but did not bear the brunt of activist ire. MoveOn.org’s director of political advocacy admitted that Target was her focus largely because of its “reputation as a progressive alternative to Wal-Mart” in regards to labor and unionization issues.

**“Despite the Center’s claims, Target did not capitulate to this politically motivated, and fleeting, campaign.”**

While the Center for Political Accountability wants Target’s story to serve as a caution to companies, and as a bludgeon to demand voluntary

limitations on corporate political spending, Target teaches a different lesson. First, the objection to Target was based on precisely the usual political factors: partisan and ideological politics. Second, Target’s donation was directed toward entirely different ends: the election of public officials whose views on taxation and macroeconomic policy promised the best economic and jobs climate for Target’s operations and, by extension, shareholder value. Third, despite protests, Target’s stock price was not fundamentally impacted by its spending, and it did not choose to give up participation in future elections. Despite the Center’s claims, Target did not capitulate to this politically motivated, and fleeting, campaign.

If the Center’s argument that political participation can harm a company’s shareholders is false or incomplete, what then guides its activities?

CPA is funded in substantial part by left-leaning foundations, including George Soros’s Open Society Institute and the Stern Family Fund, the former of which provided nearly a third of CPA’s funding from 2004 to 2009. Additional funding has come from the ARCA Foundation, an organization committed to the belief that “the increasingly dominant role of corporations in our Democracy is serving as a barrier to [economic] recovery.”<sup>15</sup> Additional funding has come from the Educational Foundation of America, a grant-making organization that presses corporations to take particular steps in support of the environmental movement.<sup>16</sup>

CPA’s funding overlaps substantially with that of various groups in the self-styled campaign finance “reform” community, which believes unfettered political speech by corporations is a substantial

14 <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/18/AR2010081806759.html?sid=ST2010081900210>.

15 <http://www.arcafoundation.org/focus.htm>

16 <http://www.efaw.org/invest.htm>



threat to our political system and, in unguarded or careless moments, identifies political speech by corporations as a substantial hurdle to the implementation of a larger, primarily left-leaning political agenda.

IRS records of foundation giving shows seven foundations that fund CPA (two additional donor-advised funds are listed): the ARCA Foundation, Open Society Institute, Rockefeller Family Fund, Carnegie Corporation of New York, Educational Foundation of America, JEHT Foundation, and Park Foundation.<sup>17</sup> All of these foundations are (or have been in the past, in the case of the JEHT Foundation, which went under as a result of the Bernie Madoff Ponzi scheme) substantial donors to organizations such as Democracy 21, Campaign Legal Center, the Brennan Center, Public Campaign, Public Citizen, and Common Cause, among the leading organizations in the country working to prohibit or at least sharply curtail political speech by corporations.

**“CPA should be viewed, accurately, as a political activist organization...”**

While the arguments of CPA and shareholder resolutions tied to them deserve to be evaluated based on their own merits, those supporting CPA have shown little interest in promoting the maximizing of profits by corporations, and more often view corporations as political and ideological adversaries that should be denied the right to speak out in the political process. This makes it difficult to accept that CPA’s true mission is to advance the interests of shareholders and improve returns for investors.

Nor are CPA’s leadership and activities neutral. Bruce Freed, the president and founder of CPA and a former Democratic congressional staffer, has worked closely with shareholding activists to push a particular policy agenda. As just one example, Mr. Freed joined Walden Asset Management in an August 2010 letter to corporations sitting on the U.S. Chamber of Commerce’s board, urging them to distance themselves from the Chamber because of its policy positions concerning global warming. Mr. Freed signed that letter in his role with CPA, and not in a private capacity. That letter had nothing to do with good governance, or political transparency: it was instead an attempt to influence corporate behavior in a way which, regardless of its merits, is not fundamentally concerned with shareholder value or aimed at boosting investment returns.

CPA’s Associate Director, Valentina Judge, previously worked as a Research Analyst at the Service Employees International Union. CPA’s General Counsel is Karl Sandstrom, a former counsel to the Democratic National Committee who chaired the Department of Labor Administrative Review Board under President Clinton. CFO Michael P. Novelli served as Maryland coordinator for Senator John Kerry’s 2004 presidential campaign. CPA Staff Associate Aaron Stanley joined CPA from the Government Accountability Project, a non-profit funded by George Soros and other foundations and founded to “promote... corporate accountability by protecting whistleblowers.” CPA’s Editor, Peter Hardin, also works for Justice at Stake, a Soros-funded non-profit that has been

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<sup>17</sup> Information available through FoundationSearch.com, a paid subscription service that reports foundation giving based on 990 tax reports filed by foundations



highly critical of business efforts to promote state-level tort reform and involvement in judicial elections. His web site states that his purpose is “to use the power of story telling for social change.”

Nothing is inherently wrong in any of these activities or beliefs. But it should be clear that while CPA claims to represent a considered approach to maximizing shareholder value, it in fact supports a partisan ideology, and seeks to enlist corporate support for particular political causes. CPA is within its rights to do this; it does not have a fiduciary duty to the shareholders of public companies. But CPA should be viewed, accurately, as a political activist organization, rather than a group that focuses on proper corporate governance, transparency for the benefit of investors, or improving performance and increasing profits.

## B. Walden Asset Management and NorthStar Asset Management

In addition to advocacy organizations such as CPA, corporations are likely to be approached by “activist” funds. Such funds stand in a different position to a corporation, as they represent not interests but actual shareholders who have chosen to invest with companies that espouse certain political goals. But the mere fact that such funds represent a (usually minor) number of voting shares does not mean that they are motivated by an interest in the economic value of the

corporation as a whole. Two prominent examples are Walden Asset Management and NorthStar Asset Management.

**“Walden’s shareholder resolution record has traditionally focused largely on environmental issues.”**

Walden Asset Management is a division of an employee-owned, Massachusetts-chartered company that provides investment management services to clients. Walden bills itself as a “leader in socially responsive investing since 1975, managing [its] clients’ assets to achieve their specific financial and environmental, social and governance (ESG) objectives.”<sup>18</sup> As part of this mission, Walden has filed a number of shareholder resolutions dating back to 1987.<sup>19</sup> In 2007, it created an investor network with the American Federation of State, County and Municipal Employees (“AFSCME”) in order to file these resolutions, and it has also worked with the Service Employees International Union (“SEIU”) in filing shareholder resolutions.

Walden’s shareholder resolution record has traditionally focused largely on environmental issues.<sup>20</sup> It has demanded that corporations increase their commitment to solar energy, cease supporting oil exploration in the Arctic National Wildlife Refuge, and develop policies concerning quantitative U.S. recycling goals and climate change policies. It has also brought resolutions that would tie executive compensation to “social criteria,” and require companies to adopt International Labour Organization standards.

A particular, recent interest of Walden has been political spending by industry groups. Much like

<sup>18</sup> <http://www.waldenassetmgmt.com>

<sup>19</sup> [http://www.waldenassetmgmt.com/social/action/library/resolution\\_history.html](http://www.waldenassetmgmt.com/social/action/library/resolution_history.html)

<sup>20</sup> *Id.*



the CPA, Walden argues that corporate participation in industry groups such as the U.S. Chamber of Commerce and National Association of Manufacturers poses reputational risks for companies. Indeed, Walden has approvingly quoted the President of CPA as noting the “serious bottom line risks for companies” who engage with trade associations opposed to certain climate-change-related policies.<sup>21</sup>

Of course companies join, and pay dues to, industry associations for a number of reasons, including shared public relations, lobbying, and political interests. Given the broad range of issues relevant to American businesses, it would be surprising if industry associations and their members always agreed. But noting the U.S. Chamber of Commerce’s “opposition to legislation and regulation addressing... climate change, healthcare, political spending transparency, and Wall Street reforms,”<sup>22</sup> Walden has explicitly sought to prevent companies from supporting the Chamber<sup>23</sup> or sitting on its Board of Directors.<sup>24</sup>

Regardless of Walden’s subjective beliefs, there is no evidence that membership in an industry group is a risk to shareholder value. Neither Walden nor its allies have ever provided any. But there is substantial reason to believe that Walden and its investors have certain political beliefs, and choose to bring shareholder resolutions in large part to advance those beliefs. And there is no doubt that many of Walden’s activism priorities have a decidedly partisan tint.

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**“NorthStar holds shares for the sole purpose of making political points.”**

Similarly, NorthStar Asset Management advertises itself as an organization

investing funds using a “socially responsible approach.”<sup>25</sup> This includes “avoiding... companies with poor track records in human rights, the environment, employee relations, and corporate citizenship” as well as entire industries such as “weapons manufacture or nuclear energy.” Of course, this philosophy tends toward particular, partisan beliefs. But to make that connection clear, NorthStar also avoids “companies with a track record of funding right wing, oppressive organizations through their philanthropy.” Specific issues tackled by NorthStar have included: complaints concerning the “predatory” fees Western Union charges for “remittances” from the U.S.

21 Walden Asset Management, Press Release, *Shareholders Urge 14 Top Companies to Challenge U.S. Chamber of Commerce and National Association of Manufacturers over Climate Change Position*, October 14, 2009 (hereafter “October 2009 Press Release”). Available online: <http://www.ipjc.org/programs/ChamberClimatePressRelease1009.pdf>.

22 Walden Asset Management, *Research and Engagement Brief*, January 2011.

23 October 2009 Press Release.

24 Walden Asset Management, Press Release, *Investors Announce Challenges on Political Spending to Corporate Responsibility Leaders: Role as U.S. Chamber of Commerce Board Members Highlighted*, November 4, 2010. Available online: [http://www.waldenassetmgmt.com/social/action/Pol\\_Spending\\_PR.pdf](http://www.waldenassetmgmt.com/social/action/Pol_Spending_PR.pdf).

25 <http://northstarasset.com/investment>

to developing nations,<sup>26</sup> climate change,<sup>27</sup> and demands that PepsiCo implement a “human right to water” policy to accompany its manufacturing activities.<sup>28</sup> NorthStar has also advocated against genetically modified foods<sup>29</sup> and increases in corporate pay.<sup>30</sup>

Further underscoring its unusual view of shareholder value, NorthStar advises its clients to divest from certain companies, but then continues to hold “the minimal number of shares required by law” to engage in corporate activism.<sup>31</sup> In short, NorthStar holds shares *for the sole purpose of making political points*, having already explicitly limited their clients’ exposure to the actual

economic effects of a corporation’s decisions. This is perfectly legal.

But it shows that NorthStar’s policy preferences are unrelated to increasing shareholder value. NorthStar’s clients may wish to hold nominal numbers of shares in order to advocate, but

**“NorthStar, and similar shareholding activists simply do not represent shareholders at large – which is why their proposals are generally defeated.”**

this approach does nothing for a company’s millions of other shareholders. Indeed, the fact that NorthStar encourages its own clients to hold only nominal shares in these companies suggests that NorthStar seems to presume that it will not increase investment value by getting companies to adopt its advice.

NorthStar has been in the news recently, thanks to its attempt to require Home Depot to submit its political spending to an “advisory” shareholder vote. NorthStar argued that shareholders have “few choices if they do not support the electioneering spending policies of a company. They can seek to vote the board out of office, or they can sell their shares. Many commentators have noted that this new development [corporate electioneering spending in the wake of *Citizens United*] endangers the corporate governance process by potentially politicizing the relationship between shareholders and their companies...” While the SEC allowed a shareholder vote to go forward,<sup>32</sup> NorthStar’s proposal was defeated.

While NorthStar claims to be distressed by any “politicization of the relationship between

26 <http://northstarasset.com/mediacontent/NS2Q07.html> (approvingly quoting an activist statement that Western Union’s CEO is “lining her pockets with the money earned by Mexican dishwashers, Chinese construction workers and Jamaican childcare providers”).

27 <http://northstarasset.com/mediacontent/NS4Q06.html>.

28 <http://northstarasset.com/mediacontent/PRpepsiwater.html>.

29 <http://northstarasset.com/wp-content/uploads/NorthStar2009ProxyBooklet.pdf>, at 13.

30 <http://northstarasset.com/mediacontent/PR Exxon2.html>.

31 <http://northstarasset.com/mediacontent/NS4Q06.html> (“We are asking socially responsible investors and others who care about sustainability to join us in divesting from ExxonMobil. As shareholder activists, we will retain the minimal number of shares required by law to continue to engage ExxonMobil’s management...”).

32 <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2011/northstarasset032511-14a8.pdf>.



shareholders and their companies,” in fact their actions do much to further precisely such politicization. By insisting on a particular political agenda, divorced from the maximization of shareholder value to which corporate management is legally bound, NorthStar creates a tension between shareholders and their companies. For instance, NorthStar’s Home Depot resolution would have created a yearly battle for the corporation’s political spending, a debate that would likely have been highly-partisan, less-than-sober, and unlikely to advance the legitimate ends of a public corporation. NorthStar, and similar shareholding activists simply do not represent shareholders at large – which is why their proposals are generally defeated.

### C. New York City Pension Funds

Among the largest institutional investors are public funds run by elected officials. And politicians can reasonably, and fairly, be expected to have a political agenda. One clear example is New York City’s Comptroller, John Liu. A democrat, Mr. Liu is responsible for pension funds worth over 100 billion dollars.<sup>33</sup> New York City Public Advocate Bill de Blasio also sits on those funds’ boards. But their approach to managing the retirement of New York public servants involves significant activism, including unsuccessful attempts to force corporate disclosure of non-material political spending.

**“The goal is not disclosure. It is silence.”**

As recently as this past proxy season, the Comptroller submitted shareholder proposals to six corporations, demanding disclosure of political spending.<sup>34</sup> Those proposals were defeated. But Mr. Liu and his ally, de Blasio, make explicit what is only implicit in other contexts: that the goal of activist investing is not shareholder value, but a particular policy outcome. In Mr. de Blasio’s words: “[w]orking with pension funds here in New York and nationwide we can continue to get corporations to reject the political activities afforded them by *Citizens United*.” The goal is not disclosure. It is silence.

Nor is this surprising. A review of the trustees of these funds shows the strong union bias of New York’s public investments. While Messrs. de Blasio and Liu are the most prominent board members, the entire board membership is listed on each press release. To take but two examples, the board of the Teachers’ Retirement System includes three representatives from the United Federation of Teachers. And the New York City Employees’ Retirement System board includes the leaders of three local unions.

In short, public pensions funds can also exhibit partisan behavior. While arguing that their activism is geared toward greater shareholder returns, these politically-controlled funds in fact may

33 <http://www.reuters.com/article/2011/07/05/us-newyorkcity-pension-idUSTRE7644DN20110705>.

34 [http://www.comptroller.nyc.gov/press/2011\\_releases/pr11-01-006.shtm](http://www.comptroller.nyc.gov/press/2011_releases/pr11-01-006.shtm).

serve as tools for their politically-inclined boards.

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The Center for Political Accountability, Walden Asset Management, NorthStar Asset Management, and the New York City pension funds are merely examples of organizations seeking changes in how corporations engage in political speech. What these groups share, however, is a commitment to particular policy outcomes, and a desire to enlist corporations as political allies, or at a minimum to silence corporate speech with which they disagree. These arguments are phrased in the language of shareholder value, and that may be an accurate statement of these groups' subjective beliefs. But they are not politically neutral, are not primarily motivated by shareholder returns, and thus have interests that do not align with the responsibilities of corporate managers.

#### IV. The Fiduciary Duties Owed by Corporations Support the Considered Use of Political Speech

A number of institutional organizations are engaged in advocacy opposed to, or in favor of limits to, corporate speech. These groups include unions, pension funds controlled by elected officials, independent companies providing guidance on proxy voting, and public advocacy organizations. But all these organizations have certain political biases. And none owe a fiduciary duty to individual, retail owners of corporate stock. Thus, while they claim to speak for shareholders, they do so through a particular prism, and they are not held to account for the accuracy or wisdom of their views, either generally or as regards long-term shareholder value.

**“Fiduciary duties require a full appreciation of the substantial costs to muzzling corporate speech.”**

Corporate managers, on the other hand, owe fiduciary duties to *all* shareholders, regardless of the size of their holdings or the content of their politics. Corporate management is the

*only* group bound by the law to prioritize the long-term profitability of the firm as a whole.

Fiduciary duties are violated when corporations go along with politically-charged demands without a full investigation of their impact on shareholder value. Part of such an investigation is simply acknowledging that advocates for limited corporate speech are (1) motivated by concerns other than shareholder value, and (2) do not have the same responsibilities toward shareholder value as do corporate decision makers. Speculative claims as to public reaction or potential political action must be seen through this lens. Fiduciary duties require a concerted, data-driven review of these claims – and a full appreciation of the substantial costs to muzzling corporate speech.

This is true not only for direct expenditures for political speech, but also for a corporation's larger efforts to impact the business environment in which it functions. For instance, many resolutions seek disclosure of payments to “trade associations and other tax exempt organizations that are used for political purposes.”<sup>35</sup> Such a position can be problematic for several reasons. Corporations

35 <http://www.politicalaccountability.net/index.php?ht=d/sp/i/867/pid/867>.





provide payments to trade associations for a wide range of purposes: lobbying, networking, access to insurance or other membership benefits, and, yes, political advocacy toward generally business-friendly goals. These payments are seldom earmarked for a particular cause, or even for political spending in general.

**“...shareholding activists are asking corporations to give up their constitutional rights.”**

Disclosure of these payments (unless material) is unnecessary for the reasons already given concerning Target’s

contribution to MN Forward. But it is

still more troubling to require disclosure of contributions to trade associations given the multiple purposes for which such organizations exist, the lack of any linkage between most corporate payments to such groups and any particular political campaign or issue, and the clearly partisan purposes of those requesting the disclosure. Management’s fiduciary duties require weighing these multiple advantages when evaluating shareholder proposals.

We have already discussed the opinion of the Supreme Court that corporate speech is important to a fully-realized national conversation, especially concerning economic questions. Corporations are being asked to refrain from political speech in order to silence a *viewpoint*, a point-of-view concerning business profitability that is opposed for partisan reasons, and which can be swamped by anti-corporate political spending. And to the extent that such an outcome undermines or threatens shareholder value, corporate stewards have a fiduciary responsibility to respond.

## Conclusion

Put simply, shareholding activists are asking corporations to give up their constitutional rights because these shareholder activists oppose what they presume will be the existing political interests of these businesses. Corporations may do so, but political speech has the potential to impact the bottom-line, and have a direct impact on shareholder value. Consequently, the fiduciary duties that corporate managers owe shareholders cannot excuse a stampede to accommodate shareholding activists who, unlike those managers, do not owe such fiduciary duties. Corporations must understand that shareholding activists are, essentially, lobbyists for causes that may or may not have interests aligned with those of shareholders. Moreover, these activists have so far been unsuccessful in accomplishing their goals using the tools of corporate democracy. Perhaps this is because there is no evidence to date showing that political spending by corporations has a negative impact on share prices. And, conversely, every reason to believe that corporate silence will result in government policies less beneficial to corporate shareholders.

Before voluntarily giving up the right to speak in our democracy, corporations should be fully aware of who is asking them to do so, and their agenda in making the request.



## About the Author

**Allen Dickerson** is the Legal Director of the Center for Competitive Politics. Allen oversees CCP's litigation efforts before state and federal courts. He was previously an associate with the New York office of Kirkland & Ellis LLP. He has served as lead counsel in cases before the U.S. Fourth Circuit Court of Appeals and the Appellate Division of the New York Supreme Court, and has participated in litigation before numerous trial courts and arbitration panels. His writing has appeared in the *Naval Law Review* and been published by the National Institute of Military Justice, and he continues to write on topics concerning campaign finance regulation, military justice, and the First Amendment. Dickerson is a graduate of Yale College and New York University School of Law.

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