What's Happening with Corporate Political Spending Disclosure?

What's happening with corporate political spending disclosure? – Cooley PubCo

By Cydney Posner, April 5, 2022

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I have to admit I was surprised to read that, in the new $1.5 trillion budget bill, Congress has once again prohibited the SEC from using any funds for political spending disclosure regulation. But there it is—Section 633—in black and white: "None of the funds made available by this Act shall be used by the Securities and Exchange Commission to finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions, contributions to tax exempt organizations, or dues paid to trade associations." That means that, for now anyway, private ordering—through shareholder proposals at individual companies and other forms of stakeholder pressure, including humiliation—will continue to be the pressure point for disclosure of corporate political contributions. Those proposals have grown increasingly successful in the last couple of years. And, notably, it appears that the focus of many proposals has shifted recently, with more emphasis on apparent conflicts between stated company policies and values and the beneficiaries of those political contributions.

As late as December last year, it looked like political spending disclosure regulation could well be on the horizon. In questioning by the Senate Committee on Banking, Housing and Urban Affairs in connection with his nomination as SEC Chair, Gary Gensler was asked by both sides about political spending disclosure. Gensler replied that his position on the issue would be grounded in economic analysis and the courts' views of materiality as the information reasonable investors wanted to see as part of the total mix of information. Gensler added that he considered the 80 shareholder proposals submitted last year on the topic and the 40% vote in favor as a strong indicator. In light of that level of investor interest, political spending disclosure was something he thought the SEC should consider. (See this PubCo post.) At another session, Senator Jon Tester commented that, in his view, *Citizens United* was one of SCOTUS's worst decisions ever, allowing billions of dollars to pour into the political system with no transparency. It did not help our democracy, he said. Aside from the provision in the appropriations bill (both last year and now this year) preventing the SEC from acting on this issue, the SEC otherwise has power to require disclosure of corporate political spending. While those donations may or may not be financially material to the corporation, they could be material to the recipient of the donation and the information about these donations is potentially material to shareholders. Shouldn't they have access to it? Gensler replied that, if investors view the information as important, and increasing numbers suggest that they do, then the SEC has a role to play in developing a proposal and soliciting public comment. (See this PubCo post.)

In a recent interview with the *NYT's DealBook*, SEC Commissioner Allison Herren Lee promoted the advantages of regulation in this area, contending that "'standardized disclosure evens the playing field." According to *DealBook*, although there are certainly benefits from shareholder proposals, such as increased "transparency around political spending and other environmental, social and governance (E.S.G.) issues, she said that relying on private actors resulted in 'spotty disclosure and may advantage larger investors.' Standardizing what companies report 'lets investors put the whole picture together, getting consistent and comparable information across the market,' she said." But standardized reporting "would highlight contradictions between rhetoric and spending. Companies can make political donations that conflict with their public stances, which undermines their stated E.S.G. agenda and may even materially mislead investors. 'Shareholders and the investing public understandably want to know whether their money is being spent to serve their interests or those of the executives who direct it,' Lee said." *DealBook* noted that Gensler has "also called for more disclosure on political giving, but Congress has limited what he can do about it."

In the absence of a disclosure mandate from the SEC, advocates of political spending disclosure have used the shareholder proposal process to pressure companies to provide information. And that process has become increasingly successful. According to the *NYT,* in 2019, of 51 political spending proposals at S&P 500 companies, none passed, and the average level of support was only 28%. By comparison, in 2020, of 55 political spending proposals, six passed and average support increased to about 35%.

The Center for Political Accountability, together with its shareholder-proposal partners, submitted about 30 proposals for 2021. Of the 12 that went to a vote, six received majority votes, including two at 80% and one at 68%. CPA and its partners also withdrew 13 proposals; 10 were agreements with companies regarding disclosure and three were strategic withdrawals where the company made substantial improvements but not enough to merit an agreement. According to CPA, 2021 was "the strongest proxy season" they've had. Their average vote has steadily increased in the past three years from 36.4% in 2019 to 41.9% last year and 48.1% for 2021. According to the CPA, reported here, "two of the largest institutional investors, BlackRock and Vanguard, voted for CPA's resolution for the first time last year. BlackRock did so for six of the 12 CPA resolutions and Vanguard for three." The *NYT* also reports that, since 2010, New York State's public pension fund, one of CPA's proposal partners, has submitted over 150 shareholder proposals on political spending. This year, two proposals received a majority vote and agreements were reached on three of five proposals, "a much higher success rate than in previous years." According to the pension fund's trustee, the New York State comptroller, "[c]orporate spending on political causes in the dark is bad for business….It puts companies, and their value, at risk."

One of those risks arises out of the potential embarrassment and stakeholder pressure (including pressure through employees) that may arise if companies' political donations do not align with their announced policies. The heated political climate has heightened sensitivity to any incongruity or conflict between those public statements or other publicly announced core company values and the company's political contributions, further complicating the political environment for companies and executives. The January 6 attack on the Capitol last year and the subsequent efforts to rewrite voting and vote-counting laws led many companies and CEOs to speak out, sign public statements and pause or discontinue some or all of their political donations. However, as companies and executives have increasingly taken positions and expressed views on important social issues such as voting and democracy, climate change and racial injustice, there are many who want to hold them to it. As an MIT Sloan lecturer suggested in this article in the *NYT*, a signed statement from a CEO expressing commitment to an issue "gives people who want to hold corporations accountable an I.O.U." One way the public has tried to call companies to account is to examine any misalignment or contradiction between those public statements and the company's political contributions.

Those misalignments between political spending and announced policies have come to the public's attention in a number of press and other reports. A piece published in 2021 in the *NYT's DealBook*, *On Voting Rights, It Can Cost Companies to Take Both Sides*, explored how that concept played out dramatically last year. Recently, the *Washington Post* reported on the dissonance between promises and political contributions, citing *Hollow Policies*, a report from the CPA: A number of well-known companies "are undermining their promises to slash emissions by donating significant sums" to elect state attorneys general "who have emerged as frequent courtroom foes of climate policies and regulations." According to *Hollow Policies*, the "corporate sums given directly to candidates and also to [an attorneys general association] came from company treasury funds, not from corporate Political Action Committees (PACs). This means corporate officers decided to contribute directly to attorneys general candidates and to [the association]—placing their corporations at risk in the event of misalignment of their political spending and their stated emissions goals and policies." See also this article in *MarketWatch*.

Proxy Preview 2022, a collaboration among several activist entities, indicates that, previously, for the most part, investor concerns about political spending have focused on "arrangements for formal oversight and disclosure of spending on elections and lobbying. Many companies have become comfortable with this framework and most large companies have formal board oversight of their contribution processes. Many also disclose at least some information on their spending, even while mostly eschewing disclosure of their support for politically active intermediaries such as trade associations." However, the *Preview* continues, shareholder proposals have recently been shaped by the "increasingly rancorous tone of the political scene," and now proponents "are asking more pointed questions about how company money is spent, and what recipients of company-connected money support. While companies routinely assert they give across the aisle to politicians who support their interests, a careful look at the record shows this is not always accurate," the *Preview* concluded. "The January 6, 2021, attack at the Capitol prompted some companies to stop giving—at least temporarily to members of Congress who voted to overturn the 2020 election results," but the cessation of support has not been comprehensive, according to the *Preview*.

SideBar

A recent survey from The Conference Board showed that, with regard to the resumption of PAC activities for companies that paused contributions in 2021, 24% have not resumed contributions, 31% resumed contributions in the second quarter, 19% resumed in each of the first and third quarters and 7% resumed in the fourth quarter. But was it back to the same-old, same-old? Not according to the survey. Rather, "most PACs changed donation criteria and emphasized employee education" in 2021. The survey found that 51% changed criteria for PAC contributions to address issues arising from January 6th and 48% "engaged with employees to educate them on the PAC, why it's necessary, how it operates." In addition, 30% percent modified their contribution criteria to address social and environmental issues.

Most respondents (60%) indicated that they do not intend to make further PAC modifications in 2022; only 15% did expect to make further changes and 25% were unsure. Where changes were expected, 44% said that they planned further employee engagement to provide education regarding the PAC.

Companies that implemented changes to political activities outside of PACs tended to focus on transparency around corporate political donations and lobbying activity (45%). In addition, many companies made an effort to be more vigilant about their external affiliations, improving their "[v]etting of/support for/membership in" industry trade associations (38%) and in other non-industry organizations or business associations (36%). For 2022, 47% responded that they were not planning additional changes to their corporate political activity outside of PACs, and 40% were unsure. (See this PubCo post.)

Most recently, the *Preview* indicated, the breakdown of proposals regarding political spending has shifted in several ways, among them proposals "that question conflicts between corporate policies and the partisan preferences of recipients have steadily grown, doubling to 20 this year." Proponents have filed 101 proposals on political spending so far in 2022, up from 89 in all of 2021, the *Preview* reports.