ESG in the Political Law Arena

Skadden

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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorney or call your regular Skadden contact.

Ki P. Hong
Partner / Washington, D.C.
202.371.7017
ki.hong@skadden.com

One Manhattan West
New York, NY 10001
212.735.3000

Political activities of corporations have been increasingly subject to scrutiny on environmental, social and governance (ESG) matters. Indeed, increased demands that corporate political action committees justify their contributions based on candidates' voting records on ESG issues started with the North Carolina gender bathroom bill in 2016. This evolved to a more general focus on LGBTQ+ and other diversity issues and culminated with the events at the Capitol on January 6, 2021, resulting in many companies reevaluating their political giving program. Many major companies decided to temporarily pause all political giving, while others suspended contributions to the 147 members of Congress who voted against certifying the 2020 presidential election results.

In the second quarter of 2021, a number of corporations are encountering the challenge of transitioning from such self-imposed bans to actively contributing again. There has also been an increase in the number and intensity of activist shareholder requests regarding disclosure of political spending and lobbying, and trade association activity. Apart from political giving, corporations are also being asked to weigh in on the changes to the state voting laws across the country.

On the regulatory front, over the past year the Securities and Exchange Commission (SEC) has been considering updating reporting requirements and expanding its standards requiring publicly traded corporations to report certain ESG matters. (See "SEC Primed To Act on ESG Disclosure.") Currently, the disclosure of ESG matters to shareholders is required only if they are considered material, and there is no guidance regarding whether political spending is considered a material ESG factor. However, on March 15, 2021, then-Acting SEC Chair Allison Herren Lee called on the public for input in crafting new disclosure requirements pertaining to ESG factors, calling them "inextricably linked" to corporate political spending. Moreover, Gary Gensler, the new SEC chair, stated during his confirmation hearing on March 2, 2021, that he would consider implementing a shareholder political spending disclosure rule.

ESG matters are also receiving increased attention from lawmakers. On March 3, 2021, the House of Representatives passed the For the People Act (H.R. 1), a sweeping package of reforms to federal voting, campaign finance and government ethics laws. While the prospects of the bill being enacted into law are unclear, its passage would result in significant changes. Among them, H.R. 1 would repeal a budget rider prohibiting the SEC's use of federally appropriated funds to implement disclosure rules regarding political activity by publicly traded corporations. Repeal of the budget rider would clear the way for the SEC to initiate a political spending disclosure rulemaking, consistent with Chair Gensler's interest in the issue as demonstrated during his confirmation hearing.