Paul Hodgson: Staff Legal Bulletin No. 141 strikes again!

All sorts of companies are targeting lobbying spending disclosure proposals
by **Paul Hodgson** | January 22nd, 2018

When the SEC released its latest SLB in November last year, companies – well, Apple – pounced on the possibility of excluding shareholders proposals on the basis of, well, the board had a good think about it and decided that they were already doing it and/or that it was irrelevant.

Now, all sorts of companies are targeting lobbying spending disclosure proposals and others with other changes to shareholder proposal rules. This latest crop rely on a change to interpreting Rule 14a-8(i)(5), the one about whether a proposal "deals with a matter that is not significantly related to the issuer's business" and "relates to operations that account for less than 5% of total assets, net earnings and gross sales". The change to the interpretation says a proponent "can continue to raise social or ethical issues in its arguments" even though the proposal relates to less than 5% of assets, "but it would need to tie those to a significant effect on the company's business". Said Bruce Freed of the Center for Political Accountability: "It looks like now we have a Trump administration and a Trump SEC, companies are mounting a full-fledged assault on these lobbying resolutions. They see that there's an opening. But it's very shortsighted."
Lobbying proposals at Goldman Sachs, Citigroup and Eli Lilly are all being challenged as a result of this 'rule change'. For example, Goldman Sachs' no-action letter says: "After considering and analyzing the total mix of the relevant information, the Board concurred in the analysis that the Proposal is not significantly related to the Company's business and does not otherwise raise new or additional social or ethical concerns that are significant to the Company's business". Because, basically, the company claims it is already complying with the proposal's request to disclose how much it spends on lobbying and the amount is insignificant. "Goldman Sachs' defense that their political spending is de minimis is baloney," said Freed. "You have to look at in context. Even a small amount can associate a company with an action that can lead to adverse publicity. And that's not just reputational harm. Adverse publicity can be economically harmful as well. Social media now is very effective at alerting the public about a company's actions, and people start making purchasing decisions based on that."

Tim Brennan, the treasurer at the Unitarian Universalist Association, the lead filer of the resolution at Goldman Sachs, agreed: "We're working on a response. Their argument is that the amount they spend on lobbying is an immaterial amount compared to what they spend overall. We believe that that's a misinterpretation of the rule. The question is: does the spending relate to their core business. These are highly regulated businesses, and I'm sure far more than half of their revenue is based on regulated business on which they lobby. But, then, it's a new SEC so we'll see what they say."
Freed noted a specific example of 'core business'. "Take a look at the recently passed tax bill," he said. "It will be very interesting to see how much a company like Goldman Sachs had spent lobbying on that, because your companies and wealthy individuals are major winners. And, at a company like Goldman Sachs, you have both a company and wealthy individuals who came out as winners from this bill. It's important for shareholders to know how much was spent in corporate funds to achieve its passage."

Citigroup and Eli Lilly are challenging several proposals under the new guidance, including lobbying disclosure proposals. Citigroup is also challenging resolutions calling for a reduction in the proportion of shareholders needed to call a special meeting and another calling for a ban on government service golden parachutes. The latter proposal and the golden parachutes one both make use of the new 'less than 5% of company revenues and no social or ethical issues' argument. At Eli Lilly, the lobbying proposal and a proposal from Mercy UAW Retiree Medical Benefits Trust on integrating concerns over drug pricing into executive compensation also make use of the argument. The only no action letters that do not have the new bulletin written all over them are an animal welfare proposal from PETA at Eli Lilly and the special meeting proposal at Citigroup.

There are some common defences among the no-action letters. Primary among them is the claim by the companies that they already disclose their spending according to the letter of the law, and then list where those disclosures are. But, apart from the fact that the disclosures have to be tracked down by visiting about twenty other sites, even those disclosures are incomplete. Both the Lilly and the Citigroup letters say that "because we make all these disclosures" the real intent of the proposal is to get at contributions to trade associations such as ALEC, the Chamber etc.

Each no-action letter also cites lack of investor interest, which they claim is proved by the low number of "clicks" on the links to those twenty other sites…. In addition, several of the no action letters quote the proposals saying, for example, "[w]e are concerned that Lilly's lack of trade association lobbying disclosures presents significant reputational risk", but then cite SLB 141's statement that "the mere possibility of reputational or economic harm will not preclude no-action relief". In fact, the Eli Lilly and Citigroup no-action letters are virtual carbon copies of each other.

All of the letters also rely on the SLB 14I argument about board consideration by saying the board has considered it and it thinks that it is part of ordinary business, therefore it must be. But the board's considerations of the issues are couched in exactly the same words as the management's consideration, therefore this would look like rubber stamping to me, rather than real consideration.

And the rubber stamp has BOILERPLATE on it.

While the companies don't say it, they probably think that their unwillingness to disclose their precise spending means that no one will ever find out; but Freed counters this, saying: "Companies cannot guarantee that this information will not be disclosed. It might happen inadvertently. There are leaks, so companies always run the risk that there could be disclosure." Freed also pointed to companies that were already making full disclosures, the top companies on the CPA-Zicklin Index, such as Merck, Microsoft and Noble Energy. "The companies not disclosing their lobbying spend are beginning to be seen as outliers," he said. Freed conceded, however, that the situation needed an SEC rule to make it uniform and universal, though that would be just codifying what a lot of companies are already doing.
Congress is preventing, unsurprisingly, the SEC from issuing that rule – it's already on their books – so it would be ironic if the SEC's bombshell bulletin can be used to prevent shareholders from calling for the very disclosures it should be requiring companies to make in the first place.