Silencing Business: How Activists Are Trying to Hijack the Public Policy Debate

CENTER *for* COMPETITIVE POLITICS

Congress shall make no law...

www.CampaignFreedom.org

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MISSION STATEMENT

The Center for Competitive Politics (CCP), through strategic litigation, communication, activism, training, research, and education, works to promote and defend First Amendment rights to free political speech, assembly, and petition. We are the nation's largest organization dedicated solely to protecting First Amendment political rights

CCP's litigation team represents clients on a pro bono basis in order to secure their First Amendment rights. They actively pursue strategic litigation and file amicus briefs to those ends.

CCP also publishes research on the effects of laws and regulations that stymie First Amendment rights to free political speech. We track and analyze proposed legislation and regulations at the federal and state levels that could negatively affect these rights.

Additionally, we seek to educate supporters and the public at large on the benefits of these First Amendment rights and, perhaps most germane to our work, the importance of these rights to competitive elections and integrity at all levels of the political process. We communicate this information through published articles in newspapers, websites and magazines; through briefings and interviews with journalists; by appearances on television and radio; and via newsletters and an extensive website and blog.

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Executive Summary

A STEP BY STEP PLAYBOOK TO SILENCE CORPORATE SPEECH

1. THE MONEY AND THE MUSCLE

Foundations, such as Soros' Open Society Foundation and the Tides Foundation, funnel millions of dollars to public policy groups such as the Center for Political Accountability (CPA), Coalition for Accountability in Political Spending (CAPS), Media Matters and others to build a public case for disclosure and ultimately pressure companies to withdraw from the public policy debate altogether.

2. BUILD A FALSE NARRATIVE

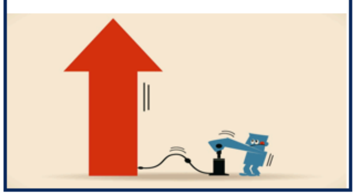
Activist groups, chief among them the CPA, quarterback a coordinated campaign to drive a false and exaggerated message to companies that corporate engagement with government is "risky" and bad for investors.

3. CREATE A MAINSTREAM FACADE

The CPA creates the facade of mainstream support by partnering with the Wharton-Zicklin School to issue a flawed index that rates company disclosure policies, and by co-opting legitimate business institutions, such as the Conference Board and Committee for Economic Development, to issue reports seemingly authored by independent business voices.

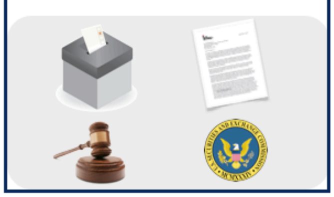
4. INFLATE VOTING RESULTS

The CPA will misrepresent past years' shareholder voting data on political and lobbying disclosure resolutions to create the illusion that political disclosure has achieved widespread acceptance in the business community, disregarding abstention votes and publicizing inflated levels of support among shareholders and mutual funds.



5. PRESSURE TO DISCLOSE

Liberal policy groups (CAPS, Common Cause, Media Matters, Think Progress, Public Citizen) and activist shareholders (social funds, government pension funds, union pension funds) target companies with coordinated letter writing campaigns, shareholder proposals, lawsuits, and regulatory/legislative advocacy campaigns at the national and state level.



6. NEGOTIATING IN BAD FAITH

Some companies, eager to avoid a resolution or to get a resolution withdrawn, find it necessary to negotiate. This may stem headaches in the short-term but only encourages future demands, emboldening activists to move to the next company leveraging past negotiations as pressure to disclose, ultimately leading to a domino effect handcuffing management's ability to conduct business.

7. SILENCE BUSINESS WITH THE INFORMATION YOU HAVE

Through negotiations and/or shareholder proposals that lead to further disclosure of corporate political engagement, activists use disclosed information to pressure companies into withdrawing from public policy engagement via name-and-shame campaigns, public protests, and boycotts.

8. IF AT FIRST YOU DON'T SUCCEED, PURSUE ANOTHER PATH

Following failed attempts to persuade Congress, shareholders, and influence independent agencies such as the SEC, activists are now looking to the state level to push disclosure legislation and use existing regulatory authority to subject corporations and non-profit organizations to burdensome disclosure requirements.

9. END CORPORATE POLITICAL ENGAGEMENT ALTOGETHER

The leaked "End Goal" of a Media Matters 2012 3-Year Corporate Transparency Strategy says it all when considering the true intentions of the activists: "To make the case that political spending is not within the fiduciary interest of publicly traded corporations and therefore should be limited."

I. Introduction

Supreme Court Justice William O. Douglas once wrote that "restriction of free thought and free speech is the most dangerous of all subversions." This is, however, exactly the goal of those whose political interests are at odds with the business community. A cadre of unions, public pension funds, and activist investors are pursuing actions that would selectively burden American public companies from exercising their First Amendment rights to participate in public dialogue.

Claiming Citizens United[1] as their rationale for action, anti-business activists have been engaged in several parallel attempts, through the legislative and executive branches, to silence the business community. Most notably, in 2010, the Senate came within a single vote of passing the DISCLOSE Act and sending it to the president.[2] The sponsor of the bill said, forthrightly, that "the deterrent effect [on political speech] should not be underestimated." Its adoption would have placed onerous requirements on corporate political speech.

Having failed to achieve what they wanted through legislation, these activists turned their attention to executive agencies to try to silence opposition through regulatory fiat. These efforts included a draft executive order that would have required businesses to disclose political activities before bidding for federal government contracts, including support for trade associations and 501(c)(4) non-profit organizations,[3] as well as separate regulatory efforts at the Federal Election Commissions (FEC),[4] the Federal Communications Commission (FCC)[5] and the Securities and Exchange Commission (SEC).[6]

In addition to these attempts to use the power of government to burden or silence the business community, activists and elected officials have engaged in an effort to force corporations, through public pressure, litigation, and corporate governance mechanisms, to disclose or scale back their expenditures related to lobbying and public policy activities. Much of this pressure has come from labor unions and other activists claiming to represent the interests of a company's shareholders, but in actuality pursuing an ideological agenda unrelated to the profit-maximizing interest of most shareholders. This paper discusses the people and strategy behind the efforts to impose new, extensive disclosure burdens on public companies and to silence the business community.

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[1] Citizens United v. Federal Election Commission

[2] ^ Bill Summary & Status – 111th Congress (2009–2010) – S.3628 – THOMAS (Library of Congress), see http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN03628:

[3] *See* http://www.politico.com/static/PPM187_disclosure.html; *See also*, http://www.washingtonpost.com/politics/obama-weighs-disclosure-order-for-contractors/2011/04/20/AFBw7qEE_story.html

[4] http://www.fec.gov/law/litigation/van_hollen.shtml

[5] http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=8867659

[6] http://action.citizen.org/p/dia/action/public/?action_KEY=9213; See also http://www.sec.gov/rules/petitions/2011/petn4-637.pdf

II. Activists Driven by Partisan and Ideological Interests

The movement to silence the business community is led by the Center for Political Accountability (CPA), a self-styled nonpartisan 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."[7] However, an examination of CPA's staff and funders reveals that the CPA is far from "nonpartisan." Bruce Freed, the president and founder of CPA, is a former Democratic congressional staffer.[8] The CPA's General Counsel, Karl Sandstrom, previously served as counsel to the Democratic National Committee and as a Democratic FEC Commissioner.[9] Other senior CPA staff include a former campaign coordinator for Senator John Kerry, as well as a writer who also works for the George Soros-funded Justice at Stake (a group critical of business efforts to promote state-level tort reform).[10]

The CPA is a member of the Corporate Reform Coalition (CRC), an alliance of dozens of unions, public officials, and academics that seeks to pressure companies to withdraw from public policy debates altogether.

The CPA's largest funders are the Open Society Institute and the Foundation to Promote Open Society (Open Society Foundations), which together contributed more than $1.2 million to the Center for Political Accountability.[11] Founded by Left-wing billionaire George Soros,[12] Open Society Foundations contributes hundreds of millions of dollars to progressive causes, including many organizations behind the so-called "disclosure" movement, including MoveOn.org Voter Fund,[13] Public Citizen,[14] Citizens for Responsibility and Ethics in Washington (CREW),[15] and Common Cause.[16]

The CPA coordinates with unions, public pension funds, and activist investors to submit shareholder resolutions and engage in letter-writing campaigns to corporations regarding

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[7] http://www.politicalaccountability.net/index.php?ht=d/sp/i/870/pid/870

[8] https://www.weeklystandard.com/keyword/bruce-freed

[9] http://www.fec.gov/members/formermembers.shtml

[10] Michael Novelli, the CPA's Chief Financial Officer, served as a campaign coordinator to John Kerry, *See* http://articles.baltimoresun.com/2004-01-28/news/0401280283_1_john-kerry-maryland-democrats-campaign-in-maryland. Peter Hardin, a writer and editor for the CPA, is a Senior Writer for Justice at Stake, *See* http://www.justiceatstake.org/about/jas_staff/peter-hardin-senior-writer/. Valentina Judge, former CPA Associate Director and co-author of the CPA-Zicklin Index worked for the Service Employees International Union, *See* http://www.rwjf.org/reports/grr/037706.htm.

[11] http://www.weeklystandard.com/articles/transparency-agenda_720569.html

[12] http://www.opensocietyfoundations.org/people/george-soros

[13] MoveOn.org Voter Fund received initial start-up money of $2.5 million from OSI in 2003-2004.

[14] In 2011, Public Citizen received a grant of $450,000 "To support the work of the Corporate Reform Coalition".

[15] In 2010, CREW received $500,000 from FPOS to "respond to Citizens United," and an additional $150,000 in general support.

[16] Since 2000, Common Cause has received over $2.6 million from OSI and FPOS. In 2011, received $200,000 to "rein in corporate spending on elections."

political spending. In this capacity, the CPA is a member of the Corporate Reform Coalition (CRC),[17] an alliance of dozens of unions, public officials, and academics that seeks to pressure companies to withdraw from public policy debates altogether.

"I think what's critical to remember is that the CPA strategy is not vulnerable to political obstruction or legal challenge. What we're finding is that corporate governance offers a route that allows the issue to be addressed almost unimpeded." - *Bruce Freed, Center for Political Accountability*

Another CRC member is the Coalition for Accountability in Political Spending (CAPS), which was founded by current New York City Mayor Bill de Blasio. Mr. de Blasio launched CAPS in the spring of 2011 when he was serving as the City's Public Advocate, but the effort did not really take shape until CAPS' parent organization, the Fund for Public Advocacy, received a $200,000 contribution from one of George Soros's foundations in 2011.[18] That contribution amounted to more than 40 percent of the total funding for the Fund for Public Advocacy and served to jumpstart de Blasio's program.[19] In addition to participating in efforts to force companies to disclose "voluntarily" their public policy expenditures, CAPS also urged activists to circumvent the process of seeking voluntary corporate disclosure by instead pressing state and federal legislatures and regulators to mandate it.[20]

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17 http://corporatereformcoalition.org/?page_id=67

18 http://www.guidestar.org/FinDocuments/2011/263/753/2011-263753801-08ba30d6-F.pdf

19 http://www.guidestar.org/FinDocuments/2012/010/576/2012-010576704-0926cf34-9.pdf.

20 http://politicalspending.org/?page_id=9

III. The Activists' False Narrative

Despite the partisan nature of the leaders and funders of the movement for increased corporate political disclosure, and their clear intent to use disclosure as a tool to silence the business community, activists have gone to great lengths in attempting to legitimize the movement by linking it to "good corporate governance."

An examination of their "good corporate governance" campaign reveals that it is nonsense. For example, the CPA has stated that more disclosure is needed because political spending "can embarrass companies and create serious risks for shareholders."[21] However, frequently, any risk actually lies in the very disclosure the activists are seeking, as the same activists and their allies will use and sometimes distort the disclosed information to "name and shame" the company. Mike Warren of The Weekly Standard summed up the activists' strategy succinctly:

> Freed's appropriation of corporate jargon—best practices, corporate reputation, bottom line, shareholder value—is deft. Ultimately, Freed argues that not disclosing political spending creates unnecessary 'risk' for a corporation. In business, avoiding unnecessary risk is a no-brainer. Yet the risk Freed warns of is actually manufactured by the very groups sounding the alarm.[22]

"Corporate policy advocacy efforts generally have positive effects on a firm's market value and its shareholder returns."

- Robert Shapiro, former Clinton Administration official

Appropriate corporate engagement in public policy is not overly risky for shareholders. On the contrary, substantial evidence shows that it is beneficial to shareholders. A June 2012 study conducted by economist and former Clinton Administration official Robert Shapiro found that "corporate political efforts generally have positive effects on a firm's market value and its shareholder returns."[23] His analysis is consistent with the performance of Strategas Research Partners' Lobbying Index, which tracks the stock market performance of the 50 companies that spend the greatest percentage of their revenue on lobbying—and which "has outperformed the S&P 500 for 15 consecutive years."[24] In fact, the Lobbying Index firms generated an average annual return of 17.4 percent in 2012 and 2013,

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[21] http://www.politicalaccountability.net/index.php?ht=display/ArticleDetails/i/562/pid/188

[22] http://www.weeklystandard.com/print/articles/transparency-agenda_720

[23] http://www.manhattan-institute.org/html/lpr_15.htm

[24] http://www.cnbc.com/id/101448501

compared to 6 percent for the S&P 500.[25] Jason Trennert, Managing Partner of Strategas, attributes this to companies "understanding better the idea that [lobbying] is important . . . that it is a fiduciary duty to spend money and make sure your voice is heard."[26]

The Façade of Support from the Business Community

While activists cannot credibly prove corporate public policy engagement is "bad" or "risky" for investors, they can attempt to achieve their goals by perpetuating the myth that increased disclosure has mainstream support from the business community. One of the key elements to this strategy is to manufacture a singular message from a variety of voices by co-opting various reputable organizations and publishing papers under their names. The CPA quarterbacks this effort, creating an echo chamber of disclosure advocates that purport to be independent leaders on the issue of corporate political spending.

> **"A word to company officers and shareholders: Ignore the [CPA-Zicklin] index . . . [I]ts ranking system is deeply flawed. The design and metrics are outcome-oriented, reflecting the subjective and political biases of the index's sponsors."**
> *- Jonathan R. Macey, Yale Law School*

William S. Laufer
Director, Zicklin Center for Business Ethics Research

The most prominent example of this tactic is the CPA's publication of its Corporate Political Accountability and Disclosure Index with the Zicklin Center for Business Ethics Research, which is part of the University of Pennsylvania's Wharton School. One leading activist recently stated that the Index stimulates "competition between companies who want to be listed in a positive way."[27] As Yale Law School Professor Jonathan Macey has stated, although the "index may acquire an air or legitimacy from its association with a venerable business school . . . its ranking system is deeply flawed."[28] For example, since 2011, the Index has made annual changes to its scoring methodology to increasingly emphasize the disclosure of contributions to 527 groups, trade associations, and 501(c)(4)s – which advance the objectives of shareholder activists by lowering company scores and moving the goalposts. This is unsurprising as Mr. Freed and Mr. Sandstrom, who also serve as advisory board members to the Zicklin Center,[29] are the primary authors of the Index.[30] After examining the Index, Professor Macey found that the "design and metrics are outcome-oriented, reflecting the subjective and political biases of the index's sponsors."[31] Therefore, "it simply isn't a valid indicator of

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[25] http://beforeitsnews.com/economy/2014/02/what-is-the-str ategas-lobbying-index-2599284.html

[26] http://beforeitsnews.com/economy/2014/02/what-is-the-strategas-lobbying-index-2599284.html

[27] http://vimeo.com/88389247 (see minute 36:35), Tim Smith, Walden Asset Management

[28] http://online.wsj.com/news/articles/SB10001424052702303442004579119580417319214

[29] http://www.politicalaccountability.net/index.php?ht=d/sp/i/240/pid/240

[30] http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/8047

[31] http://online.wsj.com/news/articles/SB10001424052702303442004579119580417319214

whether a corporation is using shareholder funds properly" and company officers and shareholders should ignore it as "another salvo by activists in the continuing political war against corporate America."[32]

The Zicklin Center itself is no proponent of the business community. It's Director, William S. Laufer, first proposed the idea of creating an index to the CPA in July 2009.[33] However, Professor Laufer's background in criminology, not business, suggests the intent behind the index was to police corporate activity rather than encourage business growth. Professor Laufer has made clear his intention is to use the Zicklin Center "to leverage the research strengths of Wharton in ways that have a broad impact" on corporate malfeasance.[34] Such advocacy is echoed in his 2006 book, "Corporate Bodies and Guilty Minds," where Professor Laufer called for an expansion of criminal law applicable solely to corporations.

The CPA also often points to publications from The Conference Board and the Committee for Economic Development (CED)[35] to support its narrative of broad support from the business community. However, a little bit of research reveals that the publications cited by the CPA are controlled by Mr. Freed and his allies and are not indicative of broad support. For example, Mr. Freed and Mr. Sandstrom serve on the three-member Advisory Panel to The Conference Board's Committee on Political Spending and have co-authored several of the Conference Board's publications, including a Handbook on Corporate Political Activity, which provides an overview of purported "standard practices" related to corporate activity in the political arena.[36] Mr. Freed is also a member of the CED's Money in Politics Subcommittee, which publishes papers in support of increased disclosure.[37] Moreover, the Executive Vice President of CED, Michael Petro, is

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[32] http://online.wsj.com/news/articles/SB10001424052702303442004579119580417319214

[33] http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/8047

[34] http://magazine.whartontest.com/issues/341.php

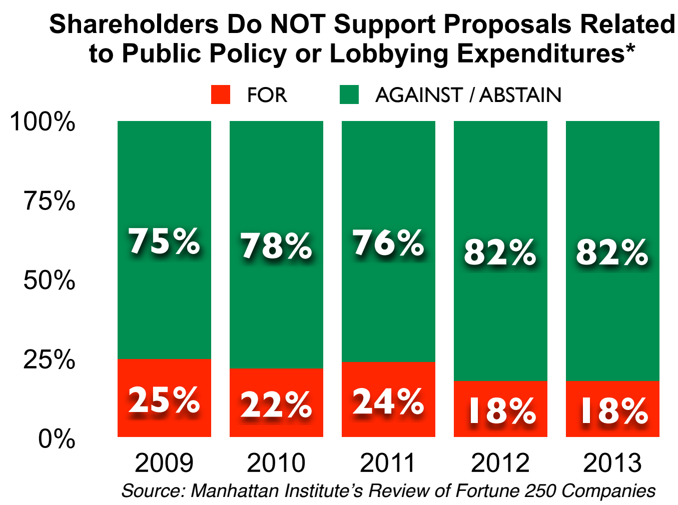
[35] The CED, purports to be "a nonprofit, nonpartisan, business-led public-policy organization that delivers well-researched analysis and reasoned solutions to our nation's most critical issues.." See http://www.ced.org/about/. However, the CED's membership, including its Money in Politics Project Subcommittee, is heavily weighted to college and university presidents, lawyers, foundation executives, and others having little or nothing to do with actual business interests as we think of for-profit businesses in the economy. See http://www.ced.org/projects/subcommittee/money-in-politics-project.

[36] http://www.socialfunds.com/news/article.cgi/3294.html

[37] http://www.ced.org/projects/subcommittee/money-in-politics-project

a former member of the CPA's Board of Directors[38] and the Money in Politics Subcommittee has largely been funded by Open Society Foundations.[39]

The Façade of Support from Shareholders



The façade is not complete without the inclusion of supposed mainstream support for increased disclosure by business groups. For this reason, the CPA regularly overstates the level of shareholder support and mutual fund support for its proposals. The CPA does this in two ways.

First, the CPA calculates the shareholder support for a proposal by dividing the number of votes "for" a proposal by the number of votes "for" and "against" a proposal. The problem with this method of calculating support is that it ignores abstention votes: many companies' corporate by-laws measure shareholder support by dividing the number of "for" votes by the number of "for," "against," and "abstain" votes.[40] By ignoring corporate by-laws regarding abstention votes, the CPA generates an inflated appearance of support. The Manhattan Institute has called the CPA's calculation "deceptive":

> Though it is understandable that the sponsors of and advocates for various shareholder proposals might wish to maximize the voting results they report for the proposals they support, there is no justification, in the authors' view, for counting shareholder votes on shareholder proposals contrary to the manner specified in corporate bylaws and under state law.[41]

Given the way the CPA manipulates its calculations of overall shareholder support, it is unsurprising that the CPA reports "support for political disclosure has grown steadily" among shareholders.[42] In reality, shareholder resolutions related to lobbying and public policy advocacy expenditures, which range from requiring companies to disclose

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[38] http://www.ced.org/people/single/michael-petro; See also http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/1285

[39] From 2009 to 2011, the CED received $740,000 from the Open Society Foundations, including $300,000 that was earmarked toward the CED's Money and Politics Project. *See* Foundation to Promote Open Society's 2011 and 2012 990s, available at http://www.guidestar.org/FinDocuments/2011/263/753/2011-263753801-08ba30d6-F.pdf and http://www.guidestar.org/FinDocuments/2010/263/753/2010-263753801-07ade08e-F.pdf. *See also* Open Society Institute 2010 and 2009 900s, available at http://www.guidestar.org/FinDocuments/2010/137/029/2010-137029285-07b54ae7-F.pdf and http://www.guidestar.org/FinDocuments/2009/137/029/2009-137029285-06ab2566-F.pdf

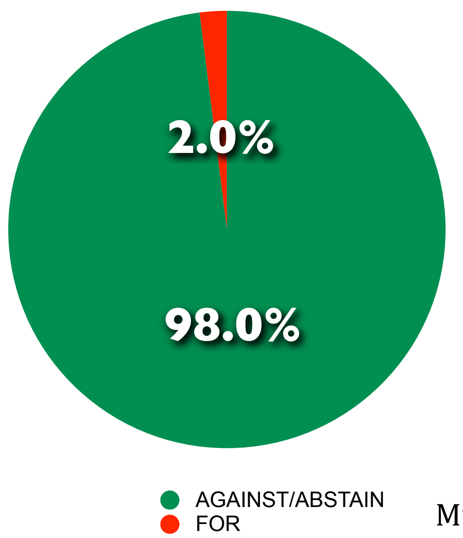
[40] http://www.proxymonitor.org/Forms/pmr_06.aspx, see also http://www.proxymonitor.org/ScoreCard2013.aspx

[41] http://www.proxymonitor.org/pdf/pmr_06.pdf

[42] http://politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/6936

contributions to trade associations to banning political spending and lobbying altogether, have generally received little support. In both 2012 and 2013, proposals among Fortune 250 companies relating to political spending or lobbying received only, on average, 18 percent support from shareholders.[43] Average support for proposals relating exclusively to political spending fell from 17 percent to 16 percent over the same period.[44]

In 2013, The 5 Largest Mutual Fund Families Supported Only 2.0% of Proposals Related to Corporate Public Policy Expenditures



In addition to its report on shareholder votes, the CPA also publishes an annual report on mutual fund voting. On November 25, 2013, the CPA's annual report found increased support for the CPA's model shareholder proposal among a group of "top mutual funds" chosen by the CPA. The report claims that in "the 2013 proxy season, 40 of the largest mutual fund families supported the 26 shareholder resolutions calling for corporate political spending disclosure, on average, 39 percent of the time."[45]

Much like the CPA's analysis of overall shareholder support, this report contains many inaccuracies,[46] including misrepresentations of several mutual funds' support.[47] It appears that the CPA in some instances reported that a mutual fund supported a CPA proposal if only one of its sub-funds supported the proposal (even if the rest of the sub-funds voted to abstain or even voted against the proposal). For example, the CPA claims that J.P. Morgan supported the CPA's resolution 20 percent of the time in 2013. In reality, J.P. Morgan funds voted "against" the CPA resolution over 94 percent of the time in 2013. At only one company did the majority of J.P. Morgan's sub-funds vote "for" a particular proposal.[48]

A review of the SEC filings of the five largest mutual fund families—Vanguard, Fidelity, PIMCO, American Funds, and T. Rowe Price—reveals that these funds supported only 2 percent of proposals related to corporate public policy expenditures in 2013. This should not come as a surprise, as many investors realize how essential public policy advocacy is for corporate economic prospects.

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[43] http://www.proxymonitor.org/Forms/pmr_06.aspx

[44] http://www.proxymonitor.org/Forms/pmr_06.aspx

[45] http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/8174

[46] In addition to misleading data, the CPA's mutual fund report weighs each of the 40 mutual funds equally. Vanguard, which holds over $1 trillion in U.S. domestic stock, has its average support for CPA proposals treated equally to Schroder, which holds just over $900 million. A recalculation of the overall support of mutual fund families weighted based on their holdings of U.S. domestic stock finds 14% support for CPA proposals.

[47] The CPA amended its original report regarding Fidelity (correcting Fidelity's support from 20% to 0%).

[48] http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/8174

IV. Activist Efforts to Force Corporations to Disclose

Activists have gone to great lengths to create a false narrative about the need for increased disclosure of corporate public policy expenditures. Likewise, ideological groups are using a variety of tactics to pressure companies to "voluntarily" disclose their lobbying and public policy expenditures. Some of these efforts to intimidate corporations include coordinated letter-writing campaigns, shareholder proposals, and even litigation.

Letter-Writing Campaigns

The disclosure movement has increasingly engaged in letter-writing campaigns that specifically target companies' participation in public policy debates, including their lobbying activities and memberships in trade associations and other nonprofit groups. The letters generally exaggerate or misrepresent a trade association's policy position on a particular issue—such as climate change—and then argue that, because a company's trade association's policy position is in supposed conflict with that company's position, continued membership in the trade association is a "reputational risk" to the company.

Fortune 250 Fact

28%
Decrease in shareholder support from 2011 to 2013 for resolutions related to lobbying and public policy advocacy expenditures

For example, on May 11, 2011, a coalition led by the SEIU urged companies on the board of the National Association of Manufacturers (NAM) to end the alleged "contradiction" between those companies' policies and NAM's purported position on climate change-related legislation.[49] After mischaracterizing NAM's position, the letter urged companies to evaluate their role on NAM's board and to "assess the benefits of Board and Executive Committee membership, the risks of misalignment, and the interests of their shareholders."[50]

FACT: From 2009-2013 none of the proposals to Fortune 250 companies attracted majority support

Similarly, on September 27, 2012, the CPA spearheaded a letter-writing campaign to 423 companies.[51] The form letter urged companies to adopt political spending disclosure and accountability policies "ahead of the 2013 proxy season" and falsely claimed that large numbers of companies had agreed to its demands for additional disclosure of political activities. This assertion was based on claims from the CPA-Zicklin Index and the

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[49] http://www.calvert.com/NRC/literature/documents/Sample letter to company about NAM.pdf

[50] *Id.* See also: http://www.greencentury.com/pdf/globaldocuments/Challenging_the_Chamber.pdf

[51] http://politicalaccountability.net/index.php?ht=a/GetDocument-Action/i/6936

Conference Board's *Handbook on Corporate Political Activity*, both of which, as noted above, are publications authored by the CPA and used to propagate activist rhetoric.

Shareholder Resolutions and Negotiations

In addition to letter-writing campaigns, activists have used shareholder resolutions to try to force increased disclosure of public policy expenditures. According to the Manhattan Institute, shareholder resolutions related to lobbying and public policy advocacy expenditures were introduced more often than any other proposal type in 2013, constituting 20 percent of all proposals among Fortune 250 companies.[52] However, none of the proposals to Fortune 250 companies attracted majority support; on average, they received support from only 18 percent of shareholders in 2013, down from nearly 25 percent in 2011.[53]

Some companies, however, seek to avoid a shareholder resolution and choose instead to negotiate with activist shareholder groups. Frequently, activist shareholders accept an offer by the company to adopt some additional disclosures, even if those disclosures fall substantially short of the requests contained in the shareholder proposal. In exchange for the "additional disclosures," the activist shareholders drop or withdraw their resolution, which often contains more aggressive disclosure proposals.

Concessions made one year invite further demands the next, a domino effect ultimately intended to handcuff management's ability to conduct business.

Although activist shareholders may not achieve all of their objectives through a negotiated agreement, they accomplish two things that advance their agenda: (1) they publicize the fact that the targeted company has joined the "growing number" of companies that disclose political spending, and (2) they use the agreement as a baseline from which to seek additional concessions in following years, again using the threat of a new shareholder resolution.

Ultimately, however, the activists will not be satisfied until a company has been browbeaten and forced to stop engaging in the political and policy-making processes altogether. For example, a company's low rank in the CPA-Zicklin Index is regularly cited by activists as they request increased disclosure during negotiations with a company. Yet, despite being ranked at the top of the CPA-Zicklin Index in 2012,[54] Merck & Co., Inc.

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[52] http://www.proxymonitor.org/pdf/pmr_06.pdf

[53] http://www.proxymonitor.org/pdf/pmr_06.pdf

[54] http://politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/6903

received two different shareholder proposals related to political and lobbying expenditures in 2013.[55]

Taking it one step further, activist investors can and have leveraged unrelated shareholder proposals to extract concessionary agreements to obtain increased disclosure. In 2011, Walden Asset Management—a self-proclaimed "socially responsible investor" that invests focused on "environmental and social objectives"[56]—did just that at IBM. The shareholder submitted multiple proposals, including one related to the company's political spending policies and oversight procedures.[57] IBM initially challenged the proposal with the SEC, arguing that the proposal could be omitted on ordinary business grounds, but later withdrew its challenge and agreed to add the resolution to its proxy statement in exchange for the withdrawal of a separate shareholder proposal that separated the positions of CEO and board chairman.[58]

2013 BY THE NUMBERS

91%
Of Fortune 250 proposals in 2013 were filed by special interests and organized labor

82%
Of investors rejected political spending and lobbying proposals

98%
Of proposals related to corporate political spending were rejected by the five largest mutual fund families — Vanguard, Fidelity, PIMCO, American Funds, and T. Rowe Price

Some activists, eager to advance their own particular partisan beliefs, invest in corporations for the sole purpose of making political points. For example, NorthStar Asset Management holds "the minimal number of shares required by law" to engage in corporate activism,[59] including shareholder proposals related to corporate public policy expenditures.[60] Such funds stand in a different position than the interest of companies, as they represent a minority of activists choosing to invest with companies to espouse certain political goals.

While negotiating with activist investors in the face of impending shareholder resolutions may stem headaches in the near-term, it only encourages similar behavior in the future. Companies are often alarmed to find that their concessions are touted by activists to other companies to "gull the same

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55 http://www.sec.gov/Archives/edgar/data/310158/000119312513155068/d427782ddef14a.htm#toc427782_39

56 http://www.waldenassetmgmt.com/About/overview

57 See http://www.proxymonitor.org/pdf/pmr_04.pdf; see also http://www.proxymonitor.org/pdf/pmr_06.pdf

58 http://www.asyousow.org/publications/ProxyPreview_2011.pdf

59 http://northstarasset.com/mediacontent/NS4Q06.html ("We are asking socially responsible investors and others who care about sustainability to join us in divesting from ExxonMobil. As shareholder activists, we will retain the minimal number of shares required by law to continue to engage ExxonMobil's management...).

60 For further discussion of NorthStar Asset Management and activist investing related to corporate public policy expenditures, see http://www.campaignfreedom.org/wp-content/uploads/2012/05/CCP-Report-with-ATA.pdf

result."[61] Moreover, concessions made one year invite further demands the next, a domino effect ultimately intended to handcuff management's ability to conduct business.

Litigation

Frustrated by the limited success of other attempts to secure voluntary disclosure, some activists and allied government officials have taken it upon themselves to target the business community through litigation. As New York State comptroller Thomas DiNapoli said when filing one such lawsuit: "We've done the petitions and the letter-writing . . . . We've done shareholder resolutions. Rather than continue to be rebuffed, we're taking this new approach."[62]

DiNapoli and the New York State Common Retirement Fund (NYSCRF) filed a "books and records" lawsuit against Qualcomm in January 2013, alleging that, as a Qualcomm shareholder, the Fund is entitled to documents concerning all of the company's political expenditures and contributions to trade associations and other tax-exempt groups.[63] Rather than fight the lawsuit, Qualcomm reached a settlement with NYSCRF and agreed to disclose the requested material—including its membership payments to various trade and business associations.[64] The *Wall Street Journal* reported that the settlement "is now being used to intimidate other companies to follow or risk a political beating."[65]

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[61] https://id.wsj.com/auth/proxy/refresh?url=http%3A%2F%2Fonline.wsj.com%2Fnews%2Farticles %2FSB10001424052702303552104577438553017191964

[62] http://www.nytimes.com/2013/01/04/nyregion/new-york-comptroller-sues-qualcomm-for-data-on-political-giving.html?_r=0

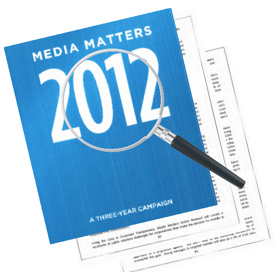
[63] http://www.nytimes.com/2013/01/04/nyregion/new-york-comptroller-sues-qualcomm-for-data-on-political-giving.html?_r=0; see also https://www.osc.state.ny.us/press/releases/feb13/022213.htm

[64] http://investor.qualcomm.com/governance.cfm; see also http://osc.state.ny.us/press/releases/feb13/022213.htm

[65] https://id.wsj.com/auth/proxy/refresh?url=http%3A%2F%2Fonline.wsj.com%2Fnews%2Farticles %2FSB10001424127887323809304578430991458829304

V. The Goal: Silence the Business Community

Despite their narrative of concern for business "risk," in fact the leaders and funders of the movement to force corporate political disclosure are actually working to silence the business community so that they can advance their other policy goals. "The danger with disclosure is that it has ceased to be about information on who supports or opposes which candidate or causes. . . . It is, instead, about identifying political opponents in order to silence them," says Cleta Mitchell, election law attorney at Foley & Lardner LLP.[66] Indeed, speaking at a CRC press event on March 12, 2012, Bob Edgar, the late President of Common Cause, stated his plans were "to organize press conferences and rallies at each of these shareholder meetings" and to "let corporations know that there will be a great cost in playing politics."[67]



Page 82 of Media Matters' Three Year Campaign Uncovers Their "Corporate Transparency" Strategy: "Misrepresent a company's political contribution as a corporate endorsement of everything that a politician has said or done."

For example, Media Matters for America, an organization that also receives funding from Open Society Foundations, has embraced a plan to "aggressively attack" and "create a multitude of public-relations challenges for corporations that make the decision to meddle in political campaigns."[68] The group, which claims to be a "progressive research and information center," seeks to misrepresent a company's political contribution as a corporate endorsement of "everything that a politician has said or done."[69] Media Matters provides a particularly malicious example: if a company supports a candidate that "once voted against an appropriations bill containing funding for special education programs," the groups will work with its "partners" to publicly assault the company "for supporting policies to cease funding education programs for children with special needs."[70] Thus, even though a company may support a pro-business candidate for reasons that have nothing to

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66 http://www.minnesotalawreview.org/wp-content/uploads/2012/11/Mitchell_MLR.pdf

67 http://www.americansunitedforchange.org/page/-/Thowing%20Down%20the%20Gauntlet%20Against%20Corporate%20Money%20in%20Elections%203-12-12.mp3; See also http://www.cbsnews.com/news/groups-offer-25k-reward-to-expose-secret-corporate-donations/

68 *See* Memo from Media Matters for America to Ben Smith, 82 (2011), available at http://dailycaller.com/wp-content/uploads/2012/02/MMFA-2012-full.pdf; *see also The Corporate Disclosure Assault*, WALL ST. J., Mar. 20, 2012; Brad Smith, *Another Union Attack on Corporate Speech*, WALL ST. J., Nov. 10, 2011, at A21.

69 *See* Memo from Media Matters for America to Ben Smith, 82 (2011), available at http://dailycaller.com/wp-content/uploads/2012/02/MMFA-2012-full.pdf; *see also The Corporate Disclosure Assault*, WALL ST. J., Mar. 20, 2012; Brad Smith, *Another Union Attack on Corporate Speech*, WALL ST. J., Nov. 10, 2011, at A21.

70 *See* Memo from Media Matters for America to Ben Smith, 82 (2011), available at http://dailycaller.com/wp-content/uploads/2012/02/MMFA-2012-full.pdf; *see also The Corporate Disclosure Assault*, WALL ST. J., Mar. 20, 2012; Brad Smith, *Another Union Attack on Corporate Speech*, WALL ST. J., Nov. 10, 2011, at A21.

do with a particular social agenda, Media Matters openly acknowledges that it will spin such support into an endorsement of and support for any and all position held by the candidate, as disingenuous as that may be.

NYC Mayor Bill de Blasio founded the Coalition for Accountability in Political Spending (CAPS)

The activists' threats are not hollow, as Target discovered in 2010 when it donated $150,000 to a pro-business organization in its home state of Minnesota.[71] That organization subsequently ran advertisements in support of a pro-business state gubernatorial candidate. After Target's donation was disclosed, CRC member Moveon.org orchestrated a boycott of Target, alleging that Target's contribution was being used to support a candidate who was hostile to gay marriage.[72] By disclosing its political activities, Target subjected itself to increased harassment and intimidation from anti-business groups, even though Target never endorsed the candidate's views on gay marriage. In 2012, Mr. de Blasio commented on Target to a group of CRC members:

> What happened to Target was child's play compared to the strength that all of these organizations can bring to bear against companies that decide they are going to go against the people's will and involve themselves unduly in the political process. . . . We will use every tool, whether it is actions among consumers up to boycotts, whether it's shareholder actions, whether it's work from pension funds—to use the pension funds to direct Corporate America to change its ways—legal action, you name it, it's on the table.[73]

One such "tool" is a shareholder proposal requesting that companies disclose, among other things, lobbying communications. Such proposals were filed at 48 companies this year. The proposals were drafted by the American Federation of State, County and Municipal Employees (AFSCME), and the aforementioned "social investing" firm of Walden Asset Management.[74] In the end, however, "disclosure" often turns out to be a mere tool to make further demands for an end to corporate political engagement. Tim Smith, President of Walden Asset Management, has made clear that his intention is to exert pressure on corporations for their support of those whose views oppose his own, such as the American Legislative Exchange Council (ALEC), an organization of state legislators generally known for pro-business views. On March 5, 2014, Mr. Smith stated:

> Of the companies receiving lobbying proposals, 22 of those companies have a reference in the resolution to the company's involvement with ALEC. . . . It is

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71 http://www.cbsnews.com/stories/2010/07/27/politics/main6717307.shtml?tag=contentMain;contentBody

72 http://www.politico.com/news/stories/0810/41160.html

73 http://www.americansunitedforchange.org/page/-/Thowing%20Down%20the%20Gauntlet%20Against%20Corporate%20Money%20in%20Elections%203-12-12.mp3

74 http://www.proxypreview.org/download-proxy-preview-2014/

> my pleasure to report that over 80 companies have withdrawn, cut their ties, [or will provide] no more funding to ALEC. . . . that pressure will continue.[75]

Other activists have opted to take a more direct approach to intimidating companies. Several companies that have previously elected to negotiate with shareholder groups and disclose their lobbying and public policy expenditures are now faced with shareholder resolutions demanding their directors to "adopt a policy prohibiting the use of corporate funds for any political election or campaign."[76] In fact, this particular proposal has been filed in 2014 at WellPoint Inc., a company that the CPA ranked at the top of its list for political disclosure in the Health Care Provides & Services Industry.[77]

[75] http://vimeo.com/88389247 (see minute 40:00), Tim Smith, Walden Asset Management

[76] https://app.e2ma.net/app/view:CampaignPublic/id:1407858.13001690853/rid:7eced7f09b83348886e10225c5bcb2d0

[77] http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/8047

VI. Conclusion

Activists have been unsuccessful in their attempts to mandate political and policy support disclosures through legislative and regulatory mechanisms; however, they are going to great lengths to pressure corporations to disclose "voluntarily" not only their direct political spending but also membership payments to trade associations and contributions to 501(c) organizations, above and beyond the disclosures currently required by campaign finance and lobbying laws. Even when such voluntary disclosures are agreed to, they as often as not lead to further demands, including demands for an end to political engagement, by non-shareholder activists.

Although many of these activists do not disclose their own memberships and activities, they continue their efforts to force all companies to cease exercising their right to political free speech. Their strategy involves several underhanded tactics, such as manufacturing and perpetuating the myth that "enhanced" disclosure policies are achieving mainstream corporate support. Activists use CPA-sponsored "studies", such as the CPA-Zicklin Index, as leverage in their demands for increased disclosure from public companies. Their goal: to use the disclosed information to organize public relations campaigns against companies that spend money to defend their pro-business interests even though the companies are not endorsing controversial policies.

FACT: 50 companies that spent the most money on lobbying outperformed the S&P 500 for 15 consecutive years

The business community should reject the false narrative that corporate participation in the public debate is "risky" and therefore should be limited. The real risk to sound policy comes when the public and lawmakers to hear only one side. Government policies can have a tremendous effect on the livelihood of public companies, their employees, shareholders, customers and vendors, meaning companies should participate in the policy debate. Despite the clear benefits of corporations having a voice in the political process, a minority consisting of unions and ideologically driven shareholders are trying to chill companies' participation in the public debate, and to force them to yield control of their own voice through onerous disclosure requirements. As activists have made clear, their plan is to push for broad disclosures and then use the disclosures to organize public relations campaigns against companies to the detriment of shareholders who just want their companies to be financially successful.