

## Transcript

### Forum: Corporate Political Spending and Foreign Influence

*Hosted by Commissioner Ellen L. Weintraub*

*Federal Election Commission, 999 E St. NW, Washington, DC 20463*

*June 23, 2016*

### **Statement of Donald Tobin, University of Maryland School of Law**

**DONALD TOBIN, UNIVERSITY OF MARYLAND SCHOOL OF LAW:** Well, thank you, Commissioner Weintraub, and thank you for hosting today....

**COMMISSIONER WEINTRAUB:** I should say, Dean Tobin. Sorry.

**DEAN DONALD TOBIN, UNIVERSITY OF MARYLAND SCHOOL OF LAW:** That's all right... for hosting today's event. It was actually 12 years ago I testified before the Commission to talk about the regulation of 527 political organizations, so, amazingly, things haven't changed much since that time. I've lost a lot of hair, but beyond that, not much has changed.

The Supreme Court's decision in *Citizens United v. Federal Election Commission* dramatically changed our campaign finance landscape by really creating an entirely new type of donor. Although much has been written about the decision and about the consequences of corporate spending on independent election advocacy, very little has looked at the ramifications of how to fit corporate election activity within our current regulatory framework.

Or about what new regulations are necessary in order to ensure compliance by corporations with existing election laws. The Supreme Court has found that corporations have a right to engage in independent election advocacy, but it has not clearly enunciated what the principles are that underlie that right. So, as regulators think through how to ensure corporate compliance with existing election

laws, they must consider how strongly corporations differ from individual citizens and how those different characteristics raise tremendous regulatory questions.

So today, what I'd like to discuss is, as we look at some of these unanswered questions, how do we look at tax law and maybe a little bit of corporate law to see what rules and what lessons we can learn?

So, let's start with the assumption that *Citizens United* will remain good law. I, then, see two areas where the uniqueness of the corporate form creates significant regulatory challenges and those involve both donations by foreign nationals and by government contractors, and disclosure.

In the tax context, policymakers have struggled for years with the corporate form and how some corporations can be used by people to manipulate and obfuscate tax laws. Tax shelters, tax evasion, tax cheats often use complex corporate arrangements including the use of holding companies or other sub-corporations as a means of hiding income.

Recent public outcry surrounding the Panama Papers highlights the length that individuals will go to avoid U.S. tax law. What tax law teaches us is that the use of the corporate form to manipulate compliance with the law is not a theoretical problem. But it's a real one.

For example, consider the existing rule that foreign nationals are prohibited from engaging in electioneering communication. In simple terms, a foreign individual could create a Wyoming corporation. The Wyoming corporation could be the sole owner of a Delaware corporation that, in turn, could own a Nevada corporation. The Nevada corporation could then engage in independent expenditures on behalf of a candidate.

For those who don't practice corporate law, I hope I picked the four most difficult corporate states as far as disclosure... to be able to break the corporate structure.

So, under existing law, it'd be incredibly difficult for any government entity, including the FEC, to have any idea that the funds in question came from a foreign individual.

Similar problems exist with regard to the disclosure provisions. In *Citizens United*, the Court upheld disclosure as justified based on a government interest in providing the electorate with information and acknowledged there was evidence in the record in *McConnell* that independent groups were running election-related advertisements while hiding behind dubious and misleading names.

Complex-entity relationships hide donors from both the public and from regulators. If we had individuals donating in the name of another person, that'd be criminal. But our existing regulatory regime seems perfectly comfortable allowing this to be done through the corporate form.

So, in thinking through the regulatory responses to these problems, I suggest we actually have to think of three different types of corporate entities. We have our publicly held corporate entities, we have our privately held corporate entities, and then we have tax-exempt organizations, which have all been put under this corporate rubric. That doesn't even include LLCs, who have generally been regulated as partnerships.

So, why do I suggest that difference? Well, these entities have very different operations, they have very different ways of acting, that I think have significant different ramifications in the election law context.

Publicly traded corporations are traded on stock exchange, they usually have diverse groups of shareholders, they're highly regulated under securities law. And in this case, an owner of a publicly held corporation is not generally contributing to the capital of the corporation. They're generally buying their shares from someone else.

So when we think about corporate money in that context being spent on elections, we're actually thinking of shareholder profits that are being used in that way.

So, then, when we look at that, we have to think, "Well, what are the underlying rationales for allowing corporations to participate in political campaigns? Are we concerned about who owns the corporation? Are we concerned about who controls the corporation? Are we concerned about who's funding the election activities?" We have to understand, in a sense, the evil we're trying to address so we can think about the ways to solve that problem.

So I think there're several ways to look at this in the publicly held context and the first is really when we're looking at sort of beneficial ownership. What is the way in which somebody has enough ownership of the corporation that they're really involved? And in a different context, the SEC has used a 5% threshold for determining that amount. And I don't know, the 5% is not magic, it's actually in a totally different context, but what it does tell us is it wouldn't be overly burdensome to ask a publicly traded corporation to know who its owner were in the 5 to 10% range, right? It's clearly difficult for them to know it in the .01% range. It's clearly hard for them to know who owns any share. But if we're talking about somebody who owns a significant share of a publicly-traded corporation, it's not that hard, not that burdensome to require the shareholder to disclose that information.

So, that's one way we've looked at that before. The second way corporate law and tax law often looks at this is effective control. Not just if you have a 15% share in the corporation, but do you have enough ownership interest that you really control the activity of the corporation? So we could look at effective control in making our determinations.

And then an out-of-the-box kind of way we've looked at this is our CFIUS regulations, the Committee on Foreign Investment in the United States, which looks at foreign ownership of defense-related activities where there's a national security interest and there, it looks at a functional definition of

control. So there's not a bright line test. In lots of other areas of election law and tax law, we argue about bright line test versus not bright line test. But what CEPHEUS is really looking at is, what abilities do the shareholders have to control the activities of the corporation? And looks at a whole set of different activities there.

So, we do have models to look at to say, when is enough, enough? When is it, when is the participation in a publicly held corporation, which has diffuse ownership, enough that we really want to think about regulating it?

The second is privately held. And that gets, to me at least, a lot scarier. We heard that a little bit in the earlier panel. But unlike publicly held corporations, in the privately held context, capital contributions to the privately held corporation may, in fact, be providing funds to the corporation that the corporation could use for election advocacy. So in other contexts I've written about the concern that taxable entities will become the new major loophole for campaign advocacy and then what you'll do is give to a corporation as a contribution to capital that's not taxed and then that capital contribution will be spent by the privately held corporation on election advocacy.

If a foreign owner donated – excuse me, contributed – capital to a privately held corporation, and that privately held corporation then spent that money on election advocacy, we would have no idea that was happening. And our existing regulatory regime has no way for identifying that.

So, here, we need to have some method that requires privately held corporations who engage, right? It's not every privately held corporation, most do not actually engage in election advocacy, who engage in election advocacy to disclose how the corporation received its funds, where its funds come from and give us some type of disclosure about at least the owners that have effective control of the corporation. But I would even say we could look at the 5% threshold for privately held corporations.

The last thing, the last area I want to talk about and to me, it's actually the most scary, is tax-exempt organizations. They don't really, you know, the Supreme Court has kind of treated them like corporations, but they're totally different than corporations. They don't really fit within a lot of the concerns we have in corporations, but what they do is shield incredibly well – donors. And, at the moment, at least, you could give a foreign contribution to, let's say, the favorite social welfare organization and as long as that foreign contribution wasn't designated for the purpose of electioneering communication or for the purpose of a particular ad, there's no disclosure requirement on that contribution, right? And that money can be mixed with the money of lots of other people in a very fungible way.

So, we've had a crisis, I think, on disclosure in the tax-exempt context for some time, but I think what we're highlighting now is this, how much that, the crisis is expanded by the fact that they can be used in a way of, in a sense, cleansing a donor's identity.

So due to wanting to leave at least some time for people to ask questions, I'm going to mainly stop there but I want to raise a whole set of other types of questions and concerns. In both the tax and the corporate context, we always worry about attribution rules, right? How you become an owner. So we have to know, do we use family attribution rules? Do we use other types of ways of combining ownership interest to know if there's effective control or not or if there's some type of improper influence. How do we do look-throughs? This is a real problem in, I think, all of our industries. You know, if you can set up 12 corporations with holding companies, how do you actually get through to find out who the real owner is? We're seeing it in campaign finance disclosure regime, right? Where the disclosure is of the corporation, not of its actual members and of course, if a corporation gives to another corporation, we make it even further.

What does it mean to be foreign? Do we care about where it's organized? Do we care about who its members are? What about, we have, having corporate inversion now? What about when a standard U.S. corporation leaves and goes to a foreign country. So it's now in a foreign country, not even paying U.S. tax, but it maybe is made up of a majority of U.S. shareholders. Is that a foreign corporation? Do we want corporations that don't even pay any U.S. tax to be able to participate in our election process?

So... what I'd say is what tax law really tells us about corporate involvement and campaign advocacy is that the situation is a mess. I mean, I wish I could give you a really more academic wonderful world for this but the fact is, tax law is a mess, because of the ability to manipulate corporate forms both here and abroad to hide income and bringing that kind of disaster into the election law context is only going to be a further disaster.

So what I really urge is as much as possible, we need to get our hands on the corporate form. You know, the Supreme Court came in and basically said corporations have this right, but we all know that corporations aren't people. It's going to take me a long time to have children, raise them up enough so they're voting for the people I think they should vote for and then they might not even listen to me, right? But in the corporate context, I can do that with people like this in a matter of minutes. So we have to get a hold on how these corporate entities work and how we want to have a disclosure regime and a regulatory regime that gives them the rights that they're entitled to have under *Citizens United* while protecting the liberties that are so important to us. So I thank you for the opportunity to be here today, it's always nice to do something else as a Dean, and I appreciate the opportunity.