



Guidelines for Corporate Engagement

External LGBT+ Issues

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Introduction

IT WAS JUST SEVEN YEARS AGO, at the very first Out Leadership Summit in 2011, that multiple CEOs from major companies came together to talk publicly about LGBT+ inclusion, and to express support for marriage equality. Since that time, corporations have taken on a leading role in driving forward LGBT+ equality, both within their companies' walls and around the world.

In 2013, the American business community spoke out forcefully for LGBT+ equality, when 278 companies, including many of the largest and most influential in the United States, signed on to an *amicus* brief to the United States Supreme Court in support of Edie Windsor's successful case to overturn Section 3 of the Defense of Marriage Act. From where we sit, in between law firms, corporations, and LGBT+ advocacy groups, it seems the volume of requests companies are receiving to take action around external LGBT+ issues have increased exponentially since *Obergefell*. In both cases, Out Leadership partnered closely with law firms and advocacy groups to organize our member companies to sign on to the briefs and firmly establish themselves at the forefront of LGBT+ inclusion.

In the nearly three years since marriage equality became the law of the land, businesses have increasingly been called upon to take action around issues of LGBT+ equality. From where we sit, in between law firms, corporations and LGBT+ advocacy groups, sometimes the volume of requests companies are receiving to take action around external LGBT+ issues have increased exponentially since *Obergefell*.

In 2016, corporations were asked to speak out against anti-LGBT+ bills in places like Georgia, North Carolina, and Texas. Last year, almost 150 discriminatory laws relating to LGBT+ issues were introduced in state legislatures. Businesses have been encouraged to join State-level corporate coalitions organized



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around the principles of inclusion and equality, and CEOs are often asked, and sometimes pressured, to sign open letters or otherwise speak out when laws are put forward that could negatively impact LGBT+ people.

Lawsuits around LGBT+ issues did not stop with *Windsor* and *Obergefell*. Corporations have been asked to sign-on to *amicus* briefs at various levels of the appellate process, from State Appeals Court to the United States Supreme Court, on issues including the rights of trans students, the interpretation of Title VII to include sexual orientation, and alleged conflict between the First Amendment and laws prohibiting discrimination in the provision of goods and services.

The business community is being asked to speak out on LGBT+ issues for an important reason: it can have a major impact.

Corporate opposition to Georgia House Bill 757, which would have allowed faith-based organizations to deny services and make hiring decisions based on sincerely-held religious beliefs, was a key factor in Governor Nathan Deal's decision to veto the legislation in 2016. After the bill was passed by the state legislature, hundreds of companies joined Georgia Prospers, an organization based on the premise that diverse and welcoming workplaces and communities are an integral component to healthy, thriving 21st century economies; a number of major employers specifically called on the governor to veto the bill.

Similarly, corporate pressure led to policy change in North Carolina. Businesses' opposition to the state's House Bill 2, which placed restrictions on what bathrooms trans people could use, kept the issue at the forefront of the news for months after the bill was passed and signed by Governor Pat McCrory, and helped lead to his defeat in the 2016 gubernatorial election. Subsequently, many of the most onerous restrictions contained in the bill were repealed.

Internationally, in 2017 a number of major financial services companies publicly supported the plaintiff in the QT Case, which challenged a Hong Kong Immigration Department decision to deny a spousal visa to the legally-married same-sex spouse of a British visa-holder. While the Court of Appeal did not allow the financial institutions to officially file a brief on the case, the action taken by the financial institutions was widely covered in the press and the court eventually unanimously ruled that QT should be granted a dependent visa.

While the impact of corporate engagement on LGBT+ equality is clear, it is unfortunately impossible for businesses to always take action on these issues, especially given the increasing volume of requests companies receive to speak out on a growing range of important social issues, both within the United States and around the world. Companies need help navigating these issues, and non-profit and advocacy organizations need to better understand the way companies decide to act.

That is why Out Leadership has produced guidelines for corporate engagement around LGBT+ issues.

To create the guidelines, Out Leadership convened a working group that included representatives from Out Leadership member companies as well as from companies outside our network, and select representatives from LGBT+ advocacy groups. The group discussed various models that businesses have implemented to evaluate and respond to requests for action on LGBT+ equality. We have distilled conversations from the working group into the following best practices, in the hope that

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they that can provide a framework for businesses to use to engage on LGBT+ equality.

As an organization uniquely situated at the intersection of law firms, corporations, and LGBT+ advocacy groups, we have observed well-intentioned organizations struggle to meaningfully engage around external LGBT+ issues. We believe that these guidelines provide a useful framework through which corporations can maximize their impact.

Implications for non-LGBT+ social issues

In general, the guidelines for corporate engagement around LGBT+ issues outlined above can also be applied to requests that companies receive to engage around non-LGBT+ social issues. While certain additional considerations may need to be addressed around more controversial potential issues, the guidelines provide a framework with which companies can initially consider requests.



Common Requests

Recent requests for companies to take action around an external LGBT+ issue, whether made by nonprofits and advocacy groups, members of the public, or employees, fall into four primary categories: amicus curiae briefs, business coalitions, and public statements.

Amicus Curiae briefs

In certain legal cases, a Court of Appeals will allow outside parties to submit amicus curiae briefs. In recent years, advocacy groups have requested that businesses sign on to corporate or employer amicus briefs at the levels of state appeals and supreme courts, US circuit courts, and the US Supreme Court. These briefs are typically drafted and filed by major law firms in partnership with a nonprofit or advocacy group. Usually briefs are filed on cases that are going to be argued in court; however, occasionally briefs have been submitted to a court asking it to grant cert.

Signing on to an amicus brief can be more time-consuming and complicated than other ways of taking action, as signing on to a brief requires the attention of legal counsel as well as the engagement of government and public affairs leaders within the company.

Following the Supreme Court decisions on the Defense of Marriage Act and marriage equality, companies have been asked to sign briefs on a number of cases. Some notable examples include the following.

Gloucester County School Board v. G.G.

This case asked whether Title IX protections from sex discrimination in educational programs included protections for transgender people. Among other claims, the 53 companies that signed on to this brief argued that school policies that discriminate against transgender students have adverse effects on their employees' transgender children and employees who are themselves transgender, and that such policies negatively impact employee recruitment efforts. The US Supreme Court reversed its initial decision to hear the case after the Trump administration withdrew trans-inclusive Department of Education Title IX guidelines that had been put in place by the Obama administration.

Zarda v. Altitude Express

The amicus brief in Zarda argued that it was in the interest of business for sexual orientation to be included in interpretations of Title VII employment protections. This brief was signed by 50 companies and filed to the US Court of Appeals for the Second Circuit, where the court ruled en banc that Title VII protections do encompass sexual orientation. The case is expected to be appealed to the US Supreme Court.

Signing on to an amicus brief can be more time-consuming and complicated than other ways of taking action

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission

A total of 37 companies signed on to this brief, which argued that providers of goods and services should not be exempted on the First Amendment basis of free speech or freedom of religion from broad-based nondiscrimination laws that include protections on the basis of sexual orientation. The case was heard by the US Supreme Court in December 2017 and a ruling is expected in the spring of 2018.

Business Coalitions

In a number of instances when state legislatures have considered or passed anti-LGBT+ legislation, businesses have organized coalitions around the idea that state law must be non-discriminatory in order for the economy to thrive. This approach has been most successful in Georgia and Texas. In other cases, companies or CEOs have signed open letters organized by advocacy groups to expressly oppose discriminatory laws. Notable examples include the following.

Texas Competes

In 2015, Texas Competes launched with a pledge signed by nearly 200 companies arguing that Texas' workplaces and communities needed to be diverse and welcoming of LGBT+ people for the state to effectively compete economically. With the introduction of anti-LGBT+ legislation in the 2017 legislative session, including a so-called "bathroom bill", the coalition organized to oppose the measure, releasing a study that found that the bill had already cost the state \$200 million in bad publicity. Over 1,350 companies are now members of the coalition.



Out Leadership Managing Director Stephanie Sandberg and Former Houston Mayor Annise Parker

North Carolina Business Leader Open Letter & Investor Statement

In March of 2016, 106 business leaders signed an open letter, organized by the Human Rights Campaign and Equality North Carolina, calling on Governor Pat McCrory and the leadership of the North Carolina General Assembly to repeal HB 2, which had overturned local LGBT+ nondiscrimination ordinances and barred transgender people from using the restrooms that corresponded to their gender identity. The letter claimed that HB 2 made it harder for companies and universities to recruit and retain talented workers and top students. Concurrently, a group of investors managing a combined \$2.1 trillion, led by Trillium Asset Management and assisted by Out Leadership, released a statement calling for the bill's repeal. Later in 2016, Governor McCrory lost his reelection campaign; HB 2 was partially repealed in early 2017.

A group of investors managing a combined \$2.1 trillion called for HB 2's repeal

Public Statements

A company or CEO may wish to release a public statement expressing support for the LGBT+ community or opposing anti-LGBT+ developments. This can be done in lieu of (or in addition to) signing on to an amicus brief or business coalition; it can also sometimes be the only option for a company to take a public stance on LGBT+ equality in the absence of a pending court case or business coalition. This option can also give a company the opportunity to make a broader statement around the importance of inclusion, rather than address a controversial issue head-on.

Marc Benioff

On 25 March 2015, Salesforce CEO, Marc Benioff, tweeted that the company might be forced to scale back its investment in Indiana if Mike Pence, who was then the governor, signed the state's "Religious Freedom Restoration Act", which would have allowed companies and organizations to discriminate against LGBT+ people. After Pence signed the bill, Benioff tweeted that he would cancel programs that would result in Salesforce employees and clients traveling to Indiana. Benioff was an early and prominent critic of the legislation, leading other major employers and regional chambers of commerce to speak out against it. The law was eventually partially repealed.

Lobbying

Internal or external stakeholders might ask that companies engage with legislators and policy makers through lobbying efforts. Depending on the situation, connecting directly with lawmakers around the business and talent impact of LGBT+ inclusion can be an effective way to either complement or substitute for more public actions like releasing a statement or joining a business coalition.

Best Practice Framework for Evaluating Requests

Based on conversations with a number of companies that have engaged publicly on issues relating to LGBT+ equality, Out Leadership has distilled the following best practices for how companies can best handle requests. These best practices can also serve as a guide for nonprofit and advocacy groups, or LGBT+ employee networks, who may wish to engage a company to take action.



GLG Global Head of Public Affairs Richard Socarides



New York Anti-Violence Project Executive Director Beverly Tillery and Activist Jim Obergefell



2015 Out Leadership Asia Summit



2017 OutWOMEN Breakfast



Lanaya Irvin of Bank of America Merrill Lynch



2016 OutNEXT Global Summit



Australia Marriage Equality Director Tiernan Brady and Irish Prime Minister Leo Varadkar

Board Demographics Reporting: The Business Case

In 2019, Out Leadership and Ropes & Gray published self ID guidelines finding many companies measure LGBTQ+ identity in their rank and file employees internally. There is a distinct lack of measuring LGBTQ+ identity in board diversity metrics across the world. Through Out Leadership's 10 years of work and research we know that visibility, especially at the top, matters to people and to the bottom line.

Diversity on corporate boards is good for business, and stakeholders are increasingly seeking transparency and engagement with regard to the demographic composition of the board. In particular, investors such as BlackRock¹, CalPERS², CalSTRS³, New York City Retirement Systems, and State Street Global Advisors⁴ actively encourage portfolio companies to improve board diversity, and are using their proxy voting power to engage with companies on this topic.

In its "Guidance on Enhancing Gender Diversity on Boards", State Street Global Advisors noted, "In the event that companies fail to take action to increase the number of women on their boards, despite our best efforts to actively engage with them, **we will use our proxy voting power to effect change** — voting against the Chair of the board's nominating and/or governance committee or the board leader in the absence of a nominating and/or governance committee, if necessary."⁵

In an open letter to corporate board chairs, State Street Global Advisors asks companies in its portfolio to provide information about "...Diversity characteristics, including racial and ethnic makeup, of the board of directors."⁶

Citing the positive impact of diversity on share price performance, Goldman Sachs announced in early 2020 that it will **no longer underwrite an IPO for a company unless it has at least one woman or other diverse member on its board**. Goldman's IPO requirement increases to two diverse directors in 2021.⁷

*"This decision is rooted first and foremost in our conviction that **companies with diverse leadership perform better**. Consider this: since 2016, US companies that have gone public with at least one female board director outperformed companies that do not, one year post-IPO. But in addition to the real commercial benefits, it's clear that **changing the stereotypes associated with corporate decision-making will have many positive effects for society as a whole.**" -David Salomon, CEO of Goldman Sachs, February 2020*

¹ BlackRock Investment Stewardship: Corporate governance and proxy voting guidelines for U.S. Securities, January 2020.

² CalPERS' Governance and Sustainability Principles, September 2019.

³ California State Teachers' Retirement System: Corporate Governance Principles, November 7, 2018.

⁴ State Street Global Advisors, "Open Letter" to Board Chairs, August 27, 2020.

⁵ State Street Global Advisors' Guidance on Enhancing Gender Diversity on Boards, page 1, 2019.

⁶ State Street Global Advisors, "Open Letter" to Board Chairs, August 27, 2020, p. 2.

⁷ Diverse Leadership Is Needed More Than Ever – Here's What We're Doing, David Solomon, LinkedIn, January 23, 2020.



Out Leadership's Guidelines for Corporate Engagement

Given the volume of requests that companies receive to take action around external social issues, many companies have adopted formal checklists or decision trees through which they can evaluate potential avenues of action. Out Leadership has distilled insights from our Corporate Engagement working group into the following eight guidelines for corporate engagement.

1. Business connection

Does the issue in question have a direct connection to the company's business? Does it connect back to a company's business or to important stakeholders such as clients or shareholders?

2. Talent

Will this issue affect LGBT+ employees' willingness or ability to work in a certain location, or will the issue negatively impact colleagues' LGBT+ children or immediate family members?

3. Location

Does the company have an employee footprint in the jurisdiction affected by this issue, or are there plans for future growth in the location?

4. Impact

If this is a local issue, has it attracted attention outside its immediate locale, and will taking action lead to wider attention and positive market or talent impacts?

5. Industry Stance

Have major industry peers and competitors taken or are likely to take action on an issue, and will the company be conspicuously absent?

6. History

Has the company previously taken a public stance around an identical or very similar issue, and what are the consequences of not taking action again?

7. Alternatives

Is there an alternative action that a company can take that would be more effective and impactful, or that more closely aligns with company goals?

8. Result of inaction

What might result from not taking action around each particular request: will failing to take action negatively impact talent, shareholders, clients, or the company's brand?

Process Ownership

Companies should have a clear procedure by which corporate engagement requests are evaluated, the first step of which should be to have a defined, senior-level "owner" of such requests. Because taking action on an external LGBT+ issue often requires approval from various departments, designating a single person who owns the process who can shepherd requests to other internal stakeholders is often necessary. As a best practice, an owner (or one of multiple owners) should be a senior decision-maker, to ensure that feedback from other stakeholders is received quickly.

As government affairs, public affairs, and diversity and inclusion functions are often integral to the internal approval process, designating a process owner who sits in one of those departments makes sense for many companies. Some companies manage these requests through their LGBT+ employee network. In those instances, it is again a best practice to have the buy-in and close involvement of a senior business leader.

For one multinational corporation that participated in the working group, requests around external engagement around LGBT+ issues are managed by the firm's head of federal government affairs. As a senior leader at the company, and with the support of the company's CEO, she is able to effectively liaise between stakeholders such as the legal department, public affairs, and the firm's LGBT+ employee resource group, which ensures that the company can respond nimbly to requests.

Designating a single person who owns the process who can shepherd requests to other internal stakeholders is often necessary

CEO and Senior Leader Engagement

It is much easier for companies to take action around external issues if the CEO and/or other C-suite business leaders are active allies and advocates for LGBT+ equality. Engagement at the most senior level of a company can often result in action, even if the criteria outlined in the above guidelines are not met.

As an example, we spoke with a major multinational financial services company that was a vocal opponent of HB 2 in North Carolina. Besides a smattering of financial advisors, the company did not have a major presence in the state, in terms of both employees and clients. Many of its direct competitors did not speak out against the bill or join various coalitions to oppose it. The company's head of wealth management, however, was an ally of the LGBT+ community and believed strongly that the firm needed to speak out. The company subsequently signed on to an investor statement organized by Trillium Asset Management and Out Leadership, which explained that HB 2 was bad for business and called for its repeal.

Note for Advocacy Groups: The guidelines outlined above are what Out Leadership has identified as best practice for businesses seeking to evaluate requests to take action around external LGBT+ issues. While no single company specifically considers all of these criteria, every company we spoke with considers some of them. Advocacy groups may find that taking these considerations into account when they make requests of companies can help speed the process along.

International Considerations

While the specific requests and processes around amicus briefs described above are unique to the United States, companies are often asked to make public statements, lobby governments, participate in the legal process, or otherwise advocate for LGBT+ equality internationally.

Based on our conversations, we believe that the framework for engagement described earlier can also be applied to requests for engagement around LGBT+ issues in foreign countries. For companies seeking to engage around LGBT+ equality at the international level, it is helpful to consider the following.

1. The Economic and Business Impact

To help companies understand the economic impact of LGBT+ exclusion abroad, Out Leadership has created CEO Business Briefs for 16 countries. These briefs, which also provide talking points around the business case for LGBT+ equality, can serve as a resource for companies seeking to engage abroad.

2. Support from the Head Office

For companies based in the United States, it is important for senior leaders based in the US to emphasize the business case and importance of LGBT+ inclusion when they visit overseas offices. This, along with engagement from US-based employees with local LGBT+ networks, not only provides support and assurance to LGBT+ employees abroad, but also can help alleviate potential concerns from local leaders about taking stances around LGBT+ inclusion.

3. Organizational Structures

International partnerships such as law firms and some professional services firms are often not structured in a way that allows the global chair or global leadership to make decisions for the entire organization. Local partners and management often have substantial power to control budgets, employee policies and procedures, and communications. It is important for management at the global level to make sure that local and regional leaders are aware of the business and talent imperative for LGBT+ inclusion, and of the negative consequences firms can face for inaction around issues that affect the LGBT+ community.

Prior to 2017, a number of multinational companies sponsored Pink Dot, an annual LGBT+ pride event in Singapore. In 2017, the Singapore government banned foreigners from attending and sponsoring the event. As a result, a senior-level representative from a former major corporate sponsor met with the Ministry of Home Affairs, armed with an Out Leadership CEO Business Brief, and explained how supporting LGBT+ inclusive was a business driver for the company and is good for the economy overall. When the government continued to refuse foreign companies to sponsor the event, this company worked with a number of their local clients to ensure that sponsorship continued for the event.

Amicus Brief Best Practices

Given the more complex and time-consuming nature of joining an amicus brief, there are a number of guidelines that advocacy groups and law firms should take into account when attempting to engage companies as amici.

1. Timing of outreach

Companies should be made aware of the opportunity to sign on to an amicus brief as early as possible. When a law firm is driving the process of writing the actual brief, it is a best practice to have them looped in for any initial outreach that is being done by advocacy groups or external partners. For major cases, the process of creating a brief will begin months before the filing deadline – advocacy groups and law firms should jointly begin reaching out to potential amici at the beginning of the process, not the end.



2. Process

When advocacy groups and law firms reach out to companies to invite them to participate in an amicus brief, they should be prepared to share an explanation of why the brief is being created, an outline of the argument, and a timeline spelling out when companies can expect to review a draft of the brief, as well as when the final brief needs to be filed.

3. Partnerships

No single advocacy group has a monopoly of contacts at corporations that might be interested in signing on to an amicus brief. If one particular advocacy organization is leading the process of bringing on amici, it is a best practice to loop in other groups that regularly engage with the private sector around these issues, to ensure that companies that might have otherwise signed on are not left uninformed of opportunities.

Common Pitfalls

Many businesses take LGBT+ inclusion very seriously, and take steps to ensure that their LGBT+ and ally employees feel comfortable at work and in their communities, to the furthest extent they are able to do so. In our conversations with business leaders, however, we identified a number of pitfalls that make it difficult for companies to engage externally around LGBT+ issues. Addressing these areas can make it easier for nonprofits and advocacy groups or LGBT+ employee networks to successfully request corporate action.

1. Volume of requests

Companies now receive a high volume of requests for engagement around a wide variety of social issues. According to one senior executive, in the last year, "issues that once popped up every five years are now coming up every five minutes". For LGBT+ issues in particular, our working group hypothesized that it might be more effective for a single, widely acknowledged organization like Out Leadership to position itself as a clearinghouse, responsible for funneling requests from various stakeholders to businesses.

2. Timing

While companies are often asked to take actions or make a statement around a breaking news issue, the issue of timing is (or ought to be) less acute with regard to slower-moving legislative processes and amicus briefs. In these cases, companies should be given as much time as possible to evaluate a request. Companies report that they often only receive one or two weeks' notice when they are asked to sign onto amicus briefs, which is not sufficient.

3. Bureaucracy

Without a senior leader, particularly from the business side, pushing to move requests among internal stakeholders, things can often get bogged down at various stages of approval. Actively engaging senior business leaders is a very effective way to ensure that requests for action are not caught up for too long in the bureaucracy that often exists inside complex multinational corporations.

About Out Leadership

Out Leadership is the global LGBT+ business network. We help out leaders and organizations realize the economic growth and talent dividend derived from inclusive business.

To generate a Return on Equality™, we provide global business with the tools for innovation and transformation. Through our summits, talent accelerators and strategic insights, we've earned the trust of influential CEOs by helping them realize the returns of equality.





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- BakerHostetler
- Bank of America
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- WACHTELL, LIPTON, ROSEN & KATZ
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