WHEN PRIVATE CORPORATIONS GIVE POLITICAL DONATIONS: SOME CORPORATE GOVERNANCE CONSIDERATIONS*

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ABSTRACT

This Article aims to guide private domestic stock corporations and their counsels in the planning, execution, and justification of corporate political spending. It discusses the general legal framework on permissible corporate contributions for partisan political activities in the Philippines. It seeks to discuss some core issues that corporate donors might raise in providing political contributions to candidates, political parties, and party-list groups, such as: (i) the scope of permissible corporate political contributions; (ii) the legal capacity and power of a corporation to make political contributions, and the limitations thereof; (iii) the corporate approvals and levels of decision-making required, including quorum and voting requirements; (iv) rights of minority stockholders who dissent from the decision of the majority stockholders, board of directors, or management to make such contributions; (v) limitations and specific requirements as to the type of industries and type of corporations; (vi) disclosure and reportorial requirements; (vii) impact of existing material agreements, and existing government licenses and concessions, on permissible political contributions; (viii) constitutional dimension of corporate political spending and its corporate governance impact; (ix) tax treatment of political donations; and (x) other pertinent issues, such as lobbying regulations and non-electoral or non-campaign-related political contributions. Resolving these issues will help corporate donors manage the legal risks of political engagement, and the decisions that will ultimately be upheld by the Commission on Elections, Securities and Exchange Commission,

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or the courts, will have a far-reaching impact on the development of the law on campaign finance in relation to corporate law and corporate governance.

I. INTRODUCTION

Suppose that you are the counsel for a private domestic stock corporation which plans to provide contributions to fund the electoral campaign of certain candidates, political parties, and party-list groups for the coming national and local elections. The client corporation's preliminary assessment indicates that Republic Act No. 11232 or the *Revised Corporation Code of the Philippines* ("Revised Corporation Code") amended Batasang Pambansa Blg. 68 or the *Corporation Code of the Philippines* ("Corporation Code") by allowing domestic corporations to provide reasonable donations for partisan political activity. The client wants to know how to render its planned political contributions legally compliant. Some specific questions of the client corporation may include:

(i) Does Philippine law now allow private domestic stock corporations to provide donations for electoral campaigns?

(ii) What are some exceptions from, and qualifications on, the general rule in the answer to item (i)?

(iii) Does the corporation have the power and capacity to extend political contributions? Does it need to expressly include the giving of political contributions as a corporate purpose in its articles of incorporation ("AOI")? Is an implied power to make political contributions permissible? To what extent are political contributions considered *ultra vires* acts?

(iv) What corporate approvals are required? What are the quorum and voting requirements?

(v) What are the rights of minority stockholders who dissent from the decision of the majority stockholders, board of directors, or management to make such contributions? Will it even be an issue for minority stockholders?

(vi) Are there limitations and specific requirements as to the type of industry or economic activity?

(vii) Are there limitations and specific requirements as to the type of corporations?

(viii) What are some special requirements in the case of publicly listed corporations and public companies?

(ix) What are the disclosure and reportorial requirements for making such contributions?

(x) What test of corporate nationality is applicable in determining a "foreign corporation", which is prohibited from making a political contribution?

(xi) What is the impact of existing material agreements with third parties, and existing government licenses and concessions, on permissible corporate political contributions?

(xii) Are there constitutional dimensions that are relevant in legitimizing corporate political spending? What is the probability that the doctrine in the landmark U.S. case of *Citizens United v. Federal Election Commission*[1] will be adopted in Philippine law? And if adopted, what are its corporate governance implications?

(xiii) What is the tax treatment and implication of corporate political contributions?

(xiv) What are the penalties and sanctions that may be imposed by different government agencies for any violation of the rules discussed in relation to the foregoing questions?

(xv) What other pertinent issues (e.g., lobbying regulation and non-campaign or non-electoral political contributions) should be considered?

Your advice to the hypothetical client corporation on these questions can help manage the legal risks of corporate political engagement. Whatever responses to these questions will ultimately be made by the Commission on Elections (COMELEC), Securities and Exchange Commission (SEC), or the courts, will have a far-reaching impact on the development of the law on campaign finance and corporate law.

[1] [Hereinafter "*Citizens United*"], 558 U.S. 310 (2010).

This Article attempts to answer these 15 questions. In doing so, it provides a general legal framework on corporate political spending and an outline of the core corporate governance issues involved. This Article aims to guide private domestic stock corporations and their counsels in the planning, execution, and justification of corporate political spending.

II. BACKGROUND

The Revised Corporation Code introduced a new dimension to the Philippines' triennial elections: domestic corporations are now permitted to "give donations in aid of any political party or candidate or for purposes of partisan political activity[.]"[2] In the upcoming 2022 national and local elections, domestic corporations may now use its financial resources to *speak* in support of the campaign of any candidate and/or party.

This poses significant problems for both the COMELEC, which must ensure that no undue advantage is gained by electoral aspirants with vast connections and/or deep pockets,[3] and the SEC, who must protect the rights of all shareholders.[4] This Article largely focuses on the latter.

When a corporation engages in political speech by way of contribution to the campaign of candidates and/or parties,[5] it presumably does so on behalf of all of its shareholders.[6] At present, there is no special law, rule, or regulation which regulates or provides guidance as to *how* a corporation will *speak* in support of any political candidate and/or party. Necessarily, this means that corporate political spending, by default, is governed by the same rules as ordinary business decisions. This is where the problem lies.

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[2] REV. CORP. CODE, § 35(i).

[3] Nat'l Press Club v. Comm'n on Elections, G.R. No. 102653, 207 SCRA 2, 14, Mar. 5, 1992.

[4] *See* SEC. REG. CODE, § 5.

[5] *See* Ejercito v. Comm'n on Elections [hereinafter "*Ejercito*"], G.R. No. 212398, 742 SCRA 210, 299–301, Nov. 25, 2014.

[6] Nikolas Bowie, *Corporate Democracy: How Corporations Justified Their Right to Speak in 1970s Boston*, 36 LAW & HIST. REV. 943, 946 (2018).

Generally, under existing corporate law rules,[7] *all corporate power* is vested in and exercised solely by the board of directors ("board"),[8] or "through its officers and agents, when authorized by resolution or its by-laws."[9] This broad grant of power permits the board to act even against shareholder preferences or their resolutions.[10]

What does this mean for corporate political spending? This means that the board alone gets to decide whether a corporation will incur expenses to support the campaign of any political candidate and/or party. However, the decision to incur expenses for political purposes, unlike ordinary business decisions, is not likely to be solely based on business judgment or a desire to improve the company's bottom line. At the very least, such expenditure is in part, if not totally, an expression of support for the election of a candidate and/or party in public office by the board only.[11] Simply stated, since the board controls the disbursement of funds intended for political spending, such disbursement will likely carry with it the political preferences and beliefs of only the individuals composing the board (and possibly a controlling shareholder block), but there is no guarantee that such preferences and beliefs are shared by the vast majority of the shareholders. This is an agency problem which requires differential treatment. Indeed, "[t]hat corporate managers

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[7] Concededly, under our present rules, there are a handful of instances when shareholders are legally entitled to take an active part in corporate decision making, e.g., REV. CORP. CODE, § 6 (provides an enumeration where all classes of shareholders may vote to approve or disapprove certain actions of the board), § 27 (removal of directors or trustees), § 32 (shareholder approval of contracts between corporations with interlocking directors), § 33 (ratifying acts of disloyal directors), § 39 (shareholder approval of the sale of all or substantially all of the assets of the corporation), § 41 (shareholder approval to invest corporate funds in another corporation, business, or for any purpose other than the primary purpose for which it was organized), § 42 (shareholder approval for the declaration of stock dividends), and § 43 (shareholder approval to enter into and conclude a management contract).

[8] San Juan Structural and Steel Fabricators, Inc. v. Ct. of Appeals, G.R. No. 129459, 296 SCRA 631, 645, Sept. 29, 1998.

[9] De Liano v. Ct. of Appeals, G.R. No. 142316, 370 SCRA 349, 372, Nov. 22, 2001.

[10] Phil. Stock Exch., Inc. v. Ct. of Appeals, G.R. No. 125469, 281 SCRA 232, Oct. 27, 1997; Wolfson v. Manila Stock Exch., 72 Phil. 492 (1941); Ramirez v. The Orientalist Co. [hereinafter "*Ramirez*"], 38 Phil. 634 (1918). *See* Barretto v. La Previsora Filipina, 57 Phil. 649 (1932).

[11] ELECT. CODE, § 79(b) *in relation to* § 94; *Citizens United*, 558 U.S. 310 (2010); Dhammika Dharmapala & Filip Palda, *Are Campaign Contributions a Form of Speech? Evidence from Recent US House Elections*, 112 PUB. CHOICE 81 (2002). *See* Osmeña v. Comm'n on Elections, G.R. No. 132231, 288 SCRA 447, Mar. 31, 1998 (Romero, *J.*, *dissenting*); Nicolas-Lewis v. Comm'n on Elections, G.R. No. 223705, 913 SCRA 515, Aug. 14, 2019.

might spend corporate funds not to maximize the shareholders' welfare but to maximize their own is a very real danger."[12]

Worse, by leaving to the board the discretion to decide on corporate political spending, a real possibility exists that the shareholders will, in effect, subsidize the political speech of the board. To illustrate, suppose that 51% of the outstanding capital stock of corporation A is owned by B, while the remaining 49% is owned by C, D, and E. B is the Chief Operating Officer ("COO") and the Chairman of the Board. The Board delegated to B the discretion to contribute to the campaign of any of the candidates in the upcoming local and national elections for the year 2022. Between presidential candidates X and Y, B prefers X but C, D, and E prefer Y. B donated 1 million pesos to the campaign of X. Under this circumstance, corporation A, and by extension C, D, and E, effectively bore the cost of the political speech of B, notwithstanding the fact that B's preference diverges from C, D, and E.

The agency problem brought about by corporate political spending under our present corporate law regime is confounded further by the fact that as a form of symbolic speech,[13] it ineluctably carries with it a unique expressive significance, i.e., that corporate political contribution to a candidate could be perceived as signifying a consistency of beliefs on political issues between the corporation and its shareholders and the candidate. Thus, for shareholders who dissent or carry political preferences and beliefs which diverge from those of corporate insiders, "the cost […] may go far beyond the amount the company spends. Shareholders may have a strong interest in not being associated with political speech they oppose[.]"[14]

One might argue that since the board was elected by shareholders, this necessarily carries with it the acquiescence of shareholders to the political speech that the board will eventually resolve to pursue. This, however, is flawed and presumptuous. Generally, shareholders choose members of the board not on the basis of an alignment of political affiliations, but rather on the competence of the individuals to act as stewards (on behalf of the shareholders) of corporate property.[15] There is thus no guarantee that an

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[12] Pamela Karlan, *Me Inc.*, BOSTON REV., July 1, 2011, *at* http://www.bostonreview.net/pamela-karlan-corporate-personhood.

[13] Diocese of Bacolod v. Comm'n on Elections [hereinafter "*Diocese of Bacolod*"], G.R. No. 205728, 747 SCRA 1, 73, Jan. 21, 2015. The decision defines symbolic speech as one which "conveys its message as clearly as the written or spoken word."

[14] Lucian Bebchuk & Robert Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 943 (2013).

[15] Tom v. Rodriguez, G.R. No. 215764, 761 SCRA 679, July 6, 2015. *See* Bowie, *supra* note 6.

elected director's (or a board's) preference for a candidate will match those of the shareholders that elected them.

Accordingly, with respect to the question of corporate political spending, the pluralism of the corporate entity carries a myriad of issues that need clarification. We now explore these various issues and answer the specific questions raised in Part I.

III. THE CORPORATE GOVERNANCE DIMENSION OF CORPORATE POLITICAL CONTRIBUTIONS

A. Permissible Corporate Political Contributions

Section 35 (i) of the Revised Corporation Code allows "[corporate] donations in aid of any political party or candidate or for purposes of partisan political activity."[16] This is implied in the deletion of *domestic corporations*, and retention of *foreign corporations*, in the blanket prohibition on corporate political donations in Section 36 (9) of the old Corporation Code. A *domestic corporation* is a corporation organized in accordance with Philippine law, i.e., the Revised Corporation Code. A *foreign corporation* is a corporation organized in accordance with foreign law.[17]

Prior to the passage of the Revised Corporation Code, Section 36 (9) of the old Corporation Code prohibited corporate political contributions, both from domestic and foreign corporations. It states:

> Section 36. *Corporate Powers and Capacity*. — Every corporation incorporated under this Code has the power and capacity:
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> * * *
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> 9. To make reasonable donations, including those for the public welfare or for hospital, charitable, cultural, scientific, civic, or similar purposes: *Provided*, that *no corporation, domestic or foreign, shall give donations in aid of any political party or candidate or for purposes of partisan political activity[.]*[18]

[16] REV. CORP. CODE, § 35(i).
[17] § 140.
[18] CORP. CODE (1980), § 36(9). (Emphasis supplied.)

The Revised Corporation Code amended Section 36 of the old Corporation Code to allow political contributions from private domestic corporations, but it retained the prohibition on corporate political contributions from foreign corporations. Section 35 of the Revised Corporation Code states:

> Section 35. *Corporate Powers and Capacity*. – Every corporation incorporated under this Code has the power and capacity:
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> * * *
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> (i) To make reasonable donations, including those for the public welfare or for hospital, charitable, cultural, scientific, civic, or similar purposes: *Provided*, [t]hat no foreign corporation shall give donations in aid of any political party or candidate or for purposes of partisan political activity[.][19]

The Revised Corporation Code does not define "partisan political activity." However, this phrase has a particular meaning in election law. "Partisan political activity" refers to any act designed to promote the election or defeat of a particular candidate or party to public office, which includes any of the following:

> a) Forming organizations, associations, clubs, committees, or other groups of persons for the purpose of soliciting votes and/or undertaking any campaign for or against a candidate/party;
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> b) Holding political caucuses, conferences, meetings, rallies, parades, or other similar assemblies for the purpose of soliciting votes and/or undertaking any campaign for or against a candidate/party;
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> c) Making speeches, announcements, or commentaries, or holding interviews for or against the election of any candidate or party for public office;
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> d) Publishing, displaying, or distributing campaign literature, or materials designed to support or oppose the election of any candidate or party;

[19] REV. CORP. CODE, § 35(i).

e) Directly or indirectly soliciting votes, pledges, or support for or against any candidate or party.[20]

The enumeration above is not exhaustive,[21] and may include other acts, such as providing contributions towards the campaign efforts of a candidate.[22] Simply stated, notwithstanding the enumeration above, any act may be considered a "partisan political activity" for as long as it is designed to affect public opinion, in support of or otherwise, of a candidate and/or party.

B. Exceptions and Qualifications

Case law provides that there can be no *partisan political activity* prior to the commencement of the campaign period.[23] This is because prior to the commencement, "there is no 'particular candidate or candidates' to campaign for or against"[24] since an individual can only be considered as a candidate at the start of the campaign period[25] for which they filed their certificate of candidacy. Thus, a foreign corporation, which is absolutely prohibited from providing corporate donations, may arguably be permitted to provide donations outside the campaign period and for other non-electoral or non-campaign-related political agenda.

Section 95 of Batasang Pambansa Blg. 881, *as amended*, or the Omnibus Election Code ("OEC"), also enumerates prohibited contributions in electoral campaigns, which include donations from certain corporations engaged in particular industries or economic activities. This would qualify the permissible scope of the Revised Corporation Code—i.e., while domestic corporations may provide political contributions, certain domestic corporations, such as public utilities and government contractors, may not provide such contributions.

Another restriction to the permissible scope of corporate political contributions by domestic corporations in Section 35 of the Revised

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[20] COMELEC & CSC Joint Circ. No. 001-16 (2016). Joint COMELEC-CSC Advisory on Electioneering & Partisan Political Activities.

[21] *See* Trinidad v. Valle, Adm. Matter No.2258-CFI, 105 SCRA 606, July 20, 1981. *See also CSC reminds government workers against engaging in partisan political activities*, CSC WEBSITE, Jan. 24, 2019, *at* http://www.csc.gov.ph/new-updates/1687-csc-reminds-government-workers-against-engaging-in-partisan-political-activities.html.

[22] Securities and Exch. Comm'n (SEC) Op. No. 15-08 (July 27, 2015).

[23] Lanot v. Comm'n on Elections [hereinafter "*Lanot*"], G.R. No. 164858, 507 SCRA 114, 147, Nov. 16, 2006.

[24] *Id.* at 148.

[25] Peñera v. Comm'n on Elections [hereinafter "*Peñera*"], G.R. No. 181613, 599 SCRA 609, 644, Nov. 25, 2009; Rep. Act No. 9369 (2007), § 13.

Corporation Code is the threshold of *reasonableness* of the donation. The law does not define what is considered a reasonable donation, and there is no SEC issuance or case law that provides for such a threshold. This may be considered on a case-to-case basis, depending on the nature, size, and relative importance of the corporation's business activities in the country.

C. Corporate Capacity to Give Political Donations: General Powers, Corporate Powers, AOI, and *Ultra Vires* Acts

Whether a private domestic stock corporation has the legal capacity to provide corporate political contributions for partisan political activities depends on whether it possesses the corporate power to do so. Section 44 of the Revised Corporation Code provides the sources of corporate power:

> Section 44. *Ultra Vires Acts of Corporations*. — No corporation shall possess or exercise corporate powers other than those conferred by this Code or by its articles of incorporation and except as necessary or incidental to the exercise of the powers conferred.[26]

There are two kinds of corporate powers: (i) express powers and (ii) implied powers.[27] Express powers are those conferred by the Revised Corporation Code and the AOI.[28] Express powers also include those conferred by law[29] including statutes other than the Revised Corporation Code. Implied powers are those that are "necessary or incidental to the exercise of the powers conferred" on the corporation.[30] Implied powers also include acts which are consistent with the object for which a corporation is created.[31] An act might be considered within the scope of corporate powers, even if it was not among the express powers, if the same served the corporation's ends.[32] The Supreme Court in *National Power Corp. v. Vera*[33] provided:

> For if that act is one which is lawful in itself and not otherwise prohibited, and is done for the purpose of serving corporate ends,

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[26] REV. CORP. CODE, § 44.

[27] Magallanes Watercraft Ass'n, Inc. v. Auguis [hereinafter "*Magallanes Watercraft Ass'n, Inc.*"], G.R. No. 211485, 791 SCRA 445, 453, May 30, 2016.

[28] REV. CORP. CODE, § 44.

[29] § 44.

[30] § 44.

[31] U. of Mindanao, Inc. v. Bangko Sentral ng Pilipinas [hereinafter "*U. of Mindanao*"], G.R. No. 194964, 778 SCRA 458, 486, Jan. 11, 2016.

[32] Nat'l Power Corp. v. Vera, G.R. No. 83558, 170 SCRA 721, 726, Feb. 27, 1989.

[33] *Id.*

> and reasonably contributes to the promotion of those ends in a substantial and not in a remote and fanciful sense, it may be fairly considered within the corporation's charter powers.
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> [A] corporation is not restricted to the exercise of powers expressly conferred upon it by its charter, but has the power to do what is reasonably necessary or proper to promote the interest or welfare of the corporation.[34]

In *Montelibano v. Bacolod-Murcia Milling Co., Inc.*,[35] the Court provided the test to determine if a corporate act is in accordance with its purposes, as follows:

> It is a question, therefore, in each case, of the logical relation of the act to the corporate purpose expressed in the charter. If that act is one which is lawful in itself, and not otherwise prohibited, is done for the purpose of serving corporate ends, and is reasonably tributary to the promotion of those ends, in a substantial, and not in a remote and fanciful, sense, it may fairly be considered within charter powers. The test to be applied is whether the act in question is in direct and immediate furtherance of the corporation's business, fairly incident to the express powers and reasonably necessary to their exercise. If so, the corporation has the power to do it; otherwise, not.[36]

The private domestic stock corporation's power to provide reasonable donations, in general, and political contributions, in particular, is covered within the general powers of the corporation in Section 35 of the Revised Corporation Code.

What if the power to provide political contributions is not expressly stated in the AOI? Based on a SEC Opinion dated August 12, 1991 and SEC Opinion No. 19-22 dated June 14, 2019, a general power of the corporation stated in the law (the Revised Corporation Code in this case) is sufficient to provide capacity on the part of the corporation to exercise such power, even if the activity is not expressly stated in the AOI.[37]

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[34] *Id.* at 726.

[35] G.R. No. 15092, 5 SCRA 36, May 18, 1962.

[36] *Id.* at 42, *citing* WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA ON THE LAW OF PRIVATE CORPORATIONS 266–68 (1950 ed.).

[37] SEC Op. (Aug. 12, 1991) states:

Accordingly, it is not necessary for the corporation to include in the AOI the power to provide political contributions. However, assuming it is necessary for the corporation to do so, the power to provide political contributions may either be expressly stated or implied in the corporation's purposes. If there is no such express statement, the provision of political contributions may still fall within the implied power of the corporation if the same is necessary or incidental to the purposes for which the corporation was created.

The Supreme Court in *Pirovano v. De La Rama Steamship, Co.*[38] ruled on whether a corporate donation is within the implied corporate power of the corporation or is an *ultra vires act*.[39] The Court declared:

> The third question to be determined is: Can defendant corporation give by way of donation the proceeds of said insurance policies to the minor children of the late Enrico Pirovano under the law or its articles of incorporation, or is that donation an ultra vires act? To answer this question it is important for us to examine the articles

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> Therefore, whether or not the power to donate is included in the articles of incorporation as to what the corporation could do and perform, it is, nevertheless, deemed to be within the scope of its corporate powers by express provision of the Corporation Code.
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> In the light of the foregoing, subject corporation may undertake community development projects as its donations for the public welfare, without amending its articles of incorporation to include such power.
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> Moreover, SEC Op. No. 19-22 (June 14, 2019) states:
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> [T]here are general powers that may be exercised by every corporation whether or not such powers are stated in the articles of incorporation or by-laws. Section 35 (g) of the RCC enumerates the powers expressly given to every corporation created under the general incorporation law[.]
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> The Commission has previously opined that: "Fletcher has regarded the power to acquire and convey property as an incident to every corporation although such power is expressly conferred to corporations incorporated in accordance with Section 36 (7) of the Corporation Code. Therefore whether or not such power is included in what the corporation can do and perform under its articles of incorporation, it is nevertheless, deemed to be within the scope of its corporate powers by express declaration of Section 36 of the Code.

[38] [Hereinafter "*Pirovano*"], 96 Phil. 335 (1954).
[39] *Id.* at 353–56.

> of incorporation of the De la Rama company to see if the act or donation is outside of their scope.
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> [W]e find that the corporation was given broad and almost unlimited powers to carry out the purposes for which it was organized among them, (1) "To invest and deal with the moneys of the company not immediately required, in such manner as from time to time may be determined" and, (2) "to aid in any other manner any person, association, or corporation of which any obligation or in which any interest is held by this corporation or in the affairs or prosperity of which this corporation has a lawful interest." The world deal is broad enough to include any manner of disposition, and [refers] to moneys *not immediately required* by the corporation, and such disposition may be made *in such manner as from time to time may be* [*determined*] by the corporations. The donation in question undoubtedly comes within the scope of this broad power [for] it is a fact appearing in the evidence that the insurance proceeds were not immediately required when they were given away.
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> Under the second broad power we have above stated, that is, *to aid in any other manner any person* in the affairs and prosperity of whom the corporation has a lawful interest, the record of this case is replete with instances which clearly show that the corporation knew well its scope and meaning so much so that, with the exception of the instant case, no one has lifted a finger to dispute their validity. […] All these acts executed before and after the donation in question have never been questioned and were willingly and actually carried out.[40]

The case of *Pirovano* also established that business corporations providing donations for causes germane to their corporate purposes are not committing *ultra vires* acts. The Court affirmed the weight of the following foreign authorities:

> "But although business corporations cannot contribute to charity or benevolence, yet they are not required always to insist on the full extent of their legal rights. They are not forbidden from recognizing moral obligations of which strict law takes no cognizance. They are not prohibited from establishing a reputation

[40] *Id.*

> for broad, liberal, equitable dealing which may stand them in good stead in competition with less fair rivals. Thus, an incorporated fire insurance company whose policies except losses from explosions may nevertheless pay a loss from that cause when other companies are accustomed to do so, such liberal dealing being deemed conducive to the prosperity of the corporation." (Modern Law of Corporations, Machen, Vol. 1, p. 81)
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> "So, a bank may grant a five years' pension to the family of one of its officers. In all cases of these sorts, the amount of the gratuity rests entirely within the discretion of the company, unless indeed it be altogether out of reason and fitness. But where the company has ceased to be a going concern, this power to make gifts or presents is at an end." (Modern Law [of] Corporations, Machen, Vol. 1, p. 82.)
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> "*Payment of Gratuities out of Capital.* — There seems on principle no reason to doubt that gifts or gratuities wherever they are lawful may be paid out of capital as well as out of profits." (Modern Law of Corporations, Machen, Vol. 1, p. 83.)
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> *"Whether desirable to supplement implied powers of this kind by express provisions.* — Enough has been said to show that the implied powers of a corporation to give gratuities to its servants and officers, as well as to strangers, are ample, so that there is therefore no need to supplement them by express provisions." (Modern law of Corporations, Machen, Vol. 1, p. 83.)[41]

Corporate acts which are outside the scope of express or implied powers are *ultra vires* acts.[42] The Supreme Court in *University of Mindanao, Inc. v. Bangko Sentral ng Pilipinas*[43] stated:

> Corporations are artificial entities granted legal personalities upon their creation by their incorporators in accordance with law. Unlike natural persons, they have no inherent powers. Third persons dealing with corporations cannot assume that corporations have powers. It is up to those persons dealing with corporations to determine their competence as expressly defined by the law and their articles of incorporation.
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> A corporation may exercise its powers only within those definitions. Corporate acts that are outside those express

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[41] *Id.* at 358–59.

[42] *Magallanes Watercraft Ass'n, Inc.*, 791 SCRA 445, 447; *U. of Mindanao*, 778 SCRA 458, 486.

[43] *U. of Mindanao*, 778 SCRA at 486.

> definitions under the law or articles of incorporation or those "committed outside the object for which a corporation is created" are *ultra vires*.[44]

Ultra vires acts also include those "that may ostensibly be within [corporate] powers but are, by general or special laws, either proscribed or declared illegal."[45]

There are two kinds of *ultra vires* acts: (i) those that are illegal *per se*, and (ii) those that are merely beyond the scope of corporate powers. *Ultra vires* acts, which are illegal *per se* for being contrary to law, morals, public policy, or public duty, are null and void. *Ultra vires* acts which are merely beyond the scope of corporate powers, and not illegal *per se*, may acquire validity by performance, ratification, or estoppel. Such acts are merely voidable and may become binding and enforceable when ratified by the stockholders. The Supreme Court in *Bernas v. Cinco*[46] provided:

> A distinction should be made between corporate acts or contracts which are illegal and those which are merely *ultra vires*. The former contemplates the doing of an act which are contrary to law, morals or public policy or public duty, and are, like similar transactions between individuals, void. They cannot serve as basis of a court action nor acquire validity by performance, ratification or estoppel. Mere *ultra vires* acts, on the other hand, or those which are not illegal or void *ab initio*, but are not merely within the scope of the articles of incorporation, are merely voidable and may become binding and enforceable when ratified by the stockholders.[47]

In the case of *Pirovano*, the Court held that assuming the donation by the corporation was an *ultra vires* act, it was nevertheless ratified by the stockholders. The grant of donation by the corporation is not illegal *per se*, and hence susceptible to stockholder ratification. The Court declared:

> Since it is not contended that the donation under consideration is illegal, or contrary to any of the express provisions of the articles of incorporation, nor prejudicial to the creditors of the defendant corporation, we cannot but logically conclude, on the strength of the authorities we have quoted above, that said donation, even if ultra vires in the supposition we have adverted to, is not void,

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[44] *Id.* at 486.

[45] Querubin v. Comm'n on Elections, G.R. No. 218787, 776 SCRA 715, 779, Dec. 8, 2015.

[46] G.R. No. 163356, 761 SCRA 104, July 10, 2015.

[47] *Id.* at 124.

> and if voidable its infirmity has been cured by ratification and subsequent acts of the defendant corporation. The defendant corporation, therefore, is now prevented or estopped from contesting the validity of the donation.[48]

In this regard, if the political contribution is an *ultra vires* act and illegal for violating prohibited contributions under the OEC, or illegal because the donor is a foreign corporation, the same cannot be subject to stockholder ratification. However, if the contribution is an *ultra vires* act but is not otherwise illegal, the same can be subject to stockholder ratification.

D. Corporate Approvals, Including Quorum and Voting Requirements

There are many layers of decision-making in a private domestic stock corporation: (i) the stockholders, (ii) the board of directors, and (iii) the president, chief executive officer, or such other authorized representatives in the executive or management team of the corporate organization. Other types of corporations, depending on their size and classification (whether a publicly listed corporation, a public company, or a corporation governed by a secondary franchise or license), may introduce other layers of decision-making, such as board committees and management committees. There may also be other special corporate approval requirements in corporations governed by codes of corporate governance, such as the indispensability of the participation of independent directors.

The general rule is that the board of directors is the repository of all corporate powers, absent any specific corporate approval requirement, whether under law or the corporation's bylaws. The Revised Corporation Code does not provide a specific corporate approval requirement for corporate donations in general and political contributions in particular. The authors do not think that donations and political contributions qualify as investment of corporate funds, which requires a specific corporate approval requirement under Section 41 of the Revised Corporation Code.[49] While the

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[48] *Pirovano*, 96 Phil. 335, 361–62.

[49] REV. CORP. CODE, § 41. *Power to Invest Corporate Funds in Another Corporation or Business or for Any Other Purpose.* – Subject to the provisions of this Code, a private corporation may invest its funds in any other corporation, business, or for any purpose other than the primary purpose for which it was organized, when approved by a majority of the board of directors or trustees and ratified by the stockholders representing at least two-thirds (2/3) of the outstanding capital stock, or by at least two-thirds (2/3) of the outstanding capital stock, or by at least two-thirds (2/3) of the members in the case of nonstock corporations, at a

law does not define "investment," the term as ordinarily understood involves the expectation of a future return, a feature which is repugnant to the concept of a donation and political contribution.

Accordingly, the general rule is applicable—i.e., the political contribution, in order to be a valid corporate act, requires the approval of the board of directors in a meeting duly called for that purpose. Under Section 52 of the Revised Corporation Code, a majority of the directors as stated in the AOI shall constitute a quorum, and the decision to approve the political contributions must be reached by at least a majority of the directors constituting a quorum.

Note that this general rule may be modified by: (i) the particular provisions in the bylaws of a specific corporate entity, and (ii) the particular manuals of corporate governance adopted by corporations required to observe corporate governance guidelines by the SEC.

There is no special requirement under the Revised Corporation Code that the voting must take place in a regular or special meeting of the board.

E. The Rights of Minority Stockholders Who Dissent from the Decision to Make Corporate Political Contributions

Divergence of interests between and among shareholders and the board is not uncommon. In theory, allowing a majority of shareholders, through the board, to direct corporate affairs is efficient because shareholders have a common interest of value maximization.[50] Thus, even if the minority shareholders have little to do to influence corporate affairs, they nevertheless benefit from what is perceived as the best route to profit maximization.

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meeting duly called for the purpose. Notice of the proposed investment and the time and place of the meeting shall be addressed to each stockholder or member at the place of residence as shown in the books of the corporation and deposited to the addressee in the post office with postage prepaid, served personally, or sent electronically in accordance with the rules and regulations of the Commission on the use of electronic data message, when allowed by the bylaws or done with the consent of the stockholders: *Provided*, That any dissenting stockholder shall have appraisal right as provided in this Code: *Provided, however,* That where the investment by the corporation is reasonably necessary to accomplish its primary purpose as stated in the articles of incorporation, the approval of the stockholders or members shall not be necessary.

[50] Peter DeMarzo, *Majority Voting and Corporate Control: The Rule of the Dominant Shareholder*, 60 REV. ECON. STUD. LTD. 713 (1993).

This, however, is not the case with corporate political spending. Unlike ordinary business decisions, it cannot be equally assumed that the shareholders have a common interest, or that they share the same political preferences and beliefs. As discussed in Part II, there exists a high probability that the board, the controlling shareholders, and the minority shareholders may diverge on matters relating to corporate political spending in view of the expressive significance that attaches to it. This agency problem becomes more pronounced for minority shareholders who have few options to protect themselves from political spending to which they dissent.

Below, we present the possible remedies available to dissenting minority shareholders and discuss the problems in undertaking each specific option to object to a corporate political contribution.

1. Procedures of Corporate Democracy

In the case of *Citizens United v. Federal Election Commission,* the US Supreme Court emphasized that the "procedures of corporate democracy" may be resorted to by shareholders to hold insiders accountable for engaging in corporate political speech from which they diverge:

> Shareholder objections raised through the procedures of corporate democracy […] can be more effective today because modern technology makes disclosures rapid and informative. […] With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.[51]

In essence, if minority shareholders feel aggrieved by the board's choice of candidates and/or parties that would receive corporate funds, a remedy available to them is to ensure that such decision makers are not elected to the board in the next general meeting. However, this remedy is arguably insufficient.

For one, in view of the near-ubiquity of concentrated ownership structures in the Philippines,[52] it is unlikely that dissenting minority

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[51] *Citizens United*, 558 U.S. 310, 370.

[52] Michael Sullivan & Angelo Unite, *The Influence of Group Affiliation and Ownership Structure on Emerging Market IPOs: The Case of the Philippines*, DE LA SALLE U. WEBSITE, *at* https://www.dlsu.edu.ph/wp-content/uploads/2019/03/1999-010.pdf; Roberto de Ocampo, A Country Paper on Corporate Ownership And Corporate Governance: Issues And

shareholders can muster enough votes to elect a sufficient number of directors that are sympathetic to or carry a similar political view as they do. For another, without special rules for disclosure of corporate political spending, minority shareholders would not have ready access to information that would allow them to make an informed vote.

2. Right of Appraisal

Dissenting shareholders may also choose the nuclear option, i.e., to exercise their right of appraisal for corporate expenditure for partisan political activity. Section 80 of the Revised Corporation Code provides:

> Section 80. *When the Right of Appraisal May Be Exercised.* – Any stockholder of a corporation shall have the right to dissent and demand payment of the fair value of the shares in the following instances:
>
> * * *
>
> (d) In case of investment of corporate funds for any purpose other than the primary purpose of the corporation.[53]

The right of appraisal refers to the right of a stockholder who dissents from certain corporation actions "to demand payment of the fair value of his or her shares."[54] However, we do not think that donations and political contributions qualify as investment of corporate funds under item (d) above. As mentioned in Part III. D., "investment" is ordinarily understood to involve the expectation of a future return, a feature which is repugnant to the concept of a donation and political contribution. Hence, the decision to provide political contributions will not trigger a dissenting stockholder's right of appraisal.

Concerns In The Philippines, (May 31, 2000) (paper presented at the Asian Development Bank-Organisation for Economic Co-operation and Development-World Bank 2nd Asian Roundtable on Corporate Governance), *at* https://www.oecd.org/corporate/ca/corporategovernanceprinciples/1931183.pdf.

[53] REV. CORP. CODE, § 80(d).

[54] Turner v. Lorenzo Shipping Corp., G.R. No. 157479, 636 SCRA 13, 25, Nov. 24, 2010.

3. Derivative Suits

Derivative suits refer to actions "brought by minority shareholders in the name of the corporation to redress wrongs committed against it[.]"[55] It may be availed of under a narrow set of circumstances, i.e., "whenever the officials of the corporation refuse to sue, or are the ones to be sued, or hold the control of the corporation."[56] For a derivative suit to be proper, the following requisites must concur:

> a) the party bringing suit should be a shareholder as of the time of the act or transaction complained of, the number of his shares not being material;
> b) he has tried to exhaust intra-corporate remedies, i.e., has made a demand on the board of directors for the appropriate relief but the latter has failed or refused to heed his plea; and
> c) the cause of action actually devolves on the corporation, the wrongdoing or harm having been, or being caused to the corporation and not to the particular stockholder bringing the suit.[57]

It is arguable that while a derivative suit may ostensibly be an available remedy, it would likely not be successful. In a derivative suit, the injured party must be the corporation itself.[58] However, in the case of corporate political contribution, the damage pertains more to the dissenting shareholder than the corporation itself,[59] i.e., for being associated with speech that they are not in agreement with.

For the corporation to be considered an injured party, it must be clearly shown that either (1) a causal relationship between the corporate political contribution and a diminishing bottom-line can be shown;[60] (2) the corporate political expenditure was made without the board being "properly inform[ed]" of the implications;[61] or (3) if such political contribution is *ultra*

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[55] W. Inst. of Tech., Inc. v. Salas, G.R. No. 113032, 278 SCRA 216, 225, Aug. 21, 1997.

[56] Chua v. Ct. of Appeals, G.R. No. 150793, 443 SCRA 259, 267, Nov. 19, 2004.

[57] San Miguel Corp. v. Kahn, G.R. No. 85339, 176 SCRA 447, 462, Aug. 11, 1989.

[58] Ching v. Subic Bay Golf and Country Club, Inc., G.R. No. 174353, 734 SCRA 569, 583 Sept. 10, 2014.

[59] *See* Bangko Sentral ng Pilipinas v. Campa, G.R. No. 185979, 787 SCRA 476, Mar. 16, 2016.

[60] Brody Mullins & Ann Zimmerman, *Target Discovers Downside to Political Contributions*, WALL STREET J., Aug. 7, 2010.

[61] James Kwak, *Corporate Law Constraints on Political Spending*, 18 N.C. BANK. INST. 251, 271–75 (2014).

vires. Under these aforementioned circumstances, or similar thereto, it can be convincingly argued that the corporation was "injured" thereby creating an opening for a derivative suit. As a result, if the political contribution does not fall under either of these situations, the corporation cannot be deemed an injured party, and a derivative suit becomes unavailable as a remedy for a dissenting minority stockholder.

F. Limitations in Specific Industries

Certain corporations engaged in specific economic activities are prohibited from, or have restrictions on, providing campaign contributions or donations for partisan political activity.

A financial institution, whether public or private, is absolutely prohibited from providing political contributions to candidates, political parties, and party-list groups.[62] However, "nothing […] shall prevent the making of any loan to a candidate or political party by any such public or private financial institutions legally in the business of lending money, and that the loan is made in accordance with laws and regulations and in the ordinary course of business."[63]

Corporations engaged in the operation of a public utility, or in possession of or exploiting any natural resources, are also absolutely prohibited from providing political contributions.[64]

Corporations which "hold contracts or sub-contracts to supply the government or any of its divisions, subdivisions or instrumentalities, with goods or services or to perform construction or other works" are likewise covered by the same absolute prohibition.[65] The word *hold* in Section 95 (c) of the OEC implies that there is already a notice of award in favor of the contractor or sub-contractor, and the government contract has already been executed. The prohibition is silent as to whether it covers bidders in pending government procurement projects. The rule on election bans imposed by the COMELEC does not adequately address this ambiguity as election bans are specific only to elections. Moreover, they usually only prohibit the disbursement of public funds for public works during the election ban.[66] This would not cover political contributions by bidders beyond the period of the

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[62] ELECT. CODE, § 95(a).
[63] § 95(a).
[64] § 95(b).
[65] § 95(c).
[66] § 261(v).

election ban or the campaign period, or for partisan purposes other than electoral campaigns.

G. Limitations on Specific Classes of Corporations

Certain classes of corporations are prohibited from, or have restrictions on, providing campaign contributions or donations for partisan political activity.

In the case of a government-owned and/or -controlled corporation ("GOCC"), the OEC is silent as to whether the said corporations are prohibited from providing contributions for any partisan political activity. Nevertheless, the Revised Administrative Code of 1987 provides:

> Section 55. *Political Activity.* — No officer or employee in the Civil Service including members of the Armed Forces, shall engage directly or indirectly in any partisan political activity or take part in any election except to vote nor shall he use his official authority or influence to coerce the political activity of any other person or body.[67]

This prohibition on partisan political activity would cover any director, officer, or executive of a GOCC. A GOCC is defined as "any agency organized as a stock or non-stock corporation, vested with functions relating to public needs whether governmental or proprietary in nature, and owned by the Government of the Republic of the Philippines directly or through its instrumentalities either wholly or, where applicable as in the case of stock corporations, to the extent of at least a majority of its outstanding capital stock."[68] Based on this definition, the prohibition in the Administrative Code would cover: (i) chartered GOCCs, or those created by special laws, (ii) non-chartered GOCCs, or those created under the Revised Corporation Code, and (iii) GOCC subsidiaries. GOCC subsidiaries refer to "corporation[s] where at least a majority of the outstanding capital stock is owned or controlled, directly or indirectly, through one or more intermediaries, by a GOCC."[69] Accordingly, a mere GOCC affiliate, which "refers to a corporation fifty percent (50%) or less of the outstanding capital stock of which is owned or controlled, directly or indirectly, by [a] GOCC,"[70] would not be covered by

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[67] REV. ADM. CODE, bk. V, tit. I, subtit. A, ch. 8, § 55.
[68] Rep. Act No. 10149 (2011), § 3(o).
[69] § 3(z).
[70] § 3(a).

the prohibition on partisan political activity under the Administrative Code, since it is not a GOCC.

In the case of a nonstock corporation, there is a wide latitude of discretion to provide political contributions. Under Section 86 of the Revised Corporation Code, "a nonstock corporation is one where no part of its income is distributable as dividends to its members, trustees, or officers."[71] Section 87 of the Revised Corporation Code provides:

> Section 87. *Purposes*. – Nonstock corporations may be formed or organized for charitable, religious, educational, professional, cultural, fraternal, literary, scientific, social, civic service, or similar purposes, like trade, industry, agricultural and like chambers, or any combination thereof, subject to the special provisions of this Title governing particular classes of nonstock corporations.[72]

The enumeration of the purposes of nonstock corporations is broad enough to cover contributions for various political agenda. However, Section 13 of the Revised Corporation Code provides that "a nonstock corporation may not include a purpose which would change or contradict its nature as such."[73] The SEC has interpreted this limitation to preclude nonstock corporations from generally engaging in profitable business activities—but this has an exception. The SEC has opined that "[a] corporation may, as incident to its purpose(s), engage in business activities which are reasonably necessary to carry out the purpose(s) for which the corporation was organized."[74] By parity of reasoning, a nonstock corporation may provide political contributions when reasonably necessary to carry out the purpose(s) for which the nonstock corporation was organized.

There is no specific prohibition or limitation on political contributions on the part of close corporations. Foreign corporations are discussed in Part III. J.

H. Absence of Special Rules in Publicly Listed Corporations and Public Companies, and Possible Regulations to be Adopted

At present, like any other registered corporation with the SEC, there appears to be no rules that specifically apply to publicly listed corporations

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[71] REV. CORP. CODE, § 86.
[72] § 87.
[73] § 13(b).
[74] SEC Op. No. 11-12 (Mar. 9, 2011).

("PLC") and public companies ("PC") on corporate political spending and/or participation in corporate political activities. To date, not even the Philippine Stock Exchange ("PSE"), which has traditionally imposed more exacting governance standards, has released any issuance related thereto.

Notwithstanding the foregoing, given the paramount interest of the State to ensure a *fair* election that is untethered from the economic power of any aspirant,[75] and to ensure the protection of "the rights of its shareholders, particularly those that belong to the minority or non-controlling group[,]"[76] it is probable that certain regulations will be put in place. The authors anticipate that these regulations will likely be imposed only on PLCs and PCs since these types of corporations generally have a significant number of public investors, and have sufficient resources to *absorb* the additional costs that new regulatory requirements will impose. In the succeeding subsections, an attempt to *predict* the nature of the regulations that Congress and/or the SEC may adopt will be made.

1. Voting Requirements

Congress may require shareholder approval as a condition precedent before a corporation can incur expenditures in relation to partisan political activity. This is a potent device to protect minority shareholder interests.[77] There is a possibility that Congress will choose to emulate the Companies Act of 2006 of the United Kingdom (UK) which requires a resolution approved by a simple majority of its shareholders before political donations can be made[78] by companies "to political parties, to other political organisations and to independent election candidates[.]"[79] Inference dictates that the purpose of the requirement is to ensure that corporate political spending remains consistent with shareholder sentiment and interest.

If the practice under the UK Companies Act of 2006 is imported into the Philippines' statute books, Congress is likely to adopt the familiar two-tier

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[75] GMA Network, Inc. v. Comm'n on Elections, G.R. No. 205357, 734 SCRA 88, 119, Sept. 2, 2014; Tolentino v. Comm'n on Elections, G.R. No. 148334, 420 SCRA 438, Jan. 21, 2004.

[76] Phil. Stock Exch. ("PSE") Mem. No. CN-0024-11 (2011). Submission of 2011 Corporate Governance Guidelines Disclosure Template.

[77] *See* Abdulrahman Nabil Alsaleh, Protecting Minority Shareholders in Close Corporations: An Analysis and Critique of Statutory Protection in the Saudi Companies Law (2019) (unpublished dissertation for the University of Indiana Mauser School of Law), *available at* https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1062&context=etd.

[78] Companies Act (2006), part 14, § 366(1)–(2).

[79] § 362(a).

approval process,[80] i.e., the donation for partisan political purposes must be approved by both a majority of the board and "ratified by a vote of the stockholders owning or representing at least [x percent] of the outstanding capital stock" (but not unanimity). The authors submit, however, that the threshold vote of shareholders must not be a simple majority in view of the prevalence of concentrated ownership structures in the Philippines.[81] It would be better if the 2/3 voting threshold for most transactions that require ratification be maintained,[82] or a *majority of minority* approach. This approach will better ensure that the interest of any dissenting minority is protected. To be sure, supermajority and "majority of minority rules" are recognized as effective tools to protect minority interests in the face of controlling shareholder authoritarianism.[83]

To illustrate, suppose that Congress passed a statute requiring the approval of two-thirds (2/3) of the outstanding capital stock on any planned expenditure for partisan political activity. If sixty percent (60%) of the outstanding capital stock of Corporation A is owned by B, while C owns twenty-one percent (21%) and D owns nineteen percent (19%), a combination of B and C or B and D or B, C, and D would be needed to approve any such budget. This situation, in our opinion, is desirable since any expenditure of Corporation A in support of a politician and/or political party would accurately reflect the sentiment or speech of both the majority and minority shareholders. In contrast, if the rule requires a mere simple majority of shareholders, then B can ensure that the corporation donates to the campaign of any politician or political party without need of the assent of C and D, the minority shareholders. Corporation A's political spending is, therefore, only reflective of B's political speech.

Considering the illustration above, requiring a voting threshold well beyond the absolute majority requirement or, at least, a *majority of the minority* rule would better ensure that any political donation made by a corporation is reflective of the sentiment of both the controlling block of shareholders and the minority shareholders. This will leave only a handful of dissenting shareholders to bear the cost of speech they wish not to be associated with.

At this juncture, it bears to preemptively address a plausible opposition to the recommendation made: that requiring a supermajority vote

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[80] *See, e.g., supra* note 7.

[81] Sullivan & Unite, *supra* note 52, at 9.

[82] *See, e.g.,* REV. CORP. CODE, §§ 15, 27, 31(d).

[83] Anupam Chander, *Minorities, Shareholder and Otherwise*, 113 YALE L.J. 119, 139 (2003).

before a corporation can donate to the campaign ascribes too much weight to the speech or interest of the minority. In the authors' view, this is not necessarily the case. Given the expressive significance of donations to the political campaigns of certain individuals or parties, necessary precautions must be put in place to ensure that the speech of a corporation is reflective of a great majority of people that compose or own it. A contrary situation—that of a simple majority requirement—would bring to fore an evil that must be avoided: that a controlling block of shareholders can basically pass on the cost of their political speech to the corporation and, consequently, to minority shareholders.

2. Independent Director Review

Independent directors were conceived in part to protect minority shareholders from value damaging actions of company controllers.[84] In the Philippines, while independent directors are required for PLCs and PCs,[85] the only role that the RCC explicitly provides for them is to vet and approve material contracts, e.g., related party transactions.[86] It is highly possible that legislators may choose to expand the role of independent directors by granting them the power to review any planned donation and/or contribution to the political campaign of any candidate and/or party, and to assess whether the same is sufficiently representative of the sentiment of a great majority of shareholders.

This potential regulation is grounded on the archetype of a Filipino independent director, i.e., unburdened by any relationship that will "materially interfere with his [or her] exercise of independent judgment in carrying out his [or her] responsibilities[,]"[87] including links with management and the controlling shareholder/s.[88] Consequently, the line drawn between an independent director and the management and/or controlling or substantial shareholders suggests that there is an expectation of neutrality on the part of independent directors, and an expectation to act solely on the interest of the

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[84] Paul Davies, *The Board of Directors: Composition, Structure, Duties and Powers*, ORGANISATION FOR ECON. CO-OPERATION AND DEV., at 24 (2001), *at* https://www.oecd.org/daf/ca/corporategovernanceprinciples/1857291.pdf.

[85] REV. CORP. CODE, § 22.

[86] § 31(d).

[87] SEC Op. No. 07-11 (May 24, 2007); SEC Mem. Circ. No. 20 (2020). SEC Rules on the Number of Independent Directors and Sectoral Representatives of Exchanges and Other Organized Markets.

[88] SEC Mem. Circ. No. 24 (2019). Code of Corporate Governance for Public Companies and Registered Issuers; SEC Mem. Circ. No. 19 (2016). Code of Corporate Governance for Publicly-Listed Companies.

corporation and all shareholders. The independent director, in theory, is at a unique vantage point to provide an objective assessment whether any proposed budget and/or donation for political spending accurately reflects the speech of a great majority of the shareholders or, at the very least, determine if such donation and/or expense is to the best interest of the corporation.

It bears clarifying, however, that the authors do not anticipate that Congress will grant independent directors the power to veto any planned donation or expenditure in favor of the campaign of a politician and/or party. This will be unlikely, as an independent director could effectively undermine the speech of a great majority of shareholders in the event that such shareholders resolve to undertake such donation and/or expense. Simply stated, no additional weight can be given to the opinion of the independent director as to the propriety of a donation or expense in favor of a politician or political party.

3. Binding Shareholder Resolutions

Shareholders in the Philippines "may propose […] for inclusion in the agenda at any regular meeting" or special meeting[89] any matter, including those involving any potential contribution by the corporation for partisan political activity. However, the use of the permissive word "may" indicates that any proposal to include for discussion and/or deliberation the matter of corporate political spending does not guarantee that the same will ultimately be included in the agenda.[90] Note that in a PLC, shareholders who "hold at least five percent (5%) of the outstanding capital stock […] shall have the right to include items on the agenda prior to the regular/special stockholders' meeting."[91]

Nevertheless, if the matter of corporate political spending is placed on the agenda, any shareholder resolution adopted pursuant thereto is at most only persuasive. This is because under the business judgment rule, boards are granted broad decision-making powers in running corporate affairs,[92] even to the extent of disobeying or ignoring shareholder resolutions.[93] Indeed, "where a meeting of the stockholders is called for the purpose of passing on the

[89] REV. CORP. CODE, § 49.

[90] *See also* Capati v. Ocampo, G.R. No. 28742, 113 SCRA 794, 796, Apr. 30, 1982.

[91] SEC Mem. Circ. No. 14 (2020). Shareholders' right to put items on the Agenda for Regular/Special Stockholders' meetings.

[92] CESAR VILLANUEVA, PHILIPPINE CORPORATE LAW 322 (2001).

[93] *See, e.g., Ramirez*, 38 Phil. 634.

propriety of making a corporate contract, its resolutions are at most advisory and not in any wise binding on the board."[94]

Despite this, Philippine authorities, including the courts, may nevertheless allow for a narrow exception to the business judgment rule, i.e., by permitting shareholders to adopt binding resolutions with respect to corporate political spending. This will not be a substantial departure from the business judgment rule since, corporate political spending is not a purely substantive business decision. The political speech aspect of corporate decision-making requires that the corporation accurately reflects the voice of the plurality of shareholders. Certainly, allowing the shareholders to resolve by themselves (as opposed to the board) the matter of corporate political spending increases the likelihood that any amount expended for partisan political activity is consistent with the interest of shareholders. To be sure, there are existing examples from which Congress may draw such practice. For instance, corporate law in the United States allows binding resolutions for highly exceptional circumstances. In *CA, Inc. v. AFSCME Emples. Pension Plan*,[95] the Supreme Court of Delaware held that shareholders may adopt binding resolutions for as long as it is limited to clarifying the procedures used by the board in its decision-making process.

I. Disclosure and Reportorial Requirements

Philippine corporations are required to disclose and/or file certain reports to the SEC or the PSE.[96] However, no special disclosure and/or reporting requirement is in place with respect to corporate expenditure relating to partisan political activities.

Nevertheless, we anticipate that, like voting requirements for political donations, Philippine authorities may choose to adopt the disclosure regime in the UK. Under the UK Political Parties, Elections and Referendum Act of 2000, any political donation and/or expenditure that exceeds GBP 2,000 must be disclosed to shareholders and reported to regulators annually.[97] Otherwise stated, under UK law, the obligation of a corporation to disclose and report its corporate political spending only arises if such corporation spends in excess of GBP 2,000.

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[94] *Id.*

[95] CA, Inc. v. AFSCME Emples. Pension Plan, 953 A.2d 227 (Del. 2008).

[96] *See, e.g., Reportorial Requirements*, SEC WEBSITE, *at* https://www.sec.gov.ph/reportorial-requirements/ (last visited July 22, 2021).

[97] Ciara Torres-Spelliscy & Kathy Fogel, *Shareholder-Authorized Corporate Political Spending in the United Kingdom*, 46 U.S.F.L. REV. 525, 544 (2010), *citing* Political Parties, Elections, and Referendum Act (2000), § 140.

Requiring disclosure and/or reporting if an expense breaches a certain threshold is not new to Philippine practice. For instance, expenses exceeding 10% of a company's revenue is required to be disclosed,[98] as well as all expenses on research and development,[99] and compensation of executives, regardless of amount.[100] Likewise, disclosure is required for any expenditure determined to be "material."[101] Indeed, there is no shortage of precedent in this regard. It must be noted, however, that in instances requiring disclosure, parameters are given as to what should be disclosed and when such disclosure must be made. For disclosure of corporate political expenses, these must likewise be considered.

What should be disclosed? To recall, Section 35 (i) of the Revised Corporation Code empowers domestic corporations to give "donations in aid of any political party or candidate or for purposes of partisan political activity[.]"[102] The use of the word "candidate" and the phrase "partisan political activity[,]" whose definitions relate to election campaigns,[103] suggest that any disclosure regime would cover only those expenses or donations incurred by a corporation during the campaign period. This is because an individual can only be considered a candidate at the beginning of the campaign period;[104] while, partisan political activity is defined as any "act designed to promote the election or defeat of a particular candidate or candidates to a public office[.]"[105] Thus, construed together, the two terms can be taken to mean that there can be no partisan political activity—which includes giving donations—unless and until the start of the campaign period, since prior thereto, there is no candidate to speak of.

To our mind, the foregoing is insufficient. Corporate political spending should be classified not on the basis of when the expense was made, but as to the purpose for which such expenditure was made. Otherwise,

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[98] *Rule 68.1, As Amended: Special Rule On Financial Statements Of Reporting Companies Under Section 17.2 Of The Securities Regulation Code* 37, SEC WEBSITE, Oct. 25, 2005, *at* https://www.sec.gov.ph/wp-content/uploads/2019/12/2005Rule_68.1.pdf.

[99] *Id.*

[100] *Annex C Non-Financial Disclosure Requirements* 16–19, SEC WEBSITE, Dec. 2003, *at* https://www.sec.gov.ph/wp-content/uploads/2019/11/2017MSRDFormAnnexC.pdf.

[101] *See also* PSE Consolidated Listing and Disclosure Rules, art. VII, § 4(3)–(4).

[102] REV. CORP. CODE, § 35(i).

[103] *In re* Gonzales v. Comm'n on Elections, G.R. No. 27833, 27 SCRA 835, 866, Apr. 18, 1969; Malinias v. Comm'n on Elections, G.R. No. 146943, 390 SCRA 480, 493–94, Oct. 4, 2002, *citing* ELECT. CODE, § 79.

[104] *Lanot*, 507 SCRA 114.

[105] ELECT. CODE, § 79(b).

corporate insiders can simply ensure that the disbursement of funds in favor of a prospective candidate be done prior to the campaign period to avoid the classification of the expense as "political" (notwithstanding the fact that such expenditure was for the purpose of assisting a campaign), and thus allow for easy circumvention of any disclosure rule. In our view, any and all expenses, regardless of timing, in favor of an individual who will become a candidate or is actually a candidate, and for the purpose of assisting such individual's campaign or potential campaign must be disclosed.

As to the question of when disclosure should be made, two factors may be taken into consideration: (1) frequency, and (2) threshold amount. Frequency refers to when disclosure and/or reporting must be made, while threshold amount refers to the necessity of disclosure and/or reporting.

The frequency of reporting is not difficult to ascertain considering that corporate political spending would likely coincide with national and local elections. However, if reporting is to be required only at the end of the election cycle or every three years, there is a two-year period wherein a corporation could funnel funds to an individual who potentially could become a candidate (provided of course that such donation can be reasonably ascertained as intended to affect public support for that individual for a future campaign). Considering this, it would be prudent to require disclosure annually, i.e., together with annual reports. Annual disclosures will more accurately cover the most recent information of corporate political spending and, at the same time, not be too disruptive and costly.

The threshold amount, i.e., the amount of expenditure that will trigger disclosure and reporting must also be given great consideration. The expressive significance of corporate political speech to all shareholders and potential investors requires that the threshold amount must not be too large. In this regard, some guidance can be taken from the PSE's Disclosure Template where corporations are obligated to determine what constitutes a threshold amount as to trigger certain reportorial requirements. The threshold amount must take into consideration the peculiar circumstances of a corporation.[106] To our mind, however, and similar to the practice of the UK, given the significance of corporate political spending, a threshold amount must be fixed by regulators on a comply or explain basis. This would allow

[106] PSE, *Corporate Governance Guidelines for Listed Companies – Disclosure Template for Year 2015* 25, PSE WEBSITE, *at* https://documents.pse.com.ph/wp-content/uploads/sites/15/2021/04/CG-Guidelines-Disclosure-Survey-for-Listed-Companies-Template.pdf.

for corporations to observe a different threshold depending on their circumstances.

The authors are of the view that the SEC will likely adopt this practice and this should be welcomed. Absent regulations requiring special voting, independent director review, or binding shareholder resolutions, minority shareholders would have to rely on traditional recourses to remedy or limit actions by corporate insiders from which they demur, e.g., among others, to elect directors that share the same or similar political view, to initiate a derivative suit, or, to withdraw their investments from the corporation. All these recourses are meaningless without access to information concerning corporate political spending.

J. Foreign Corporation

Foreign corporations are strictly prohibited from making any donations, expenditure, and/or contribution "in aid of any political party or candidate or for purposes of partisan political activity."[107] The OEC also provides:

> Sec. 81. *Intervention of foreigners.* – It shall be unlawful for any foreigner, whether judicial or natural person, to aid any candidate or political party, directly or indirectly, or take part in or influence in any manner any election, or to contribute or make any expenditure in connection with any election campaign or partisan political activity.[108]
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> * * *
>
> Sec. 95. *Prohibited contributions.* - No contribution for purposes of partisan political activity shall be made directly or indirectly by any of the following:
>
> * * *
>
> h. Foreigners and foreign corporations.[109]
>
> It shall be unlawful for any person to solicit or receive any contribution from any of the persons or entities enumerated herein.[110]

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[107] REV. CORP. CODE, § 35(i).
[108] ELECT. CODE, § 81.
[109] § 95(h).
[110] § 95.

Notwithstanding the prohibition, foreign corporations may still arguably contribute to an election campaign of a prospective candidate. This is because the proscription applies to donations and/or contributions for partisan political activity, which presumes that there is a candidate. Case law provides that there can be no candidate, within the meaning of the law, unless and until the beginning of the campaign period.[111] Thus, prior to the campaign period, since there is no candidate yet to speak of, a foreign corporation may nevertheless contribute to an individual who may become a candidate in the future.

Section 140 of the Revised Corporation Code defines a *foreign corporation* as "one formed, organized or existing under laws other than those of the Philippines' and whose laws allow Filipino citizens and corporations to do business in its own country or State."[112] The first part of this definition—that the corporation is incorporated under a foreign law—means that the place of incorporation, and not the foreign ownership of shares or corporate control, is the determining factor. The other tests of nationality—i.e., the Control Test and the Grandfather Rule—are limited in application to issues involving foreign investment limitations and the Anti-Dummy Law.[113] These other tests of nationality have not yet been extended to the issue on political contributions. In theory, it is possible to have a Philippine domestic corporation wholly-owned by foreigners, in which case the said corporation would be both a domestic corporation and one controlled by foreign stockholders. It remains to be seen whether Section 95 (h) of the OEC will be expansively interpreted to include other tests of corporate nationality.

K. Impact of Existing Material Agreements and of Government Licenses and Concessions

The corporate donor's existing material agreements with third parties, such as lenders, suppliers, customers, franchisors, joint venture partners, acquirers, investors, among others, may limit the ability of a corporation to provide political contributions. *Political contributions* clauses in contracts may prohibit or restrict donations for partisan political activity, or impose disclosure obligations on the same. Violation of such clauses may trigger default and termination clauses, violation of warranties, and obligation to pay damages. For instance, a loan agreement may prohibit the corporate borrower from utilizing a certain percentage of its annual earnings for political

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[111] *Peñera*, 599 SCRA 609; *Lanot*, 507 SCRA 114.

[112] REV. CORP. CODE, § 140.

[113] Com. Act No. 108 (1936).

contributions. Depending on the contractual design, a violation of such undertaking may be considered an event of default, trigger acceleration payment clauses, or will prevent subsequent drawdowns on the loan.

Corporate donors also have to be careful that they are not grantees of government "franchises, incentives, exemptions, allocations or similar privileges or concessions by the government or any of its divisions, subdivisions or instrumentalities, including [GOCCs.]"[114] Political contributions from such donors are considered prohibited contributions under Section 95 of the OEC.

Corporations which, "within one year prior to the date of the election, have been granted loans or other accommodations in excess of P 100,000 by the government or any of its divisions, subdivisions or instrumentalities, including [GOCCs]"[115] are likewise prohibited from extending political contributions, under Section 95 of the OEC.

Furthermore, "[e]ducational institutions which have received grants of public funds amounting to no less than P100,000" may not extend political contributions.[116]

Hence, it is imperative for a corporation to conduct internal legal due diligence on its existing material agreements, government licenses, and other concessions, to ensure that when it extends political contributions, it is not in violation of such existing agreements, and licenses and concessions.

L. Constitutional Issues

It can be reasonably anticipated that regulating corporate political spending may be subject to a free speech challenge. One of the expected arguments will focus on the "chilling effect" of regulation over a corporation's political speech similar to those argued in *Citizens United*. To our minds, such a challenge will likely have little merit.

To begin, corporations may engage in political speech in two ways: *first*, by directly contributing by donation to the campaign of a candidate and/or party (which will ultimately become a direct expense of the candidates and/or parties), and *second*, by making an independent expenditure to express support for a candidate and/or party in an election campaign. In *Citizens*

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[114] ELECT. CODE, § 95(d).
[115] § 95(e).
[116] § 95(f).

United, the US Supreme Court held that independent expenditure by corporations is not subject to regulation insofar as it offends First Amendment values.[117]

However, in our jurisdiction, regardless of the manner by which a corporation expresses its political speech—whether it expresses its support for a candidate and/or party by contribution or direct expenditure—it is nevertheless subject to State regulation. In *Ejercito v. Commission on Elections*, the Supreme Court effectively stated that corporate political speech, in whatever way the contributions are made, are subject to regulation by the State, thus:

> In tracing the legislative history of Sections 100, 101, and 103 of the OEC, it can be said, therefore, that the intent of our lawmakers has been consistent through the years: *to regulate not just the election expenses of the candidate but also of his or her contributor/supporter/donor as well as by including in the aggregate limit of the former's election expenses those incurred by the latter*. The phrase "those incurred or caused to be incurred by the candidate" is sufficiently adequate to cover those expenses which are contributed or donated in the candidate's behalf. By virtue of the legal requirement that a contribution or donation should bear the written conformity of the candidate, a contributor/supporter/donor certainly qualifies as "any person authorized by such candidate or treasurer." *Ubi lex non distinguit, nec nos distinguere debemus*. (where the law does not distinguish, neither should we.) There should be no distinction in the application of a law where none is indicated.
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> *The inclusion of the amount contributed by a donor to the candidate's allowable limit of election expenses does not trample upon the free exercise of the voters' rights of speech and of expression under Section 4, Article III of the Constitution. As a content-neutral regulation, the law's concern is not to curtail the message or content of the advertisement promoting a particular candidate but to ensure equality between and among aspirants with "deep pockets" and those with less financial resources.* Any restriction on speech or expression is only incidental and is no more than necessary to achieve the substantial governmental interest of promoting equality of opportunity in political advertising. It bears a clear and reasonable connection with the constitutional objectives set out in Section 26, Article II, Section 4, Article IX-C, and Section 1, Art. XIII of the Constitution. Indeed, to rule otherwise would practically result in an unlimited expenditure for political advertising, which skews the

[117] 558 U.S. 310 (2010).

> political process and subverts the essence of a truly democratic form of government.[118]

Plainly, the foregoing indicates that regulating campaign contributions and expenses, whether or not the contributor is a natural person, or regardless of the manner in which the contribution or expense is made, is not unconstitutional insofar as any such regulation is content-neutral, i.e., "merely concerned with the incidents of the speech, or one that merely controls the time, place or manner, and under well-defined standards[,]"[119] and is thus "constitutionally permissible, even if it restricts the right to free speech[.]"[120] On the basis of this case alone, it is unlikely that Philippine authorities will adopt a sympathetic view to the US Supreme Court's decision in *Citizens United*.

But what of the anticipated regulations set forth in Part III (H) and (J)? Are they constitutionally permissible limitations or regulations to speech? To our mind, the answer is it would not matter since the recommendations do not purport to regulate speech in the first place. Speech regulations are either content-based or content-neutral:

> Philippine jurisprudence distinguishes between the regulation of speech that is content-based, from regulation that is content-neutral. Content-based regulations regulate speech because of the substance of the message it conveys. In contrast, content-neutral regulations are merely concerned with the incidents of speech: the time, place or manner of the speech's utterance under well-defined standards.[121]

The proposed regulations in Part III (H) and (J), however, regulates neither content, or time, place, and manner of speech. The primary purpose of the proposed regulations is to provide a procedural mechanism by which a corporation, through the shareholders, will determine whether or not the corporation will *speak* in the first place. In other words, there is no speech to regulate because there is yet no speaker. Indeed, in the event that any of the proposed regulations are adopted by State authorities—prior vote, independent director review, and/or stockholders' resolution—there is yet no indication that the corporation would want to speak.

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[118] *Ejercito*, 742 SCRA 210, 299–301. (Emphasis supplied, citations omitted.)

[119] Chavez v. Gonzales, G.R. No. 168338, 545 SCRA 441, 493, Feb. 15, 2008, *citing* Reyes v. Bagatsing, 210 Phil. 457 (1983); Navarro v. Villegas, G.R. No. 31687, 31 SCRA 730, Feb. 18, 1970; Ignacio v. Ela, 99 Phil. 346 (1956); Primicias v. Fugosa, 80 Phil. 71 (1948).

[120] 1-United Transport Koalisyon v. Comm'n on Elections, G.R. No. 206020, 755 SCRA 441, 457, Apr. 14, 2015.

[121] *Diocese of Bacolod*, 795 SCRA 596, 624 n.9, July 5, 2016 (Brion, *J.*, *dissenting*).

However, even if it were to be assumed that the proposed regulations in Part III (H) and (J) are speech regulations, they are, if at all, content-neutral. Neither the proposal to require shareholder approval, prior shareholder resolution, independent director review, or post-expenditure disclosure regulate any *message* and/or *content*. It merely regulates the *manner* by which such speech will be made for the purpose of ensuring that the speech of the corporation is consistent with the will and interest of a vast majority of the shareholders, and guaranteeing that the awesome financial resources of a corporation will not be misused to create an unequal playing field in favor of aspirants with more connections and financial resources.[122]

M. Tax Treatment of Political Donations

While the Revised Corporation Code now allows political contributions by private domestic stock corporations, it does not change the current tax regime on political contributions. There is no corresponding amendment or modification in the tax laws with respect to the tax treatment of such contributions.

Section 13 of Republic Act No. 7166 provides that "any contribution in cash or in kind to any candidate or political party or coalition of parties for campaign purposes, duly reported to the [COMELEC] shall not be subject to the payment of any gift tax."[123]

Revenue Regulations No. 07-2011 dated February 16, 2011,[124] and to a limited extent Revenue Memorandum Circular No. 30-16 dated March 14, 2016[125] with respect to the May 9, 2016 national and local elections, clarify the tax treatment of campaign donations. These donations and contributions, if utilized or spent during the campaign period as set by the COMELEC, are exempt from donor's tax and may be deducted as political contribution on the part of the donor corporation.[126] Campaign donations outside the campaign period are subject to donor's tax and not subject to deduction. Moreover, even if the campaign donations are made within the campaign period, the said donations are subject to donor's tax and not subject to deduction, if the same are in violation of the old Corporation Code (now, the Revised Corporation Code).

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[122] *See* Salvador v. Comm'n on Elections, G.R. No. 230744, 840 SCRA 609, Sept. 26, 2017.

[123] Rep. Act No. 7166 (1991), § 13.

[124] Revenue Reg. No. 7-2011 (2011), § 2(1).

[125] Revenue Mem. Circ. No. 30-2016 (2016).

[126] Revenue Mem. Circ. No. 30-2016 (2016).

The payment of donor's tax, the filing of the corresponding tax return, the claiming of political contribution as a deduction, and the preservation of supporting documents thereon, are default obligations of the donor, in this case the private stock domestic corporation. This is based on the current tax compliance regime on donor's tax in general.

Bureau of Internal Revenue (BIR) issuances provide the tax compliance obligations of candidates, political parties, and party-list groups with respect to campaign donations.[127] There is no separate BIR issuance spelling out the obligations of the corporate donor; hence, general tax compliance obligations in respect of donor's tax are presumed to apply.

Note also that Revenue Regulations No. 07-2011 is limited to the tax treatment of campaign donations, i.e., political contributions with reference to political elections. It does not address non-electoral and non-campaign political contributions, or those that are made for various political agenda other than elections and campaigns. In this regard, the general legal provisions on donor's tax will apply.

N. Penalties and Sanctions

Corporations providing political contributions in violation of the Revised Corporation Code may be penalized with administrative and criminal sanctions.

Under Section 158 of Revised Corporation Code, depending on "the extent of participation, nature, effects, frequency and seriousness of the violation[,]" the SEC may impose the following administrative sanctions:

(i). A fine ranging from [5 thousand pesos] to [2 million pesos], and not more that [1 thousand pesos] for each day of continuing violation but in no case to exceed [2 million pesos];[128]

(ii). Issuance of a permanent cease and desist order;[129]

[127] *See, e.g.,* Revenue Mem. Circ. No. 30-2016 (2016).
[128] REV. CORP. CODE, § 158(a).
[129] § 158(b).

(iii). Suspension or revocation of the certificate of incorporation;[130] and

(iv). Dissolution of the corporation and forfeiture of its assets.[131]

Under Section 170 of the Revised Corporation Code, the violation of any of the provisions of the Code not specifically penalized therein (such as giving political contributions in violation of the Code) is imposable with the following criminal sanctions: (i) "a fine of not less than [10 thousand pesos] but not more than [1 million pesos];"[132] and (ii) "dissol[ution] in appropriate proceedings before the SEC."[133] Moreover, "[s]uch dissolution shall not preclude the institution of appropriate action against the director, trustee, or officer of the corporation responsible for said violation[.]"[134] This shall be "separate from any other administrative, civil, or criminal liability under [the] Code and other laws."[135]

A corporate donor in violation of the provision on prohibited contributions under Section 95 of the OEC may also be subject to criminal sanctions under the OEC. Section 262 of the OEC considers such violation as an election offense.[136] Section 264, moreover, provides that "[a]ny person found guilty of any election offense under the OEC shall be punished with imprisonment of not less than one year but not more than six years and shall not be subject to probation."[137]

O. Other Pertinent Issues

Section 35 (i) of the Revised Corporation Code on corporate donations may be broad enough to cover non-electoral or non-campaign-related political contributions. Such contributions would not be considered donations pursuant to a *partisan political activity*, which is ordinarily understood as referring to the electoral process. However, it can fall under the general power on giving reasonable donations. Hence, if the private domestic stock corporation provides donations to a potential candidate, a political party, or party-list group outside the campaign period, such donations would be considered non-electoral or non-campaign-related political contributions, and

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[130] § 158(c).
[131] § 158(d).
[132] § 170.
[133] § 170.
[134] § 170.
[135] § 170.
[136] ELECT. CODE, § 262.
[137] § 264.

the same corporate governance considerations on corporate donations in general will apply.

Non-electoral or non-campaign-related political contributions—i.e., those donations extended outside the campaign period—may to a limited extent be considered a form of lobbying if it is related to the passage of a proposed or pending legislation. The lobbying process is regulated by an old law, Republic Act No. 1827, which has not been fully implemented. *Lobbying* is defined therein as "[t]he practice of promoting or opposing the introduction or passage of legislation before either House of the Congress of the Philippines or any of its committees, or promoting or opposing the confirmation of any pending appointment before the Commission on Appointments or any of its committees."[138] A *principal* is "[a]ny person, corporation or association which engages a lobbyist or other person in connection with any legislation, pending before the Congress or to be proposed, affecting the pecuniary interest of such person, corporation or association, or in connection with any appointment pending before the Commission on Appointments."[139] *Pecuniary interest* includes any law that creates, removes, or alters: (i) the imposition of a statutory charge (whether tax, license fee, or otherwise); (ii) the privilege to be enjoyed by the principal; or (iii) the powers or obligations of a court or government agency before which the principal does business.[140] A *lobbyist* is "[a]ny person who engages in the practice of lobbying for hire. Lobbying for hire [includes] activitie[s] of any officers, agents, attorneys or employees of any principal who are paid a regular salary or retainer by such principal and whose duties include lobbying."[141] The law provides for the licensing of qualified and eligible lobbyists,[142] aims to establish a lobby registry,[143] defines the obligations of lobbyists,[144] and defines certain prohibited acts.[145]

Section 2 of the Republic Act No. 1827 defines corrupt means to influence legislation. It provides that:

> [A]ny person who shall, directly or indirectly, give or agree or offer to give any money or property or valuable thing or any security therefor to any person, for the service of such person or of any

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[138] Rep. Act No. 1827 (1957), § 4(2).
[139] § 4 (5)(a).
[140] § 4 (8).
[141] § 4 (3).
[142] § 5 (1).
[143] § 6.
[144] § 9.
[145] §§ 8, 12.

> other person in procuring the passage or defeat of any measure before the Congress of the Philippines or before either House or any committee thereof, upon the contingency or condition of the passage or defeat of such measure, or who shall receive, directly or indirectly, or agree to receive any such money, property, thing of value or security therefor for such service, upon any such contingency or condition, or who, having a pecuniary or other interest, or acting as the agent or attorney of any person in procuring or attempting to procure the passage or defeat of any measure before the Congress of the Philippines or before either House or any committee thereof, shall attempt in any manner to influence any member of said Congress for or against such measure, without first making known to such member the real and true interest he has in such measure, either personally or as such agent or attorney, shall be punished by imprisonment of not more than two years, by fine not exceeding five thousand pesos or both such imprisonment and fine.[146]

While Republic Act No. 1827 has not been fully implemented, Section 2 regarding the corrupt means to influence legislation is arguably self-executory, as it does not depend on the establishment of an administrative machinery for lobbying regulations and does not appear to depend on further implementing details.

IV. CONCLUSION AND RECOMMENDATION

There are some gaps and ambiguities in the corporate governance requirements for corporate political contributions. We summarize them below, together with our suggested measures to address them in future administrative issuances by the relevant agency:

(i). A threshold of what is a *reasonable* value or amount of political contribution must be set. The reasonable limits on corporate donations for partisan political activity under corporate law is different from the campaign expenditure limits under election law. The former refers to the limitation on the corporate donor, while the latter refers to the limitation on the candidate, political party, or party-list group. Hence, the determination of this threshold of reasonableness for the purpose of corporate political spending is within the jurisdiction of the SEC, rather than the COMELEC.

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[146] § 2.

(ii). Although the Revised Corporation Code is broad enough to include both electoral campaign contributions and non-electoral or non-campaign political contributions, there is however inadequate regulation for the latter. While the OEC defines and penalizes prohibited contributions and the COMELEC enforces the same, their application is limited to electoral campaign contributions. There is no law defining, prohibiting, restricting, or regulating non-electoral or non-campaign political contributions by corporate donors other than anti-bribery and corruption laws.

(iii). Corporate governance guidelines, disclosure rules, and other accountability measures, such as independent director review, must be promulgated by the SEC and PSE to specifically regulate corporate political contributions from PLCs and PCs.

(iv). The applicable test of corporate nationality of foreign corporations for the purpose of enforcing prohibited political contributions is the "place of incorporation" test, consistent with the definition of a foreign corporation under the Revised Corporation Code. Other tests of corporate nationality, which account for ownership and control by foreigners in the corporation, such as the Control Test and Grandfather Rule, are limited in application to foreign investment restrictions, and have not yet been extended to the issue of foreign corporate donors. The "place of incorporation" test does not account for the possibility that a domestic corporation may be fully or majority-owned, or effectively controlled, by a foreign stockholder. This should be reconsidered in assessing the legality of political contributions by foreign-owned and foreign-controlled domestic corporations.

(v). Unlike the United States, corporate political spending in the Philippines has not yet been subjected to a free speech challenge before the Supreme Court. A characterization of corporate political spending as "speech" may introduce an additional layer of complexity in establishing corporate governance mechanisms consistent with constitutional protections.

(vi). Current BIR issuances only address the tax compliance obligations of candidates, political parties, and party-list groups. Moreover, these issuances only address the tax treatment of electoral campaign contributions. Thus, the BIR needs to provide more clarity on: (i) the tax compliance obligations of the corporate donor, and (ii) the tax treatment of non-campaign/non-electoral political contributions.

(vii). Republic Act No. 1827, or the law regulating the lobbying process, has not been fully implemented. Nevertheless, the law defines and prohibits the corrupt means of influencing legislation, which appears to be self-executory and can be enforced to cover political donations in violation of the norms on lobbying for proposed or pending legislation.

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