Transcript

Forum: Corporate Political Spending and Foreign Influence
Hosted by Commissioner Ellen L. Weintraub
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Statement of John Coates, Harvard Law School

JOHN COATES, HARVARD LAW SCHOOL: Okay, thank you. And thank you very much for the invitation to be in a place I don't usually go, right? So, my background is, my introduction alluded to it, is the corporate and financial market side and I was blissfully ignorant of and happy to ignore everything that everybody else in this room has spent their careers focusing on, until *Citizens United* and actually, in fairness, *Citizens United* did wake me up to something that I think the corporate law community has neglected too, which is the way that corporations have, long before *Citizens United*, but not going back that far to the ’70s, started using the Constitution quite aggressively and opportunistically to deregulate when they lose the lobbying battles that they are very good at fighting. So, they get two rounds of regulatory reform, one in the actual regulatory process and another in court where they're increasingly using the First Amendment to take on greater and greater pieces of the regulatory world, an area that I’ve written about.

But today, I'm going to focus principally on a couple of narrow topics drawing on my teaching and research in the corporate area and just to make some basic points about disclosure, or its absence, of ownership, including foreign ownership and the fact that in many, many domains, nevertheless, there are long-standing statutes, regulations, legal traditions for treating foreign companies and foreign influence to control companies quite differently than we treat domestic and there's nothing particularly surprising or pernicious about that. It's not an embrace of nativism, it's not an embrace of Trump's approach to trade, it's a standard part of the way that every country thinks about regulating business activity in, you know, in their country.

So, as you all probably know, there's no disclosure obligation on companies as such in the U.S. to disclose their political activity. There have been efforts ongoing to try to get the SEC to do something for public companies but Chevron could spend a million dollars and no one would know unless they bragged about it, not even its current owners, right? So that's standard baseline, but there's probably a bigger gap in the disclosure laws that you may not be fully aware of which is that here's no general obligation for a company operating in the U.S. to tell anybody who its owners are. There're more than 5 million active business corporations active enough to file returns with the IRS and of those, less than 1% are public companies and even of the public companies, the public companies, essentially, have obligations only to disclose the ownership interests of the people, currently executive officers or directors of the company or if they own more than 5%. But again, just want to stress, most companies, including very, very large companies, are not public and are not even subject to that disclosure regime.

So, in sum, if the public wants to know who owns a given company that shows up in any forum as a donor, for example, in the FEC regulatory process, there's no way to find out, actually, who owns the company under normal disclosure obligations. There are some reporting requirements to specific pieces of the government, I'll come back to that in a second, such as the IRS, but they're generally not available to the public, and they've very carefully circumscribed in how that data can be used.

So is this an issue, is there any reason to think that foreign control of U.S. companies is common? Well, actually, yes. That IRS data I was just alluding to discloses in the most recent update I could find, about $12 trillion of assets owned by U.S. companies that were controlled by foreign owners – 51% or more.

Something like 100,000 such companies with a nontrivial amount of revenue and assets operating in the U.S. One you all know, actually. So you know that Budweiser can, you've seen, turn into something called America? It's actually owned by a Belgian company. The lonely city of Belgium, as Donald Trump has referred to it recently.

Okay... what about less than full control? The IRS collects data on full controlled, controlled companies. There's a separate data regime that the Federal Reserve Bank of New York and the U.S. Treasury run where they survey banks and brokers and issuers, large issuers, to try to figure out how much portfolio investment, that is, non-controlling investment, there is into U.S. corporate stock. And the best data from that is that, an astonishing increase, actually, over the past 30 years. Back to 1982 about 5% of all U.S. corporate stock was held or controlled by foreigners. Now, it's now up to 25. Twenty-five. So let that sink in for a second.

One in four dollars, in value terms, in U.S. corporations is controlled, directly or indirectly, by a foreign owner. Now what kind of foreign owner? Well, we don't know. It's part of the disclosure gap. It could be individuals, it could be companies, they could be governments and of course, in many countries like China, where governments and businesses are essentially identical, and so, a little hard to tease out, even if you know the country from which the investment is coming.

The largest single country source in that data, which they report, is the Cayman Islands. Which means, basically, it could be anybody, anywhere in the world, since the Cayman Islands are not exactly a location for major independent economic activity; it's really a location for corporate – fictional – entities to shelter their ownership.

Okay... what about elections? Is there any indication that corporations, in fact, are moving into the elections? This is something you probably already heard about to some extent on the first panel but just to pick out a couple things, to reiterate if you haven’t heard them.

Earlier in this presidential cycle, $2.5 million was given to Rubio's single-candidate super PAC by a Panamanian company. We don't know the owners of that company. I know one of them, Hank Greenberg, because I was involved in litigation involving STAR and AIG in which that company figured, but the actual total, current composition of the ownership is unknown because it's a private company and there's no obligation to disclose in any forum the owners of that company. There's a company called Children of Israel, LLC, you may have read about in *The Washington Post,* organized in the U.S. by a Silicon Valley realtor named Lisa Gao, who has no prior history of making political donations herself. Her job, which she markets herself as, is a realtor in the Silicon Valley area, helping PRC Chinese nationals find houses in Silicon Valley. They've given money, that LLC which she's the president of has given money to a number of single candidate super PACs.

One in eight dollars flowing to these super PACs now come from corporations and that of course doesn't count dark money, where the principal organized groups are predominantly business corporation members: Chamber, Business Roundtable, etc. Larry Tribe in yesterday's *Boston Globe* pointed out that Uber and Lyft are now playing a massive and completely unheralded, previously unheralded, role in local elections, fighting off local requirements that they get their drivers to have background checks. And finally, I think, actually, the thing that's the most troubling for me from an overall policy perspective, are the ghost companies where, as you probably know, companies spring up, within a week, make a $250,000 donation to a single candidate super PAC and no one has any idea who these companies are, who they're owned by, anything else. They're likely owned by U.S. citizens, my guess, on average, but we don't know. And we certainly don't know what's going to be coming down the pike. That path has been laid.

Now, just to make my final point, is it, what's the… are there precedents for thinking about differentially regulating foreign companies. And, well, obviously free trade, parity of treatment when it comes to trade and business, is a standard part of the ideology, at least traditionally, within both parties and within most of the population, if they think about it over time, long and hard enough about it. You know, sometimes we flirt with protectionism, but not in a serious way.

However, coinciding with that long tradition of free trade, we have very specific foreign restrictions throughout a number of different industries, just as every country in the world has. So take the most example, obvious defense: you simply can't do business with the Defense Department unless you go through a very specific regulatory approval process and they won't grant it to many companies because of national security concerns.

Infrastructure is another big category. Shipping, aircraft, telecom, all of those industries have very strict limits on foreign ownership. Some ban it completely and some it's regulated through an approval process. And maybe not so obvious, financial services. Now, the crisis, hopefully, has taught the lesson the financial markets are a type of crucial public infrastructure and we regulate foreign ownership in this area. There's a recent deal that fell apart involving an insurance company based in Iowa called Fidelity Life. Ang Bang, a Chinese company, was going to buy them. They announced a deal and the New York life insurance commissioner asked, as is typical, "Who owns you?" [The buyer] and the company refused to disclose their ownership. And the deal died over that. It's a multibillion dollar deal. That company actually owns the Waldorf Astoria. In case, any of you are sleeping there any time soon, you're sleeping in a hotel owned by a company that refuses to disclose its ownership to the New York state life insurance company as part of a routine acquisition.

Now, one reason probably for the sensitivity of ownership disclosure in that case is that the current chairman is married to a granddaughter of the former chairman of the party in China and *The New York Times* has done a little sleuthing around what little disclosure there is in China and has found that two of the shareholders are state-owned enterprises, all right, they're part of the government of

China. And 37 other companies are companies owned by other companies, which in turn are owned by other companies, which in turn are owned by other companies. In other words, you can't trace the ownership in any serious way, probably because it all ultimately traces back to, let's say, economically and politically advantaged descendants of the founders of the party in China, which could be politically embarrassing within China.

So... that's an example of where we already have, for good reason, an existing skepticism about foreign ownership. There are many. What more fundamental feature of our government is the protection of the republic? Foreign interest and domestic interest are going to predictably diverge. If you're appointing a president, an independent committee chairman, et cetera, through a political system that has oversight of the industries where we ban foreign ownership, it’s a little odd then to allow foreign influence to occur at the top of that chain and not further down that chain. That is to say if the Defense Department can ban somebody from participating in a contract, why would you let people with influence over the contract higher up the chain be influenced in the electoral system by the very same foreign companies? And I will stop there.