Fight Looms as SEC Mulls Campaign Money Disclosures

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Executives at public companies are feeling intense pressure to disclose corporate political donations made legal by the U.S. Supreme Court’s Citizens United ruling, but experts say the U.S. Securities and Exchange Commission will face resistance as it begins crafting a rule that would force the issue.

Advocates of disclosure got a big boost Friday when the SEC’s Luis A. Aguilar, a sitting commissioner, said the agency should “provide for disclosure of corporate political expenditures” so that investors and consumers can see what politicians are getting corporate backing.

The looming fight over adding such disclosures to annual and quarterly reports comes in the second election cycle after the high court's bellwether January 2010 decision in Citizens United v. Federal Election Commission, which struck down restrictions on the ability of corporations “to use general treasury funds to make campaign expenditures.”

The decision created controversy, with critics saying the 5-4 ruling paved the way for a small group of elites — including executives at shareholder-owned corporations — to dominate the political landscape with secret donations.

Aguilar noted that the high court's decision explicitly called for prompt disclosure, but added, "Unfortunately, the court envisioned a mechanism that does not currently exist." He called for fast action to close the gap.

But powerful forces are already lining up to challenge the agency as it launches into a rule-making effort.

“Nobody disputes that shareholders have the right to decide this. The problem is the SEC coming in and deciding a one-size-fits-all rule for everybody,” attorney Allen Dickerson, legal director for the Center for Competitive Politics, told Law360 on Tuesday.

Shareholders should force big business to disclose donations through proxy votes if they feel the need, Dickerson said, adding that corporate political donations aren't usually enough to move the needle when it comes to earnings at big public companies.

“You already have to disclose things that are material,” Dickerson said. “This concept of political spending as a discreet category is misleading. Under these rule-making initiatives, you'd have to disclose relatively small amounts of money.”

That, according to Dickerson, has the potential to distract shareholders from important issues of corporate governance.

“There's the danger of having your annual meeting every year turn into a partisan circus,”
Dickerson said.

Some executives have resisted disclosure on grounds that they simply should be free to manage corporations as they see fit, according to Harvard Law School Professor Lucian Bebchuk.

Executives have argued that "companies and their shareholders will benefit from being able to contribute without the contribution becoming public," Bebchuk said.

The financial services industry, already laboring to comply with new rules under the Dodd-Frank Wall Street Reform and Consumer Protection Act, may put up an especially tough fight.

“This would just be one more regulation they'd have to deal with,” said Venable LLP attorney Scott E. Gluck, who represents investment advisers and other financial services industry clients in their efforts to comply with a raft of new Dodd-Frank and "pay-to-play" hurdles.

The financial industry lobby is an especially powerful voice before the SEC, noted Washington University School of Law Professor Hillary Sale, who predicted banking industry captains would make the argument that complying with yet another SEC rule would make it that much more expensive to operate.

Despite the concern, most experts agree that efforts to slow down, stop or change the SEC's rules may not be enough to stop this particular train from leaving the station.

"The case for disclosure is strong and hard to oppose," Bebchuk said.

For one thing, according to transparency advocate Lisa Gilbert of Public Citizen, more than 65,000 individual and organizational commenters have come out in favor of disclosure in public comments.

“We're close to hitting a record number of comments into the SEC from citizens who care about this issue,” Gilbert said.

She said those who make arguments about materiality, the rights of executives to steer their companies or the cost of compliance are missing the point.

“The bottom line is that shareholders own these companies, and it's appalling to think that investors might have their money used in ways that are antithetical to their political beliefs,” Gilbert said.

To that end, advocates for disclosure are working on shaming corporations that don't own up to their political activities.

The Baruch Index of Corporate Political Disclosure, for example, was published in 2011 and shows that 22 percent of the S&P 100 disclose little or nothing about their corporate political activities.

Among the most "opaque" denizens of the S&P 100, according to the index, are household names like The Allstate Corp., Ford Motor Co., Google Inc., News Corp., Wal-Mart Stores Inc.
and The Walt Disney Co.

"While some companies are voluntarily providing disclosures, many others are not," Aguilar said. "In addition, the disclosure that is provided is not uniform and may not be adequate."

Others have called for a law that would force public companies to ask their shareholders whether they approve of political donations. But experts agree that kind of measure would likely be outside the scope of the SEC's rule-making efforts and would require separate legislation to pass a gridlocked Congress.

For now, forcing companies to toe the line on disclosure could ultimately help them avoid public relations nightmares, Sale noted, referring to the backlash that hit Target Corp. in 2010 after the Minneapolis retail giant donated to a group that backed a politician who opposes same-sex marriage.

“When people realized what had happened they organized a fairly successful boycott against Target,” Sale said. “There was a lot of pressure — showing the consequences can be quite serious.”