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## MONEY TALKS

*Barbara J. Hart*  
*Christina McPhaul\**

When we were asked to submit this Article, the election had not yet occurred. Needless to say, much has changed now as to how to write about being an impactful progressive. The question remains: how do we create the world with the values and resources we hope to preserve for generations to come? Is all lost? To the contrary, as events unfold, activism's legacy of success continues on, and the power of consumers and investors' pocketbooks is perhaps more important than ever to win change.

In today's marketplace, consumers and investors alike are exerting support for brands and corporations whose values align with their own. Consumers look for labels that indicate organic, cage-free, humanely-raised, non-GMO, fair trade, family-owned, and energy-efficient products. Research by the Global Strategy Group indicates that 56% of Americans believe that corporations *should* engage in a dialogue surrounding social-political issues.<sup>1</sup> A Forbes study found that Americans are 8.1% more likely to purchase from a company that shares their opinions and 8.4% less likely to purchase from a company that does not.<sup>2</sup> For instance, consumers express their preference by purchasing Chobani yogurt as the company touts:

How we do business matters to us, because we believe in doing business the right way. But we don't stop there. We also give a portion of our profits to charity through the Chobani Foundation. Through our Chobani Foundation, we work to empower sustainable change in the communities in which we operate.<sup>3</sup>

Indeed, one study found that corporate activism on social-political issues, including same-sex marriage, has a significant impact on consumer purchase

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<sup>1</sup> Melissa D. Dodd, *Brands Take a Stand: When Speaking Up About Controversial Issues Hurts Or Helps Business*, FORBES (Mar. 12, 2015), available at <http://www.forbes.com/sites/datafreaks/2015/03/12/brands-take-a-stand-when-speaking-up-about-controversial-issues-hurts-or-helps-business/#ae1a6384c086>.

<sup>2</sup> *Id.*

<sup>3</sup> CHOBANI, <http://www.chobani.com/foundation> (last visited Nov. 29, 2016).

intention.<sup>4</sup> Recently, Amazon released a commercial about inter-faith friendship between a Christian priest and a Muslim imam, which went viral on the internet.<sup>5</sup> While this ad moved the hearts of many, it also got the attention of consumers just in time for the holiday shopping season. Corporations' public stands on social-political issues clearly have an impact on the bottom line.

In its landmark decision, *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010), the U.S. Supreme Court invalidated previous limits on corporate contributions to political action committees (or "PAC"s), bringing the role of corporations in American democracy to the foreground. Corporations have a voice to be heard, and contributing money to political campaigns and other initiatives is how corporations often speak in the public space. The Supreme Court explained that "[p]olitical speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.'"<sup>6</sup> Justice Kennedy, delivering the opinion of the Court, wrote, "When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves."<sup>7</sup> Out of *Citizens United*, along with the related case *SpeechNow.org*,<sup>8</sup> and subsequent Federal Election Commission advisory opinions and regulations, super PACs emerged.<sup>9</sup> While it is unlawful for a corporation to "make a contribution or expenditure in connection with any election to any political office,"<sup>10</sup> a corporation may establish a traditional PAC as a "separate segregated fund to be utilized for political purposes by a corporation."<sup>11</sup>

Against this backdrop, shareholders should be able to see where the corporation has made contributions and how much, and corporations' CEOs and

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<sup>4</sup> Melissa D. Dodd & Dustin Supa, *Testing the Viability of Corporate Social Advocacy as a Predictor of Purchase Intention*, 4 COMMC'N RES. REPS. 32 (Oct. 23, 2015), available at [https://www.researchgate.net/profile/Melissa\\_Dodd2/publication/283554116\\_Testing\\_the\\_Viability\\_of\\_Corporate\\_Social\\_Advocacy\\_as\\_a\\_Predictor\\_of\\_Purchase\\_Intention/links/57101ec708aefb6cdaaa5d7.pdf?origin=publication\\_list](https://www.researchgate.net/profile/Melissa_Dodd2/publication/283554116_Testing_the_Viability_of_Corporate_Social_Advocacy_as_a_Predictor_of_Purchase_Intention/links/57101ec708aefb6cdaaa5d7.pdf?origin=publication_list).

<sup>5</sup> See *New Amazon Prime Commercial 2016 – A Priest and Imam meet for a cup of tea.*, YOUTUBE, <https://www.youtube.com/watch?v=Ouu6LGGIWsc> (last visited Nov. 29, 2016).

<sup>6</sup> *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 349 (2010).

<sup>7</sup> *Id.* at 356.

<sup>8</sup> *SpeechNow.org v. Federal Election Comm'n*, 599 F.3d 686 (D.C. Cir. 2010).

<sup>9</sup> R. Sam Garrett, *Super PACs in Federal Elections: Overview and Issues for Congress*, CONGRESSIONAL RESEARCH SERVICE, 1–2 (Sept. 16, 2016), available at <https://fas.org/sgp/crs/misc/R42042.pdf>.

<sup>10</sup> 52 U.S.C.A. § 30118(a).

<sup>11</sup> 52 U.S.C.A. § 30118(b)(2).

boards should be held accountable as shareholders' agents. Indeed, shareholders may very well support the corporations' right to lobby as it may protect shareholders' interests, but it is still incumbent on them to make sure that corporations' donations align with the long-term investment values and social values of the shareholders and consumers.<sup>12</sup>

Investment decisions can advance long-term social values. Ceres, a non-profit organization, mobilized investors to monetize and press for the adoption of sustainable business practices; it is working. This approach built on the legacy of activism in the 1980's, when students protested their universities' investments in corporations that operated in Apartheid South Africa.<sup>13</sup> As a result of the students' activism, the universities divested their investments with South African connections.<sup>14</sup> Divestment was one of the non-violent means that contributed to the end of Apartheid and the beginning of peace and freedom for the people in South Africa.<sup>15</sup> Today, many recognize global warming as a far greater threat than Apartheid,<sup>16</sup> and fighting climate change is an initiative that many investors care about. Shareholder activists demand disclosure of how much of their investments' assets are exposed to climate change risk. Corporate contributions to political candidates who deny climate change should also be disclosed, as such contributions are adverse to shareholder value, in every sense of the word.

Corporate governance is expanding as institutional investors become more engaged with the corporations they invest in.<sup>17</sup> Shareholders are now more confident in giving direction to public companies, and increasingly "shareholder activism is about the health of the balance sheet and income statement."<sup>18</sup> We see investors withdrawing investments from corporations that are not aligned

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<sup>12</sup> Christopher P. Skroupa, *Investors Want Disclosure of Corporate Political Contributions and Lobbying Expenditures*, FORBES (Apr. 20, 2012), available at <http://www.forbes.com/sites/christopherskroupa/2012/04/20/investors-want-disclosure-of-corporate-political-contributions-and-lobbying-expenditures-2/#63156d4550ae>.

<sup>13</sup> See James Lawrence Powell, *President of Prestigious Colleges Explains Why Divestment Makes Urgent Sense* (Jan. 24, 2013) <http://www.jamespowell.org/Divest/Divest/divest.html>; see also *Columbia University students win divestment from apartheid South Africa*, GLOBAL NONVIOLENT ACTION DATABASE, <http://nvdatabase.swarthmore.edu/content/columbia-university-students-win-divestment-apartheid-south-africa-united-states-1985> (last visited Dec. 2, 2016).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Steven Davidoff Solomon, *A New Strategy for Shareholder Activism: Engagement*, N.Y. TIMES (Nov. 29, 2016), available at <http://nyti.ms/2gGDvNm>.

<sup>18</sup> *Id.*

with their values, especially when there has been a scandal. For example, Chicago plans to divest its \$25 million investment with Wells Fargo in the wake of the bank's admission to opening fake client accounts.<sup>19</sup> Chicago joins the states of California and Illinois, which had suspended business relationships with Wells Fargo because of the scandal.<sup>20</sup>

Advisory firms provide recommendations for how investors should vote on deals and proxy contests involving large corporations.<sup>21</sup> Advisory firms also advise corporations on how to engage with their shareholders, targeting institutional investors and mutual funds specifically.<sup>22</sup> A 1988 Department of Labor directive to pension funds made clear that they have a fiduciary duty to vote their shares.<sup>23</sup> Now, large fund managers such as BlackRock argue that “shareholders should be more prominent and have an active role in shaping companies directly.”<sup>24</sup> Ordinary fund managers—who do not necessarily want to wage war on public companies—want an active dialogue with them.<sup>25</sup> Actively managed mutual funds are expected to try to distinguish themselves and their returns by taking more proactive stances with public companies.<sup>26</sup>

It seems that shareholder activism has never been more vibrant and more necessary. Additional legislation to compel social-political value-based disclosures now seems very unlikely and perhaps is not even a priority, with so many other issues demanding urgent action and resources. Yet moral suasion and exercising the power of investment and consumer dollars is still a path. Perhaps corporations may be required to disclose their employment and environmental behavior on labels and packaging, similar to the existing ingredient/nutrient/calorie labelling. Such a disclosure could get consumers and investors past the glossy misinformation of fuzzy, “feel good” advertising to

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<sup>19</sup> Elizabeth Campbell, *Chicago to Pull \$25 Million From Wells Fargo After Scandal*, BLOOMBERG (Oct. 3, 2016), <https://www.bloomberg.com/news/articles/2016-10-03/chicago-to-pull-25-million-from-wells-fargo-because-of-scandal>.

<sup>20</sup> Michael Corkery & Stacy Cowley, *California Suspends Ties With Wells Fargo*, N.Y. TIMES (Sept. 28, 2016), available at <http://nyti.ms/2daytbA>; Katherine Greifeld & Elizabeth Campbell, *Illinois to Suspend Wells Fargo From Bond, Investing Work*, BLOOMBERG (Sept. 30, 2016), <https://www.bloomberg.com/news/articles/2016-09-30/illinois-to-suspend-wells-fargo-from-bond-investing-work>.

<sup>21</sup> Steven Davidoff Solomon, *A New Strategy for Shareholder Activism: Engagement*, N.Y. TIMES (Nov. 29, 2016), <http://www.nytimes.com/2016/11/29/business/dealbook/a-new-strategy-for-shareholder-activism-engagement.html>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

hard metrics on many issues, including: workers' wages and the ratio to CEO's compensation; tax avoidance and tax rate; sustainability policies; and positions on LGBT and gun control issues. Those who want to buy a computer that is made by a company that does not avoid domestic taxes, for example, could find that information on the disclosure grid on the packaging. Those who do not care, can simply ignore the grid, as one could skip the nutritional information and enjoy their guilty pleasure. Hard metrics would need to be uniform, and those companies that are proud of their conduct will be eager to disclose; others will follow.

Information and money are power. We can have a greater impact toward the greater good by marrying the two. Stronger together.