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Companies face new pressure from shareholders and regulators to disclose political policies and contributions

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Takeaways

- Activist shareholders are increasing the pressure on companies to disclose their political spending and their lobbying and trade association activity.
- In 2021, a record 40% of shareholders' proposals regarding corporate political activities were adopted, a year after a prior record was set at 20%.
- The SEC is considering new ESG reporting requirements that could require more disclosures.

Political activities of corporations are increasingly subject to scrutiny on environmental, social and governance (ESG) grounds. Demands that corporations and their political action committees (PACs) justify their contributions based on candidates' voting records on ESG issues came to the fore with the North Carolina gender bathroom bill in 2016.

During the 2021 proxy season, shareholder proposals requesting disclosure of corporate political spending passed at the highest rate ever recorded.

This evolved to a more general focus on LGBTQ+ and other ESG issues, such as diversity and climate change, and culminated with the events at the U.S. Capitol on January 6, 2021. That resulted in many companies reevaluating their political-giving programs. Some temporarily paused all political giving, while others suspended contributions to the 147 members of Congress who voted against certifying the 2020 presidential election results.

Many companies that suspended some or all corporate and PAC contributions in the wake of January 6 have been emerging from their self-imposed bans and are actively contributing again. An increase also has occurred in the number and intensity of activist shareholder requests regarding disclosure of political spending, lobbying and trade association activity. Apart from political giving, corporations also are being asked to weigh in on state voting law changes across the country.

Shareholder political proposals gaining support

Meanwhile, during the 2021 proxy season, shareholder proposals requesting disclosure of corporate political spending passed at the highest rate ever recorded. Although some shareholders have been pushing for increased disclosure of corporate political spending for almost two decades, their proposals rarely secured majority support until recently. (See "Activism Landscape Continues To Evolve." [1])

In 2020, a record 20% of these political shareholder proposals were adopted, a number eclipsed in 2021 with a new high of 40%, according to *Bloomberg Law*. In addition to requesting disclosure of the contributions themselves, many of these proposals call for the disclosure of company policies for making contributions, as well as the titles of the individuals involved in the decision-making.

In making these requests, the proponents often point to the aftermath of January 6, as well as the intense polarization of the 2020 election, hoping to boost support for their measures given the public scrutiny of companies' actions in response to these events.

In some ways, the effect has been similar to the Supreme Court's *Citizens United* decision in 2010, which also led to a significant increase in shareholder support for political disclosure proposals, given that the Court struck down the ban on corporate independent expenditures, permitting unlimited corporate independent political spending. But campaigners in 2021 started from a much higher baseline of support.

The impact of the political disclosure movement goes beyond companies that have faced shareholder proposals. According to a recent study by the Center for Political Accountability, 370 S&P 500 companies now disclose some or all of their political spending, or ban at least one type of it, up from 332 companies in 2020.

The 2021 proxy season also saw an expansion in the scope of the proposals. Increasingly, proposals ask not for mere disclosure but also for substantive restrictions on the company, such as prohibiting it from contributing to candidates who voted for certain anti-ESG bills or asking the company to provide metrics on how it weighs

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ESG issues when making contributions or working with trade associations.

Companies that lost a proxy vote this year or are concerned about possibly losing a vote in the future are reevaluating their political activity practices and disclosures. There is a trend toward increased board oversight of political activity and memorializing guidelines for corporate political spending. Companies vary in their approaches to disclosure, balancing the transparency sought by some shareholders with the administrative burden of compiling reports and the need to conduct government affairs initiatives.

The SEC may mandate disclosures

During 2021, the Securities and Exchange Commission (SEC) considered updating reporting requirements and enhancing its standards requiring publicly traded corporations to report on ESG matters. (See our April 30, 2021, client alert "SEC Primed To Act on ESG Disclosure." [2]) Gary Gensler, the new SEC chair, publicly indicated that the SEC planned to propose mandatory climate risk disclosure rules by the end of the year.

Currently, 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, Chair Gensler stated during his confirmation hearing on March 2, 2021, that he would consider implementing a shareholder political spending disclosure rule.

Most recently, on November 3, 2021, the SEC announced changes to its no-action letter policy regarding the exclusion of shareholder proposals, which make it harder for companies to quash proposals on ESG issues.

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In particular, the SEC said it will give less credence to corporate arguments that shareholder proposals focused on social policy issues should be excluded because they interfere with a company's "ordinary business" operations. The move highlights the SEC's continued focus on ESG reporting. (See our November 5, 2021, client alert "SEC Staff Issues New Shareholder Proposal Guidance, Rescinding 2017-2019 Guidance." [3])

Notes

[1] https://bit.ly/3rTxaEu

[2] https://bit.ly/3KRMKct

[3] https://bit.ly/3r7CqFb

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Ki P. Hong (L) is a political law partner and the head of **Skadden, Arps, Slate, Meagher & Flom**'s political law group. He advises major corporations on the unique legal issues they face when engaging in government affairs or government procurement activity, such as laws regarding federal and state campaign finance, lobbying, gifts, ethics and conflicts of interest. **Melissa L. Miles** (C) is a political law counsel at the firm and advises clients on matters relating to government affairs at the federal, state and local levels. **Karina Bakhshi-Azar** (R) is a political law associate at the firm. All of the authors are based in Washington. This article was originally published Jan. 19, 2022, on the firm's website. Republished with permission.

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