



When CEOs Speak Up

Political activity by the chief executive is likely to be attributed to the corporation and requires board oversight. By Holly J. Gregory

Corporate leaders appear to be speaking out more frequently on matters of social and political importance. Whether this CEO activism is a natural extension of corporate social responsibility or a reaction to an increasingly polarized political environment, recent survey data indicate that the public expects leadership from CEOs on key social issues.

In an online survey of 1,006 consumers, Weber Shandwick and KRC Research (*3rd Annual Survey of CEO Activism*, published in July 2018) found that 77 percent of respondents agreed that CEOs should speak out when their company's values are violated or threatened, and nearly half (48%) agreed that companies should take positions on social issues they consider important to their workforce and to society, even if not directly related to the business. Such activity is not without risk.

While CEO activism may positively influence purchasing decisions among consumers who share the view espoused, with nearly

half of respondents (46%) saying they would be more likely to buy from a company led by a CEO who speaks out on an issue they agree with, there is a risk of losing sales to consumers who disagree with the CEO's stated position (45%).

Practical Guidance

Corporations and their executive leadership have long played a role in US politics through quiet lobbying activities and contributions; however, in the current polarized political environment, CEOs are engaging more publicly on sensitive social and political issues of a type that they may have avoided in the past, including issues that are not necessarily directly related to the company's business. Examples of issues that have given rise to "CEO activism" include:

- Hate speech, for example, as evidenced in the protests in Charlottesville, Virginia.
- Climate change denial and related policy.

- Anti-LGBTQ+ laws and policies.
- The “zero-tolerance” immigration policy and family separations at the southern US border.
- Gun violence.

How a CEO responds to sensitive social and political issues will vary, and there is a risk that constituents may be offended when a corporate leader takes a stand, especially when the link between the issue and the corporation’s immediate business interests is unclear. However, failure to take a position on some issues may also expose a company to criticism. Since a CEO’s public statements and activity on potentially divisive issues will be closely associated with the company, boards need to consider how to provide oversight with respect to such activity. Care needs to be taken in determining what issues to speak out on, under what circumstances, and whether to act individually or in concert with other like-minded business leaders.

Boards should discuss with the CEO expectations about how such decisions are made, and consider processes similar to those used for determinations on corporate political contributions and lobbying activities, with the understanding that at times a decision may need to be made in a very short time frame. This effort may be undertaken by a group of key executives including the CEO, the general counsel, and relevant leaders in internal and external communications, government and community relations, employee and investor relations, and marketing to:

- Identify political or social issues that the company should consider taking a position on, both in reaction to current events and proactively.
- Determine which issues are directly connected to the company’s interests and in line with the company’s core corporate values.
- Assess potential benefits and risks associated with taking a position on a certain issue (for example, through engagement with employees, customers, or suppliers), in consultation with communications and policy experts as appropriate.
- Identify in advance a response team and protocol to:
 - assess and prepare the company’s response to an issue;
 - seek broad consensus internally as appropriate;
 - articulate why the issue is important to the company and the CEO (or not appropriate for company action if the decision is to not engage);
 - address questions from key constituents about the company’s reasoning; and
 - assess and manage the impact once a position is taken, including procedures for managing negative reactions from employees, customers, and suppliers.
- Consider how the board will be kept informed generally, and

in what circumstances input from the board or a designated board committee or member will be sought prior to taking positions on issues that could pose harm to the company’s business or reputation. In addition, the board should carefully consider what level of discretion and authority to provide the CEO with respect to speaking out on sensitive issues.

On an issue that could have a material impact on the business or its reputation, care should be taken to involve the board so as to avoid surprises.

On an issue that could have a material impact on the business or its reputation, care should be taken to involve the board so as to avoid surprises and position the board to support the CEO’s actions. Whether or not the board is actively involved in determining whether to speak out on an issue, the decision-making process should incorporate the following:

- **Corporate relations and authenticity.** Does the issue directly relate to the business or otherwise have a connection to the company? Does the issue have bearing on stated corporate values and interests? On CEO values and interests? Can the CEO and the company take a position that will be viewed as authentic?
- **Constituent interests and degree of controversy.** How controversial is the issue with key constituents? How likely is it that employees, customers, suppliers, regulators, or the general public could react negatively, for example, through social media backlash, boycotts, or changed legislative or regulatory positions or relations? Is the issue of direct importance to employees? What are employees likely to think about the issue, and how are they likely to react? What positions have key institutional investors taken on the issue, and have they engaged with the company about it?
- **Financial impact.** What impact is taking a position on an issue expected to have on revenues, expenses, and share value in both the near and longer term?
- **Risks of non-action.** What are the risks of staying silent on the issue to the company’s business, reputation, relationships with employees, stockholders, and the community, and/or share value?
- **Timing and form.** When will speaking out on the issue make the appropriate impact? Is this the right time? If speaking out is determined to be the right approach, what are the opportunities and risks in collective action—for example, seeking the support of like-minded chief executives—versus individual corporate action?

Board Oversight of Political Spending in 2019*

Company has a
dedicated political
spending webpage

276

General board
oversight

237

Committee reviews
direct contributions/
expenditures

201

Committee reviews
policy on political
spending

189

Committee reviews
payments to tax-
exempt groups

174

*Refers to the number
of the 399 core
companies as defined
by the 2019 CPA-Zicklin
Index of Corporate
Political Disclosure and
Accountability.

■ **Peer activity.** Are peer companies or relevant trade associations taking a position on the issue?

■ **Compliance.** What laws are relevant to taking a position, and what steps are required to comply with applicable laws (e.g., laws relating to lobbying, campaign finance, or government ethics)?

■ **Board oversight.** Has the CEO's position on an issue been considered by the board or a board committee, and has a consensus emerged on next steps?

Oversight Responsibility

While boards are responsible under state law for the management and direction of the corporation, they usually delegate significant authority to the CEO to run the company on a day-to-day basis. This typically includes authority to serve as the corporation's spokesperson.

As with political spending and lobbying activities, the board's oversight responsibilities for corporate activity in the sphere of political and social speech are related to oversight of risk management, internal controls, and ethics. While the board has discretion to determine management's degree of authority with respect to these issues, boards should consider what level of oversight they will provide and what policies and procedures will assist them in monitoring activity and providing guidance.

Nine years ago, the Supreme Court's decision in *Citizens United v. Federal Election Commission* overturned restrictions on corporate political contributions, including spending limits, and identified a corporation's right to engage in political activity as free speech. The Center for Political Accountability (CPA) tracks corporate practices related to political activity, and in its 2019 CPA-Zicklin Index of Corporate Political Disclosure and Accountability provided the following statistics about practices among S&P 500 companies:

■ Most S&P 500 companies (84.1%) disclose a policy of some kind governing election-related corporate expenditures, including 58.9 percent that post a detailed political spending policy on their website.

■ Fewer than half (40.3%) fully describe to which political entities they may or may not contribute.

■ Reflecting a continuing upward trend, 37.5 percent prohibit at least one category of election-related

spending, up from 36 percent in 2018 and 32 percent in 2017.

■ Only 31 percent provided detailed information about the public policy positions that guide their political spending decisions.

■ As to board oversight, approximately 48 percent disclose some level of board oversight of political spending, often involving board committees, with 40.5 percent disclosing a committee that reviews direct contributions/expenditures; 38.1 percent disclosing a committee that reviews the company's policy on political spending; and 35 percent disclosing a committee that reviews payments to tax-exempt groups.

Shareholder Proposals

Greater transparency of corporate political activity, including political contributions, lobbying expenses, and board oversight of such activities, continued to be a focus of shareholder proponents in the 2019 proxy season. According to Institutional Shareholder Services (ISS), as of Dec. 10, shareholders had filed 99 proposals related to corporate political contributions and lobbying activities, continuing a push for company-by-company adoption of voluntary disclosure in lieu of regulation by the US Securities and Exchange Commission in this area.

The most prevalent shareholder proposals were those seeking disclosure regarding political contributions, with 59 proposals submitted. The vast majority failed, with only two proposals regarding political contributions and one lobbying proposal passing as of Dec. 10, according to ISS. Average support was 36.17 percent and 31.22 percent, respectively.

A coalition of approximately 70 investors filed proposals at 33 companies seeking disclosure of federal and state lobbying payments, payments to trade associations and social welfare groups used for lobbying, and payments to any tax-exempt organization that writes and endorses model legislation. Participants in this investor coalition, which has been active since 2011, include the American Federation of State, County, and Municipal Employees (AFSCME), Walden Asset Management, and the City of New York Office of the Comptroller. The targets were companies identified by the coalition as:

■ lobbying significantly at the federal and state levels;

■ failing to disclose trade association lobbying payments; or

■ members of the American Legislative Exchange Council (ALEC), which according to the coalition has a record of opposing climate change policies and regulation.

Note also that the investor coalition linked concerns about political activity and lobbying to other corporate social responsibility (CSR) issues, including climate change lobbying, and is targeting areas of potential “lobbying misalignment,” that is, where a company’s stated CSR policies in an area such as climate change are inconsistent with the lobbying position of a trade group or association that the company supports.

More Questions for Boards

The following questions are designed to help facilitate discussion about oversight of political contributions, lobbying activities, and related policies.

Board expectations and oversight. Has the board clearly defined its expectations about the company’s approach to its political contributions and lobbying activities, as well as the board’s role in oversight? Is board oversight supported appropriately through regular information flow? Do committee structures and charters support the company’s approach?

Strategy. What is the company’s strategy with respect to political contributions and lobbying, and how does it relate to corporate strategy generally? What is the business case for this activity?

Risk management. How does the company’s strategy for these activities relate to risk management? What are the most significant issues and associated risks?

Values alignment. How does management ensure that political contributions and lobbying activities align with the company’s stated values?

Management responsibility. Who is the senior executive with responsibility for managing these activities? How often does that manager report to the board or relevant board committee?

Internal controls. How does responsibility and internal reporting for these activities relate to responsibility for risk management and compliance? Is the

company appropriately positioned to assess and manage related risks?


Investor expectations. How does the company’s approach compare to the recommendations of key institutional investors? For example, BlackRock encourages companies to adopt the following practices:

■ Disclose on the company website, or through a separate report linked to the company website, company policy for political expenditures from corporate assets, including lobbying activities.

■ Ensure that appropriate oversight of political activities is in place, which in many cases would include oversight by the appropriate board committee. This oversight could include review of the company’s policy on political expenditures and lobbying activities.

■ Affirm compliance with federal laws governing political activities including the Lobbying Disclosure Act (LDA), and include links to relevant websites that contain the company’s federal lobbying reports under the LDA, as well as any company-related political action committee expenditures.

■ Affirm compliance with state laws, and disclose significant state lobbying activities, if any.

Peer and industry comparison. How do company practices measure up to peer and industry standards? Is the company leading, following, or lagging industry and peer standards in the policies and procedures it has adopted, including with respect to disclosure? Is there a solid rationale for where the company is positioned, and is the company positioned where it wants to be? 

Holly J. Gregory is a partner in Sidley Austin LLP, where she leads the firm’s corporate governance and executive compensation practice and provides counsel on the full range of governance issues, including highly sensitive matters. She is the immediate past chair of the ABA Business Law Section’s Corporate Governance Committee and in March will become the president of the American College of Governance Counsel.

The views stated above are solely attributable to the author and do not necessarily reflect the views of Sidley Austin LLP or its clients.

This article, solicited from the author, is based on a similar article authored by Gregory and published in *Practical Law*, August/September 2019.

Number of S&P 500 Companies That Prohibit Spending, by Contribution Type

State candidates,
political parties, and
committees

141

Independent
expenditures

121

527 groups

96

Ballot measures

74

501(c)(4)s

60

Trade associations

42

Source: 2019 CPA-Zicklin
Index of Corporate
Political Disclosure and
Accountability