ENLISTING THE BUSINESS COMMUNITY TO COUNTER THREATS TO DEMOCRACY

Today, we mark the birthday of Martin Luther King Jr. The cover of today's New York Times reports on the ongoing impact of America's latest export to Latin America, the copycat attack on Brazil's Congress, Supreme Court and presidential offices, a recount of 2020 ballots in a rural Pennsylvania county triggered by conspiracy theorists and election deniers and a subdued sermon delivered by President Biden reflecting the collective failure to pass the sweeping voting rights measures he has championed. Yes, Senator Warnock won re-election in Georgia, but as he noted in his victory speech in early January, he won despite forensically designed voter suppression legislation; the long lines at the polls "most certainly were not a sign voter suppression does not exist." Democracy is not out of the woods.

Last April, I wrote a briefing note on ESG-D, my shorthand for a proposed template for investors and other stakeholders to evaluate whether individual companies are doing their part in support of democracy. I asked whether it would be possible to replicate the construct (namely consistent, comparable, reliable and decision-useful metrics) embraced by investors, lenders, insurers, policymakers and regulators as a critical weapon in the fight against climate change and biodiversity loss, namely corporate transparency, in support of democracy. As ESG has attracted criticism from a number of quarters, I thought it useful to reinforce my conclusion and dispense with some of the noise around ESG. I also thought it useful to cast this note not only as guide for investors and other stakeholders, but also as a checklist for companies themselves as they consider their roles in protecting democracy.

My conclusion, in short: business needs democracy and business can play a role in supporting democracy.

Attributes of Democracy

There should be little debate over the attributes of a democracy. We should know it when we see it, and we should know when we do not see it:

- representative government (free and fair elections, inclusive suffrage, the active presence of more than one political party and a viable opposition);
- fundamental rights (access to justice, civil liberties, and protection of personal liberties through constitutional and other guarantees);
- checks on government (an effective legislature, judicial independence and a free and independent press);
- impartial administration (absence of corruption, predictable enforcement of laws and the absence of discrimination in the administration of justice); and
- participatory engagement (civil society participation).

Freedom House, in its March 2021 report [From Crisis to Reform: A call to strengthen America's battered democracy] included a few attributes that undermine democracy, which have particular relevance to the United States:

- ***The influence of money in politics and policymaking,*** which has grown since the Supreme Court removed constraints on campaign spending by equating it to free speech (*Citizens United vs. Federal Election Commission)*. In Freedom House's annual rankings set out in its *Freedom in the World* series, "the United States ranks lower on the indicator for improper influence on the political process – whether by private groups, oligarchs, patronage networks, criminal organizations, foreign powers, or armed militants – than any other established democracy, other than Italy." Freedom House notes that the United States is an outlier because, not only does it not have campaign spending caps (in common with many other democracies), in contrast to many other democracies, it has no substantial public funding of campaigns, does not ban political advertising on television and does not have relatively short campaign periods.
- ***Partisan gerrymandering*** has had the most corrosive and radicalizing effect on US politics, with the lack of competitive districts encouraging extreme positions to enable success in primary contests.

The Scorecard

Without a doubt, American democracy is in a better place than it was last year, let alone two years ago. The midterms were conducted largely without incident, and election deniers in competitive races largely lost. The House Select Committee to Investigate the January 6th Attack on the United States Capitol was able to undertake a forensic examination of the events that led to insurrection, to document its conclusions and to address those conclusions in televised public hearings. A short-sighted decision by Kevin McCarthy ultimately to boycott an exercise that satisfied his procedural demands guaranteed that the country would be spared the spectacle of a chaotic set of hearings.

But, the former president continues to maintain, and raise money off the "Big Lie," that he won the 2020 election. Few Republicans call him out for doing so. The party in control of the House contains a significant number of election deniers and members who objected to the certification of the 2020 election. Fourteen election deniers won state-wide office in 10 Republican-run states, where they will oversee the 2024 elections.

National legislation to strengthen and expand voting rights failed in Congress last year. States continue to restrict access to voting and, in effect, to make it more difficult for people of color to vote - at last count (per the Brennan Center for Justice) 42 laws restricting access have been passed in 21 states since the beginning of last year (400 additional bills were proposed in 2022). These restrictions are a direct response to the discredited belief that expansion of voting rights in 2020 led to significant fraud and debunked conspiracy theories. There is the possibility that the Supreme Court this session will endorse the "independent state legislature" theory (*see* Democracy Docket) that would enable state legislatures to override the state constitution, without judicial constraint, when it comes to setting rules for federal elections.

Gerrymandering and dark money for political campaigns still blight the landscape. And while turnout improved in both 2018 and 2020 (but was off in 2022), voter turnout in America still trails turnout in many other countries (see Pew Research Center - Turnout: in 2020, the US ranked 31 out of 49, between Colombia and Greece). While the Electoral Count Act was rewritten as part of the FY 2023 Appropriations Act, there are still flaws in the electoral system, including the possibility of a "contingent election," where no candidate gets 270 electoral votes and the election ends up in the House.

As for public perceptions, a Georgetown Institute of Politics and Public Service poll (November 30, 2022) found that 75% of Americans believe that "democracy is under attack" (80% of Democrats, 72% of Republicans and 64% of Independents). When given a list of reasons, 77% of voters cited violent behavior in society and 63% cited "the decreasing amount of respect and civility in our political system." Beyond these two reasons, there is significant divergence as to other concerns, driven by partisanship and where voters get their information.

Why Should the Private Sector Care

The Edelman Trust Barometer (2022) tells us that, at a time when distrust is now society's default emotion, globally employers are the mainstay of trust for employees and CEOs enjoy particular high levels of trust. Moreover, across every single societal issue polled, by a significant margin (ranging from 32-42 points), people want more business engagement, not less,

In the context of democracy, business is not a disinterested bystander. Businesses intersect with politics on a regular basis. Businesses lobby to advance commercial interest, and they fund political agendas, both directly and indirectly.

From a purely self-interested perspective, protection of democracy should be a high priority for the private sector.

- A stronger and stable democracy translates into a stronger economy (see Voting rights equal economic progress – Abhay Aneja and Carlos Fernando Avenanciao-Leon; Closing racial inequality gaps – Citi GPS).
- The rule of law is the necessary predicate for the protection of property rights, enforcement of contractual arrangements and the minimization of corruption and bribery. Without robust respect for the rule of law, a functioning court system and nonpartisan enforcement of the law, businesses would be hard pressed to feel confident in making long-term investments.
- Free markets depend on government accountability, and it is the institutions and mechanisms of democracy that are able to hold governments accountable.

One clear opportunity for business is to recognize, as noted by Business for America, the difference between civics and politics. In doing so, business would replace support for specific substantive policies with support for the policymaking process and actively support a functioning democracy such that substantive policies are adopted organically and democratically. See also What's next for corporate civic engagement - Jess Riegel.)

A May 2022 poll of business leaders and consumers undertaken by Morning Consult on behalf of Public Strategies, the Black Economic Alliance and the Leadership Now Project found support for reinforcing democracy. Among other findings:

- 81% of business leaders agree that businesses should act to ensure safe and fair elections – 52% strongly agree. Consumers (60%) agree businesses should act to ensure safe and fair elections.

- 80% of business leaders agree that businesses should act to drive change or progress on protecting democratic institutions – 46% strongly agree.
- Three-in-four business leaders agree that businesses should act to influence public policy related to democracy in the state(s) where their business is located (78%) and at the federal level (75%) – 39% and 40% strongly agree, respectively.
- 77% of business leaders agree that businesses should speak out about threats to democracy – 42% strongly agree.
- Consumers also agree businesses should drive change or progress on important social issues (57%) and speak out publicly about cultural or social issues (55%).

Corporate Political Spending

Despite the sentiments in support of democracy, there is a disconnect, which brings us back to one of the features of countries where democracy is under stress: the influence of money in politics and policymaking. In short, there is still little transparency around corporate political spending and there is a gap between the ESG values espoused and the allocation of dollars for political influence.

Following the January 6th insurrection, corporate America responded in a variety of positive ways, including public statements denouncing the attack and announcements that donations to members of Congress who voted against certifying the election of Joe Biden and/or to Political Action Committees would be "paused" or "reassessed." Concurrently, the tech platforms shut down accounts that spread disinformation about the election. Interestingly, only a few companies appeared to have policies that banned the making of any political donations. (See Andrew Ross Sorkin, 'An Epiphany Moment' for Corporate Political Donors May Have Arrived.)

A year later, while a number of companies held fast on their commitments, for many others the record since has been mixed (*see* CREW analysis - Angela Lee and Areeba Shah; Yale Insights - Jeffrey Sonnenfeld). Two years later, last year's trend continues. POLITICO reported that PACs affiliated with more than 70 major corporations that said they would pause or reconsider donations to those who objected to certifying the 2020 election, this past year, gave more than $10 million to objecting House members. (Of the 147 members of the House and Senate who voted against certification, 130 remain in Congress; only two lost in the midterm general election.)

POLITICO also cites research of Fortune 100 companies by Accountable.US showing that, of the 50 companies that pledged to pause or reconsider, 34 went on, over the past two years, to contribute to members who voted against certification. According to the Committee for Responsibility and Ethics in Washington (CREW), as set out in its January 6, 2023 report, 1,345 corporate and industry group PACs have given $50.5 million directly to the campaigns or leadership PACs of members of the Sedition Caucus, and $18.9 million to the National Republican Senatorial Committee and National Republican Congressional Committee. The Center for Political Accountability (CPA) recently tracked political spending through certain corporate political funding vehicles that tend to obscure the source of funds (*see* Practical Stakes: Corporations, Political Spending & Democracy).

For some good news: In terms of transparency, the 2020 CPA-Zicklin Index of Corporate Political Disclosure and Transparency found that 78% of the S&P 500 companies disclosed some or all of their political outlays or prohibited at least one type of spending in 2022. The remaining companies in the broader Russell 1000 group, which was evaluated for the first time last year, generated far lower scores than the S&P 500. Only about one out of 10 companies in the non-S&P 500 segment of the Russell 1000 had general board oversight of political spending, for example, compared with nearly two-thirds of the S&P 500, according to the index. (*See generally*, Eleanor Laise writing in MarketWatch (January 6, 2023).)

Criticism of ESG

In the midst of continued severe polarization and continued threats to democracy, the construct around measuring progress on social, as well as governance and environmental, metrics has come under increasing fire.

In certain quarters, ESG has gotten a bad rap. Last May, the global head of responsible investing at HSBC Asset Management accused central bankers and policymakers of overstating the risks of climate change. The furore over his comments, and subsequent suspension, points to a larger problem, as Pilita Clark noted (at the time) in the Financial Times, "the enduring depth of misunderstanding about a key reason why global warming is unlike another public policy problem: the profound level of uncertainty. … Rising heatwaves, drought and floods may disrupt food and energy supplies and displace populations enough to prompt vaulting carbon prices, fossil fuel bans and more. Or they may not. But regulators think companies, including banks, should try to quantify and disclose their exposures to these potential risks."

Regrettably, many have jumped on the net-zero bandwagon with overstated commitments and/or aspirations that fail to match reality. There also are no uniform and consistent, decision-useful ESG standards. These two aspects have contributed to significant greenwashing (both intentional and unintentional)[1] that, in turn, at the very least, have contributed to the scepticism and, more problematically, have fed anti-ESG narratives.

Others criticize the standards that are applied as being so vague they are meaningless, or are too all-encompassing – that combining the "S" in particular with the "E" and the "G" complicates the application of the underlying principles. Or they attempt to do too much, yielding irrational outcomes. In the investment world, funds typically buy equity securities in the secondary market, making it difficult to assess the impact, as no capital is being deployed for the investee company. Some believe that ESG investment guidelines – suggesting that capital is being properly allocated to transition to net-zero – regrettably relieve the pressure on regulatory action or concerted public-private efforts, particularly those reforms/actions intended to avoid the impacts of climate change and biodiversity loss. Yet others claim ESG is simply another box-ticking exercise, a passing phase.

Finally, in the United States, there is the weaponization of ESG as part of an attack on "woke capitalism" by Republican political figures, including most prominently Florida Gov. DeSantis. Their targets have been the large asset managers and banks, as well as regulators such as the Securities and Exchange Commission (SEC). In August, the Texas Comptroller accused 10 asset managers and approximately 350 investment funds of allegedly "boycotting" oil and gas companies in their investment portfolios. Arizona Attorney General

[1] Last February, Morningstar concluded that over 1,200 investment funds did not merit an ESG tag as they were not delivering on their stated ESG goals.

led a coalition of 19 Republican Attorneys General criticising BlackRock for allegedly putting ESG interests above investor interests and returns. Last month, Florida announced that it intended to pull $2 billion of Florida State Treasury funds from BlackRock.

The anti-ESG backlash is ramping up in 2023, powered in part by the GOP majority in the House. (*See*, *e.g.*, Marianne Lavelle writing in Mother Jones (January 4, 2023).)

And as for the aspiration-reality gap (or the public statement – private sentiment gap), a CNBC CFO survey (September 2022) found 55% of CFOs opposed to the pending SEC climate disclosure rulemaking (35% strongly oppose) and 45% support the pushback by states on ESG investing (supporting bans of investment managers that say they use ESG factors from investing state pension fund money) – 25% oppose the state bans and 30% are neutral on the question.

There is admittedly plenty room for improvement in the ESG space, starting with the need for those uniform and consistent, decision-useful ESG standards, for continued focus on the gap between aspiration and reality, particularly among companies, and for continued scrutiny of ESG claims. But, the bottom line is that the challenges that the ESG construct is intended to address are real and need to be addressed, many as a matter of urgency. (I cover these in other briefing notes.)

Fashioning a New Set of Metrics

Companies are caught in an increasing number of cross-currents, reflecting both the polarization of American society and the weaponization of culture war wedge issues. Climate is only one; in the wake of the *Dobbs* decision, the abortion cross-current has shot to the top of the agenda. This is occurring in an environment in which employees and consumers are more attuned to the values of the companies they work for or buy from.

With easily identifiable elements of a functioning democracy, can we then come up with metrics that highlight the extent to which individual businesses are engaging in, or standing behind, efforts that support democracy and that allow investors, employees and other stakeholders to assess whether public commitments by businesses to good citizenship/democracy in fact are matched by action, particularly in the realm of political contributions? At the same time, those metrics can also be used as a roadmap for companies to determine how well they align with the values around democracy that they espouse.

I offer below a set of questions to consider embedding in new metrics around civic engagement.

Civic engagement generally

- Does the company host or support programs aimed at enhancing civic engagement among employees?
- Does the company encourage employees to speak out in support of democracy?
- Does the company encourage employees to participate in external civic activities?
- Does the company work with local colleges and universities to build up regional centers of education?

Connecting on a human level

- Does the company support programs aimed at facilitating conversations among employees with opposing views on divisive issues?

Voter participation

- Does the company publicly promote fair elections and the importance of voter registration?
- Does the company support legislative efforts to protect and expand access to voting?
- Does the company host community voter registration drives?
- Does the company encourage employees to vote, provide employees with notice of upcoming elections, share links to nonpartisan websites for voting assistance (such as Vote America and BallotReady) and provide employees with time off to vote at the polls or work at polling sites? (See Time to Vote; Civic responsibility case study (from the Ash Center for Democratic Governance and Innovation at the Harvard Kennedy School); and Civic Alliance)?
- Does the company provide a voter-friendly work environment, for example by adding voter registration reminders in new hire onboarding and assistance with change of address processes?
- Does the company express opposition in its social media posts to voter suppression efforts/voter nullification efforts/threats against state election officials?

Countering disinformation

- Does the company host or support programs aimed at enhancing the ability of employees, particularly in digital spaces, to recognize hate speech, targeted disinformation and conspiracy theories?
- Does the company encourage and support independent local journalism?
- Does the company fund external civic education programs aimed at combatting disinformation?
- Does the company donate to politicians that have a track record of spreading disinformation?
- Does the company have a policy on advertising on networks or programs that perpetuate disinformation about the 2020 election or upcoming elections, that otherwise promote baseless claims about election fraud, or that incite attacks targeting state election officials?
- Does the company publicly endorse government efforts to address disinformation?

Political contributions (based on the criteria used by the CPA-Zicklin Index, published by the CPA, and the CPA's proposed Model Code)

- Does the company have a policy that describes how it allocates contributions or expenditures to influence political/ballot measure elections and, if so, does it disclose the policy?
- Does the company describe the types of recipients of its political spending or the types of recipients it will not contribute to?

- Does the company describe the public policy positions that drive its political spending decisions?
- Does the company disclose who has ultimate authority internally as to how corporate funds are allocated for political purposes?
- Does the company's board of directors (or a board committee) have oversight over the company policy on political contributions, or if there is no such policy, over the contributions themselves?
- Does the company's board of directors (or a board committee) have oversight over the amounts of political contributions the company makes or may make?
- Does the company have a preferred policy of making its political contributions directly?
- Does the company voluntarily disclose[2]:
    - contributions to candidates, parties and committees?
    - contributions to "527 organizations," such as governors associations and Super PACs?
    - independent political expenditures in direct support of, or in opposition to, a campaign?

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[2] By way of reminder (from Open Secrets):

PACs (what the FEC calls "nonconnected committees") raise and spend contributions for the express purpose of electing or defeating candidates. Most PACs represent business, labor or ideological interests. An organization's PAC will collect money from the group's employees/members and make contributions in the PAC's name to candidates and political parties. Individuals contributing to a PAC may also contribute directly to candidates and political parties, even those also supported by the PAC. PACs can give $5,000 to a candidate per election (primary, general or special) and up to $15,000 annually to a national political party. PACs may receive up to $5,000 each from individuals, other PACs and party committees per year. Politicians may form Leadership PACs to raise money for other candidates' campaigns.

Independent expenditure-only political committees, or ***Super PACs***, may accept unlimited contributions from unions, corporations, associations and individuals. Super PACs may spend unlimited amounts to influence the outcome of federal elections through independent expenditures. Unlike PACs, Super PACs may not contribute directly to a candidate or campaign, and may not coordinate with a candidate in making their expenditures. Contributions to, and expenditures of, a Super PAC are publicly disclosed.

527 groups (also referred to as "soft money" groups) can raise an unlimited amount of funds from individuals, corporations or labor unions. Contributions must be disclosed. These groups operate for the purpose of influencing elections to federal, state or local public office, but do not advocate directly for a candidate's election or defeat or coordinate with any candidate at the federal level, though may do so at the state level. The most common are affiliated specifically with an interest group, union of association of elected officials. Examples of 527s include the RGA, DGA and Emily's List.

501(c) groups can engage in varying degrees of political activity: 501(c)(3) groups operate for religious, charitable, scientific or educational purposes. These groups are not supposed to engage in any political activities, though some voter registration activities are permitted. 501(c)(4) groups are commonly called "social welfare" organizations that may engage in political activities, as long as these activities do not become their primary purpose. Similar restrictions apply to Section 501(c)(5) labor and agricultural groups, and to Section 501(c)(6) business leagues, chambers of commerce, real estate boards and boards of trade. The politically active groups – generally 501(c)(4)s and 501(c)(6)s – are referred to as "dark money" as they generally do not need to disclose the source of their funds. While donations to candidates are not permitted, donations may be made to Super PACs.

Corporations and labor unions cannot make contributions to political party committees (DNC or RNC) or candidates. Corporations can set up separate segregated funds.

- payments to trade associations that recipients may use for political purposes?
- payments by trade association of which the company is a member?
- contributions to 501(c)(4) and other tax-exempt organizations?
- payments to influence ballot initiatives?

- Does the company contribute to civil society or other organizations that work to promote democracy?
- During the 2022 election cycle, did the company make contributions to state legislators who voted for legislation that:
  - shortens windows to apply for a mail ballot
  - shortens deadlines to deliver a mail ballot
  - makes it more difficult to remain on absentee voting lists
  - eliminates or limits sending mail ballot applications to voters who do not specifically request them
  - eliminates or limits sending mail ballots to voters who do not specifically request them
  - restricts assistance in returning a mail ballot
  - limits the location, availability or number of mail ballot drop boxes
  - imposes criminal penalties on election officials and poll workers who fail to perform their duties or fail to adequately maintain voter lists
  - empowers partisan poll watchers
  - imposes stricter signature requirements for mail ballots
  - expands voter purges
  - increases barriers for voters with disabilities
  - bans providing snacks and water to voters waiting in voting lines
  - makes voter registration more difficult
  - imposes harsher voter ID requirements
  - reduces the locations or hours of polling stations
  - limits early voting days or hours
- During the 2022 election cycle, did the company make contributions to state legislators who voted for legislation that:
  - expands early voting opportunities
  - eases mail voting
  - expands mail ballot drop box access/drop-off locations
  - eases voter registration
  - provides greater access to voters with disabilities
  - improves language accessibility
  - protects polling place access
  - prohibits discrimination through state voting rights act
  - eases voter ID requirement
  - restores voting rights to people with past convictions
  - eases voting for people in jail
  - expands Election Day registration
- Does the company contribute to candidates who would qualify as "election deniers" (namely, those who claim Donald Trump won the 2020 election or that President Biden is an illegitimate president, have called into question in public forums the

legitimacy of the 2020 election, or called for or supported "forensic audits" of the 2020 election)?

Concluding Thoughts

The threats posed by anti-democratic forces to civil society, as well as to governments and the private sector, are manifold, and require a whole-of-society response. We are moving in the right direction, but much remains to be done, particularly to address legitimate concerns regarding the level of polarization in the country. Business does have an important role to play, and my suggestions are intended as much to create a template for positive civic behavior as a means of measuring contributions to sustaining democracy.

As for my proposed metrics, some are more important than others in terms of effect. Whether or not we should call my list ESG-D is beside the point, but one lesson from the ESG world needs to be carried over. As I noted above, ESG metrics can produce illogical outcomes – due to greenwashing or, for example, if all elements are weighted equally. Companies that rely on wonderfully aspirational values and have elements to show for it (*e.g.,* a diverse board of directors or a comprehensive sustainability report) may nonetheless be undertaking activities that undermine ESG values. Ultimately, given the dominant impact that corporate political spending can have on politics and by extension policy, particular attention needs to be given to the last category of metrics on my list. We should not be diverted by the "iceberg phenomenon" in political spending (disclosed versus (legally) undisclosed contributions) that can mask support for forces that are both inconsistent with public statements and, ultimately, more destructive to the democratic process.

I note that there are a range of other metrics in adjacent spaces, including many that fall within the Sustainable Development Goals. By limiting the foregoing to democracy-related metrics I do not wish to imply that addressing the consequences of the *Dobbs* decision or addressing racial inequality, social justice, human rights, pay inequality, education and health systems in dire need of support, and the like are less relevant. These and other systemic challenges drive that regrettably widespread sense that the broader system, and the democracy that underpins it, is not working for them. May I leave those to metrics measuring the "S" in ESG.

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