POPULAR INFORMATION

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How to pull back the curtain on secret corporate political spending

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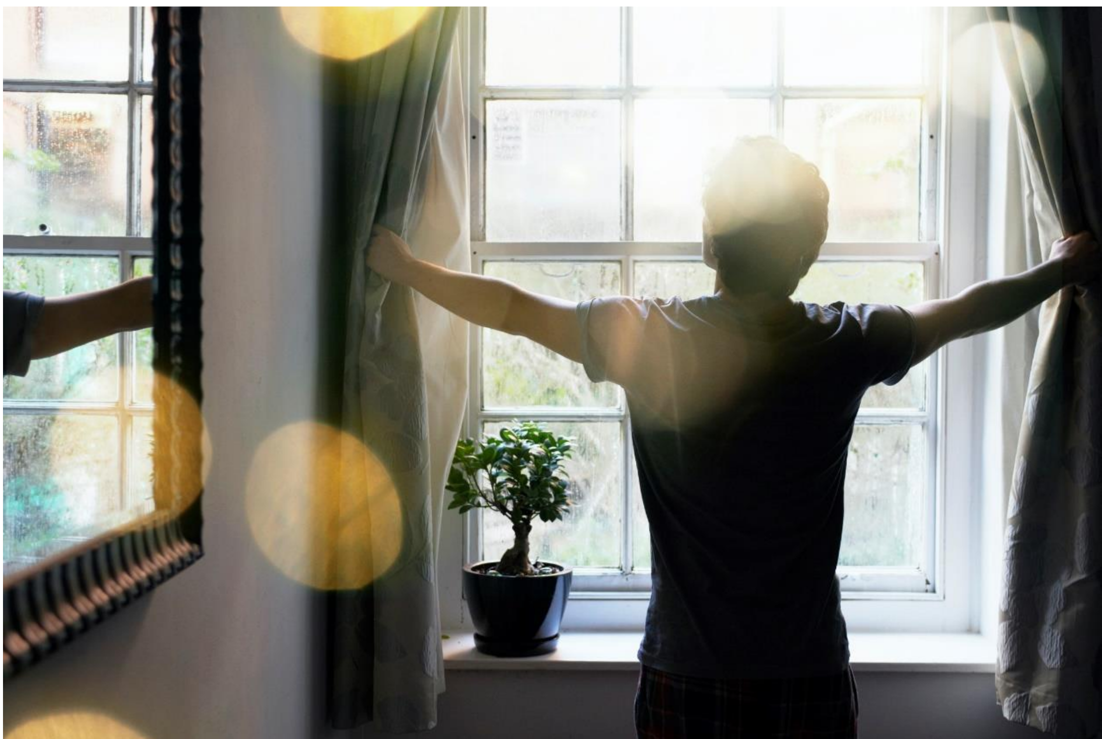

Currently, corporations in the United States are able to keep much of their political spending secret. So what the public knows about the influence of corporations on the political system is woefully incomplete.

On Monday, Popular Information reported that 25 rainbow flag-waving companies, through their corporate PACs, donated more than $10 million to anti-gay politicians. But how much did these corporations contribute to Heritage Action, a 501(c)(4) non-profit organization that supports politicians that oppose LGBT rights? Corporations can keep that secret.

This year, Popular Information has exposed the corporate donors to the sponsors of voter suppression legislation in Georgia, Texas, Arizona, and Florida. But how much money did these corporations send to the U.S. Chamber of Commerce, which is fighting federal legislation to protect voting rights? Corporations can keep that secret.

In January, Popular Information reported on the corporations that supported the Republican Attorneys General Association (RAGA), which played a role in organizing the events of January 6 in DC. But how much did these corporations donate to the Rule of Law Defense Fund, RAGA's affiliated 501(c)(4) non-profit that sent robocalls urging people to "march to Congress" to "stop the steal"? Corporations can keep that secret.

There has been some progress in convincing corporations to voluntarily disclose more political spending. The Center for Political Accountability produces an index measuring voluntary corporate disclosure. The 2020 index identifies several dozen companies as "Trendsetters," which means they disclose at least some political spending that they could keep secret. The number of companies voluntarily disclosing additional political spending is trending upward, largely due to pressure from shareholders and advocacy groups like the Center for Political Accountability.

Still, among companies listed in S&P 500, only 18% fully disclose their contributions to 501(c)(4) advocacy groups, only 24% fully disclose their contributions to trade associations, and only 30% fully disclose their donations to 527 political organizations. (Some other companies say they prohibit all payments to these groups.) So there is a long way to go.

Ten years ago, a bipartisan group of legal scholars proposed a systemic solution to this problem. Specifically, the SEC could create a rule requiring public companies to disclose the

full breadth of their political spending. The proposal briefly gained momentum until members of both parties intervened to kill the proposal and keep corporate political spending under wraps.

But the political world is very different than it was in 2011, and there is a real opportunity for the proposal to become reality in the near future. Full disclosure of political spending would be a monumental step forward for corporate transparency and accountability.

The origins of a proposed SEC rule to require corporate political disclosure

A bipartisan group of 10 legal scholars that specialize in corporate and securities law, chaired by Lucian Bebchuk of Harvard University and Robert J. Jackson of Columbia Law School, wrote to the SEC in 2011 and petitioned them to create a new rule for public companies. "We all share...the view that information about corporate spending on politics is important to shareholders—and that the Commission's rules should require this information to be disclosed," the scholars wrote.

The scholars noted that the SEC "has clear and longstanding authority to determine what information public companies must disclose to their shareholders." The scope of this disclosure has "changed in response to increased investor interest… or external events that increase the importance of certain types of information for shareholders."

The scholars cited recent Supreme Court decisions, including *Citizens United v. FEC*, which relied on shareholders to provide "corporate accountability and oversight" of corporate political spending. The court, in that case, removed most limits to corporate political expenditures. It said that shareholders could "determine whether their corporation's political speech advances the corporation's interest[s]" and "discipline directors and executives who use corporate resources for speech that is inconsistent with shareholder interests."

This oversight, of course, is impossible if the shareholders don't even know money is being spent for political purposes.

The rise and fall of the SEC's corporate political disclosure rule

The petition to create an SEC rule attracted an astounding 600,000 comments, almost all of which were in favor. (Out of the first 300,000 comments, all but 10 supported the creation of

a new rule). In late 2012, the SEC began work on a political disclosure rule under SEC chair Mary Schapiro. In January 2013, the SEC announced "that, by April, it plans to issue a Notice of Proposed Rulemaking on requiring public companies to disclose their spending on politics."

In April 2013, Mary Jo White became chair of the SEC. White, a self-described political independent, was nominated by President Obama. Under her leadership, the proposal stalled. By November 2013, the rule requiring corporate disclosure of political spending was "missing from the Security and Exchange Commission's list of regulatory priorities for the coming year." White said that she opposed creating disclosure rules that "appeared more directed at exerting societal pressures on companies to change their behavior rather than at disclosing financial information to inform investment decisions."

Prior to her nomination to chair the SEC, White was a partner at Debevoise & Plimpton, where she represented numerous corporate clients — including those seeking to avoid responsibility for the 2008 financial crisis. After leaving the SEC in January 2017, White returned to the firm, where she represents "clients on significant and sensitive matters, including companies facing crises involving multi-faceted government investigations and cases."

In 2015, Republicans took control of the House and Senate and attached a rider to the federal budget preventing the SEC from using any funds to finalize a rule around political disclosure. The proposal was a non-starter during the Trump administration. And another, more comprehensive, rider was quietly added to the budget passed in December 2020:

> None of the funds made available by this Act shall be used by the Securities and Exchange Commission to finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions, contributions to tax exempt organizations, or dues paid to trade associations.

That provision was tucked into "the fifth-longest bill to be passed by Congress in the history of the country."

The path forward

Corporations will be required to disclose their political spending if two things happen: 1. Congress removes the rider from the SEC budget, and 2. The SEC proposes and implements a rule.

In Congress, legislation to remove the rider has already been introduced. In January, Congressman Andy Levin (D-MI) sponsored the Transparency in Corporate Political Spending Act, which would remove the rider. Levin cited the January 6 attack on the Capitol as part of his justification. "In the wake of an insurrection against our Capitol that was preceded by rallies funded by millions of dollars of anonymous corporate spending, it is more apparent than ever that Americans have a right to know how major companies influence our politics," Levin said.

Ultimately, the SEC rider could be removed as part of the budget reconciliation process. That would prevent the removal from being filibustered by Republicans in the Senate. Because it can pass with just 50 votes (plus Vice President Harris) in the Senate, removal of the rider in the near future is not far-fetched.

But would the SEC take up a political disclosure rule if given the chance? The current SEC chair, Gary Gensler, signaled his support for the idea. During his confirmation hearing, Gensler was asked by Senator Bob Menendez (D-NJ) if he believed "political contributions by publicly traded companies represented 'material' information to investors and should be disclosed."

This is a key question because the SEC has the legal authority to require disclosure of information that is "material" to investors but not other information. "If confirmed, it is something I think the commission should consider in light of the strong investor interest," Gensler replied.

One of the ways the SEC determines whether information is material is whether investors believe it is material. In 2011, the legal scholars cited increased investor interest in political disclosure as part of their rationale. But since then interest has exploded. Just this year shareholders approved resolutions demanding more disclosure, sometimes by wide margins: Netflix (80.7% approval), United Airlines (67.9%), Royal Caribbean (52.9%), and Duke Energy (51.9%).

These shareholder resolutions are non-binding but usually do result in corporations increasing voluntary disclosure. Moreover, they are a strong indication of investor interest, which makes the information material.

Despite a Democratic Congress and a more favorable environment at the SEC, establishing a new rule will be difficult. The U.S. Chamber of Commerce, one of the largest recipients of secret corporate political spending, has signaled its opposition. The group reportedly opposes "rigid, prescriptive requirements." In a March letter to the SEC, the Chamber said that "disclosures should be used to protect investors and should not be used as a means to achieve policy goals outside the scope of the federal securities laws."

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