

# A Checklist for Companies Considering Whether to Speak on Political Issues

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Current events have sparked a significant change in private businesses' political behavior, as companies and their executives shift from nonpartisan observers to leaders taking on political and social causes. While this trend has been slowly building for several years, public pressure to engage in the current battles over voting-related legislation in states across the country has forced nearly every public company to assess whether it will speak out in regard to voting rights—and has resulted in an unprecedented number of companies choosing to engage.

While the trend is toward more executives making their voice heard on voting-related legislation, the answer of whether to speak out on voting rights or other social or political issues will be different from company to company and issue to issue. In this update, we provide a road map for companies and their executives to follow when deciding whether and how to engage in political issues.

## Establish a Framework for Deciding When to Speak Out

While companies may face pressure from some stakeholders to speak out on every issue of the day, that level of engagement would likely be neither feasible nor productive. Instead, most businesses will need to choose when and where to contribute their voice to a political debate.

Companies should develop a principles-based approach to deciding when to speak that is aligned with their core values. Having a principles-based decisionmaking framework for these issues allows companies to communicate to their stakeholders why they are choosing to speak out on a particular issue and—maybe more importantly—why they may be choosing not to address other issues. Factors companies may assess in deciding whether—and how—to speak out on political issues include but are not limited to:

- How directly does the issue affect the company's industry or line of business?
- Does the company have a footprint in the geographic area where the issue is taking place?
- Does the political issue in question relate to the company's stated strategy and corporate values, including values relating to environmental, social, and corporate governance (ESG) topics?
- Has management discussed the company's position on the issue in question with the board of directors? In making a public statement that could bring media attention, management would not want to take directors by surprise.
- Which stakeholders are urging the company to act? In some instances, the law allows a broader ability to speak on social and political issues internally to employees than it does externally to investors, customers, or the general public.
- Does the company have any preexisting political activities policy, code of ethics, or other internal positions with which any public response on social issues will need to comply?
- Does the company have sufficient familiarity with the political issue in question to make an informed statement and respond to potential follow-up questions? If not, how can the company educate itself?
- Has the company identified the potential for financial impacts from reputational benefits and harms connected with taking (or not taking) a position concerning the issue?

## Determine What the Law Allows

Federal law bars corporations from making political contributions—including nonmonetary in-kind contributions—to federal candidates, and many state laws impose similar prohibitions. While these rules restrict the types of activities in which companies can engage related to campaigns and elections to public office, a different set of lobbying and ethics laws governs statements and activities related to pending legislation and so-called "issue advocacy."

For companies that decide to engage, laws almost always make it possible for them to speak out on legislation or a particular issue or event more broadly. Thus, the key political law question the company must answer before it acts is not whether the activity it has planned is allowed but rather whether the statement or activity will trigger any reporting, sponsorship disclosure, or related compliance requirements. The answer can differ from jurisdiction to jurisdiction and may change depending on the content of the communication itself. The following questions provide a framework for companies to work through to ensure they are aware of any lobbying or ethics compliance requirements before they speak out:

- Is the topic in which the company is engaging related to an election or ballot measure? If yes, the laws in many jurisdictions limit election-related activity but do not bar it entirely. For example, federal law provides corporations a number of opportunities to engage in voter registration, get out the vote, and other civic engagement activities as long as they do so on a nonpartisan basis. (Federal Election Commission regulations have specific requirements for what counts as nonpartisan in this context.)
- If the company is speaking out on legislation, is the bill still pending, or has the bill been passed and signed into law? Speaking out about a bill that has already been enacted will rarely be regulated (though companies will also have to weigh whether such after-the-fact statements are effective in addressing their strategic goals).
- If the legislation is still pending, does the communication or other activity include a call to action? A call to action is a statement urging employees, customers, or members of the public to contact their government official to support or oppose legislation or some other government action. Some jurisdictions do not regulate statements that don't include a call to action.
- If the legislation is still pending, is the company paying to promote the communication in any way, such as by taking out a print or digital ad campaign or paying to boost social media posts? Some jurisdictions treat paid and unpaid content differently for ethics and compliance purposes.

In short, companies and executives do not need to view ethics and campaign finance laws as a barrier to their ability to speak out on an issue that is important to them. While activity may be regulated or subject to compliance requirements, the law almost always provides companies a path to a workable solution when faced with pressure to engage in the political arena.

## Discuss Before Pressing Send

As discussed above, a company's public statements on political issues should align with its core values and purpose. It is the role of the board of directors and management to discuss, refine, and articulate these values and purpose. Having a clear sense of what the company stands for that has been vetted and blessed by the board of directors allows management to make better decisions about when and whether to speak out on political issues and greater comfort that their statements will not catch the board of directors by surprise.

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