Political Spending Transparency from Russell 1000 Companies? Not So Much

Political spending transparency from Russell 1000 companies? Not so much – Cooley PubCo

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In the wake of the events of January 6, a number of companies, highly sensitized to any misalignment between their political contributions and their public statements or announced core values, determined to suspend or discontinue some or all of their political donations (although many have since resumed business as usual). As social and political unrest and political polarization have continued, demand for disclosure about corporate political spending has increased. In the midst of an unusually fraught mid-term election season, the Center for Political Accountability and the Zicklin Center for Business Ethics Research at the Wharton School of the University of Pennsylvania released their annual CPA-Zicklin Index of Corporate Political Disclosure and Accountability for 2022. The Index annually benchmarks public companies' disclosure, management and oversight of corporate political spending, and includes specific rankings for companies based on their Index scores, as well as best practice examples of disclosure and other helpful information. (See this PubCo post.) This year, accompanying the Index is a new CPA-Zicklin Model Code of Conduct for Corporate Political Spending, designed to provide a "thorough and ethical framework" for corporate political spending. CPA launched the Index in 2011 following the decision by SCOTUS in *Citizens United*, benchmarking only the S&P 100. In 2015, it began to benchmark the S&P 500. This year, the Index has expanded its coverage to the Russell 1000. The difference in the levels of transparency between the S&P 500 and the Russell 1000 (excluding companies in the S&P 500) is dramatic.

According to the CPA Statement on the CPA-Zicklin Index (Appendix H), the Index was created to "measure how transparently companies report and oversee their election-related spending." The Index looks at:

- "Disclosure of direct and indirect election-related spending by the companies in six areas:
    - contributions to the full range of political organizations, from SuperPACs to multiple candidate committees such governors' associations, state legislative campaign committees and attorneys general associations;
    - contributions to political candidates, parties and committees;
    - independent political expenditures made in direct support of or opposition to a candidate for public office;
    - payments to trade associations that the recipient organization may use for political purposes;
    - payments to advocacy organizations, such as 501(c)(4)s, that the recipient may use for political purposes; and,
    - payments made to influence the outcome of ballot measures.
- Internal decision-making policies related to the spending, and;
- Board and committee oversight of the companies' political spending."

After conducting a thorough review of company policies and practices in 24 areas, the Index then calculates a score for each company. Companies with a score of 90 or above are identified as "trendsetters," which reflects "robust disclosure and oversight." The Statement emphasizes that the Index "does not make a value judgment on a company's political spending or alignment with its publicly stated values and does not cover company lobbying spending or activities."

The Index evaluated key measures among companies in the S&P 500, the core S&P 500 (meaning companies measured in the CPA-Zicklin Index without interruption since 2015) and the Russell 1000 (referring only to the 511 companies not also in the S&P 500).

The Index categorizes companies into five tiers of scoring, with the top tier including companies in the top 80% to 100%. There were 185 companies in the

S&P 500 that scored in the top tier (171 last year) and 164 companies in the core S&P 500 (150 last year), compared with only 14 companies in the Russell 1000.

Looking at "political disclosure and accountability," the average score for the S&P 500 was 57.0% (up from 54.1% last year) and for the core S&P 500 was 66.7% (up from 62.5%), while the average score for the Russell 1000 was only 12.8%.

Board oversight of political spending is a critical factor, the analysis contends, and has now become a corporate governance standard practice: even the Business Roundtable wrote in 2016 that "[t]o the extent that the company engages in political activities, the board should have oversight responsibility." (Disclosure regarding board oversight of risk is a recent focus of SEC. See this PubCo post.) The CPA has written that board decisions regarding corporate political spending should be "informed; consistent with company strategies, policies, and values; and…mitigate risks as much as possible." To that end, the analysis contends, "directors must be able to do three central things: 1) decide whether the company should engage in election-related spending 2) decide whether to disclose such spending 3) ensure that appropriate oversight and other policies and procedures are in place."
In the S&P 500, boards of 62% of companies were tasked with general oversight responsibility for company political spending (307 companies, up from 295 last year); in the core S&P 500, that percentage was 71.8% (262 companies compared with 237 companies last year). For the Russell 1000, however, only 10.6% (54 companies) had general board oversight of political spending.

The boards of 42% of companies in the S&P 500 (208 companies, up from 180 companies last year) not only had general oversight responsibility for political spending, but also had allocated oversight of political spending policies and direct and indirect political spending to specified board committees. In the core S&P 500, the boards and committees of 52.1% of companies (183 companies, up from 155 last year) had been assigned those responsibilities. Those responsibilities were assigned to boards and committees at only 15 companies (2.9%) in the Russell 1000. The analysis asserts that oversight of indirect political spending—through third-party groups, trade associations and other tax-exempt organizations—is "an especially important measure because the recipient groups are not required to make public their donors, hence the term 'dark money' groups."

SideBar

A 2020 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.

Over the prior 10 years, the CPA found that hundreds of millions of dollars had 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.)

There were several milestones reached this year, including the 385 companies—almost 78% of the S&P 500 and a record high—that "fully or partially disclosed their political spending in 2022 or that prohibited at least one type of spending." In addition, the Index counted 300 companies that disclosed some or all of their political spending, and 156 companies that "prohibited direct donations to state and local candidates, political parties, and committees," another record high.

The Index analysis provides a number of examples of best practice disclosure, such as disclosure of payments to trade associations, and descriptions of the type of information that companies provide about their policies on political spending. This year, a new Model Code of Conduct for Corporate Political Spending was introduced. The preamble states that the Code is a "public commitment to employees, shareholders and the public to transparency and accountability. It not only mitigates risk but also demonstrates the company's understanding that its participation in politics must reflect its core values, its respect for the law and its responsibilities as a member of the body politic." Companies that adopt this framework and conduct due diligence, the analysis suggests, “may avoid pushback, boycotts, embarrassment, and harm to their bottom lines.”

Shareholder proposals appear to have also had an impact. The analysis reports that, at 12 of the 20 companies that the Index rated “most-improved” (for gains in their overall scores of 50 percentage points or more from last year during or since the 2021 proxy season), CPA shareholder partners submitted a CPA model political disclosure proposal. According to the analysis, since the 2004 proxy season, shareholders have submitted proposals on the issue of corporate political spending disclosure and accountability at 224 companies in the 2022 S&P 500 Index: 154 have reached agreements with shareholders and, of those companies, “the average overall Index score is 79.9 percent, as compared to 68.1 percent for the 70 companies that were engaged but did not reach an agreement.”

SideBar

In case you were thinking that, given the recent proliferation of prescriptive SEC rulemaking proposals, we would soon be seeing a proposal for political spending disclosure, think again. In the 2022 budget bill (Section 633), Congress once again prohibited the SEC from using any funds for political spending disclosure regulation. So how likely is it that will change in the next budget? That means that, for now anyway, private ordering—through shareholder proposals at individual companies and other forms of stakeholder pressure, including humiliation—will continue to be the pressure point for disclosure of corporate political contributions. (See this PubCo post.)

This CPA report indicated that, of 22 shareholder proposals on political spending submitted by its proposal partners for the 2022 proxy season, 14 resulted in an agreement with a company or a withdrawal of the proposal if the company otherwise made substantial progress, and eight went to votes, of which two received majority votes. The average vote was 33.9% (38.1% excluding a company with majority insider ownership). That average reflects a decline from the 2021 proxy season, when the average vote was 48.1%. In 2021, CPA partners submitted 28 proposals, with 12 going to a vote and six receiving majority votes, including two at 80% and one at 68%. For 2021, CPA and its partners also withdrew 13 proposals; 10 were the result of agreements with companies regarding disclosure and three were strategic withdrawals where the company made substantial improvements but not enough to merit an agreement. According to CPA, because more companies have begun to regularly provide disclosure about their political spending, there are fewer repeat proposals and fewer targets for CPA’s original model proposals that simply seek full disclosure and transparency—and these remaining companies may, on average, be “more resistant to transparency” than prior targets. CPA advised that next season will see a major increase in the number of proposals to be submitted by its proposal partners. In addition to the standard disclosure proposal to be submitted to companies with minimal or no disclosure policies, CPA also expects to submit proposals related to disclosure of contributions to 527 organizations or trade associations that engage in election-related spending. (See this PubCo post.)

A CPA board member observed that the release of the Index "comes at a critical time for companies and investors alike, as they navigate an increasingly perilous political environment in which deliberate management of corporate political spending activities has never been more important." One way, he said, to begin mitigating the risks of misalignment of corporate values and political spending—which have negatively impacted multiple companies in recent years—is with "'sunlight' provided through a proactive commitment to transparency and accountability." Former SEC Commissioner Allison Herren Lee, writing the foreword to the new Index, observed that "trends lines in the CPA-Zicklin Index over the past decade show some laudable increases in political spending transparency, but the analyses also show that non-transparency around corporate influence in the political process remains a significant issue." Political spending is obscured from view not only from the public, she wrote, but also from investors and sometimes even from management and directors because companies "lack policies, controls, and oversight around these expenditures." This lack of transparency is not risk-free. The President of CPA has previously observed that, "[w]ith companies under much greater scrutiny on their election-related spending, it really is incumbent on them that they have strong [governance] policies that they adhere to. They face the threat of boycotts. They face the threat of employee morale problems…. They face the threat of very harmful publicity. Bottom lines can be adversely affected by the way companies engage in political spending."