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# Board Oversight of Corporate Political Activity and CEO Activism

In her regular column on corporate governance issues, Holly Gregory explores the board's role in overseeing corporate political activity and CEO activism on sensitive social and political issues.

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Holly counsels clients on a full range of governance issues, including fiduciary duties, risk oversight, conflicts of interest, board and committee structure, board leadership structures, special committee investigations, board audits and self-evaluations, shareholder initiatives, proxy contests, relationships with shareholders and proxy advisors, compliance with legislative, regulatory, and listing rule requirements, and governance best practice.

The US Supreme Court's decision in *Citizens United v. Federal Election Commission* overturned restrictions on corporate political contributions in the form of disclosure requirements and spending limits, articulating a company's right to engage in political activity as free speech (558 U.S. 310 (2010)). Companies and their executive leadership have long played a role in US politics through quiet lobbying activities and contributions. However, in the current political environment, CEOs are engaging publicly on sensitive social and political issues that they may have avoided in the past, including issues that are not directly related to the company's business.

Issues that have given rise to "CEO activism" include:

- Hate speech evidenced in the protests in Charlottesville, Virginia.
- The "zero-tolerance" immigration policy and family separations at the southern border.
- The current administration's policy on climate change.
- State and municipality adoption of anti-LGBTQ+ laws and policies.
- Gun violence and its perceived link to National Rifle Association policies.

How a CEO responds to sensitive social and political issues on the company's behalf 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 company's business interests is unclear. However, failure to take a position on certain issues may also expose a company to criticism.

Against this background, this article:

- Provides an overview of board responsibility for positions taken by the CEO and the company on sensitive social and political issues.
- Examines recent shareholder proposals related to disclosure of corporate political contributions and lobbying activities.
- Offers guidance for boards on overseeing the company's approach to navigating sensitive issues in a volatile political and social environment.

## THE BOARD'S OVERSIGHT RESPONSIBILITY

While the board is responsible under state law for the management and direction of the company, boards 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 company's spokesperson.

As with political spending and lobbying activities, the board's oversight responsibilities for corporate political activity 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.

The 2018 Center for Political Accountability-Zicklin Index of Corporate and Political Disclosure and Accountability (available at [politicalaccountability.net](http://politicalaccountability.net)) reports that over half of S&P 500 companies (57%, or 281 of 493 companies) disclose a detailed policy governing corporate political expenditures, while 28% (138 companies) disclose a brief or vague policy governing election-related expenditures with corporate funds. Approximately 46% (226 companies) disclose their public policy priorities for spending decisions and 53% (259 companies) disclose political spending information through a dedicated webpage. Additionally, approximately 49% (241 companies) disclose some level of board oversight of political spending, often involving board committees, with:

- 39% (194 companies) disclosing a committee that reviews direct political contributions and expenditures.
- 35% (173 companies) disclosing a committee that reviews the company's policy on political spending.
- 32% (160 companies) disclosing a committee that reviews payments to tax-exempt organizations.

## SHAREHOLDER PROPOSALS

Greater transparency regarding corporate political activity, including political contributions, lobbying activity, and board oversight of these activities, continues to be a focus of shareholder proponents in the 2019 proxy season.

According to Institutional Shareholder Services Inc. (ISS), as of July 19, 2019 shareholders have 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 SEC regulation in this area. In February 2019, Representative Salud Carbajal (D-CA) introduced the Corporate Political Disclosure Act of 2019 (H.R. 1053), which would require public companies to disclose political spending activity during the previous year. The SEC would be required to issue regulations to implement this legislation. However, the bill has not progressed in the House and is expected to face significant opposition in the Senate.

The most prevalent shareholder proposals were those seeking disclosure regarding political contributions, with 60 proposals submitted. The vast majority failed, with only two proposals regarding political contributions and one lobbying proposal passing as of early July 2019, according to ISS data. Average support was 36.28% and 30.81%, respectively. (See ISS Governance Analytics database, available at [isscorporatesolutions.com](http://isscorporatesolutions.com), last accessed July 19, 2019 (subscription required).)



Search [What's Market: Disclosure of Political Contributions](#) for more on disclosure by US public companies regarding political contributions, including links to company disclosure reports and political contribution policies.

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 the 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. (See Press Release, AFSCME, 2019 Announcement of Lobbying Resolutions, available at [afscme.org](http://afscme.org).)

The targets of the investor coalition's proposals are companies that:

- Participate in significant lobbying activity at the federal and state levels.
- Fail to disclose trade association lobbying payments.
- Are members of the American Legislative Exchange Council (ALEC) which, according to the investor coalition, has a record of opposing climate change policies and regulation.

The investor coalition linked concerns about political activity and lobbying to other corporate social responsibility (CSR) issues, including climate change. The investor coalition is targeting corporate political responsibility and areas of potential

## BlackRock's 2019 Policy Statement on Corporate Political Activity

In early 2019, BlackRock issued a new policy statement detailing its position on shareholder proposals on political spending and lobbying activities (available at [blackrock.com](https://www.blackrock.com)). Generally, BlackRock "believes it is the duty of boards and management to determine the appropriate level of voluntary disclosure of corporate activity." In deciding how to vote on a shareholder proposal, BlackRock considers a number of factors, including:

- The governance framework for the activity.
- The current level of corporate disclosure.
- The materiality of the requested disclosure.
- The potential harm to shareholder interests.
- The scope and level of specificity of the proposal.

BlackRock encourages companies to:

- Disclose on the company website or through a separate report linked to the company website the company's 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 expenditures.
- Affirm compliance with state laws and disclose significant state lobbying activities, if any.

"lobbying misalignment," where a company's stated CSR policies in an area are inconsistent with the lobbying positions of a trade group or association that the company supports.

## CEO ACTIVISM

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

According to an online survey of 1,006 consumers, 77% of respondents agreed that CEOs are obligated to 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 their business (Weber Shandwick and KRC Research, *CEO Activism in 2018: The Purposeful CEO* (July 2018), available at [webershandwick.com](https://www.webershandwick.com)).

The survey also found that CEO activism may positively influence purchasing decisions among consumers who share the views espoused. Nearly half of respondents (46%) said that they would be more likely to buy from a company led by a CEO who speaks out on an issue they support. However, there is also downside risk of losing sales to consumers who disagree with the CEO's position. (For more information, see Aaron K. Chatterji and Michael W. Toffel, *Harv. Bus. Rev.*, *The New CEO Activists* (Jan.–Feb. 2018), available at [hbr.org](https://hbr.org).)

## GUIDANCE FOR BOARDS

Given the potential opportunities and risks in taking positions, or remaining silent, on potentially divisive social issues, CEOs should be careful in determining which issues to speak out on, as well as 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 approving corporate political contributions and lobbying activities, with the understanding that at times a decision may need to be made quickly.

A management-level committee (similar to the company's disclosure committee for Exchange Act reporting) may be helpful in this effort. The goal is to bring together 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 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 and under what circumstances input from the board or a designated board committee or director will be sought prior to taking positions on issues that could harm 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. The board or a board committee should be informed in advance of, and should ideally be involved in, any decision to speak out on an issue that could have a material impact on the company's business or reputation to avoid surprises and position the board to support the CEO's actions.

#### **POLITICAL CONTRIBUTIONS AND LOBBYING ACTIVITY: KEY QUESTIONS**

Boards should address the following issues and consider asking the following questions in discussing political contributions and lobbying activity and related policies with management:

- **Board expectations and oversight.** Has the board clearly defined its expectations about the company's approach to its political contributions and lobbying activity, as well as the board's role in oversight? Is appropriate oversight supported by regular information flow to the board? Do committee structures and charters support the company's approach?
- **Strategy.** What is the company's strategy with respect to political contributions and lobbying activity 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 political contributions and lobbying activity relate to risk management? What are the most significant issues and associated risks? Is the company appropriately positioned to assess and manage related risks?
- **Values alignment.** How does management ensure that political contributions and lobbying activity align with the company's stated values?
- **Management responsibility.** Who is the senior executive with responsibility for managing political contributions and lobbying activity? How often does that manager report to the board or relevant board committee?
- **Internal controls.** How does responsibility and internal reporting for political contributions and lobbying activity relate to responsibility for risk management and compliance? Does the company have appropriate internal controls in place to mitigate related risks?
- **Investor expectations.** How does the company's approach compare to recommendations of key institutional investors? (See Box, *BlackRock's 2019 Policy Statement on Corporate Political Activity*.)
- **Peer comparison.** Is the company lagging, following, or leading industry and peer standards in the policies and procedures it has adopted, including with respect to disclosure?

#### **CEO ACTIVISM: KEY QUESTIONS**

Boards should address the following issues and consider asking the following questions in determining whether the CEO should speak out on an issue:

- **Corporate relationship and authenticity.** Does the issue directly relate to the company's business or otherwise have a connection to the company? Does the issue implicate corporate values and interests? Does the issue implicate CEO values and interests? Can the CEO and 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 a social media backlash, a boycott, 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.** Is taking a position on the issue expected to have an impact on revenues, expenses, and share value (in both the near term and long term)?
- **Risks of non-action.** What are the risks of staying silent on the issue on the company's business, reputation, relationships with employees, shareholders, and the community?
- **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 of collective action versus individual corporate action?
- **Peer activity.** Are peer companies or relevant trade associations taking a position on the issue?
- **Compliance.** What laws are relevant to taking a position on the issue? What steps are required to comply with applicable law (for example, laws relating to lobbying, campaign finance, or government ethics)?
- **Board oversight.** Has the issue been considered by the board or a board committee? Has a consensus emerged on the issue?

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