

# The Bottom Line or Public Health

*Tactics Corporations Use to Influence  
Health and Health Policy,  
and  
What We Can Do to Counter Them*

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## II

# Using Charters to Redesign Corporations in the Public Interest

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### Introduction: Why Corporate Redesign?

Lax regulatory enforcement and unchallenged laissez-faire dogma under both Democratic and Republican administrations has resulted in a consolidation of corporate power over many areas of public life, undermining the accountability mechanisms advanced by our political system, threatening the sustainability of our environment, and threatening the stability of a society that thrived upon a strong foundation of middle-class prosperity for decades.

Over the past few decades we've seen:

- the U.S. economy consumed by an epic corporate merger and consolidation movement, especially in critical sectors such as agriculture (to the detriment of family farms), the news media, energy and other sectors;
- a precipitous decline in the strength of organized labor, with its ability to keep corporations in check as a countervailing power severely weakened;
- an epidemic of corporate crime, including financial fraud, accounting chicanery, war profiteering and the spread of life-threatening defective products;
- unprecedented threats to public health and the environment, including global warming,

- the spread of commercial values and corporate influence throughout traditionally "off-limits" areas of society, including colleges and universities (Washburn, 2006);
- the unprecedented influence of corporations over regulatory, judicial, legislative and electoral processes.

Other developments have fed into the growing power of corporations, including the growth of corporate-driven globalization.

Where it still exists to keep corporations in check, the best regulation is limited in scope and often weakly enforced. New regulations are usually only enacted as half-measures, in response to a newly revealed crisis. In fact, most of the weak regulations we have today were originally sought by corporations themselves as a way to forestall meaningful regulation (McCaw, 1984).

The trajectory of corporate power has become such that we have become virtually colonized by corporations. Not only our economy, but our system of laws, our culture, and our politics are dominated by corporate interests. Thus, after a century of regulatory experimentation, our task remains the same as it was in Teddy Roosevelt's day, when he suggested: "The citizens of the United States must effectively control the mighty commercial forces which they have themselves called into being."

What would Roosevelt do today to control "the mighty commercial forces" that are now more powerful than ever?

In this chapter, we present a summary of several strategies to elevate the public interest and hold corporations accountable. Then we turn to a way in which many of these strategies can be combined into a coherent regulatory framework: federal chartering. Next, we examine how such a chartering framework might be applied to certain specific industrial sectors. Finally, we explore some additional ways that the current hegemony of corporate power either are or should be challenged.

### Examples of Commonly Recommended Corporate Reforms

While acknowledging that there is no simple solution to so complex and systemic a problem, there are several proposals that lawmakers, business people, academics and activists commonly agree would improve our economic system and strengthen our democracy. Some of the more familiar include:

- Restrain corporate control over public life. Get corporations out of politics. Restrict corporations from any form of involvement in elections. If necessary, overturn those corporate-friendly doctrines that equate money with speech and establish full public funding of elections.
- Reclaim and expand public spaces (the commons) and restrict commercial interests from turning essential services (e.g., water) into

commodities. Ban advertising in public space and other incursions that degrade the quality of community life.

- Regulate markets to protect them from reckless corporate conduct. Strengthen the enforcement of antitrust laws. Limit cross-sector ownership structures that facilitate anticompetitive behavior or which lead to inherent conflicts of interest (Weissman, 2002). Cut corporate welfare (Nader, 2000).
- Democratize the governance of corporations themselves to make them more responsible to the society that sustains them. Give shareholders and other stakeholders more say in how they are governed through increased proxy access and by making certain votes binding on management. Restructure corporate boards and committee structures to include relevant stakeholders and add public interest directors (Stone, 1975). Expand the liability of preferred stockholders to reduce the incentive for shortsighted planning and destructive behavior.
- Cap CEO pay and restore a progressive income tax, especially on accumulated wealth, and raise the income floor through a national living wage or guaranteed income.
- Challenge unsound corporate claims to constitutional rights, such as the doctrine of corporate "personhood" and corporate claims to "speech" rights that undermine the common good.
- Improve corporate transparency and public reporting of corporate taxes, subsidies, and overseas operations.
- Restrict corporate ownership of other corporations (so as to eliminate the structural evasion of accountability, tax avoidance, etc.).<sup>1</sup>
- Create public stock ownership structures that provide taxpayers benefits in return for the subsidies they give corporations. Keep valuable goods, such as medicines developed through taxpayer-funded research, patent-free, and in the public domain (Weissman, 2007).

Although we could add many additional reforms to this list, including many designed for particular business sectors, our purpose here is not to be exhaustive but to point out how many potential steps can be taken.

#### Using Charters to Streamline Redesign and Create an Effective Framework for Corporate Policy

Perhaps just as important as any specific reform is the challenge of organizing the various reforms into a coherent whole. Currently, there is no single body responsible for the regulation of corporations—that task is shared by a variety of state and federal agencies. Yet if we wish to redesign corporations

themselves so that they clearly serve some public purpose, then we will need to establish a means of doing so. Establishing an authority that not only has the relevant expertise and legal authority, but also a certain independence from political pressure which might dilute its effectiveness—has great appeal.

“Corporations are constructs of the law,” legal scholar Harry Glasbeek explained in his book *Wealth by Stealth*. “They are not natural phenomena” (Glasbeek, 2002: 7) Any attempt to redesign them, therefore, rests upon the recognition that it is the people’s right, through their government, to alter a corporation’s design.

We have rarely chosen to exercise that authority. After two centuries of economic, technological, and historical evolution, we haven’t fundamentally changed the system of laws that create corporations.

The U.S. constitution omits any mention of corporations, in effect leaving their creation and status under the law to the state governments. Consequently, state governments continue to hold significant chartering authority today. The people of the state of Delaware (where nearly 60% of the Fortune 500 are incorporated)—a population of less than one million people—effectively define the responsibilities, privileges, and rights of most giant corporations (including limited liability). And after an historical “race to the bottom” that led corporations to reincorporate to New Jersey and other states before landing in Delaware, corporations are used to having minimal interference with internal decisions. Delaware law also gives executive managers control at the expense of the company’s owners (the shareholders) (Greenwood, 2002). Absent a federal framework for governing the incorporation process, Delaware corporate law has served as the de facto national corporate law for over a century.

Moreover, because fundamental decisions governing a corporation’s structure and design are regulated by the state of origin, the internal affairs doctrine suggests that no other states can exceed their authority and intrude upon such matters. The result is an almost total failure of corporate law to address broader societal concerns (Greenfield, 2007). In effect, it results in a failure of accountability to the society that fosters their very existence. As the U.S. Government Accountability Office stated in a recent report to Congress, “Most states do not [even] require ownership information at the time a company is formed” (GAO, 2006).

As many historians have explained (Dodd, 1954; Nace, 2005), this was not always the case.

#### Lessons from the History of Corporate Chartering

“What we take for granted today was hotly debated as the eighteenth century turned into the nineteenth,” writes Charles Perrow. “Citizens and elites

recognized at the time that permitting the existence of large organizations that were primarily responsive only to owners, and not to the public, was a fateful act" (Perrow, 2005: 32).

Early state legislators vociferously debated the creation of corporations and their implications, often writing specific structural constraints into the blueprint of the corporations they chartered. Rules were established on capitalization, debt, landholdings, and sometimes profits. States limited corporate charters to a set number of years, forcing their review and renewal when the charter expired. And unless a legislature renewed a charter, the corporation was dissolved and its assets divided among shareholders. Legal rules also limited the issuance of stock, clarified shareholder voting rules, and determined procedures for record-keeping and disclosure of corporate information (Perrow, 2005: 32).

Much of what we attempt today through external regulations on corporate behavior was originally accomplished through the chartering process, which defined a corporation's purpose. When a corporation violated its charter—that is, operated *ultra vires* (outside the powers bestowed)—it could be dissolved by an act of the legislature that created it (Greenfield, 2007).

Although the ability of state legislatures to control corporations through their charters was undermined over the course of the 19th century through a series of court decisions and legislative developments (Nace, 2005), fierce debates over the power of corporations continued to erupt over the course of the 20th century. Although it was never adopted, proposals to establish a federal corporate chartering framework were often seen as the solution.

For example, Teddy Roosevelt established a new Bureau of Corporations within his new Commerce Department to take on the trusts, but the Bureau's work was a disappointment. It had no formal connection to antitrust enforcement and its function was largely "advisory" and "experimental." Opponents of monopolization soon began to advocate for federal chartering. "Between 1903 and 1914, Presidents Roosevelt, Taft, and Wilson all voiced support for a federal incorporation or licensing scheme in their annual messages to Congress. President Taft had his attorney general, George Wickersham, draft a federal licensing bill and propose it to Congress in 1910." The proposal was even endorsed by the *Wall Street Journal* in 1908 (Nader et al., 1977: 67).

Different federal corporate charter proposals were included in the 1904 Democratic Platform, the 1908 Republican Platform, and the 1912 Democratic Platform. Between 1915 and 1932, at least eight bills related to federal chartering were introduced in Congress.

Decades later, populist Senator Joseph O'Mahoney of Wyoming concluded the most comprehensive examination of corporate power in the American economy to date by suggesting that the country needed "National Charters

for National Business." In his concluding statement to the Temporal National Economic Committee (TNEC) on March 11, 1941, O'Mahoney suggested that to ensure business responsibility, it would be necessary to have "national charters for national business" (TNEC, 1941: 681).

O'Mahoney's proposal would have required corporations with assets in excess of \$100,000 to obtain a federal license to engage in interstate business. His proposal would have forbidden stock ownership by one corporation in another and the diversification of a corporation's business beyond the provisions of its charter. O'Mahoney threatened corporations that violated child labor and collective bargaining laws with the loss of their license to engage interstate business.

After Watergate, scandalous revelations about multinational corporations including ITT led to deeper congressional investigations (including one by Senator Frank Church's committee), and new challenges to corporate power. New laws were passed to deal with the multinationals (e.g., the Foreign Corrupt Practices Act of 1976, which made corporate bribery illegal).

Federal chartering proposals are more often discarded as a result of fierce industry resistance. After the OPEC oil embargo, for instance, Senator Henry Jackson of the Senate Subcommittee on Investigations proposed the "federal chartering" of the "Seven Sister" big oil companies, allowing the appointment of a government nominee on each board to ensure that they acted in the public interest, and Senators Adlai Stevenson III and John Moss introduced a bill that would have created the Federal Oil and Gas Corporation, a federal government-owned corporation that would develop and sell natural gas and oil from federal lands, a proposal that Ralph Nader called "a constructive and lasting solution to the monopolistic grip that the giant oil companies have on the nation, small businesses and consumers" (Juhasz, 2008: 98). Although both proposals failed, they put corporate chartering at the center of the national security and energy debate. Meanwhile, Nader and his colleagues issued a comprehensive examination of the federal chartering option in their book, *Taming the Giant Corporation*, in which they suggested that all businesses with more than \$250 million in annual sales or more than 10,000 employees be required to obtain a federal charter. Under their proposal, federal charters would provide a framework for introducing corporate governance reforms (e.g., requiring corporations to hire full-time outside directors), requiring the disclosure of certain facts about business operations (e.g., workplace conditions and tax returns) of importance to consumers, shareholders, taxpayers and communities, and placing structural restraints on cross-sector ownership and monopolistic practices (Nader et al., 1977).

Although the proposal went nowhere as the conservative movement began to take hold and corporate lobbyists sought to outmaneuver Nader and his allies, the concept of federal chartering received consideration.

Federal chartering creates a potential vehicle for public policymaking that could extend far beyond the aforementioned examples where it served to fill a vacuum left by markets. In fact, federal chartering may be the most coherent unused tool we have for reforming corporate behavior and addressing the problems unique to specific industrial sectors, especially when other regulatory measures fall short.

As the U.S. Department of Justice's Law Enforcement Assistance Administration concluded in 1979, although a system of federal charters "alone would not in itself necessarily offer a solution to all corporate law violations; it would offer simply a better situation for accountability. The provisions of the charter would still have to be enforced by government agencies. Yet, the more uniform framework of a federal charter might offer greater coordination than is now provided by the SEC, the FTC, and other agencies that try independently to regulate illegal activities and secure disclosure, often without adequate legal weapons."

The 2008 Wall Street crisis and the federal government's response illustrates another way that federal chartering can serve as a model for fundamental changes in public policy and corporate regulation. As banks and other corporations come begging to the taxpayers for a bailout, not only have rigid arguments for market-based solutions been exposed as inadequate, but these failures have created new opportunities to redesign the structural flaws of such businesses alongside reforms in the regulations that govern their behavior.

Other examples where corporations can be redesigned as a means of protecting the public interest include:

- Industries which principally rely upon public resources (including taxpayer-funded contracts) or the commons for their very existence (essential services like water; the broadcast media; extractive industries). In such cases public claims upon the corporation can be made either through direct ownership or concessions bargained for in exchange for the benefits received (whether that come in the form of financial support, a license, patent on expropriated good, etc.). When public resources are involved, they should be used by the private sector in a way that spreads their benefits equitably throughout the broader community, and with respect for the interests of future generations;
- Industries that serve a compelling national interest (e.g., weapons manufacturers and other contractors whose primary income is derived from federal defense, intelligence and/or homeland security contracts) should be required to operate at least in part under public ownership. (See discussion of defense contractors, below.)

- Other industries (e.g., energy and transportation) with a key role in national security debates and perceived collective emergencies should be required to operate under federal charters that, by design, serve the national interest rather than the interest of a few shareholders, especially since they benefit from taxpayer or other forms of public support.
- Industries that provide an inherently public function should be structured in a way that protects the broader economy. A good example of this is the Big Four auditing firms which have been pressing for a liability cap under the argument that they are "too big to fail." At a minimum these firms should be required to fully divest themselves of any remaining operations (e.g., tax consulting) that create inherent conflicts of interest. ("Tax work requires you to be an advocate for the client," suggests one industry expert critical of the tax consulting loophole in Sarbanes-Oxley. "That is not compatible with audit work" (Michaels, 2003)). Another option, proposed by Reagan-era SEC commissioner Bevis Longstreth would be to put the SEC in charge of auditing public companies—the way that bank examiners audit banks—a proposal that was actually included in the original draft of the legislation creating the SEC (Corporate Crime Reporter, 2007).
- Industries whose control is critical to achieving public health goals (see tobacco example below).
- Industries where the pressures of "short-termism" cannot be alleviated by conventional reforms such as changes in executive compensation policies, corporate governance, or an emphasis on strategic planning (Tonello, 2006).
- Recidivist corporations and criminogenic industries that repeatedly break the law, where structural remedies are needed to isolate and/or eliminate the source of such behavior. As Justice Department criminologists have suggested, "The size and the complex interrelationships of large corporations make it extremely onerous for government agencies to exercise any effective social control . . . Consequently, a partial solution would be to break up the power of the large corporations by forcing them to deconcentrate and to divest themselves of certain product lines or subsidiaries" (U.S. Department of Justice, 1979).

Until we actually have a system of federal chartering like the one proposed by Nader and his colleagues, the federal government's ability to alter a corporation's charter can be exercised in other ways, such as under bankruptcy rules. Under the SEC's proceeding against WorldCom, for example, a court-appointed