

## Accountability After Citizens United – Sanford Lewis Closing Remarks

### Closing Remarks: Sanford Lewis (Strategic Counsel on Corporate Accountability)

**Ciara Torres-Spelliscy:** All righty. Well thank you especially for those of you who started with us at 9:00 am . Your endurance is admirable. I have the distinct pleasure of introducing our last speaker and we asked him to speak because we wanted to end this day on a positive and hopeful note. And for once we have good news. Our final speaker, Sanford Lewis is on the front lines of the debate of what is possible using existing corporate and securities laws to respond to the new *Citizens United* rights of corporations to spend in politics. After *Citizens United* there was an open question. Well there were many open questions, but there was one open question about the range of rights that shareholders could assert, through shareholder proposals. One school of thought was that transparency was the only thing that shareholders could ask for, and that if they asked for more the Securities and Exchange Commission would kill that proposal. Another school of thought said that shareholders could assert a far more robust set of rights. Mr. Lewis is clearly in the second camp. Sanford Lewis is an attorney who represents socially responsible investors. He is a principal at the Strategic Counsel on Corporate Accountability and his investor clients include the New York State Common Retirement Fund, Northstar Asset Management, and the Investor Environmental Health Network. He is an example of how progressive lawyers can use the securities laws creatively, for good to request transparency and accountability from corporations and it's precisely what he did at Home Depot this year. This is a true David and Goliath story. Home Depot was not a soft target. And due to his work, the SEC for the first time has issued a no-action letter supporting the ability of shareholders to ask for more accountability after *Citizens United*, so it is an enormous pleasure to introduce Sanford Lewis.

**Sanford Lewis:** Well thank you. It's an immense honor to be here with you today and I can't think of a time that I've been asked to give closing remarks anywhere. And the most important I can do starting closing remarks is by congratulating the Brennan Center on a great day of speakers and... also your thought leadership on this issue of shareholders' role after *Citizens United* has been seminal in moving this issue along, and in fact in inspiring my client to do what they did in the Home Depot instance, so again, if we could just have a round of applause for the Brennan Center.

I have to start with the usual caveats and probably even more. As others I'm not an elections lawyer. I'm not a Constitutional lawyer. I'm mostly an environmental lawyer. So I find myself in

this his funny position of talking about this issue. I come to shareholder activism from being an environmental lawyer and working on environmental issues. And it just happened that my client, Northstar Asset Management, asked me in the course of various other shareholder resolutions that I work them on to work with them on this Home Depot issue, that I'll talk about in a few minutes. But my words are my own. As a wrap up speaker, one possible job could be to summarize what went on today, I won't be doing that. But if you want to play "Where's Waldo?", I'll try to pull on some threads from the day in the course of my remarks, including things that I learned from other speakers. Finally, even though I'm talking about what we need beyond disclosure, I'm mostly known as somebody who works on disclosure. My blog is called Corporate Disclosure alert, as is my Twitter feed @CorpDisclosAlrt.

And so I've built my career around disclosure issues, beginning with Right to Know, toxics, kind of right to know issues, and I've always known any time I work on disclosure issues that there comes a point in the process when you have to say: well, what happens after we win disclosure? What do we do then? And you know in the toxics arena, it was a discussion about how after the right to know, then there's the right to act-- whatever that means. The Center for Political Accountability has done an incredible campaign building critical mass on these disclosure issues. You know, the inevitable thing happens that at some point you win that disclosure and even when you get a critical mass of companies that start to do what you're asking for. Eventually it moves into public policy. And you have a uniform rule of disclosure and so the question that raised here again is, then what? And I learned today about one really excellent thing that the Center for Political Accountability has been doing on the "then what?" which is to get companies to agree to rule out specific types of political spending. A small group of companies has now agreed to not do electioneering communications and to not do independent spending. And I think that's certainly one answer to the question of what else can you do? And the other question is how do you continue to leverage that? So, in today's conversation I heard a consensus about one thing which is: certainly we need more disclosure. And I absolutely agree. We need more disclosure and there's a lot more that we can do. We're just midway through that fight. And I also agree with Professor Taub's presentation this morning that if you ask shareholders to vote on whether a company should do political spending, instead of just more disclosure that it's much harder to get a high vote on that issue. The easy consensus around disclosure is quite different from the harder consensus about a straight thumbs down on political spending. But what I want to talk about is the legal space for asking for more, asking for a shareholder vote is as a result of this recent SEC decision.

So, shareholder resolutions are filed under SEC rule 14a-8, including the disclosure resolutions. There have also been recently some beyond disclosure, another model that again the Center for Political Accountability has done with shareholders that was at in particular at Target, which goes beyond just asking for disclosure which asks about whether the spending that they're doing is mis-aligned with their corporate values, and whether it's posing a risk, and I think those are important things.

Last year with little notice at Archer Daniels Midland, there was a proposal that requested no corporate political spending It verifies our thoughts about the relative support in votes, the proposal which was filed, I think, by just a lone shareholder, got about 5% shareholder support which is important because it's more than 3%, the amount you need to come back the following

year. But in contrast the Center for Political Accountability's proposal on the same proxy got a 28% support. So quite a big difference as you can see there.

Then there's the Home Depot example that will be voted on this year on June 2nd, and that asks for an annual advisory say on political spending. My client, Northstar Asset Management was looking at Home Depot and the way that they, in parallel to Target, had been supporting anti-gay candidates despite its non-discrimination policy which specifically said we won't discriminate based on sexual preference, gender, etc. And Home Depot already had in place some of the disclosure provisions that the Center for Political Accountability wanted and yet they were still acting inconsistent with their policy. And so Northstar said what can we do, and we started brainstorming, and we looked at and drew from a bunch of existing models that are out there.

We looked at the proposed Shareholder Protection Act. We looked at the existing say on pay resolutions, we looked at the Target proposal and we also thought about the fact that a hard won change at the SEC recently was the right of shareholders to request that companies evaluate specific risks which had been something that hadn't been allowed until shareholders really pressed the SEC on the issue. And we combined those in the proposal and I'm not going to go into great detail on the proposal but I'll mention a couple of things that are notable. One is that in the proxy there would be a report on the company's policies and the company's past and proposed future spending on electioneering communications, and an analysis of potential issues of congruency with the company's stated values or policy, the anti-gay candidates issue as well as risks to the company's brand reputation or shareholder value, an issue that was flagged by the Target example. And it also includes by the way, expenditures through a third party, so it would include disclosure for instance, if electioneering communications were done through a trade association. In response to the company's challenge the SEC issued a no action letter saying that it refused the company's request to exclude the proposal. What was most noticeable in the decision was the language that I've underlined here which the Staff of the SEC said, the Home Depot proposal does not seek to micro manage the company to such a degree that exclusion of the proposal would be appropriate. Now what that means to me is that if you filed a proposal that sought line by line approval of political spending that could well be an example of micromanagement. As a strategic starting point there's a question about how detailed you can get. I would argue that you know there's a lot of room from this proposal to move forward.

This is an advisory proposal, you could have a binding proposal instead where you actually amend the corporate by-laws. You could separate out the issue of approving a policy from approving the spending. You could even have categories of spending that you might ask for a specific vote on, for instance, electioneering communications or donations to independent organizations and ask for reports on those and ask for a yes or no vote on those expenditures. We don't know how the SEC would rule on that, but there's reason to think that those would be some of the things that would be possible. You could also call for a super majority approval, of the political spending on the grounds that this is a compelled speech issue and that that would be appropriate and there's an article that one of the panelists wrote with Lucian Bebchuck, that sort of spelled out that argument.

So, to wrap up, there are a lot of different possible pathways forward from the Home Depot decision. One is more experience with the existing disclosure processes, as well as with this new model of an advisory say on electioneering kind of a proposal. You could also take on directly

the idea of a binding by-law amendment which certainly would see a fight under Delaware Law which might either end up in the Delaware courts or fighting it out at the SEC staff, you could also look for SEC rule making or guidance. Another possibility is that we know that the SEC is considering risk issues and their guidance related to how companies disclose risk and so you could have some link between that and the shareholder approval kind of question, and of course then there's Federal legislation like the Shareholder Protection Act. So at the end of the day, I think it's clear that there are a lot of diverse approaches that we can take to these issues and to shareholder empowerment and that there's just tons of work to be done in these dangerous post-*Citizens United* times and that we all need to continue the kinds of experimentation that my clients and the Center for Political Accountability and others are undertaking to find different ways of tackling this monstrous problem, so with that, thank you very much.