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Why Dark Money Is Bad Business

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Boston — IT'S only May, but this presidential election is on track to be one of the most expensive ever. So far two-thirds of election dollars have largely come from anonymous corporate donations, funneled through what have been referred to as "dark money" nonprofit groups that freely engage in electoral and legislative politics, but don't have to disclose their donors, expenditures or even their members.

One of the most promising strategies to stem the tide of corporate dark money is a proposed rule at the Securities and Exchange Commission that would require public companies to report the amounts and recipients of their political spending. The rule has received a groundswell of support from a bipartisan group of former S.E.C. commissioners, state treasurers and law professors, and has generated more than one million public comments.

Defenders of the status quo argue the companies are simply exercising their right to free speech; critics contend that such speech, when anonymous, does immense harm to the democratic process.

But as lawyers who specialize in investor rights, we see another critical, nonpartisan reason to support the rule: When it comes to political spending, companies are often not as informed as one might think — especially when it comes to dark money.

By mandating disclosure, the rule would allow investors to serve as a potential check on risky political donations, and help investors determine whether a company's political spending habits make its shares a good investment in the first place.

In theory, a company gives money to influence politics in its favor. But there are countless examples where dark-money spending has undermined their business interests. In fact, giving to dark-money groups may be the riskiest kind of political spending, because companies often have no idea who else is giving, and whether their interests are in competition.

For example, in 2010 Target, a company that supports gay rights and has openly gay employees, donated $150,000 to a Minnesota organization called MN Forward, which advocates pro-business tax and economic development policies. But MN Forward ran TV ads supporting a candidate for governor who sought a state constitutional amendment banning same-sex marriage.

When news about the donation came to light, the company faced an employee backlash and a boycott from consumers that ultimately resulted in a personal apology from Gregg Steinhafel, Target's chief executive, and the formation of a committee to review the company's political spending.

That same year, the Pharmaceutical Research and Manufacturers of America, a trade association whose members include major manufacturers of contraceptive products such as Merck and Johnson & Johnson, gave a total of $4.8 million to two nonprofits, the American Action Network and the American Future Fund, because they promoted limited government. Both organizations, however, used the money to help elect lawmakers who voted to eliminate funding for access to contraceptives through programs like Title X and Planned Parenthood.

A number of corporations had also placed their business interests at risk as members of the American Legislative Exchange Council, until they resigned in 2014. For instance, while Google was devoting significant resources toward developing green energy technologies, its ALEC membership dues were helping campaigns seeking to gut renewable energy standards.

Why aren't companies more careful? One major reason is that the very nature of dark-money giving means that investors have virtually no information about it, and therefore cannot hold companies accountable for their mistakes.

Political spending is considered an ordinary business expense under corporate law, which means that companies have no obligation to disclose it to shareholders (and rarely do so voluntarily). It is therefore impossible for investors to track dark-money spending, at best learning about it long after the fact from watchdog groups and investigative journalists.

The rule wouldn't restrict the companies' right to give money, and there may be instances where political spending is a smart move. For example, a company may reasonably believe that giving to an organization that opposes some of its products is worthwhile because the organization successfully lobbies for lower corporate tax rates.

Beyond the risk to business interests, investors should have a right to know whether their money is going toward politicians, legislation or causes that they support or oppose, as union members already have. More and more investors are choosing to make decisions on that basis: Between 2012 and 2014, socially responsible investing in the United States increased by 76 percent, from $3.74 trillion to $6.75 trillion.

The S.E.C. has yet to officially endorse a political-spending rule. However, this week, the commission will be required to finally state its position on the rule in response to a lawsuit in the United States Court of Appeals for the D.C. Circuit. We believe that, in addition to the integrity of our democracy, transparent political spending is essential to good corporate governance and sound investment.

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