Can Shareholder Activism Affect Corporate Political Spending?

*Reuters*
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The New York Times had a great front-page story on Sunday about corporations contributing to politically active non-profits in order to shield their campaign contributions from public view. That's not a revelatory thesis -- I've written about a *suit by campaign-spending reformers* to force such non-profits as Karl Rove's Crossroads GPS to disclose corporate donors -- but the Times dug deep for examples of specific corporate contributions, such as the $3 million that Aetna gave to the U.S. Chamber of Commerce, which was initially described in a regulatory filing as a "lobbying expense."

Bruce Freed of the Center for Political Accountability read about Aetna's donation to the Chamber with great interest. Aetna, you see, is one of more than 100 large public companies that have agreed in the last several years to disclose their political spending. Most of those disclosure agreements have come under pressure from shareholders, who (often with CPA's help) have demanded proxy votes on resolutions calling for corporations not only to disclose their policies and procedures for political spending but also to itemize all contributions, direct or indirect, that are intended to influence an election or referendum.

These shareholder demands for disclosure have become increasingly common, thanks to the U.S. Supreme Court's 2010 holding in *Citizens United v. Federal Election Commission*, which said indirect corporate political spending is protected by the First Amendment. (Direct spending, as we've reported, may be another story.) Forcing companies to own up to their political involvement "has become even more critical," the CPA website says, because Citizens United means "companies face greater pressure to spend corporate dollars either directly or indirectly through conduits such as trade associations and (non-profits)."

Exceedingly few shareholder resolutions calling for disclosure have received majority shareholder votes in favor -- Wellcare was the only company whose shareholders approved a resolution this year -- but according to CPA, the disclosure campaign is gaining traction. Freed's group said in June that resolutions gained more than 30 percent approval from shareholders at 13 of the 25 corporations where political spending disclosure was up for a vote this proxy season.

Even more important, Freed told me, is the dialogue that has opened up between shareholders and corporations, which has produced the 101 disclosure agreements his group touts. But the Aetna example prompts a question that I put to Freed on Monday: What happens if a corporation flouts its promise to disclose all political spending to shareholders?

"We've been looking at that," Freed said. "These are promises stated in writing ... A breach is something we consider to be very serious. We're talking to companies, talking to directors." (In response to my request for comment on whether it breached its agreement with shareholders, Aetna directed me to a *letter* it sent to Citizens for Responsibility and Ethics in Washington
about the Chamber donation; Aetna said the $3 million contribution was publicly disclosed in an amended regulatory filing.)

Nevertheless, I'm afraid that if the best hope to reform campaign spending lies with shareholder-sponsored resolutions to enforce corporate disclosure, we'd better gird for the continuation of shadowy corporate influence on campaigns. Aside from raising a public stink, shareholders don't have much recourse if a company decides not to disclose a political donation. They could file a derivative suit claiming the directors and officers breached their fiduciary duty, but unless shareholders could establish that the board was acting against the corporation's interest, the suit would almost certainly be dismissed.

The problem for shareholders, according to Allen Dickerson, legal director of the Center for Competitive Politics, is materiality. A caveat: CCP is dedicated to assuring the free-speech rights of corporations that want to engage in politics, so Dickerson is not exactly objective on this question. But he makes a smart point. That $3 million Aetna reportedly donated to the Chamber of Commerce this year could make a big difference to some candidate or in influencing some political issue. But in the scheme of Aetna's $34 billion or so in revenue and $2 billion in profits, it's just not material. "Materiality has to be about the corporation's budget," Dickerson told me. "Management has a fiduciary duty to shareholders, but they make much larger decisions all the time." He said, not surprisingly, that he's opposed to the disclosure agreements so many companies have signed with CPA and other shareholder groups because he doesn't think corporate political spending is significant enough to deserve an exception to the rule of immateriality.

Disclosure may not impact corporate donations. A spokesman for the Chamber of Commerce, for instance, told me on Monday that corporate disclosure agreements with shareholders haven't affected donations to the Chamber. But there's a lot of debate right now about whether political spending benefits corporations and their shareholders. Harvard Law professor John Coates published a study last December with the counterintuitive finding that campaign donations don't serve shareholder interest; the Manhattan Institute questioned his methodology in June and he fired back last week at the HLS Forum on Corporate Governance. Disclosure of corporate political involvement seems to me the only way to assess the costs and benefits to shareholders of campaign spending.

That's why I hope shareholder activism -- as well as suits like the disclosure case now at the D.C. Circuit Court of Appeals, which demands disclosure from recipients of corporate donations -- brings corporate campaign contributions to light. But without enforceability, I have my doubts.