Focus on Donations Grows: Scrutiny of Political Contributions Is Intensifying As the US Enters The Next Presidential Election Year

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When the US Supreme Court ruled in 2010 that corporate political contributions are protected by free speech, the five-four split-decision signaled deep divisions.

But the court was nearly unanimous in upholding the importance of disclosure to give voters the information necessary to ‘make informed choices in the political marketplace’.

The case – known as Citizens United – has made political contributions a red-hot issue. And the focus on this area is set to intensify in 2012, when the next US presidential election will be held.

Critics of the decision, including President Obama, predict a plague of unintended consequences as unlimited contributions wash unfettered into the electoral process.

There’s no doubt there have been unforeseen consequences. Just ask Minneapolis-based Target, whose $150,000 contribution to the campaign of a conservative Republican in Minnesota’s 2010 governor’s race sparked a national boycott by gay rights groups (see Target practice, below).

Or consider the record number of shareholder resolutions filed this proxy season – more than 75 according to Institutional Shareholder Services (ISS) – that relate to corporate political activity.

Then there is California state treasurer Bill Lockyer, who requested that the state’s pension funds develop governance policies that call for board oversight of corporate political spending.

Ten prominent law school professors took a different route, petitioning the SEC to consider rules requiring public reporting of political contributions.

And then there is Starbucks CEO Howard Schultz, joined by 100 fellow chief executives, pledging to refrain from donating to candidates from either party until Congress and the president address the US’ fiscal mess.

While no single thread links all these developments directly back to Citizens United, it’s clear corporate political activity will be front and center during the coming proxy season, competing with say on pay as a top issue on activists’ governance agendas.

‘Bumper crop’ of shareholder resolutions

Patrick McGurn, special counsel at ISS, does not think the issue will crowd out other activist priorities such as environmental sustainability. But he does predict ‘a bumper crop’ of shareholder resolutions calling for disclosure and board oversight of political contributions.

Companies and boards are reluctant to get too far in front when it comes to new disclosures, he
says, but the growing number of companies voluntarily disclosing political contributions is slowly overcoming the ‘first mover’ issue.

A director sitting on multiple boards ‘tends to have that sort of viral effect’, pushing his or her companies to adopt consistent policies on the boards’ political donation practices.

Nonetheless, McGurn predicts that the number of companies voluntarily disclosing will plateau over time and broader disclosure will come only from state or federal regulatory or statutory requirements.

**SEC petitioned**

That is exactly the approach advocated by 10 prominent law school professors who petitioned the SEC to require disclosure of political campaign contributions.

Writing in the *Harvard Law Review* last year, Robert Jackson of Columbia Law School and Lucian Bebchuk of Harvard Law School, the two prime movers behind the petition, pointed out that while the Supreme Court made clear the free speech rights of corporations, the question of ‘who should have the power to decide whether a corporation will engage in political speech’ remains unanswered.

The professors argued that shareholders should have input because political speech decisions are different from ordinary business decisions and, as a result, should not be governed by the same rules.

‘After all, it’s the shareholders’ money, whether it’s being spent on executive compensation or corporate political contributions,’ Jackson says.

The Target example makes it clear corporate political spending is extremely important to shareholders, Jackson continues.

‘If you had asked Target’s directors last year whether a political donation of a few hundred thousand dollars would become a board-level issue, they’d have said you were crazy,’ he says.

**‘Tipping point’ for greater transparency**

The world of corporate contributions has changed since then. The Citizens United ruling moved us toward a ‘tipping point’ for greater transparency and board oversight of political contributions, says Tim Smith, senior vice president at Walden Asset Management.

Bruce Freed, president and co-founder of the Center for Political Accountability, a non-profit campaign for greater disclosure of political spending, says Target’s management and board failed by not asking whether political expenditures were in line with the company values.

He has stepped up his campaign this year by launching an index showing how companies engage, manage and oversee political spending. The idea is that the index will provide information to journalists, investors and the public in the run-up to the 2012 US presidential election.
Freed says corporations are safer now disclosure is being enforced. Without transparency, the threat of extortion or risk of corruption is heightened ‘like back in the days of Watergate,’ he says. ‘Disclosure really helps protect companies.’

Ironically, opponents of disclosure requirements make a similar argument. The US Chamber of Commerce, which campaigns against disclosure requirements, says donors may be subject to political pressure or excluded from government contracts based on their contribution history.

But the Supreme Court was unwilling to allow anonymity without a demonstration of ‘reasonable probability’ that disclosing contributors’ names ‘will subject them to threats, harassment or reprisals from either government officials or private parties.’

**Target practice**

The experience of Target is instructive. It shows how the Citizens United decision can have direct and far-reaching consequences for companies and their investor relations. It also suggests momentum is building for more board oversight and transparency of political contributions.

The situation came about like this: following the Citizens United case ruling at the US Supreme Court, the state of Minnesota passed a law requiring prompt disclosure of political contributions. About the same time, a group of Minnesota businesses formed MN Forward, a political action group headed by a former Republican spokesperson.

MN Forward went on to provide financial backing to Tom Emmer, the Republican candidate for governor, ostensibly for his stance to cut state spending as the way to address the state’s billion-dollar budget deficit.

But Emmer was also known as an outspoken and vigorous opponent of gay rights and same-sex partner benefits for state workers. While other prominent Minnesota companies also donated to MN Forward, Target’s $150,000 donation sparked the fiercest backlash, in part because the company had been a visible supporter of diversity in the workplace, receiving high marks from the Human Rights Campaign, a gay rights lobbying group.

The company’s varied constituents felt they could reasonably expect more from Target, observes Tim Smith, senior vice president at Walden Asset Management, one of the investors that filed a shareholder resolution calling for a review of the company’s political spending.

As a result, the Minneapolis-based retail giant – often held up as an exemplar for careful stewardship of its corporate reputation and brand – has become the poster child of how not to do political contributions in the post-Citizens United world, Smith points out.

Target’s experience has not been lost on other firms, however. Smith says it is now much easier to engage companies over the issue of corporate political campaign contributions. No management or board wants to be ‘the next Target,’ he explains.