



February 3, 2020

Via Electronic Submission System

Hon. Jay Clayton, Chairman
Hon. Robert J. Jackson Jr., Commissioner
Hon. Allison Herren Lee, Commissioner
Hon. Hester M. Peirce, Commissioner
Hon. Elad L. Roisman, Commissioner
Vanessa A. Countryman, Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

RE: Proposed Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8 (File Number S7-23-19)

Dear Chairman Clayton and Commissioners Jackson, Lee, Peirce and Roisman,

Campaign Legal Center (“CLC”)¹ writes to comment on the regulation proposed by the Securities and Exchange Commission (“SEC”) regarding an increase in ownership thresholds required to submit shareholder resolutions.²

We are concerned that the proposed rule will unduly burden shareholder proposals aimed at protecting the rights of investors to know how corporate funds are being used for political activity.

The U.S. Supreme Court’s decision in *Citizens United v. FEC* opened the floodgates to corporate spending in U.S. elections, but Justice Anthony Kennedy, writing for the majority, promised that dissenting shareholders would not be compelled to fund corporate political speech because shareholders would be able to use the “procedures of

¹ CLC is a nonpartisan, non-profit organization that represents the public interest in administrative and legal proceedings to promote the enforcement of political disclosure, campaign finance, and election laws. See CAMPAIGN LEGAL CENTER, <http://www.campaignlegal.org> (last visited Dec. 2, 2019).

² Securities and Exchange Commission, Proposed Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, 84 Fed. Reg. 66458 (Dec. 4, 2019).

corporate democracy” to ensure that their “corporation’s political speech advances the corporation’s interest in making profits.”³

Disclosure of political spending, Justice Kennedy wrote, “can provide shareholders...with the information needed to hold corporations...accountable,” and “to react to the speech of corporate entities in a proper way.”⁴

Yet the reality is that shareholders often do not know how corporations are spending corporate funds on politics, because the sources of a sizable portion of political spending are not publicly disclosed. Nonprofit corporations and trade associations that keep their donors hidden from the public—so-called “dark money” groups—have reported \$1 billion in political expenditures to the Federal Election Commission (FEC) since *Citizens United*, according to the Center for Responsive Politics.⁵ Dark money groups have spent untold millions more to influence judicial confirmations, policy issues, and state elections.

When publicly traded corporations launder their political spending through dark money groups, shareholders cannot know whether executives are using corporate resources to advance shareholder interests, or to advance the executives’ own personal ideological interests.

For example, leaked documents show that the publicly traded company Devon Energy secretly gave \$50,000 in 2012 to a dark money group supporting Wisconsin Governor Scott Walker’s reelection campaign.⁶ Emails show that the donation was made shortly after Walker was advised to solicit a donation from Devon Energy CEO Larry Nichols.⁷

It is difficult to see how Devon Energy’s \$50,000 donation advanced shareholder interests, since the company does not have business in Wisconsin. Because the donation was kept secret—and only became public years later as the result of an investigation into the dark money group—shareholders never knew or approved of the donation, and could not assess whether the donation advanced investors’ interests, or Nichols’ personal political preferences.

Devon Energy also gave \$3,000,000 in 2012 to Americans for Job Security (“AJS”), a dark money group that supported federal candidates.⁸ Shareholders also never

³ *Citizens United v. FEC*, 558 U.S. 310, 370–71 (2010); cf. *Janus v. Am. Fed’n of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463-64 (2018).

⁴ 558 U.S. at 370–71.

⁵ Anna Massoglia, ‘Dark money’ in politics skyrocketed in the wake of *Citizens United*, CENTER FOR RESPONSIVE POLITICS (Jan. 27, 2020), <https://www.opensecrets.org/news/2020/01/dark-money-10years-citizens-united/>.

⁶ Steven Elbow, *Donald Trump’s WI’s Club for Growth Donation Among Those Details in New Records*, THE CAPITAL TIMES (Oct. 29, 2014), https://madison.com/news/local/writers/steven_elbow/donald-trump-s-wi-club-for-growth-donation-among-those/article_d005b560-1ab3-524c-ae68-594380484455.html.

⁷ *Id.*

⁸ See Letter from Stephen DeMaura, President, Americans for Job Security to Jonathan A. Peterson, Enforcement Attorney, Federal Election Commission (Oct. 23, 2019),

knew about that contribution at the time, and it only became public in October of 2019, after years of litigation and an FEC investigation forced AJS to acknowledge that it had a major purpose of influencing elections and to publicly disclose its contributors.⁹

AJS' delayed disclosure revealed that at least 12 publicly traded companies had given at least \$5,887,000 to the politically active dark money group, according to CLC's analysis of AJS' report. The evidence indicates that shareholders in those companies neither knew about nor approved of corporate funds being spent in this way.

AJS is just one dark money entity; the hundreds of millions more spent by other dark money groups over the past decade disguises massive political spending by publicly traded corporations without shareholder approval or knowledge. Absent disclosure of the corporate contributions that backed that dark money spending, shareholders cannot, as Justice Kennedy promised, "hold corporations...accountable" and ensure that the "corporation's political speech advance[s] the corporation's interest in making profits."¹⁰

By using the procedures of corporate democracy, shareholders have demanded that companies be more transparent about their political activity. Shareholder resolutions regarding disclosure of corporate political spending are some of the most frequently filed proposals each year.¹¹ The proposed rules, however, would violate the Supreme Court's directive by making it harder for shareholders to introduce and advance such resolutions.

The full and robust expression of shareholder democracy is an important means of protecting both shareholder interests and U.S. democracy. The proposed rules would hinder investors from accessing the levers of shareholder democracy and should not be advanced.

Thank you for the opportunity to submit these comments.

Respectfully submitted,

/s/

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<https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2019/10/25141242/AJS-disclosure.pdf> (disclosing AJS's contributors pursuant to conciliation agreement); *see also* Jerry Bohnen, *Devon Energy Listed Among Those Who Contributed to Dark Money Group to Unseat President Obama in 2012*, OK ENERGY TODAY (Oct. 29, 2019), <http://www.okenergytoday.com/2019/10/devon-energy-listed-among-those-who-contributed-to-dark-money-group-to-unseat-president-obama-in-2012/>.

⁹ Michela Tindera, *At Least 20 Billionaires Behind 'Dark Money' Group That Opposed Obama*, FORBES (Oct. 26, 2019), <https://www.forbes.com/sites/michelatindera/2019/10/26/at-least-20-billionaires-behind-dark-money-group-that-opposed-obama/#2341ac276c66>.

¹⁰ 558 U.S. at 370–71.

¹¹ *See, e.g.*, Leah Wright, *Shareholder Proposals: Making Voices Heard*, EQUILAR (Feb. 14, 2019) <https://www.equilar.com/blogs/414-shareholder-proposals-making-voices-heard.html> PROXY PREVIEW, *2019 Corporate Political Activity*, <https://www.proxypreview.org/2019/report/social-issues/corporate-political-activity>.