THE UNTENABLE CASE FOR KEEPING INVESTORS IN THE DARK

Lucian A. Bebchuk,* Robert J. Jackson Jr.,**
James D. Nelson*** & Roberto Tallarita****

This Article seeks to contribute to the heated debate on the disclosure of political spending by public companies. A rulemaking petition urging SEC rules requiring such disclosure has attracted over 1.2 million comments since its submission almost nine years ago, but the SEC has not yet made a decision on the petition. The petition has sparked a debate among academics, members of the investor and issuer communities, current and former SEC commissioners, and members of Congress. In the course of this debate, opponents of mandatory disclosure have put forward a wide range of objections to such SEC mandates. This Article provides a comprehensive and detailed analysis of these objections, and it shows that they fail to support an opposition to transparency in this area.

Among other things, we examine claims that disclosure of political spending would be counterproductive or at least unnecessary; that any beneficial provision of information would best be provided through voluntary disclosures of companies; and that the adoption of a disclosure rule by the SEC would violate the First Amendment or at least be institutionally inappropriate. We demonstrate that all of these objections do not provide, either individually or collectively, a good basis for opposing a disclosure rule. The case for keeping political spending under the radar of investors, we conclude, is untenable.

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* James Barr Ames Professor of Law, Economics, and Finance, and Director of the Program on Corporate Governance, Harvard Law School.

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*** Assistant Professor, the University of Houston Law Center.

**** Associate Director and Research Fellow, Harvard Law School Program on Corporate Governance; Terence M. Considine Fellow in Law and Economics, Harvard Law School.

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I. The Transparency Question

Public companies are currently not required to, and most do not, report their political spending to shareholders. Over the past years, however, a heated debate has been taking place over whether the Securities and Exchange Commission (SEC) should require public companies to provide such disclosure. This Article aims at contributing to this debate. We provide a detailed analysis of the full range of objections that opponents to mandatory disclosure have put forward. We demonstrate that these objections do not, either individually or collectively, provide a basis for opposing disclosure. The case against such disclosure, we show, is simply untenable.

A focal point for the debate has been a rulemaking petition submitted to the SEC in the summer of 2011 by the Committee on Disclosure of Corporate Political Spending, an *ad hoc* committee made up of ten corporate and securities law professors and co-chaired by two of us.[1] Since its submission, the petition has attracted more than 1.2 million comments filed with the SEC[2]—far more than any other rulemaking petition, or any other specific issue, in the history of the SEC.

The petition and the proposed disclosure rules have become the subject of an intense debate. On one side, the overwhelming majority of the comments filed with the SEC, including those by numerous institutional investors, have been supportive of the petition.[3] Support has also been voiced by two former SEC chairmen,[4] as well as by a substantial number of members of the U.S. Senate and House of Representatives,[5] including forty-four U.S. senators who wrote to the SEC chair urging a "top priority" treatment of the subject.[6]

At the same time, the petition and its proposed disclosure rules have attracted strong opposition. Such opposition has come from a number of organizations, including the U.S. Chamber of Commerce;[7] many members of Congress, including the current Majority Leader of the Senate and the then-

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[1] Comm. On Disclosure of Corporate Political Spending, *Letter from Comm. on Disclosure of Corporate Political Spending to Elizabeth M. Murphy, Secretary, U.S. Sec. & Exch. Comm'n* (Aug. 3, 2011), http://www.sec.gov/rules/petitions/2011/petn4-637.pdf [hereinafter the Petition].

[2] All of these comments are available on the Commission's website. SEC, Comments on Rulemaking Petition, File No. 4-367, https://www.sec.gov/comments/4-637/4-637.shtml (last accessed Jun. 21, 2018).

[3] The vast majority of comments to the petition were filed by individuals using one of twenty-three standard types of letter, all of which support a rule mandating disclosure of political spending. The petition attracted a few thousand distinct letters as well, most of which also support the proposed rulemaking. For supportive comments by institutional investors, *see, e.g.*, Iain Richards, *Letter from Iain Richards, Reg'l Head of Corporate Governance, Aviva Investors, et al., to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n* (Nov. 1, 2011), http://www.sec.gov/comments/4-637/4637-11.pdf.

[4] William Henry Donaldson, *Letter from William Henry Donaldson, Twenty-Seventh Chairman of the U.S. Sec. & Exch. Comm'n, et al., to Mary Jo White, Chairman, U.S. Sec. & Exch. Comm'n* (May 27, 2015), http://corpgov.law.harvard.edu/wp-content/uploads/2015/06/20150601-Commissioners-Letter.pdf (Letter submitted to the SEC by three former SEC commissioners, including former Chair Donaldson, former Chair Arthur Levitt, and former Commissioner Bevis Longstreth).

[5] *See, e.g.*, U.S. Sen. Sheldon Whitehouse et al., *Letter from U.S. Sen. Sheldon Whitehouse et al., to Mary L. Schapiro, Chairman, U.S. Sec. & Exch. Comm'n* (Dec. 19, 2011), http://www.whitehouse.senate.gov/news/release/whitehouse-joins-senators-in-calling-on-sec-to-demand-disclosure-of-corporate-political-spending; Gary Ackerman et al., *Letter from Representative Gary Ackerman et al., to Mary L. Schapiro, Chairman, U.S. Sec. & Exch. Comm'n* (Oct. 11, 2011), http://ackerman.house.gov/uploads/Citizens United SEC letter 10.11.11.pdf.

[6] U.S. Sen. Jeffrey A. Merkley et al., *Letter from U.S. Sen. Jeffrey A. Merkley et al., to Mary Jo White, Chairman, U.S. Sec. & Exch. Comm'n* (Aug. 31, 2015), http://corpgov.law.harvard.edu/wp-content/uploads/2015/09/20150831_SECLetter.pdf.

[7] *See e.g.,* 60 Plus Ass'n et al, *Letter from 60 Plus Ass'n et al., to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n* (Jan. 4, 2013), https://www.sec.gov/comments/4-637/4637-1198.pdf.

Speaker of the House of Representatives;[8] and law review articles by former SEC Commissioner Paul Atkins, the Manhattan Institute's James Copland, Professor Michael Guttentag, Pfizer's Matthew Lepore, Professor Bradley Smith and the Center for Competitive Politics' Allen Dickerson, and Professor J. W. Verret.[9]

The SEC initially seemed inclined to begin a rulemaking process. Several months after the petition was submitted, the director and deputy director of the SEC's Division of Corporation Finance indicated that the SEC staff was actively considering the petition and that the Division recognized that it was of great importance.[10] Later that year, Mary Schapiro, then chairman of the SEC, indicated that the agency planned to address the petition's request for disclosure rules,[11] and the SEC placed the issue on the agency's regulatory agenda for 2013.[12]

However, several months later, in her confirmation hearings to serve as SEC chair, Mary Jo White faced substantial political pressure to avoid a rulemaking process on political spending transparency.[13] The issue was sub-

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[8] U.S. Sen. Mitch McConnell, *The Dangers Disclosure Can Pose to Free Speech*, Wash. Post, June 22, 2012, http://www.washingtonpost.com/opinions/mitch-mcconnell-how-political-disclosure-could-threaten-free-speech/2012/06/22/gJQApiE2vV_story.html (opposing rules requiring disclosure of corporate spending on politics); *U.S. Rep. John Boehner*, Boehner: Dems' DISCLOSE Act Will "Shred Our Constitution for Raw, Ugly, Partisan Gain," (June 24, 2010) (arguing that rules requiring such disclosure would "shred our Constitution"), http://boehner.house.gov/news/documentsingle.aspx?DocumentID=192240.

[9] Paul Atkins, *Materiality: A Bedrock Principle Protecting Legitimate Shareholder Interests against Disguised Political Agendas*, 3 Harv. Bus. L. Rev. 363 (2013); James R. Copland, *Against an SEC Mandated Rule on Political Spending Disclosure: A Reply to Bebchuk and Jackson*, 3 Harv. Bus. L. Rev. 381, 404-06 (2013); Matthew Lepore, *A Case for the Status Quo: Voluntary Disclosure*, 3 Harv. Bus. L. Rev. 413 (2013); Bradley A. Smith & Allen Dickerson, *The Non-Expert Agency: Using the SEC to Regulate Partisan Politics*, 3 Harv. Bus. L. Rev. 419, 422-23 (2013); Michael D. Guttentag, *On Requiring Public Companies to Disclose Political Spending*, 2014 Colum. Bus. L. Rev. 593 (2014); J. W. Verret, *The Securities Exchange Act is a Material Girl, Living in a Material World: A Response to Bebchuk and Jackson's "Shining Light on Corporate Political Spending,"* 3 Harv. Bus. L. Rev. 453, 468-70 (2013) [hereinafter Verret, *Response*].

[10] Emily Chasan, *SEC Staff Considers Proposal on Corporate Political Donations*, Wall Street J. CFO Report, (Nov. 8, 2012, 12:25 PM), http://blogs.wsj.com/cfo/2012/11/08/sec-staff-considers-proposal-on-corporate-political-donations/. The SEC included a rule requiring "disclosure regarding the use of corporate resources for political activities" among the regulatory actions under consideration for 2012. SEC RIN 3235-AL36 (Dec. 12, 2012), https://www.reginfo.gov/public/do/eAgendaHistory (under "The 2012 Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions," select "Security and Exchange Commission").

[11] Jesse Hamilton, *Disclose Political Spending: Aguilar*, Treasury and Risk (Feb. 24, 2012, 7:35 AM), https://www.treasuryandrisk.com/2012/02/24/disclose-political-spending-aguilar/.

[12] SEC RIN 3235-AL36 (Dec. 12, 2012), http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=3235-AL36 ("The Division is considering whether to recommend that the Commission issue a proposed rule to require that public companies provide disclosure to shareholders regarding the use of corporate resources for political activities.").

[13] Dina ElBoghdady, *SEC Pressed to Abandon Corporate Political Spending Disclosures Petition*, Wash. Post, (May 16, 2013), https://www.washingtonpost.com/business/economy/sec-pressed-to-abandon-corporate-political-spending-disclosures-petition/2013/05/16/d76b782e-be55-11e2-97d4-a479289a31f9_story.html.

sequently removed from the agency's published agenda for 2014[14] and has not yet been reintroduced, nor has the SEC issued a formal decision on the rulemaking petition. Furthermore, since 2016, omnibus legislation passed by Congress has precluded the SEC from adopting a rule in this area.[15] Although some scholars and lawmakers hold the view that the SEC may still engage in preliminary consideration of the subject, the agency has so far chosen not to do so.[16]

Thus, since 2013 the SEC has avoided, and has subsequently been precluded from, making a decision on this hotly debated matter. Nonetheless, we believe that the subject is not going away. Polls show that a large majority of individuals who identify as either Republican or Democrat support transparency in this area.[17] Thus, we do not expect that Congress would preclude the SEC forever from an on-the-merits deliberation of the issue. Our aim is to contribute to such an expected consideration once the SEC's hands are no longer tied.

While opponents to the petition have thus far been successful in erecting political roadblocks, we question whether they have developed a solid on-the-merits basis for their opposition. The substantial time that has passed since the submission of the rulemaking petition and the intense debate on the subject have generated a considerable record and body of writings by opponents seeking to justify their position. Below we analyze these writings and the full range of objections they put forth to assess their validity and merits.

Before proceeding to our analysis of the objections, it is worth commenting briefly on the existing lack of transparency and the main arguments for disclosure. Political spending by public companies is not already transparent to their investors for two reasons. First, public companies can, and do, engage in political spending that is never disclosed; they do this by channel-

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[14] Dina ElBoughdady, *SEC Drops Disclosure of Corporate Political Spending from its Priority List*, Wash. Post, (Nov. 30, 2013), https://www.washingtonpost.com/business/economy/sec-drops-disclosure-of-corporate-political-spending-from-its-priority-list/2013/11/30/f2e92166-5a07-11e3-8304-caf30787c0a9_story.html.

[15] *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 707, 129 Stat. 2242, 3029-3030 (2015) ("None of the funds made available by any division of this Act shall be used by the Securities and Exchange Commission to finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions, contributions to tax exempt organizations, or dues paid to trade associations."). An identical provision was included in the Consolidated Appropriations Acts of 2017 and 2018. Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 635, 131 Stat. 135, 376 (2017). Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 631, 132 Stat. 348, 584 (2018).

[16] *See* U.S. Sen. Robert Menendez et al., *Letter from U.S. Sen. Robert Menendez et al. to Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n* (Dec. 22, 2015), http://menendez.senate.gov/download/letter-to-sec-on-omnibus-provision; *see also*John C. Coates IV, *Opinion on Consolidated Appropriations Act of 2016* (Dec. 17, 2015), https://www.citizen.org/sites/default/files/opinionsigned.pdf (concluding that the terms "finalize, issue or implement" used in the Consolidated Appropriations Act of 2016 do not "prohibit the SEC from discussing, planning, investigating, analyzing, evaluating developing plans or possible proposals for, or proposing a rule, regulation or order relating to the disclosure of political contributions").

[17] *See* polls *infra* notes 158-160.

ing such spending through intermediaries that do not have to reveal who their donors are. Second, although there are public records for other types of corporate spending on politics, putting together the information necessary to identify the aggregate amounts and targets of a public company's spending would require a review of a wide range of disparate sources, and it would be impractical for a public company's investors to have a picture of the company's political spending without the company assembling it in a standard accessible format.

In *Citizens United,* the Supreme Court recognized that the interests of directors and executives with respect to such spending may frequently diverge from those of shareholders, and it relied on "the procedures of corporate democracy" to prevent political spending that deviates from shareholder preferences.[18] As the petition explained, disclosure of political spending to investors is a necessary condition for such procedures of corporate democracy to work.[19] Without disclosure of information about public companies' spending on politics, corporate-governance procedures that could help address such concerns cannot operate. The keen interest that many investors have in receiving such information has been reflected in the frequency of shareholder proposals urging disclosure of such information, the significant support such proposals get, and the decisions by many issuers to start voluntarily disclosing information about political spending in response to shareholder preferences.

Opponents of the petition have made three types of objections to the case for disclosure. The first, which we consider in Part II, questions whether providing investors with information about political spending would benefit them and posits that it might actually be undesirable to do so. In particular, we counter by discussing claims based on the potential effects of political spending on corporate profits, abuse by special interests, the need to counter spending by labor unions, the common lack of majority support for shareholder resolutions in favor of disclosure, the immateriality of political spending to companies' bottom lines, and compliance costs. We show that this type of objection does not provide a good basis for concluding that disclosure would not benefit investors.

Another type of objection, which we examine in Part III, argues that, even assuming that disclosure of political spending is beneficial, such disclosures can be provided by companies voluntarily, and such voluntary disclosure policies, which many large companies have recently adopted, make mandatory SEC rules unnecessary. We counter by discussing the limitations of voluntary disclosures and demonstrating why they cannot be relied on to provide public-company investors with information about corporate political

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[18] *Citizens United v. FEC*, 558 U.S. 310, 362 (2010) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978)) (internal quotation marks omitted).

[19] *See* Petition, *supra* note 1, at 7-9.

spending. We also explain why the lessons of recent voluntary disclosure practice reinforce, rather than obviate, the need for an SEC rule.

Finally, in Part IV, we consider claims that, even if disclosure requirements were desirable, it would be impermissible or inappropriate for the SEC to adopt them. We show that, contrary to opponents' claims, disclosure rules would not violate the First Amendment but, rather, would promote First Amendment values. Furthermore, because the rule would focus on investor protection, adopting it would not venture into election regulation. We also demonstrate the invalidity of claims that the SEC should not adopt such a rule in order to stay out of politics; we show that, to the contrary, adopting a disclosure rule would represent the SEC's *not* letting political considerations keep it from doing its job.

All told, we consider a wide range of different objections—including each of those that have been raised in the debate inside or outside the SEC comments file. We show that none of the considered objections, both individually and collectively, undermine the case for requiring public companies to disclose their spending on politics. Ultimately, when the time for an on-the-merits consideration arrives, our analysis can provide a solid foundation for mandating disclosures that would inform investors on how public companies spend their monies on politics.

II. Claims That Disclosure Is Undesirable or Unnecessary

In this Part, we examine a series of claims that question whether informing investors about their company's political spending would be beneficial. These objections, in one form or another, maintain that providing such information would be undesirable. We defer a different set of objections—those that concede that disclosure is beneficial but argue that an SEC rule is still unnecessary, inappropriate, or impermissible—to the subsequent two Parts.

In particular, we discuss below, in turn, claims that disclosure would harm shareholders by discouraging political spending (section A); would be abused by special interests (section B); would favor unions, which do not disclose their political spending (section C); would not be supported by most shareholders (section D); would be wasteful because political spending is not material (section E); and would impose substantial compliance costs (section F). Ultimately we will show that none of these arguments—either alone or in combination—provide any solid basis for concluding that disclosure would be undesirable or at least unnecessary.

A. Discouraging Political Spending

Opponents of the petition argue that corporate spending on politics benefits shareholders and mandatory disclosure rules would discourage it. This argument has been advanced forcefully by the Chamber of Commerce; the editorial board of the *Wall Street Journal;* researchers at the Manhattan Institute; and articles by James Copland, Professor Jonathan Macey, and Professor J. W. Verret.[20] As explained below, however, this argument offers no basis for opposing disclosure of corporate political spending.

First, the premise of the objection—that corporate political spending is good for shareholders—is far from obvious, and indeed, the empirical evidence on this issue is mixed. While some researchers point to evidence suggesting that indirect measures of corporate spending on politics are associated with increases in corporate income,[21] a number of empirical studies have come to the opposite conclusion, finding that such spending is associated with negative effects on shareholder value.[22]

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[20] Editorial, *The Corporate Disclosure Assault*, Wall St. J., (March 20, 2012, at 12:01 AM), http://online.wsj.com/article/SB10001424052702304692804577281532246401146.html; *see also* Editorial, *Political Spending Pays*, Wall St. J., (June 20, 2012, at 12:01 AM), http://www.wsj.com/articles/SB10001424052702303734204577468443488066430; Robert J. Shapiro & Douglas Dowson, *Corporate Political Spending: Why the New Critics Are Wrong*, 15 Center for Legal Policy at the Manhattan Institute (2012), http://www.manhattan-institute.org/pdf/lpr_15.pdf; *see also* Hui Chen et al., *Corporate Lobbying and Financial Performance*, Chamber of Commerce, 42 J. Bus. Fin. & Acc. 444 (2015); 60 Plus Ass'n et al., *Letter from 60 Plus Ass'n et al., to Elizabeth M. Murphy, Secretary, U.S. Sec. & Exch. Comm'n* at 2 (Jan. 4, 2013), http://www.sec.gov/comments/4-637/4637-1198.pdf [hereinafter Chamber of Commerce Letter]. This letter was filed on behalf of the U.S. Chamber of Commerce and twenty-eight other similar organizations. *Id*. at 30. For simplicity, however, we refer to the arguments in the letter as made by the Chamber alone; Copland, *supra* note 9; Jonathan Macey, *Using 'Disclosure' to Silence Corporate America*, Wall St. J., (Oct. 21, 2013 at 7:03 PM) https://www.wsj.com/articles/using-8216disclosure8217-to-silence-corporate-americausing-8216disclosure8217-to-silence-corporate-america-1382388104; Verret, *Response, supra* note 9, at 468-70.

[21] *See* comments and studies cited *supra* note 20. *See also* Michael J. Cooper, Huseyin Gulen, & Alexei V. Ovtchinnikov, *Corporate Political Contributions and Stock Returns*, 65 J. Fin. 687 (2010) (presenting evidence that corporate political contributions to U.S. campaigns from 1979 to 2004 are positively and significantly correlated with future returns); Pat Akey, *Valuing Changes in Political Networks: Evidence from Campaign Contributions to Close Congressional Elections*, 28 Rev. Fin. Stud. 3188 (2015) (finding that firms donating to winning political candidates have higher postelection abnormal returns than firms donating to losing candidates).

[22] John C. Coates IV, *Corporate Politics, Governance, and Value Before and After Citizens United*, 9 J. Emp. L. Stud. 657 (2012) (finding, using an event-study methodology, a negative relationship between CEO political activity and firm value); John C. Coates IV & Taylor Lincoln, *Fulfilling Kennedy's Promise: Why the SEC Should Mandate Disclosure of Corporate Political Activity* (July 27, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1923804 (finding that, after controlling for size, leverage, and other firm-specific factors, companies in the S&P 500 that voluntarily disclose corporate political activity have higher industry-adjusted price-to-book ratios than other S&P 500 companies); Stephen Ansolabehere, James M. Snyder, Jr. & Michiko Ueda, *Did Firms Profit from Soft Money?*, 3 Election L. J. 193 (2004) (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); Michael Hadani & Douglas A. Schuler, *In Search of El Dorado: The Elusive Financial Returns on Corporate Political Investments*, 34 Strategic Mgmt. J. 165 (2013) (finding, based on a sample of 943 S&P 1500 firms, that political investments are negatively associated with market performance); Deniz Igan, Prachi Mishra & Thierry Tressel, *A Fistful of Dollars: Lobbying and the Financial Crisis* (Nat'l Bureau of Econ. Research, Working Paper No. 17076, 2011), http://www.nber.org/papers/w17076 (finding, using information on lobbying and mortgage lending activity, that lenders who engaged in more lobbying also engaged in riskier lend-

We take no position in this debate.[23] For one thing, we note that satisfactorily resolving the empirical question of whether corporate political spending is good for investors will not be possible until there is adequate disclosure of such spending. Under existing rules, however, disclosure of corporate political spending is incomplete and often misleading. Moreover, much corporate political spending currently occurs under the radar, so it is not possible to evaluate the extent to which such spending is consistent with investor interests. Indeed, one major virtue of mandatory disclosure rules would be the production of more robust and accurate evidence for careful study of this issue.[24]

More importantly, however, resolving this question is not necessary to determine whether rules requiring disclosure of corporate political spending would be desirable. This is because, even if one believes that, *on average,* political spending benefits shareholders, it would not suggest that *all* political spending at large public companies is good for investors. Thus, corporate political spending consists of some mix of "good" spending—that which promotes shareholder value—and "bad" spending—that which is a consequence of misalignment between the interests of managers and shareholders. The increased accountability arising from mandatory disclosure rules would still address this misalignment. That is, disclosure would produce a more favorable ratio of good spending to bad spending—a result that would benefit investors.

Nevertheless, those who oppose mandatory disclosure rules contend that such rules will cause public companies to engage in less political spending overall. For two reasons, however, this contention holds no water. To begin with, it is far from clear to us that requiring companies to disclose corporate political spending will reduce the level of such spending overall. Indeed, if political spending is beneficial for public companies' bottom lines, as the critics claim, we might very well see spending go up rather than down.[25] This claim reminds us of an analogous argument that can be leveled against increased disclosure of executive pay arrangements—namely, that such disclosure would reduce overall executive pay in a manner that would harm shareholders. More than two decades after executive pay disclosure reforms, however, this argument appears to be mistaken, as executive pay

ing prior to the financial crisis); Rajesh K. Aggarwal et al., *Corporate Political Contributions: Investment or Agency?*, 14 Bus. & Pol., (2012) at 19 tbl.4 (providing evidence that corporations that make large political contributions have lower returns).

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

[24] On the underappreciated value of regulatory experimentalism as a form of learning in conducting cost-benefit analyses. *See, e.g.*, Matthew Spitzer & Eric Talley, *On Experimentation and Real Options in Financial Regulation*, 43 J. Leg. Stud. S121 (2014).

[25] We note that one critic of the petition acknowledges that disclosure might well leave the level of political spending unaffected. *See* Guttentag, *supra* note 9, at 656.

has substantially grown in the years following the adoption of disclosure requirements.[26]

Furthermore, and importantly, to the extent that disclosure rules actually do deter companies from engaging in political spending, we would expect that this effect would largely be limited to spending that is inconsistent with shareholder interests. In our view, that effect should be considered a benefit of disclosure rules, not a cost.

Again, the analogy with executive compensation is instructive. Even if one takes the view that executive pay arrangements in large public companies are generally beneficial for investors, this hardly implies that disclosure of executive pay is unwarranted. That is, 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 informed about pay arrangements at those firms. Doing so will make it less likely that the pay arrangements at all companies will deviate from shareholder interests.

Finally, we are struck by the paternalistic nature of this objection. The law does not typically assume that investors need not receive information about significant corporate decisions simply because researchers have concluded that these decisions are, on average, 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. We think that investors should be given the information necessary to make those judgments.

B. Special Interests

Opponents of the petition have also argued that disclosure rules on corporate political spending would empower special interests—such as unions, public pension funds, and social-purpose investors—at the expense of ordinary shareholders. This argument has been advanced by the editorial board of the *Wall Street Journal*, former SEC Commissioner Paul Atkins, former FEC Chairman Bradley A. Smith, the U.S. Chamber of Commerce, and Professor Stephen Bainbridge.[27] In contributions to the *Harvard Business Law*

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[26] *See* Lucian Bebchuk & Yaniv Grinstein, *The Growth of Executive Pay*, 21 Oxford Rev. Econ. Pol. 283 (2005) (documenting the increase in compensation after the 1992 rules requiring disclosure of executive compensation).

[27] Editorial, *The Corporate Disclosure Assault*, *supra* note 20 (arguing that a disclosure rule would "serve the narrow goal of some shareholders"); Paul Atkins, *SEC Disclosure Rule Too Extreme*, Politico (Feb. 3, 2013, 7:53 PM), http://www.politico.com/story/2013/02/sec-rule-on-corporate-political-giving-too-extreme-87107.html; Bradley A. Smith, *DISCLOSE Is a SHAM*, Nat'l Rev. Online (July 16, 2012, 8:00 AM), https://www.nationalreview.com/2012/07/disclose-sham-bradley-smith/ available at; Chamber of Commerce Letter, *supra* note 20, at 4; Stephen M. Bainbridge, *Saul Alinsky Comes to the Annual Shareholder Meeting*, ProfessorBainbridge.com (May 17, 2012, 11:12 AM), http://www.professorbainbridge.com/professorbainbridgecom/2012/05/politicized-shareholder-activists-carrying-democratic-water.html ("[U]nion-controlled pension funds are using their corporate governance powers as sharehold-

Review symposium, this criticism has also been advanced by Paul Atkins and James Copland.[28]

But this argument also provides little basis for opposing disclosure of corporate spending on politics. To begin with, it 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 of self-dealing transactions could be used by special-interest shareholders to embarrass insiders and thereby extract benefits for the shareholders' private agendas. This argument has not, of course, carried the day with respect to disclosure of those matters, and there is no reason why it should be considered weightier in the area of corporate spending on politics.

Moreover, 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 such spending as a means of pressuring insiders as directors and executives will have the necessary majority shareholder support to hold off such attacks and pursue the political spending that shareholders want. In fact, disclosure will likely bolster insiders' defenses against any pressure from special interests.

To understand why, consider a situation in which special-interest investors plan to use information about a company's political spending to embarrass incumbents. If that spending is beneficial for the company's shareholders and is then made public, a majority of shareholders will resist the demands of the minority.

It is true that activist shareholders may sometimes use disclosed information to criticize insiders for political spending that is contrary to shareholder interests. In such a case, whatever the investor's motivation, this criticism would still 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.

This scenario is illustrative of a broader dynamic of transparency in corporate governance. As Louis Brandeis famously observed, publicity can do many things, but it is particularly good at constraining investor-damaging practices.[29] It tends to marginalize the power of special interests to cut backroom deals that achieve private goals but destroy corporate value. That is, publicity tends to shut down otherwise available channels of secret influ-

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ers to carry water for a left-liberal agenda intended to help Democrats and other liberal causes.").

[28] Atkins, *supra* note 9, at 370-75; Copland, *supra* note 9, at 398-402.

[29] Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WEEKLY (1913).

ence.[30] Rather than being a tool of rent seekers, then, publicity actually makes such activity considerably more difficult.

Another way to evaluate this objection to the petition is to examine the evidence from recent voluntary disclosures. If the special-interest objection had merit, we would expect to see signs that these disclosures are being used by factional shareholder groups to obtain private benefits. However, there is very little evidence, anecdotal or otherwise, that this is actually happening. Without such evidence, we should be wary of claims that mandatory disclosures will empower special-interest investors.

C. Favoring Labor Unions

Some opponents of the petition have argued that a rule requiring public companies to disclose their political spending would create an imbalance in the relative political influence of corporations and unions. In this view, corporations and unions must be treated symmetrically, and a disclosure rule that applies only to public companies would give unions an important political advantage. Senator John McCain advanced a version of this position in his opposition to the DISCLOSE Act,[31] and the U.S. Chamber of Commerce has argued the point in a public comment on the petition.[32]

Assuming that symmetrical treatment of corporations and unions is a desirable goal,[33] however, an SEC rulemaking on corporate political spending would actually help to *alleviate* an existing asymmetry in the law. That is, rather than disrupting an equal playing field, the petition would actually "level up" corporate disclosure to look more like union disclosure.

The Labor Management Reporting and Disclosure Act of 1959 requires unions to report a host of political expenditures to the Department of Labor.[34] Among other things, unions must report "direct and indirect disbursements to all entities and individuals during the reporting period associated with political disbursements or contributions in money."[35] These political disbursements encompass any spending "intended to influence the selection,

[30] A related argument was offered in MANCUR OLSON, THE RISE AND DECLINE OF NATIONS 69-71 (1982) (arguing that lack of transparency allows public power to be harnessed for private gains).

[31] *See, e.g.*, Press Release, John McCain, Floor Statement on the DISCLOSE Act (July 16, 2012), https://www.cnn.com/2012/07/17/politics/mccain-disclose-act-statement/index.html.

[32] Chamber of Commerce Letter, *supra* note 20, at 24-25 (arguing that disclosure rules in this area should be "even-handed" as between corporations and unions).

[33] One of us questions this assumption. *See* James D. Nelson, *Corporations, Unions, and the Illusion of Symmetry*, 102 VA. L. REV. 1969 (2016) (arguing that union-corporate symmetry is not a desirable goal).

[34] *See* U.S. Dep't of Labor, Instructions For Form LM-2 Labor Organization Annual Report at 26, https://www.dol.gov/olms/regs/compliance/GPEA_Forms/2016/efile/LM-2_Instructions_Revised2016.pdf (requiring disclosure of the dates, amounts, recipients, and purpose of a labor organization's political spending); *see also* Benjamin I. Sachs, *Equal Treatment: Union and Corporate Politics*, ON LABOR, (Aug. 8, 2013), http://onlabor.org/2013/08/08/equal-treatment-union-and-corporate-politics/.

[35] U.S. Dep't of Labor, *supra* note 34.

nomination, election, or appointment of anyone to a Federal, state, or local executive, legislative or judicial public office . . . ."[36] It also includes spending on ballot referenda, communications with members and their families for get-out-the-vote and voter education initiatives, administration of union political action committees (PACs), and disbursements to other political committees.[37] In short, unions are required to disclose a great deal about their political spending under current law.

By contrast, current law requires relatively little disclosure of corporate spending on politics. For one thing, corporations can channel significant political spending through intermediaries, and such spending largely remains under investors' radar. For another thing, although the law does require some disclosures of corporate spending on politics, such disclosures are so scattered across federal and state regulatory agencies that putting together the data is a demanding task. If symmetry between corporate and union disclosure requirements is the goal, it would seem that corporate law has some catching up to do.

The law of political spending treats corporations and unions differently in another way. Unlike corporate shareholders, union members have a constitutional right to reimbursement for any portion of their union dues that are used for political activities with which they disagree. This ensures that union members can avoid funding political causes against their will. By contrast, investors in public companies that spend money on politics have no recourse if the firm funds political activities with which they disagree.

To address this asymmetry, one academic commentator has suggested that shareholders in public corporations be given the same kind of opt-out rights as union members.[38] We take no position here on this provocative suggestion,[39] but we are sympathetic with efforts to promote shareholder control over the use of their money on political activities. Whatever one's position on this opt-out proposal, however, we think that at the very least corporations should be required to *disclose* their political spending so that shareholders actually know where their money is going.

More generally, we think that the SEC's decisions on 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.[40] Regardless of what unions, private companies, or other entities must disclose, public-company investors have good reason to be interested in whether and how the companies they own spend shareholder money on politics.

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[36] *Id.*
[37] *Id.*
[38] Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights after Citizens United*, 112 Colum. L. Rev. 800 (2012).
[39] One of us has argued at length against this proposal. Nelson, *supra* note 33.
[40] *See* 15 U.S.C. § 78c(f) (2012).

The SEC should focus on the proposed disclosure rule's effects 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. For example, some champions of the petition argue that disclosure of corporate spending on politics would have beneficial effects for the American political system.[41] The SEC should not give weight to those arguments.

As we discuss further in Part VII, the SEC is a guardian not of the political process but rather of shareholder interests, and it would therefore do well to disregard speculation—by either opponents or proponents of disclosure—about the effects that disclosure might have on politics. 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 includes information on political spending. Those considerations alone should guide the SEC's rulemaking in this area.

D. Lack of Support from Most Shareholders

Another argument made by some opponents of the petition points to the results of votes on shareholder proposals seeking political spending disclosure at individual companies. According to these critics, the fact that these proposals often do not receive a majority of shareholder votes shows that investors are not interested in this information. This claim has been advanced by former SEC Commissioner Paul Atkins, the Manhattan Institute's James Copland, the U.S. Chamber of Commerce, the American Petroleum Institute, and a group of law professors who oppose disclosure of corporate political spending.[42] In their contributions to the *Harvard Business Law Review* symposium on the petition, this objection is put forward by Commis-

[41] *See, e.g.*, J. Adam Skaggs, *Letter from J. Adam Skaggs, Brennan Ctr. for Justice, to Elizabeth M. Murphy, Secretary, U.S. Sec. & Exch. Comm'n,* at 5 (Dec. 21, 2011), http://www.sec.gov/comments/4-637/4637-20.pdf (arguing that the petition's proposed rule would "[prevent] officials . . . from effectively extorting corporations through pay-to-play tactics."); *see also* David Earley & Ian Vandewalker, *Transparency for Corporate Political Spending: A Federal Solution*, Brennan Ctr. for Justice at 7–8 (2012), http://www.brennancenter.org/sites/default/files/legacy/publications/Corporate%20Disclosure%20White%20Paper%20FINAL.pdf.

[42] Atkins, *supra* note 27 ("huge majorities of shareholders routinely refuse to support mandatory disclosure . . . ."); James R. Copland, *Don't Believe the Hype About Corporate Political Spending*, Wash. Examiner (June 21, 2012), http://washingtonexaminer .com/article/2500292; *see also* James R. Copland, *The Sunshine of Disclosure and Some Intimidation, Too*, Wall St. J., October 29, 2013; Chamber of Commerce Letter, *supra* note 20, at 25; Harry M. Ng, *Letter from Harry M. Ng, Vice President, General Counsel, and Corporate Secretary, American Petroleum Institute, to Elizabeth M. Murphy, Secretary,* (Sept. 4, 2012), http://www.sec.gov/comments/4-637/4637-1095.pdf (arguing that "shareholders have shown a consistent lack of support for" proposals requesting disclosure of political spending); Stephen M. Bainbridge et al., *Letter from Stephen M. Bainbridge et al., to Elizabeth M. Murphy, Secretary, U.S. Sec. & Exch. Comm'n* at 4 (Mar. 23, 2012) http://www.sec.gov/comments/4-637/4637-318.pdf [hereinafter Law Professors Letter], (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.").

sioner Atkins, Professor Bradley Smith and Allen Dickerson, and Matthew Lepore.[43]

Here again, this critique does not offer a good basis for opposing a disclosure rule. As we explain below, historically the SEC has viewed large minority support for shareholder proposals calling for more transparency as an indication that a sufficient interest exists to justify mandatory disclosure rules. Most importantly, we argue that this traditional approach by the SEC is perfectly sensible, as material minority support for a shareholder proposal is hardly evidence that a majority of shareholders oppose it.

1. SEC Past Practice

SEC disclosure rules are not intended to provide only the information demanded by a majority of investors. Instead, they ensure disclosure of information that is reasonably sought by a significant number of investors. For example, most shareholder proposals on matters related to corporate social responsibility, including those seeking disclosure of potential effects of the company's activities on climate change, do not receive support from a majority of shareholders. Nevertheless, noting "increasing calls for climate-related disclosures by shareholders of public companies," the SEC staff has issued interpretive guidance specifying the circumstances under which a company may be required to disclose matters related to climate change.[44]

Moreover, the SEC's historical practice has been to expand its disclosure requirements in light of proposals that have received significant shareholder support. This has been the case even when the level of support was substantially lower than that achieved by recent proposals related to political spending. Perhaps most notably, none of the shareholder proposals that motivated the SEC to reconsider its executive pay disclosure rules in 1992 received majority support.[45] Indeed, the proportion of shareholders voting in favor of corporate political spending disclosure proposals during the first half of 2018 (34% of shares voted for or against)[46] was three times as high as

[43] Atkins, *supra* note 9, at 368-69; Smith & Dickerson, *supra* note 9, at 441; Lepore, *supra* note 9, at 416.

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

[45] Executive Compensation Disclosure, 57 Fed. Reg. 29,582, 29,582 and n.8 (proposed July 2, 1992) (to be codified at 17 C.F.R. pts. 229, 240).

[46] According to data from FactSet SharkRepellent, between January 1, 2018 and June 30, 2018, fifty shareholder proposals on "political issues" were voted on in S&P 500 companies. We examined the content of these proposals and found that twenty of them called for disclosure of political contributions and expenditures with corporate funds (twenty-nine proposals dealt instead with disclosure of lobbying expenditures and one had a peculiar focus on the costs and benefits of the corporation's political contributions in the most recent election cycle). The average support for these twenty proposals was 33.97% of votes cast for or against (32.99% of all votes cast, including abstention votes).

the percentage that supported the executive-pay proposals cited by the SEC (11.2%) when it expanded those rules in 1992.[47]

Furthermore, an analysis of mutual funds' voting shows that in 2018, most of the 115 mutual funds groups indexed in the Fund Votes database consistently supported shareholder proposals calling for disclosure of corporate political spending (although the largest fund groups, Vanguard, Fidelity, and Blackrock, traditionally vote against or abstain on such resolutions). In particular, 53 fund groups supported at least three quarters of the election spending disclosure resolutions voted upon and 34 of them supported all such proposals. In contrast, only 23 groups failed to support a single political spending disclosure proposal.[48]

It is also worth noting that, as a response to what they perceive as a clear evolution of shareholder views on this topic, the two leading proxy advisory firms, Institutional Shareholder Services (ISS) and Glass Lewis, have developed policies that generally favor disclosure of direct and indirect corporate political spending. ISS's general recommendation is to vote in favor of shareholder proposals requesting greater disclosure of a company's political contributions and payments to trade associations.[49] Glass Lewis recommends increasing disclosure when the firm's current policies are insufficient, when there is no or inadequate board oversight, or when the company faces significant risks due to its political activity.[50] However, Glass Lewis recognizes that "a thoughtful disclosure and oversight policy [on political spending] is an important component of corporate accountability"[51] and that, while political spending is a business decision that must be made by the company's management, these decisions must be consistently and accurately disclosed to shareholders.[52]

This evidence suggests that investors have substantial interest in disclosure of corporate spending on politics. As noted, 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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[47] *See* Petition, *supra* note 1, at 5 and n. 15.

[48] Center for Political Accountability, *Mutual Fund Support for Corporate Political Disclosure Surges* (Nov. 27, 2018), http://files.politicalaccountability.net/reports/cpa-reports/CPA_-_Mutual_Fund_Proxy_Voting_Analysis_-_2018.pdf.

[49] Institutional Shareholder Services, Inc., *United States Proxy Voting Guidelines* at 63 (Jan. 4, 2018), https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf.

[50] Glass, Lewis, & Co., *2016 Proxy Season: Guidelines on Shareholder Initiatives* at 20 (2016), http://www.glasslewis.com/wp-content/uploads/2016/01/2016_Guidelines_SHAREHOLDER-INITIATIVES-1.pdf.

[51] Glass, Lewis, & Co., *In-Depth: Corporate Political Spending* at 1 (April 2018), http://www.glasslewis.com/wp-content/uploads/2017/03/2017-In-Depth-Report-Corporate-Political-Spending.pdf.

[52] *Id.* at 15.

2. The SEC's Past Practice Makes Sense

Having observed that the SEC has not viewed majority support for shareholder proposals as a prerequisite for rulemaking, let us now explain why the SEC past practice makes sense and should be followed in the current case.

The arguments of the petition's opponents are implicitly based on the premise that shareholders that do not vote for disclosure of political spending should be regarded as opposing transparency in this area. As explained below, however, this inference is unwarranted. There are reasons to believe that the lack of support for shareholder proposals on political spending substantially overstates investors' opposition to transparency.

First, shareholders that vote against disclosure proposals are not necessarily opposed to transparency: they might simply conclude that the benefits they expect to obtain from disclosure do not pass the significant threshold that must be overcome to convince many shareholders—including institutional investors—to vote against management. In fact, it is almost certainly the case that many existing disclosure rules—including relatively uncontroversial ones such as those requiring disclosure of significant corporate events or rules requiring corporate insiders to disclose when they trade in the firm's securities—would not receive majority support if they were the subject of new shareholder proposals on a blank slate.

In a recent empirical study, Professors Fabrizio Ferri and David Oesch show that investors give significant deference to management recommendations on shareholder proposals.[53] Their study estimates that a management recommendation on a particular frequency of future say-on-pay votes is associated with a 26% increase in voting support for that frequency. A similar effect is found when shareholders vote on proposals regarding board declassifications. The authors conclude that such an effect captures a causal influence of management recommendations on shareholder votes. In other words, proposals supported by the management obtain an additional 26% of votes compared to proposals opposed by the management, other things being equal.

Lack of majority support for shareholder proposals, then, should not be regarded as the ultimate test of investor sentiment. In fact, if a management influence of a similar magnitude were at work in the case of the most recent proposals regarding political spending, the average support of about 34% would turn into majority support in the absence of management opposition.

In addition, some institutional investors might be in favor of disclosure in general but reluctant to support a shareholder proposal in a specific company. As long as there is no general disclosure requirement, such investors might not want to be in the position of picking on a single company when

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[53] Fabrizio Ferri & David Oesch, *Management Influence on Investors: Evidence from Shareholder Votes on the Frequency of Say on Pay*, 33 CONTEMP. ACC. RES 1337 (2016).

peer companies do not disclose. Such views reinforce the conclusion that shareholders not voting in favor of shareholder proposals at a particular company should not be regarded as opposed to mandated transparency across the board.

These considerations confirm our hypothesis that the number of votes against disclosure proposals considerably overstate the fraction of shareholders opposed to transparency. Indeed, there is evidence that most public investors are not genuinely opposed to the disclosure of political spending. As noted in Part III below, in 2017, 232 S&P 500 companies voluntarily disclosed at least some information on their political expenditures. If most investors were opposed to transparency, we would expect a large number of shareholder proposals urging those companies to cease their voluntary disclosure. However, to the best of our knowledge, there has been no such proposal and no significant opposition by investors to the introduction of a disclosure regime on political spending in a large number of firms. The absence of shareholder opposition to voluntary disclosure is consistent with our analysis.

In conclusion, the fact that shareholder proposals on corporate political spending do not achieve majority support is not a good reason to oppose SEC rulemaking on the subject. Majority support is neither a legal requirement for such rules nor a realistic expectation to demonstrate significant investor interest in this information. Many shareholders that do not vote in favor of such proposals would be pleased to see transparency on this topic but, for some of the reasons discussed above, decide not to vote against the management in a particular company. As happened in the past, the SEC should consider the significant minority support for disclosure proposals as a reason for issuing a rule on this topic, not for questioning its desirability.

E. Materiality

Opponents of the petition have also argued that the SEC lacks authority to adopt disclosure rules in this area because corporate political spending is not sufficient in magnitude—in securities-law parlance, not "material"—for investors to be interested in such spending. This argument has been advanced most forcefully by the U.S. Chamber of Commerce, which has claimed that the SEC's authority is limited to mandating disclosure of material matters and that "there is no basis whatever for finding [information on political spending] material."[54] In addition, Paul Atkins, James Copland, Professor Michael Guttentag, Professor Bradley Smith and Allen Dickerson, and Professor J. W. Verret have all expanded on this criticism.[55] These com-

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[54] Chamber of Commerce Letter, *supra* note 20, at 3; *see also* J. W. Verret, *The SEC Ponders Circumventing Citizens United,* Wall St. J., Jan. 7, 2013, at A15.

[55] Atkins, *supra* note 9, at 363–70; Copland, *supra* note 9, at 385–89; Guttentag, *supra* note 9, at 598, 647–48; Smith & Dickerson, *supra* note 9, at 440; Verret, *Response, supra* note 9, at 457–61.

mentators each have a slightly different focus in their claim that corporate political spending is not sufficiently material to warrant rulemaking in this area. What all their arguments have in common, though, is the contention that corporations simply do not spend enough money on politics for the SEC to get involved.[56]

We turn first to the basic claim that the amount of money that firms spend on politics is not financially significant; we show that it is without foundation and provide reasons to believe that, even if the sheer amount of money involved were not large, it would still be significant to investors. We then address the erroneous legal claim that a showing of financial materiality is required for all disclosure rules.[57]

1. Financial Significance of Political Spending

Critics of the petition have claimed that the amount of money corporations spend on politics is not financially significant.[58] This argument offers no basis for opposing transparency in corporate political spending. To begin with, we note that there is very little reliable evidence on how much money public companies actually spend on politics. As we have explained, until companies are required to disclose such information, it is impossible to know the full amount of corporate spending in this area. Thus, there is no solid basis for the claim—confidently made by many opponents of the petition—that the amount of money involved is not monetarily significant.

Moreover, even if the sums spent on politics were assumed not to be, by themselves, significant, the payments could nonetheless be economically and financially significant because they could be associated with risks to the firm and could reflect agency problems.[59] To the extent that spending on

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[56] *See, e.g.*, Smith & Dickerson, *supra* note 9, at 432.

[57] During her tenure, former SEC Chairman Mary Jo White repeatedly warned about the dangers of an "information overload" caused by too much disclosure to investors. *See, e.g.*, Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, Keynote Address at the Fourteenth Annual A.A. Sommer, Jr. Corporate Securities and Financial Law Lecture, Fordham Law School (Oct. 3, 2013), https://www.sec.gov/news/speech/spch100113mjw ("[w]hen disclosure gets to be too much or strays from its core purposes, it can lead to 'information overload'—a phenomenon in which ever-increasing amounts of disclosure make it difficult for investors to focus on the information that is material and most relevant to their decision-making as investors in our financial markets."). She hinted that the SEC should not intervene in this area. Although she did not comment specifically on the "materiality" of information on political spending, her remarks have been interpreted as a hint that rulemaking on political spending should not be among SEC's policy priorities. *See* Alec MacGillis, *Mary Jo White Doesn't Scare Anybody,* New Republic (May 5, 2014), https://newrepublic.com/article/117632/secs-mary-jo-white-whiffs-transparency-wall-street-dark-money.

[58] *See* Chamber of Commerce Letter, *supra* note 20, at 3; Verret, *The SEC Ponders Circumventing Citizens United, supra* note 54; Atkins, *supra* note 9, at 363–70; Copland, *supra* note 9, at 385–89; Smith & Dickerson, *supra* note 9, at 440; Verret, *Response, supra* note 9, at 457–61.

[59] *See, e.g.*, Rajesh K. Aggarwal et al., *Corporate Political Contributions: Investment or Agency?*, *supra* note 22 (providing evidence that "better corporate governance . . . is associated with smaller [political] donations"). *See also* Coates, *Corporate Politics, supra* note 22.

some controversial political causes favored by the company's management can generate risks to the company or provide a valuable window into the quality of the company's governance, investors solely focused on financial returns might still be interested in knowing about these payments even if the monetary amounts are not large.

Finally, even if the political spending were assumed not to be financially significant, it could be viewed as material for many investors because of the expressive significance of such spending.[60] Shareholders have an interest in knowing whether their funds are being used to support ideological causes with which they disagree. That interest would remain important even if it turned out that such spending was not financially significant.

One critic objects that expressive protection of investors is not among the goals of federal securities law.[61] The SEC would disagree. At least since 1976, the Commission has recognized that ethical issues (and decisions about political contributions in particular) are to be considered significant enough (although not necessarily significant from an economic standpoint) to justify mandatory rules that protect investors.[62] More broadly, the interest of investors to oversee the political use of corporate money has been considered worthy of protection under the law. For example, the Supreme Court has interpreted the ban on corporate direct donations to federal election candidates also as a way to protect "the individuals who have paid money into a corporation . . . from having that money used to support political candidates to whom they may be opposed."[63]

2. Disclosures of Financially Insignificant Payments

Even if opponents could demonstrate that corporate political spending is not financially significant, they would not be able to show that such significance is legally required for disclosure rules in this area. Federal securities law does not limit the SEC's authority to require disclosure to items that meet a particular threshold of financial significance. Indeed, many SEC rules have long mandated disclosure of amounts that are unlikely to be financially significant for most large public companies. For example, the SEC's rules on executive pay require disclosure of "[a]ll compensation" paid to executives, including elements of compensation that are not financially significant for

[60] Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 Harv. L. Rev. 83, 96 (2010).

[61] Guttentag, *supra* note 9, at 619 (arguing that investor expressive protection "does not . . . have a historical foundation in the federal securities statutes' goal of protecting investors from various harms.").

[62] U.S. Sec. & Exch. Comm'n, Adoption of Amendments Relating to Proposals by Security Holders, 41 Fed. Reg. 52,994, 52,997 (Nov. 22, 1976) (to be codified at 17 C.F.R. pt. 240). *See also* U.S. Sec. & Exch. Comm'n, Amendments to Rules on Shareholder Proposals, 63 Fed. Reg. 29,106, 29,108 (May 28, 1998).

[63] Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 154 (2003) (citing Fed. Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197, 208 (1982)).

the company.[64] In some cases, in fact, the rules expressly mandate disclosure of amounts as small as $25,000.[65] Similarly, the SEC's rules on related-party transactions require disclosure of amounts as small as those exceeding $120,000, even though such sums are not financially significant for most large public companies.[66]

The SEC requires these disclosures because it has long recognized that investors may well have an interest in matters beyond their direct relevance to the company's profits and losses. As we have noted, public-company investors have expressed considerable interest in having additional information on political spending at the companies in which they invest. Consistent with this evidence, the SEC has previously recognized that political activity is among the issues that "may be significant to an issuer's business, even though such significance is not apparent from an economic viewpoint."[67] Thus, even if opponents of the petition were correct that the financial magnitude of corporate political spending is not by itself sufficient to meet the standard of securities-law materiality, that fact would provide no basis for concluding that the SEC lacks authority to mandate disclosure of corporate spending on politics.

In response to these arguments, opponents of the petition have resorted to strained readings of various regulatory materials. One purported source of a legal requirement of materiality is the SEC's 1975 proposed rules on environmental and social disclosure.[68] The Chamber of Commerce, for example, cites those proposed rules for the proposition that financial materiality is a "limitation" on the agency's rulemaking authority.[69] But rather than establishing materiality as a legal requirement, those rules simply say that the SEC should not require disclosure for the "sole purpose" of promoting social goals that are not related to the securities laws.[70] We acknowledge, of course, that some supporters of the petition are focused on such social purposes. However, the petition itself—as well as our arguments in support of it—is grounded solely in concerns for investor protection that are squarely within the SEC's mandate.[71]

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[64] 17 C.F.R. § 229.402(a)(2).

[65] *Id.* § 229.402(c)(2)(ix) (requiring disclosure of perquisites "that exceed[ ] the greater of $25,000 or 10% of the total amount of perquisites and personal benefits for the" executive).

[66] *Id.* § 229.404(a) (requiring all public companies to disclose "any transaction . . . in which the [company] was or is to be a participant and the amount involved exceeds $120,000, and in which any related person had or will have a direct or indirect material interest.").

[67] Adoption of Amendments Relating to Proposals by Security Holders, 41 Fed. Reg. 52,994, 52,997 (Nov. 22, 1976) (to be codified at 17 C.F.R. pt. 240).

[68] 40 Fed. Reg. 51,656, 51,660.

[69] Chamber of Commerce Letter, *supra* note 20, at 21 (quoting 40 Fed. Reg. at 51,660).

[70] 40 Fed. Reg. at 51,660.

[71] One opponent of the petition has gone even further, contending that existing SEC rules that fail to meet a rigorous materiality requirement—like the executive compensation and related-party transaction rules we discuss above—are either illegal or illegitimate. *See* Verret, *Response, supra* note 9, at 466, 467. We think that this extreme claim is unlikely to persuade lawmakers or courts to invalidate many decades' worth of SEC rulemaking. Executive com-

Indeed, at least one prominent critic of the petition has conceded that no such legal requirement of materiality exists.[72] In his article taking issue with the rulemaking petition, James Copland explained that an SEC rulemaking on corporate political spending disclosure may be justified, even in the absence of financial materiality, if it helps to correct a misalignment of preferences between managers and shareholders—that is, if it works to reduce agency costs within the firm. Although Copland expresses doubts as to the strength of the agency-costs argument—doubts that we obviously do not share—he has at least identified the proper grounds on which our argument should be judged.

The idea that the SEC must demonstrate a certain level of financial significance before promulgating disclosure rules has no sound basis in the law. Accordingly, this objection offers no grounds on which to oppose the petition.[73]

F. Compliance Costs

Opponents of the petition also 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. Keith Paul Bishop, the former California commissioner of corporations, advanced this argument in a letter to the SEC opposing the petition,[74] and the Chamber of Commerce has argued that disclosure rules in this area would "impose substantial costs on public companies" that would outweigh any benefits of disclosure.[75] Even if the marginal burdens imposed by a rule on corporate political spending are minimal, these critics argue, disclosure rules now cumulatively impose substantial burdens on public companies, and the SEC should not add to these burdens by requiring additional disclosure on political spending.[76]

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pensation rules and related-party transactions—just like political spending rules—are not legally required to meet any formal test of financial materiality.

[72] Copland, *supra* note 9, at 390 and n. 40 ("I thus agree . . . 'a finding that political spending is financially significant is not a necessary condition to SEC rules mandating disclosure of that spending'" (quoting Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 Geo. L.J. 923, 956 (2013)).

[73] Another critic argues that the analogy to executive compensation and related party transactions is not persuasive because some forms of executive compensation and some transactions with related parties must not be disclosed under current regulation. Guttentag, *supra* note 9, at 610–11. However, our argument recognizes and is consistent with the fact that current disclosure rules require disclosure of executive compensation and related party transactions only in certain cases and above certain (very low) thresholds. The point of our analogy is that disclosure of executive pay and related party transactions is required even for amounts that are not financially large.

[74] Keith Paul Bishop, *Letter from Keith Paul Bishop to Elizabeth M. Murphy, Secretary, U.S. Sec. & Exch. Comm'n* (Aug. 6, 2011), http://www.sec.gov/comments/4-637/4637-1.pdf.

[75] Chamber of Commerce Letter, *supra* note 20, at 3.

[76] Letter from Keith Paul Bishop, *supra* note 74, at 2.

We argue that the expense associated with disclosing corporate spending on politics does not provide a solid 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 decision makers. To the extent that some firms have not done so, it 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 it to shareholders are not sufficient to justify keeping it from them.

Opponents of the petition might respond that the actual costs of a rule that requires disclosure of corporate spending on politics may exceed these estimates and that the SEC is obligated to minimize the costs of its rules for public investors and companies. Rather than a justification for providing no disclosure at all to investors, we think that these considerations should instead inform the design of the SEC's rules in this area. The associated costs might help guide the SEC regarding the types of political spending covered by these rules and the selection of a de minimis level of spending that need not be disclosed. However, since investors currently receive virtually no information in this area, we think that the low costs of disclosure do not justify opposing a rule that would give shareholders at least some information on corporate political spending.

Of course, authority for some kinds of spending decisions—such as ordinary business expenditures—is often spread throughout large public companies. Collecting information on spending of this type might indeed be expensive for some firms. However, the authority to decide to spend investor funds on politics is, at most firms, concentrated in one or two individuals, usually among the leadership of the firm, and thus disclosure of these amounts is unlikely to be costly. To the extent that the authority to spend investor funds on politics is scattered throughout some companies, we think that this is another gaping governance flaw rather than a basis for resisting disclosure rules in this area.

Moreover, federal tax law does not allow the deduction of political expenditures.[77] This is another reason why most firms' internal control systems will track these expenses carefully. Since most companies already have such information available to them, the cost of complying with an SEC rule on corporate political spending "may be as little as the hours it would require an employee to copy and paste data from an internal file to a public one."[78] It is unlikely that a court would find these costs sufficient to invalidate an SEC rule requiring companies to disclose their spending on politics.

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[77] I.R.C. § 106(e).

[78] Susan R. Holmberg, *A Cost-Benefit Analysis of Corporate Political Spending Disclosure*, Roosevelt Institute White Paper at 5 (Oct. 30, 2013), http://rooseveltinstitute.org/wp-content/uploads/2013/10/2013_10_30_Holmberg_Cost_Benefit.pdf.

This analysis is consistent, moreover, with the SEC's standard approach to estimating the costs of disclosure rules in other areas. For example, there is no reason to believe that the costs of disclosing political spending would be any higher than the costs of disclosing related-party transactions,[79] given that both sets of data are already available to companies. For the same reason, the costs of political spending disclosure would likely be *far less* than disclosure of executive compensation, which requires companies to provide extensive discussion and analysis of the company's decisions in addition to basic data about the level and structure of executives' pay.[80] To be sure, there are legitimate questions about the SEC's estimates of the costs of rules more generally.[81] But the SEC's approach to analyzing the costs of its rules is consistent with our view of the low costs of corporate political spending disclosure.

In sum, compliance costs for an SEC rule requiring disclosure of corporate political spending are not likely to be significant. To the degree that such costs do exist, however, we think that they should inform the SEC's regulatory design choices rather than preclude disclosure altogether.

III. Claims that Voluntary Disclosure is Sufficient

Having examined claims that disclosure is undesirable, we now turn to claims that, even if disclosure is desirable, it can be provided by public companies voluntarily and should not be required by an SEC rule. Section A discusses the voluntary disclosures in recent years on which opponents of an SEC rule rely. Section B then provides several reasons as to why voluntary disclosure does not obviate the need for an SEC rule. Finally, section C argues that the recent introduction of voluntary disclosure practices reinforces rather than undermines the case for an SEC rule.

A. Recent Voluntary Disclosures

Since 2005, a growing number of large public companies have voluntarily adopted policies that require disclosure of their political spending. This development was in part a response to a significant number of shareholder proposals that were brought up at public companies. The Center for Political Accountability (CPA) has played a key role in this transformation by drafting model disclosure policies, partnering with investors for the filing of

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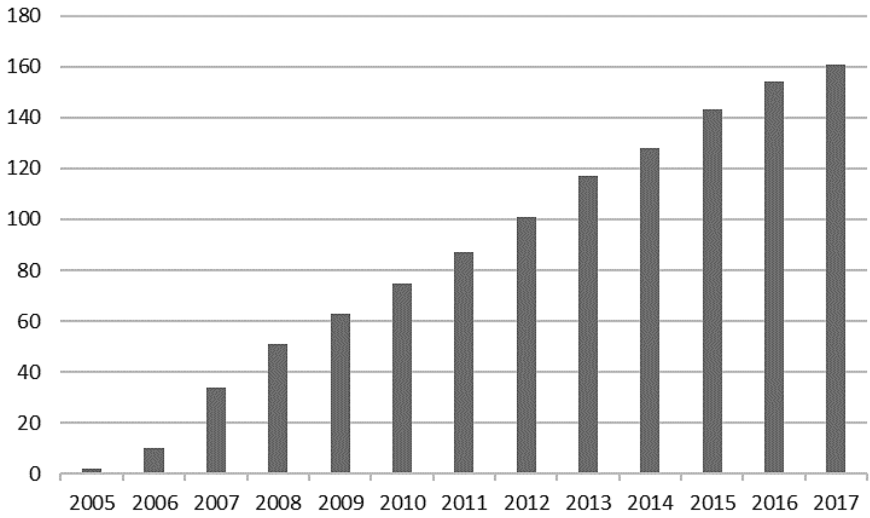
[79] *See* SEC, *Executive Compensation and Related Person Disclosure*, https://www.sec.gov/rules/final/2006/33-8732a.pdf.

[80] *See, e.g.*, SEC, *Pay Versus Performance*, http://www.sec.gov/rules/proposed/2015/34-74835.pdf.

[81] *See, e.g.*, Center for Capital Markets Competitiveness, The Egregious Costs of the SEC's Pay-Ratio Disclosure Regulation at 6, https://www.centerforcapitalmarkets.com/resource/the-egregious-costs-of-the-secs-pay-ratio-disclosure-regulation/ (criticizing the SEC's cost estimates in the context of its pay-ratio disclosure rule).

shareholder proposals, and facilitating agreements with over 150 public corporations committing to disclose their political spending. The CPA has also made an important contribution by providing researchers and the general public with data about corporate political spending and its disclosure, tracking on the CPA website and in its publications the incidence and specific details of the disclosure policies adopted by firms.[82] To illustrate the evolution of voluntary disclosure among public companies, Figure 1 draws on data collected by the CPA that show the increase from 2005 to 2017 in the total number of public firms that have voluntarily adopted the disclosure policies proposed by the Center.[83]

Figure 1: Number of Public Companies That Have Adopted the CPA Model for the Voluntary Disclosure of Political Spending, 2005-2017



In addition, likely in response to a growing shareholder demand for disclosure, many other companies have adopted voluntary disclosure practices without entering into agreement with shareholders. Of the 493 S&P 500 companies included in the *2018 CPA-Zicklin Index of Corporate Political Disclosure and Accountability*, which measures the quality of disclosure practices and policies in this area, 128 companies had reached agreements with their shareholders on voluntary disclosure, while 166 other S&P 500

[82] *See* Center For Political Accountability, www.politicalaccountability.net; *see also* Center for Political Accountability, *The 2018 CPA-Zicklin Index of Corporate Political Disclosure and Accountability*, http://files.politicalaccountability.net/index/2018_CPA-Zicklin_Index_web.pdf [hereinafter 2018 CPA-Zicklin Index].

[83] Center for Political Accountability, *Agreement History of CPA Model Resolution* (2018) (on file with authors).

companies disclosed full or partial information on, or prohibited, political spending without an agreement with shareholders on the subject.[84]

Because shareholder proposals have focused on large companies, the incidence and quality of voluntary disclosure is substantially higher in large companies than in small companies. Indeed, there is a strong positive correlation between a company's market capitalization and its score in the *CPA-Zicklin Index*.

As of June 2018, companies ranked in the index's first tier (score between 80% and 100%) had an average market capitalization of $94.9 billion, while companies ranked in the second tier (score between 60% and 79.9%) had an average market capitalization of $62.8 billion. By contrast, firms ranked in the bottom tier of the index (disclosure score between 0% and 19.9%) had an average market capitalization of $23 billion.[85] These data show that small companies have not kept pace with larger companies in the level and quality of voluntary disclosure.

B. Reasons for Not Leaving Disclosure to Private Ordering

Because 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 its 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.[86]

For a variety of reasons, though, disclosure of corporate spending on politics should not be left to private ordering. These reasons also explain why, in many areas, corporate law generally does not rely on voluntary disclosure; instead, regulators typically adopt mandatory rules establishing minimum levels of information that must be made available. We identify and discuss each of these reasons below.

In particular, we discuss in turn the following reasons: first, that such disclosures in this area have often been incomplete; second, that some company policies may contain vague language and loopholes that undermine the effort; third, that a mandatory rule is necessary to provide the standardiza-

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[84] 2018 CPA-Zicklin Index, *supra* note 82, at 24, 33.

[85] *Id.* at 31.

[86] *See, e.g.*, Guttentag, *supra* note 9, at 620–22; Larry Ribstein, *Should the SEC Regulate Corporate Political Speech?*, Truth on the Market (Aug. 4, 2011), http://truthonthemarket.com/2011/08/04/should-the-sec-regulate-corporate-political-speech/ ("[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?"); *see also* Verret, *Response*, *supra* note 9, at 463 (arguing that corporate competition for investment capital will lead to the optimal level of disclosure).

tion and uniformity that enables investors to make comparisons; fourth, that for most public companies to obtain voluntary disclosure through shareholder engagement would be a massive effort requiring decades to complete; fifth, that even if most companies end up voluntarily disclosing, those that abstain from doing so would likely be the ones that disproportionately engage in political spending that shareholders likely disfavor; and, sixth, that shareholder engagement in controlled companies is ineffective.

1. Incomplete or Partial Disclosures

Review of voluntary disclosure policies indicates that while the adoption of voluntary disclosure policies is spreading, there is significant variation in the quality and kinds of disclosure that companies provide. In 2018, according to statistics from the CPA, only 231 S&P 500 companies disclosed at least some corporate political contributions. In particular, the center reported the following problems:

- 48% of S&P 500 companies provide no disclosure of contributions to candidates, parties, and committees;
- 54% provide no disclosure of payments to national 527 groups;
- 57% provide no disclosure of ballot measure payments;
- 57% provide no disclosure of payments to trade associations;
- 56% provide no disclosure of direct independent political expenditures; and
- 69% provide no disclosure of payments to 501(c)(4) social welfare organizations.[87]

Putting together the information from Figure 1 and the percentages reported above, we can see that although voluntary disclosure is growing in popularity, there is no consensus among firms about what information investors should have, and the specifics of those policies remain highly variable. Many of the voluntary disclosure policies are not providing a complete picture of corporate political spending by design because companies are reticent to disclose certain kinds of information that shareholders would be interested in knowing.

2. Vague Language and Loopholes

Even when companies agree to voluntarily disclose their political spending, their policies may contain loopholes that allow them to withhold certain information that shareholders would expect to receive.

Indeed, not all companies use clear and precise language to explain their political spending policies. For example, according to the CPA, even some top-performing firms in the 2018 CPA-Zicklin Index, such as Apple

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[87] 2018 CPA-Zicklin Index, *supra* note 82, at 25.

Inc. (81.4% score), Coca-Cola Co. (90% score), and 3M Co. (84.3% score), use a "vague language" or offer a "short or incomplete list" with respect to the types of entities that may receive the company's money.[88]

The concern for misleading or incomplete voluntary policies is consistent with the results of a study conducted by Citizens for Responsibility and Ethics in Washington (CREW) in 2014.[89] CREW reviewed contributions to political groups organized under Section 527 of the Internal Revenue Code made by twenty-seven companies that had received the highest overall ranking in the 2013 CPA-Zicklin Index. The study documents several instances of significant discrepancies between the companies' voluntary disclosure policies and their actual practices. For example, CREW's report discusses Microsoft's omission of almost $1 million between 2011 and 2013, Pfizer's failure to account for more than $395,000 in the same time period, and discrepancies in Prudential's disclosure totaling more than $211,000 from 2011 to 2012.[90]

In addition to these discrepancies between policy and actual practice, CREW's report also highlights how some companies employ confusing or overly technical language in their voluntary disclosure policies. This language, in turn, might lead corporate shareholders to expect some kinds of information that they are, in fact, not receiving. For example, CREW discusses the case of Wells Fargo, which stated that the company does "not use company funds for any candidate campaign committees, political parties, caucuses, or independent expenditure committees."[91] But a closer look at the policy shows that Wells Fargo is permitted to make contributions to political organizations provided that those organizations use those funds for administrative costs rather than electioneering, which may account for its $140,000 of contributions to the Democratic Governors Association among others between 2011 and 2013.[92]

All these findings highlight the fact that even when companies have adopted voluntary disclosure policies that appear to provide full transparency, their policies and practices include "loopholes" that allow them to spend money on politics without disclosure to investors. Closing these loopholes, including by specifying with precision the scope of required disclosures, is yet another reason to prefer mandatory disclosure rules to voluntary disclosure.

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[88] *Id.* at 41–42 (reporting the partial score of said companies on indicator 13, which measures whether the company publicly describes the types of entities that may receive corporate funds for political purposes). *See also id.* at 38–39 for the explanation of the scoring methodology with respect to such indicator.

[89] Citizens for Responsibility and Ethics in Washington, *The Myth of Corporate Disclosure Exposed* (April 15, 2014), https://www.citizensforethics.org/press-release/crew-releases-report-failure-major-corporations-disclose-honestly/ [hereinafter CREW Report].

[90] *Id.* at 24, 27, and 29.

[91] *Id.* at 2.

[92] *Id.*

3. Standardization and Comparisons

One of the great advantages of mandatory disclosure rules is that they standardize information and facilitate cross-company comparisons. Voluntary disclosures, by contrast, vary widely in both their content and their format. For example, some firms disclose their payments to political candidates and committees, including the names of the individual recipients and the relevant amounts; others disclose only the aggregate annual contributions.[93] Companies also have widely varying minimum thresholds for even counting indirect political contributions: Hershey only reports payments over $10,000, Microsoft only discloses amounts over $25,000, and Edwards Lifesciences only above $50,000.[94] Finally, companies even have inconsistent definitions of what counts as political spending in the first place.[95]

This lack of standardization makes it difficult for shareholders to make meaningful, apples-to-apples comparisons among firms. Without standardized disclosure and means of comparison, the likely result is that they will be unable to measure disparate approaches to company disclosure against one another *even if the disclosures are full and accurate*. Mandatory rules, on the other hand, carry the important benefit of ensuring that companies will present this information in a manner that would be familiar to shareholders and facilitate comparisons among companies.

In addition to the lack of standardization, voluntary disclosure carries with it little meaningful oversight. Voluntary disclosure is just that: voluntary. Shareholders can—and have—brought pressure on firms to disclose more information about their political spending practices, and many firms have responded. But currently there is no way to ensure that these responses are accurate or complete. That is, there is no way to be sure that firms are providing what they say they are providing.

For example, Aetna's accidental disclosure in 2012 of over $7 million in contributions to political intermediaries was apparently inconsistent with its voluntary disclosure report.[96] The company replied that those funds were not

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[93] *See* 2018 CPA-Zicklin Index, *supra* note 82 at 38–55.

[94] The Hershey Company, *2014 Annual Report of Lobbying and Advocacy Expenditures* (Mar. 16, 2015), https://www.thehersheycompany.com/content/dam/corporate-us/documents/annual-reports/2014-lobbying-and-advocacy-expenditures-report.pdf; Microsoft Corp., *Principles and Policies for Guiding Microsoft's Participation in the Public Policy Process in the United States*, https://query.prod.cms.rt.microsoft.com/cms/api/am/binary/RE1F8WC (Aug. 2017); Edwards Lifesciences Corp., Corporate Political Disclosure and Accountability, https://www.edwards.com/aboutus/PoliticalDisclosure.

[95] For example, most companies disclose only the nondeductible portion of their payments to trade associations and other politically active organizations, while some companies voluntarily report the full amount. *See* 2018 CPA-Zicklin Index, *supra* note 82, at 26. For example, Northrup Grumman discloses both the nondeductible portion and the total amount. Northrup Grumman, *Investor Relations*, https://www.northropgrumman.com/InvestorRelations/TradeAssociations/Pages/default.aspx.

[96] Charles Riley, *Oops! Aetna discloses political donations*, CNN Money (June 14, 2012), http://money.cnn.com/2012/06/14/news/economy/aetna-political-contributions/index.htm. *See also* Melanie Sloane, *Letter from Melanie Sloan, Executive Director, Citizens for Responsibil-*

meant for political purposes but for "educational activities."[97] However, some of the spending on "educational activities" seemed to be clearly relevant to those interested in disclosure regarding political spending. In 2011, for example, the U.S. Chamber of Commerce (one of the recipients of Aetna's money), as part of what it referred to as a "voter education . . . campaign," aired negative advertisements against the reelection of several members of Congress, an activity that seems eminently political in nature.[98] In this situation, mandatory disclosure rules could identify with more precision and in a coherent fashion what information companies must provide about their political spending, and would require them to comply in a full, accurate, and timely manner.[99]

4. Difficulty of Obtaining Disclosure through Engagement with Numerous Companies

In addition to a lack of standardization and oversight, another shortcoming of reliance on voluntary disclosure is the difficulty of engaging with numerous public companies on the subject of political spending disclosure. We cannot expect that voluntary disclosures in response to shareholder engagement will be produced in thousands of publicly traded companies within any reasonable period of time. It has taken significant shareholder engagement over the last ten years to produce the limited amount of voluntary disclosure we have now. At this rate, it would take several more decades to achieve full disclosure among all public companies.

A critic might contend, however, that voluntary disclosure will become a best governance practice at some point, which will put pressure on all companies to adopt similar policies. As a general matter though, companies tend to adopt new governance arrangements only when they get—or anticipate getting—shareholder proposals on an issue. More specifically, in the context of political spending disclosure, it appears that companies that have not been the subject of shareholder engagement overwhelmingly choose not to disclose their political spending practices.

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ity and Ethics in Washington, to Mark T. Bertolini, Chairman, CEO and President, Aetna, Inc. (June 14, 2012), https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2016/07/20022402/6-14-12_CREW_Letter_to_Aetna.pdf.

[97] *See* Mark T. Bertolini, *Letter from Mark T. Bertolini, Chairman, CEO and President, Aetna, Inc., to Melanie Sloan, Executive Director, Citizens for Responsibility and Ethics in Washington* (June 14, 2012) http://www.aetna.com/aetna-press/document-library/aetna-citizens-responsibility-ethics-letter.pdf.

[98] Amended Complaint at 11–12, Silberstein v. Aetna, Inc., No. 13-CV-8759, 2015 WL 1424058, at *10 (S.D.N.Y. Mar. 26, 2015).

[99] Guttentag, *supra* note 9, at 634 (Guttentag disagrees, questioning "the ability of regulators to create topic-specific disclosure requirements that work well for all public companies."). This concern, however, seems to be unwarranted. Public companies, despite their many differences, should be able to adapt to a standard disclosure format as they have adapted to such formats in other areas.

According to the CPA, 297 companies in the S&P 500 have never been the subject of shareholder engagement on political spending, and, of those companies, only 73 (25%) disclose some information on both their direct and indirect political expenditures or say that they prohibit such spending.[100] Also, the level and quality of disclosure by companies engaged by shareholders is much higher.[101] Without shareholder engagement, it seems unlikely that companies will voluntarily adopt appropriate disclosure policies on political spending.

In any event, it remains the case that a large number of public companies do not disclose any information at all about their 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.[102] It 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 shareholders. 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.[103] 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.[104] Thus, in general, the SEC has not waited for investors to pursue disclosure at all public companies when considering mandatory rules of this type.

5. Special Concerns of Companies Not Voluntarily Disclosing

Even if we could expect investors to demand voluntary disclosure at many or even most public companies, we would not expect shareholders to succeed in persuading all of those firms to disclose. In addition, even if the group of companies that refuses to provide disclosure is small, those 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, in other words, may be those for which disclosure will reveal spending that shareholders would find objectionable.

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[100] 2018 CPA-Zicklin Index, *supra* note 82, at 33.

[101] *Id.* The average 2018 CPA-Zicklin score for companies that reached an agreement with shareholders is 74.1%; for companies that have been engaged by shareholders but did not reach an agreement with them, it is 51.7%. In contrast, the average score for companies with no history of shareholder engagement is 29.4%.

[102] *Id.*

[103] Executive Compensation Disclosure, 57 Fed. Reg. 29,582, 29,590 (proposed July 2, 1992) (to be codified at 17 C.F.R. pts. 229, 240).

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

The SEC identified a similar problem when it moved to expand the required disclosure of executive pay at all public companies. In doing so, it noted that firms declining to disclose executive compensation were probably those at which pay arrangements were most likely to meet with shareholder disapproval.[105] A similar problem would arise with corporate political spending, which is another reason why mandatory rules are needed.

It is important to stress that mandatory SEC rules would not completely eliminate the possibility of tailoring by individual firms. They 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 thought that additional information might be particularly important to their shareholders.[106] By establishing a floor and not a ceiling, this approach would facilitate comparisons among companies while also allowing them the flexibility to pursue a competitive advantage by supplementing the minimum required information. In other words, shareholders would have a better idea of what is actually in company disclosures and would also be in a position to request additional information that might be missing.

6. The Ineffectiveness of Engagement in Controlled Companies

Thus far, we have focused on the large set of public companies where shareholder engagement could lead, at least in theory, to voluntary disclosure. We have shown how difficult it would be for investors to obtain effective disclosure in most public companies through engagement, and we have explained that the companies in which such efforts fail are disproportionately likely to be those where transparency would be more valuable. We wish to end this section by considering the smaller group of companies with a controlling shareholder, where engagement by public investors is almost invariably destined to be unsuccessful.

Controlled companies constitute a minority in the U.S. public market, but a significant one. At the end of 2016, there were 379 companies in the Russell 3000 index with a shareholder owning more than 30% of voting shares, and in 220 of these companies, one shareholder held more than 50% of voting shares.[107]

In these companies, shareholder engagement will quite likely be ineffective. Shareholder proposals on the disclosure of political spending are

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[105] *See* Executive Compensation Disclosure, 57 Fed. Reg. 29,582, 29,590 (proposed July 2, 1992) (to be codified at 17 C.F.R. pts. 229, 240).

[106] 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.*, Michael J. Segal et al., Wachtell, Lipton, Rosen & Katz, Compensation Committee Guide 46 (2011) (noting that public-company compensation committees have increasingly chosen to supplement their mandatory disclosures on executive pay with additional information).

[107] Lucian A. Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. Pa. L. Rev. 1271, 1279 (2017).

precatory in nature, and therefore do not bind the board even if passed. However, directors of companies without a controlling shareholder have a strong incentive not to defy the preferences expressed by shareholders, because their reelection depends on the vote of public investors. By contrast, when a company has a controlling shareholder, the board is rationally inclined to follow the preferences of the controller, which has the power to replace or reappoint the incumbents, and has little incentive to follow different preferences expressed by public investors. Indeed, it is well documented that dual-class companies regularly ignore shareholder proposals to dismantle dual-class structures that received support from a majority of public investors.[108]

Although public investors in controlled companies could well be unable to obtain information about public spending via engagement, they might well be interested in such information for some of the same reasons that motivate investors in dispersed-ownership companies to seek such information. In particular, if political spending introduces risks, investors might well be interested in obtaining enough information to assess such risks. Furthermore, to the extent that public investors in a controlled company attach expressive significance to spending on political causes, they might wish to know for what political aims their monies are spent.

Note that current SEC rules do ensure that public investors in controlled companies receive substantial information about corporate choices even though these investors have little ability to affect those decisions. For example, controlled companies must disclose information about executive compensation and related-party transactions.[109] The provision of information to investors in these companies is based on the premise that such investors should be able to assess and price the risks and prospects they are facing. Clearly, if the SEC had left the disclosure of such matters to private ordering, public investors in controlled companies would have likely remained in the dark on these matters.

To illustrate these arguments, consider the case of Facebook.[110] Public investors own more than 80% of the equity capital of Facebook,[111] but the

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[108] Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585, 617 (2017) (reporting evidence that fifty-three precatory proposals submitted to twenty-five Russell 3000 companies between 2005 and 2014 received support, on average, by 71% public investors but were not implemented by the controller).

[109] *See* 17 C.F.R. §229.402 (regulating disclosure of executive compensation); 17 C.F.R. §229.404 (regulating disclosure of transactions with related persons, promoters, and certain control persons).

[110] In the interest of full disclosure, note that one of us served as an expert, and submitted an expert report, in litigation concerning the Facebook reclassification noted in this Article (In re Facebook, Inc. Class C Reclassification Litig., C.A. No. 12286-VCL (Del. Ch., Dec. 12, 2016)).

[111] As of March 31, 2018, executive officers and directors (including CEO Mark Zuckerberg) held 26,776,602 Class A shares and 444,919,356 Class B shares (equal, in the aggregate, to 16% of common stock); co-founder Eduardo Saverin held 6,067,288 Class A shares and 47,233,360 Class B Shares (equal to additional 2% of common stock); while all other shareholders held the remaining 82% of common stock. Facebook, Inc., 2018 Proxy Statement 38 (Apr. 13, 2018).

company's dual-class voting structure enables Mark Zuckerberg to control the firm. Thus, if Zuckerberg is not interested in disclosing information on Facebook's political expenditures, public investors would likely be unable to obtain such information through the submission of precatory resolutions or other forms of engagement. Note that public investors fund more than 80% of any political spending by Facebook. Therefore, without an SEC rule, these investors are unlikely to learn how their Facebook monies are spent on politics.

C. *The Lessons of Voluntary Disclosure Practices*

Opponents of mandatory disclosure have been using the willingness of some companies to adopt voluntary disclosure policies as a basis for opposition, arguing that this issue should be left to private ordering. As we explain, however, although voluntary disclosure is beneficial, it cannot provide a substitute for mandatory rules. To the contrary, the trends on voluntary disclosure, and the lessons that can be drawn from them, strengthen the case for a mandatory rule.

The steady rise in voluntary disclosure numbers among top public firms, however, remains notable for two reasons. First, it shows that companies are increasingly recognizing that there is significant investor demand for their political spending information. Second, and more importantly, it indicates that disclosure of such information is feasible and practical for public companies. Many companies have been able to adopt political spending disclosure practices without much trouble. As we discuss in the next part, these practices should also alleviate expressed fears that special interests will use disclosure to extract costly concessions from companies.

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.

IV. Claims That Disclosure Rules Are Impermissible or Inappropriate

This Part deals with objections of a different character than those considered in the preceding two Parts. In particular, it considers claims that, even if a mandatory disclosure rule could be beneficial overall, the SEC should not adopt such a rule because it would be either legally precluded or institutionally inappropriate. More specifically, section A discusses the claim that disclosure rules would violate the First Amendment. Section B considers the argument that political spending disclosure is not an appropriate subject for SEC rulemaking. Finally, section C addresses the claim that SEC rulemaking in this area would not pass the legally required cost-benefit analysis.

A. Constitutional Impermissibility

Critics of the petition argue that mandatory disclosure of corporate political spending would run afoul of the First Amendment. The claim here is that disclosure rules would place a serious burden on corporate political speech, which cannot be justified by any corresponding governmental interest. Prominent proponents of this objection include the U.S. Chamber of Commerce,[112] the group of law professors who oppose the petition,[113] former SEC Commissioner Daniel Gallagher,[114] as well as James Copland in his contribution to the *Harvard Business Law Review* symposium.[115]

The Court's decision in *Citizens United* lies at the heart of this objection. The *Citizens United* Court held that independent expenditures on elections are core political speech, which receives the highest level of constitutional protection. The Court further explained that the source of the speech—whether it be a corporation, union, association, or individual—does not affect the value of that speech and is therefore irrelevant for constitutional purposes. For these reasons, the Court struck down parts of a federal law that partially banned corporations from engaging in such spending.

Critics of the petition argue that *Citizens United* can be read to suggest that SEC rules shining light on political spending would violate the First Amendment. Forcing corporations to disclose their political spending, they argue, is impermissible because it seeks to discourage corporations from exercising their constitutional rights.[116] On this view, SEC rules requiring disclosure of corporate political spending amount to an attempt to accomplish indirectly what *Citizens United* prohibited the government from achieving directly: interfering with corporations' right to speak.[117]

1. The Support for Disclosure in *Citizens United* and Its Progeny

However, the decision in *Citizens United* provides no basis for opposing rules in this area. While it is true that the Court in that case struck down

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[112] Chamber of Commerce Letter, *supra* note 20.

[113] Law Professors Letter, *supra* note 42, at 6–7.

[114] Daniel M. Gallagher, *Remarks at SEC Historical Society 2014 Annual Meeting: On the 80th Anniversary of the SEC* (June 5, 2014), http://www.sec.gov/News/Speech/Detail/Speech/1370542005031.

[115] Copland, *supra* note 9, at 383.

[116] *See* Law Professors Letter, *supra* note 42, at 6–7; Americans for Prosperity, *Letter from Americans for Prosperity, to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n* (Jan. 25, 2012), https://www.sec.gov/comments/4-637/4637-62.pdf.

[117] *See* Law Professors Letter, *supra* note 42, at 7 ("Corporate political activity is constitutionally protected, and the SEC cannot institute a rule that indirectly does what the Constitution forbids.").

the *prohibition* on corporations using treasury funds to make independent expenditures, the Court also upheld by a vote of 8-1 the laws requiring *disclosure* of such expenditures.[118] In doing so, the Court emphasized the crucial difference between *restrictions* on corporate political speech, which violate the First Amendment, and *disclosure provisions,* which generally do not. Thus, while *Citizens United* stands as a strong denunciation of restrictions on corporate spending itself, it is simultaneously a resounding affirmation of the Court's willingness to uphold disclosure rules in this area.

And for good reason. As the Supreme Court has recognized, disclosure provisions "impose no ceiling on campaign-related activities"[119] and "[d]o not prevent anyone from speaking."[120] In fact, rather than posing a challenge for free speech law, disclosure requirements actually *promote* significant First Amendment values.[121] In the words of the *Citizens United* Court, "[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way."[122] That is why disclosure requirements are subject to a more forgiving standard of First Amendment review than laws that restrict speech.[123]

Since *Citizens United,* lower courts have overwhelmingly endorsed disclosure as a proper regulatory tool.[124] For example, in *Human Life of Washington v. Brumsickle,* the Ninth Circuit upheld Washington State's public disclosure law, which required full disclosure of political contributions and expenditures.[125] The Court recognized that, rather than limiting speech, disclosure provisions promote significant First Amendment values by allowing both citizens and shareholders to react to information in a "proper way."[126] Relying heavily on *Citizens United,* the Ninth Circuit upheld the "fundamental distinction" between unconstitutional speech limitations and appropriate disclosure requirements.[127]

Similarly, in *National Organization for Marriage v. McKee,* the First Circuit upheld the disclosure requirements contained in Maine's ballot question statute.[128] After highlighting *Citizens United*'s distinction between

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[118] Citizens United v. FEC, 558 U.S. 310, 369 (2010).
[119] Buckley v. Valeo, 424 U.S. 1, 64 (1976).
[120] McConnell v. FEC, 540 U.S. 93, 201 (2003).
[121] *See* Buckley, 424 U.S. at 82; *see also* Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J. L. & Pol. 683, 691 (2012).
[122] Citizens United, 558 U.S. at 371.
[123] *See* Buckley, 424 U.S. at 64 (stating that there must be a "relevant correlation" or "substantial relation" between the government interest and the information required to be disclosed).
[124] *See, e.g.*, Family PAC v. McKenna, 685 F.3d 800 (9th Cir. 2012); Human Life of Washington, Inc. v. Brumsickle, 624 F.3d 990 (9th Cir. 2010); National Organization for Marriage v. McKee, 649 F.3d 34 (1st Cir. 2011); SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010).
[125] Human Life of Wash., 624 F.3d at 996.
[126] *Id.* at 1006 (citing Citizens United, 130 S.Ct. at 915–16).
[127] *Id.* at 1013. (citing Citizens United, 130 S.Ct. at 897, 915–16).
[128] Nat'l Org. for Marriage, 649 F.3d at 34.

speech limitations and disclosure laws,[129] the court explained in greater detail how disclosure promotes important transparency goals: "[I]n the case of corporate or organizational speakers, disclosure allows shareholders and members to 'hold [them] accountable for their positions.'"[130] Without such disclosure, shareholders and members would have no way to police the actions of those entrusted with their money.

Far from undermining the case for SEC rules requiring disclosure in this area, then, *Citizens United* and its progeny provide *support* for such rules. Courts have repeatedly upheld legal rules that require disclosure of political spending, explaining that such rules do not limit speech but instead promote important goals of transparency and accountability.

2. Chilling Speech Arguments

In the face of such overwhelming legal support for disclosure in *Citizens United* and subsequent cases, some critics have turned to arguments based on the potential chilling effects of disclosure rules. The claim here is that if corporations are required to disclose their spending on politics, they will be subject to harassment and retaliation from the public at large. This argument has been advanced by, among others, the Chamber of Commerce[131] and Senate Majority Leader Mitch McConnell.[132]

To support this argument, critics cite *NAACP v. Alabama,* a civil rights-era case involving a challenge to a state law mandating disclosure of the NAACP's membership list.[133] In *NAACP,* the Supreme Court held that the First Amendment protected members' right to conceal their identities so as to avoid retaliation and harassment.[134]

However, *NAACP* provides no basis for opposing transparency in this area. To begin with, it involved systematic threats of physical violence in the Jim Crow South, a situation that hardly seems analogous to the kinds of reactions public companies might face if their political contributions are disclosed. As Justice Sotomayor has explained, the *NAACP* case involved the "rare circumstance in which disclosure poses a reasonable probability of serious and widespread harassment that the state is unwilling or unable to control."[135] We do not think courts will be receptive to this analogy between

[129] *Id.* at 54–55 (citing Citizens United, 130 S.Ct. at 915).

[130] *Id.* at 57 (quoting Citizens United, 130 S.Ct. at 916).

[131] Chamber of Commerce Letter, *supra* note 20, at 23–24.

[132] Mitch McConnell, *Disclose Act is un-American*, USA TODAY (July 5, 2012), http://usatoday30.usatoday.com/news/opinion/editorials/story/2012-07-05/Disclose-Act-Mitch-McConnell/56046300/1.

[133] *See, e.g.*, Chamber of Commerce Letter, *supra* note 20, at 23; McConnell, *Disclose Act is un-American*.

[134] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

[135] Doe v. Reed, 561 U.S. 186, 215 (Sotomayor, J., concurring) (contrasting the disclosure provision at issue with the one challenged in NAACP v. Alabama) (citing Patterson, 357 U.S.).

those circumstances and requiring public companies to disclose their political spending.

We also note that subsequent cases have made clear that the *NAACP* standard is exceedingly difficult to meet. In *Family PAC v. McKenna*, the Ninth Circuit upheld disclosure requirements in the absence of "a significant or systemic risk of harassment or retaliation."[136] Moreover, that risk had to be demonstrated by a "particularized showing"—a situation that the court recognized would be "unusual."[137] In other words, although theoretically possible, the standard of proof for claims of harassment is so high as to make those arguments unlikely to prevail. In these cases—and, arguably, in most conceivable cases of public companies' political spending—the existing facts do not support fears of retaliation.

In fact, there is virtually no evidence of systematic threats against corporations (of the kind that motivated the *NAACP* decision), even when their contributions are tied to the most polarizing issues.[138] That is why, despite the fact that corporate contributions to political committees must be revealed as a legal matter and we now have over 200 of the nation's largest public companies voluntarily disclosing other information about their political spending, we see little evidence of systematic or large-scale retaliation in response to those disclosures.

Some critics contend that companies may suffer public criticism and business boycotts as a result of their (or their executives') support for certain candidates or political causes. For example, in 2010 retailer Target Corp. faced a business boycott after its indirect support for a gubernatorial candidate who opposed same-sex marriage became public.[139] More recently, outdoor apparel manufacturer L.L. Bean faced intense criticism and calls for boycotting its stores after board member and founder's granddaughter Linda Bean disclosed a donation in favor of presidential candidate Donald J. Trump.[140] In 2018, Delta Airlines lost a lucrative tax break as a punishment by Georgia lawmakers for having cut its ties with the National Rifle Association (NRA) after the shooting at Marjory Stoneman Douglas High School in Parkland, Florida,[141] and Publix, a company operating retail food supermarkets, faced a social media boycott campaign after the revelation that its

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[136] Family PAC v. McKenna, 685 F.3d 800, 807 (9th Cir. 2012).

[137] *Id.* at 808.

[138] *See* Briffault, *supra* note 121, at 713–14 (discussing the public's reaction to disclosure of California's Proposition 8 supporters).

[139] Brody Mullins & Ann Zimmerman, *Target Discovers Downside to Political Contributions*, Wall St. J. (Aug. 7, 2010), https://www.wsj.com/articles/SB10001424052748703988304575413650676561696.

[140] Louis Nelson, *Trump Thanks L.L. Bean Heir for Her Support After Boycott Backlash*, Politico (Jan. 12, 2017), https://www.politico.com/story/2017/01/trump-thanks-l-l-bean-linda-bean-233529.

[141] Marwa Eltagouri, *Georgia Republicans Honor their Threat to Punish Delta for Cutting Ties with NRA*, Wash. Post (Mar. 1, 2018), https://www.washingtonpost.com/news/business/wp/2018/03/01/georgia-republicans-honor-their-threat-to-harm-delta-in-defense-of-the-nra.

founder's heirs and current and former executives had donated a substantial amount of money to a political candidate with strong ties to the NRA.[142]

We note, however, that these examples would not meet the legal standard for retaliation from the *NAACP* case. In other words, we agree with Justice Scalia, who explained that "harsh criticism, short of unlawful action, is a price [the American] people have been willing to pay for self-governance."[143] In short, these concerns provide little basis for opposing transparency in corporate political spending.

The decision in the *Citizens United* case has long been, and continues to be, the subject of a heated debate. However, that debate has largely focused on the Court's holding that *limits* on corporate and union spending are unconstitutional. By contrast, the Court's 8-1 decision upholding disclosure has been followed by overwhelming consensus on the legal permissibility of disclosure provisions. There can be little doubt, therefore, that mandatory disclosure of corporate political spending is on sound constitutional ground.

B. Inappropriateness of Political Engagement

Critics of the petition also argue that rulemaking on disclosure of corporate political spending would improperly draw the SEC into political debates.[144] According to these critics, such a rulemaking would be beyond the SEC's mission and would insert the agency into politically divisive or politically consequential issues. Various aspects of this argument have been advanced forcefully by the American Petroleum Institute, SEC Commissioner Daniel Gallagher, and the group of law professors who oppose disclosure of corporate spending on politics.[145] The argument has also been made in contributions to the *Harvard Business Law Review* symposium by Paul Atkins, James Copland, Professor Bradley Smith and Allen Dickerson, and Professor J. W. Verret.[146] We take each component of the argument in turn.

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[142] Editorial Board, *Florida's Campaign Swamp Is Wider and Deeper Than Publix*, South Fla. Sun Sentinel (May 26, 2018), www.sun-sentinel.com/opinion/editorials/fl-op-editorial-adam-putnam-publix-20180525-story.html. For other examples, *see* Center for Political Accountability, *Collision Course. The Risks Companies Face When Their Political Spending and Core Values Conflict and How to Address Them* at 4, 10 (2018), http://files.politicalaccountability.net/reports/cpa-reports/Final_Draft_Collision_Report.pdf.

[143] Doe, 561 U.S. at 228 (Scalia, J., concurring).

[144] *See, e.g.*, Atkins, *supra* note 9, at 376–79; Copland, *supra* note 9, at 404; Smith & Dickerson, *supra* note 9, at 427–34; Verret, *Response, supra* note 9, at 465; Letter from Harry M. Ng, *supra* note 42, at 13.

[145] *See* Letter from Harry M. Ng, *supra* note 42, at 13 (arguing that the petition "seeks to force the Commission into taking action in a political cause in an election year"); Gallagher, *supra* note 114; Law Professor Letter, *supra* note 42, 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.").

[146] Atkins, *supra* note 9, at 376–79; Copland, *supra* note 9, at 404; Smith & Dickerson, *supra* note 9, at 427–34; Verret, *Response, supra* note 9, at 465.

1. Staying Out of Election Regulation

To begin with, some critics contend that the SEC is not the appropriate agency to pursue rules related to campaign finance.[147] The mission of the SEC, they argue, is to "protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation;" by contrast,[148] the regulation of elections is the province of the Federal Election Commission.[149] In short, on this view, the SEC should stick to what it knows best—the regulation of markets—and stay out of politics.

To bolster this claim, critics contend that the SEC has a wealth of expertise in regulating capital markets but no expertise in regulating elections.[150] Its commissioners and staff are not selected for their knowledge of political spending.[151] By contrast, the Federal Election Commission was deliberately designed to have the requisite knowledge and experience to handle matters related to campaign finance.[152]

We begin with a note about the different agency interests and competencies at play here. The Federal Election Commission has its own set of legal requirements, which tend to focus on whom politicians are getting their money from. Our focus, by contrast, is on how *companies* are spending their money. That is, we are interested in the question of what information should be made available to investors. That question lies at the heart of the SEC's responsibilities. Indeed, the SEC is the agency with the most expertise to figure out what information investors should get and how to structure disclosure rules that would benefit them.

We readily concede that SEC staff members are not chosen based on their expertise in regulating elections. However, rather than undermining the case for disclosure, these observations actually help to alleviate concerns about politicized rulemaking. The fact that SEC staff are chosen based on their knowledge about, and expertise in, investor protection facilitates their focus on the former rather than the latter. Furthermore, since disclosure rules are designed to protect investors, writing them is within the expertise of SEC staff, who have in recent years prepared regulatory guidance on matters ranging from conflict minerals to environmental issues. The SEC is undoubtedly the right agency to ensure that investors in public companies have the information they need to protect their investments.

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[147] *See* authors cited *supra* note 146; *see also* Law Professors Letter, *supra* note 42, at 7.

[148] *See* U.S. Sec. & Exch. Comm'n, *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, http://www.sec.gov/about/whatwedo.shtml.

[149] *See* Federal Election Commission, *Mission and History*, http://www.fec.gov/info/mission.shtml.

[150] *See, e.g.*, Smith & Dickerson, *supra* note 9, at 419, 429, 439; Atkins, *supra* note 9, at 378, 379.

[151] Smith & Dickerson, *supra* note 9, at 437; Chamber of Commerce Letter, *supra* note 20, at 1–2.

[152] Smith & Dickerson, *supra* note 9, at 419, 430.

2. Staying Out of Politically Divisive or Consequential Issues

Critics of the petition also argue that the SEC should stay out of politically divisive or politically consequential issues. This line of argument includes at least two corollaries. First, and relatedly, critics claim that the SEC should not take actions that have an effect on the existing political balance of power. Second, they claim that if the SEC were to get involved in these politically divisive or politically consequential issues, the agency would undermine its own credibility.

We start with the claim that the SEC should not take actions that are politically divisive. Opponents of the petition have argued that an SEC rulemaking on disclosure of corporate political spending is merely a ploy by Democrats and their allies to skew the rules of the political game in their favor.[153] These critics claim that the seemingly broad-based movement in favor of greater transparency is actually a narrow and partisan push by labor unions and liberal advocacy groups to silence business voices—which, they argue, tend to support Republican candidates and causes.[154] Given these partisan motives, the objection goes, any rulemaking in this area would be both inappropriate and impermissible.

Although there is a certain rhetorical appeal to these claims, they ultimately ring hollow. First, as an historical matter, it is far from clear why disclosure would be necessarily associated with the Democratic Party. In fact, for years the Republican Party's mantra in the area of campaign finance was to "deregulate and disclose."[155] Disclosure, in other words, was the natural and appropriate way to promote both liberty and accountability. It was not until very recently that some political interests began to see transparency as a disease rather than a cure.

In addition, the political divisiveness of disclosure may be more apparent than real. It is certainly the case that some prominent political actors have denounced the move toward disclosing more information about the

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[153] *See, e.g.*, Smith & Dickerson, *supra* note 9, at 420, 429; Verret, *Response, supra* note 9, at 457 (discussing the work of Larry Ribstein and Bradley Smith); Atkins, *supra* note 9; *see also* Nicholas Confessore, *S.E.C. Is Asked to Require Disclosure of Donations*, NY TIMES (April 23, 2013) (quoting Blair Holmes, a spokesperson for the Chamber of Commerce), http://www.nytimes.com/2013/04/24/us/politics/sec-is-asked-to-make-companies-disclose-donations.html.

[154] *See* Smith & Dickerson, *supra* note 9, at 444–45; see also Atkins, *supra* note 9, at 373; Center for Competitive Politics, *Silencing Business: How Activists are Trying to Hijack the Public Policy Debate* at 5, 17 (June, 2014) http://www.proxyfacts.org/wp-content/uploads/2014/06/CCP-White-Paper-6.2.pdf; Verret, *The SEC Ponders Circumventing Citizens United*, *supra* note 54; Business Roundtable, National Association of Manufacturers & Chamber of Commerce, *Letter to Business Leaders* (discussing "The Campaign to Quiet American Business"), http://electionlawblog.org/wp-content/uploads/Joint-BRT_NAM_USCC-letter.pdf; Jonathan Macey, *Using "Disclosure" to Silence Corporate America*, WALL ST. J., Oct. 21, 2013 (criticizing the Center for Political Accountability for promoting voluntary disclosure among public companies); Chamber of Commerce Letter, *supra* note 20, at 3.

[155] *See* Thomas E. Mann, *Deregulating Campaign Finance: Solution or Chimera?* at 301, http://www.hoover.org/sites/default/files/uploads/documents/0817996729_300.pdf.

sources of political funding.[156] Senator McConnell, for example, has been perhaps the most outspoken advocate on the issue, both in litigation and in public statements.[157] But outside the Beltway, support for disclosure of corporate political spending is overwhelming.

For example, in a 2012 poll of American citizens, 81% of respondents said that they favor disclosure of corporate political spending.[158] A 2013 poll provided strong evidence that disclosure enjoys a similar level of support among business executives.[159] And in a 2015 poll conducted by Mayday.US, 88% of Republicans said that they believe the SEC should require corporations to disclose their political spending.[160] That figure—88%—is exactly the same as the percentage of Democrats who responded the same way.[161] Given these numbers, it becomes even harder to see the move toward disclosure in a partisan light.

Suppose, however, that critics were correct to argue that developing rules in this area would be highly politically divisive. That is, suppose that this issue is not supported evenly by members of both parties. That possibility should not deter the SEC from rulemaking that is necessary to serve the agency's mission of investor protection. To the contrary, the SEC was conceived in the 1934 Securities Exchange Act as an independent agency precisely so that it could serve that mission without regard to the political divisiveness of its decisions. The possibility that requiring transparency in corporate spending on politics would be divisive in this way provides no basis for opposing rules to this effect.

Next, critics claim that rulemaking on corporate political spending would upset the current balance between the major political parties.[162] As we have demonstrated, it is far from clear that this issue splits neatly along partisan lines. But even if it did, the SEC should not deprive investors of information they have asked for because members of the major political par-

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[156] *See, e.g.*, Boehner, *supra* note 8; McCain, *supra* note 31.

[157] *See* McConnell, *supra* note 132; Mitch McConnell, *Growing Threats to Our First Amendment Rights: An Address by Senate Republican Leader Mitch McConnell* (June 15, 2012), https://www.mcconnell.senate.gov/public/index.cfm/2012/6/growing-threats-to-our-first-amendment-rights-an-address-by-senate-republican-leader-mitch-mcconnell.

[158] *New Poll: Americans Condemn High Levels of Corporate Political Spending, Overwhelmingly Support Strong Transparency and Accountability Reforms*, https://www.citizen.org/media/press-releases/new-poll-americans-condemn-high-levels-corporate-political-spending; Liz Kennedy, *Citizens Actually United, The Overwhelming, Bi-Partisan Opposition to Corporate Political Spending and Support for Achievable Reforms*, at 5, http://www.demos.org/sites/default/files/publications/CitizensActuallyUnited_CorporatePoliticalSpending.pdf.

[159] Hart Research Associates & American Viewpoint, *American Business Leaders on Campaign Finance and Reform,* at 13–14 (2013), https://www.ced.org/pdf/Campaign_Finance%2C_Hart_and_AmView.pdf (noting high level of bipartisan support).

[160] *New Mayday.US Poll: Voters of Every Political Stripe Agree on the Need for Fundamental Reform to the Campaign Finance System* (Sept. 25, 2015), http://blog.mayday.us/post/129846704150/new-maydayus-poll-voters-of-every-political.

[161] *Id.*

[162] *See, e.g.*, Law Professors Letter, *supra* note 42, at 7.

ties disagree about the subject. Party members have long held different beliefs on 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 are likely to depart from shareholder interests.[163] But this disagreement did not preclude—nor should it have precluded—the SEC from requiring detailed disclosure on executive pay or pursuing its mandate more generally.

To illustrate this point further, consider a scenario in which there is a major scandal involving violation of the federal securities laws. As it happens, this scandal implicates several prominent members of the Democratic Party but does not implicate any Republicans. Would it be appropriate in this scenario for the SEC to decline enforcement efforts because those efforts would tip the overall political balance in favor of the Republican Party? Of course not: the SEC should carry out its regulatory responsibilities without consideration of or regard for its effects on political balance. Likewise, a rulemaking on corporate political spending, which would provide investors with the information they need to make decisions about their investments, should not be influenced or impeded by considerations of its effect on the political balance of power.

Finally, these critics argue that, by requiring disclosure of corporate political spending, the SEC will undermine its independence and performance as a regulator.[164] To regulate effectively in this space, these opponents contend, the SEC needs to preserve its credibility as a nonpartisan champion of investors and efficient capital markets. By stepping outside of its traditional wheelhouse, they argue, it will suffer serious reputational consequences[165] that will, in turn, not only cripple its ability to regulate political spending effectively but also invite skepticism of its activities more generally. Having been entrusted with important regulatory responsibilities like the functioning of securities markets, critics conclude, the SEC should not put its reputation at risk.[166]

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[163] *Compare Empowering Shareholders on Executive Compensation: Hearing Before the Comm. on Fin. Servs.*, 110th Cong. 2 (2007) (statement of Rep. Frank) ("I have listened to a lot of 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] somehow evaporates when it comes to [allowing shareholders to vote over] paying 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.").

[164] Smith & Dickerson, *supra* note 9, at 438, 451; Gallagher, *supra* note 114; *see also* Dina ElBoghdady, *supra* note 13 (discussing House Republican pressure on SEC to abandon rulemaking in response to the petition); Law Professors Letter, *supra* note 42, at 1.

[165] *See, e.g.*, Smith & Dickerson, *supra* note 9, at 427-39.

[166] *See* Atkins, *supra* note 27; Keith Paul Bishop, *Did the SEC Make a Mistake? I Think Not*, The National Law Review (Dec. 17, 2013), https://www.natlawreview.com/article/did-sec-make-mistake-i-think-not (defending the SEC's decision to take the disclosure rulemaking off the agency's agenda).

Although these arguments may seem appealing on the surface, they ultimately provide little reason for opposing transparency in corporate political spending. To begin, it is important to distinguish between regulation that has a tangential effect on politics and regulation that aims to influence the political process. If the SEC were to pursue a rulemaking on disclosure of political spending merely as a way to reform election law, it would rightly be subject to criticism for "mission drift" or regulatory overreach. The petition, however, does not ask the SEC to do this.

Instead, the petition argues that in order to serve its function of protecting investors, the SEC should require disclosure of corporate political spending in order to reduce agency costs and managerial slack. The possibility that disclosure of such information may have incidental effects on the political landscape should not deter the commission from carrying out its important responsibilities. In fact, if the SEC chose not to adopt disclosure rules because of concerns about the potential political effects of providing investors with the information they need, that choice—rather than the choice to adopt rules—would reflect inappropriate consideration of political matters.

We agree with critics who contend that it would be inappropriate for an independent agency to take actions because one partisan group supports them or because it thinks such actions will achieve certain desired political effects. However, the fact that a given rule has more support in one party than the other, or that it might have consequences for the political balance, should not preclude its consideration by the SEC, provided that the SEC is motivated by investor protection. Indeed, if the SEC believes that a rule would serve to protect investors, its job is to adopt such a rule. In that case, if the SEC were to refrain from acting because the rule has disproportionate support across parties or because it could potentially have consequences for their relative power, that inaction would represent a failure of the SEC to carry out its responsibilities.

C. Cost-Benefit Analysis

Finally, critics of the petition contend that the SEC lacks authority to make rules in this area because any rule mandating disclosure of corporate political spending would fail the legally required cost-benefit analysis.[167] These critics claim that recent federal court decisions invalidating SEC rulemaking for failing to demonstrate that the benefits of the rule exceeded its costs suggest that rulemaking in this area would also be struck down on this basis.

Those advancing this objection focus especially on a 2011 case, *Business Roundtable v. SEC,* in which the D.C. Circuit applied a particularly stringent form of cost-benefit analysis in striking down the SEC's proxy ac-

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[167] *See, e.g.*, Atkins, *supra* note 9, at 370; Copland, *supra* note 9, at 385; Verret, *Response, supra* note 9, at 456; Guttentag, *supra* note 9, at 615.

cess rule.[168] They argue that, because the benefits of a rule requiring disclosure of corporate political spending would be outweighed by its costs, any such rule would also likely be invalidated by the courts. That is, even if the SEC formed the judgment that, overall, rules requiring disclosure of corporate political spending would be a good thing, the agency could not simply act on that educated judgment, but instead must be able to quantify the rule's costs and benefits and document them with empirical studies.

With regard to the rule's costs, those costs are not likely to be meaningful. As to opponents' claim that empirical studies are necessary to quantify every cost and benefit, we think that it would be an extreme and counterproductive view for the courts to take. For one thing, such studies would require assessment of counterfactual situations that do not actually exist.[169] Quantified cost-benefit analysis, in other words, would involve "guesstimates," leading to unreliable causal determinations.[170] In corporate governance and finance, conducting reliable studies is particularly challenging because of various methodological problems, including endogeneity. These challenges make it difficult to establish reliable causal findings in the context of quantified cost-benefit analysis.[171]

We also think that courts would, and should, be especially reluctant to strike down disclosure requirements for failure to pass cost-benefit analysis. If courts were to strike down a rule requiring disclosure of corporate political spending, we see no reason why they would not also have to strike down disclosure of executive compensation and many other disclosure rules. In each of these contexts, one can speculate about potential adverse effects that are theoretically possible, and the SEC, even though it might form the judgment that those effects are not meaningful, would not have any empirical studies to prove that such effects would not occur.

For example, a critic of executive compensation disclosure could speculate about undesirable results for compensation practices; indeed, some executive compensation disclosure requirements might lead to a reduction in certain salutary pay practices that are disfavored by shareholders, or those requirements could conceivably be used by special interests seeking to extract private gain at the expense of ordinary investors. However, although the SEC may judge that such results are inconsequential, it would not be able to marshal definitive empirical proof that such unlikely results would not in fact materialize. On this view, courts would have to strike down certain executive compensation disclosure requirements.

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[168] *See generally* Business Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

[169] *See* John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882 (2015) (making a similar argument with regard to cost benefit analysis of financial regulation).

[170] *Id.*

[171] *See generally*, Vladamir A. Atanasov & Bernard Black, *The Trouble with Instruments: Re-Examining Shock-Based IV Designs* (April 10, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2417689.

In addition to being undesirable, we also think that this extreme view of cost-benefit analysis is not required by law. For example, in a 2014 case, *National Association of Manufacturers v. SEC,* the D.C. Circuit seemed to pull away from the most stringent reading of *Business Roundtable*.[172] In particular, it rejected a claim that the SEC's conflict minerals rules, which require that certain public firms disclose the connection between their use of selected minerals and the armed conflict in the Democratic Republic of the Congo, fail to adequately analyze the costs and benefits of the rules.[173] Plaintiffs in that case placed heavy reliance on *Business Roundtable,* but the court rejected their claims, saying that "[a]n agency is not required to 'measure the immeasurable,' and need not conduct a 'rigorous, quantitative economic analysis unless [a] statute explicitly directs it to do so."[174]

This reading of *Business Roundtable* seems more consistent with the warning of the Supreme Court in *Fox Television Stations* ("[i]t is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can be readily obtained . . . . It is something else to insist upon obtaining the unobtainable").[175] The same interpretation of *Business Roundtable* was recently used in *Lindeen v. SEC,* which rejected the claim that the SEC, in issuing Regulation A+, had failed to show its actual benefits.[176] In particular, the Court held that the Commission "did not have the necessary data to quantify precisely the risks . . . for investors and the costs . . . for issuers" and therefore, since the SEC cannot be required to complete an impossible quantitative analysis, its "discussion of unquantifiable benefits fulfill[ed] its statutory obligation to consider and evaluate potential costs and benefits."[177]

We think that this view of cost-benefit analysis is superior to the one advanced by critics of the petition. Moreover, as we have explained, rules requiring disclosure of corporate spending on politics would convey significant benefits for investors. Such rules would give investors the information they have long been asking for at many public companies. They would also help ensure that corporate insiders make decisions in this area in a manner that is consistent with shareholder interests. Giving investors the information they need to monitor and evaluate how their money is being used in politics is a substantial benefit. Under a reasonable view of what cost-benefit analysis requires, an SEC rule requiring disclosure of corporate political spending should pass without much trouble.

[172] *See* National Ass'n of Mfrs. v. SEC, 748 F.3d 359 (D.C. Cir. 2014), *overruled by* Am. Meat Inst. v. USDA, 760 F.3d 18 (D.C. Cir. 2014) (en banc) (overruled on other grounds).

[173] *Id.*

[174] *Id.* at 16.

[175] FCC v. Fox TV Stations, Inc., 556 U.S. 502, 519 (2009).

[176] *See generally* Linden v. Securities and Exchange Commission, 825 F.3d 646 (D.C. Cir. 2016).

[177] *Id.* at 658 (quoting Inv. Co. Inst. v. CFTC, 720 F.3d 370, 379 (D.C. Cir. 2013)).

Conclusion

In the course of the heated debate over the disclosure of corporate political spending, opponents of mandatory disclosure have put forward a wide range of objections to an SEC rule requiring such disclosures. This Article has provided a comprehensive and detailed analysis of these objections.

Among other things, we examine claims that disclosure of political spending would be counterproductive or at least unnecessary, that any necessary provision of information would best be provided through voluntary disclosures of companies, and that SEC adoption of a disclosure rule would violate the First Amendment or would at least be institutionally inappropriate. We conclude that none of these objections provide, either individually or collectively, a solid basis for opposing a disclosure rule. When the subject is examined on the merits, we show that the case for keeping corporate political spending under investors' radar is untenable.