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How ESG and Election Law Intersect: Putting the ‘S’ in ESG

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In today's interconnected world, the realms of Environmental, Social, and Governance (ESG) and political law have become inextricably entwined, shaping the landscape of responsible business practices and governmental regulations. Join Wiley partners Kevin B. Muhlendorf of the White Collar Defense & Government Investigations Practice and Carol A. Laham of the Election Law & Government Ethics Practice as they dissect how political law is affected by ESG, largely through the avenue of social responsibility. Listen as they discuss shareholder proposals and the power of institutional investors in controlling these votes, an explanation of the CPA-Zicklin Index, and more.

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Election Law & Government Ethics
Environmental, Social & Governance (ESG)
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Transcript

Kevin Muhlendorf

Welcome to another of the Wiley ESG podcasts. For our previous listeners, you know that ESG stands for Environmental, Social, and Governance (ESG), if not welcome. Today I'm excited to have my partner Carol Laham on to discuss with us a really interesting topic. I don't think people think about this as much as Carol does. But how yeah ESG issues and election law intersect. Carol is a partner in our election law practice and a national leader in the political law arena. She is consistently ranked as one of the top practitioners in this space where she advises corporations on how to effectively operate in a very complicated regulatory system. Carol, thanks so much for joining us.

Carol Laham

Oh, thanks for having me, Kevin.

Kevin Muhlendorf

So why don't we dive right in. The first question people are probably wondering, what role does ESG play in the political arena?

Carol Laham

Okay, I'm sure people are wondering because it's a little bit crazy, but there are two common ways for ESG to infiltrate the political process. The most direct way is through shareholder proposals and those happen on a regular basis. And the second way has been through the Center for Political Accountability Zicklin Index. This is known as the CPA-Zicklin Index and that actually is going on right as we speak.

Kevin Muhlendorf

Okay, well great. This is timely then. We'll take those in two steps. Let's talk a little bit about the shareholder proposals. What are what are shareholders intending to accomplish with these things?

Carol Laham

Well, first let's start with the basics, Kevin, which is that shareholder proposals fall under the ‘S’ in the ESG. That is they're viewed as proposals related to Social Responsibility. So, in the past five or six years these social or policy proposals have ranged from 20% to 50% of all shareholder proposals. And in terms of what they hope to accomplish, they're looking primarily for public disclosure of political and lobbying related spending.

Kevin Muhlendorf

Right. So, I guess anyone can do one of these shareholder proposals, but I've never done one, who typically is doing these things? Well, they do have to own a certain percentage of the shares before they can do it, but in terms of who's doing it and they vary. It's anywhere from a social investing fund, to a religious organization, to entities with ties to organized labor such as the AFL CIO pension fund, and others include the New York State common retirement fund, whose sole fiduciary is the state controller, and he takes an active role in sponsoring political spending or lobbying related proposals. And in fact, if you go back 10 years now to 2013, the New York controller went as far as to sue Qualcomm in Delaware State Courts, seeking access to the company's political spending records. As a result, Qualcomm quickly settled agreeing to publicly disclose certain of its donations and ever since then these shareholder proposals have been very popular.

Kevin Muhlendorf

Yeah, and we're going to talk a little bit later in the podcast about the way that companies do those disclosures, but let's talk about what kind of public disclosure of political and lobbying related spending are these proposals seeking?

Carol Laham

So, the proposals actually cut a very wide swath. So, the first thing that they're looking for is corporate contributions to candidates, political parties, and PACs or Super PACs, now. The next thing they're looking for is whether corporations are making independent expenditures, and for those who don't know the lingo, an independent expenditure is an expenditure that expressly advocates the election or defeat of a candidate. And these proposals typically don't want corporations to be making independent expenditures even though they're perfectly legal. The next thing is they're looking for corporate contributions to ballot initiative committees. And ballot initiative committees interestingly enough are not even political committees under the law. They're actually, usually a 501C4 Committee, which is a social welfare organization.

Next, they're looking for payments to trade associations that might be used for political or lobbying purposes. And as you know, many corporations belong to multiple trade associations and so the whole point of the proposals basically is to force a corporation to assess whether it should belong to a trade association, and then whether the amount of money that's being spent by the trade association for political purposes, should be counting against the corporation, basically. Payments to 501C4 organizations, which I mentioned are social welfare organizations, again that can be used for political or lobbying purposes. And these 501C4 organizations are things like the Sierra Club or the National Rifle Association, which are you know on both sides of the political spectrum, but they can engage in a limited amount of political activity and an unlimited amount of lobbying activity. So, these shareholder proposals want to know exactly how much of this activity corporations are engaged in and then the newest and sort of most dangerous, in my mind, is that they're looking, for what they call, general alignment between political giving and the social positions a company's taken. Specifically in the environmental area, and as it relates to Diversity. So, if a company has put out a statement on diversity or on its environmental goals, and it gives to a candidate that doesn't seem to align with that, these shareholder proposals are challenging the companies to prove why such a contribution complied with the policy.

Kevin Muhlendorf

Yeah, that's a really interesting area. I mean, if you if you spin it out a little bit, and we'll talk about this in a bit, about how public disclosures in your SEC filings about what you're doing and does it match what you say you're doing, are you are you doing what you say you're doing, is that going to lead people down the SEC enforcement route? So, what other goals do the shareholders wish to accomplish?

Carol Laham

Well, the most significant goal is to ensure that there's a board approval of the company's political activities. Or even better, that some proposals actually wish to shut down the political activity altogether. But in general, the proposals seek to identify the senior managers involved in the political giving, besides all of this disclosure that we just discussed.

Kevin Muhlendorf

So, is this small-time investors or do institutional investors care about these proposals?

Carol Laham

Oh no, institutional professor definitely care about the proposals. So, several years ago ISS started to support the proposals. Although their recommendations are more nuanced than straightforward support. So, they really don't want the adoption of any proposals that would be burdensome to a company without providing the shareholders any meaningful information. And they don't really want companies to be put in a competitive disadvantage, visa v others in their industry, so that's sort of where ISS stands on things. In more recent years, BlackRock has definitely taken an interest in these proposals, and quite frankly, once they got into the game, that's when some of these proposals started passing. Although I don't know where we are in the arc of whether these proposals are going to continue to pass or whether companies are really being more politically savvy and you know engaging in more strategic political activity than they had before.

Kevin Muhlendorf

Ok, you know I think back to the movie Wall Street and there's this scene where he's fighting the shareholder proposals and I wonder is that what is that what's going on here? Are there people standing up at these shareholder meetings and standing up at annual meetings are saying, I want to know about this diversity initiative, is that is that how this goes?

Carol Laham

You know there are certain people that before the game is played, they basically say hey, you need to start playing with us. You know. Here's the proposal we're going to submit to you, and unless you start providing disclosure, we are really going to come to your meeting and we are going to push for this. And what happens is, because it's no longer a given that the proposals are going to lose. It used to be a given that they would lose, but in recent years several have passed, so companies are very willing to negotiate with shareholders in order to have them withdraw the proposals. And of course, that means giving something up on the political disclosure front or on the giving front. So, others do fight the proposals but in recent years several, as I mentioned, have garnered the 50% plus one needed to pass the proposal. So, companies just can't afford to ignore them.

Kevin Muhlendorf

Okay, let's talk about this CPA Zicklin Index you mentioned a little bit earlier that measures political giving and ESG.

Carol Laham

So, the CPA Zicklin Index now surveys the Russell 1,000 and when it started it was the top 50 companies, and then it was the top 100, and then it was the top 200, and then it was the top 500, so now they've expanded out to a 1,000 companies. And they ask many of the same questions that this shareholder proposals are interested in and at least a quarter of the questions actually focus on the board, and the role of the board in the company's political giving and lobbying policies. Now CPA Zicklin isn't necessarily interested in not having a company engage. Politically they just want to know what the engagement is. So again, they want to know, are you making corporate contributions? They don't actually care if you make them and you might know at the federal level corporate contributions are prohibited as direct contributions to candidates. But there are 30 states that allow direct corporate contributions. So they want to know are you making the contributions, are you making those independent expenditures, who are you giving to in terms of trade associations and 501C4's? It's a panoply of questions. There's 24 questions you can go online and find the questions that they ask.

And then many of the rest relate to whether and how much the company is giving to trade associations 527 political committees, 501C4 committees. It's a broad, a broad swath.

Kevin Muhlendorf

Okay well, what action items should companies operating in this sphere take away from this focus on ESG? It seems like it's really ramping up over the last few years, so what should companies be doing?

Carol Laham

It definitely is ramping up. So, I mean number one, confirm that the company does actually have a recently reviewed political contributions policy. And according to a recent study, 68% of companies build DEI into the company's broader business plans, and PAC Boards are also taking notice of these DEI initiatives. So companies need to review their business code of conduct because there's typically something in there about political contributions. Review their code of ethics. Decide much how much disclosure is right for the company and decide how DEI should be reflected in your political programs.

Kevin Muhlendorf

So, I've seen some companies go ahead, and go so far as to post their ESG policies online and in those policies specifically discuss how they engage on societal issues. Do you think, you know from where you sit, do you think this is a good idea and what are the positives and pitfalls of doing so?

Carol Laham

It's a really a double-edged sword. If you're going to publicize that sort of information as many companies do, you need to make sure that number one it's accurate. So what I'm finding in dealing with these disclosures, is that there are different levels of the company that have different views of all of this. So, you have your C-Suite, you have your communications folks, and then you have your political folks, and they all need to talk to each other, because they don't always talk to each other. And so, typically frankly, the government affairs folks who are the ones making the political contributions are caught totally off guard by something that happens in the C-Suite. So first of all, they all need to sort of talk internally. And you know, I'm sure you've seen Kevin, that where the danger is for public companies and the SEC or shareholder actions related to the accuracy of the statements. So if you're going to publicize the information make sure it's accurate.

Next, explaining in any disclosures that large entities have an interest in making sure that their interests are advanced and can help explain that large companies and small, have a right and some might say obligation to engage in political discourse.

So here it's really a little bit complicated. So for instance, if you're in the transportation industry you of course want a voice in the legislation related to fuels or roads and environmental issues. And supporting the right vehicle, no pun intended, to advocate those positions is important to further those goals. You need to be prepared to defend yourself as a company for why you're doing that. And third, the entities often do this through their trade associations and it's really important in an efficient way to do this for the company, right, because they're all joining together. They're coming up with a single policy on something. But one disclosure, one might consider, is that supporting a trade association doesn't mean you always support everything that the organization is doing. And this is actually a flashpoint for a lot of companies because they do belong to trade associations that don't agree with them on every single issue, but they belong because the primary issue is the one that they do agree on, or many of my companies, clients, will tell you that they need a voice in the industry position and if they don't belong to the trade association, then the trade association can go off and do things that's not in the interest of the company. So it's more in their interest to belong, than not belong.

Kevin Muhlendorf

Well this just sounds like a tremendously difficult and fraught area for companies to work through. It's good that you're there for them.

Carol Laham

We do our best.

Kevin Muhlendorf

We've been talking about this problem with a U.S. focus, but this isn't just a U.S. issue is it? I mean this is this a global thing are other countries worrying about this?

Carol Laham

It is definitely a global thing, and it's becoming more and more of a global thing. You'll have seen in the past few years something that we didn't focus too much on here, is that more countries are coming online with lobbying disclosure for instance. And so, you know any sort of disclosure that can be seen by companies on the international level, becomes more challenging because of the different levels and laws of each of these countries. So it really does have to be, you have take a global perspective. There are lots of multinational organizations that have put out guidance on responsible political lobbying and addressing issues of transparency. And I know that's an area of importance to you Kevin, which is making sure that U.S, entities don't run afoul of the Foreign Corrupt Practices Act or any other anti-corruption laws and their activities.

Kevin Muhlendorf

Yeah, you know it's interesting we're talking about making these donations, but one of the things where you can really get yourself in trouble, is donation to a foreign government, foreign government actor. That's one of the red flags that we often advise people against and so, if they're if you're being pressured to do that, this is something I think to your point Carol, about having a sort of holistic view in the company of what's going on and what's being said is really tremendously important, to make sure people stay have trouble.

Well listen Carol, thank you so much for doing this. This was really interesting and informative and I think, people think in ESG they think, you know carbon emissions but don't think about the sort of practical way that and that businesses are going about dealing with these things. And both from the internal and external pressures they're getting. So I hope everyone will stay tuned in our next podcast we're going to build on an earlier discussion we had surrounding the SEC's case against a Brazilian minor called Vale and how that settlement is going to influence ESG activities going forward. So, thanks for listening and I look forward to talking to you again. Goodbye everybody.