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Senators Block Vote on SEC Nominees

By Melissa J. Anderson April 18, 2016

A group of Democratic senators has delayed the confirmation of **SEC** commissioner nominees **Lisa Fairfax** and **Hester Peirce** over their views on a universal corporate political spending disclosure regulation.

Boards of directors should expect continued delays on SEC rulemakings if the commission remains understaffed, experts say. They could also face louder calls from shareholders to disclose the amount of corporate funds spent on political donations or lobbying, particularly in this politically charged election year.

Shareholders currently have no view into how companies are spending corporate money on political speech, says Sen. **Jeff Merkley** (D-Ore.) in an interview with *Agenda* . Therefore, they can't even vote with their feet by selling their shares if they disagree with how the money is spent. According to Merkley, that amounts to "stolen speech."

"If a nominee to the SEC supports stealing the speech of the owners of a company … they should not be serving on the commission," he says.

Merkley was joined by three other members of the **Senate** Banking, Housing and Urban Affairs Committee, Sen. **Bob Menendez** (D-N.J.), Sen. **Chuck Schumer** (D-N.Y.) and Sen. **Elizabeth Warren** (D-Mass.), who cast a "no" vote on moving forward with the nominees' confirmation on April 7. Sen. **Tim Scott** (R-S.C.) also voted 'no.' Banking committee chair Sen. **Richard Shelby** (R-Ala.) said he would postpone the vote until later this month.

During the banking committee's nomination hearing in March, the senators asked the nominees to share their views on whether the SEC should commit to developing a disclosure rule on corporate political spending. Both nominees said they would consider stakeholder concerns on the issue and are interested in learning about the commission staff's research on the potential disclosure rule.

But both pointed out that the commission's agenda is set by Chair **Mary Jo White**, who has staunchly refused to put the rule on the calendar. Moreover, **Congress**'s omnibus spending bill signed by President **Barack Obama** in December included a rider prohibiting the SEC from "finaliz[ing], issu [ing] or implement[ing]" the rule this year.

Nevertheless, a petition for the SEC to write the rule has received considerable public support, the Democratic senators argue. The SEC has received more than 1.2 million letters on the issue since August 2011. The commission says the vast majority are in support of the disclosure rule.

During the hearing, the senators suggested that the commission could work on the development of the rule, even if commissioners are barred from finalizing it this year. During the hearing Merkley also complained of the commission's sluggishness in finalizing rules mandated by the 2010 Dodd-Frank Act.

Currently, the SEC is down two commissioners following the retirements of **Luis Aguilar** and **Daniel Gallagher** last year. Some experts have argued that the currently short bench could have an effect on the speed with which the commission rolls out the remaining Dodd-Frank rules.

Merkley lays the tardiness of the Dodd-Frank rules squarely at White's feet.

"She has had a commission fully capable of getting these rules done; she's chosen to simply put on ice any number of them," Merkley says.

In previous years, paired Democratic and Republican nominees for SEC commissioner have cleared the banking committee easily to advance to a vote on the Senate floor.

Political Disclosure

In 2011, a committee of **Columbia Law School** professors led by **Robert Jackson** petitioned the SEC to write a rule requiring public corporations to disclose their political spending activities. The petition was sparked by the 2010 **Supreme Court** ruling on Citizens United, which struck down laws that prevented corporations from using general funds on political speech.

A 2013 **University of New Mexico** study compared campaign contributions between the 2008 and 2012 presidential elections and recorded a 426% increase in expenditures, which the researchers attributed to Citizens United. However, they discovered, only a small portion of the increase was due to corporate political spending; most of it came from contributions from wealthy individuals.

There was also no statistically significant difference in the political spending by the top 10 biggest corporate spenders between 2008 and 2012, the study found.

Wendy Hansen, professor of political science at the University of New Mexico and co-author of the study, says she believes that corporations have shied away from big political expenditures because of the potential reputational risk.

For instance, after **Target** gave $150,000 to **MN Forward**, a PAC backing an anti–gay marriage political candidate, in 2010, the company faced backlash from consumers and a boycott from gay rights activists. Former Target CEO **Gregg Steinhafel** said the donation was made because of the candidate's pro-business stance, but the reputational damage had already been done.

Since then, corporations have not substantially increased donations they made independently or to political action committees (PACs) or super PACs, the research shows.

"Corporations knew this was not a game they should be playing," Hansen says.

But Hansen points out that the research tells only part of the story. Donations directly from corporations to candidates, as well as donations to PACs and super PACs, are relatively easy to track because of **Federal Elections Commission** reporting requirements. Other nonprofit campaign financers like 501(c) or 527 groups face limited disclosure requirements, so corporate donations to these groups are not included in the study.

"My guess is that there's more spending under those because they're more secretive, but I think there's also a bit of caution because of leaks and because of the risk of backlash," Hansen says.

Shareholder Support

About half of the S&P 500 already provide some level of political spending disclosure, according to an index published by the **Center for Political Accountability** and the Zicklin Center for Business Ethics Research at the **University of Pennsylvania**'s Wharton School. Since 2003, the CPA has been submitting shareholder proposals to companies to encourage them to disclose information on political donations.

When the group first started approaching companies on the issue, many offered excuses that information on political disclosure was proprietary and could be used against them by competitors. But today, according to **Bruce Freed**, president and founder of the CPA, many companies are going beyond what shareholders have asked and implementing their own policies on corporate political donation disclosure.

"Companies are finding that disclosure really has prompted them to play closer attention to political spending," Freed says.

Generally, Freed says, executives report to the board on political expenditures once or twice a year, which gives directors an opportunity to ask questions of senior management about companies' political spending: What drives it, what types of issues it raises, how they are addressing the risks, and how they are setting policies on the type of spending that a company will engage in.

As *Agenda* has reported, shareholder resolutions on political contributions and lobbying have been the most popular type of proposal filed over the past two years. Experts expect to see more than 100 shareholder resolutions on political contributions in 2016, according to a *Wall Street Journal* report published this month.

But the voluntary reports do not offer the same uniformity of information that a mandatory, universal disclosure rule would afford, experts say.

Merkley, the Oregon senator, says companies that do choose to make voluntary disclosures are probably not the ones that shareholders or consumers are concerned about.

"A mandatory system makes sure that it's not just the folks with integrity … who disclose. But those who should be embarrassed, whose owners would be upset — those [shareholders are] the ones being shortchanged by the current system of stolen speech," Merkley says.

Best Practices?

According to political donation tracker **OpenSecrets**, Merkley's top corporate donors include **Intel**, **DaVita HealthCare**, **Honeywell**, **Fluor Corp.** and **Berkshire Hathaway**. While Intel and Honeywell rank highly on the CPA-Zicklin index, Fluor ranks in the middle and DaVita HealthCare and Berkshire Hathaway rank low.

The index tracks a number of types of disclosures, including whether companies disclose information on the names and amounts given to political parties, committees and candidates; amounts given to special interest groups; whether the company gives money to trade associations that can be used for political purposes; and whether the company spends money to influence ballot initiatives.

It also ranks companies on the level of the board's involvement in decisions on political contributions. Companies regularly score highly on some factors and zero on others.

Matteo Tonello, managing director at the **Conference Board**, says there are no best practices for companies when it comes to corporate political donation disclosure, since there are so many different ways to spend and talk about the spending.

Companies that do disclose the information should be sure to elaborate on the connection between their political spending and how it is intended to benefit the company, he says. They should also reassure shareholders that the board is overseeing how that money is spent and that there is a policy or process in place to determine how and when spending occurs.

While shareholder support for political spending disclosure is increasing, resolutions on this topic rarely pass. Many boards decide not to say anything at all. Indeed, Tonello says, while half of the S&P 500 do make some disclosures on corporate political spending, the other half are still waiting on the sidelines for the SEC to issue a rule before saying anything on the subject.

"They're waiting for clearer guidelines with respect to the disclosures to make, and they are also waiting for clear evidence of the implications that may result from the decision to disclose," he says.