Why shield corporations from disclosing political spending?

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By Alison Frankel
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I'm going to confess right here that I don't possess the requisite statistical skills to hazard an opinion on whether shareholders benefit when their corporation engages in lobbying and campaign expenditures. If you have a more powerful appetite for numbers than I do, **John Coates** of Harvard Law School offers a bibliography of academic studies that conclude corporate political spending is bad for shareholders at the Harvard Forum on Corporate Governance (including his own influential 2012 paper for the Journal of Empirical Legal Studies). Want a different view? A pair of economics consultants from Sonecon disputed Coates and those who think likewise in a 2012 paper for the Manhattan Institute that found corporate political spending has "a generally positive effect" on a company's value, in terms of market returns. You can pick whichever analysis suits you because I'm not going to argue the merits of either. I do believe, however, that regardless of the benefits of lobbying and campaign contributions, shareholders have a right to know when and how their money is being spent on politics.

Coates does too, which prompted his post Friday at the Harvard corporate governance forum. Coates was reacting to the Securities and Exchange Commission's decision in November to table consideration of rules that would require disclosure of corporate political spending; the Harvard prof called the SEC's move "a policy and political mistake" that permits large corporations to lobby secretly against Dodd-Frank regulations, using other people's money. As you probably know, corporate disclosure of political spending has been kicking around in shareholder proposals for about a decade, but the SEC was pushed into the debate in 2011, when a group of 10 law professors with varying views on the impact of such spending joined together to petition the SEC to develop disclosure rules.

The professors, led by co-chairs **Lucian Bebchuk** of Harvard and **Robert Jackson** of Columbia, argued that the U.S. Supreme Court assumed when it expanded the First Amendment rights of corporations to engage in political speech in Citizens United v. Federal Election Commission that shareholders could monitor corporate expenditures to assure themselves that such spending was in their interests. But the Supreme Court's assumption doesn't work without mandatory disclosures, the professors said. Thanks to nudging from public interest groups, about 600,000 shareholders asked the SEC to take up the issue, which made it as far as the agency's rulemaking agenda in November 2012 before falling off the SEC's priority list for the upcoming year. SEC chair Mary Jo White told reporters earlier this month not to infer that the disclosure proposal is dead and buried forever. But SEC rulemaking is shelved for at least a year.

Nevertheless, as **Zachary Parks** of **Covington & Burling** discusses at his very useful blog Inside Political Law, shareholders continue to push for disclosure of corporate political spending by other means. Parks cites shareholder proposals – which are increasingly common, as you can see from the Manhattan Institute's Proxy s Monitor study, but rarely attract anything approaching majority support – and novel shareholder litigation, such as the New York State pension fund's

successful suit to force Qualcomm to disclose its expenditures and a newly filed suit accusing Aetna of misleading shareholders about its political spending.

So while the SEC sits on the sidelines, I talked to both Parks and Coates about what legitimate reasons corporations might have for opposing disclosure, keeping in mind that more than 150 of the biggest companies in the country have already volunteered to disclose information about their political spending to shareholders. Though they're on opposite sides of the discussion, they agreed on the two biggest reasons why corporations are reluctant to disclose their expenditures (with Coates wearing a devil's advocate hat): cost of compliance and business risks.

Parks said the cost of monitoring and compiling data on political spending can be significant. (I should note that SEC Commissioner Daniel Gallagher said the same thing in October.) Companies might have to implement new systems and train employees to gather tax and lobbying data reported and maintained in disparate parts of the company, Parks said in an email. If the SEC enacted new disclosure rules, businesses might even have to consult with lawyers about what information is and is not reportable. "All this costs money and can be particularly expensive for smaller public companies," Parks said. And the cost of compliance would be particularly galling and burdensome, according to SEC Commissioner Gallagher, because political expenditures usually aren't large enough to be material to the corporation.

Coates told me he often hears companies argue that if they disclose political spending, non-shareholders will try to use that information against them. Business rivals, for instance, would be able to see competitors' investments in lobbying, and members of the public could judge whether corporations support candidates they approve of. Just ask Target, which faced public protests in 2010 after disclosing that it donated to a political action committee backing a Minnesota gubernatorial candidate who opposed same-sex marriage. Even Coates said corporations have reason to worry about how disclosures will affect business. "I don't think this is a trivial concern," he said.

I don't either, but, in a way, the possibility that political spending might blow up in a corporation's face belies Gallagher's argument that such is not material. The sheer dollars may not be big enough to warrant shareholder notice, but the potential reputational harm to the corporation from contributing to a particular candidate or lobbying effort seems to me to be exactly why shareholders should know about such spending. It's like the old saying that if you wouldn't want to see your conduct reported on the front page of The New York Times, then you shouldn't do it. Besides, as Coates told me, competitors and members of the public already have access to all kinds of potentially damaging information about companies that report to the SEC, from their intellectual property to litigation against them. Corporations have learned to handle those disclosures, so why not political spending? "We deal with that kind of issue across disclosure requirements," Coates said.

So what about the cost of compliance? As I mentioned, Parks told me it could be expensive, but Coates said most corporations already track their political spending internally, to meet federal reporting requirements on lobbying and campaign expenditures or for tax reasons. Granted, Coates is convinced that corporations should disclose political spending, but he said the cost of compliance is a "makeweight" argument.

Coates and Parks each offered an additional explanation for corporate reluctance to disclose spending. Parks said at his blog that the new Aetna suit could be the harbinger of a new cause of action for shareholders, who can sue corporations for failing to live up to disclosure requirements. Litigation risk, he said, is another reason corporations might not want the SEC to impose new rules. And Coates told me that the most stringent opposition to SEC disclosure rules may actually be coming from corporate trade groups. By donating to pro-business trade groups, individual corporations are able to impact policy while remaining anonymous. Those groups, Coates said, are concerned that if corporations have to disclose lobbying expenditures, they'll lose contributions and influence.

To me, none of these arguments against disclosure seem very persuasive. I'm willing to take SEC chair White at her word that the agency has too many other obligations to take on rulemaking for political spending this year. But I have to agree with Coates and the law professors who wrote to the agency in 2011. Political spending may not represent significant dollars for big businesses, but it represents significant risk. A hodgepodge of voluntary disclosure agreements between companies and their shareholders isn't a long-term answer. The SEC should find time in 2014 to consider this issue.