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Abstract

This Article puts forward the case for SEC rules requiring public companies to disclose their political spending. We present empirical evidence indicating that a substantial amount of corporate spending on politics occurs under investors' radar screens and that shareholders have significant interest in receiving information about such spending. We argue that disclosure of corporate political spending is necessary to ensure that such spending is consistent with shareholder interests. We discuss the emergence of voluntary disclosure practices in this area, and show why voluntary disclosure is not a substitute for SEC rules. We also provide a framework for the SEC's design of these rules. Finally, we consider and respond to the wide range of objections that have been raised to disclosure rules of this kind. We conclude that the case for such rules is strong, and that the SEC should promptly develop disclosure rules in this area.

Keywords: Political spending, SEC, disclosure, transparency

JEL classification: G3, G38, K2, K22

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I. INTRODUCTION

Public companies' political spending, and whether it serves the interests of shareholders, is the subject of considerable debate. Currently, however, this debate is conducted in the absence of critical facts. 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 and for whom.

In this Article, we argue that the Securities and Exchange Commission (SEC) should develop rules requiring public companies to disclose political spending to shareholders. We provide empirical evidence suggesting that the amount of such spending is substantial and that investors are increasingly interested in obtaining this information. We offer a framework for the design of rules that would give shareholders the information they need to assess whether corporate spending on politics is consistent with investors' interests. Finally, we consider and respond to a range of potential objections to rules of this kind.

The Article systematically develops the case for a position taken in a rulemaking petition that was submitted to the SEC in August 2011 by a committee of ten law professors that we co-chaired.[1] The Petition has received unprecedented support, including comment letters submitted to the SEC by more than a quarter of a million individuals. In addition, the Petition has drawn supportive commentary from institutional investors, the

[1] Letter from Committee on Disclosure of Corporate Political Spending to Elizabeth M. Murphy, Secretary, U.S. Sec. & Exch. Comm'n (Aug. 3, 2011), *available at* http://www.sec.gov/rules/petitions/2011/petn4-637.pdf [hereinafter, the Petition]. As co-chairs of the committee, we were the principal draftsmen of the Petition.

editorial staff of the *New York Times* and *Bloomberg News*,[2] and a substantial number of members of the U.S. Senate and House of Representatives.[3] At the same time, the Petition, and the push for SEC disclosure rules in this area, has attracted opponents, including legal academics,[4] prominent members of Congress,[5] and commentators such as the *Wall Street Journal* editorial page.[6] The Chairman of the SEC recently indicated that the agency plans to address the Petition's request for disclosure requirements.[7] And a sitting Commissioner has taken the

[2] Editorial, *Serving Shareholders and Democracy*, N.Y. TIMES (Aug. 9, 2011); Editorial, *New Ways to Make Money Talk in Campaign Finance Disclosure*, BLOOMBERG (Sept. 25, 2011).

[3] Letter from U.S. Sen. Sheldon Whitehouse et al. to Mary L. Schapiro, Chairman, U.S. Sec. & Exch. Comm'n (Dec. 19, 2011), *available at* http://www.whitehouse.senate.gov/news/release/whitehouse-joins-senators-in-calling-on-sec-to-demand-disclosure-of-corporate-political-spending; Letter from Representative Gary Ackerman et al. to Mary L. Schapiro, Chairman, U.S. Sec. & Exch. Comm'n (Oct. 20, 2011), *available at* http://ackerman.house.gov/uploads/Citizens%20United%20SEC%20letter%2010.11.11.pdf.

[4] Letter from Stephen M. Bainbridge et al. to Elizabeth M. Murphy, Secretary, U.S. Sec. & Exch. Comm'n (March 23, 2012), *available at* http://www.sec.gov/comments/4-637/4637-318.pdf; *see also* Letter from Keith Paul Bishop to Elizabeth M. Murphy, Secretary, U.S. Sec. & Exch. Comm'n (Aug. 6, 2011), available at http://www.sec.gov/comments/4-637/4637-1.pdf.

[5] U.S. Rep. John Boehner, Press Release (June 24, 2010) (arguing that rules requiring such disclosure would "shred our Constitution"), *available at* http://boehner.house.gov /news/documentsingle.aspx?DocumentID=192240; U.S. Sen. Mitch McConnell, *The Dangers Disclosure Can Pose to Free Speech*, WASH. POST (June 22, 2012) (opposing rules requiring disclosure of corporate spending on politics).

[6] Editorial, *The Corporate Disclosure Assault*, WALL ST. J. (March 19, 2012).

[7] *See* Jesse Hamilton, *SEC's Aguilar Says Companies Should Report Political Spending*, BLOOMBERG NEWS (Feb. 24, 2012), *available at* http://mobile.bloomberg.com/news/2012-02-24/sec-s-aguilar-says-companies-should-report-political-spending.

unusual step of publicly announcing his support for the rulemaking advocated by the Petition.[8]

Given the SEC's expected consideration of the Petition, and the strong views that have been expressed both in favor of it and against it, this Article provides a detailed, empirically grounded case for rules requiring public companies to disclose their spending on politics. We provide a framework for analysis of the desirability of disclosure rules in this area. We conclude that the case for rules requiring disclosure of public companies' political spending is strong, and that the SEC should promptly proceed to developing such rules.

Our analysis is organized as follows. In Part II, we explain that the SEC's disclosure framework for public companies is not static. SEC disclosure rules have evolved over time in response to increased shareholder interest in particular types of information about their companies. The SEC has always had broad authority to adopt disclosure rules, and the body of SEC requirements has developed considerably over time. Historically, the SEC has adopted new requirements when shareholder interest in certain information grew—or in light of external events that made such information more relevant for investors.

Part III presents and evaluates empirical evidence about the extent to which corporate spending on politics is not transparent. To begin, public companies can, and do, engage in political spending that is never disclosed by channeling such spending through intermediaries. We present evidence indicating that public companies engage in substantial political spending through these intermediaries. Furthermore, although other types

[8] *See* Luis A. Aguilar, Comm'r, U.S. Sec. & Exch. Comm'n, Address at Practicing Law Institute's SEC Speaks in 2012 Program (Feb. 24, 2012), *available at* http://www.sec. gov/news/speech/2012/spch022412laa.htm.

of corporate spending on politics are occasionally disclosed in public filings, collecting the information necessary to identify the amount or targets of a public company's spending would require a review of a wide range of disparate sources. As a result, it is currently impractical for a public company's investors to have a complete picture of the company's political spending. Indeed, this task is sufficiently demanding that there is currently no dataset or organization that provides information about the aggregate political spending of particular public companies.

In Part IV, we show that public-company investors have expressed significant interest in receiving information about corporate political spending. We present evidence that disclosure of political spending has in recent years been a more frequent subject of shareholder proposals at U.S. public companies than any other corporate governance issue. This evidence of shareholder interest is similar to, but stronger than, the evidence from shareholder proposals that led the SEC to overhaul its executive-pay disclosure rules in 1992. Furthermore, this evidence is consistent with views that institutional investors have expressed in polls, policy statements, and comments on the Petition filed with the SEC.

In Part V, we explain why disclosure rules are necessary to ensure that corporate political spending is consistent with shareholder preferences. We show that the interests of directors and executives with respect to such spending may frequently diverge from those of shareholders. Moreover, because of the expressive significance of political spending, shareholders may attach greater importance, beyond the amounts spent, to political spending that deviates from their preferences. Disclosure, we argue, is indispensible to addressing these concerns. Without disclosure of information about public companies' spending on politics, corporate-governance procedures that could help address such concerns cannot operate.

Part VI considers voluntary disclosure of political spending. We first present evidence that, in response to significant interest from investors, more than fifty of the largest U.S. public companies have voluntarily agreed to publicly disclose their spending on politics. While such voluntary disclosure is a useful development, we explain why voluntary disclosure cannot serve as a substitute for SEC rules that would require all public companies to disclose their political spending.

Part VII focuses on the design of these rules. We identify and examine several issues that the SEC will need to consider in designing the rules, including the scope of the political spending and public companies covered, the treatment of spending channeled through intermediaries, the setting of *de minimis* exemptions, and the frequency and timing of disclosure. We explain that the SEC's staff will be able to address these issues in light of the agency's expertise and experience with the design of other disclosure rules raising similar questions.

In Part VIII, we consider a range of possible objections to disclosure rules in this area. We show that all the considered objections, both individually and collectively, do not undermine the case for requiring public companies to disclose their spending on politics.

Before proceeding, it may be helpful to note the relationship between our subject and recent judicial decisions in this area. In 2010, in *Citizens United v. FEC*, the Supreme Court held that rules limiting corporate spending on electioneering expenses were unconstitutional.[9] Relying on *Citizens United*, the D.C. Circuit subsequently concluded in *SpeechNow.org v. FEC* that limits on corporate contributions to

[9] 130 S. Ct. 876 (2010).

independent groups, such as "Super PACs," were also unconstitutional.[10] While corporations were able to spend investor funds on politics before these decisions (for example, through intermediaries), the decisions considerably expanded companies' freedom to do so. Because investors' strong interest in, and need for, information about public companies' spending on politics preceded these decisions, the case for disclosure rules in this area does not turn on these decisions. Nevertheless, the significant expansion of the scope of constitutionally protected corporate political spending brought about by *Citizens United* and its progeny makes the need for disclosure rules all the more pressing.

II. THE EVOLVING NATURE OF DISCLOSURE REQUIREMENTS

In this Part, we provide an assessment of the Securities and Exchange Commission's approach to developing the disclosure rules that apply to most U.S. public companies. Historically, this framework has not been composed of a stagnant, inflexible series of requirements. Instead, the SEC's disclosure rules have long evolved in response to shifting investor interest in particular information and to external events that make particular information more relevant to shareholders in publicly traded companies. This approach is consistent with the requirement that the SEC's rules protect investors and promote efficiency.[11]

The SEC has exceptionally broad authority to determine what information public companies must disclose to their shareholders.[12] The original source of that authority, the Securities Exchange Act of 1934,

[10] 599 F.3d 686, 689, 695 (D.C. Cir. 2010) ("Given th[e Supreme Court's] analysis [in] *Citizens United*, we must conclude that . . . contribution limits [that previously applied to independent groups] violate the First Amendment").

[11] 15 U.S.C. § 78c(f).

[12] Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a).

specified only a few matters required to be disclosed. Instead of specifying all of the information that companies had to disclose, Congress expressly chose to give the SEC "complete discretion" to determine what types of additional disclosure investors should receive.[13] In the decades that followed, the SEC developed an elaborate framework of disclosure rules that gives public-company shareholders detailed information on the companies in which they invest.

Investor interest in certain information has often prompted the SEC to consider whether changes to disclosure rules are needed—and, in particular, whether disclosure of additional information should be required. For example, in 1975, while considering a rulemaking petition requesting that the SEC require disclosure related to social-policy matters, the SEC carefully evaluated shareholders' interest in that information. Concluding that no additional disclosure was needed, the SEC expressly noted that "corporations have apparently not received a significant number of social inquiries from their shareholders."[14]

Similarly, in 1992 the SEC considered whether to revise its rules on disclosure of executive compensation to require more extensive quantitative detail. In the course of its rulemaking, the SEC noted that shareholders had expressed significant interest in executive pay. Indeed, the preamble to its proposed rules referred directly to shareholder proposals on executive compensation at nine well-known public

[13] H.R. Rep. No. 1383, 73d Cong., 2d Sess. 1051 (1934); *see also* Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1045 (D.C. Cir. 1979) (concluding that Congress "opted to rely on the discretion and expertise of the SEC for a determination of what types of additional disclosure would be desirable").

[14] The Commission separately pointed out that the few shareholder proposals related to this issue "received an average of [only] from 2 to 3% of the vote in recent years." Environmental and Social Disclosure, Exch. Act Release No. 33-5627, 40 Fed. Reg. 51,656, 51,664 (1975).

companies.[15]

More recently, in the wake of the 2008 financial crisis, the SEC considered revising its rules to require all public companies to disclose the extent to which directors oversee risk-taking. Again the SEC concluded that substantial investor interest in the issue indicated that additional disclosure was needed. Noting that the crisis had caused investors to demand "additional information that would enhance their ability to make informed voting and investment decisions," the SEC quickly mandated that public companies give investors extensive new information on director oversight of risk.[16]

The level of shareholder interest has not, however, been the sole factor influencing the evolution of the SEC's disclosure rules. Changes have also been driven by external events that render certain information more important to investors. For example, in the course of developing its new rules on disclosure of directors' risk oversight, the SEC noted that "recent market events . . . demonstrate[]" that "the capacity to assess risk and respond to complex financial and operational challenges can be important attributes" for directors.[17]

The disclosure rules that apply to public companies have not, then, reflected a stagnant list of statutory requirements. Instead, the SEC's disclosure framework has evolved over time, responding both to

[15] Executive Compensation Disclosure, Exch. Act Release No. 33-6940, 57 Fed. Reg. 29,582 (1992) (referring to shareholder proposals on executive pay brought during the 1992 proxy season at Aetna, Baltimore Gas and Electric, Bell Atlantic, Black Hills, Chrysler, Eastman Kodak, Equimark, IBM, and Reebok).

[16] Proxy Disclosure Enhancements, Exch. Act Release No. 33-9089, 74 Fed. Reg. 68,334 (2009).

[17] Proxy Disclosure and Solicitation Enhancements, Release No. 33-9052, 74 Fed. Reg. 35,076, 35,082 (2009).

shareholders' interests and to external events that render particular information important for investors. Thus, the SEC should be open to changing its rules on the disclosure of political spending if it concludes that there are now good reasons for doing so. In the remainder of this Article, we show that this is indeed the case.

III. CORPORATE POLITICAL SPENDING UNDER THE RADAR SCREEN

Because SEC disclosure rules evolve in response to shareholders' need for information about their companies, in this Part we turn to the amount of information public company investors currently have about corporate political spending. Shareholders in most public companies in the United States do not have the information they need to determine whether the company engages in political spending, how much is spent, or who the recipients are.

In Section A, we explain that, under current law, public companies can engage in corporate political spending that is not disclosed in any public record by funneling the spending through intermediaries. In Section B, we show that, although some corporate political spending is described in scattered public filings with federal and state governments, even this spending is not transparent to investors because of the practical difficulty of assembling a complete picture of a public company's spending from those sources.

A. Spending Without Any Public Record

Public companies can, and do, engage in political spending that is never disclosed by channeling that spending through intermediaries. Corporations contribute to entities that spend significant sums on politics,

yet these intermediaries do not have to disclose either the identity of the corporations that make these contributions or the amounts that they contribute. As a result, there is no information in the public domain on how much of an intermediary's funds, if any, was provided by a given public company. Even a determined individual shareholder willing to collect all available public information on a company's political spending would be unable to measure any spending through these intermediaries. In this section, we show that intermediaries spend substantial sums on politics; that the level of intermediary spending on politics has been growing over time; and that there is reason to conclude that a significant source of the intermediaries' funding comes from large public companies.

To begin, intermediaries that receive support from large public companies spend considerable sums on politics, and these amounts have been increasing over time. To illustrate the potential magnitude of the corporate political spending that occurs through intermediaries, we collected data from public filings describing the amounts that eight active intermediaries spent on lobbying and political expenditures between 2005 and 2010.[18] Because these entities are generally not required to divide their reported spending between lobbying and political expenditures, we focus below on their overall spending in both categories.

[18] The data were drawn from the Form 990 that each intermediary filed with the Internal Revenue Service for each year between 2005 and 2010. These are made publicly available by the IRS and Guidestar, one of several organizations that tracks spending by intermediaries. We drew each organization's lobbying and political expenditures from Schedule C to Form 990, which requires disclosure of lobbying and political expenses. *See, e.g.*, Am. Council on Health Ins. Plans, IRS Form 990, Return of Organization Exempt from Income Tax (OMB No. 1545-0047) (2010).

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Table 1 provides data on the spending by each of these eight intermediaries. Two of them (the Chamber of Commerce and the Business Roundtable) are known for advancing the interests of a broad range of businesses, and six (the Pharmaceutical Research and Manufacturers Association, American Health Insurance Plans, the American Council on Life Insurers, the American Petroleum Institute, the Financial Services Roundtable, and the National Association of Manufacturers) focus on particular industries. Together, these eight organizations spent more than $1.5 billion on lobbying and politics over this six-year period alone.

TABLE 1: SPENDING BY EIGHT ACTIVE INTERMEDIARIES, 2005-2010

	Total Spending, 2005-2010
Pharmaceutical Research and Manufacturers Association	$568.6 million
United States Chamber of Commerce	$385.3 million
American Petroleum Institute	$206.4 million
America's Health Insurance Plans	$187.5 million
Business Roundtable	$55.2 million
American Council on Life Insurance	$62.9 million
Financial Services Roundtable	$40.4 million
National Association of Manufacturers of the United States of America	$53.3 million
Total Spending	**$1,559.7 million**

To observe the change in intermediary spending over time, we compared the total spending of each entity over two periods similarly situated within the political cycle: 2005 and 2006 (years that directly followed a presidential election year) and 2009 and

2010 (also following a presidential election). Our analysis indicates that spending by these intermediaries increased substantially from 2005-2006 to 2009-2010. Overall, these eight intermediaries spent $353 million in 2005 and 2006, compared to more than $814 million in 2009 and 2010—an increase of more than 130%.

The evidence suggests, then, that not only do intermediaries spend large sums on politics, but also that these amounts have been increasing in recent years. And for three reasons we can expect that these intermediaries receive a significant proportion of their funds from large public companies. First, some indirect evidence of corporate funding of these intermediaries already exists. To be sure, there is no systematic evidence that the intermediaries' funding comes directly from public companies. But anecdotal evidence developed through independent research suggests that public companies donate substantial amounts to intermediaries.

For example, several publicly traded insurance companies revealed their contributions to intermediaries in filings with insurance regulators in 2012.[19] These filings indicate that Aetna,

[19] Although, as we have noted, current election-law rules do not require intermediaries to disclose the identities of the corporations that fund their activities, these companies revealed this spending in filings with the National Association of Insurance Commissioners, a voluntary organization of chief insurance regulatory officials from each of the fifty states. The NAIC requires insurers to file an annual statement disclosing the amount of any payments to any intermediary that received more than 25% of the total payments the company made to intermediaries overall. See NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, ANNUAL STATEMENT (2008), *available at* http://student.bus.olemiss.edu/ files/liebenberg/blanksandinstructions2008/08%20Health%20Blank.pdf. Because Aetna's payments to the Chamber of Commerce and American Action Network each exceeded 25% of the $11.6 million that it contributed to

Inc. provided more than $4 million to the Chamber of Commerce, and an additional $3 million to the American Action Network, in 2011 alone.[20] Similarly, the press has revealed substantial political spending by both Microsoft and News Corporation through intermediaries.[21]

Second, public company executives often sit on the intermediaries' boards, suggesting that the executives' companies have provided financial support to the intermediaries. To assess the extent to which public-company executives participate on the boards of intermediaries, we compiled information on the composition of the boards of all eight of the entities described in Table 1.

Our analysis indicates that public-company executives enjoy substantial representation on the boards of these intermediaries. For example, the Board of Directors of the Chamber of Commerce includes executives from Pfizer, WellPoint, ConocoPhillips, Harrah's Entertainment, Alcoa, Caterpillar, and Altria, among other well-known,

intermediaries in 2011, these payments were required to be disclosed in the company's NAIC annual statement.

[20] *See* Sean P. Carr & Wayne Dalton, *Aetna Led Insurers in 2011 Lobbying Spending, Funded Pro-GOP Group*, SNL FINANCIAL (June 4, 2012) (on file with authors).

[21] Microsoft provided over $250,000 to the Michigan Chamber of Commerce, which in turn funded advertisements on the Michigan Senate race in 2000, and reportedly spent nearly $16 million on lobbying and political expenses between 1997 and 2000. John R. Wilke, *Microsoft Is Source of 'Soft Money' Funds Behind Ads in Michigan's Senate Race*, WALL ST. J., Oct. 16, 2000, at A3. News Corporation contributed $1 million to the Republican Governors' Association in 2010. Brody Mullins, *Groups' Spending for GOP on Rise*, WALL ST. J. (Sept. 14, 2010), at A1.

large public companies.[22] Similarly, the Business Roundtable's Executive Committee is also composed almost exclusively of the executives of large public companies, including the Chief Executive Officers of Boeing, Dow Chemical, Procter & Gamble, Honeywell, American Express, Xerox, JPMorgan Chase & Company, General Electric, and Exxon Mobil.[23] Table 2 below describes the percentage of seats on the board of eight active intermediaries that are currently held by executives of large public companies. [24]

[22] U.S. CHAMBER OF COMMERCE, BOARD OF DIRECTORS, *available at* http://www.uschamber.com/about/board (last accessed June 22, 2012).

[23] BUSINESS ROUNDTABLE, EXECUTIVE COMMITTEE, *available at* http://businessroundtable.org/ about-us/executive-committee/.

[24] We drew the data in Table 2 from public reports describing the board of directors of each intermediary and the current affiliations of each member of the board. *See* American Council on Life Insurance, About ACLI: Board of Directors (2011), *available at* http://www.acli.com/About%20ACLI/Board%20of%20Directors/Documents/BoardofDirectors2012_updated071212.pdf*;* AMERICA'S HEALTH INSURANCE PLANS, *Who We Are: Board of Directors*, *available at* http://www.ahip.org/Who-we-are/; BLOOMBERG BUSINESSWEEK, *Company Overview: American Petroleum Institute*, (2012), *available at* http://investing.businessweek.com/research/stocks/private/board.asp?privcapId=4288157; BUSINESS ROUNDTABLE, *supra* note 23; FINANCIAL SERVICES ROUNDTABLE, ABOUT US: BOARD OF DIRECTORS (2012), *available at* http://www.fsround.org/fsr/about/board.asp; NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, *Board of Directors* (2012), *available at* http://www.nam.org/About-Us/Board-of-Directors/Landing-Page.aspx; PHARMACEUTICAL RESEARCH AND MANUFACTURERS ASSOCIATION, 2011 ANNUAL REPORT 14 (2011), *available at* http://www.phrma.org/sites/default/files/159/phrma_2011_annual_report.pdf; U.S. CHAMBER OF COMMERCE, *supra* note 22.

TABLE 2: PERCENTAGE OF PUBLIC-COMPANY EXECUTIVES AMONG THE LEADERSHIP OF INTERMEDIARIES

	Percentage of Board Members Currently Serving as Public-Company Executives
United States Chamber of Commerce	45%
Pharmaceutical Research and Manufacturers Association	71%
American Petroleum Institute	77%
America's Health Insurance Plans	32%
Business Roundtable	95%
American Council on Life Insurance	62%
Financial Services Roundtable	78%
National Association of Manufacturers of the United States of America	68%
Average	**66%**

Our analysis indicates that public-company executives have a substantial presence on the boards of these intermediaries. Indeed, at six of the eight intermediaries, public-company executives make up a majority of the board of directors; at four, executives occupy approximately 75% of the seats on the board. On average, public-company executives hold two-thirds of the seats on the boards of these intermediaries.[25]

[25] To be sure, the presence of public-company executives on the intermediaries' boards does not demonstrate that the executives' companies contributed to the organization. Notably, however, the few organizations that track corporate spending on politics usually assume that board members' companies provide funding to these intermediaries. For example, one such organization, the Center for Political Accountability, noted in its profile of AT&T, whose executives are on the board of the Chamber of Commerce, that "a portion of the company's payments to [the Chamber of Commerce] likely was used to underwrite some of [the Chamber's] political spending."

Finally, we reviewed the filings of 72 large public companies that have agreed to voluntarily disclose their political spending through intermediaries. Based on this review, 29 companies, or approximately 40%, contributed to the Chamber in 2011 alone.[26] While the evidence shows that many public companies engage in spending through the Chamber, the data also suggest that there is substantial variance among companies. In 2011, for example, Prudential Financial, Chevron, and WellPoint spent $570,000, $500,000, and $500,000, respectively, on contributions to the Chamber. Many other companies of similar size, however, such as Dell and EMC, contributed nothing at all to the Chamber.[27] Thus, for the thousands of public companies that do not make voluntary disclosures, investors can only speculate as to the amount of spending the companies do through intermediaries—with no means of verifying their guesswork.

CTR. FOR POLITICAL ACCOUNTABILITY, POLITICAL TRANSPARENCY AND ACCOUNTABILITY PROFILE, AT&T 5 (2012).

[26] This evidence is based on our review of voluntary disclosures of political spending provided by 102 large public companies in response to shareholder requests for this information. *See, e.g.*, WELLPOINT, INC., POLITICAL CONTRIBUTIONS AND RELATED ACTIVITY REPORT 5 (2011) (disclosing $500,000 in annual dues paid by WellPoint to the U.S. Chamber of Commerce), *available at* http://www.wellpoint.com/AboutWellPoint/GovernmentRelations/PoliticalContributions/index.htm. Some of these companies, however, decline to disclose contributions to intermediaries. Among the total group of 102 companies, 72 have agreed to disclose spending through intermediaries. Of those 72 companies, 29 listed contributions to the U.S. Chamber of Commerce. We are grateful to the Center for Political Accountability for its assistance in identifying these disclosures.

[27] Our findings are consistent with anecdotal reports on contributions to the Chamber, which indicate that half of the $140 million in contributions the Chamber received in 2008 came from 45 donors. *See* Nicholas Confessore, *Inquiry Looks Into a Shield for Donors in Elections*, N.Y. TIMES (June 26, 2012), at A1.

B. Spending with a Public Record but Not Transparent to Investors

In addition to spending through intermediaries, corporations are free to spend investor funds on indirect support of political candidates—for example, advertisements urging the election of a particular candidate. Existing election-law rules, such as regulations promulgated by the Federal Election Commission, may require that information about this type of corporate political spending be available in the public domain.[28] These rules, however, are designed to provide the public with information about the funding sources for particular politicians—not to allow investors to assess whether public companies are using shareholder money to advance political causes.[29]

Thus, the information about corporate political spending that is currently in the public domain is scattered throughout separate filings with the Federal Election Commission, 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. Putting together all such public data for a given company is a demanding task. Investors in public companies should not have to bear the costs of assembling this information when the corporation, which already has the information, can easily provide it to shareholders. The corporation, rather than individual investors, is in the best position to assemble this information efficiently.

[28] *See, e.g.*, 2 U.S.C. § 434(f)(1), (4) (2006 & Supp. III 2009).

[29] *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 196 (2003) (noting that election-law disclosures are generally designed to require the parties who fund political advertisements "to reveal their identities so that the public is able to identify the source of the funding" (quoting McConnell v. FEC, 251 F. Supp. 2d 176, 237 (D.D.C. 2003))), *overruled on other grounds by Citizens United*, 130 S. Ct. at 876.

Moreover, assembling this information from currently available sources is not straightforward. To identify the disclosed political spending of a single corporation, a shareholder would begin with the Federal Election Commission's database, which would provide reports of the company's indirect expenditures in support of candidates for federal office. These reports would exclude, however, contributions to third-party organizations that, in turn, provide support to federal candidates. The investor would separately have to search databases that track this information.[30] There is a large and growing group of these third-party organizations, including "527" organizations like "Super PACs."[31] To identify the company's political spending at the federal level, an investor would need to review the filings of each of these organizations and aggregate all of the company's contributions to each of them.[32]

Although a review of these filings might provide some detail on the company's spending on federal politics, to assess the company's spending on state-level elections an investor would have to conduct an entirely separate analysis. While public databases summarize information from state-level disclosures, because of variation in state law with respect to the information that is required to be disclosed, it may be difficult for an

[30] *See, e.g.*, POLITICAL MONEY LINE, DONOR SEARCHES, *available at* http://pml.cq.com/tr/tr_MG_indivdonor.aspx?&td=1_0 (last accessed July 21, 2012) (providing a searchable database of contributions, including some contributions to third-party organizations).

[31] These tax-exempt organizations are named after Section 527 of the Internal Revenue Code. *See* 26 U.S.C. § 527.

[32] Even this review is unlikely to permit the investor to identify all of the company's political spending. As we have noted, such spending can be channeled through intermediaries, *see supra* Part III.A., which are typically organized under Section 501(c)(6) of the Internal Revenue Code, 26 U.S.C. § 501(c)(6). In addition, corporate spending on politics can be funneled through "social welfare" groups organized under Section 501(c)(4) of the Internal Revenue Code, *id.* § 501(c)(4).

investor to assess a single corporation's spending across all fifty states through a search of these resources.[33] Combining this information into a single picture of nationwide political spending is sufficiently difficult that, to our knowledge, no organization or source currently provides a means of searching for an individual or company's aggregate spending at the federal and state level during a particular period.

Despite the absence of comprehensive data on the corporate political spending that is described in public records, there is reason to think that the level of corporate spending on politics is considerable. An inference concerning the potential willingness of companies to spend significant amounts on politics might be drawn from evidence about the substantial amounts spent by company political action committees, or PACs. The evidence shows that spending by such PACs is significant. For example, the PACs of AT&T and Honeywell International contributed $3.3 million and $3.7 million, respectively, to candidates at the national level in the 2010 election cycle.[34] During that cycle, business PACs are

[33] The National Institute on Money in State Politics collects data from state disclosure agencies with which candidates must file campaign-finance reports. The database permits a nationwide search for spending on state politics. Follow the Money, About Our Data, *available at* http://www.followthemoney.org/Institute/about_data.phtml (last accessed July 20, 2012). However, because the database necessarily relies on disclosures provided pursuant to state law, *see id.*, and there is a great deal of variation among states with respect to these disclosure requirements, *see, e.g.*, CORPORATE REFORM COALITION, SUNLIGHT STATE BY STATE AFTER CITIZENS UNITED 2 (2012), *available at* http://www.citizen.org/documents/sunlight-state-by-state-report.pdf, even searches of this database may not allow investors to obtain a complete picture of a particular corporation's spending on state politics.

[34] *See Top PACs*, CTR. FOR RESPONSIVE POLITICS, *available at* http://www.opensecrets.org/pacs/toppacs.php?Type=C&cycle=2010 (last visited July 20, 2012).

collectively estimated to have spent approximately $300 million at the national level alone.[35]

The funds provided by corporate PACs come from the personal wealth of executives and other employees, not from corporate treasuries. In the wake of *Citizens United*, companies are now allowed to use corporate funds for indirect support of candidates. Thus, executives may prefer to replace some of the amounts spent by corporate PACs with spending from corporate treasuries, since the costs of the latter type of spending are to a substantial extent borne by shareholders. Alternatively, executives may supplement PAC funds, which may be used for direct support of candidates, with corporate political spending designed to provide indirect support. In either case, the previous willingness of executives to spend substantial amounts in support of candidates even when they were personally required to bear the full costs of such support suggests that executives would be willing to spend even more to advance such causes using corporate funds.

IV. INVESTOR INTEREST IN CORPORATE POLITICAL SPENDING

As we have shown, public companies spend significant amounts of shareholder money on politics, and the levels and recipients of the spending are not transparent to investors. This Part shows that, in response, shareholders have increasingly expressed strong interest in receiving information on political spending from the companies they own.

[35] This estimate is drawn from a database maintained by the Center for Responsive Politics, which assigns each PAC included in Federal Election Commission filings to one of thirteen sectors. The figure includes PACs assigned to sectors relating to particular industries, but excludes PACs assigned to the "Ideological/Single-Issue," "Labor," and "Other" sectors. *See PACs by Industry*, CTR. FOR RESPONSIVE POLITICS, *available at* http://www.opensecrets.org/pacs/list.php (last accessed July 22, 2012).

Section A provides data on investors' extensive use of shareholder proposals to express this interest. Section B describes evidence from polls, policy statements, and commentary on the Petition indicating that institutional investors are increasingly urging the companies they own to disclose their political spending to shareholders.

A. Shareholder Proposals

Federal securities law allows public-company shareholders, under certain circumstances, to submit proposals to be voted on in the company's annual proxy statement.[36] Recently, public companies have received significant numbers of proposals requesting that companies disclose their political spending. The SEC has long recognized that shareholder proposals can serve as an important indicator of investor interest in particular matters.[37] And these proposals reflect more than just the proposing shareholder's interest in the subject. Because shareholder proponents focus their limited time and attention on proposals that are likely to attract substantial support, evidence about shareholder proposals also indicates the type of proposals most likely to be supported by other shareholders.

Shareholders have brought proposals requesting disclosure of corporate spending on politics at a significant number of public companies in recent years. During the 2012 proxy season, out of the 544 shareholder proposals appearing on public-company proxy statements, 71 related to political spending. Thus, 13% of all proposals that appeared on public-

[36] Shareholder Proposals, 17 C.F.R. § 240.14a-8 (2012) (requiring that certain proposals from certain shareholders be included for a vote in the annual proxy statement).

[37] *See, e.g.*, Executive Compensation Disclosure, *supra* note 15, at 29,582 (referring to shareholder proposals related to executive compensation in connection with rules broadening the Commission's disclosure rules on executive pay).

company proxy statements in 2012 were related to political spending. Further, proposals on political spending were more common than proposals on any other topic.[38]

By comparison, other types of shareholder proposals—including those that have long generated significant investor interest—appeared less frequently on proxy statements. The total number of proposals concerning political spending (71) exceeded the number of proposals related to the separation of the Chairman and CEO positions (51), board declassification (50), majority voting (35), requirements that executives retain equity in the company (28), elimination of supermajority voting requirements (15), executives' golden parachutes (12), and clawback of incentive compensation (2).[39]

[38] Based on a June 26, 2012 search of the SHARKREPELLENT DATASET OF FACTSET RESEARCH SYSTEMS INC., PROXY PROPOSALS, *available at* http://sharkrepellent.net. In its category of proposals related to "political issues," the Sharkrepellent dataset includes shareholder proposals that "request that the board provide a report detailing the company's policies regarding political contributions." SHARKREPELLENT DATASET OF FACTSET RESEARCH SYSTEMS INC., PROPOSAL TYPES, *available at* http://sharkrepellent.net.

[39] The Sharkrepellent dataset includes a broad universe of shareholder proposals, including some from individuals that may not reflect the preferences of larger, institutional shareholders. *See* SHARKREPELLENT DATASET OF FACTSET RESEARCH SYSTEMS INC., PROXY PROPOSALS, *supra* note 38. However, an analysis of the Sharkrepellent dataset limited to proposals submitted by institutional investors also finds that proposals on corporate political spending appeared on proxy statements more frequently than any other type of proposal. Among only those proposals brought by institutional shareholders, the number related to political issues (53) was greater than the number of proposals related to the separation of the Chairman and CEO positions (23), board declassification (42), majority voting (33), requirements that executives retain equity in the company (9), elimination of supermajority voting requirements (1), executives' golden parachutes (11), and clawback of incentive compensation (0). *See id.*

To show how frequently shareholders bring proposals seeking additional disclosure of political spending at the largest public companies, it may be useful to focus on companies in the Standard & Poor's 100 index. Among these companies, during the 2012 proxy season, 39 included such a proposal on their proxy statements. Thus, more than one out of three of America's largest corporations included shareholder proposals requesting disclosure of corporate spending on politics in their proxy statements in 2012.[40]

Furthermore, these figures actually *underestimate* investor interest in information on political spending. As we describe in Part VI below, many public companies have already voluntarily agreed to provide some disclosure of political spending to shareholders. In the most recent proxy season, among companies currently in the S&P 100 that have not already

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For purposes of this analysis, in cases where Sharkrepellent lacked data on the nature of a proponent, we assumed that the proposal was not brought by an institution.

We separately analyzed shareholder proposals tracked by the Institutional Shareholder Services dataset, which emphasizes those relevant for large institutional investors. Within this group, too, there were more proposals relating to political spending than any other issue. According to that dataset, among the 500 proposals included on proxy statements in 2012, 67 related to corporate spending on politics, more than any other type of proposal in the database. *See* Email from Institutional Shareholder Services to Robert J. Jackson, Jr. (July 11, 2012). We are grateful to the staff at Institutional Shareholder Services for their assistance in analyzing these data.

[40] SHARKREPELLENT DATASET OF FACTSET RESEARCH SYSTEMS INC., PROXY PROPOSALS, *supra* note 38. As we have noted, the dataset from which this evidence is drawn includes both proposals from large institutional shareholders and proposals from individual shareholders. Limiting our analysis only to proposals brought by institutional investors, among the 39 companies in the S&P 100 to include proposals related to political issues on the proxy statement, 31 received at least one proposal from an institutional investor; eight received only proposals from individuals.

agreed voluntarily to disclose information on political spending, 45% included shareholder proposals on political issues. Thus, nearly half of the largest companies in the United States that have not yet voluntarily agreed to provide this information to investors held a vote on a proposal related to political spending in 2012.

When considering changes to disclosure rules, the SEC has previously taken note of the frequency and support of shareholder proposals. For example, when the SEC considered changing its executive compensation disclosure requirements in 1992, it pointed out that 9 large public companies held votes on proposals related to executive pay, signaling increased investor interest in the issue.[41] By comparison, during the 2012 proxy season 39 companies in the S&P 100, as well as another 25 public companies outside the S&P 100, held a vote on one or more proposals requesting further disclosure of corporate political spending. Thus, the total number of companies holding votes on shareholder proposals about corporate political spending in 2012 is more than seven times the number that prompted the SEC to revise its executive-pay disclosure rules in 1992.[42]

B. Other Expressions of Interest

Looking beyond the recent data on shareholder proposals, investors' strong interest in disclosure of corporate political spending is also evident from the views of large institutional investors. Several recent

[41] *See* Executive Compensation Disclosure, *supra* note 15, 57 Fed. Reg. 29,582, 29,582 & n.8.

[42] This difference is all the more striking given that, at the time of the 2012 proxy season, more than half of the companies in the S&P 100 had already voluntarily agreed to provide disclosure of corporate political spending. By contrast, in 1992 very few firms were providing voluntary disclosure of executive compensation.

polls indicate that these investors strongly believe that public companies should disclose political spending. Policy statements recently released by the largest institutions take the same view. And the institutional investors who have commented on the Petition voiced unanimous support for rules requiring disclosure of corporate spending on politics. Taken together, these polls, public statements, and regulatory comments make clear that institutions responsible for managing significant amounts of shareholder funds take the view that public corporations should disclose their political spending to investors.

To begin, as early as 2006, polls of public-company investors indicated that 85% of shareholders thought there was a lack of transparency in corporate political activity.[43] According to these polls, investors expressed these views with notable intensity; 57% of shareholders "strongly agree[d]" that there was too little transparency in corporate spending on politics.

In addition, several of the largest institutional investors have also recently established corporate governance policies indicating their view that public companies should disclose political spending. For example, TIAA-CREF, which manages over $450 billion in assets, notes in its policies on corporate governance that "[c]ompanies involved in political activities should disclose . . . contributions as well as the board and management oversight procedures designed to ensure that political expenditures are . . . in the best interests of shareholders."[44]

[43] MASON-DIXON POLLING & RESEARCH, CORPORATE POLITICAL SPENDING: A SURVEY OF AMERICAN SHAREHOLDERS 6 (2006).

[44] TIAA-CREF POLICY STATEMENT ON CORPORATE GOVERNANCE 16 (6th ed. 2011); *see also id.* ("corporate political spending may benefit political insiders at the expense of shareholder interests").

Similarly, CalPERS, which manages some $239 billion, recently added to its principles of corporate governance the statement that public companies "should disclose on an annual basis the amounts and recipients of" political spending, including any spending channeled through intermediaries.[45] Another significant institutional investor, CalSTRS, which manages more than $150 billion, also recently adopted a policy "calling for [its] portfolio companies to annually report their expenditures on political contributions."[46]

Moreover, the Council of Institutional Investors, a nonprofit association of institutional investors whose members manage more than $3 trillion in assets, has recently articulated its views on political spending. The Council has said that public companies should "disclose on an annual basis the amounts and recipients of all monetary and non-monetary contributions made" from the company's treasury.[47]

Finally, several large institutional investors have commented on the Petition. The comment file includes several letters from individuals associated with or writing on behalf of institutional investors, and all of these are supportive of the Petition. In one such letter, a coalition of 40 institutional investors with more than $690 billion under management submitted a detailed letter urging the SEC to adopt rules requiring public

[45] CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM, GLOBAL PRINCIPLES OF ACCOUNTABLE CORPORATE GOVERNANCE § 6.5(c), at 19 (2011), *available at* http://www.calpers-governance.org/docs-sof/principles/2011-11-14-global-principles-of-accountable-corp-gov.pdf (last accessed June 26, 2012).

[46] California State Teachers' Retirement System, *CalSTRS Adopts Policy on Corporate Political Contributions Disclosure* (2011), *available at* http://www.calstrs .com/Newsroom/2011/news110411 .aspx (last accessed June 26, 2012).

[47] COUNCIL OF INSTITUTIONAL INVESTORS, CORPORATE GOVERNANCE POLICIES 7 § 2.14b (2011).

companies to disclose their political spending.[48]

V. THE CRITICAL ROLE OF DISCLOSURE

In this Part, we explain why disclosure on corporate political spending is necessary to ensure that such spending is consistent with shareholder interests. Section A argues that the interests of directors and executives often diverge from those of shareholders with respect to corporate spending on politics. Given that the interests of directors and executives in this area often do not overlap with those of shareholders, Section B shows that transparency is critical for both market forces and corporate-governance mechanisms to bring corporate political spending into line with shareholder interests.

A. The Need for Accountability

Most corporate decisions are left squarely within the sound discretion of the board of directors and senior executives. Investors have no difficulty placing most of these decisions in the hands of insiders, both because the interests of directors and executives are likely to be aligned with those of shareholders and because, even if these decisions occasionally depart from investors' interests, such departures are unlikely to be sufficiently common or significant to warrant investors' attention.

As we explain in this section, however, for two reasons this is unlikely to be the case with respect to the decision to spend corporate funds on politics. First, the interests of directors and

[48] Letter from Iain Richards et al. to Elizabeth M. Murphy, Secretary, U.S. Sec. & Exch. Comm'n (Nov. 1, 2011), available at http://www.sec.gov/comments/4-637/4637-11.pdf.

executives may frequently diverge from those of shareholders with respect to political spending. Second, the decision to spend corporate funds on politics may carry expressive significance for shareholders beyond their direct financial effects.

1. Frequency of divergence of interests. Corporate law has long recognized that, in some areas—such as executive compensation—the interests of directors and executives may be different from those of shareholders. As we explain below, the interests of directors and executives may also diverge, frequently and substantially, from those of shareholders with respect to corporate spending on politics.[49]

At the outset, we acknowledge that the interests of directors and executives may be aligned with those of shareholders with respect to some categories of corporate political spending. This might be the case, for example, for spending on lobbying for rules that would help the company become more profitable. But there are good reasons to believe that the interests of directors and executives with respect to political spending frequently diverge from those of investors.

The problem is that corporate political spending may reflect not only directors' and executives' business judgment, but also their political preferences. Political spending often has consequences unrelated to the company's performance, and directors' and executives' preferences with respect to such spending might be influenced by these consequences. Thus, a divergence of interests may arise with respect to the company's decision to spend corporate funds on a particular political issue.

[49] *See generally* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 85-92 (2010).

Shareholders do not sort themselves among companies according to their political preferences. Thus, there is no reason to expect that their political preferences will match those of the individuals who make the company's political spending decisions. Suppose, for example, that the CEO of Company *A* has conservative political views and hopes someday to campaign to be Governor in a conservative state, while the CEO of Company *B* has liberal views and hopes to run for Governor in a liberal state. There is no reason to expect that the shareholders of both companies—or even a majority of the investors in each company—have political views that reflect those of the CEOs. Thus, if the companies' political spending is significantly influenced by the CEOs' beliefs, the interests of one or both of the CEOs may be significantly different from those of each company's shareholders.[50]

2. Expressive significance. The scant available evidence suggests that the financial magnitude of corporate political spending is unlikely to be trivial for public companies and their investors.[51] When considering the significance of political spending for investors more generally, however,

[50] The interests of directors and executives are especially likely to diverge from those of shareholders with respect to rules addressing corporate governance and the rights of public-company shareholders. In this area, insiders may use corporate resources to oppose rules that would expand shareholder rights that investors favor. Indeed, because corporate lobbying of this type is likely to affect corporate governance rules more generally, a failure to address the divergence of interests between insiders and investors with respect to corporate political spending may make it more difficult to address agency problems with respect to other corporate decisions. *See* Lucian A. Bebchuk & Zvika Neeman, *Investor Protection and Interest Group Politics*, 23 REV. FIN. STUD. 1089, 1113 (2010) (describing a model of interest group politics in which corporate insiders' ability to use corporate resources to lobby politicians leads to a suboptimal equilibrium level of investor protection).

[51] *See supra* Part III.A.

we should not limit our attention to the financial stakes, because such spending carries unique expressive significance for shareholders as well.

This is likely to be particularly true with respect to corporate spending that reflects beliefs about general political issues. For this kind of spending, the costs to investors may go far beyond the amount the company spends. Shareholders may have a strong interest in not being associated with political speech they oppose—and this interest may not be proportionate to the amount that the company has spent. To see this, consider a corporation that spends a small amount of company money on an advertisement on the firm's behalf describing the company's support for a political view that most shareholders abhor. While these shareholders are likely to be indifferent to corporate spending in these amounts more generally, they may well feel differently about spending on an advertisement that associates the company—and, by proxy, the investors themselves—with a political position of this kind.

Indeed, the SEC has for some time recognized that investors may well have an interest in social issues that goes beyond those issues' direct relevance to the company's bottom line. Federal securities law does not require public companies to include on their proxy statements a shareholder proposal that addresses the company's "ordinary business operations."[52] Nevertheless, recognizing the "depth of interest" among shareholders on certain social-policy issues, the SEC has concluded that this exclusion should not apply to shareholder proposals related to such social issues.[53] Consistent with the view that shareholders may attach special significance to the company's political spending, the SEC has previously identified political contributions as an example of the "ethical

[52] Shareholder Proposals, 17 C.F.R. § 240.14a-8(i)(7) (2009).

[53] Amendments to Rules on Shareholder Proposals, 63 Fed. Reg. 29,106, 29,108 (May 28, 1998).

issues" that "may be significant to the issuer's business, even though such significance is not apparent from an economic viewpoint."[54]

B. The Importance of Transparency

The SEC has long recognized that, where the interests of directors and executives diverge from those of shareholders, disclosure is a necessary mechanism for accountability. For example, the SEC requires extensive disclosure of directors' decisions on executive compensation, recognizing that directors may have reason to favor executives when setting executive pay.[55] The SEC also requires that public companies give investors detailed information about any transactions between the company and insiders, again acknowledging that such bargains may be struck in a fashion inconsistent with the interests of shareholders.[56]

As we have seen, the interests of directors and executives may conflict with those of investors when it comes to corporate spending on politics. Thus, disclosure of such spending is necessary for corporate accountability and oversight mechanisms to bring corporate spending on politics into line with shareholder interests.

The federal courts have often recognized accountability and governance mechanisms in their consideration of the constitutional rules

[54] Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12999, 10 SEC Docket 1006 (Nov. 22, 1976).

[55] For example, in the area of executive compensation, securities law requires detailed disclosure designed to help shareholders identify, and hold directors accountable for, executive-pay arrangements. *See generally* 17 C.F.R. § 229.402 *et seq.*; *id.* § 229.402(b)(i-xv) (requiring public companies to provide disclosure with respect to the influence of twenty-five separate considerations on executive pay decisions).

[56] *See id.* § 229.404(a) (setting forth the Commission's related-party transaction disclosure rules).

governing corporate spending on politics. For example, in *Citizens United*, the Supreme Court relied on "the procedures of corporate democracy" as a means through which investors could address corporate spending on politics. "Shareholders," in the Court's view, could "determine whether their corporation's political speech advances the corporation's interest in making profits," and remove directors and executives who spend corporate funds on speech that is inconsistent with investors' interests.[57] The Court's previous cases in this area, too, relied upon shareholders' ability to "decide, through the procedures of corporate democracy, whether their corporation should" spend corporate resources on politics.[58]

For shareholders to be able to take these steps, however, investors must have information about the company's political spending. Otherwise, shareholders cannot know whether such spending "advances the corporation's interest in making profits." Without transparency, shareholders cannot hold directors and executives accountable when they spend corporate resources on politics in a way that departs from investors' interests.

Of course, even if shareholders have precise information about the company's spending on politics, one could argue that existing corporate-governance arrangements are insufficient to ensure that such spending is aligned with shareholder interests. In other work, we have described the additional measures that might be necessary to give shareholders the authority they need to hold directors and executives accountable for political spending.[59] For example, policymakers might consider giving shareholders the right to approve corporate budgets and targets for spending on politics. Lawmakers might also consider rules that would

[57] 130 S. Ct. 876, 916 (2010).

[58] First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 794-95 (1978).

[59] *See generally* Bebchuk & Jackson, *supra* note 49, at 97-107.

require independent directors to approve executives' decisions on political spending. Whether these measures would be desirable is a question on which reasonable observers may disagree. Whatever one thinks of these measures, however, it is clear that no corporate accountability mechanisms—whether the existing rules or new ones—can work without giving investors the information they need to assess and respond to corporate political spending.

VI. VOLUNTARY DISCLOSURE

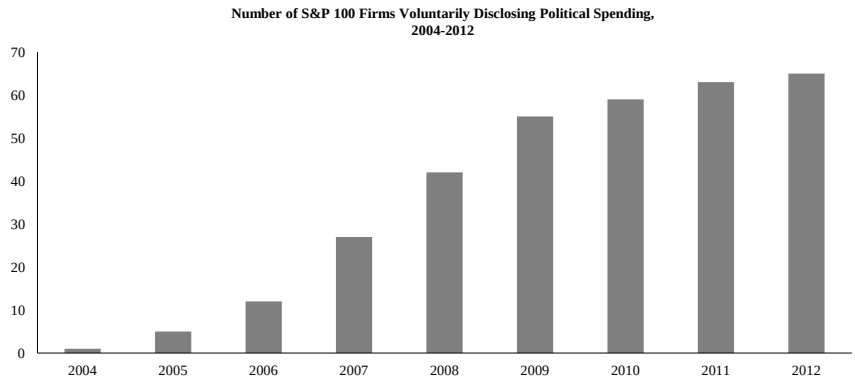
In response to shareholder interest in detailed information on political spending, many large public companies have recently voluntarily agreed to disclose this information. In this Part, we provide evidence about this development—and explain why voluntary reporting of this kind does not suggest that disclosure of corporate political spending can be left to private ordering among firms. Section A describes the voluntary disclosure practices that have emerged at the largest U.S. public companies. Section B then explains why such voluntary disclosure does not obviate the need for a mandatory rule requiring all public companies to disclose this information to investors.

A. Recent Voluntary Disclosures

As we have explained, investors have grown increasingly interested in information on corporate political spending over the past several years. In turn, public companies' disclosure practices have recently evolved to reflect investors' growing demand for transparency. Indeed, a significant number of the largest U.S. public companies have voluntarily agreed to disclose this information to shareholders and the public—indicating that such disclosure is practically feasible for public companies.

Since 2004, a growing number of these companies have voluntarily adopted policies requiring disclosure of the company's spending on politics. Figure 1 below describes the increase over time of the total number of firms in the S&P 100 that have voluntarily adopted such policies.[60]

Figure 1: Total S&P 100 Firms Voluntarily Disclosing Political Spending, 2004-2012



[60] To produce the data in Figure 1, we examined the group of companies that have voluntarily agreed to adopt a policy requiring some disclosure of their political spending, *see* CENTER FOR POLITICAL ACCOUNTABILITY, LEADERS IN POLITICAL DISCLOSURE, *available at* http://www.politicalaccountability.net/index.php?ht=d/sp/i/869/pid/869 (last accessed July 5, 2012) and compared them with a list of the companies that were constituent members of the S&P 100 at any time during the 2004-2012 period, *see* STANDARD & POOR'S, S&P DOW JONES INDICES, S&P 100, *available at* http://www.standardandpoors.com/indices/sp-100/en/us/?indexId=spusa-100-usduf--p-us-l-- (last accessed July 5, 2012). Because several companies have been added to, and removed from, the S&P 100 during this period, the total number of companies that were in the index at some point during this period is greater than 100.

Evidence showing that a significant number of major public companies are voluntarily providing shareholders with information on their political spending is important for two reasons. First, this evidence is another manifestation of strong investor interest in political spending. The willingness of a significant number of America's largest public companies to provide this information voluntarily reflects, in our view, the companies' recognition of the significant investor demand for, and interest in, such information.

Second, the disclosure of this information by significant numbers of large companies indicates that doing so is feasible and practical for public companies. Furthermore, these disclosure practices, which a significant number of companies are comfortable with, can serve as a starting point for the SEC in designing rules in this area.[61]

[61] For a detailed description of our proposal for designing such rules, *see infra* Part VII. It is important to note that the type of disclosure provided by these firms varies substantially, and not all firms adopting these policies have satisfied investors that they have disclosed enough information for shareholders to assess the company's spending on politics. The SEC staff recognized this possibility in a recent ruling on a shareholder proposal requesting additional disclosure on political spending at Home Depot. *See* The Home Depot, Inc., SEC No-Action Letter, 2011 SEC No-Act. LEXIS 333, at *1 (Mar. 25, 2011). After a shareholder filed a proposal asking the company to provide more complete data on political spending, Home Depot responded that its existing policies, which required some disclosure of this information, "compare favorably" with those in the proposal and that the proposal could therefore be excluded from Home Depot's proxy statement. Noting that the shareholder proposal requested more detailed information than Home Depot had previously provided under its voluntary disclosure policy, the SEC staff disagreed, and Home Depot included the proposal in its proxy statement. *See id.*

B. Should Disclosure be Left to Private Ordering?

In light of the fact that many large public companies have voluntarily agreed to provide information on political spending to shareholders, it might be argued that there is no need for a mandatory rule requiring this information to be disclosed. Instead, these matters might be left to private ordering among investors and firms, allowing each to choose the level and type of disclosure that best suits their needs. Indeed, many commentators who oppose the Petition have made this argument, noting that allowing private ordering to address the issue would avoid the imposition of a one-size-fits-all rule on public companies.[62]

For four reasons, however, disclosure of corporate spending on politics should not be left to private ordering. These reasons also explain why, in a wide variety of areas, corporate law generally does not rely on voluntary disclosure but instead adopts mandatory rules—beyond which companies are free to provide additional voluntary disclosure.

First, the quality of the information that large public companies have so far provided to investors through voluntary disclosure policies is generally very low. Many of these disclosures make it difficult not only to ascertain the actual amount of corporate funds spent on a particular political issue, but also the recipients of those funds.[63] For example, in

[62] *See, e.g.*, Larry Ribstein, *Should the SEC Regulate Corporate Political Speech?*, TRUTH ON THE MARKET (Aug. 4, 2011), *available at* http://truthonthemarket.com/category/securities-regulation/disclosure-regulation/ ("[M]any corporations already [are] voluntarily disclosing political spending . . . . Why not continue the experimentation and evolution rather than locking down a one-size fits all rule?").

[63] *See, e.g.*, Vishal P. Baloria, Kenneth J. Klassen, and Christine I. Wiedman, *Determinants and Consequences of Voluntary Disclosure of Corporate Political Spending* 2 (2012) (unpublished manuscript, on file with authors) (noting, based on a review of the voluntary disclosures of more than 350 S&P 500 firms, that in general

response to significant shareholder interest in its political spending, Boeing has voluntarily agreed to disclose such spending. In 2012, however, Boeing's voluntary report excluded a $200,000 in-kind contribution to a third-party group.[64] Mandatory rules are needed to address gaps and loopholes that now exist in voluntary disclosure policies—that is, to ensure that disclosures actually give investors the information they need to evaluate each company's spending on politics.

Second, there is a great deal of variation in the type and quality of information that companies now voluntarily provide.[65] This lack of uniformity makes comparison among companies costly for investors. Mandatory rules carry the important benefit of ensuring that companies will present this information in a manner that would be familiar to investors and would facilitate comparisons among companies. Given that investors compare a large number of firms across a wide range of characteristics, uniformity among disclosures would be a substantial benefit.

Third, even if voluntary disclosure was of high quality and was relatively uniform, most public companies currently do not disclose any information at all about political spending. Investors have focused their requests for information on the largest public companies, but many other firms do not provide any disclosure about their spending on politics. It

"disclosure of both observable and unobservable political spending is very poor"), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2079131.

[64] *See* Ameet Sachdev, *Political Advocacy Piques Shareholders' Interest*, CHI. TRIB. (May 18, 2012), at A4.

[65] *See, e.g.*, *id.* at 6 (noting that "there is considerable cross-sectional variation among firms in their level of spending disclosure"); *see also* Sustainable Investment Institute, Corporate Governance of Political Expenditures: 2011 Benchmark Report on S&P 500 Companies (2011), *available at* http:// si2news.files.wordpress.com /2011/11/corporate-governance-and-politics-policy-and-spending-in-the-sp500.pdf.

would take a considerable amount of time and investor resources to request this information from all public companies. Lawmakers should not expect investors to make these requests on a company-by-company basis for thousands of firms.

In the past, the SEC has not placed this burden on investors. For example, after investors demanded additional information on executive pay at a few large public companies, the SEC promptly proceeded to expand its disclosure rules—rather than wait for shareholders to make those requests at more firms.[66] The SEC has taken this approach because, as is now well-recognized, shareholders face collective action problems that make it costly for them to take action at individual firms.[67] Thus, in general, the SEC has not waited for investors to pursue disclosure at all public companies when considering mandatory rules of this type.

Fourth, even if we could expect investors to successfully demand voluntary disclosure at many or even most public companies, we would not expect shareholders to persuade all firms to disclose. And even if the group of companies that refuses to provide disclosure is small, these companies might be disproportionately likely to engage in political spending that is inconsistent with shareholder interests. The companies most likely to resist shareholder requests for disclosure may be those most likely to reveal spending that shareholders would find objectionable.

The SEC identified a similar problem when it moved to expand the required disclosure on executive pay at all public companies. In doing so, the SEC noted that the firms that declined to disclose compensation information voluntarily might well be the firms at which pay arrangements

[66] Executive Compensation Disclosure, *supra* note 15, at 29,590.

[67] *See* Lucian A. Bebchuk & Scott Hirst, *Private Ordering and the Proxy Access Debate*, 65 BUS. LAW. 329, 340 (2010) (describing impediments to shareholder action).

would be most likely to meet with the disapproval of shareholders.[68] A similar problem would arise with corporate political spending—which is why mandatory rules are needed.

Finally, we want to stress that mandatory SEC rules would not completely eliminate the possibility of tailoring by individual firms. Mandatory rules would set a minimum standard for information that must be disclosed to shareholders. But companies would be free to add to those disclosures if they think that they have additional information that might be important to their shareholders in their particular circumstances.[69]

In sum, although the movement among large public companies toward voluntary disclosure of corporate political spending is, in our view, a positive development, this trend does not obviate the need for mandatory rules in this area. Instead, the fact that the largest public firms have acknowledged the importance of this issue—and have been willing and able to provide this information to shareholders—suggests that the SEC should develop rules requiring disclosure of all public companies' spending on politics.

VII. DESIGNING DISCLOSURE REQUIREMENTS

As we have explained, transparency of corporate spending on politics is necessary to ensure that such spending is consistent with

[68] *See* Executive Compensation Disclosure, *supra* note 15, at 29,590.

[69] Indeed, in the area of executive compensation, it is common for well-advised companies to provide additional disclosure to investors in order to give context to the information they are required to disclose under mandatory SEC rules. *See, e.g.*, WACHTELL, LIPTON, ROSEN & KATZ, COMPENSATION COMMITTEE GUIDE 44 (2012) (noting that public-company compensation committees have increasingly chosen to supplement their mandatory disclosures on executive pay with additional information).

shareholder interests. Investors have expressed a great deal of interest in receiving this information. And many public companies have voluntarily agreed to provide shareholders with some information in this area. In our view, the SEC should move promptly to require public companies to give investors consistent, detailed disclosure of their political spending.

It might be argued that designing disclosure rules of this type will be especially complex.[70] However, as we explain in this Part, the development of disclosure rules on corporate political spending would raise design questions similar to those that the SEC has already faced in previous rulemaking. The SEC has significant experience and expertise in designing disclosure rules of this kind. Moreover, in designing these rules the SEC will be able to draw on voluntary disclosures already provided by the largest U.S. public companies. And rules already developed in the United Kingdom, where public companies have been required to disclose political spending annually for more than a decade, will also provide the SEC with insight in developing these rules.[71]

The SEC has sufficient experience, expertise, and existing practices from which to draw to design rules mandating disclosure of corporate political spending. In this Part we identify four issues—concerning the rules' scope, their application to spending channeled through intermediaries, exceptions for *de minimis* spending, and the frequency and timing of disclosure—that we expect the SEC to face in developing these rules.

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[70] *See, e.g.*, Letter from Keith Paul Bishop, *supra* note 4, at 2 (noting that a rule requiring disclosure of corporate political spending, in light of its complexities, would add to the "cumulative impact of the increasing number of disclosure requirements" on public companies).

[71] Political Parties, Elections and Referendums Act, 2000, c. 41, § 140 (U.K.).

A. Scope

The SEC will have to determine the scope of these rules on at least two dimensions. First, the SEC will need to determine the types of political spending that will be covered by the rules. Second, the SEC will have to determine which public companies will be subject to the rule.

1. Spending covered. We begin with the kinds of political spending that the SEC's rules should cover. At the outset, we note that the SEC will need to determine whether particular types of spending, such as spending on lobbying, constitute political spending for purposes of such rules. We note, however, that the SEC has faced definitional questions of this type before. For example, while developing its rules on executive pay disclosure, the SEC has had to determine whether certain benefits received by executives constitute "compensation."[72]

In the area of political spending, however—unlike the area of executive pay—the SEC can draw on the well-developed definitions of political spending established by election-law rules. For instance, corporate spending on advertisements that expressly advocate for or against the election or defeat of a candidate should be included in the SEC's definition of political spending for purposes of these rules.[73]

[72] Notably, the Commission has modified the definition of "compensation" over time to accommodate shifting investor interest in the various forms of executive pay. *See, e.g.*, Executive Compensation and Related Person Disclosure, Exch. Act. Nos. 33-8732A, 34-54302A, 71 Fed. Reg. 53158, 53176 (2006) (noting the SEC's changing guidance as to whether particular types of compensation constitute "perquisites or other personal benefits" that must be disclosed).

[73] *See* Coordinated and Independent Expenditures, Notice 2002-27, 68 Fed. Reg. 421 (2003) (modifying this definition to conform to changes required by the Bipartisan Campaign Reform Act of 2003, 2 U.S.C. § 431(17)).

Two specific design choices the SEC will face when determining the types of political spending to be covered by its rules deserve particular attention. First, the SEC should consider whether to exclude company contributions to third parties that are restricted from political use. There may well be cases in which the SEC will conclude that exclusion of these expenses is appropriate given that such funds will not be spent on politics. On the other hand, there will also be cases, such as corporate contributions to intermediaries that spend a large fraction of their funds on politics, that should be included within the scope of the SEC's rules.[74]

Second, the SEC should consider whether, to address less obvious cases, disclosure rules should include criteria for determining the types of spending subject to disclosure. In selecting these criteria, the SEC should aim to address potential problems of over- or under-inclusion, ensuring that the rule covers cases where corporate funds will eventually be spent on politics—and excludes cases where they will not.

2. Companies covered. The SEC will likely also face questions about the types of companies that will be subject to these rules. In particular, the SEC will have to determine whether some firms, such as smaller companies, should be exempted from the rules. The SEC has long exempted smaller public companies from application of some of its rules, citing the relatively high costs of compliance for smaller firms. More recently, after convening an advisory committee to study the regulatory burdens faced by smaller companies,[75] the SEC revised its rules to reduce

[74] For detailed information on substantial political spending by several large intermediaries, *see supra* text accompanying notes 18-19& tbl. 1.

[75] *See* SEC, Advisory Committee on Smaller Public Companies, Final Report (April 23, 2006), *available at* http://www.sec.gov/info/smallbus/acspc.shtml.

the disclosure burdens for smaller public companies, including "scaled," or reduced, disclosure requirements related to executive compensation.[76]

The SEC should likewise consider whether to develop scaled disclosure requirements related to corporate spending on politics for smaller public companies. The SEC's existing disclosure rules for these smaller firms may offer a helpful starting point for the development of such scaled requirements.

B. Spending through Intermediaries

The SEC should also carefully consider how disclosure rules in this area will address corporate political spending channeled through intermediaries. Detailed information on such spending is essential to providing shareholders with effective disclosure.

As we have noted, these intermediaries have long spent substantial sums on politics. In addition, these amounts have grown rapidly over time.[77] And there is good reason to expect that a significant amount of the intermediaries' funding comes from large public companies.[78] Thus, corporate political spending through intermediaries should be given careful attention by regulators developing rules in this area.

[76] *See* Smaller Reporting Company Regulatory Relief and Simplification, 73 Fed. Reg. 934, 939 (2008) (describing the less stringent executive compensation disclosure requirements that now apply to smaller public companies—which, the SEC has concluded, include those with less than $75 million in public equity float or, for companies without a calculable public equity float, revenues of less than $50 million).

[77] *See supra* text accompanying notes 18-19 and tbl. 1.

[78] *See supra* text accompanying note 22.

The precise design of the disclosure rules addressing spending through intermediaries is beyond the scope of this Article. We note, however, that previous efforts to provide disclosure in this area have failed to fully address spending through intermediaries.[79] Requiring effective disclosure of such spending is essential to giving investors complete information on corporate political spending. Without such a requirement, public-company investors will lack an accurate picture of the political causes that their money is used to support.

C. *De Minimis* Exceptions

The SEC should also consider whether disclosure rules in this area should exempt *de minimis* spending on politics. In our view, the SEC's rules should include a *de minimis* exception, which would appropriately balance the benefits of disclosing corporate spending on politics with the costs of disclosing very small amounts of spending that are unlikely to be important to investors.

Nevertheless, we reiterate that the unique symbolic significance of corporate spending on politics for investors suggests that the SEC should

[79] Several bills recently introduced in Congress would impose disclosure requirements with respect to corporate political spending. *See, e.g.*, Shareholder Protection Act of 2010, H.R. 4537, 111th Cong. § 4 (2010). These proposals do not, however, include robust disclosure of spending through intermediaries. For example, one proposal includes a requirement that corporations disclose contributions that were given to an intermediary and transferred to a third party, but only if the funds were designated for a particular political purpose. *See, e.g.*, Shareholder Protection Act of 2010, H.R. 4537, 111th Cong. § 4 (2010). Thus, the proposal seems not to address the important cases in which public companies provide funds to intermediaries without identifying the political causes on which the money will be spent.

define *de minimis* spending to include only appropriately low amounts.[80] The SEC's existing regulatory framework for *de minimis* exceptions, such as its rules on disclosure of related-party transactions, may offer a sound starting point for the development of such an exception.[81]

D. Frequency and Timing

Finally, the SEC should consider how often public companies should be required to disclose political spending to investors. Reporting that is too frequent would be disruptive and costly for many firms. When choosing the required reporting frequency, the SEC should ensure that disclosure is not so frequent that reporting would be excessively burdensome or expensive. Of course, the SEC should balance these considerations with the need to ensure that disclosure is not so occasional as to make it ineffective for purposes of transparency and accountability.

In the past, one approach the SEC has taken to balancing these considerations has been to require disclosure in the proxy statement that public companies provide to shareholders in advance of each annual meeting. For example, the proxy statement now includes annually required disclosures on executive pay, related-party transactions, director independence, the annual audit of the company's financial results, and the board's role in overseeing risk.[82]

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[80] For a discussion of the symbolic importance of corporate political spending to investors, *see supra* Part V.A.2.

[81] *See* 17. C.F.R. § 229.404(a) (exempting from disclosure rules related-party transactions with a value of $120,000 or less).

[82] SEC rules currently describe, in detail, the disclosure that must be included on each of these matters in each public company's annual proxy statement. *See* 17 C.F.R. § 229.402 *et seq.* (disclosure on executive compensation); *id.* § 229.404 (disclosure on related-party transactions); *id.* § 229.407(a) (disclosure on the board's determinations with respect to the independence of each director); *id.* § 407(d) (disclosure on the review,

A more demanding—but costly—approach would be to require public companies' quarterly financial reports to include this information. In our view, a more appropriate framework would instead require annual disclosure in the proxy statement. Because the purpose of disclosing corporate spending on politics is to provide for accountability to shareholders, the disclosure should be provided in advance of the company's annual meeting, where shareholders will have the opportunity to vote on director elections in light of this information.

VIII. OBJECTIONS

Since the filing of the Petition asking the SEC to develop disclosure rules on corporate political spending, several comment letters have raised objections to the proposed rules. And outside the comment file, a number of observers, including lawmakers, the editorial boards of major publications, and academics, have publicly argued against the adoption of such rules.

In this Part, we examine eight objections to the proposed rules. These include all of the objections that, to our knowledge, have been raised in formal rulemaking commentary and other public reports. As we explain below, none of these objections, individually or collectively, provides a basis for opposing rules requiring public companies to disclose political spending to their investors.

by the board's audit committee, of the company's annual audit); *id.* § 407(h) (disclosure on the board's leadership structure and role in risk oversight).

A. Constitutional Impermissibility

Especially in light of the Supreme Court's recent decision in *Citizens United*, it might be argued that the First Amendment precludes lawmakers from mandating disclosure of corporate political spending. This objection has been raised by the Chamber of Commerce in a public letter to the Members of the U.S. Congress;[83] John Boehner, the current Speaker of the U.S. House of Representatives;[84] Mitch McConnell, the Minority Leader of the U.S. Senate;[85] and a group of law professors who, in a letter commenting on the Petition, urged the SEC not to adopt rules requiring disclosure of corporate spending in politics.[86]

[83] Letter from U.S. Chamber of Commerce to the Members of the United States Congress (July 12, 2012) (arguing that proposed legislation requiring public companies to disclose political spending is "unconstitutional"), *available at* http://www.uschamber.com/issues/letters/2012/letter-opposing-latest-house-and-senate-version-so-called-disclose-2012-act-s-33.

[84] *See* John Boehner, Press Release (June 24, 2010) (arguing that a proposed law that would require such disclosure would "shred our Constitution"), *available at* http://boehner.house.gov/news/documentsingle.aspx?DocumentID=192240.

[85] *See* Mitch McConnell, *The Dangers Disclosure Can Pose to Free Speech*, WASH. POST (June 22, 2012) (arguing that disclosure of corporate spending on politics will be used "to harass people who have participated in the political process or to scare others from doing so," and thus would represent a "retreat from [the] defense" of the First Amendment); *see also* Sean Lengell, *Republicans Block Bill on Transparency*, WASH. TIMES (July 16, 2012), *available at* http://www.washingtontimes.com/news/2012/jul/16/republicans-block-bill-on-transparency/ (noting that Senator McConnell has described proposals for such disclosure as a "threat to the First Amendment").

[86] Letter from Stephen M. Bainbridge et al. to Elizabeth M. Murphy, *supra* note 4, at 7 (arguing that "[c]orporate political activity is constitutionally protected, and the SEC cannot institute a rule that indirectly does what the Constitution forbids").

It is clear, however, that the Constitution leaves ample room for disclosure rules of this kind.[87] The Court in *Citizens United* upheld the disclosure rules challenged in that case by an 8-1 vote.[88] That outcome is consistent with the Court's historical approach to rules requiring disclosure of information to investors. The Court's First Amendment analysis has long given the SEC considerable deference in the development of rules that provide investors with information necessary to facilitate the functioning of securities markets.[89]

Moreover, the Court in *Citizens United* relied heavily on investors as a means of accountability for corporate spending on politics, noting that "prompt disclosure of expenditures can provide shareholders . . . with the information needed to hold corporations . . . accountable" for political spending, because "[s]hareholders can determine whether their corporation's political speech advances the corporation's interest in making profits."[90] Having concluded that disclosure can help ensure accountability for corporate spending on politics, the Court is unlikely to strike down disclosure rules in this area. Rather than suggesting that the Court would hold a rule requiring disclosure of corporate spending on

[87] *See* Bebchuk & Jackson, *supra* note 49, at 107-11.

[88] The Court's decision in Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011) might raise similar concerns. Notably, however, the *Sorrell* Court was addressing a statute that prohibited dissemination of certain commercial information. *See id.*, 180 L. Ed. 2d at 554-55. The Court did not suggest that its holding implicated its longstanding approach to rules requiring disclosure of certain information to securities investors. For analysis of the Court's highly deferential approach to First Amendment challenges to securities disclosure rules, *see* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1779-80 (2004).

[89] *See id.* at 1780.

[90] *Citizens United*, 130 S. Ct. at 916 (quoting McConnell v. FEC, 540 U.S. 93, 249 (2003) (opinion of Scalia, J.)).

politics unconstitutional, these cases indicate that such a rule would not run afoul of the First Amendment.

B. Shareholders' Ability to Sell Stock and Vote Out Directors

In response to concerns about agency problems related to political spending, some have argued that shareholders displeased by the company's spending on politics are free to vote against directors in annual elections—or sell their shares. Adherents of this view argue that these protections will deter directors and executives from engaging in spending that is inconsistent with shareholder preferences.[91]

As we have explained elsewhere, there are reasons to doubt that shareholder voting and investors' freedom to sell shares are sufficient to protect investors from political spending that is contrary to their interests.[92] For present purposes, however, we need only point out that these mechanisms cannot currently ensure that political spending is consistent with investors' preferences. The reason is that, in order to use these mechanisms, shareholders must *know* about the company's political spending. As we have explained, however, under current law investors receive virtually no information about corporate spending on politics. Therefore, even those who are generally content to rely on market mechanisms in corporate governance should recognize the need for disclosure of corporate political spending.

[91] *See, e.g.*, Letter from David C. Martin to the Members of the Securities and Exchange Commission (April 29, 2012), *available at* http://www.sec.gov/comments/4-637/4637-428.htm. For detailed analysis of these arguments, *see, e.g.*, Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1114–18 (2002).

[92] *See* Bebchuk & Jackson, *supra* note 49, at 90-92.

C. Political Spending is Beneficial for Shareholders

Opponents of the Petition have also argued that such spending is usually beneficial for investors, and that mandatory disclosure rules will constrain public companies' ability to engage in political spending that will increase shareholder value.[93] Researchers at the Manhattan Institute, for example, have recently pointed to empirical evidence suggesting that indirect measures of corporate spending on politics are associated with increases in corporate income.[94]

The possibility that corporate political spending, on average, benefits investors provides no basis for opposing disclosure of such spending. At the outset, we note that we do not take a position as to whether corporate spending on politics is beneficial for investors.[95] Resolving this question is not necessary to determine whether disclosure of such spending is needed. In our view, it is clear that such disclosure is necessary regardless of the relationship between such spending and firm value. We note, however, that the proposition that corporate political spending is beneficial for investors is now hotly debated. Some researchers, including John Coates,[96] Stephen Ansolabehere, James

[93] *See, e.g.*, Editorial, *The Corporate Disclosure Assault*, WALL ST. J. (March 19, 2012).

[94] *See, e.g.*, Robert J. Shapiro & Douglas Dowson, *Corporate Political Spending: Why the New Critics Are Wrong*, MANHATTAN INSTITUTE LEGAL POL'Y RPT. 15 (June 2012), *available at* http://www.manhattan-institute.org/html/lpr_15.htm (citing Hui Chen, David C. Parsley, and Ya-wen Yang, *Corporate Lobbying and Financial Performance* (April 2010) (unpublished manuscript, on file with authors), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014264).

[95] We also note that the Petition does not take a position on this question. *See* Petition, *supra* note 1, at 6.

[96] John C. Coates IV, *Corporate Politics, Governance, and Value Before and After* Citizens United 1-4 (December 23, 2011) (unpublished manuscript, on file with

Snyder, and Chin Ou,[97] Michael Hadani and Douglas A. Schuler,[98] Deniz Igan, Prachi Mishra, and Thierry Tressel,[99] and Rajesh Aggerwal, Felix Meschke, and Tracy Wang, [100] have taken the opposite view, and have presented empirical support for that proposition. It will not be possible for researchers, and more importantly investors, to determine whether corporate spending on politics is beneficial for investors until there is adequate disclosure of such spending. At present, because much corporate political spending occurs under the radar screen, it is not possible for researchers or investors to evaluate the extent to which such spending is consistent with investor interests.

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authors), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1973771 (finding, using an event-study methodology, a negative relationship between CEOs' political activity and firm value).

[97] Stephen Ansolabehere, James Snyder, and Chin Ou, *Did Firms Profit from Soft Money?*, 3.2 ELECTION LAW J. (2012) (concluding, using event-study methodology, that firms that spend large amounts of "soft money" do not enjoy excessively high rates of returns associated with that spending).

[98] Michael Hadani & Douglas A. Schuler, *In Search of El Dorado: The Elusive Financial Returns on Corporate Political Investments*, STRAT. MGMT. J. (2012) (finding, based on a sample of 943 S&P 1500 firms, that political investments are negatively associated with market performance).

[99] Deniz Igan, Prachi Mishra, and Thierry Tressel, *A Fistful of Dollars: Lobbying and the Financial Crisis*, IMF Working Paper No. 09/287 (2009) (finding, using information on lobbying and mortgage lending activity, that lenders who engaged in more lobbying also engaged in riskier lending prior to the financial crisis), *available at* http://www.imf.org/external/pubs/ft/wp/2009/wp09287.pdf.

[100] Rajesh K. Aggarwal, Felix Meschke, and Tracy Wang, *Corporate Political Contributions: Investment or Agency ?* 1-2, 49-50 tbl. 4 (April 5, 2012) (unpublished manuscript, on file with authors), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=972670 (providing evidence that corporations that make large political contributions have lower returns).

Even if one believed, however, that on average political spending is beneficial for shareholders, that would not suggest that all political spending by all large public companies is good for investors. The increased accountability to shareholders that would come from mandatory disclosure of political spending would still improve the alignment of corporate political spending with shareholder interests.

Similarly, even if one takes the view that executive pay arrangements in large public companies, in general, are beneficial for investors, this hardly implies that disclosure of executive pay is unwarranted. Even if executive compensation arrangements on the whole benefit investors, there may be significant departures from shareholder interests at some firms. Thus, shareholders should be given information about pay arrangements at those firms. Providing this information to investors will make it less likely that the pay arrangements at all companies will deviate from shareholder interests.

Finally, it would be inconsistent with the basic philosophy of the securities laws to take the paternalistic view that investors need not receive information about significant decisions made by directors and executives merely because outside researchers have concluded that these decisions are generally beneficial for shareholders. Whether political spending is beneficial for investors in general, or at a specific firm, is a matter on which investors should be free to form their own judgments, and we think it is clear that investors should be given the information necessary to make those judgments.

D. Special Interests

Opponents of the Petition have also argued that disclosure rules on political spending will empower shareholders who have special interests, such as pension funds, at the expense of other investors. This argument

has been advanced, for example, by the editorial board of the *Wall Street Journal* and a former Chairman of the Federal Election Commission, Bradley A. Smith.[101] They argue that shareholders with private interests in politics could use data on corporate political spending to pressure public companies to direct such spending in the manner that these shareholders prefer—or to extract benefits for their private political agendas.

This argument provides little basis for opposing disclosure of corporate spending on politics. To begin, this argument can be made against any rule that would require companies to disclose information that is necessary for accountability to shareholders. For example, it might be argued that disclosure of executive compensation, or self-dealing transactions, could be used by special-interest shareholders such as labor unions to embarrass insiders and hence extract benefits for their private agenda. These arguments have not, of course, carried the day with respect to disclosure of those matters, and there is no reason why they should be considered more weighty in the area of corporate spending on politics.

Moreover, to see the limits of this argument, note that, if certain political spending enjoys the support of a majority of shareholders, a minority of special-interest investors will not be able to use evidence of

[101] Editorial, *The Corporate Disclosure Assault*, WALL ST. J. (March 19, 2012) (arguing that a disclosure rule would "serve the narrow goal of [only] some shareholders"); Bradley A. Smith, *DISCLOSE is a Sham*, NAT'L REV. ONLINE (July 16, 2012), *available at* http://www.nationalreview.com/blogs/print/309452. A member of the group of law professors that filed a comment letter opposing the petition has taken a similar position. *See, e.g.*, Stephen M. Bainbridge, *Saul Alinsky Comes to the Annual Shareholder Meeting*, PROFESSORBAINBRIDGE.COM (May 17, 2012) ("[U]nion-controlled pension funds are using their corporate governance powers as shareholders to carry water for a left-liberal agenda intended to help Democrats and other liberal causes."), *available at* http://www.professorbainbridge.com/professorbainbridgecom /2012/05/politicized-shareholder-activists-carrying-democratic-water.html.

such spending as a means of pressuring insiders. Directors and executives will be able to hold off such attacks with respect to spending supported by a majority of shareholders. There is no reason to expect that disclosure would undermine directors' and executives' ability to pursue political spending that shareholders want. On the contrary, disclosure will likely bolster insiders' defenses against any pressure from special interests.

It is true that activist shareholders may use disclosed information to criticize insiders for political spending that is contrary to shareholder interests. But in that case, whatever the investor's motivation, this criticism would be an important means of discouraging insiders from deviating from shareholder preferences. Thus, the possibility that disclosure will give unwarranted influence to special interest shareholders provides little basis for opposing disclosure of corporate political spending.

E. Absence of Disclosure by Labor Unions

Some opponents of the Petition have also argued that a rule requiring public companies to disclose their political spending would create an important imbalance in the information that is provided to investors and voters about two of the most significant sources of spending on politics: corporations and unions. Senator John McCain[102] and the

[102] *See, e.g.*, John McCain, *Floor Statement on the DISCLOSE Act* (July 17, 2012) (describing one proposal to mandate disclosure of corporate political spending as "a clever attempt at political gamesmanship . . . . [that] forces some entities to inform the public about the origins of their financial support, while allowing others—most notably those affiliated with organized labor—to fly below the . . . radar."), *available at* http://www.mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.FloorStatements&ContentRecord_id=95a68934-0fd7-cf92-8767-6602106c2c6f.

group of law professors that has publicly opposed the Petition[103] have both advanced this argument. Supporters of this view have argued that a rule requiring corporations to provide detailed disclosure of their political spending would convey an advantage to unions.

We support enhanced disclosure of political spending for labor unions as well as for public companies. For present purposes, however, we limit our analysis to the question whether, assuming that the rules governing disclosure of union spending on politics are unchanged, the nature of those rules provides a basis for opposing disclosure of corporate political spending.

To begin, under current law unions are required to disclose a great deal of information about their spending on politics.[104] Thus, even if one believes that the SEC must maintain perfect symmetry in the disclosure rules faced by corporations and labor unions, that view would require enhancing the disclosure rules that currently apply to public companies.

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[103] Letter from Stephen M. Bainbridge et al. to Elizabeth M. Murphy, *supra* note 4, at 4.

[104] While a comprehensive assessment of the rules governing disclosure of unions' political spending is beyond the scope of this Article, we note that, in general, unions are subject to far more extensive disclosure of their spending on politics than public companies. Unions are required to file annual reports that include a separate schedule dedicated to disclosure of political activities, the amounts contributed to political organizations and the identities of those organizations. *See* U.S. Dep't of Labor, Form LM-2, Sched. 16 (requiring disclosure of the dates, amounts, recipients, and purpose of a labor organization's political spending), *available at* http://www.dol.gov/olms/regs/compliance/lm2_blankForm.pdf. Moreover, federal law gives union employees the right to opt out of the use of their dues for political spending with which they disagree. Shareholders in public companies, of course, enjoy no such right. *See, e.g.*, Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After* Citizens United, 112 COLUM. L. REV. 800, 803 (2012).

Furthermore, and importantly, the SEC's decisions on the disclosure requirements for public companies should not be guided by considerations concerning the relative balance of political power between unions and corporations. As a matter of law, the SEC's charge is to protect investors.[105] Regardless of what unions, private companies, or other entities must disclose, investors have good reason to be interested in understanding whether and how the companies they own spend shareholder money on politics. As we have shown, there is evidence that investors do, in fact, have an interest in those matters. Refusing to provide investors with this information because members of other types of organizations do not receive it is hardly persuasive.

In our view, then, the SEC should focus on the effects of the proposed disclosure rule on investors and disregard arguments concerning its effects on the political process. This view, we should stress, rules out not only some arguments made by opponents of disclosure, but also some arguments made by supporters of disclosure. For example, some supporters of the Petition argue that disclosure of corporate spending on politics would have beneficial effects for the American political system.[106] The SEC should not give weight to those arguments. The SEC is a guardian not of the political process, but rather of shareholder interests, and would therefore do well to disregard speculation—either by opponents or proponents of disclosure—about the effects that disclosure might have

[105] *See* 15 U.S.C. § 78c(f).

[106] *See, e.g.*, J. Adam Scaggs, Brennan Ctr. for Justice, Letter to Elizabeth M. Murphy, Secretary, U.S. Sec. & Exch. Comm'n 5 (Dec. 21, 2011) (arguing that the Petition's proposed rule would "[p]revent[] officials . . . from effectively extorting corporations through pay-to-play tactics"), *available at* http://www.sec.gov/comments/4-637/4637-20.pdf; *see also* David Earley & Ian Vandewalker, Brennan Ctr. for Justice, Transparency for Corporate Political Spending: A Federal Solution 7 (August 2012), *available at* http://brennan.3cdn.net/27f3a9e8709aabbc4d_kom6iyjfw.pdf.

on the political process. The SEC's role is to ensure that public-company investors receive the information they need to evaluate the corporations they own. As we have shown, this clearly includes information on political spending. Those considerations, without more, should guide the SEC's rulemaking in this area.

F. Absence of Majority Support for Shareholder Proposals

Certain opponents of the Petition have also argued that the case for rules requiring disclosure of corporate political spending is weakened by the fact that, in many cases, shareholder proposals seeking such disclosure at individual companies are supported by less than a majority of the voting shares. This claim has been advanced by the Director of the Center for Legal Policy at the Manhattan Institute as well as by the group of law professors that oppose disclosure of corporate political spending.[107] Supporters of this view argue that the absence of majority support for these proposals provides evidence that a majority of shareholders are not interested in this information.

SEC disclosure rules, however, are not intended to provide only the information demanded by a majority of investors. Instead, SEC rules ensure that information reasonably sought by a significant number of investors is disclosed. For example, most shareholder proposals on matters related to corporate social responsibility, such as those seeking disclosure of potential effects of the company's activities on climate change, do not

[107] James R. Copeland, *Don't Believe the Hype About Corporate Political Spending*, WASH. EXAMINER (June 21, 2012), *available at* http://washingtonexaminer.com/article/2500292; Letter from Stephen M. Bainbridge et al. to Elizabeth M. Murphy, *supra* note 4, at 4 (noting that many such proposals were "defeated . . . by large margins," and that this "inform[s] the Commission that [disclosure of corporate spending on politics] is simply not something investors desire").

receive support from a majority of shareholders.[108] Nevertheless, noting "increasing calls for climate-related disclosures by shareholders of public companies," the SEC staff recently issued interpretive guidance specifying the circumstances under which a company may be required to disclose matters related to climate change.[109]

Moreover, the SEC's historical practice has been to expand its disclosure requirements in light of proposals that received significant shareholder support—even when the levels of support were substantially lower than the support recently received by proposals related to political spending. For example, none of the shareholder proposals that motivated the SEC to reconsider its executive pay disclosure rules in 1992 received majority support.[110]

Indeed, the proportion of shareholders voting in favor of corporate political spending disclosure proposals during the 2012 proxy season (21.4% of shares voted for and against) was nearly twice as high as the percentage that supported the executive-pay proposals the SEC cited when it expanded those rules in 1992 (11.2%). The evidence from shareholder proposals during the 2012 proxy season, then, suggests that investors have substantial interest in disclosure of corporate spending on politics. It is clear, too, that there is even more investor interest in this area than has previously motivated the SEC to adapt its rules to changing shareholder preferences.

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[108] According to the Sharkrepellent dataset, *see supra* note 38, shareholders voted on 46 proposals relating to environmental matters during the 2012 proxy season. None of these proposals was supported by a majority of the votes cast; on average, 18.5% of votes cast were voted in favor of these proposals.

[109] *See* Commission Guidance Regarding Disclosure Related to Climate Change, Exch. Act. Release Nos. 33-9106, 34-61469, 75 Fed. Reg. 6290, 6291, 6296 (2010).

[110] Executive Compensation Disclosure, *supra* note 15, 57 Fed. Reg. 29,582, 29,582 & n.8.

G. Staying Out of Politics

Critics of the Petition also argue that rulemaking on disclosure of corporate political spending would draw the SEC into political debates. According to these opponents, entering such a debate is inconsistent with the agency's traditional mission and would damage its credibility, limiting its ability to perform its critical function of protecting investors. This argument has been advanced most forcefully by the group of law professors that has opposed disclosure of corporate spending on politics.[111] This objection may reflect, in part, the perception that corporate spending on politics favors the Republican Party, and many in that Party have opposed disclosure[112]—although, of course, without disclosure it cannot be known whether corporate political spending in fact does favor one party over the other.

We do not think that the SEC should deprive investors of information they have asked for because members of the major political parties may disagree about the subject. Party members have long had different views about many matters within the SEC's purview. For example, members of the major political parties have often disagreed about the extent to which executive pay arrangements depart from shareholder interests.[113] But this did not preclude—nor should it have precluded—the SEC from requiring detailed disclosure on executive pay.

[111] *See, e.g.*, Letter from Stephen M. Bainbridge et al. to Elizabeth M. Murphy, *supra* note 4, at 7 ("The [Petition] asks the SEC to enter into a political debate that is not in keeping with its traditional mission, with great risks to the agency.").

[112] *See, e.g.*, Boehner, *supra* note 84; McCain, *supra* note 102.

[113] *Compare, e.g.*, *Empowering Shareholders on Executive Compensation: Hearing Before the Comm. on Fin. Servs.*, 110TH CONG. 2 (statement of Rep. Frank) ("I have listened to my colleagues talk a lot about how well the private market works. . . I am puzzled, however, when [these people tell me that the wisdom of private markets]

Of course, the SEC should not take action in this area for the purpose of benefiting one of the major parties over the other. But the SEC should not be deterred from acting to provide investors with information they need by the possibility that its actions might have implications for the political landscape. The SEC's role is to require that companies provide investors with information they need. In executing that task, the SEC should avoid speculating, and ignore speculation from outsiders, about how requiring that information might influence politics. If the SEC chose not to adopt disclosure rules because of its concerns about the possible effects on politics, that choice—rather than the choice to adopt rules—would reflect inappropriate consideration of political matters.

H. Reporting Expenditures

Finally, opponents of the Petition maintain that public companies will incur substantial reporting expenditures if they are required to disclose political spending to investors. These expenses might include, for example, the internal controls and legal expenses associated with preparing such disclosures. Among others, Keith Paul Bishop, the former California Commissioner of Corporations, advanced this argument in comments to the SEC opposing the Petition. Even if the marginal burdens imposed by a rule on corporate political spending are minimal, these critics argue, disclosure rules now cumulatively impose substantial

somehow evaporates when it comes to [allowing shareholders to vote over] how to pay the people whom they hire to run companies") *with id.* at 7 (statement of Rep. Paul) ("I think where the fallacy comes [with respect to regulation of executive pay is that] it is a violation of the free market, because in the free market, what would happen is if salaries got out of whack, the shareholders have an option. They can sell their shares.").

burdens on public companies, and the SEC should not add to these burdens by requiring additional disclosure on political spending.[114]

The expense associated with disclosing corporate spending on politics does not provide a basis for opposing disclosure rules in this area. For one thing, most companies have already collected detailed information about their political spending for use by the company's key decisionmakers. To the extent that some firms have not done so, this reflects an obvious flaw in the firm's internal reporting system, given the potential benefits, costs, and risks related to such spending. Since most companies already have this information available, however, the costs of providing this information to shareholders are not sufficient to justify keeping this information from investors.

Rather than serving as a justification for providing no disclosure at all to investors, we think that considerations related to reporting expenditures should instead inform the design of the SEC's rules. These costs might help guide the SEC with respect to the types of speech covered by these rules and the selection of a *de minimis* level of spending that need not be disclosed. Given, however, that investors currently receive virtually no information in this area, we think that the relatively low costs of disclosure do not justify opposition to a rule that would give shareholders at least some information about corporate political spending.

IX. CONCLUSION

Large public companies spend significant amounts of shareholder resources on politics. The interests of directors and executives may frequently diverge from the interests of shareholders with respect to such

[114] *See* Letter from Letter from Keith Paul Bishop to Elizabeth M. Murphy, *supra* note 4, at 2.

spending, and such spending carries special significance for shareholders. Current law, however, does not require public companies to disclose this spending to their investors.

In this Article, we have put forward the case for mandatory SEC rules requiring public companies to disclose political spending to shareholders. We have shown that disclosure rules have historically developed dynamically, responding to investors' changing interests. We have presented evidence that a significant amount of corporate political spending occurs under investors' radar screens, and that shareholders have a great deal of interest in obtaining information about such spending. We have also shown that, in response to investor interest, a significant number of firms have voluntarily agreed to disclose this information, and have explained why such voluntary disclosure does not obviate the need for mandatory rules in this area. We have also identified the issues involved in designing disclosure rules for corporate political spending, and have explained that the issues are similar to those faced by the SEC in the design of other disclosure rules in the past.

Finally, we have considered objections to disclosure rules in this area, and have shown that the considered objections provide no basis for concluding that these rules should not be developed. The case for rules requiring disclosure of public companies' political spending is strong.