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Center for Political Accountability introduces Guide to Model Code

[Center for Political Accountability introduces Guide to Model Code | Cooley LLP - JDSupra]

By Cydney Posner

In 2020, the Center for Political Accountability introduced the CPA-Zicklin Model Code of Conduct for Corporate Political Spending, designed to provide a "thorough and ethical framework" for corporate political spending. 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." The goal is to help companies adopting this code to avoid the reputational and financial harm that might result from a failure to align corporate values and political spending. Ultimately, the CPA observes, "directors and officers are responsible and accountable for the political choices and broader impact that may result from their company's election-related spending, no matter how financially immaterial it may seem." Now, the CPA has developed a Guide to Becoming a Model Code Company, designed to help companies and their boards understand the Model Code and how it can help them manage election-related political spending in high-risk environments—think the 2024 election cycle now upon us. According to the President of the CPA, the Guide was developed based in part on questions raised by companies at a recent roundtable on corporate political spending at NYU's Stern School.

As described in the Guide, while the Model Code is based in part on the CPA-Zicklin Index, it "goes beyond the disclosure and accountability policies in the Index to require companies to know and publicly disclose where their contributions ultimately end up and consider broader factors of societal interests and democracy in company political spending decisions." The emphasis is on proactively managing the "risks posed by election-related spending from corporate treasury funds (as opposed to a corporate PAC)."

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> Last year's Guide to Corporate Political Spending from the CPA discussed some of those risks and offered advice to address them. For example, a company may face reputational risk when its political contributions are viewed to be in conflict with the company's publicly stated values or brand, or with the interests of the company's stakeholders. The effect could rupture a company's relationship with its employees, customers and shareholders. In that context, the CPA has a number of suggestions, including articulating the company's core values and the core positions and policies that emanate from those values, establishing a process to assess the possible consequences of a political contribution if the recipient's actions might conflict with the company's espoused values, and ensuring that this analysis is conducted at the appropriate level, including at the board level. In addition, reputational risk may be exacerbated as a result of contributions made to third-party organizations that lack transparency, where the company's funds may be used to support candidates or positions that conflict with the company's stated values. The CPA recommends that companies conduct due diligence, refining their processes to ensure that corporate contributions to third-party

organizations are carefully examined. In particular, the CPA advises that companies require third-party organizations to which the company plans to direct contributions to provide a report that identifies the candidates and issues that the funds will be used to support. Companies will then need to assess those candidates in the same manner as they assess their direct contributions. The CPA suggests that companies contribute "only to outside organizations that publicly disclose the candidates and issues that the organization supports and the reasons for that support."

In addition, the CPA contends that commitment to the Model Code "publicly demonstrates to stakeholders a company's dedication to being a leading corporate citizen." Companies can be recognized as Model Code companies either through statements that the board has approved the company's adoption of the Model Code or statements that the company's policies are consistent with the provisions of the Model Code.

What Model Code disclosures go beyond the CPA-Zicklin Index? While insights on some Model Code disclosures can be found in the Index, this new Guide identifies other disclosures that are not in the Index, but are "unique to the Model Code," including:

- "Disclosure of all direct political contributions to candidates, parties, or political committees made with corporate treasury funds.
- Disclosure of all indirect contributions to 501(c)(4) groups, also known as 'social welfare' organizations, trade associations, 527 committees, super PACs, and other third-party groups *that engage in election-related spending*. [Emphasis added.]
- Disclosure that the company receives a report from third-party groups to which it contributes, *if that group engages in election-related spending*, detailing how corporate contributions are

spent and which candidates' campaigns are promoted using those contributions....

- Disclosure that the company annually reviews the candidates and political organizations that its contributions directly or indirectly support to ensure that the positions held by those candidates do not conflict with the company's core values and policies."

The Guide observes that some companies implement the Model Code's third-party disclosure requirement by posting on their websites the 990 tax return of their trade associations that engage in election-related spending. The return "provides information on where the company's political money ends up and what it enables." The Guide also notes that "[o]nly a handful of trade associations engage in election-related spending," identifying a number of them.

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In its 2020 report, Conflicted Consequences, the CPA 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, they control the message and decide which candidates or issues to support, regardless of the contributor's own goals and intentions.

The CPA found that, over the prior 10 years, 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." As indicated in the forward to the report, a number of the intermediate organizations that were 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." For example, the report discusses the use of 527 funds, donated by companies that had spoken out in favor of preserving the Paris climate accord, to support political groups that worked in opposition to domestic climate initiatives. Similarly, the report highlights 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, 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. The report suggested that donations to 527s appear to be particularly fraught with peril and merit special attention, precisely because, as discussed above, once the contribution is made, the company essentially cedes control over the use of the funds. (See this PubCo post.)

What disclosures are not required by the Model Code? Importantly, the Guide also makes clear that certain types of disclosure are *not required* by the Model Code, specifically:

- "Disclosure of corporate PAC spending.
- Disclosure of dues and other payments made to trade associations that *do not engage in election-related spending*.

- Reports from other third-party groups that *do not engage in election-related spending*. This includes 501(c)(4) groups."

SideBar

What is a 501(c)(4) third-party group? According to the 2023 CPA-Zicklin Index, IRC section 501(c)(4) exempts from federal income tax "certain civic groups and nonprofit organizations whose primary purpose is to promote social welfare. Even though such groups have always existed in varying forms, the U.S. Supreme Court's decision in *Citizens United* gave rise to a new wave of 501(c)(4) groups that actively engage in election-related activities." However, the Guide notes, "[o]nly a handful of 501(c)(4) groups engage in election-related spending." The Guide identifies a number of them. How can a company distinguish between 501(c)(4) groups that actually are social welfare organizations and groups that are primarily engaged in election-related spending? The 2023 CPA-Zicklin Index has added guidance to clarify which 501(c)(4) contributions should be disclosed. The Index advises that

> "companies can look at the organization's activities to see if it engages in any political activity as defined by the Internal Revenue Service. Using current regulatory definitions, including the IRS's definition of 'political intervention,' political spending comprises:
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> - any direct or indirect contributions or expenditures on behalf of a candidate for public office or referenda,
> - any payments made to trade associations or tax-exempt entities used for intervening in a political campaign, and
> - any direct or indirect political expenditure that must be reported to the Federal Election Commission, Internal Revenue Service or state disclosure agency."

What should boards do? Under the Model Code, to help companies shape their strategies for political spending in light of the risks presented, boards of directors are required to "consider the broader societal and economic harm and risks posed by the company's political spending." To that end, the Guide advises that boards need to consider the "broader policy, political and societal environment" necessary for the company's success and assess the near- and long-term impact of the company's political spending on that environment—not just "access, regulation and taxation," but also the more expansive social impact, such as "gerrymandering, controversial lawsuits, and legislation that creates conflicts with company policies and positions." The Guide advises that this board review "is intended to be an independent and more comprehensive review of the impacts of company electoral spending beyond the immediate moment."