SB220

Measure Title:	RELATING TO CAMPAIGN FINANCE.
Report Title:	Campaign Finance; Corporations; Shareholder Approval
Description:	Requires a corporation to have the approval from the majority of shareholders to make a contribution to any candidate, candidate committee, or noncandidate committee. Prohibits a corporation from making a contribution if the majority of its shares are owned by persons who are prohibited from makings contributions under state law or taking political positions due to investments with the State or county. Requires corporations to provide notice within forty-eight hours of the contribution. Permits voting shareholders who did not approve of the contribution to request a prorated reimbursement of the contribution made by the corporation.
Companion:	
Package:	None
Current Referral:	CPN, JDL
Introducer(s):	KEITH-AGARAN, IHARA, SHIMABUKURO

Sort by Date		Status Text
1/23/2015	S	Introduced.
1/23/2015	S	Passed First Reading.
1/23/2015	S	Referred to CPN, JDL.
2/3/2015	S	The committee(s) on CPN has scheduled a public hearing on 02-11-15 9:30AM in conference room 229.

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2015

ON THE FOLLOWING MEASURE:
S.B. NO. 220, RELATING TO CAMPAIGN FINANCE.

BEFORE THE:

SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

DATE: Wednesday, February 11, 2015 **TIME:** 9:30 a.m.

LOCATION: State Capitol, Room 229

TESTIFIER(S): Russell A. Suzuki, Attorney General, or
Deirdre Marie-Iha or
Valri Lei Kunimoto

Chair Baker and Members of the Committee:

The Department of the Attorney General has significant reservations about this bill. There is a substantial possibility the bill cannot be reconciled with controlling case law from the United States Supreme Court. Unless these concerns can be addressed, the bill should be held.

The purpose of this measure is to prevent corporations from making any contribution to a candidate, candidate committee, or noncandidate committee unless the contribution is approved by a majority of the corporation's shareholders. It also prohibits corporations from making contributions if a majority of their shareholders are owned by persons prohibited from making contributions pursuant to section 11-355, Hawaii Revised Statutes (the government contractors' ban) or section 11-356, HRS (contributions by foreign nationals). The bill further provides that if a contribution is made with the shareholders' approval, the corporation must provide written notice on the corporation's website. A voting shareholder who did not approve of the contribution can request a prorated reimbursement of the contribution made with the approval of the majority of the shareholders.

The Department understands this bill to be motivated, at least in part, by the influx of large sums of money into American elections since Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010). In general, the Department shares these concerns and agrees there is great reason to be concerned about this trend. Given the current state of the case law, however, there are limited options for the states to address these concerns in a manner consistent with the federal constitution. By our reading this bill seeks to prevent corporations from making political

contributions without the prior approval of their shareholders. Though this concern is a genuine one, in the First Amendment context the Supreme Court has generally rejected the protection of shareholders as a sufficient justification to prevent corporate speech. Id. at 361 (rejecting "protecting dissenting shareholders" as a sufficient interest to justify restrictions on corporate speech.). In fact, the Supreme Court has held that the usual procedures of "corporate democracy[,]" id. at 362, are sufficient to protect shareholders. See also First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 794-95 (1978) ("Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests."). Political speech is the highest, most protected form of speech under the First Amendment. When corporations make political contributions or independent expenditures, this activity is protected as a form of political speech. "[T]he First Amendment does not allow political speech restrictions based on a speaker's corporate identity." Citizens United, 558 U.S. at 347. This bill's focus on corporations and corporations alone is irreconcilable with this controlling case law.

The other problem with the bill stems from the fact that the corporation may not speak until it satisfies a precondition. The bill intends to prohibit corporate speech unless majority shareholder approval is first secured. This would require a meeting of all shareholders (potentially a very numerous group). All contributions are banned until that approval is secured. As such, the bill would operate as a pre-condition on the corporation's speech, and a fair amount of effort would be required to comply. Citizens United specifically rejected burdensome requirements applied as a predicate to corporate speech, particularly given the necessity of responding quickly to changing political campaigns. Id. at 339 ("Given the onerous restrictions, a corporation may not be able to establish a [political action committee] in time to make its views known regarding candidates and issues in a current campaign."). Placing prerequisites on speech, such as this bill does, may also be unconstitutional due to a separate First Amendment doctrine called "prior restraint." "A prior restraint need not actually result in suppression of speech in order to be constitutionally invalid. The relevant question in determining whether something is a prior restraint is whether the challenged regulation authorizes suppression of speech in advance of its expression[.]" Long Beach Area Peace Network v. City of Long Beach, 574 F.3d 1011, 1023 (9th Cir. 2009) (brackets and internal quotation marks omitted; quoting

Ward v. Rock Against Racism, 491 U.S. 781, 795 n.5 (1989)). See also Citizens United, 558 U.S. at 335 (analogizing onerous regulatory burdens on political speech with prior restraint); Arizona Right to Life Political Action Comm. v. Bayless, 320 F.3d 1002, 1008 (9th Cir. 2003) (finding that advance-notice requirement in campaign finance law was unconstitutional prior restraint). Given the time and planning necessarily involved with holding a shareholder meeting, it is unlikely that a corporation could secure majority shareholder approval in a manner sufficiently timely to respond to changing news about an election. Id. at 1008 ("To suggest that the waiting period is minimal ignores the reality of breakneck political campaigning and the importance of getting the message out in a timely, or, in some cases, even instantaneous fashion.").

It is possible that an argument may be made that this bill is merely acting to prevent a corporation from engaging in speech against the views of the majority of its shareholders. It could be argued that a corporation should not have an unrestricted right to speak in derogation of the views of the majority of its shareholders.

The second substantive portion of the bill (page 1, lines 11-16) would expand the government contractors' ban (section 11-355, HRS) and the foreign nationals provision (section 11-356, HRS). As to section 11-356, the additions made by the bill are largely unnecessary as Hawaii law already prohibits contributions by corporations if they are owned by a foreign corporation or are domestic subsidiaries of a foreign corporation. See section 11-356, HRS.

As to section 11-355, the apparent intent is to ban corporations from making contributions if a majority of its shares are owned by persons prohibited from making contributions under the government contractors' ban (section 11-355). If triggered, this would function as a ban on corporate contributions. Campaign finance laws such as this bill are often subject to constitutional challenges. In the event of such a challenge, the burden rests on the *government* to demonstrate that (in the case of a ban) the restriction is necessary to prevent corruption and the appearance of corruption. See, e.g., Thalheimer v. City of San Diego, 645 F.3d 1109, 1117 and 1118 (9th Cir. 2011) (burden is on the government; "[t]he Supreme Court has concluded that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.") (citation and internal quotation marks omitted). The Supreme Court describes "corruption" and

its appearance narrowly: it can mean only *quid pro quo* corruption. See Citizens United, 558 U.S. at 359 ("[w]hen Buckley identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to quid pro quo corruption.") (citing Buckley v. Valeo, 424 U.S. 1 (1976)). Access or influence is *not* sufficient. See id. at 314. In order to survive a constitutional challenge, the legislative record justifying the bill would have to demonstrate that this portion of this bill is necessary to prevent corruption and its appearance, as described in controlling Supreme Court case law. To make this showing, it is advisable to rely on specific facts and actual, recent occurrences. If this burden cannot be met, this provision should be removed from the bill.

The Department reiterates that we understand the oft-repeated concern that corporate money is overrunning American politics. Our testimony is not meant to dismiss those concerns but only to ensure that the State's actions, when taken, are consistent with the federal constitution. We note that *all* corporations that contribute or spend more than $1000 to influence any of Hawaii's elections are subject to the State's comprehensive disclosure rules under existing law. Under current case law, the State has much more flexibility with disclosure rules than it does with laws banning, conditioning, or restricting campaign speech. If further regulation is needed regarding corporations, additional disclosure measures may offer a productive avenue for further discussion. Our office is available to consult on this topic if desired.

For the reasons articulated above, we believe the bill's apparent intent cannot be achieved without raising significant constitutional concerns and that, given the case law, the risk of an adverse result is significant. The Department respectfully urges the Committee to hold this bill.

KRISTIN E. IZUMI-NITAO
EXECUTIVE DIRECTOR

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STATE OF HAWAI'I
CAMPAIGN SPENDING COMMISSION
235 SOUTH BERETANIA STREET, ROOM 300
HONOLULU, HAWAII 96813

February 9, 2015

TO: The Honorable Rosalyn H. Baker, Chair
Senate Committee on Commerce and Consumer Protection

The Honorable Brian T. Taniguchi, Vice Chair
Senate Committee on Commerce and Consumer Protection

Members of the Senate Committee on Commerce and Consumer Protection

FROM: Kristin Izumi-Nitao, Executive Director kei
Campaign Spending Commission

SUBJECT: **Testimony on S.B. No. 220, Relating to Campaign Finance**

Wednesday, February 11, 2015
9:30 a.m., Conference Room 016

Thank you for the opportunity to testify on this bill. The Campaign Spending Commission ("Commission") opposes this bill and offers the following comments.

This bill amends chapter 414, Hawaii Revised Statutes ("HRS"), by adding a new section. Subsection (a) of the new section requires that campaign contributions made by a corporation be approved by a majority of the corporation's shareholders and that a corporation adopts bylaws providing a mechanism for shareholder approval of contributions. Subsection (b) prohibits corporations whose majority shareholders are government contractors or foreign nationals, who themselves are prohibited from making contributions, or persons who are prohibited from taking political positions due to investments with the state or county, from making contributions. Subsection (c) requires a corporation to post on its website, if available, notice of making a shareholder-approved contribution within 48 hours of the making of the contribution. Subsection (d) allows a voting shareholder who did not approve of the contribution to seek a *pro rata* reimbursement (to the corporation, we assume) of the contribution. Finally, subsection (e) defines "corporation" as "a business entity incorporated or granted a certificate of authority under state law."

This measure will be difficult to enforce.[1] Although the measure requires a corporation to provide written notice, or post on its website, the making of a contribution, it is unclear how written notice is to be provided or how corporate website information is to be gathered and made public. Also, there does not exist a readily-available database that identifies shareholders of corporations or shareholders' approval of corporate matters. There would be no practical way to enforce the prohibition on contributions since the enforcing agency could not readily verify that a majority of shareholders approved of a corporation's contribution.[2] Also, allowing voting shareholders to seek a *pro rata* reimbursement of a contribution, would make the reporting of contributions uncertain, since the measure has no parameters as to the time frame within which these shareholders may seek reimbursement.

The Commission respectfully asks that the Committee defer S.B. No. 220.

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[1] It is unclear which agency is to enforce the bill. HRS chapter 414 (the Hawaii Business Corporation Act) is administered by the Department of Commerce and Consumer Affairs. The Commission regulates campaign contributions under HRS chapter 11.

[2] Since this bill places a burden (beyond disclosure) on campaign contributions of corporations, there may be constitutional implications. However, the Commission will defer to the Department of the Attorney General on this issue.

ADA HAWAI'I
AMERICANS FOR DEMOCRATIC ACTION

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MAILING ADDRESS
PO. Box 23404
Honolulu
Hawai'i 96823

February 6, 2015

Chair Baker and Commerce and Consumer Protection Committee Members

Re: SB 220 Relating to Campaign Finance
Hearing on Feb 11, 2015

Dear Senator Baker and Members of the Committee:

Americans for Democratic Action is an organization devoted to the promotion of progressive public policies.

We support SB 220 to require a corporation to have the approval from the majority of shareholders to make a contribution to any candidate, candidate committee, or non-candidate committee. It also requires corporations to provide notice within forty-eight hours of the contribution and permits voting shareholders who did not approve of the contribution to request a prorated reimbursement of the contribution made by the corporation. Many of our Board members are stockholders. Therefore we are participants in political actions we often oppose. This bill would at least force the corporation to get some shareholder consent before they contribute to a political campaign.

Thank you for your consideration.

Sincerely,

John Bickel
President

First Hawaiian Bank
Neal K. Okabayashi
Senior Vice President & Attorney
Government Affairs

Presentation To
Committee on Commerce and Consumer Protection
Wednesday, February 11, 2015, 9:30 a.m.
State Capitol, Conference Room 229

Testimony in Opposition for S.B. No. 220, Relating to Campaign Finance

TO: The Honorable Rosalyn H. Baker, Chair
The Honorable Brian T. Taniguchi, Vice Chair
Members of the Committee

My name is Neal K. Okabayashi and I represent First Hawaiian Bank. We oppose S.B. 220 for the reasons stated in my testimony. It appears that the purpose of this bill is to prohibit corporations from contributing to a candidate, candidate committee or noncandidate committee (e.g., ballot committee or PAC).

Although it purportedly permits a corporation to make such contributions provided that shareholder approval is obtained, the mechanics of obtaining approval is cumbersome and makes the task of obtaining approval difficult, if not impossible, to timely obtain approval.

Normally, shareholders only meet once a year and at other times, if shareholder approval is needed, a board of directors resolution recommending shareholder approval is first normally obtained. The process of obtaining shareholder approval, especially if there are many shareholders, is almost akin to a proxy process to obtain shareholder approval.

The necessity of subsection (b) is questionable since section 11-356 expressly permits a corporation owned by a foreign corporation so long as the contribution is domestically derived or foreign national individuals are not participating in the electoral process. For purposes of section 11-356, foreign means non-U.S.

This measure subjects only Hawaii corporations and foreign corporations who must obtain a certificate of authority to transact business in Hawaii to its provisions. In this context, foreign means non-Hawaii and has a different meaning than in section 11-356. Non-Hawaii corporations who buy property in Hawaii and engage in interstate commerce do not need to obtain a certificate of authority to transact business in Hawaii. It also appears that no certificate is needed to make a loan in Hawaii. Thus, some corporations will be subject to this law but many corporations domiciled on the mainland will not be subject to this law.

Since corporations do file reports with the campaign spending commission as do candidates, candidate committees, and noncandidate committees, and are subject to the same contribution limits, this measure is not needed and thus, we oppose this bill.

Thank you for this opportunity to testify.

Neal K. Okabayashi

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