

Market Trends 2020/21: Disclosure on Political Contributions

A Practical Guidance® Practice Note by
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This practice note discusses market trends on how public companies' political contributions, or "political spending," is perceived to be intertwined with environmental, social, and governance (ESG) issues, and provides illustrative disclosures regarding political contributions. This practice note concludes with recommendations on how to prepare and enhance such disclosures.

Political Contributions as ESG Issue

Over the years, there have been calls from legal academics, investors, and activist shareholders for the Securities and Exchange Commission (SEC) to adopt rules requiring public companies to disclose the use of corporate resources for political activities. The objective of these efforts is to empower investors with relevant information to (1) adequately assess "congruency between political contributions and company values," (2) understand the potential risks of these political contributions before they materialize, and (3) ultimately hold corporate managers accountable for these risks.

The importance of these issues is highlighted by recent examples in which activist shareholders have asserted that a company's political expenditures were inconsistent with its publicly disclosed ESG policies and values. For example, on January 25, 2021, shortly after a group of

protesters had stormed the U.S. Capitol, 24 officials from public pension funds wrote a [letter](#) to Larry Fink, the chief executive officer of BlackRock, the largest money manager in the United States, demanding that the company withhold all corporate political contributions to U.S. Congressmen who opposed the certification of the election of President Biden and publicly disclose all of its direct and indirect corporate political spending. The letter further noted that, despite the fact that BlackRock had established strict disclosure requirements for its portfolio companies on many ESG topics, including corporate political spending, "BlackRock's disclosure of its own activities on its website falls short of the expectations BlackRock set for portfolio companies," and further claimed that BlackRock had failed "to demonstrate leadership in its own practices."

Similarly, on April 8, 2021, a group of activist investors in JPMorgan Chase & Co. submitted a shareholder proposal that the company produce "an annual report analyzing the congruency of political and electioneering expenditures during the preceding year against publicly stated company values and policies." The investor group noted in the proposal that the company had donated hundreds of thousands of dollars in the preceding year to politicians with records of opposition to proactive climate policy, LGBTQ rights, and reproductive rights, which seemingly contradicted the company's public statements in support of those same issues.

The recent increase in shareholder activism relating to corporate disclosure of political contributions has become a focus for the SEC. In her March 2021 speech, then-acting SEC Chair Allison Herren Lee stated that "political spending disclosure is inextricably linked to ESG issues" and "key to any discussion of sustainability." During his nomination hearing on March 2, 2021, before the U.S.

Senate Committee on Banking, Housing, and Urban Affairs, SEC Chairman Gary Gensler, when asked by U.S. Senator Bob Menendez whether corporate political spending is material information that should be disclosed to investors, stated that he would be “grounded . . . in the materiality standard that drives all those decisions on disclosure.” Chairman Gensler also noted that nearly 80 shareholder proposals during the previous proxy season had addressed lobbying spending and political contributions and stated that disclosure of political contributions was an issue that the SEC “should consider in light of the strong investor interest.”

Despite the foregoing, the SEC has yet to propose, let alone adopt, any rule on this topic because it is prevented by the Consolidated Appropriations Act of 2021 from using its allocated funds to “finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions, contributions to tax exempt organizations, or dues paid to trade associations” (H.R. 133, Pub. Law No. 116-260, Sec. 631). Consequently, there is limited guidance as to how public companies should disclose their political contributions.

For further information on public company disclosure in general, see [Public Company Periodic Reporting and Disclosure Obligations](#) and [Periodic and Current Reporting Resource Kit](#).

Disclosure on Political Contributions Included in MD&A

Item 303(a) (17 C.F.R. § 229.303) of Regulation S-K, management’s discussion and analysis of financial condition and results of operations (MD&A), requires a discussion of a company’s financial condition and changes in financial condition and results of operations, as well as any known trends or factors that management believes to be important to the company’s liquidity, capital resources, and results of operations. This includes known trends, commitments, events, or uncertainties that will likely have a material impact on the company’s business. MD&A should not include merely generic or boilerplate disclosures but should reflect how particular facts and circumstances affect the company and its business.

For more information about MD&A generally, see [Management’s Discussion and Analysis of Financial Condition and Results of Operations](#) and [Management’s Discussion and Analysis Section Drafting Checklist](#).

A number of public companies have disclosed, in the MD&A section of their quarterly and annual reports, their expenses from lobbying activities and a general description of those activities. For example, several companies discuss lobbying expenditures generally in support of state-level legislation and ballot measures but did not identify the causes or issues to which these lobbying activities related or the positions the companies took regarding those causes or issues. These disclosures also generally did not identify any political candidates as recipients of corporate political contributions.

The following are some examples of political contribution disclosures included in the MD&A section of recent periodic reports.

Executive Summary

- “FirstEnergy is making significant changes in its approach to political and legislative engagement and advocacy, through stopping all contributions to 501(c)(4) organizations, the pause of other political disbursements, including from the FirstEnergy Political Action Committee, limiting participation in the political process, suspending or terminating various political consulting relationships, and adding additional oversight and significantly more robust disclosure around political spending to provide increased transparency.” *FirstEnergy Corp., Form 10-Q filed October 28, 2021 (SIC Code 4911—Electric Services)*

Results of Operations

- “Other expenses, net consists of . . . (ii) non-recurring expenses relating to lobbying efforts and legal expenses in Pennsylvania and lobbying efforts in Missouri” *Accel Entertainment, Inc., Form 10-Q filed November 3, 2021 (SIC Code 7900—Services—Amusement & Recreation Services)*
- “There was an increase in outside and professional services of \$0.5 million due to higher legal and lobbying expenses as well as additional cost for consultants to implement new software solutions.” *WM Technology, Inc., Form 10-Q filed August 13, 2021 (SIC Code 7372—Prepackaged Software)*
- “During the second quarter of 2020, we recognized \$0.5 million [in] Colorado legislation lobbying expenses These expenses are included in Other operating items, net in the Consolidated Statement of Operations.” *Monarch Casino & Resort Inc., Form 10-Q filed August 6, 2021 (SIC Code 7011—Hotels and Motels)*
- “General and administrative expenses increased \$5.9 million, or 8.2%, to \$77.9 million for the year ended December 31, 2020 compared to \$71.9 million for

the year ended December 31, 2019. The increase was primarily attributable to political contributions made for statewide ballot measures.” *Hudson Pacific Properties, Inc., Form 10-K filed February 22, 2021 (SIC Code 6500—Real Estate)*

- “General and administrative expenses decreased by approximately \$4.0 million, or 17.7%, for the three months ended September 30, 2020 compared to the three months ended September 30, 2019 partially offset by [an] increase of \$2.4 million primarily related to political contributions for statewide ballot measures.” *Kilroy Realty Corporation, Form 10-Q filed October 29, 2020 (SIC Code 6798—Real Estate Investment Trusts)*
- “The \$214,038 decrease in professional and legal fees primarily resulted from a decrease in legal fees and costs associated with fundraising as well as lobbying expenses.” *Helix TCS, Inc., Form 10-Q filed May 15, 2020 (SIC Code 7791—Security and Investigation Services)*
- “The primary reasons for the decrease [in general and administrative expenses] in the current period was due to . . . offset by . . . a \$111,000 increase in lobbying expense....” *Arcimoto, Inc., Form 10-K filed April 14, 2020 (SIC Code 3751—Motorcycles, Bicycles, and Parts)*

Disclosures on Political Contributions Included in Risk Factors

Item 105 (17 C.F.R. § 229.105) of Regulation S-K requires that a registrant provide a description of the material risks that make an investment in the registrant or any securities being offered speculative or risky its business and how each risk affects the registrant or an investment in such securities. The disclosure should be written in plain English and should not comprise sweeping general statements applicable to any issuer or offering.

Disclosures in the Risk Factors section generally focused on the potential adverse reputational effects associated with corporate political contributions by the company or any of its affiliates or portfolio companies, particularly if such contributions were incompatible with the political beliefs or policies of the company’s shareholders or customers. For further information on risk factor disclosure, see [Top 10 Practice Tips: Risk Factors](#) and [Market Trends 2020/21: Risk Factors](#).

Below are some examples of political contribution disclosures included in the Risk Factors section of recently filed annual reports on Form 10-K.

General Disclosure

- “We, Other Blackstone Accounts and their portfolio entities may, in the ordinary course of our or their respective businesses, make political contributions to elected officials, candidates for elected office or political organizations, hire lobbyists or engage in other permissible political activities with the intent of furthering our or their business interests or otherwise. In certain circumstances, there may be initiatives where such activities are coordinated by Blackstone for the benefit of us, Other Blackstone Accounts and/ or their portfolio entities. The interests advanced by a portfolio entity through such activities may, in certain circumstances, not align with or be adverse to our interests, the interests of our stockholders or the interests of Other Blackstone Accounts or their other portfolio entities. The costs of such activities may be allocated among us, Other Blackstone Accounts and their portfolio entities (and borne indirectly by our stockholders). While the costs of such activities will typically be borne by the entity undertaking such activities, such activities may also directly or indirectly benefit us, Other Blackstone Accounts, their portfolio entities or Blackstone. There can be no assurance that any such activities will be successful in advancing our interests or the interests of an Other Blackstone Accounts or a portfolio entity or otherwise benefit such entities.” *Blackstone Real Estate Income Trust, Inc., Form 10-K filed March 17, 2021 (SIC Code 6798—Construction & Real Estate)*
- “Maintenance of our reputation depends not only on our success in maintaining our value-focused culture and controlling and mitigating the various risks described herein, but also on our success in complying with campaign finance and other regulations relating to our client base or lobbying efforts, identifying and appropriately addressing issues that may arise in areas such as potential conflicts of interest, anti-money laundering, client personal information and privacy issues, record-keeping, regulatory investigations and any litigation that may arise from the failure or perceived failure of us to comply with legal and regulatory requirements. If our reputation is negatively affected, by the actions of our employees or otherwise, our business and, therefore, our operating results may be materially adversely affected.” *Amalgamated Financial Corp., Form 10-K filed March 15, 2021 (SIC Code 6022—State Commercial Banks)*

- “The SEC, the Financial Industry Regulatory Authority (“FINRA”), the Municipal Securities Rulemaking Board, as well as certain U.S. states, localities, and public instrumentalities, have adopted “pay-to-play” laws, rules, regulations and/or policies which restrict the political activities of investment managers that seek investment from or manage funds on behalf of state and local government entities. Such restrictions can include limits on the ability of . . . certain covered employees of the adviser or covered political action committees controlled by the adviser or its employees to make political contributions to or fundraise for certain state and local candidates, officials, and political organizations, as well as obligations to make regular disclosures about such political activities to federal, state, or local regulators and to use only parties that are subject to equivalent political activity restrictions in soliciting investment from state and local government entities. In addition, many pay-to-play regimes (including the SEC pay-to-play rule for investment advisers) impute the personal political activities of certain executives and employees, and in some instances their spouses and family members, to the manager for purposes of potential pay-to-play liability. Violation of pay-to-play laws can lead to the loss of management fees, rescission of current commitments to our funds, and a loss of future investment opportunities, and issues involving pay-to-play violations and alleged pay-to-play violations often receive substantial media coverage and can result in regulatory [inquiries] from federal, state or local regulators. Any failure on our part or a party acting on our behalf to comply with applicable pay-to-play laws, regulations or policies could expose us to significant penalties and reputational damage, and could have a material adverse impact on us.” *Apollo Global Management, Inc., Form 10-K filed February 19, 2021 (SIC Code 6282—Investment Advice)*
- “Our ability to attract and retain consumer and small business Card Members and corporate clients is highly dependent upon the external perceptions of our . . . trustworthiness, business practices, . . . response to political and social issues . . . and other subjective qualities Negative public opinion could result from actual or alleged conduct in any number of activities or circumstances, including . . . conduct by our colleagues and policy engagement, including activities of the American Express Company Political Action Committee, and from actions taken by regulators or others in response thereto. Discussion about such matters in social media channels can also cause rapid, widespread reputational harm to our brand.” *American Express Company, Form 10-K filed February 12, 2021 (SIC Code 6199—Finance Services)*
- “Our political advocacy activities may reduce our customer count and sales. We believe our ability to profitably operate our business depends, in part, upon our access to natural and organic products and dietary supplements. We attempt to protect our interest in this access through ongoing and proactive political advocacy campaigns, including participation in education programs, petitions, letter writing, phone calls, policy conferences, advisory boards, industry groups, public commentary and meetings with trade groups, office holders and regulators. We may publicly ally with and support trade groups, political candidates, government officials and regulators who support a particular policy we consider important to our business and in alignment with our principles regarding access to natural and organic products and dietary supplements. We may, from time to time, publicly oppose other trade groups, candidates, officeholders and regulators whose point of view we believe will harm our business or impede access to nutritious food and dietary supplements. In some cases, we may lose customers and sales because our political advocacy activities are perceived to be contrary to those customers’ points of view, political affiliations, political beliefs or voting preferences.” *Natural Grocers by Vitamin Cottage, Inc., Form 10-K filed December 20, 2020 (SIC Code 5411—Retail—Grocery Stores)*

Disclosures on Political Contributions Included in the Business Section

Item 101(a) (17 C.F.R. § 229.101) of Regulation S-K requires a reporting company to describe, and disclose material information necessary to understand, the general development of its business. Disclosures in the Business section generally focus on the activities of the company’s government affairs office or affiliated political action committee (PAC) through which the company conducts political engagement and advocacy. Such disclosures also often mention whether the company has engaged lobbyists on its behalf. For more information on the Business section requirements, see [Form 10-K Drafting and Review – Overview of Major Disclosure Items](#) and [Form 10-K Form Check: Checklist](#).

Set forth below are some examples of political contribution disclosures included in the Business section of recent Form 10-K filings.

General Disclosure

- “Our Government Solutions customers are typically local government agencies, and our operations within this segment are therefore subject to state and local procurement laws pertaining to gifts and entertainment, payments of commissions and contingency fees, conflicts of interest, licensing and permitting requirements and other matters. These laws are overseen by different government agencies, depending on the jurisdiction, including departments of procurements services, contracting offices and offices of inspector general. In large municipalities, many of which have their own offices of the inspector general, these laws and regulations tend to be much more detailed and impose greater restrictions. To successfully navigate this regulatory landscape, we have a dedicated government relations team that works with state legislators and local authorities, often with the help of lobbyists and consultants, to track and help support favorable camera-enforcement safety and toll-related legislation. Through this network, we have a presence in every state in which our Government Solutions segment does business. These lobbying activities are subject to state and local lobbying regulations and registration requirements.” *Verra Mobility Corporation, Form 10-K filed April 6, 2021 (SIC Code 4700—Transportation Services)*
- “In November 2017 we formed the Cumberland Health and Wellness Political Action Committee (PAC). The objective of the PAC is to support candidates and policies that are consistent with Cumberland’s mission of advancing patient care. The PAC’s activities will be at the local, state and federal level and conducted in a bi-partisan manner. The initial committee membership is comprised of Cumberland Pharmaceuticals employees. The PAC received initial funding from us and future funding will include voluntary individual contributions from Cumberland Pharmaceuticals directors and employees.” *Cumberland Pharmaceuticals, Inc., Form 10-K filed March 12, 2021 (SIC Code 2834—Pharmaceutical Preparations)*
- “We maintain a global Government Affairs presence, headquartered in Washington, D.C., to actively monitor and advocate on myriad legislation and policies that may potentially impact the Company, both on a domestic and an international front. The Government Affairs office works closely with members of Congress and committee staff, the White House and Administration offices, state Governors, legislatures and regulatory agencies, embassies and global governments on issues affecting our business. Our proactive approach and depth of political and policy expertise are aimed at

having our positions heard by federal, state and global decision-makers to improve patient care and to advance our business objectives by educating policymakers on our positions, key priorities and the value of our technologies. The Government Affairs office manages our political action committee and works closely with trade groups on issues affecting our industry and healthcare in general. The Government Affairs office also advocates for public policy that benefits our employees, and the patients we serve and supports the communities in which we live.” *Boston Scientific Corporation, Form 10-K filed February 23, 2021 (SIC Code 3841—Surgical & Medical Instruments & Apparatus)*

- “Lobbyists, as part of the Company’s governance, are only engaged under the remuneration principle of a success fee basis (lobbying activities for obtaining concession agreements with governments), with certain exceptions of financial compensation, whereby BioCrude (under careful consideration of circumstances and utility) will cover some of the travel expenses of same.” *BioCrude Technologies USA, Inc., Form 10-K/A filed February 16, 2021 (SIC Code 4953—Refuse Systems)*

Political Contributions Disclosure Enhancements

There has been increasing interest from regulators and demand from investors for more robust political contributions disclosure by public companies to assist the investing public in evaluating the potential risks stemming from their or their PACs’ social and political priorities and spending. The following steps may be helpful in preparing or enhancing political contributions disclosures in SEC-filed documents:

- **Ascertain and disclose whether the company currently engages, or is likely to engage, in political spending and which corporate priorities it seeks to promote through its activities.** These disclosures should not only include the amounts spent or to be spent on political contributions and/or lobbying, but also identify the target issues, advocacies, agenda, political campaigns, or legislation for which such expenditures were or will be made.
- **Describe how the company decides to initiate and discontinue political contributions.** A company should specify if an approval process for political contributions is in place; and, if so, whether it is conducted by a committee of executives or other employees or by or subject to the oversight of the board of directors. It should consider disclosing how and why a political

organization is chosen to receive contributions and the extent to which it will contribute to the organization's target issues, advocacies, agenda, and campaign. If a company decides to stop contributing to a particular organization or to contribute to an additional organization, it should consider disclosing the reasons for any such change.

- **Disclose the business risks and impacts associated with political contributions.** A company should consider identifying which parts of its business or operations it expects will be affected by its political contributions. It should also estimate how its political contributions will affect that business segment and for how long. It should focus not just on the potential negative effects on financial condition, operating results, and cash flows but should also underscore any favorable effects its political contributions may have on the company's business and operations.
- **Disclose the political benefits or backlash the company receives as a result of its political contributions and how it intends to manage these consequences.** A company that contributes to political organizations may face lawsuits by activist shareholders, employee

dissatisfaction, or disruptions to supplier relationships based on political disagreements. However, political contributions may also enable a company to obtain a more favorable regulatory environment to promote public perception and the company's business. A company should consider disclosing the impacts of its political contributions and any plans in place to address these impacts.

- **Mention if a company has control or influence over any employee's political activities or affiliations.** A company may choose to disclose if it operates in a business environment, or has any policy, arrangement, or activities that may constitute control or influence over an employee's political activities or affiliations. For example, registered investment advisers and municipal advisors that seek investment from or manage funds on behalf of state and local government entities frequently disclose that they are regulated by the "pay-to-play" rules of the SEC, FINRA, or the Municipal Securities Rulemaking Board, which require such companies to restrict political contributions and fundraising activities by their employees to and on behalf of certain state and local candidates, officials, and political organizations.
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Anna T. Pinedo, Partner, Mayer Brown LLP

Anna Pinedo is a partner in Mayer Brown's New York office and co-leader of the Global Capital Markets practice. She concentrates her practice on securities and derivatives. Anna represents issuers, investment banks/financial intermediaries and investors in financing transactions, including public offerings and private placements of equity and debt securities, as well as structured notes and other hybrid and structured products.

She works closely with financial institutions to create and structure innovative financing techniques, including new securities distribution methodologies and financial products. She has particular financing experience in certain industries, including technology, telecommunications, healthcare, financial institutions, REITs and consumer and specialty finance. Anna has worked closely with foreign private issuers in their securities offerings in the United States and in the Euro markets. She also works with financial institutions in connection with international offerings of equity and debt securities, equity- and credit-linked notes, and hybrid and structured products, as well as medium term note and other continuous offering programs.

In the derivatives area, Anna counsels a number of major financial institutions acting as dealers and participants in the commodities and derivatives markets. She advises on structuring issues as well as on regulatory issues, including those arising under the Dodd-Frank Act. Her work focuses on foreign exchange, equity and credit derivatives products, and structured derivatives transactions. Anna has experience with a wide range of transactions and structures, including collars, swaps, forward and accelerated repurchases, forward sales, hybrid preferred stock and off-balance sheet structures. She also has advised derivatives dealers regarding their Internet sites and other Internet and electronic signature/delivery issues, as well as on compliance matters.

Anna regularly speaks at conferences and participates in panel discussions addressing securities law issues, as well as the securities issues arising in connection with derivatives and other financial products. She is the co-author of the leading capital markets treatise, *Corporate Finance and the Securities Laws*, published by Wolters Kluwer (6th Ed., updated 2020); co-author of *A Deep Dive Into Capital Raising Transactions*, published by the International Financial Law Review (2020); co-author of *JOBS Act Quick Start* (International Financial Law Review, 2013; updated 2014, 2016); contributor to *OTC Derivatives Regulation Under Dodd-Frank: A Guide to Registration, Reporting, Business Conduct, and Clearing* (Thomson Reuters, first ed. 2014, second ed. 2015, third ed. 2016, fourth ed. 2017); co-author of *Considerations for Foreign Banks Financing in the US* (International Financial Law Review, 2012; updated 2014, 2016); co-author of *Liability Management: An Overview* (International Financial Law Review, 2011, updated 2015); co-author of *Structuring Liability Management Transactions* (International Financial Law Review, 2018); co-author of *Covered Bonds Handbook*, published by Practising Law Institute (2010, updated 2012-2014); co-author of the treatise *Exempt and Hybrid Securities Offerings*, published by Practising Law Institute (2009, second ed. 2011, updated 2014, third ed. 2017); and co-author of *BNA Tax and Accounting Portfolio: SEC Reporting Issues for Foreign Private Issuers* (BNA Accounting Policy and Practice Series, 2009, second ed. 2012, third ed. 2016, fourth ed. 2020). Anna is also a contributing author to *Broker-Dealer Regulation* (2011, second ed. 2012, updated 2020), published by Practising Law Institute. She co-authored "The Approaches to Bank Resolution," a chapter in *Bank Resolution: The European Regime* (Oxford University Press, 2016). Anna contributed to *The Future of Bank Funding and Capital: Solutions for Issuers, Opportunities for Investors* (IFR Market Intelligence, 2009). Additionally, Anna co-authored "The Ties that Bind: The Prime-Brokerage Regulation," a chapter in *Global Financial Crisis* (Globe Law and Business, 2009); "The Law: Legal and Regulatory Framework," a chapter in (Bloomberg, 2006); and "The Impact Security: Reimagining the Nonprofit Capital Market," a chapter in *What Matters: Investing in Results to Build Strong, Vibrant Communities* (Federal Reserve Bank of San Francisco and Nonprofit Finance Fund, 2017). Anna is a contributor to Practising Law Institute's "BD/IA: Regulation in Focus" blog.

Anna is a member of the American Bar Association's (ABA) Committee on the Federal Regulation of Securities, a member of the subcommittee on Disclosure and Continuous Reporting, chair of the subcommittee on Securities Registration, chair of the subcommittee on Annual Review, and a member of the task force on the future of securities regulation.

She has participated in the drafting committee for the ABA's comment letters on such topics as securities offering reform, revisions to the definition of accelerated filer and smaller reporting company, amendments to the accredited investor definition; amendments to the exempt offering framework; and various JOBS Act-related and disclosure effectiveness related matters. Anna also is a member of the ABA Committee on the Regulation of Futures and Derivatives Instruments. Anna is a chair of the Structured Products Association Legal, Regulatory and Compliance Executive Committee. She is a member of the Mortgage Bankers Association's Mortgage REIT Council and a member of the MBA's Secondary & Capital Markets Committee.

Anna is an adjunct professor at the George Washington University School of Law and member of the George Washington University Center for Law, Economics & Finance Advisory Board. She is a member of the Visiting Committee of the Law School of the University of Chicago. Anna was a member of the University of Chicago Legal Forum during her time at the University of Chicago Law School.

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