December 2, 2021

2021 CPA-Zicklin Index shows steady rise in board oversight and disclosure of political spending

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In the aftermath of January 6, a number of companies, highly sensitized to any dissonance or conflict between their public statements or announced core values and their political contributions, determined to pause or discontinue some or all of their political donations. Notwithstanding those actions—or perhaps to some extent because of them—the clamor for disclosure regarding corporate political spending has continued. To that end, in March, Senators Chris Van Hollen and Robert Menendez reintroduced the Shareholder Protection Act of 2021, a bill to mandate not only political spending disclosure, but also shareholder votes to authorize corporate political spending. (See this PubCo post.) The chances that this bill will pass in this Senate? Not great. Nevertheless, even in the absence of legislation, investor pressure and public sentiment may well be having some effect. As shown in the new 2021 CPA-Zicklin Index of Corporate Political Disclosure and Accountability (from the Center for Political Accountability and the Zicklin Center for Business Ethics Research at the Wharton School of the University of Pennsylvania), the number of companies increasing transparency and enhancing board oversight of corporate political spending, whether on their own initiative or prodded by shareholder proposals, is on a gradual but determined rise. According to the president of the CPA, “companies are moving in a turbulent political climate to better manage the risks of spending to sway elections….In the months both before and after January 6th, this has accelerated at the board level, with more directors, through board committees, paying closer attention to company political activity.” The Director of the Zicklin Center commented that “embracing accountability should not only be a matter of legal risk mitigation and even code compliance. Ultimately, corporate political accountability is a reflection of a firm’s integrity, culture, and leadership. This, I believe, explains the significant progress made by S&P 500 companies on the 2021 Index.”

The Index compiles and analyzes data for this year for all S&P 500 companies as well as the 364 “core” companies that have been in the S&P 500 since 2015. (The first Index, published in 2011 following the decision in *Citizens United*, benchmarked only the S&P 100.) The Index also includes specific rankings for companies based on their Index scores, as well as best practice examples of disclosure and other helpful information.

Board oversight. Among core companies, in 2021, 246 companies had policies providing for general board oversight of political spending, an increase of 10.8% from 2020 (222 companies); 217 provided for board committee review of direct political contributions and expenditures, an increase of 9% from 2020 (199 companies); and 196 provided for board committee review of payments to trade associations and other tax-exempt groups, an increase of 11.4% from 2020 (176 companies). All of these categories showed increases since 2015, with an accelerated increase in the past two years, “as more boards of directors are paying closer attention to political spending than ever before.”

Among the 493 companies in the S&P 500, the level of board oversight also rose. Specifically, 295 companies had policies for general board oversight of political spending, an increase of 13.9% from 2020 (259 companies); 255 had board committee review of direct political contributions and expenditures, up 12.3% from 2020 (227 companies); and 228 had board committee review of payments to trade associations and other tax-exempt groups, an increase of 14.6% from 2020 (199 companies).

Disclosure. Among the S&P 500, 370 (or over 75% of the S&P 500) fully or partially disclosed their political spending in 2021 or prohibited at least one type of spending, representing a "record high" since the Index was launched; 293 companies disclosed at least some corporate political contributions or expenditures. In addition, with regard to direct contributions, 334 companies fully or partially disclosed, or prohibited, political payments to state or local candidates or committees (a record); 305 companies (61.9%) disclosed information about, or prohibited, corporate contributions to Section 527 organizations; 278 companies (56.4%) disclosed information about, or prohibited, "independent expenditures made to support or oppose a political campaign"; and 268 companies (54.4%) disclosed information about, or prohibited, "contributions to support or oppose ballot initiatives." With regard to indirect contributions, 280 companies (56.8%) disclosed information about memberships in or payments to trade associations, or instructed trade associations not to use company payments for election-related activity. In addition, 222 companies (45%) included disclosure about donations to 501(c)(4) "social welfare" organizations—"often a focus of scrutiny over their 'dark money' spending"—or had policies prohibiting contributions to these groups or instructed these groups "not to use company contributions for election-related activity." In 2021, 147 companies disclosed or prohibited donations to tax-exempt 501(c)(4) organizations, a 98.6% increase over 2015 (74 companies), representing the biggest improvement over that period in any category.

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An earlier report from the CPA, Conflicted Consequences, looked at corporate political spending through non-profit, tax-exempt "527" organizations, such as state party leadership and legislative campaign committees and the governors and attorneys general associations. These organizations accept "contributions from a variety of sources and

> then spend it to advance a broad political agenda.” Once a company has contributed to a 527 group, the corporate and other funds are pooled and then channeled to state and local PACs and candidates, to “dark money” groups and to other national 527 groups. As a result, companies no longer control the use of their funds. The groups determine how the money is used, what the message will be and which candidates or issues to support, regardless of the contributor’s own goals and intentions.
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> Over the last 10 years, the CPA found that hundreds of millions of dollars have been poured into six large partisan groups by publicly held companies and their trade associations, destined to help elect state officials who drove “new agendas that have transformed state and national policy.” What’s more, a number of the intermediate organizations that are financed through 527s “often direct that money in ways that belie companies’ stated commitments to environmental sustainability, racial justice, and the dignity and safety of workers.” The report also highlighted companies that voiced their concern for racial injustice and support of diversity, but, through their donations, ended up supporting legislators who were instrumental in implementing racial gerrymandering. These and other conflicts were exposed in various media reports. As a result, the CPA advised, companies and their boards need to be aware of an “increasing risk…from their political spending. When corporations take a public stand on such issues as racial injustice or climate change, the money trail… can lead to their boardroom door. It can reflect a conflict with a company’s core values and positions” and lead to sometimes humiliating, and perhaps even toxic, unintended consequences. (See this PubCo post.)

Shareholder engagement. The Index suggests that “the gains reflected in the 2021 Index also correlate with the campaign of CPA and shareholder partners to file disclosure resolutions seeking change through corporate governance.” Since 2004, 218 of the 493 companies included in the 2021 Index received shareholder proposals regarding corporate political spending disclosure. Of these companies, 145 reached agreements with shareholders, and, notably, their "average overall Index score is 80.2 percent, as compared to 64.0 percent for the 73 companies that were engaged but did not reach an agreement." The average score for the 275 companies with no history of shareholder engagement is 37.7%. Twenty companies were rated "most-improved," reflecting gains in their overall scores of 50 percentage points or more from last year. Notably, of these 20 most improved, 14 were engaged by CPA shareholder proposal partners beginning with the 2020 proxy season.

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> The CPA, together with its shareholder-proposal partners, had, as of June, submitted 30 proposals for 2021. Of the 12 that went to a vote, six received majority votes, including two at 80% and one at 68%. CPA and its partners have also withdrawn 13 proposals; 10 were instances where agreements regarding disclosure were reached with companies and three were strategic withdrawals where the company made substantial improvements but not enough to merit an agreement. According to CPA, 2021 "has been the strongest proxy season" they've had. Their average vote has steadily increased in the past three years from 36.4% in 2019 to 41.9% last year and 48.1% for 2021. (See this PubCo post.)

Repeat basement-dwellers. There were 27 companies that received scores of zero last year and again this year.

Corporate policies and prohibitions. Why adopt a policy on political spending? The Index contends that, "[b]y setting out objective criteria for political spending, a company provides a context for decision-making. An articulated policy provides a means for evaluating the risks and benefits of political spending; measuring whether such spending is consistent and aligned with a company's overall goals and values; determining a rationale for the expenditures; and judging whether the spending achieves its goals." The Index found that 441 companies (89.5%) disclosed policies on corporate political spending, including 317 companies (64.3%) that posted a detailed policy, and 124 companies (25.2%) that posted only “brief or vague policies. There appears to be substantial variation in the level of description of the scope of permissible donations: 182 companies (36.9%) provided complete descriptions of the political entities to which they may or may not contribute, while 168 companies (34.1%) provided “less than comprehensive information.” Similarly, with regard to decision-making criteria, 158 companies (32.0%) provided “detailed information about the public policy positions that provide the basis of their political spending decisions,” while 97 companies (19.7%) “provided vague explanations about what drives the company’s giving.” The Index includes a Model Code of Conduct for Corporate Political Spending as Appendix G, as well as sample company policies.

The policies of 220 companies (44.6%) prohibited at least one category of corporate election-related spending, an increase of 53.8% since 2016 (143 companies). Fourteen companies have “clear policies that prohibited the use of corporate assets to influence elections and asked third parties not to use company payments for election-related purposes.” The policies of 24 companies provide that direct and indirect political expenditures may be made only through an employee-funded PAC. With regard to restrictions on indirect contributions, 86 companies “prohibited or restricted payments to both trade associations and 501(c)(4)s.” According to the Index, companies “engage in trade and industry associations for a variety of reasons and may not always agree with political positions taken by those associations. Likewise, company contributions to politically active 501(c)(4) organizations may be used for election-related purposes not supported by the company. To avoid such conflicts, some companies prohibit the recipients of company funds from using those funds for election-related purposes.”

Assuming that no legislation mandating political spending disclosure is passed, is private ordering the only option for proponents of political spending disclosure? Perhaps not. For the last several years, including in the “Consolidated Appropriations Act, 2021,” Congress has prohibited the SEC from using any of the funds made available “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." But the new Congress may eliminate that bar, leaving the SEC free to consider adopting regulations to require political spending disclosure. The Director of the Zicklin Center commented that "[w]ith the looming possibility of a Securities and Exchange Commission rulemaking over corporate political disclosure, corporations can cross the threshold of accountability before being required to do so as a matter of law."

And political spending disclosure regulation may well be on the horizon. In questioning by the Senate Committee on Banking, Housing and Urban Affairs in connection with his nomination as SEC Chair, Gary Gensler was asked by both sides about political spending disclosure. Gensler replied that his position on the issue would be grounded in economic analysis and the courts' views of materiality as the information reasonable investors want to see as part of the total mix of information. Gensler added that he considered the 80 shareholder proposals submitted last year on the topic and the 40% vote in favor as a strong indicator. In light of that level of investor interest, political spending disclosure was something he thought the SEC should consider. (See this PubCo post.) At another session, Senator Jon Tester commented that, in his view, *Citizens United* was one of SCOTUS's worst decisions ever, allowing billions of dollars to pour into the political system with no transparency. It did not help our democracy, he said. Aside from the provision in the current appropriations bill preventing the SEC from acting on this issue, the SEC otherwise has power to require disclosure of corporate political spending. While those donations may or may not be financially material to the corporation, they could be material to the recipient of the donation and the information about these donations is potentially material to shareholders. Shouldn't they have access to it? Gensler replied that, if investors view the information as important, and increasing numbers suggest that they do, then the SEC has the same role as discussed earlier in terms of developing a proposal and soliciting public comment. (See this PubCo post.)