Securities Regulation Daily Wrap Up, TOP STORY—IBM proposes legislative changes to address companies' political influence, (Jan. 15, 2021)

Securities Regulation Daily Wrap Up

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Spurred by recent events at the U.S. Capitol, some companies have suspended or are reconsidering making political donations to members of Congress.

According to IBM, companies can succeed without making sizeable political donations. Christopher Padilla, IBM's Vice President of Government and Regulatory Affairs, said in a blog post that targeted governmental legislative reforms could address concerns that corporations have too much influence in U.S. politics. The proposals address many topics that touch on corporate influence but do not directly address public companies' securities law disclosures. The IBM proposals come after more than a year of political turmoil in the U.S., including the U.S. Capitol insurrection on January 6, 2021. Padilla's blog post adds to the growing number of reform proposals made by public intellectuals and lawmakers that could help to make corporate political spending more transparent.

IBM proposal. Padilla's statement, made via IBM's Think Policy Blog, called for reforms to address corporate political influence and spotlighted a key IBM tenet: "At IBM we believe in engaging in policy, not politics." Padilla then quoted one of IBM's former CEOs, Thomas Watson Jr., as stating in 1968 that: "A company 'should not try to function as a political organization in any way.'"

Padilla explained that IBM does not have a political action committee and does not make political donations and that this approach was best for IBM, its employees, and its stakeholders (according to data published on the website OpenSecrets.org, part of the Center for Responsive Politics, IBM made various lobbying and other contributions in 2019 in the $6 million range). Going forward, Padilla said that "IBM will advocate for bipartisan, good government reforms to ensure that this country's institutions and traditions are strengthened…"

With this background, IBM urged several legislative changes to address the outsized influence of corporate political donations:

- **Presidential transitions—**IBM urged Congress to create specific presidential transition requirements.
- **Hatch Act—**The Hatch Act addresses political activities that involve federal employees. IBM called for modernization of the Hatch Act.
- **Federal Vacancies Reform Act—**IBM further called for modernization of the Federal Vacancies Reform Act. Although not directly mentioned in Padilla's blog post, the problems resulting from numerous acting agency heads have become pronounced as the Trump Administration comes to an end.
- **Government ethics—**IBM called for stronger federal laws addressing government officials' disclosures, divestitures, and ethics.

Padilla had begun his blog post by addressing what is likely to be a longer-term effort to reform American politics. "But this moment in history should be about much more than organizations temporarily withholding political money to take a stand," said Padilla. "This is an opportunity for us to pause and think, to look ahead at what policy measures can truly restore trust and confidence in our democracy."

The problem of corporate political donations. Much of the debate over corporate political spending centers on the Supreme Court's *Citizens United* opinion in which the court concluded that the First Amendment protects corporate political donations. Writing for a fractured court, then-Justice Kennedy addressed the issue of disclosure of political donations toward the end of the court's opinion. According to Justice Kennedy, the Internet and other modern technologies make corporate disclosures easier and faster. Kennedy concluded; "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."

Former Delaware Supreme Court Chief Justice Leo Strine, Jr., has, among other things, highlighted two aspects of corporate political donations. First, companies that rely on political influence to facilitate their growth are less likely to do well in the long run because their dependence on political solutions to business problems suggests a flawed business model. Second, and more apropos of the immediate political environment in the U.S., Strine suggested that *Citizens United* may have stripped some company executives of the ability to decline to make political donations. In a scholarly paper, Strine, addressing what he views as the failures of the "Big 4" fund families on portfolio companies' political spending disclosures, said the following: "There is another reality that the Big 4 seems to ignore when abdicating their duty to address corporate political spending: many businesses favored the pre-*Citizens United* world because it gave them a reason to say no to political pressures to use corporate money for political spending."

Could the events of January 6 be a turning point for companies despite the existence of *Citizens United*? Many companies have now announced the suspension of political donations, but for varied durations and with varied scope in terms of which members of Congress will be impacted by the suspensions. Several companies have made especially strong statements on the topic. Blue Cross Blue Shield Association, for example, said the following: "In light of this week's violent, shocking assault on the United States Capitol, and the votes of some members of Congress to subvert the results of November's election by challenging Electoral College results, BCBSA will suspend contributions to those lawmakers who voted to undermine our democracy."

SEC rules. The SEC has for several years been banned by Congress from pursuing disclosure rules for public companies' political spending habits. Democrats, since regaining a majority in the House in the 116th Congress, have tried unsuccessfully to remove the SEC policy rider from appropriations legislation. With Democrats now in control of both the House and Senate in the 117th Congress, it is possible that the SEC policy rider will be removed from the upcoming FY22 appropriations legislation.

The SEC has previously received thousands of public comments seeking political spending rules in response to a petition for rulemaking that included among its signatories former SEC Commissioner Robert Jackson, Jr. Although the SEC has not addressed political donations directly, recent changes to the proxy process by which shareholders submit proposals at annual meetings could make it harder for shareholders to persuade companies to take action on their own because the new rules raise the eligibility requirements and increase the resubmission thresholds for shareholder proposals.

However, Exchange Act Rule 15Fh-6 addresses political donations made by security-based swap dealers. Investment Advisers Act Rule 206(4)-5 imposes limits on political contributions by investment advisers. Likewise, the Municipal Securities Rulemaking Board has a set of rules on political donations that apply to brokers, dealers, municipal securities dealers, and municipal advisors. The rules are set forth in MSRB Rule G-37.

Proposed legislation. In the 116th Congress, several bills would have required corporate disclosures or would have mandated additional corporate democracy measures. One bill introduced by Rep. Jamie Raskin (D-Md), The Shareholders United Act of 2019 (H.R. 936), a play on words invoking the Supreme Court's landmark opinion *Citizens United*, would allow corporate political donations only if a company has in place a procedure to assess the preferences of its shareholders.

Among the many other bills, Sen. Elizabeth Warren's (D-Mass) and Rep. Ben Ray Lujan's (D-NM) Accountable Capitalism Act (S. 3215; H.R. 6056), stands out as at least an aspirational bill. Under the Warren-Lujan bill, a corporation could make political donations only if 75 percent of its shareholders and 75 percent of directors approved such an expenditure.

With respect to SEC disclosure rules, Rep. Bill Foster’s (D-Ill) Shareholder Political Transparency Act of 2020 (H.R. 5929) would amend Exchange Act Section 13 to require public companies to disclose political donations. Portions of the bill’s Congressional findings state: "shareholders and the public have a right to know how corporate managers are spending company funds to make political contributions and expenditures benefitting candidates, political parties, and political causes" and "corporations should be accountable to shareholders in making political contributions or expenditures affecting Federal governance and public policy." Bills similar to the Foster bill would amend the Exchange Act’s proxy requirements to achieve public company disclosure of political donations (See S. 1630; H.R. 4491).

Although most of the disclosure and corporate democracy bills are sponsored by Democrats, Republicans also have previously introduced bills on the topic. For example, the Union Member Protection Act (H.R. 5959), sponsored by Rep. Bill Huizinga (R-Mich), would amend the Labor-Management Reporting and Disclosure Act of 1959 to require disclosure of political donations by labor unions. The bill’s Congressional findings state, in part: "Historically, union members have not had a way to know, or to influence, the political activities of unions that are supposed to represent them. Union members and the public have a right to know how unions are spending members’ dues to make political contributions or expenditures benefitting candidates, political parties, and political causes."

Companies: IBM

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