SULLIVAN & CROMWELL LLP

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Corporate Political Contributions

Stakeholder Interest in Contribution and Lobbying Policies Has Been Increasing for Years, but Recent Events Have Caused Companies to Rapidly Re-Examine Approaches to Political Giving

SUMMARY

In the wake of recent events in Washington, D.C., several companies have come under fire for making contributions to candidates who opposed the certification of the U.S. Presidential election. In addition, several large corporations have announced that they are pausing the making of political donations altogether. These actions coincide with a general trend of intense scrutiny of corporate political donations and lobbying, and may be viewed as an extension of institutional investors' heightened focus on environmental, social and governance ("ESG") issues. The combination of these events is creating increased focus on corporate political spending and suggests that issuers should review carefully their corporate political contribution policies and disclosures ahead of the upcoming proxy season.

In *Citizens United*,[1] the U.S. Supreme Court ruled that a corporation's political spending is a form of protected speech. In the years that followed that decision, corporate political spending through political action committees ("PACs") tripled. However, scrutiny of corporate political spending has also increased. This scrutiny takes several forms: (1) the development of related voting guidelines by proxy advisory firms ISS and Glass Lewis; (2) the proxy voting guidelines of large passive investors; and (3) the rise of shareholder proposals related to political contributions and lobbying.

The combined level of scrutiny, which is outlined below, has focused primarily on disclosure considerations. In the current environment we anticipate that the identity of the recipients of political contributions will come into focus with potential reputational and financial consequences. As such, directors may want to consider how to incorporate consideration of political contribution-related matters into the board's oversight agenda. In addition, issuers facing shareholder proposals relating to political contributions and lobbying at their upcoming annual meeting will need to consider their approach and associated disclosures in light of the current environment.

INCREASED STAKEHOLDER SCRUTINY OF CORPORATE POLITICAL GIVING

Proxy Adviser Voting Guidelines

To date, proxy advisory firms have not taken the initiative in their approach to political contributions and lobbying. They defer to management on the underlying question of whether a company should be spending money on lobbying and political campaigns. Their policies address how shareholders should vote if a shareholder proposal requests enhanced disclosure of those activities This approach stands in contrast to the proxy advisers' approach to other governance issues, where even in the absence of being presented with a targeted shareholder proposal on which to make a voting recommendation, the proxy advisers may seek to influence corporate policies by recommending that shareholders withhold votes from directors who fail to take actions in conformity with the proxy advisers' views of governance best practices.

Institutional Investor Voting Policies

Both BlackRock and State Street have recently published policies signaling that political activities are a source of risk for corporations, and both institutional investors have indicated they expect to see board oversight of these activities. However, like the proxy advisers, BlackRock's and State Street's policies focus largely on the quality of disclosure that issuers provide. Nonetheless, they could publish additional guidance in light of recent events.

Shareholder Proposals

In recent years, shareholder proponents have mounted campaigns to increase disclosure and transparency regarding corporate political spending. Shareholder proposals seeking reports on corporate lobbying payments have become more frequent, and the average support for reports on political contributions grew from 25% in 2018 to 40% in 2020. In many cases, the requested reports would include disaggregated disclosures of contributions above a stated threshold on a candidate-by-candidate basis, as well as disclosures of aggregated expenditures.

As issuers move in to the 2021 proxy season, they should be aware of the increased focus on this issue and potential reputational consequences of their policies and disclosures. While interest in issuers' political contribution policies predated the 2020 election cycle, recent events have only heightened stakeholders' attention on companies' political activities.

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ENDNOTES

[1] *Citizens United* v. *Federal Election Commission*, 558 U.S. 310 (2010).

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