TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2016

ON THE FOLLOWING MEASURE:
H.B. NO. 2560, RELATING TO CORPORATIONS.

BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY

DATE: Thursday, February 4, 2016 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Douglas S. Chin, Attorney General, or
Deirdre Marie-Iha, Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Department of the Attorney General supports the intent of this bill, but raises several comments regarding its consistency with other provisions of Hawai‘i law and the bill's ability to survive a constitutional challenge. This bill would require corporations incorporated under Hawai‘i law or foreign corporations authorized to transact business here to file detailed annual reports disclosing to their shareholders the money spent to influence elections. We make three important suggestions to improve the bill's chances of surviving a constitutional challenge and several drafting suggestions. The Department respectfully asks that this Committee pass the bill only if these changes are made.

Because this bill touches upon speech that is protected under the First Amendment, we make three suggestions to improve the bill's chances of surviving a constitutional challenge. First, the rationale behind the bill needs to be articulated in the legislative history used to support it. Expenditures and contributions made to influence an election are protected speech under United States Supreme Court precedent. Buckley v. Valeo, 424 U.S. 1 (1976). By law, corporations are also entitled to this protected speech. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010). This bill would require information regarding this protected speech to be provided to the shareholders in an annual report. Campaign finance laws often require similar forms of disclosure. Disclosure laws, if properly crafted and not unduly burdensome, are generally constitutional under the First Amendment. To survive a constitutional challenge, however, the law must meet an intermediate form of scrutiny called "exacting scrutiny." Under this test, the government's interest behind the law must be "sufficiently important" and the law

must be "substantially" related to that interest. See Yamada v. Snipes, 786 F.3d 1182, 1194 (9th Cir.), *cert. denied sub nom.* Yamada v. Shoda, 136 S. Ct. 569 (2015) ("Because the challenged laws provide for the disclosure and reporting of political spending but do not limit or ban contributions or expenditures, we apply exacting scrutiny. To survive this scrutiny, a law must bear a substantial relationship to a sufficiently important governmental interest. Put differently, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.") (citations and internal quotation marks omitted). For campaign finance disclosure bills, the government's interest lies in informing the electorate and restoring public confidence in elected government. Id. at 1196-97.

Similarly, to survive review under exacting scrutiny, the disclosure interest at issue must be "sufficiently important." Because the information is sought for the corporation's *shareholders*, rather than the electorate, this is a distinct disclosure interest that differs from the interest generally underlying most campaign finance laws. To improve the bill's chances of surviving a constitutional challenge, the Legislature's interests behind this bill should be fully articulated in the legislative history and be of sufficient importance to meet the exacting scrutiny test. This goal would be assisted by including facts demonstrating that this form of disclosure is necessary for effective corporate governance.

Second, the bill's chances of surviving a constitutional challenge can be increased by reducing the burden imposed. One way to accomplish the bill's apparent objective with less burden would be to allow corporations to circulate to their shareholder copies of the reports they filed with the Campaign Spending Commission rather than requiring the corporation to prepare a separate report. By law any corporation that made contributions or expenditures of over $1000 in an election period is required to register as a noncandidate committee. Sections 11-302, 11-321, Hawaii Revised Statutes (HRS). See also Yamada, 786 F.3d at 1194-1201 (upholding definition of noncandidate committee). Consequently, the information the bill seeks to make available to the shareholders should already be available elsewhere.

Third, the bill's chances of surviving a constitutional challenge will be increased by adding a disclosure threshold—a minimum amount of contributions or expenditures that must be made before disclosure is required. See, e.g., Canyon Ferry Rd. Baptist Church v. Unsworth, 556 F.3d 1021, 1033-34 (9th Cir. 2009) (striking down zero-threshold disclosure requirement).

We suggest a $1000 threshold in an election period, which matches the threshold in current law for other campaign finance purposes. Section 11-321(g), HRS. See also Yamada 786 F.3d at 1199 (relying on $1000 threshold to uphold definition of noncandidate committee).

We also urge the Committee to adopt several drafting suggestions. In general we respectfully recommend the bill be revised to better track the existing law under part XIII of chapter 11, HRS.

a. The annual reporting period should be specified, such as calendar or fiscal year. The bill currently contemplates a reporting period but does not specify what it is or if the corporation can define the reporting period itself.

b. The use of the phrase "independent expenditure" should be made consistent with existing Hawai‘i law. "Independent expenditures" are not made "to" a committee or noncandidate committee; they are spent independently by the corporation itself. Page 1, lines 8 and 11. (That is, the corporation is spending its own money on political speech.)

c. The phrase "election candidate" should be omitted. Page 1, lines 8-9. There is no need for this phrase. Under Hawaii's campaign finance laws, organizations accepting contributions or making expenditures over $1000 in an election period can *only* be either candidate committees or noncandidates committees. Candidates may lawfully accept contributions only through their candidate committees. Section 11-321, HRS. For the same reason "candidate" on line 11 must be replaced with "candidate committee."

d. The word "entity" is vague and undefined and should be replaced. Page 1, line 11. It appears that this portion of the bill is looking to determine how the independent expenditure was spent, such as with advertisements. To accomplish this objective, the reporting requirements should be articulated separately for contributions and independent expenditures. Contributions are made *to* a candidate or noncandidate committee; independent expenditures are made *by* the corporation. How each transaction is accomplished and what information is necessary to effectively disclose each is not the same.

e. As with the other defined terms, the word "election" should be given the same meaning as in section 11-302, HRS.

f. "Independent expenditures" are distinct from "expenditures" under Hawai‘i law. Section 11-302, HRS. The bill as written would require disclosure only of independent

expenditures but not expenditures. The consequence is that the corporation would not be required to disclose expenditures made in coordination with a candidate for elected office. Such expenditures would fall under the definition of "expenditure" but not under the definition of "independent expenditure." If it is desired that *expenditures* be disclosed in addition to independent expenditures, wording must be added to the bill requiring that, along with a cross-reference to the appropriate definition in section 11-302, HRS.

The Department urges the Committee to pass this bill only if these concerns are addressed. Thank you for the opportunity to testify.

HAWAII
COMMON CAUSE
Holding Power Accountable

House Judiciary Committee
Chair Karl Rhoads, Vice Chair Joy San Buenaventura

Thursday 02/04/2016 at 2:00 PM in Room 325
HB 2560 – Relating to Corporations

TESTIMONY — SUPPORT
Carmille Lim, Executive Director, Common Cause Hawaii

Dear Chair Rhoads, Vice Chair San Buenaventura, and members of the House Judiciary Committee:

Common Cause Hawaii supports HB 2560 which requires domestic and foreign corporations to provide their shareholders with detailed reports of independent expenditures and political contributions.

The 2014 election cycle brought about an unprecedented amount of money in our elections – particularly money from the influential SuperPACs that operate independently of political candidates. Voters were inundated with political ads attempting to influence their votes, and many citizens wanted to know more about the entities behind these ads, and the funders and decision-makers behind these entities.

Common Cause Hawaii believes that providing shareholders with an annual report detailing election-related and/or independent expenditures helps bring accountability to these shareholders, who govern the special interest groups attempting to impact voters and our elections.

Thank you for the opportunity to offer testimony **supporting HB 2560.**

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