The Non-Expert Agency: Using the SEC to Regulate Partisan Politics

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The regulation of political speech, including the regulation of contributions and spending, is one of the most constitutionally delicate operations in which the government can engage. As the Supreme Court stated in *Buckley v. Valeo*, "[Political] contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. . . . [T]he First and Fourteenth Amendments guarantee 'freedom to associate with others for the common advancement of political beliefs and ideas.'" The same is true of "compelled disclosure," which the Court has noted "in itself[] can seriously infringe on privacy of association and belief guaranteed by the First Amendment."

Given these important First Amendment concerns, and wary of creating the actuality or appearance of partisan advantage, Congress has entrusted interpretation and enforcement of the campaign finance laws to the Federal Election Commission (FEC). This agency is unique in a number of ways. Perhaps most fundamentally, it includes six commissioners evenly divided between the two major parties. Furthermore, having been the defendant in many of the most important First Amendment lawsuits of the past 40 years, it has considerable expertise in dealing with the intricate intersection of campaign finance regulation and constitutional liberties.

Nevertheless, believing that the FEC's bipartisan composition has frustrated a drive toward more intrusive regulation of political speech, many prominent voices on the political left have attempted to bypass the FEC in the area of campaign finance regulation. This has included calls for rulemaking or enforcement by the Internal Revenue Service (IRS) and the Federal Communications Commission (FCC). Most recently, the Securities and Exchange Commission (SEC) has been asked to require disclosure of corporate political spending, including payments to nonprofits and industry organizations, even where those payments would not be considered material under current and traditional securities laws.

While unaffiliated with the partisan debates surrounding campaign finance regulation, Professors Lucian Bebchuk and Robert Jackson have been at the fore of intellectual arguments urging the SEC to engage in regulation of this kind. This has included a petition for rulemaking submitted to the SEC on behalf of a number of prominent

academics in August 2011, and a forthcoming defense of that petition, *Shining Light on Corporate Political Spending*, 101 Geo. L.J. 923 (2013).

In **The Non-Expert Agency: Using the SEC to Regulate Partisan Politics**, 3 Harv. Bus. L. Rev. __ (forthcoming 2013), we respond to a number of particular arguments advanced by Professors Bebchuk and Jackson. Equally important, we argue that whatever the theoretical merits of the position put forth by Professors Bebchuk and Jackson, the reality is that the current pressure on the SEC to adopt new compulsory disclosure laws is a direct result of a desire to use the SEC to regulate not just corporate governance or the world of investment and trading, but also campaign finance. As a result, we suggest that any rules adopted are likely to be ill-advised and co-opted for partisan purposes in the enforcement process.

At the core of the theory of the independent agency is the presumption that such agencies will develop a unique technical competence and will operate within that sphere of expertise. Should the SEC (or any agency other than the FEC) begin to regulate campaign finance, it would find itself firmly outside its area of professional expertise and competence. The result is likely to be bad law, damage to institutional reputation, and a distraction from the agency's core mission. Indeed, we show how efforts to engage the IRS and the FCC in campaign enforcement have resulted in poorly designed rules, public confusion, and, in the case of the IRS, damaging politicization of its core responsibilities.

In Part I of this reply, we explore the reasons for the current pressure on the SEC to adopt new compulsory disclosure rules. In particular, we note that the move away from the bipartisan FEC and toward agencies with partisan majorities appears to be motivated largely by opposition to the *Citizens United* ruling. In Part II, we discuss the theory of the independent agency and argue that these efforts to involve the SEC in regulating political activity violate that theory in general terms. We suggest that such a result is unlikely to produce effective regulation, and is more likely to embroil the SEC in political conflicts harmful to its traditional mission: protecting efficiency, competition, and capital formation. Part III discusses the theory behind SEC rules governing corporate disclosures, and shows that current proposals to mandate more disclosure of public affairs spending do not serve the purposes of the SEC's traditional disclosure regime. Part IV addresses some of the specific arguments made by Professors Bebchuk and Jackson to support an SEC move into this new area of law.

The paper suggests that SEC regulation of campaign finance is contrary to the theory of the administrative agency, fits poorly with the SEC's competence and experience, and appears to stem in large part from political pressures that would undermine public confidence in the SEC as a nonpartisan, expert enforcement agency. We conclude that neither administrative law nor practical considerations supports substituting the non-expert SEC's judgment for that of the FEC.