INFORMING SHAREHOLDERS: PROVIDING A ROADMAP FOR THE SEC TO ACT TO REQUIRE PUBLIC CORPORATIONS TO DISCLOSE POLITICAL SPENDING

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"With the advent of the Internet, prompt disclosure of expenditures can provide shareholders . . . with the information needed to hold corporations . . . accountable for their positions . . . . Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits."[2]

The Supreme Court erred by not revisiting its holding in *Citizens United v. Federal Election Commission (FEC)*.[3] I made this argument in a previous article.[4] The Supreme Court's decision "removed the prohibition on corporate independent political expenditures, and allows corporations to spend unlimited sums from corporate treasuries to expressly advocate the election or defeat of a political candidate."[5] Unfortunately, my pleas to the high court went unanswered.[6] However, the United States Securities Exchange Commission ("SEC") has a chance to shine light on this issue by requiring public corporations "to disclose to shareholders the use of corporate resources for political activities."[7]

Disclosure of corporate political spending would ensure that directors adhere to their duties of full and fair disclosure to shareholders.[8] Additionally, disclosure of corporate political spending would diminish monitoring costs by informing shareholders of harmful political spending and will provide potential investors with key information for making informed, rational investment decisions.[9] Due to the misguided decision in *Citizens United*, it is legal for corporations to spend an unlimited amount of money on political issues;[10] however, this Article

[2] 558 U.S. 310, 370 (2010) (emphasis added).

[3] William Alan Nelson, *Buying the Electorate: An Empirical Study of the Current Campaign Finance Landscape and How the Supreme Court Erred by Not Revisiting Citizens United*, 61 CLEV. ST. L. REV. 443, 444 (2013). *See generally Citizens United*, 558 U.S. at 372.

[4] Nelson, *supra* note 3, at 444.

[5] *Id.* at 445–46 (citing *Citizens United*, 558 U.S. at 365). In addition, relying on *Citizens United*, the D.C. Circuit in 2010 concluded in *SpeechNow.org v. FEC* that limits on corporate contributions to independent groups, such as Super PACs, were also unconstitutional. *See* SpeechNow.org v. FEC, 599 F.3d 686, 695–96 (D.C. Cir. 2010).

[6] *See* Nelson, *supra* note 3, at 444–45.

[7] Comm. on Disclosure of Corp. Political Spending, Sec. Exch. Comm'n, Petition for Rulemaking, File No. 4-637, at 1 (Aug. 3, 2011), https://www.sec.gov/rules/petitions/2011/petn4-637.pdf [hereinafter Original Petition].

[8] *Id.* at 8.

[9] *Id.* at 7, 10.

[10] *Id.* at 9.

submits that shareholders need to know about those expenditures and that if corporations truly believe their political spending benefits their bottom lines, they should not oppose disclosure of that spending.[11]

This Article is timely, especially since in May 2015, a corporate shareholder filed for relief under the Administrative Procedure Act ("APA")[12] to require the SEC to initiate a rulemaking mandating that public corporations disclose corporate resources used for political activities.[13] Additionally, in May 2015, a bipartisan group of former SEC officials sent a letter to the SEC in support of the rulemaking petition.[14]

The issue of mandatory disclosure of corporate political spending has also recently been elevated by members of Congress.[15] On August 31, 2015, a group of forty-four Senators sent a letter to the SEC expressing support for the petition for rulemaking,[16] and on October 22, 2015, a group of fifty-nine members of the House of Representatives sent a letter to the SEC expressing support for the petition for rulemaking.[17] Unfortunately, the SEC has also faced considerable political pressure from members of Congress not to consider a rule mandating disclosure of corporate political spending.[18] In its most recent Fiscal Year 2016 Financial Services

[11] Letter from Ian Vandewalker, Counsel, Democracy Program, Brennan Center for Justice to Mary Jo White, Chair, Sec'y Exch. Comm'n, at 4 (Mar. 10, 2014), http://www.brennancenter.org/sites/default/files/analysis/SEC_comment_031014.pdf ("A company's decision to engage in political spending should be made transparently and with shareholder value in mind, which is why disclosure policies are good for investors, companies, and the market.").

[12] *See* 5 U.S.C. §§ 501, 551, 552 (2012); *see infra* note 13.

[13] Complaint for Declaratory and Injunctive Relief, Silberstein v. SEC, 1:15-cv-00722 (D.D.C. May 13, 2015) [hereinafter Silberstein Complaint].

[14] Letter from William Henry Donaldson, Arthur Levitt, & Bevis Longstreth, Sec. Exch. Comm'n to Mary Jo White, Chair, Sec. Exch. Comm'n (May 27, 2015), http://corpgov.law.harvard.edu/wp-content/uploads/2015/06/20150601-Commissioners-Letter.pdf.

[15] *See, e.g.*, Letter from Fifty-Nine Members of the House of Representatives to Mary Jo White, Chair, Sec. Exch. Comm'n (Oct. 22, 2015), http://corpgov.law.harvard.edu/wp-content/uploads/2015/10/10262015-house-of-representatives-letter-support-petition-4-637.pdf [hereinafter House Letter]; Letter from Forty-Four U.S. Members of the Senate to Mary Jo White, Chair, Sec. Exch. Comm'n (Aug. 31, 2015), http://www.merkley.senate.gov/imo/media/doc/20150831_SECLetter.pdf. [hereinafter Senate Letter].

[16] Senate Letter, *supra* note 15.

[17] House Letter, *supra* note 15.

[18] *See, e.g.*, H.R. 114, 114th Cong., Reg. Sess. (2015), http://appropriations.house.gov/uploadedfiles/bills-114hr-sc-ap-fy2016-fservices-

Bill, the U.S. House Appropriations Committee included a prohibition to the SEC from implementing a rule to require disclosure of corporate political spending.[19] The issue has also arisen in the 2016 Presidential race; on September 8, 2015, Democratic candidate Hillary Clinton voiced her support for a SEC rule for mandatory disclosure of corporate political spending.[20]

The Article begins by discussing the original and amended petitions for rulemaking, including the reasoning behind them and the response received from shareholders and the community at large. The Article then transitions into an analysis of why the rule is both constitutional and within SEC's jurisdiction; responds to opposition arguments alleging that a rule is not necessary; discusses the recent lawsuit filed to compel the SEC to promulgate a rule; and researches possible benefits and costs imposed by a mandatory disclosure obligation. The Article concludes by providing shareholders with options under the current regulatory regime to investigate corporations' political spending, provides a model structure for SEC if and when they decide to initiate a rulemaking on this issue and provides a model for firms to establish programs to supervise corporate political spending.

I. ORIGINAL AND AMENDED PETITIONS FOR RULEMAKING AT THE SEC

In August 2011, a group of academics filed a petition for rulemaking, asking the SEC to promulgate "rules to require public companies to disclose to shareholders the use of corporate resources for political activities."[21] The petition contends that political spending information should be disclosed to shareholders because data indicates that "public investors have become increasingly interested in receiving information about corporate political spending[ ]" and "disclosure of information on corporate

subcommitteedraft.pdf.

[19] *Id.* Section 625 of the bill would prevent the SEC from using funds to create a rule on disclosure of political contributions, or contributions to trade associations and other tax-exempt organizations. *Id.*

[20] Jennifer Epstein, *Hillary Clinton Proposes Making Companies Disclose Political Donations*, BLOOMBERG, (Sept. 8, 2015, 12:00 AM), http://www.bloomberg.com/politics/articles/2015-09-08/hillary-clinton-proposes-making-companies-disclose-political-donations. Democratic Presidential Bernie Sanders also supports disclosure; Senator Sanders was a signatory to the Senate letter mentioned above. Senate Letter, *supra* note 15.

[21] Original Petition, *supra* note 7, at 1.

political spending is important for the operation of corporate accountability mechanisms[.]"[22]

The petition contends that the SEC "has clear and longstanding authority to determine what information public [corporations] must disclose to their shareholders"[23] and that Congress has "'opted to rely on the discretion and expertise of the SEC for a determination of what types of additional disclosure would be desirable.'"[24] The petition also relied on shareholder interest in the issue, citing a 2006 poll that found eighty-five percent of shareholders believed there was a lack of transparency with respect to corporate political activity.[25]

The petition also cited language from *Citizens United*, where the Supreme Court "relied upon '[s]hareholder objections raised through the procedures of corporate democracy' as a means through which investors could monitor the use of corporate resources on political activities."[26] The petition believed that the Supreme Court found that shareholders could "'determine whether their corporation's political speech advances the corporation's interest in making profits,' and discipline directors and executives who use corporate resources for speech that is inconsistent with shareholder interests."[27] The petition also noted that the Court in upheld the disclosure rules challenged in *Citizens United* by an 8-1 vote.[28]

The petition further contended that even though information on corporate spending on politics was already required to be publicly disclosed under federal, state, and local election laws, shareholders were unable to easily obtain the information.[29]

> First, the information that is publicly available on corporate political spending is scattered among several federal, state[,] and local

[22] *Id.* at 2.

[23] *Id.*

[24] *Id.* (quoting Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1045 (D.C. Cir. 1979); *see also Natural Resources Defense Council, Inc.*, 606 F.2d at 1051 ("[T]he Commission is given complete discretion . . . to require in corporate reports only such information as it deems necessary or appropriate in the public interest or to protect investors."(omissions in original)).

[25] *Id.* at 4 (citing MASON-DIXON POLLING & RESEARCH, CORPORATE POLITICAL SPENDING: A SURVEY OF AMERICAN SHAREHOLDERS 6 (2006)).

[26] *Id.* at 7 (quoting Citizens United v. Fed. Elections Comm'n, 558 U.S. 310, 370 (2010)).

[27] Original Petition, supra note 7, at 7 (quoting *Citizens United*, 558 U.S. at 370).

[28] *Id.* at 9.

[29] *Id.* at 8.

> government agencies, presented in widely varying formats, and is ill-suited to giving shareholders a good picture of a particular corporation's political spending. . . . [30]

> Second, . . . a substantial amount of the public-company resources spent on politics are currently not disclosed in any public filing and thus would be hidden even from someone who invested significant effort in trying to put together all the publicly available information about a company's public spending.[31]

In April 2014, due to the SEC's lack of action on the original petition, Citizens for Responsibility and Ethics in Washington ("CREW") filed a petition, which incorporated by reference the Original Petition, for rulemaking that would require public corporations to disclose to shareholders their corporate political spending.[32]

The Amended Petition relied upon a study completed by CREW in April 2014 that found "significant discrepancies" with respect to corporate political expenditures.[33] CREW described how some corporations were not complying with disclosure policies they self-adopted and listed several corporations that contradict their stated policies' overseeing political contributions and actual practices.[34] The Amended Petition, based on this evidence, contends that "leaving disclosure of corporate political spending to the discretion of individual [corporations] has deprived investors, shareholders, and the public of information that would help them assess whether those contributions are in the best interest of these corporations"[35] and that "[t]he many problems that voluntary disclosure policies have created demonstrate conclusively they are no substitute for regulations that would provide a clearly delineated, unambiguous, and uniform set of disclosure requirements for all public [corporations]."[36]

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[30] *Id.*

[31] *Id.*

[32] Comm. on Disclosure of Corp. Political Spending, Sec. Exch. Comm'n, Petition for Rulemaking, File No. 4-637 (Apr. 15, 2014), http://www.sec.gov/rules/petitions/2014/petn4-637-2.pdf [hereinafter Amended Petition].

[33] *Id.* at 8, 9; *see The Myth of Corporate Disclosure Exposed,* CREW (Apr. 15, 2014), http://www.citizensforethics.org/page//PDFs/Reports/4_15_2014_Myth_of_Corporate_Disclosure_Exposed_The_Problem_with_Political_Spending_Reports_CREW.pdf?nocdn=1 [hereinafter CREW].

[34] *See* Amended Petition, *supra* note 32, at 16.

[35] *Id.*

[36] *Id.*

Incredibly, as of November 2015, the SEC has received more than 1.2 million comments on the Original Petition—more than any rulemaking petition in the SEC's history.[37] In response to the Original Petition, the SEC added the issue to its Spring 2013 regulatory agenda,[38] however, the issue was not included in the Fall 2013 regulatory agenda.[39] It is important to note that a wide range of groups supports the rulemaking.[40] Many consumer groups such as Public Citizen, Americans for Financial Reform, and National Association of Consumer Advocates submitted comments in support.[41] Labor groups including American Federation of Labor and Congress of Industrial Organizations ("AFL- CIO") and American Federation of State, County and Municipal Employees ("AFSCME") submitted comments.[42] Additionally, many institutional investor groups such as the Council of Institutional Investors ("CII") also submitted comments in support.[43]

It is rare to have such a diverse group of stakeholders supporting a rulemaking;[44] this fact makes the SEC's inaction puzzling to say

[37] Lucian A. Bebchuk & Robert J. Jackson, *Hindering the S.E.C. From Shining a Light on Political Spending*, N.Y. TIMES (Dec. 21, 2015), http://www.nytimes.com/2015/12/22/business/dealbook/hindering-the-sec-from-shining-a-light-on-political-spending.html?_r=0; *Comments on Rulemaking Petition: Petition to Require Public Corporations to Disclose to Shareholders the Use of Corporate Resources for Political Activities*, SEC, File 4-637, http://www.sec.gov/comments/4-637/4-637.shtml (last visited Feb. 8, 2016).

[38] *Agency Rule List – Spring 2013*, SEC, http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPubId=201304&showStage=longterm&agencyCd=3235&Image58.x=38&Image58.y=25&Image58=Submit (last visited Feb. 8, 2016).

[39] *Agency Rule List – Fall 2013*, SEC, http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPubId=201310&showStage=active&agencyCd=3235&Image58.x=34&Image58.y=1&Image58=Submit (last visited Feb. 8, 2016).

[40] *See* Bebchuk & Jackson, *Hindering the S.E.C., supra* note 37.

[41] Letter from Am. for Fin. Reform, et al., to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n (Sept. 26, 2013), https://www.sec.gov/comments/s7-06-13/s70613-434.pdf.

[42] *Id.*

[43] Original Petition, supra note 7, at 6; *see* Bebchuk & Jackson, *Hindering the S.E.C., supra* note 37. Additional organizations that support "this measure include a group of [forty] mutual fund and institutional asset managers that together manage more than $690 billion, as well as several state treasurers and pension funds." Ian Vandewalker, *Why Both Shareholders and Companies Should Support Political Spending Transparency*, HUFFINGTON POST BUSINESS (updated Jan. 23, 2014), http://www.huffingtonpost.com/ian-vandewalker/corporate-political-spending-disclosure_b_4177413.html.

[44] *Group Presses on Political Spending Disclosures,* ISS: GOVERNANCE WEEKLY, http://www.issgovernance.com/group-presses-on-political-spending-disclosures/

the least. As of November 2015, the SEC has not acted on the Original Petition;[45] however, this author is optimistic that now that the SEC "has taken action to address virtually all of the mandatory rulemaking provisions of the Dodd-Frank Act[,]"[46] it can move forward with addressing this issue.[47]

II. REGULATORY ACTION IS APPROPRIATE AND CONSTITUTIONAL

Opponents of a rulemaking argue that comments put forth by proponents of disclosure of corporate political spending are unpersuasive and that the requirement for public corporations to disclose to shareholders the use of corporate resources for political activities is both outside of the SEC's jurisdiction and unconstitutional.[48] Opponents also argue: that there is little shareholder interest in mandating disclosure of political spending; that the management and board have no obligation to inform shareholders about political spending; that corporations are not adopting disclosure standards voluntarily; and that political spending does not harm shareholder value.[49]

A. SEC has Jurisdiction to Promulgate Rules with Respect to Disclosure of Corporate Political Spending

This Article agrees with the Original Petition that the SEC has

(last visited Feb. 8, 2016).

[45] *See id.*

[46] *Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act*, SEC, http://www.sec.gov/spotlight/dodd-frank.shtml (last modified Aug. 6, 2015).

[47] Sadly recent comments from SEC Chair Mary Jo White have blunted this optimism. Patrick Temple-West, *SEC's White remains cool to rule for corporate campaign disclosure,* POLITICOPRO (Nov. 17, 2015, 1:37 PM), https://www.politicopro.com/financial-services/whiteboard/2015/11/secs-white-remains-cool-to-rule-for-corporate-campaign-disclosure-063855 (Mary Jo White stated that "[a]n SEC rule to require companies to disclose campaign contributions is not 'mission critical' at the agency, in part because shareholder prodding has led companies to disclose this information voluntarily.").

[48] *See, e.g.*, Michael D. Guttentag, *On Requiring Public Corporations to Disclose Political Spending*, 2014 COLUM. BUS. L. REV. 593, 662 (2014) ("a careful review of the evidence, including previously unpublished empirical findings, shows that even those who favor increased disclosure of corporate spending in political contests generally should be hesitant to support a rule that would require only public [corporations] to disclose political spending."); Letter from U.S. Chamber of Commerce, et al., to Elizabeth M. Murphy, Sec'y, Sec. & Exch. Comm'n, at 22 (Jan. 4, 2013), http://www.sec.gov/comments/4-637/4637-1198.pdf [hereinafter Chamber of Commerce Letter].

[49] *See* Guttentag, *supra* note 48, at 620.

authority to promulgate a rule under the Securities Exchange Act of 1934 ("Exchange Act") to require public corporations to disclose their political spending.[50] In *Natural Resources Defense Council, Inc. v. SEC*, the D.C. Circuit, relying on the legislative history of the Exchange Act, held that Congress "has seen fit to delegate broad rulemaking authority to the SEC[ ]" and that "(t)he Commission is given complete discretion . . . to require in corporate reports only such information as it deems necessary or appropriate in the public interest or to protect investors."[51] The D.C. Circuit also stated that "[t]he [Exchange] Act's periodic reporting and proxy solicitation provisions leave the SEC with even greater discretion to require disclosure by rulemaking."[52]

Opponents of the rulemaking argue that the SEC only has the authority to require disclosure of "material" information and that political and lobbying expenditures do not constitute material information.[53] The opposition cites to a 1999 SEC Staff Accounting Bulletin that describes the standard of materiality and claims that political expenditures do not generally rise to the five percent materiality threshold;[54] however, they omit language from the Staff Bulletin stating that:

> [m]ateriality concerns the significance of an item to users of a registrant's financial statements.[55] A matter is "material" if there is a substantial likelihood that a reasonable person would consider it

[50] 15 U.S.C. § 78n(a)(1) (2012) (prohibiting the solicitation of proxies "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors[ ]"); *see also* Original Petition, *supra* note 7, at 1–2.

[51] Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1050–51 (D.C. Cir. 1979) (internal citation omitted)(omissions in original).

[52] *Id.* at 1050, n. 26.

[53] Chamber of Commerce Letter, *supra* note 48, at 22. This letter was filed on behalf of the U.S. Chamber of Commerce and twenty-eight other similar organizations. *Id.* at 30.

[54] *See* Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150, 45,150 (Aug. 19, 1999)(to be codified at 17 C.F.R. pt. 211); Chamber of Commerce Letter, *supra* note 48, at 22 (arguing that "[t]he petition does not even attempt to demonstrate that political . . . expenditures constitute material information. Certainly the amounts of money would not come close to triggering the [five-percent] materiality threshold"). Interestingly, the Staff Bulletin directly contradicts this argument by stating that the "[e]valuation of materiality requires a registrant and its auditor to consider all the relevant circumstances, and the staff believes that there are numerous circumstances in which misstatements below [five percent] could well be material." Staff Accounting Bulletin No. 99, 64 Fed. Reg. at 45,150 (emphasis removed).

[55] Staff Accounting Bulletin No. 99, 64 Fed. Reg. at 45,150; *see* Chamber of Commerce Letter, *supra* note 48, at 22.

important.[56]

The U.S. Supreme Court has held that a fact is material if there is "a substantial likelihood that the . . . fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[57] This Article contends, and provides empirical evidence to support, that corporate political expenditures are material under these standards.[58] Even if opponents are correct in arguing that political spending is not economically significant, which the evidence contradicts, the SEC has stated previously that issues such as corporate political spending may be "significant to an issuer's business, even though such significance is not apparent from an economic viewpoint."[59]

The SEC has recognized that shareholder accountability over corporate political spending is appropriate.[60] In March 2011, Northstar Asset Management "filed a shareholder resolution [with Home Depot] seeking a vote on political spending fearing that its fiduciary obligation to protect client assets might be at risk if executives were allowed to continue to make political contributions outside of shareholder control."[61] Home Depot challenged Northstar's resolution with the SEC claiming infringement upon its ordinary business.[62] The SEC issued a no-action letter in favor of Northstar; the letter recognized that shareholder accountability over corporate political spending is a significant policy issue that can not be barred from a proxy statement under the ordinary business exclusion.[63]

Recently, on October 22, 2015, the SEC provided a staff bulletin

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[56] Staff Accounting Bulletin No. 99, 64 Fed. Reg. at 45,150.

[57] TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976).

[58] *See id.*

[59] Adoption of Amendments Relating to Proposals by Security Holders, 41 Fed. Reg. 52,994, 52,997 (Dec. 3, 1976) (to be codified at 17 C.F.R. pt. 240); Lucian Bebchuk & Robert J. Jackson, *Responding to Objections to Shining Light on Corporate Political Spending (1): The Claim of Immateriality*, HARV. L. SCH. FOR. OF CORP. GOVERNANCE & FIN. REG. (Apr. 4, 2013), https://corpgov.law.harvard.edu/2013/04/04/responding-to-objections-to-shining-light-on-corporate-political-spending-1-the-claim-of-immateriality/.

[60] *See New SEC Decision Gives Shareholder Activists the Right to Seek a Vote on Political Contributions,* NORTHSTAR ASSET MGMT. (Mar. 30, 2011), http://northstarasset.com/articles/new_sec_decision_gives_shareholders_right_to_vote_on_political_contributions.

[61] *Id.*

[62] *Id.*

[63] *Id.*; The Home Depot, Inc., SEC No-Action Letter, 2011 SEC No-Act. LEXIS 333, at 17 (Mar. 25, 2011).

concerning Rule 14a-8[64] that reinforces the reasoning behind the Northstar letter discussed above.[65] In the bulletin, the SEC looked at whether corporations can exclude certain shareholder proposals concerning policy issues.[66] The SEC stated that "proposals that focus on a significant policy issue transcend a company's ordinary business operations and are not excludable under Rule 14a-8 (i)(7)."[67] The SEC staff further stated that "a proposal may transcend a company's ordinary business operations even if the significant policy issue relates to the 'nitty-gritty of its core business.'"[68]

B. Disclosure Would Not Violate the First Amendment

Opponents of the rule argue that "public [corporations'] political and lobbying[69] activities are protected by the First Amendment" and that forced disclosure of these activities "would single out these activities for special requirements not applicable to other speakers . . . violat[ing] the First Amendment."[70] Opponents also argue that "[t]he Supreme Court has recognized that disclosure requirements can chill the exercise of First Amendment rights, and invalidated such requirements in a variety of contexts."[71] These arguments are not supported by legal precedent with respect to corporate political spending.[72]

Under the proposed rule, the SEC would only mandate that

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[64] 17 C.F.R. § 240.14a-8 (2011); Sec. Exch. Comm'n Div'n of Corp. Fin., Staff Legal Bulletin No. 14H, Oct. 22, 2015, http://www.sec.gov/interps/legal/cfslb14h.htm#_ednref23. Rule 14a-8(i)(7) permits a company to exclude a shareholder proposal "[i]f the proposal deals with a matter relating to the company's ordinary business operations[.]" 17 CFR § 240.14a-8 (i)(7).

[65] Sec. Exch. Comm'n Div'n of Corp. Fin., Staff Legal Bulletin No. 14H, *supra* note 64.

[66] *See id.*

[67] *Id.*

[68] *Id.* (quoting Trinity Wall St. v. Wal-Mart Stores, Inc., 792 F.3d 323, 347 (3d Cir. 2015)).

[69] Chamber of Commerce Letter, *supra* note 48, at 22. This argument is strange, since lobbying expenses must currently be disclosed, so if anything, the example of lobbying actually weakens the opposition argument. *See generally Lobbying Disclosure Act: A Brief Synopsis of Key Components*, PUBLIC CITIZEN 2, 5, http://www.citizen.org/documents/Brief-Synopsis-of-LDA.pdf (last visited Mar. 2, 2016) (explaining disclosure requirements).

[70] Chamber of Commerce Letter, *supra* note 48, at 22.

[71] *Id.* at 23.

[72] *See generally* Adam Liptak, *Justices 5-4, Reject Corporate Spending Limit*, N. Y. TIMES, Jan. 22, 2010, at A1 (discussing the *Citizens United* opinion and that the legal precedent is in regard to limits on spending, not disclosure, the Supreme Court indicating that it may be proper to mandate disclosure).

companies disclose their political spending, it would not prohibit it.[73] The Bipartisan Campaign Reform Act of 2002 ("BCRA")[74] provides that any person who spends more than $10,000 on electioneering communications within a calendar year must file a disclosure statement with the FEC.[75] The BCRA also provides that the statement must identify the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors.[76] So those individuals who argue that corporations are people[77] could not then subsequently argue that corporations would not have to disclose corporate political spending.[78] It is important to note, as noted above, that *Citizens United* left the disclosure provision of the BCRA intact.[79]

In the securities context, the SEC has regulated public corporate speech since the 1930's.[80] For example, under the Securities Act of 1933 ("Securities Act"):

> securities may be neither offered nor sold without registration, except under narrowly defined circumstances typically reserved for small offerings. [ ] as the registration provisions operate in practice, neither offers nor advertisements may be made, published, or

[73] *See, e.g.*, *id.*; Original Petition, *supra* note 7, at 1.

[74] Sometimes referred to as the McCain-Feingold Act. *How McCain-Feingold Failed to Change American Politics*, ABOUT NEWS (updated June 24, 2015), http://uspolitics.about.com/od/finance/a/mccain_feingold.htm.

[75] 2 U.S.C. § 434(f)(1) (2012).

[76] 2 U.S.C. § 434(f)(2).

[77] The Supreme Court has generally provided for constitutional rights for corporations since the late nineteenth century. Gulf, C. & S.F. Ry. Co. v. Ellis, 165 U.S. 150, 154 (1897) ("corporations are persons within the provisions of the Fourteenth Amendment . . . . A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens."). *But see* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.").

[78] *See* 2 U.S.C. § 434(f)(2)(B)(including that the principal place of business should be in the contents of statement if not individual).

[79] *Citizens United*, 558 U.S. at 315–16. The Court explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. *Id.* at 369 (citing Buckley v. Valeo, 424 U.S. 1, 75–77 (1976) (upholding "a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures.")); McConnell v. FEC, 540 U.S. 93, 321 (2003) ("three Justices who would have found § 441b to be unconstitutional nonetheless voted to uphold BCRA's disclosure and disclaimer requirements.")).

[80] *See Federal Securities Laws: The Laws that Govern the Securities Industry*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/about/laws.shtml#secact1933 (last visited Feb. 9, 2016).

> delivered without advance approval by the SEC - approval contingent upon the Commission's determination that the materials are neither false nor misleading.[81]

Additionally, with respect to proxy solicitation, "the SEC is concerned with whether the materials used in the proxy process are false or misleading - even when the grounds for a proxy challenge are explicitly political - and equally with the timing and style of the communications."[82] For the purpose of registration of securities, "the SEC requires that the information provided be accurate[.]"[83]

Broker-dealers are also subject to regulation of corporate speech.[84] Financial Industry Regulatory Authority ("FINRA") Rule 2210 governs broker-dealers' communications with the public.[85] The rule provides "standards for the content, approval, recordkeeping[,] and filing of communications with FINRA."[86] The rule also specifically regulates the content of the communications:

> must be based on principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service.[87] No member may omit any material fact or qualification if the omission, in light of the context of the material presented, would cause the communications to be misleading.[88]

Additionally, in June 2010, the SEC adopted its "pay-to-play" rule under the Advisers Act.[89] The "pay-to-play" rule refers to "various arrangements by which investment advisers may seek to influence the award of advisory business by making or soliciting

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[81] Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1778 (2004) (citing 15 U.S.C. § 77n (d)–(e) (2000)).

[82] *Id.* at 1779.

[83] 17 C.F.R. § 230.408(a) (2005) (The Securities Act contains a provision requiring public corporations, when making disclosures, to always disclose "such . . . material information . . . as may be necessary to make the required statements . . . not misleading."); *Federal Securities Laws, supra* note 80.

[84] *Advertising Regulation: FINRA Rule 2210*, FINRA, http://www.finra.org/industry/issues/advertising (last visited Feb. 9, 2016).

[85] *Id.*

[86] *Id.*

[87] *Rule 2210 (d)(1), Communications with the Public*, FINRA, http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=10648 (last visited Feb. 9, 2016).

[88] *Id.*

[89] 17 CFR § 275.206 (4)–5 (2015); Covington & Burling LLP, *Summary of the SEC's Pay-to-Play Rule 206(4)-5*, COVINGTON, https://www.cov.com/files/Uploads/Documents/Summary_of_SEC's_Pay_to_Play_Rule.pdf (last visited Apr. 20, 2016).

political contributions to the government officials charged with awarding such business."[90] Under this rule, the SEC has placed conditions on political spending by investment advisers, including "a two-year prohibition on an adviser's providing compensated services to a government entity following a political contribution to certain officials of that entity[.]"[91] The New York Republican State Committee and the Tennessee Republican Party sued to enjoin the SEC from enforcing the "pay-to-play" regulation; the case was dismissed by the D.C. District Court in September 2014.[92] It is important to note that the conditions imposed by the SEC under the "pay-to-play" rule, which provide for a limited ban on all political expenditures to certain government officials, are much more severe than mere disclosure.[93]

Contrary to opposition arguments, the proposed regulation of political spending disclosure is also distinguishable from the SEC's Conflict Minerals Provision.[94] In *National Association of Manufacturers v. SEC*, the D.C Circuit recently held that the SEC's conflict minerals disclosure requirement violates the First Amendment.[95] However, in that case, the D.C. Circuit relied upon the SEC's determination that the regulations were "'directed at achieving overall social benefits,' that the law was not 'intended to generate measurable, direct economic benefits to investors or issuers,' and that the regulatory requirements were 'quite different from the economic or investor protection benefits that our rules ordinarily strive to achieve.'"[96] The court also relied upon the SEC's determination that "unlike in most of the securities laws, Congress intended the Conflict Minerals Provision to serve a humanitarian purpose[.]"[97] Any proposed regulation concerning disclosure of political spending would be predicated on economic and investor protection benefits.[98] As noted later in this Article, corporate political spending can have both a direct and indirect

90 *Id.*

91 *Id.*

92 N.Y. Republican St. Comm., et al. v. Sec. & Exch. Comm'n, No. 14-01345 (BAH), at 1, 2 (D.D.C. Sept. 30, 2014) (memorandum opinion).

93 *See generally* Covington & Burling, *supra* note 90 (explaining prohibitions under the "pay-to-play" rule).

94 *See* Conflict Minerals, 77 Fed. Reg. 56,274, 56,274 (Sept. 12, 2012) (to be codified at 17 C.F.R. §§ 240.13p-1, 249b.400).

95 *See* Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 530 (D.C. Cir. 2015).

96 *Id.* at 522 (quoting 77 Fed. Reg. at 56,350).

97 *Id.* at 521, n.7 (quoting 77 Fed. Reg. at 56,350).

98 *See id.*

effect on a corporation's finances.[99]

Both SEC and FINRA rules, including the provisions discussed above, reflect that financial regulators have content-based control over corporate speech.[100] Securities regulations, which provide for content-based regulation over corporate speech, have governed the conduct of registrants for over seventy-five years.[101] Roberta Karmel, former Chair of the SEC, has stated that "[s]ecurities regulation is essentially the regulation of speech."[102]

It is important to note that SEC rules only apply to regulated entities;[103] therefore, the opposition argument that this division is discriminatory is not legally supported.[104] The Supreme Court has provided for differing levels of rights under the First Amendment for numerous situations. One example is in the context of speech allowed in an academic setting. For example, the Supreme Court has held "that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings[ ]"[105] and that the rights of students "must be 'applied in light of the special characteristics of the school environment.'"[106] Additionally, in the commercial context, the Supreme Court has concluded "that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way[ ]"[107] and that "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake."[108]

It is also important to note that lower courts have upheld

[99] *See infra* note 218 and accompanying text (discussing effect of corporate political expenditures on shareholders).

[100] *See* Schauer, *supra* note 81, at 1777–78; FINRA *supra* note 84.

[101] *See Federal Securities Laws*, *supra* note 80.

[102] Roberta Karmel, *The Third Abraham L. Pomerantz Lecture The First Amendment And Government Regulation Of Economic Markets: Introduction*, 55 BROOK. L. REV. 1, 1 (1989); *Roberta Karmel*, BROOK. L. SCH., https://www.brooklaw.edu/faculty/directory/facultymember/biography.aspx?id=roberta.karmel (last visited Mar. 17, 2016).

[103] *See The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, SEC. & EXCH. COMM'N, https://www.sec.gov/about/whatwedo.shtml#laws (last visited Feb. 8, 2016) (detailing that SEC is only involved in certain, regulated entities).

[104] *See id.* (explaining that regulations only apply to those entities that choose to do business under SEC regulations).

[105] Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 682 (1986).

[106] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (quoting Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503, 506 (1969)).

[107] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1977).

[108] *Id.* at 771(citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974)).

political spending disclosure requirements post-*Citizens United*.[109] In *Yamada v. Kuramoto*, the Federal District Court for the District of Hawaii held that "corporations are free to speak, but should do so openly."[110] In *SpeechNow v. FEC*, the D.C. Circuit held that "the public has an interest in knowing who is speaking about a candidate and who is funding that speech, no matter whether the contributions were made towards administrative expenses or independent expenditures[ ]"[111] and that "requiring disclosure of such information deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals."[112] In *Free Speech v. FEC*, the Tenth Circuit held that:

> The FEC disclaimer requirements at issue are necessary to provide the electorate with information and to insure that the voters are fully informed about the person or group who is speaking. Moreover, the disclosure requirements provide the transparency that "enables the electorate to make informed decisions and give proper weight to different speakers and messages."[113]

In *Van Hollen v. FEC*, the D.C. District Court found that 11 C.F.R. § 104.20(c)(9)[114] was "arbitrary, capricious, and contrary to law in violation of the APA."[115] The D.C. District Court, relying on *Citizens United*, held that "the disclosure requirements in the BCRA — even those that apply to ads that are not express advocacy or its functional equivalent — do not impinge upon constitutional rights[.]"[116] The Court, citing to the legislative history of the BCRA, further held that "[o]ne of the main purposes of Title II of BCRA was to make sure that the public was informed of the identity of persons making expenditures on electioneering

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[109] *See, e.g.*, Van Hollen v. FEC, 74 F. Supp. 3d 407, 435 (D.D.C. 2014); Free Speech v. Fed. Election Comm'n, 720 F.3d 788, 798 (10th Cir. 2013) (citing Citizens United v. Fed. Elections Comm'n, 558 U.S. 310, 370 (2010)); SpeechNow.org v. FEC, 599 F.3d 686, 698 (D.C. Cir. 2010); Yamada v. Kuramoto, 2010 U.S. Dist. LEXIS 120795, at *3 (D. Haw. 2010).

[110] *Yamada*, 2010 U.S. Dist. LEXIS 120795, at *3.

[111] *SpeechNow.org*, 599 F.3d at 698.

[112] *Id.*

[113] *Free Speech*, 720 F.3d at 798 (citation omitted) (citing *Citizens United*, 558 U.S. at 371).

[114] 11 C.F.R. § 104.20 (2015); *Van Hollen*, 74 F. Supp. 3d at 435. FEC regulation that narrowed the disclosure requirements of the BCRA for corporations and labor organizations that funded electronic communications. 11 C.F.R. § 104.20.

[115] *Van Hollen*, 74 F. Supp. 3d at 435.

[116] *Id.* at 435 (citing *Citizens United*, 558 U.S. at 367–69).

communications."[117]

C. Increased Shareholder Interest in Mandating Disclosure of Political Spending

Opponents argue that the number of shareholder proposals filed regarding disclosure of political and lobbying activity does not demonstrate a level of shareholder interest that justifies the promulgation of a rule requiring disclosure by all corporations.[118] The U.S. Chamber cites to:

> [a]n independent evaluation of proxy resolutions at Fortune 200 [corporations] found that the average shareholder vote in favor of proposals relating to disclosure of political and lobbying activities in recent years has ranged around the [twenty percent] level; but "[o]verall, in 2012, Fortune 200 shareholder proposals relating to political spending or lobbying received only [seventeen] percent support. This is the lowest level of any year in the Proxy Monitor database."[119]

The study additionally found that

> shareholder votes across all classes of political-spending proposals generally declined [from 2011 to 2012], including among the more limited class of political-spending-disclosure proposals advocated by the Center for Political Accountability, for which shareholder support across the Fortune 200 fell from 26.6 percent in 2011 to 22.7 percent in 2012.[120]

Contrary to opponents' claims, ample empirical evidence reflects that shareholder interest in political spending disclosure has increased.[121] The Center for Political Accountability ("CPA")[122] recently published a report reflecting that as of the end of 2013, "a total of 217 [corporations] have formally been engaged through a shareholder resolution on the issue, resulting in a total of 118

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[117] *Id.* at 424.

[118] Chamber of Commerce Letter, *supra* note 48, at 26–27.

[119] *Id.* at 27 (quoting JAMES R. COPLAND, ET AL., PROXY MONITOR 2012: A REPORT ON CORPORATE GOVERNANCE AND SHAREHOLDER ACTIVISM 19 (2012)).

[120] *Id.* (quoting JAMES R. COPLAND, ET AL., PROXY MONITOR 2012: A REPORT ON CORPORATE GOVERNANCE AND SHAREHOLDER ACTIVISM 19 (2012)).

[121] *Id.*; *see infra notes* 122–26, 131 and accompanying text.

[122] The CPA is a "non-profit, non-partisan organization working to bring transparency and accountability to corporate political spending. It was formed to address the secrecy that cloaks much of the political activity engaged in by corporations and the risks this poses to shareholder value." CTR. FOR POLITICAL ACCOUNTABILITY, ET AL, THE 2015 CPA-ZICKLIN INDEX OF CORPORATE POLITICAL DISCLOSURE AND ACCOUNTABILITY 2 (2015).

agreements"[123] and that the average shareholder support for resolutions on political spending disclosure has risen by twenty percent (ten to thirty percent) from 2004 to 2012.[124] In a November 2014 study, CPA found that in the 2014 proxy season, sixty-nine of the largest mutual fund families supported the thirty-two shareholder resolutions calling for corporate political spending d6isclosure, on average, forty-one percent of the time.[125] In its most recent data filing, CPA found that as of July 2015, twenty-two proposals for political spending disclosure have been voted on in the 2015 proxy season with average shareholder support at thirty-five percent.[126]

As additional evidence of strong investor concern about political spending, from 2009 to 2014, shareholders filed 530 resolutions on corporate political activity.[127] A 2014 Sustainable Investment Institute Report found that the "overwhelming focus in 2014 and previous years has been on disclosure.[128] Investors want [corporations] to disclose contributions to intermediary groups that disburse money to both political campaigns and lobbying after elections are over—via trade associations, nonprofit 'social welfare' organizations and charities that promote model legislation,"[129] and that "[l]ooking ahead, it is likely that [corporations] will continue to face more shareholder proposals on this subject."[130]

These figures represent that shareholder support for disclosure of political spending is increasing.[131] In addition, a majority of both business leaders and consumers also believe that corporations should disclose their political spending activities.[132] In a June 2013

123 CTR. FOR POLITICAL ACCOUNTABILITY, SHAREHOLDER RESOLUTIONS ON CORPORATE POLITICAL SPENDING DISCLOSURE & ACCOUNTABILITY 6 (2013), https://www.sec.gov/comments/4-637/4637-2227.pdf. The proposals were withdrawn because the corporation reached an agreement with the filer to provide more information about its political activities. *Id.*

124 *Id.*

125 CTR. FOR POLITICAL ACCOUNTABILITY, CORPORATE POLITICAL SPENDING AND THE MUTUAL FUND VOTE: 2015 PROXY SEASON ANALYSIS SHOWS STEADY SUPPORT 1–2 (2015).

126 *Record Support in 2015 Proxy Season for CPA Political Disclosure*, CPA NEWSLETTER (Ctr. for Political Accountability, Washington, D.C.), July 2015, http://files.cfpa.gethifi.com/news/cpa-newsletters/July_Newsletter.pdf.

127 HEIDI WALSH, MID-YEAR REVIEW: CORPORATE POLITICAL ACTIVITY PROPOSALS IN THE 2014 PROXY SEASON 10 (2014).

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.* (showing on a graph how support has been increasing over time).

132 HART RESEARCH ASSOCIATES, AMERICAN BUSINESS LEADERS ON CAMPAIGN

survey of business leaders, ninety percent supported reforms that disclose all individual, corporate, and labor contributions to political committees.[133] The June 2013 survey was especially interesting because it found that the issue of disclosure of corporate political spending was bipartisan: ninety-five percent of Democrats and eighty-eight percent of Republicans supported disclosure reform.[134] In a June 2015 New York Times / CBS News Consumer Poll, a large majority of respondents (eighty-four percent) believed that "[t]here are some good things in the system for funding political campaigns but fundamental changes are needed[ ]"[135] or that "[t]he system for funding political campaigns has so much wrong with it that we need to completely rebuild it."[136] The survey also found that seventy-five percent of respondents believed that "groups not affiliated with a candidate that spend money during political campaigns should be required to publicly disclose their contributors[.]"[137]

D. Directors Have an Obligation to Accurately Inform Shareholders About Political Spending

Directors of a corporation are charged with a fiduciary duty to the corporation's shareholders.[138] Under the umbrella of this

FINANCE AND REFORM: KEY FINDINGS FROM SURVEY CONDUCTED MAY/JUNE 2013 FOR COMMITTEE FOR ECONOMIC DEVELOPMENT 12 (2013), https://www.ced.org/pdf/Campaign_Finance,_Hart_and_AmView.pdf; *see* CTR. FOR POLITICAL ACCOUNTABILITY, THE 2015 CPA-ZICKLIN INDEX, *supra* note 122, at 4.

133 HART RESEARCH ASSOCIATES, *supra* note 132, at 4. The survey was conducted among 302 business executives from May 29–June 3, 2013. "Job titles for respondents were restricted to owner, president, chairman, partner, CEO, COO, CFO, senior vice president, department head, vice president, director, and administrator. All respondents work for a company with at least five employees[ ] . . . While online surveys are not sampled surveys, a comparable sampled survey of this size would have a statistical margin of sampling error of ±5.64 percentage points." *Id.* at 2.

134 *Id.* at 14.

135 AMERICANS' VIEWS ON MONEY IN POLITICS, N.Y. TIMES (June 2, 2015), http://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html?_r=0.

136 *Id.* "The nationwide telephone poll was conducted on landlines and cellphones May 28–31[, 2015,] with 1,022 adults and has a margin of sampling error of plus or minus three percentage points." *Id.*

137 *Id.*

138 Guth v. Loft, 5 A.2d 503, 510 (Del. 1939). This Article will use Delaware law when discussing director's obligations. *See, e.g.*, Mullen v. Acad. Life Ins. Co., 705 F.2d 971, 973 n.3 (8th Cir. 1983) (per curiam) ("[C]ourts of other states commonly look to Delaware law . . . for aid in fashioning rules of corporate law.").

fiduciary duty, "directors owe a duty to honestly disclose all material facts when they undertake to give out statements about the business to stockholders."[139] Delaware courts have adopted the materiality standard articulated by the U.S. Supreme Court with respect to the federal securities law.[140] When directors deliberately misinform shareholders about the business of the corporation, either directly or by a public statement, it is a violation of their fiduciary duty.[141]

As discussed in greater detail later in this Article, many public corporations are adopting voluntary political spending disclosure policies in response to shareholder and public pressure.[142] While this can be seen as a positive development, in an April 2014 study, CREW found that there was a significant discrepancy in what a corporation disclosed to shareholders and what they actually contributed.[143] Key findings from the study include: for twenty-five of the sixty corporations included in the study, CREW found significant discrepancies between corporations' reports and the 527 organizations' disclosures; 527 organizations reported contributions from twenty corporations that had not disclosed those contributions at all;[144] and the significant discrepancies in political spending for the twenty-five corporations totaled more than $3.1 million between 2011 and 2013.[145] Additionally, the study found that "some [corporations'] contributions to 527 organizations appeared to contradict their stated policies about political giving, published on their websites, in their corporate reports, and in proxy statements."[146]

The study reflects that corporations' disclosures do not necessarily match the actual amounts contributed.[147] For example, Microsoft's political engagement webpage states that "[s]ince July 2005, Microsoft has made no corporate contributions to any non-candidate or non-party political committee organized under section

139 Kelly v. Bell, 254 A.2d 62, 71 (Del. Ch. 1969), *aff'd*, 266 A.2d 878 (Del. 1970).

140 Rosenblatt v. Getty Oil Co., 493 A.2d 929, 944 (Del. 1985).

141 Malone v. Brincat, 722 A.2d 5, 14 (Del. 1998).

142 *See* Lucian A. Bebchuk & Robert Jackson, *Voluntary Disclosure on Corporate Political Spending Is Not Enough*, N.Y. TIMES (Dec. 17, 2012 11:58 am), http://dealbook.nytimes.com/2012/12/17/voluntary-disclosure-on-corporate-political-spending-is-not-enough/ [Bebchuk & Jackson, *Voluntary Disclosure*].

143 CREW, *supra* note 33, at 1.

144 *Id.*

145 *Id.*

146 *Id.* at 2.

147 *Id.*

527 of the Internal Revenue Code."[148] However, in its 2014 Report, CREW found that Microsoft had contributed almost $1 million ($993,090) to multiple 527 organizations, including: the Republican Governors Association; Democratic Governors Association; Democratic Attorneys General Association; and Democratic Legislative Campaign Committee.[149] Even for a corporation like Microsoft, a $1 million omission is not insignificant.[150] The CREW Report only takes into account a handful of 527 organizations, so Microsoft's unreported political spending could be much greater.[151]

Without regulation of corporate political spending, there is little oversight of political spending disclosure.[152] Until the SEC promulgates regulations mandating disclosure of corporate political spending, corporations will be able to pick and choose which political spending they disclose and also may not be held legally accountable for misleading and/or incorrect disclosures.[153] Importantly, studies have found that corporations that spend the most on political activities tend to disclose less than corporations with more moderate political spending.[154]

E. Corporate Political Spending and the Business Judgment Rule

Opponents argue that "[e]xperience and access to information leaves corporate directors best equipped and able to make the complex day-to-day decisions[ ]" and that directors should not be subject to "constant and unwarranted second-guessing from outside forces."[155] Opponents further argue that "good-faith,

[148] *Political Engagement,* MICROSOFT TRANSPARENCY HUB, http://www.microsoft.com/about/corporatecitizenship/en-us/working-responsibly/principled-business-practices/integrity-governance/political-engagement/ (last visited Feb. 9, 2016).

[149] CREW, s*upra* note 33, at 2, 7, 24.

[150] *Id.* at 1.

[151] *Id.* at 24; *see, e.g.*, *Top 50 Federally Focused Organizations*, OPENSECRETS.ORG: CTR. FOR RESPONSIVE POLITICS (May 12, 2015), https://www.opensecrets.org/527s/527cmtes.php.

[152] *See* Bebchuk & Jackson, *Voluntary Disclosure, supra* note 142.

[153] *See id.*

[154] Donald Schepers & Naomi Gardberg, *Baruch Index of Corporate Political Disclosure: 2011 Launch Report*, CUNY BARUCH COLLEGE: ZICKLIN SCHOOL OF BUSINESS (2011), www.baruch.cuny.edu/baruchindex/BILaunchReport.pdf.

[155] *U.S. Chamber Expresses Strong Opposition to Shareholder Protection Act*, U.S. CHAMBER OF COMMERCE (July 27, 2010, 8:00 PM), https://www.uschamber.com/press-release/us-chamber-expresses-strong-opposition-shareholder-protection-act (internal citations omitted).

disinterested decisions by directors are protected by the business judgment rule. This gives directors the latitude to make decisions that, in their informed view, are in the best interest of the corporation."[156] While the business judgment rule does provide protection for directors' decision-making, the opposition argument is misplaced.[157]

Opponents' arguments are blunted by the "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[158] Case law is clear in stating that "the business judgment rule has no relevance to corporate decision making until after a decision has been made."[159] This ensures that directors are able to carry out their day-to-day functions without outside interference.[160] Shareholders who want to challenge political spending decisions will have the burden of proving that the expenditures were not in the best interest of the corporation.[161] Due to cases like *Shlensky v. Wrigley*[162] and its progeny, shareholders will have a herculean task in arguing against corporate political spending.[163]

This Article submits that disclosure of corporate political spending should actually enhance the business judgment rule.[164] For example, when discussing the rule, the Delaware Chancery

156 David A. Katz, *Limitations on Contributions Would Undercut Directors*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Aug. 11, 2011), https://corpgov.law.harvard.edu/2011/08/11/limitations-on-contributions-would-undercut-directors/.

157 *See* Aronson v. Lewis, 473 A.2d 805, 811, 812 (Del. 1984); Katz, *supra* note 156.

158 *See Aronson*, 473 A.2d at 812 (citing Kaplan v. Centex Corp., 284 A.2d 119, 124 (Del. Ch. 1971); Robinson v. Pitt. Oil Refinery Corp., 126 A. 46 (Del. Ch. 1924)); *see also* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 360 (Del. 1993) (the business judgment rule "operates to preclude a court from imposing itself unreasonably on the business and affairs of a corporation.").

159 *Aronson*, 473 A.2d at 813 (citing Zapata Corp. v. Maldonado, 430 A.2d 779, 782 (Del. 1981)) (emphasis omitted).

160 *Id.* at 811.

161 *See id.* at 812 (citing Puma v. Marriott, 283 A.2d 693, 695 (Del. Ch. 1971)); *see also* Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985) (requiring that plaintiffs establish directors acted with gross negligence in order to rebut the business judgment rule presumption).

162 Shlensky v. Wrigley, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968) (because the company's decision to forego night games was not fraudulent, illegal, or self-interested, the court refused to review it); *see supra* notes 157–61 (for progeny).

163 *Shlensky*, 237 N.E.2d at 780.

164 In re Walt Disney Co. Derivative Litig., 907 A.2d 693, 698 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006).

Court has held that, "[t]he redress for failures that arise from faithful management must come from the markets, through the action of shareholders and the free flow of capital, and not from this Court."[165] Without disclosure of corporate political spending, shareholders are generally unaware of failures in management and are unable to obtain redress for harmful actions at the board and executive levels.[166] As noted by one prominent scholar: "[o]ne substantial limitation on a stockholder's ability to discipline his or her managers is the inability to discover what kind of political expenditures the corporation is making and in what amount."[167]

Importantly, disclosure has the ability to "render management more accountable in the area of political expenditures by making corporate political speech more visible to stockholders and the public[ ]"[168] and will provide "stockholders with information on expenditures in connection with their proxy materials, encouraging stockholders to monitor their corporation's speech more directly[.]"[169] While any disclosure regime should avoid "counterproductive interference in corporate decision-making[,]"[170] a properly formed disclosure regime[171] could avoid this result, while at the same time providing shareholders greater information concerning corporate political spending.[172]

F. Corporations Are Adopting Disclosure Standards Voluntarily

Opponents argue that political disclosure requirements are not "best practices" and that a majority of public corporations have not

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165 *Id.*

166 *See id.*

167 Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 WM. & MARY L. REV. 587, 638 (1991).

168 *Id.* at 639.

169 *Id.* at 640.

170 David A. Katz & Laura A. McIntosh, *Corporate Governance Update: Limitations on Contributions Would Undercut Directors*, N.Y. L.J., July 28, 2011, at 3–4, http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.20951.11.pdf.

171 *TSC Indus.*, 426 U.S. at 448–49 ("[M]anagement's fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information - a result that is hardly conducive to informed [sic] decisionmaking."). The disclosure regime must not be too complicated or overwhelming. *Id.*

172 *See id.* (explaining that a general standard adopting disclosure of material facts is important to informed shareholder decision making.).

adopted them.[173] However, ample empirical evidence contradicts this claim.[174] In its 2014 CPA-Zicklin Index of Corporate Political Disclosure and Accountability,[175] the CPA found that "[s]ixty-one percent of [corporations] in the top echelon[ ] of the S&P 500 are now disclosing political spending made directly to candidates, parties and committees[ ]"[176] and that "[a]lmost half of [corporations] in the top echelons of the S&P 500 have opened up about payments made to trade associations."[177] As noted by CPA, "[t]he 2014 CPA-Zicklin Index reflects concrete progress in the direction of corporate political disclosure and accountability, with more leading American [corporations] establishing political disclosure as a mainstream corporate practice."[178]

In its 2015 CPA-Zicklin Index of Corporate Political Disclosure and Accountability,[179] the CPA found that "[e]ighty-seven percent of the S&P 500 corporations, or 435, had a detailed policy or some policy governing political spending on their websites.[180] Over half, [fifty-two] percent or 259 [corporations,] had a detailed policy; [thirty-five] percent, or 176 [corporations,] had a brief or vague policy."[181] CPA opined that "[t]he 2015 Index reflects sustained, concrete progress in the direction of corporate political disclosure and accountability."[182] As noted in Section II(D), these disclosures are not always completely accurate,[183] but this data reflects that a majority of corporations now provide at least some disclosure concerning their political activities.[184] Additionally, oversight of corporate political spending will help ensure that disclosures are

173 Chamber of Commerce Letter, *supra* note 48, at 28.

174 *See* CTR. FOR POLITICAL ACCOUNTABILITY , ET AL., THE 2014 CPA-ZICKLIN INDEX OF CORPORATE POLITICAL DISCLOSURE AND ACCOUNTABILITY 9 (Sept. 24, 2014), http://files.cfpa.gethifi.com/2014_CPA-Zicklin_Index_PDF.pdf.

175 *Id.*

176 *Id.* "A total of 133 out of the 299 corporations ([forty-four] percent) disclosed some information on their direct contributions to candidates, parties and committees, while [fifty] corporations ([seventeen] percent) said it is their policy not to make such contributions directly." *Id.*

177 *Id.* "Of the 299 corporations, 127 ([forty-three] percent) disclosed some information on their payments to trade associations while [eighteen] ([six] percent) said they asked trade associations not to use their payments for election-related purposes." *Id.*

178 *Id.*

179 CTR. FOR POLITICAL ACCOUNTABILITY, THE 2015 CPA-ZICKLIN INDEX, *supra* note 122, at 8.

180 *Id.*

181 *Id.*

182 *Id.*

183 *See supra* notes 152–54 and accompanying text.

184 *See supra* notes 179–82 and accompanying text.

accurate.[185]

III. LAWSUIT TO COMPEL SEC TO PROMULGATE RULE ON CORPORATE POLITICAL SPENDING

In July 2015, Stephen Silberstein[186] filed an amended complaint for declaratory and injunctive relief in the U.S. District Court for the District of Columbia against the SEC challenging:

> as arbitrary, capricious, and contrary to law the failure of the U.S. Securities and Exchange Commission ("SEC") to respond to a petition for rulemaking that would require public [corporations] to disclose to shareholders and the public the use of corporate resources for political activities, and the failure of the SEC to initiate such a rulemaking.[187]

Silberstein contends that "[w]ithout greater transparency in the political contributions of Aetna and other publicly traded corporations in which . . . Silberstein owns stock, . . . Silberstein is harmed in fulfilling his shareholder duties, as he cannot determine whether those contributions are in the best interests of the [corporations]."[188]

In July 2015, the SEC filed a motion to dismiss Silberstein's complaint. In the SEC's Memorandum of Law in Support of its Motion to Dismiss, the SEC contends that Silberstein impermissibly "seeks to compel agency action [a corporate disclosure rulemaking] that is purely discretionary."[189] The SEC acknowledges that the APA allows "private parties to seek relief when adversely affected or aggrieved by agency action or inaction[;]"[190] however, states that such claims "fail where the

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185 *See supra* note 153 and accompanying text.

186 First Amended Complaint for Declaratory and Injunctive Relief, at 2 ¶ 4, Silberstein v. U.S. Sec. Exch. Comm'n, No. 15-00722 (RMC) (D.D.C. July 16, 2015).

> [Silberstein] is an investor with a broad portfolio that includes shares in Aetna, Inc. . . . Mr. Silberstein brought a lawsuit against Aetna under § 14 (a) of the Securities Exchange Act of 1934, as amended, based on the false and misleading statements in Aetna's 2012 and 2013 proxy statements made in opposition to shareholder proposals that would have required greater oversight of, and transparency in, Aetna's political contributions.

Id.

187 *Id.* at 1 ¶ 1.

188 *Id.* at 2 ¶ 5.

189 Memorandum of Law of the Sec. and Exch. Comm'n in Support of its Motion to Dismiss and to Stay Discovery, at 4, Silberstein v. U.S. Sec. Exch. Comm'n, No. 15-00722-RMC (D.D.C. July 13, 2015).

190 *Id.*

agency action the plaintiff seeks to compel is 'committed to agency discretion by law.'"[191]

Silberstein contends that "[f]ailure to respond to a rulemaking petition is subject to judicial review"[192] and that "the SEC has offered no explanation to plaintiff, the public, or the Court for its effective denial of the rulemaking petition."[193] The SEC responded by stating that "an agency's inaction on a rulemaking petition is the same as a denial of that petition."[194] In January 2016, the D.C. District Court granted the SEC's motion to dismiss. The Court found that since Silberstein was challenging the SEC's failure to respond to his rulemaking petition, rather than alleging the SEC "failed to act in response to a clear legal duty," Silberstein failed to state a valid APA claim upon which relief could be granted.[195]

Unlike the recent ruling by the U.S. District Court for the District of Massachusetts, where the court ordered the SEC to expedite its resource extraction rule,[196] the petition for rulemaking for disclosure of political spending is not a congressionally mandated rule.[197] Therefore, the D.C. District Court rightly dismissed the complaint.[198] Once the SEC formally denies Silberstein's petition, he can appeal that determination.[199]

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191 *Id.* (citing 5 U.S.C. § 701(a)(2) (2012)).

192 Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss, at 8, Silberstein v. U.S. Sec. Exch. Comm'n, No. 15-00722 (RMC) (D.D.C. Aug. 19, 2015) (citing Nat'l Parks Conservation Ass'n v. Dep't of Interior, 794 F. Supp. 2d 39, 44–45 (2011) ("If the agency does not respond to a petition, a reviewing court may 'compel agency action unlawfully withheld or unreasonably delayed.'"); WWHT, Inc. v. FCC, 656 F.2d 807, 813 (1981)).

193 *Id.* at 15.

194 Reply in Support of the Sec. Exch. Comm'n's Motion to Dismiss the Amended Complaint and to Stay Discovery at 9–10, Silberstein v. U.S. Sec. Exch. Comm'n, No. 15-00722 (RMC) (D.D.C. Aug. 31, 2015) (quoting Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 63 (2004) ("A 'failure to act' is not the same thing as a 'denial.' The latter is the agency's act of saying no to a request; the former is simply the omission of an action without formally rejecting a request—for example, the failure to promulgate a rule or take some decision by a statutory deadline.")).

195 Silberstein v. U.S. Sec. & Exch. Comm'n, 2016 U.S. Dist. LEXIS 284, at *11–14 (D.D.C. Jan. 4, 2016).

196 Oxfam America, Inc. v. U.S. Sec. & Exch. Comm'n, No. 14-13648-DJC, 2015 U.S. Dist. LEXIS 116982, at *1, 8, 9 (D. Mass. Sept. 2, 2015) (The court held that "the SEC is now more than four years past the deadline set by Congress for the promulgation of the final disclosure rule[ ]" and that "the SEC's delay in promulgating the final extractive payments disclosure rule can be considered 'unlawfully withheld'").

197 *Id.*; Chamber of Commerce Letter, *supra* note 48, at 4.

198 *Silberstein*, 2016 U.S. Dist. LEXIS 284, at *14–15.

199 *See id.*

IV. COST-BENEFIT ANALYSIS OF CORPORATE POLITICAL SPENDING DISCLOSURE

The issue of cost-benefit analysis for rulemaking imposed on regulatory agencies has existed for over eighty years.[200] The SEC has conducted at least some type of cost-benefit analysis in connection with its rulemaking since the early 1970's.[201] The SEC is an independent regulatory agency.[202] The SEC is required to follow the APA[203] and its own organic statutes, when conducting rulemaking.[204] It is important to note that "the SEC is not subject to an express statutory requirement to conduct cost-benefit analyses for its rulemakings[.]"[205]

The SEC is also required by statute to analyze the impact of its rules.[206] Section 78w (a)(2) of the Exchange Act requires the SEC to "consider among other matters the impact any such rule or regulation would have on competition. The [SEC] shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act]."[207] The SEC shall also "include in the statement of basis and purpose incorporated in any rule or regulation" adopted under the Exchange Act.[208]

This Section provides a framework for the SEC's cost analysis with regard to mandated disclosure of corporate political spending by publicly-traded corporations. As noted in the Current Guidance, the proposed rule must "include a discussion of the need for regulatory action and how the proposed rule will meet that

200 Donna M. Nagy, *The Costs of Mandatory Cost-Benefit Analysis in SEC Rulemaking*, 57 ARIZ. L. REV. 129, 130, 133–34 (2015).

201 *Id.* at 137.

202 44 U.S.C. § 3502(5) (2012). The term "independent regulatory agency" is defined in the Paperwork Reduction Act (44 U.S.C. § 3502(5)), and specifically includes the SEC. 44 U.S.C. § 3502(5).

203 *See* 5 U.S.C. § 553 (2012).

204 *See, e.g.*, 15 U.S.C § 77b (b) (2012); 15 U.S.C. § 78c (f) (2012); 15 U.S.C. § 78w (a)(2) (2012); 15 U.S.C. § 80a (2) (2012); 15 U.S.C. § 80b-2 (c) (2012); U.S. SEC. & EXCH. COMM'N, OFF. OF INSPECTOR GEN., USE OF THE CURRENT GUIDANCE ON ECONOMIC ANALYSIS IN SEC RULEMAKINGS 46 (2013), http://www.sec.gov/oig/reportspubs/518.pdf [hereinafter Current Guidance].

205 U.S. SEC. & EXCH. COMM'N, OFF. OF INSPECTOR GEN., FOLLOW-UP REVIEW OF COST-BENEFIT ANALYSES IN SELECTED SEC DODD-FRANK ACT RULEMAKINGS v (2012), www.sec.gov/about/offices/oig/reports/audits/2012/rpt499_followupreviewofd-f_costbenefitanalyses_508.pdf.

206 *See id.*

207 15 U.S.C. § 78w (a)(2).

208 15 U.S.C. § 78w (a)(2).

need."[209] Executive Order 12,866 states that an agency "shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem."[210]

A. Statement of Need

Public corporations currently engage in political spending that is not disclosed to shareholders.[211] "Under current law, public companies are not required to, and commonly do not, report their political spending to shareholders. Thus, it is impossible for shareholders to know whether their companies spend investors' money on politics—and, if so, how much is spent and for whom."[212] Additionally, even when corporations disclose political spending, it "is scattered throughout separate filings with the FEC, tax authorities, and state officials, presented in widely varying formats, and is ill-suited to giving shareholders a good picture of a particular corporation's political spending."[213] Disclosure of corporate political spending would ensure that directors adhere to their duties of full and fair disclosure to shareholders.[214] Additionally, disclosure of corporate political spending would diminish monitoring costs by informing shareholders of harmful political spending and will provide potential investors with key information for making informed, rational investment decisions.[215]

B. Benefits of Disclosure

1. Disclosure Can Inform Shareholders of Harmful Corporate

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[209] U.S. SEC. & EXCH. COMM'N, CURRENT GUIDANCE, *supra* note 204, at 6.

[210] Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993). Exec. Order No. 12,866 revoked the previous Exec. Order No. 12,291, implemented by President Ronald Reagan. *Id.* at 51,744 ("*Revocations*. Executive Orders Nos. 12,291 and 12,498; all amendments to those Executive orders; all guidelines issued under those orders; and any exemptions from those orders heretofore granted for any category of rule are revoked.")

[211] Lucian A. Bebchuk & Robert J. Jackson, *Shining Light on Corporate Political Spending*, 101 GEO. L. J. 923, 925 (2013).

[212] *Id.*

[213] *Id.* at 935.

[214] *Id.* at 944.

[215] *Id.* at 945; Susan R. Holmberg, *A Cost-Benefit Analysis of Corporate Political Spending Disclosure*, ROOSEVELT INST. 6 (Oct. 30, 2013), http://rooseveltinstitute.org/wp-content/uploads/2015/11/133138315-10-Ideas-for-Economic-Development-2013.pdf.

Political Spending

Opponents argue that "[t]he [e]vidence [p]lainly [s]hows [t]hat [c]orporate [p]olitical [a]ctivity [e]nhances [s]hareholder [v]alue."[216] It is disingenuous that opponents of the rule believe that all political activity is done for the benefit of the shareholders.[217] The evidence reflects that political contributions may be harmful to, both a corporation's image, and its bottom line.[218]

Target encountered this problem in 2011, when consumers boycotted its stores after discovering that the company had made a contribution to an organization which supported a gubernatorial candidate who opposed a number of gay rights measures, including same-sex marriage.[219] The matter resulted in considerable news coverage and a public apology from the company.[220] Recently, Capital One Financial Corporation came under fire for a donation to New Jersey Representative Scott Garrett, head of a House panel which oversees the banking industry, and who made anti-gay remarks.[221] Capital One defended its donation, saying it "bases political giving on business interests rather than social issues."[222] However, other financial services companies, including Goldman Sachs Group Inc. and BBVA Compass, "stopped donating to Garrett after Politico reported in mid-July that he had complained in a private meeting about his party recruiting gay candidates."[223]

For a more extreme example, what if a corporation donates to a candidate with an American pro-Nazi party, who would likely have no chance of winning a general election.[224] Not only could it offend

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216 Chamber of Commerce Letter, *supra* note 48, at 6.

217 *See generally id.* at 2, 6 (discussing the opponents' position).

218 Holmberg, *supra* note 215, at 4. Even though many of the empirical studies reflect corporate political spending may harm shareholder value, the evidence is inconsistent regarding whether corporate political spending provides a net benefit to corporations. *Id.* ("There is a tremendous amount of literature that evaluates whether CPA actually achieves the aforementioned firm-level outcomes, and the results are not consistent.").

219 Brian Bakst, *Target Apologizes for Political Donation to Group Supporting Anti-Gay Candidate,* THE HUFFINGTON POST (May 25, 2011), http://www.huffingtonpost.com/2010/08/05/target-apologizes-for-pol_n_672167.html.

220 *Id.*

221 Robert Schmidt, *Capital One Defends Garrett Donation Amid Anti-Gay Controversy,* BLOOMBERG POLITICS (Nov. 10, 2015, 5:00 AM), http://www.bloomberg.com/politics/articles/2015-11-10/capital-one-defends-garrett-donation-amid-anti-gay-controversy.

222 *Id.*

223 *Id.*

224 Joseph K. Leahy, *Are Corporate Super PAC Contributions Waste or Self-*

shareholders of the corporation, but if the business was involved in retail sales (like Target in the example above), it could damage the image of the corporation and could result in a substantial loss of future profits. This argument also begs the question that if political contributions always benefit shareholder value, why would opponents not want shareholders to know?

Empirical evidence supports the assertion that political spending may harm shareholder value.[225] In a 2003 study, researchers from the Massachusetts Institute of Technology ("MIT") found that "campaign contributions should be viewed primarily as a type of consumption good, rather than as a market for buying political benefits[ ]"[226] and that "[c]ontributions explain a miniscule fraction of the variation in voting behavior in the U.S. Congress."[227] In an analysis completed by economist Professor Jin-Hyuk Kim in 2008, Professor Kim found that weak shareholder rights positively correlate with corporate political activity.[228] A 2011 study that examined almost 1,000 firms over a ten year period found that political spending was negatively associated with market performance and that cumulative political expenditures make both market and accounting performance worse.[229] In a 2012 study of over 12,000 U.S. firms, researchers found that large corporate political expenditures are linked with lower shareholder value and less effective corporate management.[230]

In an April 2013 letter to the SEC, Harvard Professor John Coates provided a "[n]on-exhaustive List of Studies Inconsistent with Corporate Political Activity Being Generally Good for

Dealing? A Closer Look, 79 MO. L. REV. 285, 341 (2014), scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=4079&context=mlr ("A contribution to the American Nazi Party would have *essentially zero* potential upside and a *massive, near certain* downside. This is a paradigmatic irrational transaction. This is classic corporate waste.") (emphasis in original).

225 Holmberg, *supra* note 215, at 6.

226 Stephen Ansolabehere, et al., *Why is There so Little Money in U.S. Politics?* J. ECON. PERSPECTIVES 105, 105 (2003), www.ingentaconnect.com/content/aea/jep/2003/00000017/00000001/art00006 (emphasis removed).

227 *Id.* at 116.

228 Jin-Hyuk Kim, *Corporate Lobbying Revisited*, 10 BUS. & POL. 7–8 (2008).

229 Michael Hadani & Douglas A. Schuler, *In Search of El Dorado: The Elusive Financial Returns on Corporate Political Investments*, 34 STRATEGIC MGMT. J. 165, 166–67, 171, 173–74, 176 (2013).

230 Rajesh K. Aggarwal, et al., *Corporate Political Donations: Investment or Agency?*, 14 BUS. & POL. 1, 1–7 (2012), https://kuscholarworks.ku.edu/bitstream/handle/1808/9251/Meschke_Corporate PoliticalDonations.pdf?sequence=1.

Shareholder Interests[.]"[231] The list was comprised of seventeen empirical studies casting doubt on the idea that political activity by corporations produces better returns for shareholders.[232] A July 2014 Working Paper developed by researchers at the Mercatus Center reported that, despite the "greatly expanded political activities of firms, we find little evidence to support the idea that political activity undertaken by corporations leads to improved performance for firms and their shareholders at both the industry and firm level."[233] The researchers additionally found "a robust and significant positive relationship between political activity and executive compensation. Therefore, while industry and firm-level performance are not robustly related to 'cronyism,' executive compensation is—suggesting that any benefits gained from corporate political activity are largely captured by firm executives."[234]

The opposition argues that "[t]he few studies advocating the counterintuitive proposition that company engagement in policy hurts shareholder value are seriously flawed[.]"[235] However, their review did not include many of the studies listed by Professor Coates, inducing the Kim and Hadani Studies, and also referred to the Aggarwal Study as a working paper, when in fact it has been published in a peer-reviewed journal.[236]

2. Disclosure of Political Spending May Maximize Shareholder Value

Mandatory disclosure of political spending could compel managers to focus more on the maximization of shareholder value.[237] In 2006, Michael Greenstone, a professor in the University of Chicago Department of Economics, studied the

231 Letter from Professor John C. Coates to Ms. Elizabeth M. Murphy, Sec'y, Sec. & Exch. Comm'n 3–4 (Apr. 30, 2013), https://www.sec.gov/comments/4-637/4637-1692.pdf.

232 *Id.* The list includes the Aggarwal, Hadani, and Kim studies discussed above. *See id.*

233 Russell S. Sobel & Rachel L. Graefe-Anderson, *The Relationship Between Political Connections and the Financial Performance of Industries and Firms* 5 (Mercatus Center Working Paper No. 14-18, Jul. 2014), http://mercatus.org/sites/default/files/Sobel-Relationship-Political-Connections_1.pdf.

234 *Id.*

235 Chamber of Commerce Letter, *supra* note 48, at 2.

236 *See id.* at 9–10.

237 Michael Greenstone, et al., *Mandated Disclosure, Stock Returns, and the 1964 Securities Acts Amendments*, Q. J. OF ECON. 399, 400–03 (2006).

impact of mandatory disclosure laws by analyzing the effect of the 1964 Securities Acts Amendments on stock returns and operating performance of firms.[238] The study's "findings are consistent with the notion that mandatory disclosure laws can cause managers to more narrowly focus on the maximization of shareholder value."[239]

In a 2010 study, John Coates found that, based upon a comprehensive literature review and empirical data:

> in industries that are not heavily regulated or government dependent, political activity is associated with weaker shareholder power, greater signs of managerial agency costs, and lower corporate value.[240] The value-politics relationship is strongest for firms making large capital expenditures, suggesting one channel through which politics make lead to value-destroying investments.[241] The precise extent and means by which politics may induce poor performance remains a topic for future research, but at a minimum the findings here reinforce the case that shareholders have a legitimate interest in obtaining better information about corporate politics.[242]

Professor Coates further found that,

> [e]ven if political activity were a mere 'symptom' of a more serious underlying disease for a given company, and not, as the difference-in-difference results suggest at least a partial cause, shareholders could use that symptom as a guide for where they should invest time and resources in improving corporate governance more generally – but only if disclosure laws are revised to reveal the symptom.[243]

3. Disclosure of Political Spending Will Diminish Monitoring Costs for Investors

Opponents argue that shareholders that are displeased with a corporation's political spending, they can vote against directors in annual elections.[244] However, for shareholders to vote, they must actually have knowledge of corporations' political spending.[245] Other than those firms who voluntarily disclose information about

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[238] *Id.* at 400–01; *Michael Greenstone*, UNIV. OF CHICAGO, DEPT. OF ECON., https://economics.uchicago.edu/facstaff/greenstone.shtml (last visited Mar. 7, 2016).

[239] Greenstone, *supra* note 237, at 403.

[240] John C. Coates, *Corporate Politics, Governance, and Value Before and After Citizens United*, 9 J. EMPIRICAL LEGAL STUD. 657, 690–91 (2012).

[241] *Id.*

[242] *Id.*

[243] *Id.* at 691.

[244] *See* Bebchuk & Jackson, *supra* note 211, at 944.

[245] *See id.* at 925, 935, 944–45.

political spending, shareholders receive very little information about corporate spending on politics.[246]

Mandatory disclosure of political spending will diminish monitoring costs for investors.[247] With respect to information asymmetry, "[c]orporate executives know precisely how much money is being spent on politics while neither CPA's process nor strategic outcomes are at all transparent to shareholders or the investing public."[248] Additionally, "[u]nlike economic production, the market does not signal the 'production' of [corporate political spending]. In other words, if a closed-door meeting between a corporate lobbyist and a policymaker goes badly, that failure will not be broadcast . . . ."[249]

Empirical data illustrates the issue of the potential harm due to monitoring costs for political spending.[250] A June 2013 study conducted by researchers at the University of Oklahoma found a significantly negative market reaction to politically connected firms around *Citizens United* and opined that these findings were consistent with a positive association between agency costs and political connections.[251] A March 2015 study by researchers at University of Texas at Austin and University of Minnesota found that the study's results "are supportive of an agency cost interpretation of corporate political activity" and that "[g]ranting shareholders greater control over political activity may solve the agency problem" addressed in the study.[252]

C. Costs of Disclosure

Opponents argue that corporations will incur substantial costs if they are required to disclose political spending to investors.[253] However, due to tax reporting requirements and the number of

246 *Id.* at 925, 945.

247 *See* Holmberg, *supra* note 215, at 6.

248 *Id.* at 4.

249 *Id.*

250 *See id.* at 4, 6.

251 Ashley Newton & Vahap B. Uysal, *The Impact of Political Connectedness on Firm Value and Corporate Policies: Evidence from Citizens United* 1–6 (Univ. of Oklahoma, June 3, 2013) http://www.ou.edu/content/dam/price/Finance/CFS/paper/pdf/Newton%20and%20Uysal%20-%20Paper.pdf.

252 Timothy Werner & John J. Coleman, Citizens United, *Independent Expenditures, and Agency Costs: Reexamining the Political Economy of State Antitakeover Statutes*, 31 J. L. ECON. & ORG. 127, 128, 153 n.17 (2015).

253 *See* Bebchuk & Jackson, *supra* note 211, at 964; Chamber of Commerce Letter, *supra* note 48, at 3.

firms who currently voluntarily disclose political spending, compliance costs of disclosing corporate political spending should be nominal for many corporations.[254]

First, corporate political spending is not tax deductible as a regular business expense for tax reporting purposes under Internal Revenue Code ("IRC") § 162(e).[255] Dues or contributions to IRC 501(c)[256] organizations may be deductible as business expenses under IRC § 162(e); however, the IRC disallows deductions for:

> (A) influencing legislation, (B) participation in, or intervention in, any political campaign on behalf of (or in opposition to) any candidate for public office, (C) any attempt to influence the general public, or segments thereof, with respect to elections, legislative matters, or referendums, or (D) any direct communication with a covered executive branch official in an attempt to influence the official actions or positions of such official.[257]

Under the IRC, the tax consequences depend on whether the IRC 501(c) entity provides its members, at the time the dues are paid, with a "reasonable estimate" of the portion of dues that are allotted to political activities.[258] If the group provides the notification, then its members are unable to deduct that portion of the dues. If the group fails to provide the notification then it must pay a tax (known as a "proxy tax") on the amount of non-deductible dues.[259]

Generally, this means that any amounts paid to an IRC 501(c) organization that are specifically for political campaign activities or lobbying, would not be deductible under IRC § 162.[260] Therefore, corporations who are politically active

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254 Bebchuk & Jackson, *supra* note 211, at 964–65.

255 26 U.S.C. § 162(e) (2012).

256 John Francis Reilly & Barbara A. Braig Allen, *Political Campaign and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations*, IRS.GOV, https://www.irs.gov/pub/irs-tege/eotopicl03.pdf (last visited Mar. 6, 2016)(includes 501(c)(4), (c)(5), and (c)(6) organization).

257 26 U.S.C. § 162(e)(1)(A)–(D).

258 26 U.S.C. § 6033(e)(1)(A)(ii); *see also* 26 C.F.R. § 1.162-20(c)(3) (2015) (If a substantial part of the activities of the IRC 501(c) organization consists of political campaign activities or lobbying, a deduction under IRC 162 is allowed only for the portion of dues or other payments to the organization that the taxpayer can clearly establish was not for political campaign or lobbying activities).

259 26 U.S.C. § 162(e)(3); 26 U.S.C. § 6033(e)(1)(A)(ii); 26 U.S.C. § 6033(e)(2); *see also Proxy Tax: Tax-Exempt Organization Fails to Notify Members that Dues are Nondeductible Lobbying/Political Expenditures*, IRS.GOV (last updated Dec. 17, 2015), https://www.irs.gov/Charities-&-Non-Profits/Proxy-Tax-Tax-Exempt-Organization-Fails-to-Notify-Members-that-Dues-Are-Non-Deductible-Lobbying-Political-Expenditures.

260 *See* Reilly & Allen, *supra* note 256, at 6.

must already keep track of political expenditures to provide accurate tax returns with the IRS.[261] SEC regulations would only require corporations to publicly disclose their political activity; as will be discussed later, the SEC could build upon the current disclosure for tax reporting purposes.[262]

Second, many corporations are voluntarily disclosing political spending, so any new mandatory disclosure regulations should not substantially raise costs for those firms.[263] As noted in the 2014 CPA-Zicklin Index of Corporate Political Disclosure and Accountability, "[s]ixty-one percent of [corporations] in the top echelons of the S&P 500 are now disclosing political spending made directly to candidates, parties and committees[ ]"[264] and that "[a]lmost half of [corporations] in the top echelons of the S&P 500 have opened up about payments made to trade associations."[265] Additionally, as noted in the 2015 CPA-Zicklin Index of Corporate Political Disclosure and Accountability, the CPA found that "[e]ighty-seven percent of the S&P 500 [corporations], or 435, had a detailed policy or some policy governing political spending on their websites. Over half, [fifty-two] percent or 259 [corporations], had a detailed policy; [thirty-five] percent, or 176 [corporations], had a brief or vague policy."[266] This data reflects that many corporations will not incur a substantial increase in costs if required to disclose their political spending.[267]

Opponents also argue that smaller firms will be disproportionately affected by any new disclosure requirements.[268] However, all firms, both large and small, are required to track their corporate political spending for tax reporting purposes.[269] As noted above, the SEC disclosure requirement can be as simple as making internal accounting records public, so small firms should

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261 *See generally id.* (describing that corporations cannot receive deductions for certain types of political behavior).

262 *See* Bebchuk & Jackson, *supra* note 211, at 935, 966.

263 *Id.* at 945, 964–65; *see* Tim Devaney, *Investors Urge Corporate Political Spending Disclosure,* THE HILL (May 20, 2015, 11:37 AM), http://thehill.com/regulation/business/242655-investors-push-sec-to-disclose-dark-money-in-politics.

264 CTR FOR POLITICAL ACCOUNTABILITY, THE 2014 CPA-ZICKLIN INDEX, *supra* note 174, at 9.

265 *Id.*

266 CTR FOR POLITICAL ACCOUNTABILITY, THE 2015 CPA-ZICKLIN INDEX, *supra* note 122, at 8.

267 Bebchuk & Jackson, *supra* note 211, at 964–65.

268 *See id.* at 951–52.

269 *See supra* note 261 and accompanying text.

not be impacted more than large firms.[270] Additionally, the Article recommends a tiered approach to regulation of corporate political spending that would take into account the size of the company.[271]

D. Analysis – Benefits Justify Costs

Based upon the discussion above, this Article opines that the benefits of mandating disclosure of corporate political spending justifies the costs.[272] This is an important point—the benefits must justify the costs imposed, there is no requirement that the benefits outweigh the costs.[273] This is especially important in the financial services context, since it is extremely difficult to quantify the benefits from rules which would increase consumer confidence and trust in both the financial services provider and the market as a whole.[274] This Article has provided empirical evidence that rebuts much of the rhetoric being used by opponents to argue against mandatory disclosure.[275]

Opponents cite to a string of cases from the D.C. Circuit Court that found a number of the SEC's previous cost-benefit analyses to be legally deficient.[276] However, more recent cases reflect that the D.C. Circuit has evolved on the issue.[277] In *Inv. Co. Inst. v. CFTC*, the D.C. Circuit held that "the law does not require agencies to measure the immeasurable. [ ] discussion of unquantifiable benefits fulfills its statutory obligation to consider and evaluate potential costs and benefits."[278] Additionally, in *Nat'l Ass'n of Mfrs.v. SEC*, the D.C. Circuit held that "[a]n agency is not required 'to measure the immeasurable,' and need not conduct a 'rigorous, quantitative economic analysis'[279] unless the statute explicitly directs it to do so."[280] These decisions reflect that even if an agency is not able to measure all the unquantifiable benefits and/or costs, it should not stop that agency from moving forward with a

[270] *See supra* notes 37–38 and accompanying text.
[271] *See infra* notes 302–05 and accompanying text.
[272] *See supra* notes 35–38 and accompanying text.
[273] *See infra* notes 278–281 and accompanying text.
[274] *See infra* notes 279, 281 and accompanying text.
[275] *See, e.g.*, *supra* Section II.
[276] *See* Business Roundtable v. SEC, 647 F.3d 1144, 1155–56 (D.C. Cir. 2011); Chamber of Commerce v. SEC, 412 F.3d 133, 136 (D.C. Cir. 2005).
[277] *See infra* notes 278–280 and accompanying text.
[278] Inv. Co. Inst. v. CFTC, 720 F.3d 370, 379 (D.C. Cir. 2013).
[279] Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 369 (D.C. Cir. 2014) (quoting *Inv. Co. Inst.*, 720 F.3d at 379).
[280] *Id.* (quoting *Inv. Co. Inst.*, 720 F.3d at 379).

rulemaking supported by ample empirical evidence.[281]

V. OPTIONS FOR CURRENT SHAREHOLDERS

Corporations are currently not required to disclose their political spending to shareholders;[282] however, there are tools available to shareholders to assist with discovery of corporate political spending.[283]

A. Inspection of Books and Records

> Shareholders have certain powers to inspect corporate records to investigate corporate political expenditures, even if a corporation does not disclose those expenditures in public financial filings. Under Delaware law, shareholders 'have the right . . . to inspect for any proper purpose . . . the corporation's stock ledger, a list of its stockholders, and its other books and records' . . . [284] 'Proper purpose' has been defined as 'a purpose reasonably related to the demander's interest' as a shareholder.[285]

Importantly, the burden of proof is on the corporation to establish that the inspection the shareholders seek is for an improper purpose.[286]

For a shareholder to investigate corporate wrongdoing, he or she "must demonstrate 'a "credible basis" from which a court can infer that mismanagement, waste[,] or wrongdoing may have occurred.'"[287] It is:

> the well-established law of Delaware that stockholders seeking

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[281] *See supra* note 278 and accompanying text.

[282] Anthony Kammer & Liz Kennedy, *Who Decides When a Corporation Spends Money in Politics*, DEMOS (June 19, 2013), http://www.demos.org/publication/who-decides-when-corporation-spends-money-politics.

[283] *See infra* Section V(A): Inspection of Books and Records, Section V(B): Shareholder Resolution.

[284] William Alan Nelson, *Post-Citizens United: Using Shareholder Derivative Claims of Corporate Waste to Challenge Corporate Independent Political Expenditures*, 13 NEV. L.J. 134, 149–150 (2012) (quoting DEL. CODE ANN. tit. 8, § 220 (West 2010)).

[285] *Id.* at 150 (quoting Weisman v. W. Pac. Indus., Inc., 344 A.2d 267, 268 (Del. Ch. 1975)).

[286] W. Pac. Indus., Inc. v. Liggett & Myers, Inc., 310 A.2d 669, 671 (Del. Ch. 1973).

[287] SEPTA v. AbbVie Inc., No. 10374-VCG, 2015 Del. Ch. LEXIS 110, at *47 (Del. Ch. Apr. 2015) (quoting Seinfeld v. Verizon Commc'ns. Inc., 909 A.2d 117, 118 (Del. 2006)); *see also* Freund v. Lucent Techs., No. 18893, 2003 Del. Ch. LEXIS 3, at *8–9 (Del. Ch. Jan. 2003) (investigation of corporate mismanagement is a proper purpose for books and records inspection).

> inspection under section 220 must present "some evidence" to suggest a "credible basis" from which a court can infer that mismanagement, waste[,] or wrongdoing may have occurred. The "credible basis" standard achieves an appropriate balance between providing stockholders who can offer some evidence of possible wrongdoing with access to corporate records and safeguarding the right of the corporation to deny requests for inspections that are based only upon suspicion or curiosity.[288]

Mandatory disclosure will avoid demands by shareholders to investigate corporate political spending. Because the corporation will disclose its political expenditures, shareholders would have no reason to bring a books and records claim.[289] Disclosure would also lower corporations' ligation costs, since they would not have to defend themselves against these claims.[290]

B. Shareholder Resolution

Shareholders can currently file shareholder resolutions to the company management to be voted on in the corporation's annual meeting.[291] Rules promulgated by the SEC issued under Section 14a-8 of the Exchange Act govern the inclusion of shareholder proposals in proxy statements.[292] Shareholders are allowed to file resolutions if they own at least $2,000 or one percent of the corporation's shares and have held the shares continuously for the year prior to the corporation's annual submission deadline.[293] Shareholder proposals are limited to 500 words and generally need to address corporate environmental, social, and governance policy questions that are considered significant public issues.[294] The SEC has recognized, as noted above in the Northstar SEC no-action

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288 S*einfeld*, 909 A.2d at 118 (citation omitted).

289 *See, e.g.*, Kaufman v. CA, Inc., 905 A.2d 749, 750 (Del. Ch. 2006) (Although shareholders' inspection demand was found to be for a "proper purpose," the corporation had already given the shareholder documents that provided a substantial basis to investigate potential misconduct).

290 *See generally* Lawyers for Civil Justice, Civil Justice Reform Grp., U.S. Chamber Inst. for Legal Reform, *Litigation Cost Survey of Major Companies*, U.S. COURTS 2–4 (May 10–11, 2010), www.uscourts.gov/file/document/litigation-cost-survey-major-companies (discussing the immense cost of corporate litigation, particularly with regard to document discovery).

291 17 C.F.R. § 240.14a-8 (2016).

292 17 C.F.R. § 240.14a-8.

293 17 C.F.R. § 240.14a-8.

294 David M. Lynn & Anna T. Pinedo, *Frequently Asked Questions About Shareholder Proposals and Proxy Access*, MORRISON & FOERSTER LLP 2, 10 (2015), www.mofo.com/~/media/files/pdfs/securities%20offerings%20faqs/frequentlyaskedquestionsaboutshareholderproposalsandproxyaccess.pdf.

letter, that shareholder accountability over corporate political spending is a significant policy issue that can not be barred from a proxy statement under the ordinary business exclusion under 17 CFR § 240.14a-8(7).[295]

Shareholder resolutions can be an effective tool: "[a]lthough shareholder resolutions generally are non-binding, they still have teeth. If a company fails to take action on a shareholder resolution that received a majority of votes cast, influential proxy advisory firms like Institutional Shareholder Services will, the following year, recommend a vote against the company's directors."[296] For example, in 2013, the New York State Common Retirement Fund ("NYSCRF") sued Qualcomm for the right to inspect records detailing Qualcomm's corporate political spending. The NCSRF withdrew its lawsuit based upon a promise by Qualcomm to "post details online about its contributions to political candidates and political parties, as well as its political expenditures to trade groups and other organizations."[297] Even an unsuccessful challenge can motivate change.

VI. MODEL STRUCTURE FOR SEC MANDATED POLITICAL SPENDING DISCLOSURE RULE

This Section provides an outline for the SEC when designing mandatory disclosure regulations.

A. Scope

The rule should adopt the well-developed definitions of political spending as established under federal election laws. The SEC should adopt the definitions under the BCRA for "independent

[295] *See supra* Section II(A).

[296] Robert Kelner, et al., *Responding to Corporate Political Disclosure Initiatives: Guide for In-House Counsel*, COVINGTON & BURLING LLP 12 (Mar. 2015), https://www.cov.com/~/media/files/corporate/publications/2015/03/responding_to_corporate_political_disclosure_initiatives_guide_for_in_house_counsel.ashx.

[297] Sinead Carew, *New York Fund Withdraws Political Spending Lawsuit against Qualcomm*, REUTERS (Feb. 22, 2013), http://www.reuters.com/article/2013/02/22/us-qualcomm-nylawsuit-idUSBRE91L0IT20130222#4WyMEH6AHTfYvPmY.97.

expenditures"[298] and "electioneering communications."[299] Public corporations will be required to disclose these political expenditures and also any amounts paid to an IRC 501(c) organization that are specifically for political campaign activities or lobbying or any amounts paid to an IRC 501(c), if a substantial part of the activities of the IRC 501(c) organization consists of political campaign activities or lobbying.[300] Since these expenditures are not tax deductible and must already be reported to the FEC, public corporations will have access to this data.[301]

The SEC disclosure rule should implement a threshold limit for public disclosure of corporate political spending. The threshold limits should be determined by company size.[302] For smaller

[298] 52 U.S.C.A. § 30101(17) (2015) (West).

> The term "independent expenditure" means an expenditure by a person -- (A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.

52 U.S.C.A. § 30101(17).

[299] 52 U.S.C.A. § 30104(17) (2015) (West).

> The term "electioneering communication" means any broadcast, cable, or satellite communication which -- (I) refers to a clearly identified candidate for Federal office; (II) is made within -- (aa) [sixty] days before a general, special, or runoff election for the office sought by the candidate; or (bb) [thirty] days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

52 U.S.C.A. § 30104(17).

[300] *See* 26 C.F.R. § 1.162-20 (c)(1) (2016). If a substantial part of the activities of the IRC 501(c) organization consists of political campaign activities or lobbying, a deduction under IRC 162 is allowed only for the portion of dues or other payments to the organization that the taxpayer can clearly establish was not for political campaign or lobbying activities. 26 C.F.R. § 1.162-20 (b)(ii).

[301] *Public Disclosure and Availability of Exempt Organizations Returns and Applications*, IRS.GOV, (Jan. 2016), https://www.irs.gov/Charities-&-Non-Profits/Public-Disclosure-and-Availability-of-Exempt-Organizations-Returns-and-Applications:-Documents-Subject-to-Public-Disclosure.

[302] *See* SEC ADVISORY COMM. ON SMALLER PUB. CORPS., FINAL REPORT OF THE ADVISORY COMMITTEE ON SMALLER PUBLIC CORPORATIONS TO THE U.S. SECURITIES AND EXCHANGE COMMISSION 4–5 (Apr. 23, 2006), http://www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf (citing SEC OFFICE OF ECON. ANALYSIS, BACKGROUND STATISTICS: MARKET CAPITALIZATION AND REVENUE OF PUBLIC CORPORATIONS, tbl. 2 (Apr. 6, 2006)). The thresholds put forward in this paper follow the "Recommendation on Scaled or Proportional Regulation for Smaller Public [Corporations]" by the SEC Advisory Committee on Smaller Public Companies. *Id.*

corporations, the SEC should mandate disclosure for any individual expenditure of $10,000 or more or yearly political expenditures of $50,000.[303] For medium corporations, the SEC should mandate disclosure for any individual expenditure of $25,000 or more or yearly political expenditures of $100,000.[304] For large corporations, the SEC should mandate disclosure for any individual expenditure of $50,000 or more or yearly political expenditures of $250,000.[305] These thresholds should strike a balance between providing shareholders with information, while at the same time not burdening corporations to disclose minimal amounts of political spending.[306]

The SEC disclosure rule should not include direct lobbying, through registered lobbyists, or separate political action committees ("PACs") established by public corporations.[307] Direct lobbying is already highly regulated and disclosed to the public[308] and corporations' PACs are funded through employees' voluntary personal contributions.[309] The SEC rule should focus on the use of corporate treasuries to fund political campaigns and causes.

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303 *See id.* Small corporations have market capitalization of less than $128 million – this is the same threshold as microcap companies in the report. *Id.*

304 *Id.* Medium corporations have market capitalization of between $128 million and $787 million - this is the same threshold as small cap companies in the report. *Id.*

305 *Id.* Large corporations have market capitalization of more than $787 million - this is the same threshold as large public companies in the report. *Id.*

306 *See id.* at 38.

307 *See infra* notes 308 and 309 and accompanying text. *See generally* Lee Fang, *Secret Money Lobbyists Fight SEC Disclosure Rule*, THE NATION (Jan. 10, 2013), http://www.thenation.com/article/secret-money-lobbyists-fight-sec-disclosure-rule/ (discussing the fact that lobbyists reacted negatively to the SEC proposal.).

308 *See, e.g.*, Pub. L. 110-81, 121 Stat. 735 (2007). The Legislative Reorganization Act of 1946, required lobbyists to register with Congress and disclose receipts and expenditures. Ch. 753, 60 Stat. 35 (1946) (repealed by Pub.L. 104-65 Stat. 691 (1995)). In 1995, the Lobbying Disclosure Act repealed the Legislative Reorganization Act and created a system of detailed reporting and registration thresholds. Pub. L. 104-65, 109 Stat. 691, Dec. 19, 1995, (as amended by Pub. L. 105-166, 112 Stat. 38, Apr. 8, 1998) (amended by Pub. L. 110-81 Stat. 735 (2007). The Honest Leadership and Open Government Act of 2007 amended the Legislative Reorganization Act, in part by changing the frequency of reporting for registered lobbyists, creating new semi-annual reports on contributions. Pub. L. 110-81, 121 Stat. 735 (2007).

309 11 C.F.R. § 114.5 (a)(2)(i), (b) (2002) ("Corporations, labor organizations, membership organizations, cooperatives, or corporations without capital stock may use general treasury monies, including monies obtained in commercial transactions and dues monies or membership fees, for the establishment, administration, and solicitation of contributions to its separate segregated fund.").

B. Content and Timing

The SEC rule should require all public corporations to include in their annual proxy statement both a summary and comprehensive list of their political spending for the previous fiscal year. For corporations who do not meet the thresholds provided above, they will not have a legal obligation to disclose the total amount of political expenditures during the fiscal year.[310] The political spending summary can be as simple as the sum of all political spending for the previous year. When reporting individual expenditures, corporations should provide the date, amount, purpose, and name of the candidate or 501(c) organization who received the expenditure.

C. Shareholder Approval

The SEC rule should not mandate that political spending require shareholder approval. The SEC rule should be based upon the current model for shareholder votes on compensation of a company's executive officers.[311] Under Section 951 of the Dodd-Frank Act, public corporations are required to conduct a non-binding shareholder vote at least once every three years to approve the compensation of a company's executive officers.[312]

The proposed rule on political spending should mandate a non-binding shareholder vote each year to approve the corporation's previous year political spending as disclosed in accordance with this proposed rule. Similar to the vote on executive compensation, the vote on political spending will:

> [N]ot be binding on the issuer or the board of directors of an issuer, and may not be construed— (1) as overruling a decision by such issuer or board of directors; (2) to create or imply any change to the

[310] *See supra* notes 302–306 and accompanying text (describing suggested thresholds). "Courts have long held that disclosure should be excused where it only captures de minimis spending in elections." Ciara Torres-Spelliscy, *An Intersection of Laws: Citizens United v. FEC: Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After Citizens United and Doe v. Reed*, 27 GA. ST. U.L. REV. 1057, 1094, n.135 (2011) (citing McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 337, 341, 357 (1995); Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 29 (1st Cir. 1993)).

[311] *See* 15 U.S.C. § 78n-1 (2012); *see also Corporate Governance Issues, Including Executive Compensation Disclosure and Related SRO Rules*, U.S. SEC. & EXCH. COMM'N (last modified July 1, 2015), https://www.sec.gov/spotlight/dodd-frank/corporategovernance.shtml.

[312] 15 U.S.C. § 78n-1(a).

> fiduciary duties of such issuer or board of directors; (3) to create or imply any additional fiduciary duties for such issuer or board of directors; or (4) to restrict or limit the ability of shareholders to make proposals for inclusion in proxy materials related to [political spending].[313]

D. Liability Under the Proposed Disclosure Rule

The rule should state that a violation of the proposed rule, for failing to accurately disclose corporate political spending, will be considered a breach of a fiduciary duty of the officers and directors of the corporation. However, the rule should contain a clause stating that the rule does not preempt any current fiduciary duties under state corporate law or common law. The rule should also explicitly state that it does not preempt any current duties under SEC rules concerning liability for misleading or erroneous disclosures.[314]

VII. MODEL CORPORATE POLICIES AND PROCEDURES FOR POLITICAL SPENDING

This Section provides an outline for establishing an effective program to manage and oversee corporate political spending.

A. Key Elements

The Center for Political Accountability ("CPA") provides a nice roadmap for corporations to engage in meaningful disclosure of corporate political spending.[315] The disclosure regime consists of three main parts: policies, disclosure, and oversight.[316] First, "[a]n articulated policy provides a means for evaluating benefits and risks of political spending; measuring whether such spending is consistent, and is aligned with a company's overall goals and

313 15 U.S.C. § 78n-1(c).

314 *See generally* 17 C.F.R. § 240.12b-20 (2016) (describing one of the rules regarding misleading information). Rule 12b-20 requires the issuer of a security to include in the annual report "such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading." 17 C.F.R. § 240.12b-20.

315 Memorandum and Attachment to Memorandum from Domini Social Investments LLC, Letter to SEC Chair Mary Jo White, Chair, Securities & Exchange Commission, Corporate Political Accountability - 2013 Proxy Season Review 1–2 (Sept. 9, 2013), https://www.sec.gov/comments/4-637/4637-2227.pdf [hereinafter Attachment to Memorandum].

316 *Id.*

values; determining a rationale for the expenditure; and judging whether the spending achieves its goals."[317] Second, "[d]isclosure of political spending from corporate treasury funds gives shareholders the information they need to judge whether corporate spending is in their best interest. It identifies possible sources of risk. It also helps ensure that board oversight is meaningful and effective."[318] Third, "[b]oard oversight of corporate political spending assures internal accountability to shareholders and to other stakeholders. It is becoming a corporate governance standard."[319] CPA considers all of the elements outlined in the document – policy, disclosure, and oversight of corporate political spending – to be important and necessary.[320]

B. Type of Spending and Delegation of Responsibilities

Corporations must decide whether to limit the company's political spending to funds voluntarily contributed to a company-maintained PAC or whether to permit corporate treasury funds to be used. Corporations must then identify those individuals or groups responsible for making spending decisions, determine approval procedures, and decide what type of reporting needs to be completed.[321] Corporations need to have policies in place that define the roles of the board and senior management. The central question to ask is "[w]here do senior managers' responsibilities end and board members' begin?"[322]

Corporations must also decide whether to only make political expenditures directly or make expenditures through third-party groups. For third-party groups, to comply with the tax code, best practices dictate that corporations request that third-party organizations tell them what portion of their dues or similar payments are used for political activities.[323]

C. Code of Conduct

Corporations need to have in place well-articulated policies

317 *Id.*
318 *Id.*
319 *Id.*
320 *See* Attachment to Memorandum, *supra* note 315.
321 PAUL DENICOLA, ET AL., HANDBOOK ON CORPORATE POLITICAL ACTIVITY: EMERGING CORPORATE GOVERNANCE ISSUES 21 (2010), https://www.conference-board.org/retrievefile.cfm?filename=1189_1309335497.pdf&type=subsite.
322 *Id.*
323 *Id.* at 23.

which encourage decision makers to take into account company policies, public policy stances, and internal corporate values.[324] Adopting a code of conduct for political spending can ensure that a company's employees are aware of and acting in accordance with company policy. Typical elements of these codes include:

> [C]ompany policies on public disclosure of expenditures of corporate funds on political activities on the company's website; disclosure of dues and other payments made to trade associations and other tax-exempt organizations that the company anticipates will be used for political expenditures; and establishment of boards' of directors policy on monitoring of political spending.[325]

The CPA provides a model code of conduct for political spending.[326] It includes provisions concerning director impartiality, comprehensive public disclosure, board and management monitoring, and approval processes.[327] One of the most important elements from the CPA model code is a preference that:

> [T]he company will follow a preferred policy of making its political expenditures directly rather than through third-party groups. In the event that the company is unable to exercise direct control, the company will monitor the use of its dues or payments to other organizations for political purposes to assure consistency with the company's stated policies, practices, values and long-term interests.[328]

In a post *Citizens United* and *SpeechNow* world, with trade groups and Super PACs not legally obligated to disclose their donors, this provision is essential.[329]

CONCLUSION

The SEC has a chance to shine light on corporate political

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[324] *See id.* at 22.

[325] *Id.* at 23.

[326] *A Model Code of Conduct for Corporate Political Spending*, CTR. FOR POLITICAL ACCOUNTABILITY, https://zicklin.baruch.cuny.edu/centers/zcci/downloads/cpa---model-code-of-conduct.pdf/at_download/file (last visited Mar. 6, 2016).

[327] *Id.*

[328] *Id.*

[329] *See Super PACs*, OPENSECRETS.ORG, (Feb. 11, 2016), https://www.opensecrets.org/pacs/superpacs.php (last visited Feb. 11, 2016) ("Technically known as independent expenditure-only committees, super PACs may raise unlimited sums of money from corporations, unions, associations and individuals, then spend unlimited sums to overtly advocate for or against political candidates.").

spending by requiring public corporations to disclose to shareholders the use of corporate resources for political activities.[330] As discussed throughout this Article, disclosure of corporate political spending would ensure that directors adhere to their duties of full and fair disclosure by informing shareholders of harmful political spending and providing potential investors with key information for making educated, rational investment decisions. Due to the misguided decision in *Citizens United*, it is legal for corporations to spend an unlimited amount of money on political issues;[331] however, this ability must be coupled with disclosure - if corporations truly believe their political spending benefits shareholder value, they should not oppose disclosure of that spending.

330 *See supra* note 7 and accompanying text.
331 *See supra* notes 10, 11 and accompanying text.