IN-DEPTH:
CORPORATE POLITICAL SPENDING

UPDATED MARCH 2016

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INTRODUCTION

Glass Lewis believes that a thoughtful disclosure and oversight policy regarding a company's political contributions, developed and overseen by the board, is an important component of corporate accountability. In our view, a rigorous oversight process can minimize a company's exposure to legal, reputational and financial risk by ensuring that donations are made in accordance with federal and state law, and that these donations are consistent with both a company's stated values and the long-term interests of the company.

For four consecutive years from 2010 to 2014, resolutions related to the political spending of a company were the most common shareholder proposal voted by shareholders at annual meetings in the U.S.; in 2015, these proposals were second only to proposals seeking proxy access. Many of these political spending proposals, particularly those seeking reports on political contributions and expenditures, received record levels of shareholder support. Given the dynamic regulatory environment that surrounds issues related to corporate political spending, and the reputational implications of such spending, investors have remained interested in disclosure of corporate political spending.

It is easy to see why companies, which now have the ability to spend vast sums on political causes, would want to donate to candidates who they believe would serve their business interests. Money, whatever the source, plays a significant role in political campaigns, as better-financed candidates can more easily spread their messages to voters and sway Election Day decisions. For example, in the 2014 midterm elections, the highest spender won in 94% of House races, and 82% of Senate races, an increase from 93% and 76%, respectively, in 2012.[1]

In light of the benefits that seem to accrue from making political contributions, the majority of large companies are engaging in political spending. Based on a political spending survey in 2010, nearly 60% of S&P 500 companies used funds from their corporate treasuries on political campaigns and as many as 80% of S&P 500 companies appeared to have spent some money on political campaigns, either from their corporate treasuries or through political action committees ("PACs").[2] According to the 2015 CPA-Zicklin report, only 17% of S&P 500 companies have policies which prohibit direct political contributions, and only 4% have policies which prohibit payment to trade associations. (p. 14)

In addition, corporations may be engaging in political spending through other means. Political organizations, many of which receive funding from corporations, have been empowered by the Supreme Court to spend more than ever before on elections and lobbying. The 2012 elections were, at the time, the most expensive in U.S. history, with total spending eclipsing $6 billion, exceeding previous election spending by more than $700 million. Spending in the presidential election alone totaled an estimated $2.6 billion. More than $528 million of this spending came from outside organizations, many of which are funded through corporate contributions.[3] Likewise, the 2014 midterm elections proved to be even more expensive, with total spending approaching $3.8 billion, despite the fact that the number of individual donors fell in comparison with the 2010 midterms.[4] Meanwhile, the rate of independent expenditures is also on the rise. Independent expenditures, defined as money spent on behalf of a candidate by individuals not affiliated with his or her campaign, increased 426% in the 2012 presidential election from the contest four

1 Domenico Montanaro, Rachel Wellford and Simone Pathe. "Money is a Pretty Good Predictor of Who Will Win Elections." *PBS*. November 11, 2014.

2 Heidi Welsh, Robin Young. "How Companies Influence Elections: Political Campaign Spending Patterns and Oversight at America's Largest Companies." Sustainable Investments Institute, IRRC Institute. October 14, 2010.

3 "2012 Election Spending Will Reach $6 Billion, Center for Responsive Politics Predicts." Center for Responsive Politics. October 31, 2012.

4 Russ Choma. "Final Tally: 2014's Midterm Was Most Expensive, With Fewer Donors." Center for Responsive Politics. February 18, 2015.

years earlier.[5] The 2016 election will continue this trend: both parties could spend twice as much as Mitt Romney and Barack Obama in 2012,[6] and even without individual donations close to $900 million, the election "is already on track to be the most expensive in history."[7]

Given the dramatic increase in aggregate political spending and the variety of ways in which companies may assert their political voice, it's not surprising that investors are growing more concerned with how companies are ensuring that political donations and activities are aligned with maximizing long-term shareholder value. Many investors have realized that increased political activity brings increased risk. This realization has intensified as the avenues through which companies can spend corporate funds to influence elections and legislation have expanded, primarily as a result of the 2010 Citizens United Supreme Court case.

CITIZENS UNITED V. FEDERAL ELECTION COMMISSION

In 2008, Citizens United, a conservative nonprofit group funded primarily through individual contributions, released a documentary called *Hillary: The Movie*. This film, which was highly critical of Hillary Clinton's candidacy for president, was released in theaters and on DVD. Showing the film in theaters or via DVD was not restricted under the Bipartisan Campaign Reform Act ("BCRA" or "McCain-Feingold Act"). But the legality of the group's attempt to make the film available as a video-on-demand cable selection and to run commercials for the movie on television was challenged. The BCRA restricted corporations and labor unions from using general treasury revenue to engage in "electioneering communications" 30 days before a primary election or 60 days before a general election.[8] The BCRA also specifically restricted any broadcast, cable or satellite communication that could be received by at least 50,000 people and that referred to "a clearly identified candidate for federal office."

After it was prohibited from airing the film using video-on-demand capabilities, Citizens United sued the Federal Election Commission ("FEC"), claiming that video-on-demand was not a mass airing as defined by the BCRA. The case was subsequently appealed to the Supreme Court in November 2008. On January 20, 2010, the court ruled in favor of Citizens United, in a 5-4 decision that overturned a variety of earlier decisions and invalidated several state laws and federal acts. The new ruling rejected distinctions of applicability of the First Amendment based on the identity of the speaker, essentially giving corporations the same political spending and political speech protection under the First Amendment as that afforded to an individual. Fundamentally, *Citizens United v. Federal Election Commission* found that corporate funding of independent political broadcasts in candidate elections is protected under the First Amendment and therefore may not be restricted.[9]

As a result of this ruling, advocacy organizations have significantly greater freedom to run television ads and fewer restrictions on the permissible language in those ads.[10] Further, corporations and labor unions for the first time can use money from their general treasuries to pay for political ads that expressly call for the election or defeat of a specific candidate and to donate unlimited amounts to various organizations, groups and committees.[11] Citizens United did not impact direct corporate contributions to national political parties and committees

5 Michael Rocca, Windy L. Hansen, Brittany Ortiz. "The Effects of Citizens United on Corporate Contributions in the 2012 Presidential Election." ASPSA 2013 Annual Meeting Paper. 2013.
6 Albert Hunt, "How Record Spending Will Effect 2016 Election." *Bloomberg*. April 26, 2015.
7 Nicholas Confessore, "Koch Brothers' Budget of $889 Million for 2016 is on Par with Both Parties Spending." *New York Times*. January 26, 2015.

8 H.R. 2356. "Bipartisan Campaign Reform Act of 2002."
9 "A Free Speech Landmark." *Wall Street Journal*. January 22, 2010. See also *Citizens United v. FEC*., 558 U.S. 310, 35 (2010), (stating "The First Amendment protects...speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas").
10 Katrina Vanden Heuvel. "Citizens United Aftershocks." *The Washington Post*. August 25, 2010.
11 Spencer MacColl. "Citizens United Decision Profoundly Affects Political Landscape." Center for Responsive Politics. May 5, 2011.

controlled by federal officeholders, which are prohibited under federal law. Currently, federal law caps an individual's donations to a single federal candidate at $2,700 per election, while companies can donate up to $5,000 per election to candidates through PACs funded by voluntary employee donations.[12] While an Eastern Virginia judge attempted to overturn these restrictions in 2011, based on the Citizens United ruling,[13] a federal appeals court overturned this decision, ruling that allowing corporations to make direct contributions to candidates "ignores the well-established principle that independent expenditures and direct contributions are subject to different government interests."[14] The Supreme Court allowed this ruling to stand by rejecting the petition for a writ of certiorari in 2013.[15]

In October 2013, campaign finance laws were again debated at the Supreme Court in the case of *Shaun McCutcheon v. Federal Election Commission*. In this case, Mr. McCutcheon wanted to donate more than was allowed by laws capping donations to candidates and certain political committees, which he argued was a violation of the First Amendment. Prior to this case, FEC laws stated that individuals were subject to biennial limits on contributions. Specifically, individuals had: (i) a $48,600 limit on contributions to candidate committees; and (ii) a $74,600 limit in contributions to any other committees, of which no more than $48,600 may be given to committees that are not national party committees. In addition to these limitations, individuals were restricted from giving more than $2,600 to a specific candidate for federal office, per election per cycle.[16] In April 2014, the Supreme Court ruled against the FEC and struck down the aggregate limit on contributions that may be made by individuals, while leaving the limits on contributions to specific candidates or PACs in place.[17] As a result, individuals are free to contribute to as many separate candidates and committees as they wish. The issue of caps on contributions was not addressed by Citizens United. McCutcheon, which Richard L. Hasen, an expert on election law at the University of California, Irvine, states "could be the start of chipping away at contribution limits," may represent a fundamental reassessment of *Buckley v. Valeo*, which stated that contributions could be regulated more strictly than expenditures as a result of their potential for corruption.[18] Following the Supreme Court hearing on McCutcheon, President Obama stated that removing overall limits on political contributions could potentially destroy what was left of campaign finance regulation and that it "would say anything goes: there are no rules in terms of how to finance campaigns."[19]

While corporations are currently still restricted from donating to individual federal candidates, there are several other mechanisms by which they may engage in the political process, including political action committees; organizations registered under 26 USC §527 of the Internal Revenue Code ("527 organizations"); 501(c)(4) organizations ("social welfare groups"); trade associations; direct corporate contributions; and through direct lobbying.

POLITICAL ACTION COMMITTEES

Political action committees are private organizations, typically established by corporations or trade associations, which contribute more than $1,000 for the purpose of influencing an election. Corporate-sponsored PACs are generally only able to receive funding through voluntary employee or member contributions. These PACs are able to donate up to $5,000 to a single candidate and up to $15,000 to a political party per

12 "Contribution Limits for 2015-2016 Federal Elections." Federal Election Commission. February 2015.
13 Brody Mullins. "Judge Upholds His Ruling to Let Companies Donate to Candidates." *Wall Street Journal*. June 7, 2011.
14 Andrew Longstreth. "Court Upholds Ban on Corporate Political Contributions." *Thomson Reuters News & Insight*. June 28, 2012.
15 Erin Fuchs, "The Supreme Court Won't Let Corporations Line Politicians' Pockets." *Business Insider*. February 25, 2013.
16 *McCutcheon v. FEC*, 134 S.Ct. 1434, 4-5 (2013).
17 "McCutcheon, et al. v. FEC." Federal Election Commission.
18 Adam Liptak. "Justices Take on Overall Limit to Political Donations." *New York Times*. February 19, 2013.
19 Adam Liptak. "Supreme Court Again Weighs Spending Limits in Campaigns." *New York Times*. October 8, 2013.

each election.[20] Over the past several years, a new type of PAC has emerged, commonly referred to as a "super PAC." In July 2010, the federal court ruling in *SpeechNow.org v. Federal Election Commission* effectively loosened restrictions regarding political spending and has allowed these super PACs to raise unlimited amounts of money from any source, provided that the donors are disclosed and that funds are only spent on independent expenditures. Essentially, while super PACs are unable to donate directly to any candidate, they are allowed to raise unlimited sums from companies, unions, associations and individuals, and to spend unlimited sums to advocate for or against political candidates.

The emergence of these super PACs has resulted in massive amounts of political funding. For example, during the 2010 election cycle, 83 groups organized as super PACs reported total expenditures of more than $62 million. Moreover, this spending is growing increasing rapidly: During the 2012 election cycle 1,310 groups organized as super PACs reported total independent expenditures in excess of $609 million, while during the 2014 midterm cycle, 1,360 groups made expenditures of almost $350 million.[21] As of March 2016, 2,222 groups organized as super PACs have already reported spending in excess of $240 million in the 2016 cycle.

Leadership PACs

Another type of PAC that has been receiving significant media attention is the "leadership PAC." According to the FEC, these PACs are established as "nonconnected committees... [designed] to support candidates for various federal and nonfederal offices" and are "directly or indirectly established, financed, maintained or controlled by a candidate or an individual holding federal office," but are not an authorized committee of the candidate or office holder and are not affiliated with an authorized committee of a candidate or officeholder. Leadership PACs must disclose contributions beyond a certain threshold if they have been bundled by a lobbyist or registrant PAC.[22]

Individuals are allowed to donate up to $5,000 annually to a members' leadership PAC, contributions that can be made in addition to the maximum donation to the members' campaign committee. In addition, leadership PACs can contribute up to $5,000 per election to their sponsor's campaign committee, thus allowing both direct and indirect benefits to a politician who maintains such a PAC.[23]

According to the Center for Responsive Politics, a nonpartisan research group that tracks money in U.S. politics and its effect on elections and public policy, leadership PACs are designed for two things: "to make money and to make friends." These PACs typically fund travel expenses, office expenses, consultants, polling and other non-campaign expenses. Additionally, the funds may be used to fund other candidates' campaigns or to donate to other candidates because they are seeking a leadership position in Congress or a higher office.[24]

Although leadership PACs are designed to fund campaign expenditures and expenditures associated with holding office, many argue that these PACs ostensibly act as personal expense accounts for politicians. According to Melanie Sloan, the executive director of Citizens for Responsibility and Ethics in Washington, when individuals make contributions to politicians, "they are doing it because they are in sync with that member of Congress's views and they want to see them pushing policies and getting reelected... [they likely don't] have any idea that some of that money is going into the member's personal bank account."[25] However, these donations appear to be doing just that. According to Trevor Potter,

20 "Contribution Limits for 2015-2016 Federal Elections." Federal Election Commission. March 2015.
21 "Super PACs." Center for Responsive Politics.

22 "Metadata Description of Leadership PAC List." Federal Election Commission.
23 "Leadership PACs: Background." Center for Responsive Politics.
24 "Leadership PACs: Background." Center for Responsive Politics. October 2010.
25 Steve Kroft. "Washington's Open Secret: Profitable PACs." *60 Minutes*. October 21, 2013.

a former chairman of the FEC, leadership PACs are now the second largest political revenue stream for members of Congress, and these members will use the funds from their leadership PACs "in retirement for everything that is vaguely a political expense. If they become a lobbyist, which about half of members who leave Congress do nowadays, that becomes their lobbying slush fund. So it just keeps going, at least until death."[26]

Despite the problematic nature of leadership PACs and the reputational downside potential for donating funds to these PACs,[27] they are a growing phenomenon. During the 1998 election cycle, there were 120 leadership PACs; in 2014, there were 557, which received more than $125 million during the midterm cycle, and spent $123 million, including more than $47 million in direct campaign contributions.[28] According to Geoffrey Skelley, a political analyst for the University of Virginia's Center for Politics, "a very large number" of sitting senators use leadership PACs.[29]

TRADE ASSOCIATIONS

Companies are often members of trade associations or trade groups, which frequently spend large amounts of money on political donations or lobbying as a means of corporate political action. For example, according to the Center for Responsive Politics, the U.S. Chamber of Commerce ("the Chamber"), one of the largest and most politically active trade associations, reported more than $136 million in total reported lobbying expenditures in 2012, more than $124 million in 2014, and nearly $85 million in 2015.[30]

Corporate donations to trade associations can have financial implications for shareholders. Under Section 162(e)(1) of the Internal Revenue Code, members of trade associations are not allowed to deduct the part of their dues or payments to these groups that are used for political ends. While trade associations are required by law to provide member companies estimates of the proportion of their payments that will be used for political purposes in compliance with the Internal Revenue Code, trade associations are not required to provide a breakdown of the recipients of these expenditures. Additionally, trade associations are able to pay a tax, referred to as a proxy tax, which is the highest rate imposed by the Internal Revenue Code, in lieu of providing member companies with a breakdown of their expenditures.[31] Given current regulations, tracking these expenditures to political causes through trade associations can often be nearly impossible, leaving corporations unable to determine which, if any, causes or campaigns their dues or donations supported. Further, not all donations or membership dues paid by companies to trade associations are used for strictly political purposes. Therefore, it is difficult to assess the outcomes or benefits of donations or their effects on long-term shareholder value.

Assessment is particularly difficult given the low levels of corporate disclosure of trade association payments. In a 2015 report, the Center for Political Accountability, a nonpartisan, nonprofit group that works with shareholder advocates to directly engage companies to improve disclosure and oversight of political activities, found that 204 S&P 500 companies (41%) either disclosed some level of payments to politically active trade associations, or stated that they instructed trade associations not to use their payments for political purposes.[32]

26 Steve Kroft. "Washington's Open Secret: Profitable PACs." *60 Minutes*. October 21, 2013.
27 *See, e.g.* Alexander Borisov, Eitan Goldman and Nandini, Gupta. "The Corporate Value of (Corrupt) Lobbying." European Corporate Governance Institute. September 20, 2014) (finding that firms which spend $100,000 or more on PACs and other forms of lobbying experienced, on average, a loss of $1.2 million in value when lobbyist Jack Abramoff pleaded guilty to bribing politicians).
28 "2014 Leadership PACs and Sponsors." Federal Election Commission.
29 James Nord. "Rounds Create Leadership PAC to Help Like-minded Lawmakers." *USA Today*. July 21, 2015.
30 "Summary: U.S. Chamber of Commerce." Center for Responsive Politics.
31 Internal Revenue Service. "Proxy Tax: Tax-exempt Organization Fails to Notify Members that Dues are Nondeductible Lobbying/Political Expenditures." December 17 ,2015. *See also* 26 USC §6033(e)(2).
32 "The 2015 CPA-Zicklin Index of Corporate Political Disclosure and Accountability." Center for Political Accountability, The Carol and Lawrence Zicklin Center for Business Ethics Research at the Wharton School. October 2015.

In an effort to address issues related to corporate contributions to trade associations, investors have begun to engage companies in order to evaluate their roles in trade associations and to assess the risks and benefits of association with and donations to these organizations. For example, in January 2011, a coalition of 44 investors and investment organizations, representing approximately $43 billion in assets, wrote letters to 35 major corporations that served on the board of the U.S. Chamber of Commerce, requesting that the companies engage with the Chamber in order to address its policy on climate change legislation. In letters sent to ConocoPhillips, the coalition wrote that the Chamber's history on climate change is "particularly disturbing" and that it has a history of lobbying extensively for anti-regulatory campaigns. The investors also cited examples of companies, such as Apple, Exelon and PG&E, that withdrew their Chamber membership due to the Chamber's position on climate change and concerns that companies' dues to the Chamber were being used for lobbying or political purposes contrary to their beliefs and values.[33]

This type of engagement has grown as issues related to corporate contributions to trade associations gain more attention from mainstream investors, particularly considering the potential risks associated with companies' performing leadership roles in trade associations that hold controversial views or positions that contradict those publicly stated by their membership. For example, in August 2015, in the wake of the Obama Administrations announcement of its Clean Power Plan to combat climate change, 60 investors and investment organizations representing more than $320 billion in assets sent a letter asking companies to use their "leverage" with the Chamber "to encourage the organization to step back from its campaign against the ... Clean Power Plan."[34]

LOBBYING

Lobbying is becoming an increasingly popular form of corporate political activism. Companies, unions and other organizations spend billions of dollars annually to lobby Congress and federal agencies, often at a far higher rate than their political contributions. During the 2010 election cycle, roughly $3.6 billion was spent on federal elections, versus approximate spending of $7.5 billion on lobbying. Of these figures, corporate spending accounted for approximately 10% ($350 million) of federal campaign expenditures and at least 68% ($5.1 billion) of federal lobbying expenditures. This phenomenon was echoed by the U.S. Chamber of Commerce, which, during the same election cycle, spent $33 million on PAC contributions and independent expenditures and $302 million on lobbying. Given this spending, it is unsurprising that lobbying has been found to be the primary means in which corporations influence policy in their favor.[35]

However, unlike corporate political contributions, companies are required to report and make publicly available information regarding their lobbying activities. Under the Lobbying Disclosure Act of 1995, companies that hire lobbyists must file Lobbying Disclosure Act ("LDA") reports that provide good-faith estimates, rounded to the nearest $10,000, of all lobbying-related expenditures in a six-month period. Organizations that spend less than $12,500 lobbying in a quarter are exempt from such disclosure.[36]

However, this disclosure only covers direct lobbying activities - those in which companies engage the services of professional lobbyists to influence legislation; it does not include information regarding activities constituting indirect lobbying, also known as grassroots lobbying. Grassroots lobbying, which has become increasingly popular in the last several years, commonly refers to attempts

33 Walden Asset Management. "Press Release: Investors Call on Companies Sitting on the U.S. Chamber of Commerce Board to Evaluate Their Role." January 31, 2011.
34 Walden Asset Management, "Investors Ask Corporate Supporters of the U.S. Chamber of Commerce to Oppose the Organization's Efforts to Thwart the Environmental Protection Agency's Clean Power Plan." August 28, 2015.
35 Adam Bonica. "Avenues of Influence: On the Political Expenditures of Corporations and Their Directors and Executives." Stanford University. September 15 2015.
36 2 U.S.C. § 1601. *See also* "Lobbying: Methodology." Center for Responsive Politics.

to influence public opinion of certain issues and encourage action with respect to relevant legislation. Rather than being undertaken by professional lobbyists, this type of lobbying is most commonly undertaken by advocacy groups and social welfare organizations.

ADVOCACY GROUPS

527 Organizations and Social Welfare Organizations

Another mechanism by which political funds are disseminated is advocacy groups, particularly 527 organizations. These organizations are typically parties, candidates, committees or associations organized to influence a federal, state or local issue, policy, appointment or election. These tax-exempt groups are able to raise an unlimited amount of funds from individuals, corporations or labor unions and must register with the IRS and disclose their contributions and expenditures unless: (i) it is a political party, a PAC or engages in express advocacy of the election or defeat of a candidate, in which case it would be required to file with the FEC; (ii) it is a state or local candidate or party committee; or (iii) it is an organization that anticipates gross annual receipts of less than $25,000.[37]

Another type of advocacy group is a 501(c)(4) organization, commonly called a social welfare organization. These groups are allowed to engage in political activities as long as that is not their primary purpose. The rule of thumb typically applied to these organizations is that they are allowed to spend up to 49% of their money directly attacking or promoting candidates for office.[38] However, regulation of these entities is generally lax because, historically, neither the IRS nor the FEC appears to have examined them closely. Further, as these groups are not required to file their first tax forms until more than a year after they begin activity, the IRS is unlikely to know of many of these groups' existence.[39]

While both 501(c)(4) and 527 organizations are able to raise unlimited amounts of funds and are tax-exempt, a distinguishing difference is that 501(c)(4) organizations are not required to disclose their donors, while 527 organizations are. Thus, social welfare organizations play an increasingly important role in elections because they allow individuals and corporations to make unlimited anonymous donations to issues, causes, or, essentially, politicians. For example, of the $226.4 million spent by outside groups in the 2010 elections, those that did not reveal any details about their funders spent approximately $136 million, almost twice the amount spent by such groups in 2006.[40] By 2014, spending among these groups had grown to over $173 million.[41] Moreover, the number of these organizations is growing rapidly. In the year ended September 30, 2010, the IRS received 1,741 applications from social welfare organizations requesting tax-exempt status; two years later, that figure was 2,774.[42] This means that there are an increasing number of organizations with limited disclosure requirements entering the political sphere, potentially creating more risks for investors concerned about companies' political activities.

Despite different disclosure requirements of these two groups, both are often funded through contributions of "soft money" – money donated in a way that avoids federal regulation or limits – and both typically attempt to influence elections through "issue ads." Ads are determined to be issue ads if they do not use what a Supreme Court footnote in *Buckley v. Valeo* deemed "magic words," such as "vote for," "vote against," "elect" or "defeat."[43] However, these ads are, more often than not, thinly veiled attacks on

37 26 U.S.C. § 527. *See also* "527 Basics." Center for Responsive Politics.
38 Peter Overby. "For Tax-Exempt Groups, How Much Politics is Too Much?" *NPR*. May 13, 2013.
39 Michael Luo, Stephanie Strom. "Donor Names Remain Secret as Rules Shift." *New York Times*. September 20, 2010.
40 John C. Coates, IV, Taylor Lincoln. "Fulfilling Kennedy's Promise: Why the SEC Should Mandate Disclosure of Corporate Political Activity." Harvard Law School, Public Citizen. July 27, 2011.
41 "2014 Outside Spending, by Group." Center for Responsive Politics. Accessed February 18, 2015.
42 Steven Rattner. "Behind the I.R.S. Mess: A Campaign-Finance Scandal." *New York Times*. May 16, 2013.
43 *Buckley v. Valeo*, 387 F. Supp. 135. *See also* "Straight Talk on Campaign Finance: Separating Fact from Fiction Paper No. 5." Brennan Center for Justice at New York University School of Law. January 1, 2000.

or promotions of candidates. As an example, the Brennan Center for Justice at New York University Law School cites a 2000 issue ad titled "Is That the Change You Want." The ad, it noted, "concludes with, 'Eight Nobel Prize winners in economics warn: George W. Bush's plans exhaust the surplus and do not add up. Is that the economic change you want?' Nowhere does the ad say 'vote against George W. Bush.' Yet no viewer could possibly miss that message. Since the ad forgoes magic words, the Democratic Party claimed this commercial was an issue ad and paid for it with unregulated soft money."[44]

As the line between candidate ads and issue ads has blurred, companies that have donated to some of these groups may face significant reputational risks. While these organizations may be funded through soft money or may legally not be required to disclose their donors, questionable actions on behalf of these groups could cause the release of information regarding their donors. For example, in November 2012, a Montana judge allowed the release of the bank records of the Western Tradition Partnership ("WTP"), a 501(c)(4) organization that had been extensively involved in recent Montana elections. According to WTP documents released during that investigation, the group touts to potential donors that "corporate contributions are completely legal," and that "Montana has very strict limits on contributions to candidates, but there is no limit to how much you can give to this program." The group further states that, "unlike every other type of political advocacy organization, [it] is not required to report the name or the amount of any contribution that [it] receives. The Supreme Court has repeatedly affirmed the right to lobby on the issues anonymously," it continues, stating that if donors "decide to support this program, no politician, no bureaucrat and no radical environmentalist will ever know you helped make this program possible... [Donors] can just sit back on election night and see what a difference [they've] made."[45] According to ProPublica and PBS, the parties who investigated WTP and requested the release of their records from the Montana courts, "[i]t was the first time that a court has ordered a modern dark money group's donors to be made public, firing a warning shot to similar organizations involved in politics."[46]

If this judicial order stands as a precedent, it may not be the last time a social welfare organization is required to reveal its donors. Given that possibility, companies should ensure that they thoroughly vet organizations to which they make contributions in order to mitigate any potential reputational risks that they may face should their contributions be revealed.

In an attempt to remedy the historically lax oversight afforded to these advocacy organizations, in November 2013 the Treasury Department and the Internal Revenue Service announced proposed rules that would expand and clarify how the IRS defines political activity and establish clearer limits for how politically active 501(c)(4) organizations may be. For example, under these proposed rules, candidate events or any ads that mention a candidate within 60 days of an election would be excluded from the definition of "social welfare."[47] This would be a stark departure from the status quo, as the IRS has never formally specified what types of spending are classified as political or non-political. However, a recent bill proposed in January 2015 by congressional Republicans would forbid the IRS from issuing new rules for the groups until 2017, so that pending congressional investigations would be able to contribute to the rulemaking.[48] After generating the most comments ever received by an IRS and Treasury proposal, the Commissioner has stated that it is

44 "Straight Talk on Campaign Finance: Separating Fact from Fiction Paper No. 5." Brennan Center for Justice at New York University School of Law. January 1, 2000.

45 Western Tradition Partnership. "2010 Election Year Program Executive Briefing."

46 Sarah Tory. "Judge Reveals 'Dark Money' Donors." *Slate*. November 5, 2012.

47 Nicholas Confessore. "New Rules Would Rein In Nonprofits' Political Role." *New York Times*. November 26, 2013.

48 Bernie Becker. "Republicans Intensify Battle with IRS." *The Hill*. January 28, 2015.

reviewing the proposed regulation but is still "committed to providing updated standards for tax-exemption."[49] Given the politically-charged climate surrounding their status, and the legal uncertainties of their classification, companies should carefully consider any donations to or involvement with such groups.

The American Legislative Exchange Council ("ALEC")

Another advocacy organization that has gained significant attention from media and investors in recent years is the American Legislative Exchange Council ("ALEC"), which is registered as a 501(c)(3) organization. Similar to 501(c)(4) organizations, 501(c)(3) organizations are nonprofit groups focused on benefiting society, specifically through religious, charitable or educational means. However, 501(c)(3) organizations are much more restricted in the amounts of lobbying and advocacy they may do and they are not permitted to engage in activities directly related to elections. Further, although both 501(c)(4) organizations and 501(c)(3) organizations are tax-exempt, only 501(c)(3) organizations can receive tax-deductible contributions.

According to its website, ALEC "is America's largest nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free markets and federalism."[50] In practice, ALEC's members, who include corporations, draft model legislation on a wide variety of issues. ALEC, which had promoted controversial bills regarding "stand your ground" self-defense provisions, came to national attention following the 2012 fatal shooting of Trayvon Martin, an unarmed 17-year-old African-American. As media reports spread regarding Martin's shooting and stand your ground laws, some version of which had been adopted by 26 states, companies associated with ALEC soon came under fire from activist groups and the media. In response, many companies, including Coca-Cola, Kraft Foods and McDonald's, quickly dropped their association with ALEC.[51]

ALEC has disbanded the task force that drafted the stand your ground legislation, but companies' associations with ALEC have caused significant reputational concerns for many investors. A group of 40 investors sent letters to 49 major companies about their membership in ALEC. In the letters, the investors urged the companies to "reconsider the business rationale for continuing a relationship with [ALEC]." Over the past few years, ALEC has lost numerous corporate members and hundreds of state legislators, and is facing a crisis of funding as a result of the controversy.[52]

EFFECTS OF CITIZENS UNITED ON CORPORATE POLITICAL SPENDING

Shortly after the Citizens United ruling, many believed corporate interests would overrun those of citizens. However, according to a political scientist at the University of Michigan, even with Citizens United, the power of the business lobby has been waning since the 1970s, when it succeeded in beating back government regulation and organized labor. Since that time, he suggests that corporations have turned to narrow individual agendas and have gradually lost force as a collective power that could enforce its dictates on political parties.[53] Further, recent research has found that corporate funds may not be to blame for the drastic increase in political spending. During the 2012 election cycle, only a handful of mostly privately owned corporations spent approximately $75 million from their treasuries on federal elections. That totaled only 1% of the estimated $6 billion in spending during the 2012 election cycle. Moreover, nonprofit

49 "IRS Update on the Proposed New Regulation on 501(c)(4) Organizations." IRS. May 22, 2014.
50 American Legislative Council. "About ALEC."
51 Arian Campo-Flores, Joe Palazzo, Mike Estrel. "'Stand Your Ground' Backer Retreats, and New Bills Stall." *Wall Street Journal*. April 17, 2012.
52 Ed Pilkington and Suzanne Goldenberg. "ALEC Facing Funding Crisis from Donor Exodus in Wake of Trayvon Martin Row." *The Guardian*. December 3, 2013.
53 Eduardo Porter. "Business Losing Clout in a G.O.P. Moving Right." *New York Times*. September 3, 2013.

spending accounted for, at most, only $375 million of the total spending in 2012, falling short of the anticipated amounts.[54]

A 2013 study concluded that the post-Citizens United increase in spending was largely due to individual, not corporate, contributions. The study found that the spending behavior of the largest U.S. companies remained similar between 2008 and 2012; PAC spending remained constant, there was not spending on electioneering communications from the general treasury and only 9 of the more than 500 companies reviewed gave to super PACs. However, the study's authors noted that they were unable to study corporations' donations to nonprofit groups, and an official analysis of this issue would be impossible without improved transparency requirements for these organizations.[55]

It is possible that these donations are being made by companies under the guise of personal expenditures by their executives. A University of Texas at Austin study found executives and company-sponsored PACs make campaign contribution decisions as if they share a joint utility function. The researchers demonstrated that one of the reasons individuals make more significant campaign contributions when they serve in leadership roles is that they are giving strategically on behalf of their organization, rather than giving only in-line with their personal preferences.[56] However, a separate study disputes those findings. Adam Bonica, a political scientist at Stanford, found that the political preferences of those at the tops of large organizations typically span the ideological spectrum, suggesting that either the choices of which candidates to support primarily reflects the donor's personal preferences or that these individuals do not share a mutual understanding of which candidates and policies are in the best interests of their respective companies. Specifically, Bonica found that corporate political spending tended to be slightly more pro-Republican than the partisan center. However, the spending of corporate executives tends to create an inverse bell curve, with the most spending falling into either heavily Democratic or heavily Republican causes. The author suggests that this ideological diversity "protects citizens from corporate funded elections."[57]

ACADEMIC RESEARCH REGARDING CORPORATE POLITICAL SPENDING

Many have argued that the most direct effects of corporate political spending and activity are seen at a reputational level. As the reputational effects of such spending and activity can be extremely difficult to quantify, it can be challenging for investors to accurately gauge how and to what degree they should intervene in companies' decisions on political spending and its disclosure. However, over the past several years, academics have tried to measure the impacts of political activity and disclosure on corporate performance.

Political Spending May be Related to Corporate Governance Practices

Corporate political activity and related disclosure could arguably be seen as a proxy for overall corporate governance. This is supported by a 2012 study that suggested that corporate political donations could be symptomatic of agency problems within corporations, finding that an increase of $10,000 in corporate political spending is associated with a reduction in excess returns of 7.4 basis points. It also suggested that poor corporate governance practices are associated with larger political donations. The researchers further found that firms that make corporate political donations are more likely to engage in acquisitions than

54 Adam Bonica. "Avenues of Influence: On the Political Expenditures of Corporations and Their Directors and Executives." Department of Political Science, Stanford University. June 20, 2014.

55 Michael Rocca, Windy L. Hansen, Brittany Ortiz. "The Effects of Citizens United on Corporate Contributions in the 2012 Presidential Election." American Political Science Association. 2013 Annual Meeting Paper. 2013.

56 Brian Kelleher Richter, Timothy Werner. "Campaign Contributions from Corporate Executives in Lieu of Political Action Committees." July 12, 2013.

57 Adam Bonica. "Avenues of Influence: On the Political Expenditures of Corporations and Their Directors and Executives." June 20, 2014; Eduardo Porter. "How Companies and Executives Diverge Politically." *New York Times*. September 4, 2013.

firms that do not and that the acquisitions performed worse than those made by firms that do not participate in corporate political spending, as measured by cumulative abnormal announcement returns.[58]

Political activity may also be indicative of factors related to effective management and oversight, as suggested by a 2011 study by a researcher at the University of Western Ontario, which found a relationship between corporate social responsibility, corporate political activity and firm value. The study found that the most lobbying occurs at firms that are either the most or the least socially responsible and that the interaction between a firm's level of corporate social responsibility and its lobbying intensity appears to increase firm value. The authors suggest that a firm's corporate social responsibility activities "work as an economic complement to its political activity rather than a substitute — jointly the two types of non-market behavior increase a firm's value, while independently each activity is more difficult to reconcile and perhaps may simply be symptomatic of some other inherently unobservable firm-fixed characteristic such as 'good management.'"[59] In a similar vein, one 2015 study, which looked specifically at environmental issues, proposes a "U-shaped relationship between issue performance and political activity. That is, while the conventional view states that 'dirty' firms will increase their political activity to stop regulation, 'green' firms can also benefit from such activity because more stringent regulations are to their benefit.[60]

Other researchers have further demonstrated the link between effective management of corporate resources and political activity. For example, a recent Harvard Law School study found that in industries that are not heavily regulated or dependent upon government, corporate political activity could be associated with weaker shareholder rights, greater signs of managerial agency costs, such as corporate jet use by CEOs, and lower corporate value, as measured by industry-relative Tobin's Q.[61] This trend was reiterated in a 2013 study suggesting that CEO pay is positively correlated with the incidence of lobbying.[62]

Further studies have also supported the notion that more political activity is directly correlated with weak corporate governance practices. In 2010, a Harvard study found that, for the period 1998-2004, strong corporate governance practices were strongly and consistently negatively related to observable corporate political activity, and that such activity negatively related to firm value. The study concludes that its findings "together with the likelihood that unobservable political activity is even more harmful to shareholder interests imply that laws that replace the shareholder protections removed by Citizens United would be valuable to shareholders."[63]

Perhaps in an effort to mitigate the governance risks and capitalize on the opportunities associated with corporate political activity, companies appear to be increasingly adopting more stringent oversight of political spending. A 2011 review by the Sustainable Investments Institute found that in 2011, 31% of S&P 500 companies had explicit board oversight of corporate political spending, a 23% increase from the prior year. However, those S&P 500 companies that provide explicit board oversight of political spending, on average, engage in 30% more corporate political spending than their peers, when controlled for size of revenue.[64]

58 Rajesh K. Aggarwal, Felix Meschke, Tracy Wang. "Corporate Political Contributions: Investment or Agency?" American Finance Association Meeting Paper. April, 2012.
59 Brian Kelleher Richter. "'Good' and 'Evil': The Relationship Between Corporate Social Responsibility and Corporate Political Activity." University of Western Ontario. June 24, 2011.
60 Magali Delmas, Jinghui Lim, Nicholas Nairn-Birch. "Corporate Environmental Performance and Lobbying." Academy of Management Discoveries, Forthcoming. May 6, 2015.
61 John C. Coates, IV. "Corporate Politics, Governance, and Value Before and After Citizens United." Journal of Empirical Legal Studies, Vol. 9, Issue 4. December 2012.
62 Hollis Skaife, David Veenman and Timothy Werner. "Corporate Lobbying and CEO Pay." October 15, 2013.
63 John C. Coates, IV. "Corporate Governance and Corporate Political Activity: What Effect Will Citizens United Have on Shareholder Wealth?" Harvard's John M. Olin Center for Law, Economics, and Business. September 21, 2010.
64 Heidi Welsh, Robin Young. "Corporate Governance of Political Expenditures: 2011 Benchmark Report on S&P 500 Companies." Sustainable Investments Institute. November 2011.

Political Activity Boosting Corporate Performance

Some researchers have found that corporate political activity may be in shareholders' best interests. For example, in one study of firm-level contributions to U.S. political campaigns from 1979 to 2004, researchers found that measures of support for candidates were positively and significantly correlated with a cross-section of future returns. This was especially the case when those contributions went to a large number of candidates in the same state as the contributing firm.[65] Further, a 2013 study by a researcher from the London Business School found that the loss of a Senate connection to a politician who sits on the committee responsible for overseeing discretionary government spending leads to an average decrease in future sales of $1.9 billion, suggesting that campaign contributions made by firms represent investments in political capital and can have significant value to companies.[66]

Additionally, lobbying may play a key role in ensuring positive corporate performance. A 2011 study found that firms that spend more on lobbying have higher market valuations relative to firms with smaller lobbying expenditures, suggesting that engaging in lobbying activities may be a strategically effective way for some companies to increase firm value.[67] One benefit of political activity may be seen in reduced taxes. A 2008 study published in the *American Journal of Political Science* found that, on average, companies with higher lobbying expenditures in one year generally pay lower effective tax rates the following year. Specifically, the researchers found that increasing registered lobbying expenditures by 1% appears to lower effective tax rates by 0.5 to 1.6 percentage points for the average firm that engages in lobbying activities.[68] This could be due to more aggressive tax strategies for politically active firms. A 2013 study found evidence that corporate political connections, including the employment of former politicians as directors, corporate campaign contributions and lobbying, are associated with higher levels of aggressive tax avoidance strategies. The study's authors suggest that politically connected companies can afford more complicated and aggressive tax planning because they face lower costs of tax aggressiveness in the form of lower capital market pressure for transparency.[69] However, it should be noted that a separate recent study found that while lobbying activities tend to increase firm value, a portion of this value may be attributed to corruption. The researchers also note that they observed "a negative market response to legislative restrictions on corrupt practices, which…suggests that stock market participants view corrupt lobbying as value-enhancing."[70]

A 2014 study on corporate lobbying and firm performance confirms this finding. Looking at public lobbying data in a pooled regression, this study found "that lobbying expenditures are on average positively correlated with financial performance." The study further found that firms with the highest lobbying intensities outperformed the benchmarks of non-lobbying firms, but qualifies its statement by noting that lobbying presents in discrete opportunities, is firm-specific and may also have a negative signaling effect in the current political climate.[71]

Politically active companies may also be adopting strategies to mitigate the risks of such activity, according to an October 2011

65 Michael J. Cooper, Huseyin Gulen, Alexei V. Ovtchinnikov. "Corporate Political Contributions and Stock Returns." September 26, 2008

66 Pat Akey. "Valuing Changes in Political Networks: Evidence from Campaign Contributions to Close Congressional Elections." London Business School. November 2013.

67 Matthew D. Hill, G. W. Kelly, G. Brandon Lockhart, Robert A. Van Ness. "Determinants and Effects of Corporate Lobbying." June 28, 2013.

68 Brian Kelleher Richter, Krislert Samphantharak, Jeffrey F. Timmons. "Lobbying and Taxes." American Journal of Political Science, Vol. 53, Issue 4. October 22, 2008.

69 Chansog Kim, Liandong Zhang. "Corporate Political Connections and Tax Aggressiveness." City University of Hong Kong. Updated August 12, 2014.

70 Alexander Vorisov, Eitan Goldman, Nandini Gupta. "The Value of (Corrupt) Lobbying." February 4, 2015.

71 Hui Chen, David Parsley and Ya-Wen Yang. "Corporate Lobbying and Firm Performance ." Vanderbilt School of Management. October 2014.

study that found that companies with a high level of political engagement tend to adopt more conservative accounting practices. The researchers believe this could be because "firms that are more actively engaged in lobbying are likely to trigger more scrutiny than firms less actively so engaged, firms with political connections may also be more likely to trigger scrutiny than firms without such connections."[72]

Further, corporate political activity may increase a company's ability to receive government assistance, particularly in times of crisis. A 2011 study found that financial institutions that engaged in lobbying activities or that had other types of political connections received a greater amount of support under the 2008 Troubled Asset Relief Program ("TARP") earlier than companies not engaged in such activities. The researchers found that for every dollar spent in the five years prior to TARP, these companies received between $485.77 and $585.65 in TARP support.[73] Similarly, a 2015 study using a large sample of commercial and savings banks found that "banks engaged in lobbying activities have lower probabilities of receiving an enforcement action."[74]

Political Activity Harming Shareholder Value

While some researchers have found a positive association between corporate performance and political activity, others have found that such activity may harm shareholder interests. For example, John Coates of Harvard Law School has found that corporate political activity could be associated with lower corporate value. Specifically, Coates found that companies in the S&P 500 that are politically active through company-controlled PACs, registered lobbying, or both, had lower price-to-book ratios than industry peers that were not politically active. While these findings were true from 1998 to 2004, this disparity became even more significant following the 2010 Citizens United decision, when politically active firms, had, on average, 24% lower price/book ratios than their industry peers, after controlling for factors including profit, sales growth, leverage, size and shareholder rights.[75] Additionally, in a separate 2012 study, Coates found that firms that engaged in political activities in 2008 experienced, on average, an 8% lower increase in industry-relative shareholder value from their financial crisis-era lows when compared to firms that were not politically active in 2008. The researcher suggests that this finding is consistent with Citizens United "inducing an increase in unobservable political activity by previously politically active firms, with a significant attendant drag on shareholder value."[76] Further, a 2012 study of political contributions from 1991 to 2004 by Rajesh K. Aggarwal, Felix Meschke and Tracy Wang, found political donations were negatively correlated with future excess returns and their findings demonstrated only limited support for the contention that political donations represent an investment in political capital.[77]

The negative effects of political activity may have been especially profound for shareholders of companies engaged in mortgage lending. A 2009 study by economists from the International Monetary Fund investigated the relationship between lobbying by financial institutions and mortgage lending. The researchers suggested that the political influence of the financial industry can be associated with the accumulation of risks and provided some support for the view that prevention of future crises might require closer monitoring of lobbying activities and weakening the political influence of the

72 Xiangting Kong, Suresh Radhakrishnan, Albert Tsang. "Corporate Lobbying and Accounting Conservatism." October 2011.

73 Benjamin M. Blau, Tyler J. Brough, Diana W. Thomas. "Corporate Lobbying, Political Connections, and the 2008 Troubled Asset Relief Program." Utah State University. September 30, 2011.

74 Thomas Lambert. "Lobbying on Regulatory Enforcement Actions: Evidence from Banking ." Rotterdam School of Management. November 30, 2015.

75 John C. Coates, IV, Taylor Lincoln. "Fulfilling Kennedy's Promise: Why the SEC Should Mandate Disclosure of Corporate Political Activity." Harvard Law School, Corporate Citizen. July 27, 2011.

76 John C. Coates, IV. "Corporate Politics, Governance and Value Before and After Citizens United." Journal of Empirical Legal Studies, Vol. 9, Issue 4. December 2012.

77 Rajesh K. Aggarwal, Felix Meschke, Tracy Wang. "Corporate Political Contributions: Investment or Agency?" American Finance Association Meeting Paper. April 2012.

industry. The researchers found that lenders that lobbied more intensively on mortgage-related regulation had: (i) more lax lending standards, as measured by loan-to-income ratio; (ii) a greater tendency to securitize loans; and (iii) faster growing mortgage loan portfolios. The study's authors found that the companies that lobbied more intensively experienced negative abnormal stock returns, and suggested that their findings "seem to be consistent with a moral hazard interpretation whereby financial intermediaries lobby to obtain private benefits, making loans under less stringent terms," and that these firms may "expect to be bailed out when losses amount during a financial crisis or because they privilege short-term gains over long-term profits."[78]

The negative effects of political activity may also be profound for firms engaged in extensive lobbying at times where news events raise public awareness of lobbying. For example, one study found that, on average, a firm that spent $100,000 or more lobbying from 2002-2005 suffered a loss of $1.2 million in value when lobbyist Jack Abramoff pleaded guilty to bribing politicians.[79]

Ultimately, we recognize that political engagement is a business decision, the benefits and costs of which each company must weigh in the context of its circumstances and business environment. However, it appears that, should companies choose to participate in the political process, disclosure of such participation may be correlated with increased shareholder value. A 2011 Harvard study found that, after controlling for size, leverage, research and development activities, three-year sales growth and whether companies have active PACs, companies with politics regarding political disclosure had a 7.5% higher industry-adjusted price-to-book ratio than other firms as of year-end 2010. While the researchers concede that it is uncertain whether such disclosure policies cause higher price-to-book ratios, their findings are consistent with the theory that "well-managed companies responsive to shareholder concerns tend to be more highly valued than other companies."[80]

INVESTOR CONCERNS REGARDING CORPORATE POLITICAL SPENDING

While not necessarily the intention, ambiguity or opaqueness in corporate political spending has been a byproduct of the Citizens United ruling. In fact, the Supreme Court opinion recognized that "prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."[81] However, there is currently no standardized manner in which companies must disclosure their contributions to state and local candidates, advocacy groups, or state-level political committees. As a result, shareholders often must search through numerous campaign finance reports and detailed tax documents to ascertain even limited information.

Several public policy efforts have attempted to solve this problem. For example, there has been a recent movement toward legislation intended to strengthen corporate disclosure of political spending. The Shareholder Protection Act (H.R. 4537), which called for disclosure and shareholder authorization of political expenditures, was introduced in the House in March 2010. This act would have required a vote by the board of directors on any corporate political expenditure in excess of $50,000. The House didn't vote on the bill, but it was reintroduced as H.R. 2517 in July 2011.[82] Further, in June 2010, the House passed H.R. 5175, the DISCLOSE

78 Deniz Igan, Prachi Mishra, Thierry Tressel. "A Fistful of Dollars: Lobbying and the Financial Crisis." The International Monetary Fund. December 2009.
79 Alexander Borisov, Eitan Goldman and Nandini, Gupta. "The Corporate Value of (Corrupt) Lobbying." European Corporate Governance Institute. September 20, 2014.
80 John C. Coates, IV, Taylor Lincoln. "Fulfilling Kennedy's Promise: Why the SEC Should Mandate Disclosure of Corporate Political Activity." Harvard Law School, Public Citizen. July 27, 2011.
81 *Citizens United v. FEC*., 558 U.S. 310, 55 (2010).
82 Lucian Bebchuk. "The Re-Introduction of the Shareholder Protection Act." Harvard Law School Forum on Corporate Governance and Financial Regulation. July 14, 2011.

Act, which aimed to increase transparency of corporate and special interest money in national political campaigns. While the act was not passed into law, in February 2012, Congressman Chris Van Hollen introduced another version of this bill, which required disclosure of the names of those making donations of $10,000 or more within 24 hours. This act would also have required increased disclosure from corporations, unions and political organizations, such as super PACs and advocacy groups.[83] However, Senate Republicans successfully filibustered this legislation.[84] Most recently, a coalition of over two dozen senators and 100 house members delivered a petition to Obama in 2015 asking for an executive order curbing the ruling of Citizens United.[85]

Legislation regarding corporate political spending has also been introduced at the state level. In November 2012, voters in Montana overwhelmingly approved Initiative 166, a measure that requires the state's congressional delegation to propose an amendment to the U.S. Constitution prohibiting corporate political spending in Montana elections. From 1912 until June of that year, Montana had maintained a Corrupt Practices Act, which banned corporations from making political expenditures from their general treasuries. However, the U.S. Supreme Court, in line with its Citizens United ruling, struck down this law.[86]

An alternate attempt at increased disclosure of political spending was made in August 2011 by the Committee on Disclosure of Corporate Political Spending, which submitted a petition requesting that the Securities and Exchange Commission ("SEC") adopt rules to require public companies to disclose the use of corporate resources for political activities to shareholders. The committee, which is composed of academics whose teaching and research focus on corporate securities law, stated in the petition that disclosure of political spending is "necessary for corporate accountability and oversight mechanisms to work."[87] The petition drew more than 300,000 comment letters, a higher than average response, and prompted the SEC's corporate finance division in November 2012 to state that it was considering recommending that the SEC propose rules mandating disclosure of corporate political spending and lobbying activities.[88] The SEC is also receiving pressure to provide guidance or rules on political spending from other sources. In February 2012, SEC Commissioner Luis Aguilar urged the commission to begin rulemaking on corporate political spending disclosure, stating that "[w]ithholding information from shareholders is a fundamental depravation that undermines the securities regulatory framework, which requires investors receive adequate and appropriate information so that they can make informed decisions about whether to purchase, hold, or sell shares - and how to exercise their voting rights...Investors are not receiving adequate disclosure, and as the investor's advocate, the commission should act swiftly to rectify the situation by requiring transparency."[89] However, late in 2013, the chairman of the SEC, Mary Jo White, made it clear the agency had no plans to address such rulemaking in 2014.[90] By the end of 2015, the SEC had received over one million comments on the proposed petition, though a major spending plan unveiled in December of that year restricted the SEC from forcing public companies to disclose political activities, thereby stopping the bill in its tracks.[91]

This approach is unsurprising given the SEC's historical role in regulating corporate political

83 "Sunlight on Secret Donations." *New York Times*. February 12, 2012.

84 Ezra Klein. "The DISCLOSE Act Won't Fix Campaign Finance." *Washington Post*. July 27, 2012.

85 Sheldon Whitehouse, "Time to Crack Down on 'Dark Money.' *CNBC*. July 6, 2015.

86 "Montanans Take A Stand." *New York Times*. November 16, 2012.

87 Committee on Disclosure of Corporate Political Spending. "Petition for Rulemaking." August 3, 2011.

88 Emily Chasan. "SEC Staff Considers Proposal on Corporate Political Donations." *Wall Street Journal*. November 8, 2012.

89 Emily Chasan. "SEC's Aguilar Wants New Political Donation Disclosures." *Wall Street Journal*. February 24, 2012.

90 "Keeping Shareholders in the Dark." *New York Times*. December 3, 2013.

91 Andrew Ackerman, "Deal Restricts SEC from Requiring Disclosure of Corporate Political Contributions." *Wall Street Journal*. December 16, 2015.

spending. Nearly four decades prior to the Citizens United ruling, the SEC investigated political contributions by U.S. corporations in the aftermath of the Watergate scandal, in which it was revealed that public companies had made illegal corporate political contributions to the re-election campaign of President Nixon. Soon after, the SEC learned that hundreds of American companies had made undisclosed payments to both political parties in American elections and to foreign politicians, thus prompting the SEC to push Congress to pass the Foreign Corrupt Practices Act, which required greater corporate transparency and made bribery of foreign officials illegal.[92] However, attempts at broadening the SEC's scope to include mandated disclosure of corporate political spending have so far been fruitless.

Investors are also devising novel strategies to obtain enhanced disclosure of political spending from companies. For example, in January 2013, Thomas DiNapoli, the New York State Comptroller, sued Qualcomm in an attempt to force increased disclosure of the company's political expenditures. The lawsuit, which raised concerns that companies were spending treasury funds against their own corporate interests and simply giving to candidates favored by senior executives, could have a significant impact on corporate political spending.[93] According to some legal experts, this lawsuit could ultimately lead to fewer instances of undisclosed indirect political spending, as companies could be forced to reveal the recipients of their political spending. On February 22, 2013, as part of an agreement to resolve this dispute, Qualcomm agreed to increase its disclosure regarding political contributions to its political parties, super PACs and other political parties.[94] Although it is now resolved, this lawsuit, which was filed under a provision of Delaware law that allows any shareholder to request to see certain books and records of a company, could signal increased legal risk for companies with poor disclosure or for those unresponsive to shareholder pressure regarding disclosure of political spending.

Given this widespread push to mandate more transparency in corporate political spending, it is unlikely that, without the implementation of some sort of rule or guidance, this issue will soon be resolved. As investors, academics and lawmakers push to require broader transparency of political spending, there will likely be more attempts at legislative engagement on this issue. In the meantime, many investors have turned to corporate engagement and shareholder proposals in order to remedy some of the opaqueness in disclosure of corporate political spending. This is evidenced by record activity during the last five proxy seasons, which have seen a marked increase in attention and mainstream support for such proposals. While the three preceding years each saw only one proposal receive majority shareholder support, the 2014 season saw majority support for proposals requesting disclosure at four different companies. Additionally, support from mutual funds for political disclosure proposals has risen steadily over the past decade. In 2014, 30 of the 69 largest mutual fund families supported such proposals more than half the time, with an average of 41% support among them.[95] In 2015, while the average amount of shareholder support for political spending disclosures increased from 27% to 28.7%, no proposals received majority support.

In light of the potential risks and in accordance with the growing mainstream investor demand for more comprehensive disclosure of political spending, many companies have begun to improve their disclosure practices. In fact, 50% of companies in the S&P 500 index already disclose their political spending

92 Ciara Torres-Spelliscy. "The SEC and Dark Political Money: An Historical Argument for Requiring Disclosure." Corporate Reform Coalition. June 18, 2013.

93 Dan Strumpf. "Qualcomm Sued Over Political-Giving Records." *Wall Street Journal*. January 3, 2013.

94 Dan Strumpf. "Qualcomm Settles Disclosure Suit with New York." *Wall Street Journal*. February 22, 2013.

95 Center for Political Accountability. "Corporate Political Spending and the Mutual Fund Vote: 2014 Proxy Season Analysis: Wider Review Shows Higher Support." November 2014.

to some degree.[96] Additionally, many companies are beginning to understand the reputational risks associated with political spending. According to the Center for Political Accountability, a 2010 Zogby survey of 301 business leaders found that two-thirds believe secret political spending poses a threat to companies. An even higher percentage supports disclosure by third-party political groups that receive company money and limiting company contributions only to non-political purposes unless the board or shareholders permit otherwise.[97]

Despite the large strides that have been made to better understand the risks associated with political spending and to improve disclosure practices, many major corporations have been slow to adopt more thorough disclosure of their political donations and contributions. Only 41% of the S&P 500 companies made any disclosure of payments to trade associations for political purposes.[98] This could help explain why shareholder initiatives to improve corporate disclosure of political spending have become extremely popular in the past several years.

CONCLUSION

Disclosure of political spending is a rapidly evolving issue that is likely to continue to change dramatically in the coming years. Particularly given the spending in the 2012 and 2014 elections, the spotlight on political contributions is more intense than ever before. Since the Citizens United ruling, there have been a number of legislative and public policy attempts aimed at increased disclosure of corporate political contributions, which will only intensify given the ruling in *McCutcheon v. FEC*. At the same time, the number of shareholder proposals regarding this issue has steadily increased, indicating increased investor interest in ensuring that companies are appropriately mitigating risks or exploiting the benefits associated with political involvement.

Perhaps as a way of mitigating the risks associated with political engagement, some companies are refraining from engaging in the political process. A 2011 review by the Sustainable Investments Institute found that, of the S&P 500 companies, 57 said that they do not engage in corporate political spending. Of these, only 23 did not give any money to political committees, parties or candidates in 2010 and only 17 avoided all forms of political spending, including lobbying. The review noted that, while an additional 57 of these companies did not have explicit policies regarding corporate political spending, they did not appear to engage in such spending.[99] Not only is this a small fraction of companies but even in these companies, investors cannot possibly ascertain the political spending that may be conducted through the trade associations or through other independent organizations to which the companies contribute.

In part due to the fact that disclosure of political spending is so limited, it is hard to know the ultimate risks that companies face due to their political activity. However, it appears that disclosure of this issue is rapidly improving. According to the 2015 CPA-Zicklin Index, 34% of S&P 500 companies disclose some information regarding their direct contributions (17% give no political contributions at all) and 33% disclose their contributions to 527 organizations (13% have no membership in 527 organizations at all). Another 37% disclose information regarding their payments to trade associations for lobbying purposes and 31% disclose information regarding their payments to intervene in ballot measures.[100] This is a stark contrast from 2010, when more than

96 "The 2015 CPA-Zicklin Index of Corporate Political Disclosure and Accountability." Center for Political Accountability, The Carol and Lawrence Zicklin Center for Business Ethics Research at the Wharton School. October 2015.

97 "Press Release: CPA Finds Solid Business Leader Support for Corporate Political Accountability in New Survey." Center for Political Accountability. November 1, 2010.

98 "The 2015 CPA-Zicklin Index of Corporate Political Disclosure and Accountability." Center for Political Accountability, The Carol and Lawrence Zicklin Center for Business Ethics Research at the Wharton School.

99 Heidi Welsh, Robin Young. "Corporate Governance of Political Expenditures: 2011 Benchmark Report on S&P 500 Companies." Sustainable Investments Institute. November 2011.

100 "The 2015 CPA-Zicklin Index of Corporate Political Disclosure and Accountability." Center for Political Accountability, The Carol and Lawrence Zicklin Center for Business Ethics Research at the Wharton School.

80% of companies in the S&P 500 did not provide information on the amount of their corporate political spending.[101] Given this improvement in disclosure, companies lagging in this regard are especially obvious, particularly for investors looking to ensure that corporate funds are being put to uses that serve the best long-term interests of companies and their shareholders.

Though improving, disclosure is still spotty, particularly for smaller companies. As such, despite this improvement, without some sort of broad rule or regulation, investors will likely not be afforded a clear picture of the nature of corporate political spending in the near future. Thus, it is important that investors press companies to ensure that management is vetting and engaging with the trade associations and independent organizations to which they make contributions for political purposes. As has been seen at other companies, it is possible that association with these groups can work directly against a company's business interests or stated position on issues or that its association may expose the company to unnecessary risk. Ultimately, however, political engagement is a business decision that must be made by each company in the context of its unique situation. We believe that it is important that companies maintain proper oversight of their political activity and related spending to ensure that it is being conducted in a manner that serves the best long-term interests of the company and its shareholders. The limited disclosure of political spending that is accessible to investors makes it difficult for them to monitor these activities, which may leave management unaccountable for its political activities. However, as incidents such as those surrounding ALEC raise the investment community's awareness, development of greater mechanisms to ensure consistent and accurate disclosure of corporate political activity may occur. We believe that, in most cases, political decisions should be made by management and the board without prior shareholder approval because these political decisions involve business judgment like any other business decision. However, given the importance of these political decisions, they should be disclosed to investors - subject, of course, to appropriate trade secret and reputational protections - so that investors have an opportunity to understand the way in which management is exercising this important corporate prerogative.

101 Heidi Welsh, Robin Young. "How Companies Influence Elections: Political Campaign Spending Patterns and Oversight at America's Largest Companies." Sustainable Investments Institute, IIRC Institute. October 14, 2010.

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