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"Political Spending: What Now?"

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Audio Archive

Lobbying & political contributions have topped the list for most common shareholder proposals in the last couple of years - and with another Presidential election approaching, there will be even more scrutiny of these activities - and the related disclosure - in the coming year. Learn how to get out in front of the issue with your policies and engagement. Join these experts:

- **Zally Ahmadi**, Director of Corporate Governance, DF King & Co.
- **Hagen Ganem**, Counsel, Skadden, Arps, Slate, Meagher & Flom
- **Brendan McGuire**, Partner, WilmerHale

John Jenkins, *Editor*, *TheCorporateCounsel.net*: Hi. This is John Jenkins, Editor of TheCorporateCounsel.net. I'd like to welcome you to today's program, "Political Spending: What Now?"

Corporate political spending is always a hot topic. Lobbying, political contributions, it's top of the list for most common shareholder proposals for the last couple of years. And it's an election year, so you can bet there'll be even more scrutiny of these activities.

We've got a great panel here today to get you up to speed on disclosure and other issues surrounding corporate political spending. Joining me today are Zally Ahmadi, Director of Corporate Governance at D.F. King; Hagen Ganem, Counsel at Skadden; and Brendan McGuire. Brendan, Partner at WilmerHale.

With that, I'm going to turn it over to Brendan to kick off the discussion with an overview of the current climate for corporate political spending.

Overview of the Current Climate for Corporate Political Spending

Brendan McGuire, *Partner, WilmerHale*: Thank you, John. It's good to be with you all.

As John noted, I'll begin with some thoughts on the current climate relating to political spending as well as identify some important considerations for policies in this area. Zally and Hagen will then take a lead on discussing how these policies affected by today's environment manifest themselves in practice.

I think it's fair to say that even before our current global pandemic, corporate political spending was an area in considerable flux. The upcoming presidential election will only add to that volatility. This is due in large measure to the Supreme Court's 2010 decision in*Citizens United,* a landmark case in which the court overturned election spending restrictions that had been in place for more than a century wherein the Court ruled that corporations and other outside groups can spend unlimited money on elections provided that the spending is not coordinated with a candidate's campaign.

The result over the past decade following *Citizens United* has been a huge uptick in political spending of all types including by corporations and their senior management. While many have viewed this changed landscape as full of business and policy opportunities, it is undoubtedly one that also carries increased risk for public and private corporations as well as their CEOs and senior management.

Primary among the risks is that the contributions and spending will conflict with the company's core values as well as important positions that they're taking on key issues. In today's values-driven world where —for example, the CEOs of major U.S. companies recently pledged to the Business Roundtable to run companies in a manner that is fair to all stakeholders not just their shareholder — employees and consumers have begun to track political spending and take action often in full view of the public.

One example that speaks to the current climate is the public relations issues that resulted last summer when a major investor in Equinox and SoulCycle, in fact, the CEO of the parent company, Stephen Ross, hosted an exclusive fundraiser for the President. Employees and clients protested as a result of that, viewing this event as inconsistent with the values of Equinox and SoulCycle. Some employees quit their jobs, and some members terminated their memberships. This event forced the Chairman of Equinox to issue a public apology and make a large donation to multiple charities that supported causes reflecting Equinox's values.

That is one example which certainly caught Equinox by surprise, and it demonstrates the importance of understanding the current climate on these issues and at least trying to plan accordingly.

The good news is that an increasing number of companies are taking this issue seriously and increasing their level of transparency. A recent survey found that more than 300 members of the S&P 500 disclosed some or all of their political spending with corporate funds, which is a marked increase from just a few years ago — and a number of S&P 500 companies with the strongest political disclosure and accountability policies, that number increased by 28%, from 57 to 73 last year. While these numbers are certainly encouraging, many shareholders, employees and others are likely not entirely satisfied.

Just a note about the effect of the pandemic on these areas, as in most other areas, it is hard to predict how the pandemic and its second and third order effects will influence the focus on corporate political spending. But we can all probably agree that scrutiny of public and private companies will only increase as we attempt to begin an economic recovery.

If the aftermath of last decade's financial crisis is any indication, there will be pressure to expose corporate malfeasance as well as political favoritism, particularly as to larger public companies, inquiries and investigations into other areas may reveal facts or evidence related to political spending which otherwise may not have been a focus and may otherwise have not come to light but nonetheless may become an area for regulators or media interest.

Hagen Ganem, *Counsel, Skadden*: I noted there's been a reduction in corporate spending as a result of COVID-19. For example, buyback cancellations, dividend suspensions, executive comp reductions, pretty much across the board it seems like. Have we a sense that due to COVID, there's increased scrutiny being paid to political spending and the potential malfeasance, and you can think of PPP programs and other things, right?

Do we have a sense of whether there's a downtick in this spending? I assume there's been a downtick in the political activity because, quite candidly, you can't take your Congressional Representative out to dinner right now. Do you have a sense on that or see where that might be going?

McGuire: It's a fair and important question. I do not know, for example, over the last two months whether there has been significant reordering of spending in the area. My instinct is that that the effect may have been more significant had this not all developed in a year with a presidential election.

Given recent spending habits, it is hard to believe that as November approaches, there's not going to continue to be at least close to the same level of investment in various ways as you say, Hagen, it may be different ways because of social distancing and other circumstances. But it seems to me that the usual folks who are looking to spend are not going to take their eye off the ball in a presidential election year.

It remains to be seen. It certainly does speak to the degree to which this issue does find itself at the top of the list, both on the company side and on the shareholder or the other side of the ledger. With all else that is going on today, it's not clear how much the folks who are normally focused on this will do so. You just don't know whether that's going to increase or reduce the risk because as the scrutiny grows and as we get closer to the election, there is a real chance that this could take center stage in the right circumstances.

Key Considerations for Political Spending Policies

McGuire: What I'll offer now is with that brief overview of the climate, a few considerations regarding political spending policies. This is by no means an exhaustive list, but it will help us segue into our subsequent sections here in terms of talking about the way in which all of this plays out.

An initial consideration to keep in mind is that perception can easily become reality in this area, and there is no such thing as a purely personal decision, particularly for a larger company senior management. Obviously, the Equinox example is one in which it shows that they had to take significant steps to reaffirm its values in the face of a public uproar. In addressing this, the companies that proactively assess and plan their political activities with an eye towards public perception are typically the ones that are best positioned.

These steps can include education of senior-most management on the ways in which their individual political contributions can be scrutinized by the media and the public and others as well as tracking traditional political spending by the corporation and, in particular, indirect contributions which are sometimes not always prioritized. Those to say trade associations, 501(c)(4s) and other advocacy organizations.

It's also important now, given current circumstances, a contribution in a normal election year may be viewed differently this year. It's important to consider the view of relevant constituencies in light of the pandemic and the resulting economic hardship that folks are experiencing.

A second consideration for companies that deem political spending to be appropriate and in their best interest, which are many, they should consider at least some form of disclosure. That may sound self-evident, but there are many who resist any type of disclosure. Also, it's worth considering preparing oneself to explain the rationale behind the spending and in those instances where companies fail to take control, and we'll hear some more about that later on in today's program.

If you fail to take control of the narrative regarding their own activities, others, shareholders and employees, the media may very well step into that vacuum and do it for them. Related to that is really a particular risk, which again flows from *Citizens United*, which is the rise of political action committees and so-called social welfare organizations.

These are organizations that are allowed to spend in an unlimited way so long as they are not coordinating directly and their primary purpose is not for a particular campaign. Some of these organizations have become very powerful. They can, in very different ways, influence the priorities and the choices of both public and private companies.

Going back to the perception point, it's important to consider the relationship that the corporation has with these organizations including any individual relationships that senior management may have. These are going to obviously be a very powerful group of organizations later this year or as we approach the election.

The final consideration is simply taking a clear-eyed assessment of policies and procedures for control over political activities and contributions. As you will no doubt hear from our other two panelists, recent shareholder proposals oftentimes will focus on the actions or the lack of attention to this issue, and oftentimes with reference to the board or board committees.

It is worth examining whether board committee oversight in this area is worthwhile, and that's oftentimes a significant focus of activists and pro-transparency groups, that even a few steps in that direction can really help to mitigate risks from missteps and government enforcement of complex regulations relating to lobbying, campaign finance and pay to play restrictions.

If there is some process in place, some oversight in place, it can go a long way in demonstrating the intent of the company to approach this area responsibly and with executive and management buy-in.

With that, I will hand it over to Zally to give her thoughts on corporate governance, and to get a little bit more into the weeds here in terms of board oversight.

Corporate Governance/Board Oversight

Zally Ahmadi, *Director of Corporate Governance, D.F. King:* Thanks, Brendan. Let's start at the beginning. When it comes to board oversight and corporate governance, you have boards that might ask, "Okay, why is board oversight important to investors now, and how does it tie into good corporate governance?"

Really that question is a good follow-up to a lot of what you've been saying, Brendan. Any time a company engages in political expenditure, it poses a certain set of risks. These risks can extend to a company's reputation, business strategy, its legal footing, employee relations and shareholder and customer relationships as well. All of this ties into why an investor is interested in what sort of oversight you have over this process.

I know you mentioned the Equinox example. We've seen directors across almost all industries that have been hurt by media reporting to where company money has helped fund causes that are adverse to what are in the interest of a company. We've seen in a lot of cases that oftentimes these directors didn't have a direct hand in where this money went.

For a lot of non-profit organizations that are politically active, they don't need to disclose their donors for there's oftentimes a question on where this money is going, and naturally what we tie back to board oversight of where the money is going.

Once a board decides it wants to engage in political expenditures, one, it needs to decide whether to disclose that spending. Two, that's really where you start getting into the idea of okay, how can we ensure appropriate oversight, and how do we make sure policies and procedures are in place.

A good way to start this process when you're starting at the beginning here is always to start with board education, just really hot topics these days. Directors need to understand the types of direct and indirect political spending and all the applicable laws and regulations. That's really a good baseline for boards to start at if they're implementing a policy, if they're implementing oversight guidelines.

Directors should understand the risks posed by political spending. Oftentimes in the initial steps of creating these policies, it's a good idea for boards to think along the lines of, "what kind of environment does my company need to thrive, and do these specific contributions allow for that environment to exist?"

This may seem self-evident, but it's also really important for companies and boards to start out with outlining what the red flags are for them; that also really helps tie into outlining where the company's stated public values are. So, whether a red flag could be a failure to just follow company policy or whether it's contributions that conflict with company values, it's a good idea to get those on paper.

The last one that I mentioned, the conflict of company values, that's actually an interesting one. We've seen a few shareholder proposals this year actually asking for congruency reporting on whether political expenditure is in conflict with what a company's publicly stated value is. That's particularly relevant for 2020.

Once we've got past this stage of board education, and now boards are ready to outline what it is that they want in their policies, it can be really important to specify the types of political spending that the company will and will not engage in. That can help avoid any risky results or anything that can splash out in the media as well.

For some companies, we've seen some of them have a policy to contribute only the ballot initiative. For example, some restrict payments to the politically non-profits that I mentioned earlier. They want to make sure they know exactly where that money is going.

The next step often is to outline decision-making procedures for management. What steps are they required to follow? Where is the chain of command there? Any reporting around that can really help an investor identify that there is this oversight extended down to management, everyone knows where the steps are, what they need to do to follow these rules.

It really helps to alleviate these concerns about risk management that the political expenditures can bring up.

McGuire: Zally, what has your experience been in terms of board's willingness to engage with senior management including CEOs on their personal contribution choices? I can imagine this is an area where you want to tread delicately but can also be one that in certain cases can be very important to address.

Ahmadi: Just from what our experience has been, oftentimes it's the more higher profile companies where that really comes into play. The largest companies are the ones that really care about what the CEO is doing. If your CEO is a name that's recognized in every household, you want to make sure that that name also protects the company as well and everything associated with it.

Outside of that, as you filter into the Russell 1K, the Russell 3K, we don't see as much. That's really when it comes down to a robust oversight policy that a board could implement. I think that's also why we see investors care more about to what length a board is doing to make sure that all aspects of the company including management, how that's affecting the company reputation.

Along with the board oversight, a couple of things that can be important to alleviate investor concern, providing for regular reporting from management on scheduled reports made to a board committee, for example, on what's being done in terms of political expenditures and then also an annual review by the board; that's becoming increasingly popular as well.

Another thing that we're seeing is boards requiring third party groups to report to board committees on how they plan on using the money. That gets rid of the concern of once we donate the money, where does it go after that. That's where we've seen a lot of directors come under fire to media.

The last thing on this topic is diving in a little bit deeper into the political re-spending reviews the directors can implement. There are a couple of things that they should look into. One is ascertaining how the policies are carried out. That's a good question to have. That's something to dive into during the review.

Assessing how a company's compliance program is implemented. That's always good to follow-up on. A really important one is obtaining outside assistance or counsel for advice that they needed and to not just take management's word on certain things. If you need the help, there is help out there for boards to get.

Lastly, it's always important to ask yourselves what impact this has on stockholders. What does this have on the firm's long-term interest and the needs of the society in which the company operates?

Shareholder Proposal Submission Trends, Proponent & Investor Behavior

Ahmadi: I'm going to talk a little bit about shareholder proposal submission trends, proponent behavior, investor behavior. I'll start off with what we're seeing in terms of how investors are behaving in response to these proposals. Increasing amounts of attention being paid to political expenditures.

BlackRock, for example, last year updated their policy. They are encouraging companies to disclose on their website in a separate report showing what their policies on political expenditures are. They want to ensure that appropriate oversight is in place. They specifically state that this can include board committee, and they want to make sure the companies are affirming their compliance with laws, federal laws, state laws and that sort of thing.

What we're seeing in the actual voting for this year; that's a bit notable, too. For example, Northern Trust used to never vote for shareholder proposals requesting a report. They revised their policy between 2019 and 2020, and now we're seeing them vote for these. State Street, Wellington are still considered swing votes depending upon disclosure.

Those are just some of the things we're seeing with the more household names when it comes to how the voting is actually playing out.

Ganem: With BlackRock and Northern Trust and some of these requests in voting policy changes, are we seeing a measurable dent in the voting outcome meaning majority support or close to majority support? We went maybe five years without one of these proposals passing, and then last year we saw a few proposals pass asking for disclosure on political contributions.

I'm wondering, does it move the needle enough based on what you're seeing this year?

Ahmadi: That's a really good question. You've mentioned that there was a period of five years where it was a dead zone, and none were passing.

Last year, we did see two pass. This year, we've already seen two of these pass as well. In terms of the numbers, it's been increasing every year. I think this year is a bit more noticeable than previous years. Right now, we're seeing results average around the lower 40s; I think around 42%.

Last year's proxy season was around 36%, so there was a spike there. Just in comparison, I think it was in 2017 where it was in the high 20s on average for political reporting shareholder proposals.

We are seeing the needle move. It's not this big rush to where all proposals are passing. There are certainly, then, a large number of withdrawals that's still in play as well. On that note as well, we've seen less submissions this year. That's been interesting, less submissions but increased levels of shareholder support.

Ganem: Would we attribute that maybe to increased engagement? The proponents are happier this year? What do we think?

Ahmadi: I think it is both a combination of increased engagement, but I think also best practice is always evolving. It typically moves towards the needle of better corporate governance.

Disclosure across the board for all topics has increased over the last five years and that can certainly come into play when it comes to political reporting. I think especially considering the contentious election in 2016 and this upcoming election year, we're seeing more and more companies act proactively there.

Engagement five years ago is nowhere near what it is today, so that's 100% as having had a hand in the numbers that we're seeing now.

Ganem: In the past, I know that political contributions proposals, vis-à-vis requests for information about lobbying activities and the like, the contribution proposals tend to do a little bit better and make up the three proposals that passed last year. There is one related to lobbying, but it got the support of the company, so that is an outlier in the space.

Also, there are different brands of shareholder proposals in the political lobbying expenditure space. The ones that we're seeing support at the lower 40s, I think you mentioned, are those more tried and true proposals? Or, are these more of the exotic variety?

Ahmadi: The ones that we have seen pass are, as far as we know, they're more or less just straightforward report on political contributions. The exotic variety, the requests that are a little bit outside the norm that we're seeing aren't currently getting passing levels, but I will say that one of them, the numbers are getting little dicey when you're thinking about shareholder proposals.

You often think, okay, less than 30% is what you typically see. We're seeing this encroach into the lower 40s, the high 30s, so it's definitely something that we're seeing reflected in terms of how investors are reinforcing their interest in these, and then just across the board in terms of the asks.

Ganem: Is it generally support? Are these proposals generally supported by ISS and Glass Lewis? Is that probably the case?

Ahmadi: ISS and Glass Lewis, that's a good question. Whenever I look at a shareholder proposal support level, if I see a proposal in the 30s or 40s, oftentimes that does mean ISS and Glass Lewis have both supported it.

Glass Lewis can get anywhere on average from 5-10% of the support, and ISS can sometimes tack on another 20% at its best. These are definitely proposals that have teeth when it comes to advisory firms as well, depending on what the ask is, of course.

Ganem: Got it. It seems like a takeaway there may be there could be a benefit to reviewing those two proxy advisory firms' voting guidelines and seeing if any incremental changes can be made by a company in order to avoid potential dangerously close voting outcomes, it sounds like.

Ahmadi: Oh, absolutely. On top of that as well, you really have to look at the shareholder profile. That's usually what ends up leading or directing a strategy once you do get a shareholder proposal.

There are certain shareholders who always vote against these proposals no matter what. And yes, in the last year we've seen a handful of institutions change the way that they're voting on these. But at the end of the day, a lot of times, there's not a drastic shift.

Shareholder profiles is always a way to go, understanding how ISS and Glass Lewis, what percentage of influence they might have. That's always what we figure is a good way to start the strategy thinking process.

And, Hagen, I know that you also followed these statistics pretty closely over the last couple of years. Do you have any insights in terms of what you've been seeing with regard to that ask, how the asks have evolved in the shareholder proposals?

Ganem: Yes. There are a couple of varieties of proposals that I refer to as the tried-and-true in the sense that they're difficult to exclude under Rule 14a-8, which as many listeners know governs the shareholder proposal submission process.

The one is a basic proposal that, at a high level, asks for a company's disclosures, policies and procedures and the itemization of political contributions. Another variety asks for a report on a company's policies and procedures governing lobbying communications and payments used for lobbying communications, as well as the description of management's and board' decision-making oversight process.

I'd say that the vast majority of political spending proposals submitted to companies' year-over-year fit one of those two descriptions. We also do see some proposals that, as you mentioned, seek a congruency analysis between a company's mission and public statements and the types of political or lobbying activities that the company might be engaging in at the same time.

We're also starting to see some proposals tie two sensitive topics together - that is, climate change and political spending. Those proposals are difficult to exclude under SEC rules. But we're not seeing high passage rates on any of those on this front.

One thing that is interesting, and I've yet to put my thumb fully on it is: why are we seeing fewer proposals this year versus last year.

For context, in the past handful of years, we saw above or just about 100 proposals relating to political spending and lobbying activities submitted to companies each year. And this year, I don't know whether your statistics say anything different, but I think we're at maybe 70 proposals or a little shy at that.

That's statistically significant, and I would be curious what we would attribute it that to.

And, Brendan, I know that you had said, with regard to the disclosure of contributions, providing the rationale for those contributions typically is advisable. One question I had is whether we're seeing more specific rationale disclosed by companies or whether we would more typically advise an approach that, in my experience, companies tend to find more palatable, and that is more overarching policy statements. That is, in general, isn't it about what the companies' goals are and that they will contribute to causes that are consistent with those goals, as opposed to a company saying we contributed to this candidate or this cause for this specific reason.

It seems like, at least in my experience, companies are less eager to set a precedent for themselves that then they will have to explain with a certain degree of granularity why they made very specific contributions.

McGuire: Yes, I think that's right, Hagen. I think that they obviously want to maintain some flexibility in the language they use to allow them to make choices. The place where we've seen there to be some issue is where it doesn't appear to be any thought given at the time with respect to either lobbying expenses or contributions.

I think just establishing a practice of ensuring that it is clear that this was done with a particular purpose. It can be, as you said, a more generalized purpose, but one that was not done thoughtlessly. One that was not done based on the individual wishes of a senior employee or a group of employees, but that it was vetted in some way as it does go a long way when viewed with the benefit of hindsight by those who come along and want to scrutinize it.

I wonder to your point, Hagen, whether there is in terms of the lower numbers of proposals. Is it possible that that could reflect some level of engagement in other ways. I'm just curious whether you or Zally had seen engagement by shareholders or others on different fronts other than directly with the company, and whether that's with regulators, whether that's with the media, whether that's with other groups that could potentially wield some influence.

Have either of you seen any of that? Do the lower numbers reflect a more varied set of efforts on behalf of shareholders or related parties?

Ganem: Yes. I can go first. I've not seen a significant amount of horse-trading in this space. The conversations tend to go — and let me sort of step back and say the proponents of what I'm referring to as the tried-and-true proposals — they tend to be sophisticated and serious players as opposed to some others who are less willing to pick up the phone and then engage.

In general, we encourage companies to engage with these proponents and, typically, the conversation is centered around the desire for more disclosure related to political activities or lobbying activities and not so much, to answer your question, if you do something else to appease them, they'll withdraw this proposal or they won't submit a proposal in the future. The proponents in this space tend to be very focused on disclosure and enhanced board oversight and don't tend to stray too far from that mission.

Ahmadi: I would agree with that. That's pretty much what I've been saying to you. Another thing that I want to note as well is that when it comes to the larger institutional shareholders and the ones who vote, this really will affect the outcome.

A lot of the engagement and discussion is revolving around, as opposed to any specifics, how much money did you give this specific politician or anything like that. More so around, what are you doing in terms of risk management and mitigating anything we should be concerned about. What is the oversight that you have in place? How often are you receiving reporting from your management, from outside parties?

That's sort of saying "talk to us about the level of compliance that you have with all of this." A lot of times that is what is driving the discussion there as well.

No-Action Relief, Negotiating a Withdrawal

Ganem: I'll turn to no action relief, the no action process and negotiating with proponents.

For companies, the sobering news — maybe "news" is a misnomer — but political and lobbying proposals are difficult to exclude under Rule 14a-8. I spend a fair amount of time in this space and to say the very least, I could probably fill up a whole hour just taking about 14a-8 proposals. I won't do that or try not to do that. We're running a little short on time.

Just for context since 2017, nearly 360 of these proposals have been submitted to companies. Of those only 25 — not 25% — but only 25 absolute number were excluded under Rule 14a-8, meaning that the SEC Staff granted the no-action request in those instances; 95 or over a quarter of those instances, however, were withdrawn by proponents.

That gives a lot of context and builds on what we've been talking about here. From those numbers alone, it's pretty obvious the proposals are often excluded on the rule and engaging with the proponent may lead to a favorable result for both sides.

That said, I do always encourage clients to closely review or have us closely review a submission to determine whether there's a procedural or substantive defect in the proposal. As many listeners know, whether or not a proposal can be excluded on the rules can depend on a company's own facts and circumstances as well as the very specific drafting of a proposal. So, it always makes sense to stop and review closely, even if you received the same proposal or a very similar proposal the prior year, to make sure that you're reviewing your submissions closely.

To cover some of the arguments, or the more notable arguments, that companies make in this space — the ordinary business argument, this has rarely worked for companies. As you see, Staff decisions are clear that political contributions and lobbying activities or at least request for information regarding those topics generally do not involve ordinary business matters.

Occasionally, a proposal is however written in a way that essentially masquerades as one relating to political contributions or lobbying, but in substance it does relate to ordinary business operations, so this is maybe what I was referring to earlier when I said exotic proposals.

A few years ago, for example, the Staff agreed that a proposal asking for a report on a company's assessment of its political activity resulting from its advertising with certain media companies was excludable. The Staff agreed that in that instance it related more to advertising, which is an ordinary business matter, so that's an example why we have to review these proposals closely.

On to a different basis or two other bases, unfortunately, the most successful exclusionary arguments require a company to have received more than one of these proposals. So, lucky you, if you're able to make one of these arguments.

Those arguments are substantial duplication, meaning that the company already received a proposal substantially similar to this one and for inclusion in the same year's proxy statement.

And resubmissions, which, as many know, means that you received the same or substantially the same proposal the prior year, and it did not receive the requisite shareholder vote. Those thresholds are 3 and 6 and 10%.

If a proposal didn't receive those levels of support, then depending on how many times the proposal was submitted in the last five years, a proponent wouldn't be able to get their proposal included in the proxy statement.

But just to say, if it's not already obvious enough, these proposals tend to receive support in the range of 25 and 40%, so it's usually the case that resubmission arguments aren't available for companies to exclude these proposals.

One thing to mention, because it comes up frequently, is the relevance argument. On its face, the rule would seem to apply to almost every political contribution and/or lobbying proposal. I'll unpack that a little bit because the rule allows a company to exclude a proposal that relates to operations, accounting for less than 5% of the total assets, net earnings and gross sales for the last year, and does not otherwise significantly relate to the company's business.

The quantitative thresholds might have you marshaling arguments in your head and saying, "oh, that seems to work, right?" Well, unfortunately, the second prong — that the proposal must not otherwise significantly relate to the company's business — is read pretty broad in the sense that the Staff normally views proposals related to political contributions and lobbying activities as significantly related to a company's business.

So, you wouldn't be able to rely on this rule. One thing to mention, though, is that a company was successful a few years ago in excluding a political spending proposal on relevance grounds. That company, Reliance Steel and Aluminum, however, had very special facts. For context, the company did not make any direct political contributions, its only potential direct contributions were paid to a trade association that was not permitted to get to go to political campaigns. The board was involved in reviewing the proposal and had stated or concluded that the proposal was not significantly related to the company's business. The weight of the evidence, if you will, was heavily in favor of this company's specific facts and circumstances.

I come full circle, it underscores the importance of assessing your own facts and the proposals that you received to see if there's a basis to exclude. It's difficult to exclude these, and we've said it more than once — it's important to engage with the proponents and see if there's a way in which you could move forward with an amicable withdrawal.

Particularly because the proponents are willing to engage. Having that conversation, reaching out and seeing if you're able to find a happy medium, is important.

Some tips to consider in this regard: consult your government affairs colleagues to gauge their actual level of political and lobbying activity and their willingness to provide disclosures. I know we've talked a bit about that on this call. Also, consider which information already may be public.

Brendan, you may have some thoughts on this, but I know, for example, political contributions information generally is already public. If a company is willing to put it all in one place on their website, then that could be a less painful way of satisfying a proponent's desire for additional disclosure.

Another thing is consider providing an overarching or high-level rationale as we discussed earlier and a description of the board's oversight and management process. This approach probably is going to be more self-sustainable and palatable over time.

Keep in mind that these proposals do rarely pass, even though they're also very difficult to exclude. Brendan, you asked earlier, if the board is not wanting to engage on this issue with management or if management does not have a desire or see the need, even in the face of institutional shareholders asking for this disclosure, it ought to be viewed through the lens of and understanding that these proposals do rarely pass.

They do sometimes receive majority support, very rarely. If a company is dealing with a crisis like the Equinox situation or a litigation relevant to their political activities or involved in some other related controversy, that could also garner the support of not just ISS and Glass Lewis but other shareholders interested in more oversight in this area.

If you lose a shareholder vote on one of these proposals, then you're faced with having to implement that proposal potentially more closely to what the proponents ask for in the first instance. Therein is the challenge and hopefully there's an opportunity for companies to negotiate a withdrawal.

Drafting an Opposition Statement

Ganem: Now, if you end up with a shareholder proposal in your proxy statement because you're not able to negotiate a withdrawal and because it's so difficult to exclude these under the rule, then it's important to think about what you'll say in terms of the opposition statement that you include in your proxy statement following the proposal.

I suppose a silver lining to the fact that these proposals are difficult to exclude is that there's a lot of opposition statements out there to pull from.

Not all precedent opposition statements are created alike, however. So, here are some drafting tips that could help you to make a persuasive opposition statement.

Describe the company's overall approach to political spending. It's important, along with the description of the board oversight because they're two important topics. You ought to lead with that, if you can.

It's also important to explain the role and importance of the company in helping to shape the discussion and political and public policy on issues relevant to a company's customers and employees and communities in which the company operates.

Also, if a company's percentage of political contributions relative to objective financial measures like its annual spend is very low, it's worth pointing that out.

And, finally, remember your audience is your shareholders. I try to avoid using arguments or jargon more suitable to a no-action request. You'll sometimes come across an opposition statement that uses terms that would be more appropriate for Rule 14a-8 arguments and that might not resonate as much with shareholders, so that's something to think about.

That's my advice in terms of dealing with shareholder proposals that are difficult to exclude and negotiating with proponents along the way.

Jenkins: Okay. Great. I would like to close by thanking the panelists for what I thought was a really great discussion, and to all of you for joining us here today. This concludes today's webcast. Thanks very much.