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To Give or Not to Give?

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The board should evaluate whether it's appropriate to engage in political spending.

The U.S. Supreme Court's 2010 ruling in *Citizens United v. Federal Election Commission* permitted essentially unlimited expenditures in the political arena by businesses as a protected First Amendment activity. Since then, expenditures for lobbying and other political purposes have exploded as businesses and other groups use their financial resources to advance corporate objectives. However, particularly in recent years, payments by businesses for political objectives have become increasingly controversial; today, they are under intense scrutiny. In this environment, the board of directors should make sure it is exercising its duties of oversight and understands what management and the corporation are seeking to accomplish by making such payments, particularly when these payments are to "dark money" organizations that do not disclose their donors' identities.

Some businesses publicly align their political expenditures to their stakeholder focus, asserting that the corporation has an important role to play in advancing social and broader political or economic goals beyond stockholder returns. In 2020 and 2021, the press was full of accounts of such expenditures on both sides of the political spectrum, as the country faced polarizing political and social issues, including the Presidential election, civil rights issues and voting procedures.

In several instances, it was later discovered that certain corporations' political contributions were inconsistent with, or even undermined, publicly stated positions taken by senior management on notable public issues. And watchdog organizations such as the Center for Political Accountability and others have made concerted efforts to highlight these kinds of inconsistencies to the public. In addition, many corporations provide no disclosure at all regarding their political and lobbying expenditures, so investors have no visibility on these issues. In response, some institutional investors and others have demanded that corporations refrain from any political giving, or at least better align their political and lobbying expenditures with their stated values, and disclose their policies for making such payments as well as the amounts of the payments. While a complete moratorium may be difficult for many companies that need to have good relationships with (and access to) regulators and legislators, board oversight of such

payments can provide important guardrails and build confidence that they are being made appropriately and for important corporate purposes.

In addition, shareholder proposals to increase reporting of political and lobbying activity have significantly increased over the last several years. In 2021, approximately 60% of companies in the S&P 500 adopted some level of disclosure of political expenditures. Firms including ISS, Vanguard and Blackrock have called on public companies to confirm that their corporate and political activities are consistent with their public statements on material and strategic policy issues, and that they similarly monitor the activities of trade associations and other groups they support financially.

In this environment, the board should put on the agenda the oversight of such payments in order to minimize the risk of public embarrassment or misalignment with key stockholder constituencies. The board should first address whether it is appropriate to engage in this sort of spending at all. The board cannot be sure that a politician or trade association supported by the corporation will not use those funds to support actions or causes that conflict with the company's core values or that otherwise would be embarrassing.

If the board concludes that there are good reasons for permitting political expenditures, it should examine the business practices behind the corporation's political and lobbying expenditures and decide which of these expenses would be permitted and which would not be allowed. For example, some corporations permit payments to lobbyists that are advocating for regulations favorable to the business, while forbidding contributions to trade associations that do not provide transparency on their expenditures. The board also should establish how these decisions are to be made, and the degree of oversight the board intends to exercise over individual decisions. These policies should be set out in a written charter that has appropriate safeguards to ensure that giving reflects core corporate objectives, including those related to ESG. These safeguards should generally include regular oversight by a board committee composed of independent directors, and a request that third parties report to the board how they use the corporation's contributions. Finally, the board should decide whether and how the corporation should disclose its political expenditures and its policies and practices related to these contributions, including trade associations and other groups that may be used for political purposes. While the debate over the proper role of corporate money in the political arena is expected to continue, directors should be sure that they do not get swept up in the debate in an unfavorable way.

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