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Q1 2017 Corporate Governance Quarterly Update

The Call for Transparency in the Murky Waters of Corporate Political Contributions Disclosure

Since the U.S. Supreme Court's 2010 decision in *Citizens United*, which effectively invalidated restrictions on certain corporate political contributions, various shareholder activists and corporate governance advocates have increasingly sought corporate disclosure of such contributions.[1] Shareholder proposals seeking greater transparency of corporate political spending, for example, have generally increased in both number and investor support since *Citizens United*. Moreover, subsequent to *Citizens United*, neither the U.S. Congress nor the Securities and Exchange Commission ("SEC") has taken any formal action to ensure that shareholders (as ultimate owners of publicly held companies) are informed of how their corporate assets are being spent on political activity despite the significant increase in investors' and governance advocates' calls for corporate political contributions disclosure. Many companies, however, are voluntarily making these types of disclosures and such undertaking is evolving into a best corporate governance disclosure practice.

This corporate governance update (1) provides general background information regarding corporate political contributions and related disclosure, including corresponding 2016 and 2017 proxy season activity, (2) summarizes the current corporate political contributions policies and positions of several large asset managers and pension funds, leading proxy advisory firms and certain corporate governance advocates, to provide insight into the expectations of these entities with respect to such contributions and related disclosure, and (3) presents practical considerations for board members to help facilitate discussion as to whether their company's current political contributions and related disclosure policy, if any, satisfies the needs of the company and its shareholders and other stakeholders.

Political Contributions and Related Disclosure

Background. Many companies and their boards of directors are being challenged by certain shareholders and corporate governance advocates to disclose information relating to their corporate political contributions.[2] Despite no current congressional or SEC mandate to do so, companies are increasingly voluntarily disclosing their political contributions prompted, in part, by increased shareholder activism on this issue. Such transparency, certain shareholders and corporate governance advocates argue, helps shareholders monitor whether this use of corporate assets is aligned with the business purposes and corporate values of the company and will generate long-term shareholder value. For these and other reasons, disclosure of political contributions is evolving into a best governance practice. Consequently, and often prompted by shareholder (or a threat of shareholder) action, boards of directors and management are discussing the extent to which their companies should make such disclosures.

> In 2016, 52% of S&P 500 companies disclosed some level of information relating to political contributions or disclosed policies prohibiting such contributions.[3]

2016 Proxy Season. During the 2016 proxy season, 105 corporate political activity shareholder proposals, including those relating to lobbying spending and political contributions, were reportedly filed with U.S. public companies, down from a high of approximately 140 in 2014.[4] The decrease in these types of proposals is due, in part, to the overall increase in companies voluntarily disclosing such activity. Lobbying spending and political contributions disclosure proposals were the fourth and fifth most prevalent shareholder proposals, respectively, in 2016.[5] The Center for Political Accountability ("CPA"), a leading member of a coalition that since 2003 has spearheaded a shareholder proposal campaign for corporate political disclosure and accountability, has utilized a proposal template that generally asks companies to disclose political-spending guidelines, all payments to trade associations and other tax-exempt organizations that are used for political purposes, the amounts contributed and the identities of corporate officers involved in the expenditure decisions.[6] CPA's proposals that went to vote during the 2016 proxy season averaged nearly 33% shareholder support, with two proposals receiving majority support (no company received majority shareholder support on a political activity proposal during the 2015 proxy season).[7]

2017 Proxy Season. It is anticipated that the 2017 proxy season will be similar to the 2016 season, as CPA and its investor coalition will continue to submit shareholder proposals relating to corporate political disclosure and accountability. As of mid-February 2017, at least 90 corporate political activity proposals had been reportedly filed and it is anticipated that additional proposals will be filed as the proxy season progresses.[8]

Future Action. With the recent change of administration in Washington, DC, it is unlikely that any formal federal legislative or regulatory action concerning political contributions disclosure will occur anytime soon. Certain investors and corporate governance advocates, however, will likely continue their efforts to make such disclosure a best governance practice and pressure companies to make those disclosures voluntarily.

Current Policies and Positions of Certain Institutional Investors, Proxy Advisory Firms and Corporate Governance Advocates with Respect to Political Contributions and Related Disclosure

There is no one-size-fits-all approach to corporate governance, including whether a company makes political contributions and related disclosures. The unique characteristics of the company, the industry in which it operates, the needs of company stakeholders (including shareholders), and the adoption of corporate governance policies the company and its board feel are essential to generate long-term shareholder value should inform, in part, such contributions and disclosures. As boards evaluate whether making and/or disclosing such contributions is in the best interest of their companies and shareholders, it may be helpful to understand the corresponding policies and positions of large institutional investors, leading proxy advisory firms and certain corporate governance advocates, as this provides insight into the general expectations of these entities. A select summary of those policies and positions is provided below.

Institutional Investors – Asset Managers

- *BlackRock, Inc.* states that (1) companies may engage in certain political activities, within legal and regulatory limits, in order to influence public policy consistent with the companies' values and strategies, thus serving shareholders' best long-term economic interests; however, it is not the role of shareholders to suggest or approve corporate political activities, and companies that choose to engage in such activities should develop and maintain robust processes to guide these activities and to mitigate risks, including by means of board oversight, and (2) when presented with a related shareholder proposal, considers the political activities of that company and its peers, the existing level of disclosure and associated risks (as BlackRock generally believes that it is the duty of boards and management to determine the appropriate level of disclosure of all types of corporate activity); however, may determine to support a shareholder proposal requesting additional reporting of corporate political activities where there seems to be either a significant potential threat or actual harm to shareholders' interests and the company has not already provided shareholders with sufficient information to assess the company's management of the risk[9]

- *J.P. Morgan Asset Management* generally votes against proposals to publish a company's political contributions, but takes into consideration recent significant controversies, fines or litigation regarding the company's political contributions or trade association spending[10]

- *The Vanguard Group, Inc*. does not explicitly address this topic in its proxy voting guidelines; however, with respect to "corporate and social policy issues" generally, it believes that these are "ordinary business matters" that are primarily the responsibility of management and should be evaluated and approved solely by the company's board[11]

Institutional Investors – Pension Funds

- *California Public Employees' Retirement System* notes that robust board oversight and disclosure of corporate political activity are needed to ensure alignment with business strategy and to protect assets on behalf of shareholders, and recommends that the board (1) develop and disclose a policy that outlines the board's role in overseeing corporate political contributions, the terms and conditions under which such contributions are permissible, and the process for disclosing those contributions annually, (2) monitor political contributions (including trade association contributions directed for lobbying purposes) made by the company and ensure that only contributions consistent and aligned with the interests of the company and its shareholders are approved, and (3) disclose on an annual basis the amounts and recipients of monetary and nonmonetary contributions made by the company during the prior fiscal year[12]

- *Florida State Board of Administration* states that companies should disclose the amount and rationale for making donations to political campaigns, political action committees and other trade groups or special interest organizations, and considers the following factors as to whether to support a related shareholder proposal: (1) recent significant controversy or litigation related to the company's political contributions or governmental affairs, (2) the public availability of a company policy on political contributions and trade association spending, including the types of organizations supported, (3) the business rationale for supporting political organizations, and (4) the board oversight and compliance procedures related to such expenditures of corporate assets[13]

- *New York City Retirement Systems and Pension Funds* mention that corporate expenditures on lobbying and contributions in support of, or in opposition to, political candidates or campaign initiatives create certain legal, compliance and reputation risks; therefore, generally support reasonable requests that boards exercise oversight and transparency of corporate political spending by regularly reviewing and publicly disclosing all corporate assets spent on political expenditures; however, generally oppose proposals that would prohibit corporate political spending or subject corporate political contributions to shareholder approval[14]

Leading Proxy Advisory Firms

- *Institutional Shareholder Services Inc.* generally supports proposals requesting greater disclosure of a company's political contributions and trade association spending policies and activities, considering (1) the company's policies and management and board oversight related to its direct political contributions and payments to trade associations or other groups that may be used for political purposes, (2) the company's disclosure regarding its support of, and participation in, trade associations or other groups that may make political contributions, and (3) recent significant controversies, fines or litigation related to the company's political contributions or political activities; however, opposes proposals barring a company from making political contributions (as businesses are affected by legislation at the federal, state and local levels and barring political contributions can put a company at a competitive disadvantage) and proposals requiring publication in newspapers and other media of a company's political contributions (as such publications could present significant cost to the company without providing commensurate value to shareholders)[15]

- *Glass, Lewis & Co., LLC* generally believes that decisions regarding day-to-day management and policy decisions, including those related to political issues, are best left to management and the board as they in almost all cases have more and better information about company strategy and risk; however, when there is a clear link between the subject of a shareholder proposal and value enhancement or risk mitigation, will recommend in favor of a reasonable, well-crafted shareholder proposal where the company has failed to or inadequately addressed the issue[16]

Certain Corporate Governance Advocates

- *Council of Institutional Investors* (advocating on behalf of shareholders) asserts that the board should monitor, assess and approve all political contributions (including trade association contributions) made by the company and only approve those that are consistent with the interests of the company and its shareholders (the terms and conditions of such contributions being clearly defined and approved by the board); further, the board should (1) develop and disclose publicly its guidelines for approving political contributions and (2) disclose on an annual basis the amounts and recipients of all monetary and nonmonetary contributions made by the company during the prior fiscal year (with any expenditures earmarked for political activities that were provided to or through a third party included in the report)[17]

- *The Business Roundtable* (advocating on behalf of management) believes that companies have an important perspective to contribute to the public policy dialogue and discussions about the development, enactment and revision of the laws and regulations that affect their businesses and the communities in which they operate and their employees reside; to the extent that a company engages in political activities, the board should have oversight responsibility and consider whether to adopt a policy on disclosure of these activities[18]

Considerations for Boards of Directors

To facilitate discussion among board members as to whether their company's current political contributions and related disclosure policy, if any, satisfy the needs of the company and its shareholders and other stakeholders, directors may consider the following:

- **Undertake a Cost-Benefit Analysis**. Public companies are currently facing increased pressure from shareholders and other stakeholders to disclose their direct and indirect political contributions and to adopt related accountability and oversight policies and procedures. If a company does not already make these disclosures, its board may consider undertaking a cost-benefit analysis (including evaluating (1) risks relating to reputation, public relations, business strategy and legal liability, and (2) arguments "for" and 'against" such disclosure) to help determine the extent to which the company should disclose its corporate political contributions, if any. A management level committee comprised of a broad range of internal stakeholders (including representatives from key business units, investor relations, legal, compliance and marketing) may contribute multiple and diverse perspectives as part of the analysis.

- **Consider Adopting (and Disclosing) a Formal Policy**. To help provide guidance and a framework within which to make corporate political contributions and related disclosures, a company may find it beneficial to adopt a corresponding formal policy. Adoption (and disclosure) of such policy may prevent related shareholder activism and be well received by shareholders and other stakeholders. A potential political contributions and disclosure policy could incorporate the following or similar concepts:

    - the company's political contributions will only be made for the benefit of the company, without regard to the personal political preferences of company directors or officers, and shall comply with all applicable federal, state and local laws, rules and regulations

    - the company will not knowingly contribute to candidates whose views and actions are inconsistent with the company's corporate values

    - the board will (1) provide (by resolution) an annual cap on the amount of political contributions to be made by the company for that year, (2) review political contributions made by the company at its regularly scheduled meetings throughout the year, and (3) at least annually, review the policy

    - the CEO, president or other authorized officer is permitted, in his or her discretion, to make or approve contributions and expenditures for the purpose of supporting state or local political groups (including, but not limited to, political action committees, candidate campaign committees, political committees, 527 organizations, ballot initiatives and political parties) and political causes that will promote the best interest of the company and the communities it serves

    - officers will develop an annual budget that identifies recipients of corporate funds

    - the company will post on its website this policy and links to government websites that contain a listing of all the company's political contributions, and dues or other payments to trade associations that use a significant portion of those payments for political activities, if any

    - the role of the board or board committee (e.g., audit and risk committee) in overseeing an annual audit of the company's political contributions should be specified (since monitoring political spending should be an element of the board's oversight responsibilities, as the board ought to be aware of reputational risks as well as the risk of noncompliance with political contributions spending and reporting requirements); by overseeing political contributions, the board can help confirm whether corporate funds are being used in ways that are expected to create long-term value for shareholders

    In adopting a political contributions and disclosure policy, it will be necessary for the board to determine whether such policy should be a formal stand-alone policy or a policy incorporated into an existing company policy or handbook (e.g., corporate compliance policy or handbook). Regardless of where the policy is placed, it is a best governance disclosure practice to post (or provide a link to) such policy on the company's website. Many companies also disclose a reference to their policy in their annual meeting proxy statement. If a company adopts a policy that explicitly prohibits political contributions, it should consider disclosing the same.

- **Determine the What, When, Where and How to Disclose**. If the board determines that it is in the best interest of the company and its shareholders and other stakeholders to voluntarily disclose corporate political contributions, it should formalize procedures (which may be incorporated or summarized in the policy discussed above) on the mechanics of the what, when, where and how of such disclosures. Common disclosure mechanics include having a dedicated webpage to making the disclosures, with relevant links to state and/or federal filings, as applicable, that are updated semiannually or annually. A summary of these contributions may also appear in the company's annual or corporate social responsibility report and be briefly referenced in the company's annual meeting proxy statement.

- **Review Policies and Positions of Major Shareholders**. The board should undertake a review of the political contributions and disclosure positions of its largest shareholders to determine what, if any, support and/or opposition may exist to the board's current practice, particularly since large asset managers have varying views on this topic and support corresponding shareholder proposals to differing degrees.[19]

- **Benchmark Political Contributions Disclosure**. Boards should consider benchmarking their political contributions disclosure against that of their peers and the industry in which they operate (as an outlier may become the target of activist shareholder campaigns or be identified by certain institutional investors as an organization with potentially problematic shareholder engagement and/or corporate governance practices). If a majority of peer companies' disclosure practices differ from those of the company, the board should analyze the reasons behind this and determine whether a different approach might be in the best interest of the board, the company and its shareholders and other stakeholders.

How Chapman Can Help

Chapman and Cutler attorneys provide corporate and business counseling to a wide range of clients, both publicly and privately held entities, with a focus on financial services institutions, utilities, investment advisors, insurance companies, manufacturers, distributors, wholesalers, retailers, contractors, transportation companies, professional service providers, pension funds and not-for-profit entities. Chapman and Cutler maintains a dedicated Corporate Counseling Practice Group with the necessary skills and experience to counsel on the issues presented in this corporate governance update. If you would like to discuss any of the issues contained in this update or other legal, regulatory, compliance or corporate governance-related issues facing your institution, please contact an attorney in our Corporate Counseling Practice Group.

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1 *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), which, in relevant part, effectively held that political spending is a form of protected speech under the First Amendment and the government may not keep corporations or unions from spending money to advocate for or against a candidate in an election. Interestingly, the Supreme Court's decision in *Citizens United* was, however, supported (in part) by expectations that shareholders and other stakeholders would be informed of the company's political contributions, with the Court noting:

> With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "in the pocket" of so-called moneyed interests. The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

2 Although companies may be required to report certain political expenditures to the Federal Election Commission, Internal Revenue Service and/or state disclosure agencies, it has been argued that the current "patchwork" of various political contribution disclosure policies leaves shareholders with "a complex system of partial and disjointed information to consider" which has "substantial financial implication." See letter to Mr. Brent J. Fields, Secretary, SEC, Re: File No. 4-637, Committee on Disclosure of Corporate Political Spending, Petition for Rulemaking, from certain State Treasurers (April 21, 2015).

3 *The 2016 CPA-Zicklin Index of Corporate Political Disclosure and Accountability*, Center for Political Accountability (September 29, 2016).

4 Of the 105 shareholder proposals filed, 65 related to lobbying and 38 to political contributions. *2016 Proxy Mid-Season Review*, Sustainable Investments Institute, Heidi Welsh (September 9, 2016).

5 *2016 Proxy Season Review and Random Thoughts on 2017*, Institutional Shareholder Services Inc. (course materials for *Pat McGurn's Forecast for 2017 Proxy Season* webcast on January 18, 2017).

6 A typical CPA model political contributions resolution asked the company to report on and update semiannually the following:

> 1. Policies and procedures for making, with corporate funds or assets, contributions and expenditures (direct or indirect) to (a) participate or intervene in any political campaign on behalf of (or in opposition to) any candidate for public office, or (b) influence the general public or any segment thereof, with respect to an election or referendum.
> 2. Monetary and nonmonetary contributions and expenditures (direct and indirect) used in the manner described in section 1 above, including (a) the identity of the recipient as well as the amount paid to each and (b) the title(s) of the person(s) in the company responsible for decision making.
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> The report shall be presented to the board of directors or relevant board committee and posted on the company's website.

2016 Proxy Season Analysis: Three Top Mutual Funds' Votes Support CPA Political Disclosure Resolution in Line with Their Policies, Center for Political Accountability (November 16, 2016).

7 Shareholder proposals at Fluor Corporation and NiSource Inc. received 61.9% and 50.3% shareholder support, respectively (based on votes "for" and "against"). During the 2016 proxy season, five additional companies received shareholder support of more than 40% for political contributions-related proposals (McKesson Corporation, NextEra Energy, Inc., Range Resources Corporation, The Western Union Company and Wyndham Worldwide Corporation). *2016 Proxy Mid-Season Review*, *supra* note 4.

8 *Proxy Preview 2017*, Heidi Welsh (of the Sustainable Investments Institute) and Michael Passoff (of Proxy Impact) (March 8, 2017). At its annual meeting of shareholders on February 7, 2017, Emerson Electric Co. received 40.3% shareholder support (based on votes "for" and "against") on a CPA-supported proposal regarding the issuance of a political contributions report. See Emerson Electric Co. Form 8-K filed with the SEC on February 10, 2017.

9 *Proxy Voting Guidelines for U.S. Securities*, BlackRock, Inc. (February 2015).

10 *Global Proxy Voting Procedures and Guidelines (North America)*, J.P. Morgan Asset Management, Inc. (April 1, 2017).

11 *Vanguard's Proxy Voting Guidelines*, The Vanguard Group, Inc. (2017). Notably, a coalition of advocacy groups launched a 2016 email campaign, which reportedly generated over 65,000 responses, urging Vanguard to change its voting on political disclosure resolutions submitted by shareholders. In response, a Vanguard spokesperson stated: "We regularly engage with the companies held by our funds and political spending disclosure is one of many topics we evaluate and discuss. We're continuing to monitor the broader conversation." *Corporate Political Donations and Lobbying Are Still Trapped in a Murky, Dark Cloud*, FORTUNE, Eleanor Bloxham (March 7, 2016).

12 *Global Governance Principles*, California Public Employees' Retirement System (March 14, 2016).

13 *2016 Corporate Governance Principles and Proxy Voting Guidelines*, Florida State Board of Administration (2016).

14 *Corporate Governance Principles and Proxy Voting Guidelines*, New York City Employees' Retirement System, New York City Police Pension Fund, New York City Fire Department Pension Plan and Board of Education Retirement System of the City of New York (April 2016).

15 *United States Summary Proxy Voting Guidelines – 2017 Benchmark Policy Recommendations*, Institutional Shareholder Services Inc. (Updated March 14, 2017).

16 *2017 Proxy Paper Guidelines: An Overview of the Glass Lewis Approach to Proxy Advice (United States)*, Glass, Lewis & Co., LLC (November 18, 2016).

17 *Corporate Governance Policies*, Council of Institutional Investors (September 30, 2016).

18 *Principles of Corporate Governance*, The Business Roundtable (2016).

19 For example, a 2016 proxy season report noted the level of support for CPA's model political disclosure proposals by the following asset managers:

- Deutsche Asset Management and Allianz Global Investors – voted in support of proposal 100% of the time
- Morgan Stanley Investment Management – voted in support of proposal 83% of the time
- State Street Global Advisors – voted in support of proposal 55% of the time
- J.P. Morgan Asset Management – voted in support of proposal 18% of the time
- BlackRock, Inc. and The Vanguard Group, Inc. – opposed or abstained on all proposals

2016 Proxy Season Analysis: Three Top Mutual Funds' Votes Support CPA Political Disclosure Resolution in Line with Their Policies, *supra* note 6.

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