

We look at strategies for board oversight of corporate speech in the social and political sphere.

SPEAKING OUT ON WHAT MATTERS

“Society increasingly is turning to the private sector and asking that companies respond to broader societal challenges”

– LARRY FINK

Corporations have long engaged in political lobbying activities and contributions. However, in the current polarised political environment, they face increased pressure to engage more publicly on sensitive issues that they may have avoided in the past, including issues that have varying degrees of relationship to the company’s business. Pressures to speak out or to take actions consistent with a proponent’s values come from employees and customers but also may be generated by corporate leaders consistent with their own values on issues like hate speech, racial, gender and LGBTQ equality, gun violence, voting rights, and abortion access.

How a company determines when to and when not to speak out on sensitive issues will vary and there is considerable risk that some key constituents will be offended in any event. Since failure to take a position may expose a company to significant criticism and risk, the strategy of avoidance may not be as available as it was in the past. What is key is that the decision to speak out or not is consistent with the company’s interests and values.

TRUST AND BACKLASH

Trust has been described as both the glue of democratic societies and the lubricant for a market economy. Trust is fundamental to cooperative relationships and when it is lacking, conflict is more apparent. The 2022 Edelman Trust Barometer underscores that trust has broken down in the current environment and that lack of trust is impeding the ability to have constructive debates and collaboration. In particular, it highlights that government and media are perceived now to “fuel a cycle of distrust,” with government leaders viewed as least trusted. The survey describes a collapse of trust in democracies, loss of optimism about the future, and increasingly acute societal fears.

The survey provides a more positive view of business, while outlining expectations for business: according to the survey, business is the most trusted institution, and is also viewed as more competent and ethical than government. This trust is highly personal and specific, with 77 per cent of respondents viewing the most trusted institution as “my employer.” The survey underscores that a significant majority of employees (60 per cent) want their CEO to speak out on controversial issues they care about, and an even greater percentage of the general population expect CEOs “to shape conversation and policy” on issues such as “global warming and climate change (68 per cent).” The survey concludes that “business must lead in breaking the cycle of distrust.”

The midyear update of the annual Edelman Trust Barometer found that 77 per cent of respondents believe CEOs have a responsibility to address societal issues, with 68 per cent indicating that business leaders should help shape policy, specifically on discrimination and prejudice. The study also found that companies that boycotted Russia due to the war in Ukraine saw an increase in employee loyalty and consumer trust.

Business leadership on sensitive societal presents significant challenges and risk of retaliation. Traditional conservative policies on taxation and deregulation have long been favored by many corporations. As a result, in their lobbying and political contributions, many corporations have supported politicians who hold positions on other issues that are coming into

sharper focus as inconsistent with the values of a significant group of employees, customers and shareholders, and with the views of directors and members of the management team. Increasingly, corporations are finding that issues such as fossil fuel reduction, voting rights, gun safety, abortion access and redress of racial and gender inequity have bearing on business operations, employee retention and relations, and corporate reputation. Companies may choose to stay silent on potentially divisive issues to avoid the risk of alienating employees and customers who share different views, but in many circumstances refraining from speaking out on such matters may also result in a storm of criticism.

Corporations that weigh in on these matters – because they matter to the business interests and/or values of the company – have found themselves criticised for following a progressive agenda, and some have become the focus of retaliatory action. For example, when Disney spoke out against the Florida bill that prohibited discussion of sexual orientation

and gender identity in elementary schools, the Governor revoked the special tax district for its theme parks. In Texas, in reaction to concerns that banks were restricting credit for the gun industry in the wake of mass shootings, legislation passed to require banks that underwrite the state’s municipal bonds to certify that they don’t restrict credit to firearms or ammunitions industries or retailers, or be barred from doing business with state agencies. A group of Republican state treasurers threatened to pull funds from banks that had committed to cut financing for new fossil fuel



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investments, and Arkansas, Texas, and West Virginia have taken action to prohibit business with or divest from such banks and asset managers.

At the federal level, several Republican senators have proposed legislation that target corporations that have taken a stance on issues with which they disagree. The No Tax Breaks for Radical Corporate Activism Act introduced in May 2022 would prohibit employers from deducting expenses related to their employees' abortion travel costs or so-called 'gender affirming care' for young children of their employees. The Mind Your Own Business Act introduced in 2021 would require corporate directors to prove their decisions were in the shareholders' best interest, in order to avoid liability for breach of fiduciary duty in shareholder litigation over corporate actions relating to certain social policies. The Copyright Clause Restoration Act introduced in 2022 would limit copyright protections and remove special copyright protections for entertainment companies with a market cap of greater than \$150 billion, like Disney.

THE BOARD'S OVERSIGHT ROLE

The board's oversight responsibilities for corporate speech in the political and social spheres are related to issues of risk management, internal controls and corporate 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.

According to the Center for Political Accountability, board involvement in oversight of company political spending is growing.¹ It is unclear to what extent this oversight extends to speech on social and political issues separate and apart from corporate spending.

- Well over half of S&P 500 companies (approximately 60 per cent) disclose a policy governing corporate political expenditures, an increase of almost 14 per cent from 2020.
- A majority of S&P 500 companies (approximately 52 per cent) have a board committee review direct political contributions and expenditures, up 12 per cent from 2020.
- Board committee review of payments to trade associations and other tax-exempt groups also rose considerably, by almost 15 per cent in 2021, but remains a minority practice with 46 per cent of S&P companies reporting committee engagement.

Corporate disclosure about political spending is also increasing:



- Companies that fully or partially disclosed their political spending, or that prohibited at least one type of spending, in 2021 reached a record high of 75 per cent of S&P 500 companies.
- Well over three-fifths of S&P 500 companies (68 per cent) either fully or partially disclosed their political payments to state or local candidates or committees, or prohibited such payments.

PRACTICAL GUIDANCE ON SOCIAL AND POLITICAL SPEECH

Given the potential opportunities and risks associated with corporate speech on sensitive social and political issues, boards should clarify the CEO's authority to speak out on behalf of the company on sensitive issues, including expectations for board involvement on potentially divisive social and political issues. For example, the board may wish to emphasise that, while the CEO has considerable discretion to make statements on behalf of the company, where an issue could have a material impact on the company's business or its reputation, the board should be informed of the CEO's intent in advance to avoid surprises. This allows the board an opportunity to understand and probe the rationale of management's approach. The board should also understand the processes that management uses to assess what issues to speak out on and when, and how those processes relate to those used for determinations on corporate

political contributions and lobbying activities.

Establishing sound processes and policies in advance can help avoid an ad hoc inconsistent approach, when issues arise and decisions need to be made in a 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. Efforts should aim to:

- Identify social or political issues that the company should consider taking a position on, both proactively and in reaction to current events
- 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

It may also be useful to identify, in advance, a response team and protocol to:

- Assess options, including whether or not to speak out and if so whether to do so internally or externally (with the understanding that internal positions will

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likely become public), and whether to act as an individual company or participate in a group

- Prepare the company's response
- Seek consensus as appropriate
- Articulate why the issue is important to the company (or not appropriate for company action if the decision is to not engage)
- Prepare for questions from key constituents including employees, customers, suppliers, shareholders, regulators and legislators) about the company's reasoning
- Consider how to mitigate and manage potential negative reactions from key constituents
- Assess and manage the impact once a position is taken

Consideration should be given to how the board will be kept informed generally and in what circumstances input from the board (or a designated board committee or director) will be sought, prior to taking positions on issues that could pose harm to the company's business or reputation. 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 considerations:

Corporate Relation & Authenticity: Does the issue directly relate to the business or otherwise have a connection to the company? Does the issue have bearing on corporate

values and interests (or is this more a matter of the personal values and interests of the CEO and/or other members of the senior management team)? Can the company take a position that will be viewed as authentic?

Constituent Interests & 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, boycott, 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 the issue expected to have on revenues, expenses and share value (in both the near term and longer term)?

Risks of Non-Action: What are the risks of staying silent on the issue on 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 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 and what steps are required to comply with applicable laws (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 and has a consensus emerged on the issue?

POLITICAL CONTRIBUTIONS AND LOBBYING

Boards should also consider the company's approach to political spending and lobbying and consider whether it is likely consistent with positions that the company may take. A recent report from The Conference Board recommends that the board engages in a discussion of the costs and benefits of the company's political activities, on an annual basis, with consideration given to simplifying corporate political activity and eliminating areas that create the greatest risk.²

The following questions may be helpful in guiding board discussions about corporate political contributions and lobbying activities:

Board Expectations and Oversight: Has the board clearly defined its expectations about the company's approach to its political and lobbying activities, as well as the board's role in oversight? Is appropriate oversight supported by regular information flow to the board? Do committee structure 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 both corporate strategy and corporate values? What is the business case for this activity?

Risk management: How does the company's strategy for political contributions and lobbying activities relate to risk management? What are the most significant issues and associated risks?

Inventory: Does the company have an inventory of all of the corporation's political contributions and lobbying activities, and has management considered how to simplify and reduce risk, and eliminate any efforts at cross purpose?

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?

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?

The challenges for corporations in navigating the current polarised environment are considerable. Unfortunately, corporations will be damned for speaking out and damned for remaining silent. In overseeing social and political speech, boards should help management to identify and focus in speech that matters: speech on issues that are important to the company's business interests and values. This is best assured by putting in place processes to support an objective assessment of the 'what, when and why,' with a focus on consideration and articulation of how the company's statement or silence advances those interests and values. ❸

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

¹<https://politicalaccountability.net/index>

²www.conference-board.org/press/Corporate-Political-Activity-ESG-2022th