Political Contributions

Enactment of the 2002 Bipartisan Campaign Reform Act (BCRA) brought renewed attention to campaign funding reform. Corporate political contributions, including dues used by trade associations, have since become a major topic for shareholder consideration. The issue took on increased relevance following the January 2010 Supreme Court ruling in *Citizens United v. Federal Election Commission*. The Court held that restrictions on independent political expenditures made by corporations in federal elections constitute a First Amendment violation. The decision did not lift the ban on direct corporate contributions to candidates, although the following election cycle saw unprecedented levels of contributions from outside interest groups.

The ultimate effects of the Supreme Court’s *Citizens United* decision are not yet conclusively known. Nonetheless, the corporate governance landscape is trending towards more transparency and accountability in corporate spending on political activities. Shareholder proposals demanding greater disclosure and scrutiny over corporate political spending have increased dramatically since *Citizens United*. In 2014 the U.S. Securities and Exchange Commission (SEC) received over 700,000 comments on political spending disclosure; the overwhelming majority of these comments were supportive, prompting the SEC to give serious consideration to a rulemaking petition that would require companies to disclose political spending made with corporate funds. Such initiatives have not gained traction in the past. In December 2012, the SEC indicated in its semiannual regulatory agenda that the staff of the SEC’s Division of Corporation Finance was considering whether to recommend that the SEC commence formal rulemaking procedures. Although the SEC decided to remove the issue from its formal agenda for 2014, shareholder scrutiny is unlikely to abate, suggesting that SEC action on corporate political disclosure is likely to be reexamined in coming years.

Background

Information on corporate political contributions is available from various online sources. Political watchdogs and campaign finance reporters generally sponsor the information, although this data may not be current, all-inclusive, or readily available. The Center for Political Accountability (CPA), coordinator of a shareholder campaign focused on disclosure of corporate political contributions, considers it the responsibility of corporations to consolidate information on their contributions and present it to shareholders. The CPA campaign initially focused primarily on direct political contributions, although its focus expanded in 2006 to include transparency initiatives related to trade association contributions. Companies typically view trade association expenditures as dues rather than political contributions, although the campaign contends that trade associations may ultimately use corporate funds to support political agendas that are not aligned with shareholder interests or company policies. Issues in this area became more prominent in 2011 as social investment firms mounted a campaign on U.S. Chamber of Commerce dues and other payments, primarily at companies that already provided reporting on direct political contributions. Increased disclosure of such payments has played a significant role in achieving withdrawal agreements.

Activists interested in increasing transparency in political contributions are also concerned that funds intended for political purposes may be provided to Section 527 and 501(c)(4) organizations. 527 organizations do not expressly advocate for specific candidates or coordinate with any candidate’s campaign, although they are entitled to raise funds in support of issue advocacy and voter mobilization. Top 527 spenders in the 2014 election cycle were the Democratic Congressional Campaign Committee, the National Republican Congressional Campaign Committee, and the U.S. Chamber of Commerce,
among others. Likewise, 501(c)(4) groups can receive unlimited funding from associations, corporations, individuals, and unions under Citizens United, and are subject to flexible disclosure requirements, making their activities increasingly controversial. Corporate political action committees (PACs) are subject to stringent funding limitations and FEC reporting requirements. The July 2010 Supreme Court ruling in Speechnow.org v. Federal Election Commission upheld the Citizens United decision and created independent expenditure-only committees, known as Super PACs. Super PACs cannot contribute "hard money" directly to a campaign, although they can raise unlimited amounts of money from associations, corporations, individuals, and unions to influence elections. Donors and amounts must be disclosed, although a technicality in the filing requirements can allow for a postponement in disclosure until after elections conclude. Unlike 527s, Super PACs can make independent expenditures advocating directly for or against a federal candidate, so long as efforts are not directly coordinated with a campaign. The visibility of Super PACs increased greatly during the 2012 presidential campaign as their effectiveness and role in the political process became a controversial and debated issue.

Indeed, support for greater disclosure of corporate political contributions is widespread among the American public. A 2012 poll released by Public Citizen—a non-profit consumer rights advocacy think-tank—found that 77 percent of Americans support legal requirements for companies to publicly disclose political contributions which may influence campaigns and regulators. The Public Citizen poll also found that 83 percent of Americans agree that companies should spend money on political campaigns only if they disclose their spending immediately while 80 percent said that corporations should spend money on political campaigns only with prior shareholder approval.

Recent Developments

In response to Citizens United, companies are facing an increasing number of shareholder demands for disclosure of corporate political spending. These demands represented the most frequently filed shareholder resolutions in 2014 and 2013. The 2014 CPA-Zicklin Index of Corporate Political Accountability and Disclosure report notes evidence of growing momentum among leading American corporations to disclose the details of their political spending. The report found that more than 60 percent of the top 300 companies in the S&P 500—183 companies—have disclosed full or partial information on their contributions to political bodies. Half of these corporations have also disclosed their payments to trade organizations.

The Council of Institutional Investors and nearly 50 advocacy groups joined the shareholder campaign in urging S&P 500 companies to adopt transparency and board oversight for political spending. In July 2013, the Committee for Economic Development (CED)—a business-led public policy organization—released a poll which revealed significant frustration amongst senior business leaders on the state of corporate political contributions. According to the poll, 87 percent of business leaders believe that “campaign finance…needs major reforms or a complete overhaul.” The poll also found that 9 out of ten business leaders surveyed support institutional reforms requiring full disclosure of all individual, corporate, and labor contributions to political committees.

Reports indicate that corporate accountability and disclosure of political contributions is on the rise. For example, a November 2011 report issued by the IRRC Institute found that 77 companies in the S&P 500 do not make independent expenditures, an increase from 58 in 2010. The proportion of companies with policies on corporate oversight of indirect spending through trade associations has increased to 24 percent in 2011, from 14 percent in 2010, with half of the 100 largest S&P 500 companies having such policies. Only 14 percent of S&P 500 companies actually provide information on the proportion of their trade association dues spent for political purposes. The November 2011 IRRC report also showed that 65 percent of companies in the S&P 500 identify the individual responsible for making political expenditure decisions, whereas only 58 percent did the same in 2010.

Several other groups have also weighed in on the issue. The political contributions disclosure shareholder campaign received an endorsement of its reform program from the CED which, in its September 2011 report on political spending, notes that corporate political donations may engender significant business and reputational risks. The report stated,
"Companies that make contributions to organizations they do not control face the possibility that these organizations will use the funds to support issues or candidates that do not conform to a company’s values or interests, or that are not aligned with the interests of a company’s clients, customers, or vendors. Even when organizations do use corporate resources to advance positions a company supports, the highly partisan or divisive character of election campaigns can lead to adverse responses from some segments of the public that may not benefit the long-term interests of a company or its investors."

Academic studies have also contributed to the discussion. In a recently published paper, Harvard Law School Professor John Coates argues that excessive campaign contributions represent a diversion of resources which may “stunt” the long-term growth of companies. The study finds that political contributions made by S&P 500 companies cede control over the use of corporate funds to outside political entities. In doing so, corporations shirk accountability to customers, shareholders and employees, effectively limiting shareholder power and lowering shareholder value. These findings are buttressed by a 2012 report from the Strategic Management Journal which notes that, “political investments are negatively associated with market performance and...cumulative political investments worsen both market and accounting performance.”

Advocacy groups such as the Conference Board, a non-partisan, non-profit, business leadership and research group, created a committee on political contributions and sponsored a Symposium on Corporate Political Spending in October 2011, at which Exelon, Merck, Microsoft, and Pfizer expressed support for greater disclosure of political contribution activities. The Conference Board also released an article in early 2012 focusing on the two-year anniversary of Citizens United, and discussing the "Watergate" type risks that corporations now face. The article points out that, during Watergate, the focus was on the Nixon White House, but, in 1974, "twelve corporations and seventeen corporate executives were indicted or pleaded guilty, mainly to charges of making illegal campaign contributions."

In August 2011, Professors Lucian Bebchuk and Robert J. Jackson Jr., along with eight other professors of corporate and securities law, as part of the newly formed Committee on Disclosure of Corporate Political Spending, submitted a petition to the SEC asking for the enactment of rules that would require companies to disclose the use of corporate resources for political activities.

The petition argued that the Citizens United decision increased investor concern over transparency related to corporate political contributions, and noted that many corporations in the S&P 100 have voluntarily begun to disclose such information. The petitioners assert that because, "no existing rule requires disclosure of this information to investors, and corporate political spending remains opaque to investors in most publicly traded companies," formal disclosure requirements are in order. The petition suggests that the SEC set de minimis levels for disclosure, define a time frame for regular reporting, and determine the types of political spending that would be subject to disclosure. Over 600,000 (mostly favorable) comments have been submitted in response to the petition, the highest amount the SEC has ever received.

More recently, initiatives such as the grassroots Move to Amend campaign have launched initiatives seeking to amend the U.S. Constitution to clarify that, “corporations are not individuals and, as such, are not entitled to the same rights as individuals.” While it is unlikely that this campaign will gain significant political support, Move to Amend is nonetheless a sign of the evolving legal and political landscape surrounding political spending. As a response to Citizens United, the Move to Amend Campaign retains many of the values of the Democracy is Strengthened by Casting Light in Elections Act (DISCLOSE Act), a legislative initiative which was defeated in the U.S. Senate in 2010. As introduced, the DISCLOSE Act sought to ban U.S. corporations with 20 percent or more foreign ownership from influencing U.S. elections through campaign contributions.

Advocates of greater disclosure of corporate political spending have not found an absence of opposition. The U.S. Chamber of Commerce has remained antagonistic to shareholder activism, accusing the CPA and other groups calling for disclosure of “making war” on corporations by curtailing private sector rights to free speech. Responding to previously cited reports which outline the reputational risks which may be incurred by corporate political spending, the Chamber argues that
greater corporate transparency will create a “chilling” business climate wherein greater disclosure on political spending may result in corporations being “targeted” as a result of their political affiliation, potentially disturbing consumer purchasing patterns. The American Civil Liberties Union (ACLU) has taken a more nuanced position, arguing that demands for universal disclosure would, “severely impact donor anonymity, especially those donors who give to smaller and more controversial organizations.”
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