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Citizens United, Shareholding Activists, And Political Speech: What Corporate Managers Need To Know

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Last month marked the second anniversary of the U.S. Supreme Court's decision in *Citizens United v. FEC,* a case which famously expanded the scope of political speech protected under the First Amendment. Whereas corporations and unions were previously prohibited from directly advocating for and against political candidates, the Supreme Court recognized that those viewpoints are important components of the national debate, and the Constitution does not permit the government to suppress or stifle those voices.

But that decision has been controversial. Many object to the *Citizens United* decision because of a general view that money spent in the political process is somehow inherently corrupting or distorting. Others – especially those from within the environmental and labor movements – see for-profit corporations as their political enemies and seek partisan or ideological advantage by squelching corporate political speech while their own speech remains unencumbered.

As a result, corporations themselves have become a crucial battleground. Politically active, mostly left-leaning, groups have increasingly turned to "activist investing" with the aim of limiting corporate political speech.

Activist investing is the process whereby politically concerned individuals and groups purchase a minimum number of shares in a company, not solely or principally with the intention of maintaining those shares for their wealth-generating potential, but instead to ensure that they can force corporate votes on political initiatives concerning global warming, labor relations and political spending.

This year's proxy season will likely see a number of requests for corporations to voluntarily limit or forego their political speech. But corporate managers should remember that their duty is to shareholder value, not partisan advantage. And they should be aware that, despite the heated rhetoric surrounding this issue, opponents of corporate political speech have not won a single proxy election.

What *Citizens United* Actually Says

Citizens United held that independent political speech by corporations, unions, and similar associative entities is protected by the First Amendment. Of course, the usual rules of corporate law apply to political speech: the same actors, duties, laws and regulations apply to decisions concerning political spending as apply to all other corporate decision making. But the Supreme Court clearly believes that corporate participation in the nation's political debates is a positive outcome. In the Court's words "[p]olitical speech is indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."

The trouble with corporate self-censorship is that it silences certain viewpoints, while allowing others to flourish. Allowing unlimited political speech by unions or environmental advocacy groups, while silencing business organizations and industry advocates, creates an unbalanced and misleading public conversation on issues vital to American politics. When more than half of Americans own shares of publicly traded companies, and many more owe their income to corporate employment (and, by extension, a healthy corporate balance sheet), corporations represent a vital economic viewpoint. Americans are entitled to have their political choices informed by a broad range of interests, including those of corporations. That is the lesson of *Citizens United*.

Many Shareholding Activists Are Driven By Partisan And Ideological Considerations.

Corporate officers are often confronted with shareholding activists who claim to represent the interests of a company's shareholders but are actually pursuing a partisan or ideological agenda that is unrelated or contrary to the actual, profit-maximizing interest of shareholders. A leading and exemplary group in this effort is the Center for Political Accountability (CPA).

The Center holds itself out as a "non-partisan organization … formed to address the secrecy that cloaks much of the political activity engaged in by companies and the risks this poses to shareholder value." Actually, a review of the Center's activities discloses a concern not for the health of American corporations, but for the content of corporate political speech.

Consider The Much-Touted Example Of Target Corporation

During the 2010 election cycle, Target gave $150,000 to an organization called MN Forward. That group was formed to advocate a business-friendly policy climate in Minnesota and supported candidates on that basis. This support was extended to Tom Emmer, the Republican candidate for governor. Representative Emmer had made lower corporate tax rates a central theme in his campaign, and as Target was headquartered in the state, his election would arguably have benefitted Target's shareholders.

Emmer also opposed gay marriage. In a March 2011 editorial in the *Huffington Post*, the CPA's founder, Bruce Freed, noted that Target Corporation was "Target-ed" by activists for supporting Emmer's candidacy, ostensibly for this reason. A campaign was organized against Target, largely centering on accusations that Target's behavior was hypocritical since its internal company policies were friendly to gay rights. Target retreated, voluntarily agreeing to changes in its political spending policies, including a requirement of approval by senior corporate officers and regular reports to a committee of the Target Board of Directors.

But as its CEO noted, Target's contribution had nothing to do with gay rights: it was intended to support "a business climate conducive to growth." Moreover, while Target's CEO apologized to the company's employees for any offense given, he did not seek a return of the questioned contribution or pledge to avoid political spending in the future.

A look at those pushing back against Target's donation reveals, unsurprisingly, a distinctly partisan agenda. The liberal-leaning group MoveOn.org and gay rights advocacy group Human Rights Campaign (who gave $150,000 to Emmer's opponent) took the lead. Moreover, another Minnesota-based retailer – Best Buy – also donated $100,000 to MN Forward, but did not bear the brunt of activist ire. MoveOn.org's director of political advocacy admitted that Target was her focus largely because of its "reputation as a progressive alternative to Wal-Mart" as regards labor and unionization issues.

While the Center for Political Accountability and other activists want Target's story to serve as a caution to companies, and as a bludgeon to demand voluntary limitations on corporate political spending, Target teaches a different lesson. First, the objection to Target was based on precisely the usual political factors: partisan and ideological politics, and spearheaded by groups who supported a particular candidate. Second, Target's donation was directed toward appropriate ends: the election of public officials whose views on taxation and macroeconomic policy promised the best economic and jobs climate for Target's operations and, by extension, shareholder value. Third, despite protests, Target's stock price was not fundamentally impacted by its spending, and it did not choose to give up participation in future elections. Despite the Center's claims, Target did not capitulate to this politically motivated, and fleeting, campaign.

Of course, CPA itself is not politically neutral, nor are its allies. Bruce Freed, the president and founder of CPA and a former Democratic congressional staffer, has worked closely with shareholding activists to push a particular policy agenda. As just one example, Mr. Freed joined Walden Asset Management in an August 2010 letter to corporations sitting on the U.S. Chamber of Commerce's board, urging them to distance themselves from the Chamber because of its policy positions concerning global warming. Mr. Freed signed that letter in his role with CPA, not in a private capacity.

Similarly, CPA and the Zicklin Center for Business Ethics at the University of Pennsylvania's Wharton School issued an "index" of companies' compliance last year, containing "best practices" for corporate political spending. These "best practices" are in turn taken from a 2010 Handbook published by the Conference Board, and co-authored by none other than CPA's Bruce Freed.

And other groups are also active in convincing corporations to unilaterally give up their political speech rights, including groups providing investment advice. For instance, NorthStar Asset Management advises its clients to divest from certain companies, but then continues to hold "the minimal number of shares required by law" to engage in corporate activism. In short, NorthStar holds shares *for the sole purpose of making political points,* having already explicitly limited their clients' exposure to the actual economic effects of a corporation's decisions. This is perfectly legal. But it betrays policy preferences unrelated to increasing shareholder value. Indeed, the fact that NorthStar encourages its own clients to hold only nominal shares in these companies suggests that NorthStar does not expect its policy advice to increase the value of those shares.

Even large institutional clients, especially those controlled by elected politicians, have gotten involved. As recently as this past proxy season, the New York City Comptroller, John Liu, submitted shareholder proposals to six corporations demanding disclosure of political spending. Those proposals were defeated. But Mr. Liu and his ally, Public Advocate Bill de Blasio, make explicit what is only implicit in other contexts: that the goal of activist investing is not shareholder value, but a particular policy outcome. In Mr. de Blasio's words: "[w]orking with pension funds here in New York and nationwide we can continue to get corporations to reject the political activities afforded them by *Citizens United*." The goal is not disclosure or internal policy changes. It is silence.

Nothing is inherently wrong with these activities or beliefs. But it should be clear that while advocacy groups claim to represent a considered approach to maximizing shareholder value, they in fact support a partisan ideology, and seek to enlist corporate support for particular political causes. CPA, NorthStar, New York City's politicians and others are within their rights to do this. They do not have fiduciary duties to the shareholders of public companies. But they should be viewed, accurately, as political activists rather than as groups focused on proper corporate governance, transparency for the benefit of investors, or improving performance and increasing profits.

Corporate Managers Have A Duty To Look Deeper And Determine For Themselves What Role Corporate Political Speech Will Have On Shareholder Value

Put simply, shareholding activists are asking corporations to give up their constitutional rights because these shareholder activists oppose what they presume will be the existing political interests of these businesses. Corporations may do so, but political speech has the potential to impact the bottom line and have a direct impact on shareholder value. Consequently, the fiduciary duties that corporate managers owe shareholders cannot excuse a stampede to accommodate shareholding activists who, unlike those managers, do not owe such fiduciary duties.

Moreover, these activists have so far been unsuccessful in accomplishing their goals using the tools of corporate democracy. Every shareholder proposal they have brought to date has been defeated. Perhaps this is because there is no evidence showing that political spending by corporations has a negative impact on share prices, and conversely, there is every reason to believe that corporate silence will result in government policies less beneficial to corporate shareholders.

Before voluntarily giving up the right to speak in our democracy, corporations should be fully aware of who is asking them to do so and their agenda in making the request.

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