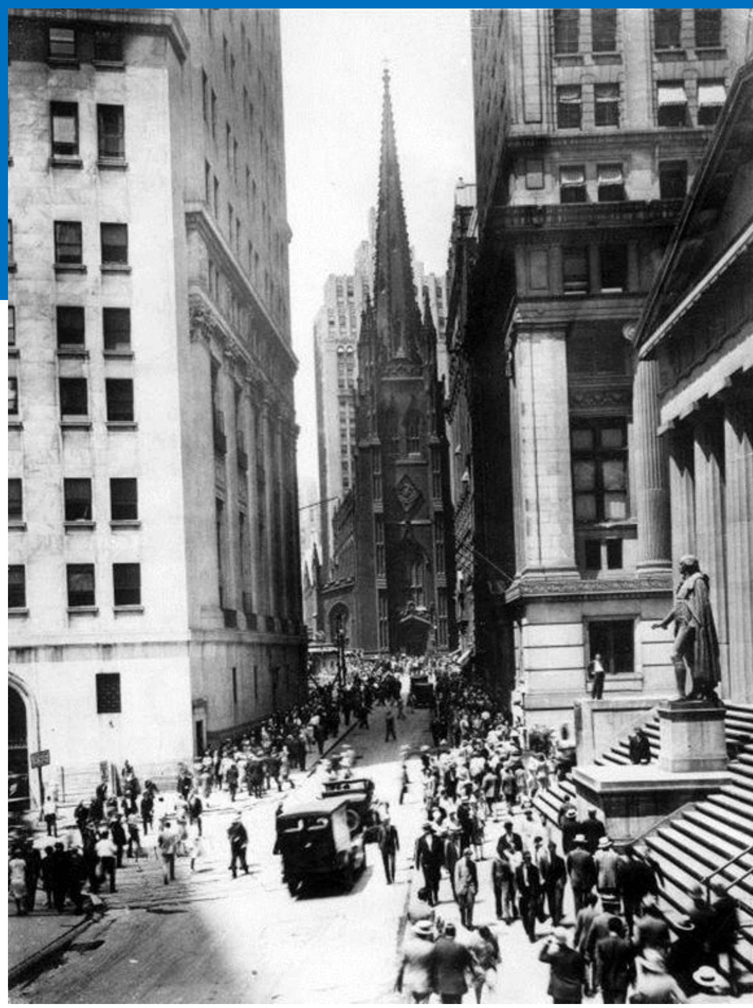
The SEC and Dark Political Money

An Historical Argument for Requiring Disclosure

By Ciara Torres-Spelliscy



June 18, 2013

Corporate Reform Coalition

About the Author

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As well as publishing in law reviews, such as the University of San Francisco Law Review, the Montana Law Review, and the NYU Journal of Legislation and Public Policy, Professor Torres-Spelliscy has been published in the New York Times, New York Law Journal, U.S. News and World Report, Boston Review, Roll Call, Business Week, Forbes, The Atlantic, USA Today, Business Ethics Magazine, San Francisco Chronicle, The Hill, Huffington Post, The Root.com, Judicature, Salon.com, CNN.com, and the ABA Judges Journal. She has also been quoted by the media in The Economist, The New York Times, Mother Jones, Newsweek on Air, The National Journal, USA Today, L.A. Times, NBC.com, Sirius Radio, National Public Radio, Fox, CSPAN, and NY1. She is also a member of the Board of Directors of the National Institute on Money in State Politics.

Acknowledgments

This piece is based on a longer law review article, Ciara Torres-Spelliscy, Safeguarding Markets from Pernicious Pay to Play: A Model Explaining Why the SEC Regulates Money in Politics, 12(2) Connecticut Public Interest Law Journal __ (Forthcoming 2013). The author thanks the Corporate Reform Coalition for the grant it provided to support this piece as well as Stetson University College of Law which provided a grant to support writing of the original law review article.

About the Corporate Reform Coalition

More than 75 organizations make up the Corporate Reform Coalition, and while each group works on a diverse array of issues, the causes of transparency and accountability in democracy bring them all together. From good governance groups to environmental groups, organized labor to elected officials, institutional investors to academics, the CRC seeks to promote corporate governance solutions to combat undisclosed money in elections. We believe both the market and our democracy are strengthened through transparency, and we are pursuing a variety of strategies to ensure that voters and shareholders are never left in the dark.

Corporate Reform Coalition

Democracy Through Accountability

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> "Integrity is not some impractical notion dreamed up by naive do-gooders. Our integrity is the foundation for, the very basis of our ability to do business. If the market economy ever goes under, our favorite socialist economics and government regulators won't be to blame. We will."
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> *— A.W. Clausen, President of the Bank of America (1976)*

Executive Summary

In 2011, 10 corporate law professors petitioned the Securities and Exchange Commission ("SEC" or the "Commission") asking for a new rule requiring transparency of corporate political spending. This report argues that the SEC should act on this Petition. The SEC has already been regulating corporate money in politics in various guises for the past forty years, and so its jurisdiction on this matter is well established. Furthermore, unlike other nations, such as the United Kingdom, the United States is uniquely ill-equipped to deal with the new and growing phenomenon of corporate political spending, unleashed by the *Supreme Court's Citizens United v. Federal Election Commission* decision in 2010. Much of corporate political spending had simply not been allowed in the US until recently, and thus there are no federal laws or regulations in place to ensure responsible corporate governance will be in place to cope with this type of political spending.

In addressing this issue, I first explore the investigations conducted by the SEC of public companies following the Watergate scandal, which revealed that corporate treasury funds had been given to President Richard Nixon's 1972 reelection campaign. The SEC found that the money that went to Nixon's campaign was just the tip of the iceberg. The SEC discovered that hundreds of American companies had made political payments to both political parties in American elections as well as significant payments to politicians abroad, much of these political payments were made secretly in ways that hid them from investors. Following this discovery, the SEC was instrumental in pushing Congress to pass the Foreign Corrupt Practices Act to require more corporate transparency as well as to outlaw bribery of foreign officials by US businesses.

The next major intervention of the SEC into the regulation of money in politics came in the 1990s when SEC Chair Arthur Levitt made fighting pay to play in the municipal bond market a top priority for the Commission. The SEC found that contracts to underwrite municipal bonds were often being awarded to those investment companies that had given sizable campaign contributions to state and local elected officials. Many investment companies, it appeared, were "paying to play" in the profitable municipal bonds market – essentially, rigging the awarding of government contracts. To stop this practice, the SEC through the Municipal Securities Rulemaking Board (MSRB) promulgated Rule G-37 to clamp down on pay-to-play corruption.

Finally in 2010, after a string of further embarrassments in the public pension fund market sent numerous elected officials to jail for kickback schemes, the SEC acted again to curb pay to play in this market as well. This time the SEC promulgated Rule 206(4)-5, which restricts the amount of campaign money investment advisers can give to public officials in charge of investments for public pensions.

This piece argues that just as the SEC acted in these three previous cases to prevent corruption in the capital markets whether the source was foreign or domestic, federal state or local, the Commission likewise has a duty to step up to the plate to provide sensible new rules for corporate political spending again post-*Citizens United*. *Citizens United* is the Supreme Court case from 2010 which allow corporations to spend an unlimited amount of money in state and federal American elections. Already, millions of dollars that can be traced from publicly traded companies has been spent in the 2010 and 2012 federal and state elections. Unfortunately, there are hundreds of millions of dollars being spent in the federal election alone that cannot be traced. Investors and voters are left in the dark about how much of this money is from public companies.

This new era of corporate political spending raises a similar problem of transparency for investors as the previous three cases and threatens the integrity of our capital markets. This is why the SEC should act on Petition No. 4-637 to establish clarity of how much money is being spent by public companies for exactly which political causes, candidates and parties.

Introduction

In traveling across the country to talk about the impact of the Supreme Court's 2010 decision in *Citizens United*, I frequently encounter resistance from audiences when I suggest that the Securities and Exchange Commission ("SEC" or the "Commission") has a vital role to play in providing greater clarity about corporate money in the American political process. One version of this objection is: "you're asking the wrong thing of the wrong agency." This paper is meant to provide a fulsome explanation about why the SEC should continue its leadership in fighting pay-to-play corruption by requiring transparency of corporate political spending across the board.

Contrary to common misconceptions, securities regulators had to grapple with the problem of corporate money in politics four decades before *Citizens United*.

Some may think regulating money in politics is outside the SEC's wheelhouse. But this is a mistaken view. Contrary to common misconceptions, securities regulators had to grapple with the problem of corporate money in politics four decades before *Citizens United*. In actuality, the SEC has been sitting at the nexus of campaign finance law and corporate securities law since the mid-1970s.

Part I. The SEC's Leadership after the Dark Days of Watergate

The last time the SEC took a probing look into corporate political spending, the Commission found a rats' nest.[1] Forty years ago, the SEC took a leadership role in investigating political contributions by US corporations in the aftermath of the Watergate scandal, which through the investigation of Congress and prosecutors had revealed illegal corporate political contributions to the Nixon campaign from public companies.

All told, during the Watergate prosecutions, 21 companies pleaded guilty to charges of making illegal corporate contributions totaling $968,000.[2] Among the companies that ran afoul of the corporate campaign finance laws in Nixon's reelection campaign were several companies that are still around today.[3] As Former FEC Chair Trevor Potter stated: "[M]ajor corporations … violated the law: ITT, American

Airlines, Braniff, Ashland Oil, Goodyear Tire & Rubber, Gulf, Philips, Greyhound—those were just a few of the well-known corporations caught up in the Watergate campaign financing scandal: 31 executives ended up being charged with criminal campaign violations, and many plead guilty."[4] Other companies ensnared in the Watergate corporate contribution scandal included 3M, Carnation, American Ship Building, Diamond International, Hertz, Lehigh Valley Cooperative Farmers, and Northrop.[5]

A. The SEC Got to the Bottom of the Secret Corporate Funds More Effectively than the Watergate Prosecutors

"How does Gulf Oil record a transaction of a $50,000 cash payment? I wanted to know, what account did they charge? Do they have an account called 'Bribery'?"

— *Former Director of SEC Enforcement Stanley Sporkin*

Stanley Sporkin, then-Director of SEC Enforcement, was curious about how corporate payments from publicly traded corporations, revealed during the Watergate investigations, could make their way into a presidential campaign when such donations were patently illegal.[6] He remarked, "[w]hat sparked my interest was the fact that these were cash payments to the Committee to Reelect the President which came directly out of the corporate treasuries. And I knew that was illegal."[7] Mr. Sporkin continued:

> How does Gulf Oil record a transaction of a $50,000 cash payment? I wanted to know, what account did they charge? Do they have an account called "Bribery"? And so I decided to ask one of my investigators to go out and find out how they did it . . . . When we looked into these funds, we found out they were not only being used domestically in the United States for illegal campaign contributions, but we found that the same monies were being used to bribe officials overseas in connection with the companies' business.[8]

The SEC stepped in to investigate whether the 21 companies ensnared by Watergate were just a few bad apples, or whether the whole barrel was rotten.[9]

The SEC picked up where other Watergate congressional and prosecutorial investigations left off. The more the SEC investigated, the deeper the rabbit hole of corporate political donations went.[10] Corporate donations flowed not only to

Nixon's campaign, but also to Democrats.[11] As author J. Anthony Lukas reported: "[3M, for example,] conceded that between 1963 and 1972 it doled out at least $634,000 in 390 contributions to politicians of both parties."[12] Furthermore, the corporate political spending was not just bipartisan; it was also international.[13]

In reaction, the SEC required voluntary disclosure by publicly traded corporations of questionable foreign and domestic political payments.[14] Hundreds of companies stepped forward to confess that they too had a secret political fund.[15] The SEC was disturbed by the obfuscation they uncovered. As the SEC reported to Congress in 1976: "The almost universal characteristic . . . has been the apparent frustration of our system of corporate accountability which . . . [requires] not omit[ing] or misrepresent[ing] material facts. Millions of dollars …have been inaccurately recorded in corporate books and records to facilitate the making of questionable payments."[16] The SEC explained the depth of the deception by publicly traded companies included, "falsifications of corporate financial records, designed to disguise or conceal the source and application of corporate funds misused for illegal purposes, as well as the existence of secret 'slush funds' disbursed outside the normal financial accountability system."[17]

> "The most distressing aspect of all this — more distressing, if possible, than the realization that many corporations had deliberately, knowingly, wittingly, and as the result of command from the highest levels, flaunted the American election laws — was the discovery that frequently these payments were made out of substantial pools of money that had been sucked out of the corporate accountability process and squirreled away…"
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> *— Then-SEC Commissioner A. A. Sommer, Jr.*

The scope of the questionable and illegal payments was quite sizable, occurring in nearly 500 top American firms.[18] Then-SEC Commissioner A. A. Sommer, Jr. painted a gruesome picture of the corporate political spending in the decades leading up to the 1970s. I quote from him at length to show the magnitude of the deception the SEC uncovered:

> [W]e have indeed lost our innocence; we have in a sense known sin and been repelled by its face…. Among the most distressing of

> disclosures has been the revelation that many large corporations have engaged in a variety of misdeeds … to an extent never imagined…. [T]he pattern of illegal political contributions extended back many years…. [T]hese contributions were carefully planned, artfully concealed and in no sense the fruit of illicit pressures. The means of tucking the money away for future distribution were often carefully developed, with clear assignments of responsibilities and well-developed techniques for the bestowal of the favors. The most distressing aspect of all this — more distressing, if possible, than the realization that many corporations had deliberately, knowingly, wittingly, and as the result of command from the highest levels, flaunted the American election laws — was the discovery that frequently these payments were made out of substantial pools of money that had been sucked out of the corporate accountability process and squirreled away in the accounts of overseas agents, Swiss bank accounts, Bahamian subsidiaries, and in various other places where the use of the money would be free of the questions of nosey auditors, responsible directors, and scrupulous underlings. These systems were characterized by such interesting phenomena as the transportation in suitcases of vast sums of money in one hundred dollar bills by top executives. False or misleading entries were made in the books of corporations to conceal the true purposes for which the money was used…. [I]t was the executive suite itself which was engaged in deceit, cunning and deviousness worthy of the most fabled political boss or fixer.[19]

What the SEC found post-Watergate was galling and it had real consequences abroad. Heads of state in Japan, the Netherlands and Italy all resigned.[20] In other words, President Nixon was not the only head of state to leave office in the wake of Watergate. Rather, the impact of corporate political spending was felt in capitols across the globe.

In light of these post-Watergate revelations of gross corporate misconduct, with respect to political expenditures here and abroad, the sitting SEC Commissioners in the 1970s touted the need for better reporting from companies. Not surprisingly, central among the legislative fixes to this problem was a strict requirement to keep accurate corporate books and records.[21]

Transparency was one of the solutions to the problem uncovered in the 1970s. As Commissioner Sommer told the American Institute of Certified Public Accountants, "investors are… rational people…. To make a rational choice in any matter, information is essential – and the possibility of a rational choice is enhanced if that information has certain characteristics. Investors must have information that is sufficient, timely, reliable and fairly presented."[22] In other words, for market discipline to work, transparency is essential.

B. The SEC Proposed Legislation that became the Foreign Corrupt Practices Act

The SEC Commissioners put their revulsion to work and urged Congress to tighten the rules on internal accounting and the rules for the use of corporate funds for donations to foreign officials. These suggestions would eventually become the Foreign Corrupt Practices Act of 1977 (FCPA).

Congress enacted the FCPA[23] to restore public confidence in the integrity of the American capital markets.[24] The FCPA amended the Securities Exchange Act of 1934 (the "1934 Act") to require registered issuers to keep detailed books, records, and accounts that accurately record corporate payments and transactions.[25] The FCPA also requires SEC registered issuers to institute and maintain an internal accounting control system.[26] Thirdly, the FCPA prohibits domestic corporations, whether or not registered with the SEC, from bribing a foreign official, a foreign political party, party official, or candidate for the purpose of obtaining or maintaining business.[27] The FCPA applies to political contributions abroad if they are made with corrupt motives.[28]

Since 1978 the SEC, along with the Department of Justice, have had jurisdiction over campaign contributions used for foreign bribes. Schering-Plough gave $76,000 to a charity headed by a Polish official that purchased health materials for Polish hospitals. As a result, Schering-Plough paid a $500,000 civil penalty.[29] Titan paid $3.5 million to an agent in Benin who funneled the money to the election of Benin's incumbent president. This led to Titan's paying $28.5 million in penalties for violating the FCPA.[30]

Part II. SEC Chair Levitt's Leadership on Municipal Bond Pay to Play in the 1990s

In the 1990s, the SEC responded once again to the problem of corporate money in politics. Right out of the gate, the SEC under President Clinton made addressing pay to play in the municipal bond market a top priority.[31] What brought the SEC into this regulatory space was foresight of its then-Chair Arthur Levitt Jr.[32] Mr. Levitt was gravely troubled that the municipal bond market wasn't functioning as a normal market. Rather, the award of lucrative underwriting contracts seemed to flow not necessarily to the best talent, but rather to the most politically connected.[33] Chair Levitt made a mini-crusade of fighting pay to play. He intoned: "Municipal finance is the number one priority of the Commission ... It's an obsession of mine, and we're going to come down hard."[34]

Corruption damages both the government and the private sector as resources are not allocated for their most productive use.[35] Pay to play in the municipal bond market is not a victimless practice because it can steer government contracts not to the most efficient business partner, but rather to the best connected. This, in turn, can cost the government more than if a contract was awarded on a competitive and lowest cost basis. As one author articulated: "pay to play harms the public. Taxpayers and investors are harmed …[because it] cheats taxpayers out of the quality services taxpayers would receive if pay to play conduct were not involved….[and costs are passed on to] federal, state or local government[s]."[36]

The "municipal" bond market is a bit of a misnomer since the market includes both state and locally issued bonds.[37] The size of the market is vast as states and their political subdivisions raise money for public works by borrowing it. As economists explained, "[m]unicipal securities are debt obligations issued by over 50,000 units of state and local governments such as cities, counties, and special authorities or districts. Well over one million different municipal securities are outstanding…"[38]

The muni-bond market has continued to grow over the past two decades. In 1995, there was $1.3 trillion in outstanding municipal debt.[39] Federal Reserve economists estimated the municipal bond market at $1.9 trillion in 2005.[40] Five years later, the *New York Times* reported the municipal bond market stood at an estimated $2.7 trillion with $21.4 billion new issues scheduled in 2010 alone.[41] In the 2011-2012 period, the municipal bond market had an estimated value of $3.73 trillion.[42] Or as author Michael Lewis summed the state of play up for *Vanity Fair*, "[f]rom 2002 to 2008, the states had piled up debts right alongside their citizens': their level of indebtedness, as a group, had almost doubled, and state spending had grown by two-thirds."[43]

The market for underwriting municipal bonds is competitive with large commissions at stake for the investment bank which wins the contract. Commissions that can be earned by underwriters in the municipal bond market are big because the market is so massive.[44] The fees were also large pre-1994 because they were not negotiated as arms-length transactions because of pay to play. As former Counsel to the SEC Jon B. Jordan explained, "dealers and underwriters use political contributions to the campaigns of elected officials in order to solicit municipal bond business for their firms. These contributions are specifically directed to the campaigns of elected officials who will in turn favor those firms that contributed to them when it is time to select dealers for municipal bond work."[45]

Underwriters were able to extract larger fees in negotiated deals (as compared to competitively bid deals) with municipal bond issuers by donating political campaign contributions to politicians with control over the bonds. As economists Alexander W. Butler, Larry Fauver, and Sandra Mortal found:

> When underwriting firms routinely made political campaign contributions to win underwriting business from the state, gross spreads were significantly higher, but only for negotiated bid deals, i.e., those deals that can be allocated on the basis of political favoritism. The effect is statistically significant and economically large—it ranges from 11.8 to 13.8 basis points, depending on the specification. … In contrast, competitive deals, which offer no room for favoritism, have fees that are only negligibly higher (and generally not statistically significant). This result continues to hold when controlling for underwriter fixed effects. We interpret these higher fees as the quid pro quo for political campaign contributions.[46]

These results have been replicated in other economic studies.[47]

Charles Anderson who retired as manager of tax-exempt bond field operations for the Internal Revenue Service summed up the problem for the *New York Times* in the following way, "[i]t's rare to sell a Senate seat, but it's not rare to sell a bond deal… Pay-to-play in the municipal bond market is epidemic."[48]

> "I have myself experienced someone sitting across the table from me saying that she would need a $50,000 from me for a candidate who was running for office and I said I wasn't able to do that and she said, 'Well, then I have to be very frank with you. You are not going to do any business with this particular client.'"
>
> — *Former MSRB Chair David Clapp*

SEC Chair Levitt urged the Municipal Securities Rulemaking Board (MSRB), the self-regulating organization (SRO) which has been authorized by Congress to make rules for the municipal bond market,49 to promulgate rules banning pay to play.[50] The Board did just that with Rule G-37. This rule was approved by the SEC.[51] In the SEC's Release on the Rule G-37, it explained the motivation for the rule: "Unlike general campaign financing restrictions, ... which … combat unspecified forms of undue influence and political corruption, [these] conflict of interest provisions, ... are tied to a contributor's business relationship with governmental entities and are intended to prevent fraud and manipulation."[52]

Looking back on the sordid practices that motivated Rule G-37, David Clapp, the 1994 Chair of the MSRB, reminisced in 2011:

> I have myself experienced someone sitting across the table from me saying that she would need a $50,000 from me for a candidate who was running for office and I said I wasn't able to do that and she said, "Well, then I have to be very frank with you. You are not going to do any business with this particular client."[53]

Mr. Clapp's experiences in the municipal bond market were not atypical.[54]

Shortly after being promulgated, MSRB Rule G-37 was challenged in federal court. In upholding the constitutionality of Rule G-37, the D.C. Circuit Court of Appeals explained political contributions have both positive and negative aspects—being one part free speech and one part bribery.

> Contributions. . . . may communicate support for a candidate and his ideas, but they may also be used as the cover for what is much like a bribe: a payment that accrues to the private advantage of the official and is intended to induce him to exercise his discretion in the donor's favor, potentially at the expense of the polity he serves.[55]

The Court went on to explain that the parallel between the government's interest in defending the integrity of the market and the integrity of the political system: "here the effort is to safeguard a commercial marketplace. … In every case where a quid in the electoral process is being exchanged for a quo in a particular market where the government deals, the corruption in the market is simply the flipside of the electoral corruption."[56]

Indeed the Court found the conflict of interest between underwriters who are political donors to local politicians with influence over hiring underwriters patently obvious. As the Court wrote,

> underwriters' campaign contributions self-evidently create a conflict of interest in state and local officials who have power over municipal securities contracts and a risk that they will award the contracts on the basis of benefit to their campaign chests rather than to the governmental entity. Petitioner himself remarked on national radio that "most likely [state and local officials] are gonna [sic] call somebody who has been a political contributor" and, at least in close cases, award contracts to "friends" who have contributed.[57]

The Court also found the link between ending pay-to-play and promoting a free market to be manifest as well, noting "the link between eliminating pay-to-play practices and the Commission's goals of 'perfecting the mechanism of a free and open market' and promoting 'just and equitable principles of trade' is self-evident."[58]

Part III. Former SEC Chair Schapiro's Leadership on Pay to Play for Investment Advisers to Public Pension Funds in the 2000s

Approximately one decade later, corporate pay-to-play abuses grabbed headlines yet again. This time the problem arose in the public pension investment market. After a raft of embarrassing public pension scandals resulted in several elected officials going to jail,[59] the SEC promulgated a new Rule 206(4)-5 in 2010 to prevent investment advisers from becoming major campaign donors to those who control investments by public pension funds.[60]

Like the municipal bond market, public pension funds are also a huge revenue source for those who manage their investments.[61] In 2011 the estimated size of the public pension fund market was $4.6 trillion.[62] According to the U.S. Census Bureau, "[i]n 2010, the largest share of all state government cash and security holdings was in public-employee retirement trust funds…"[63] Fees paid by public pension funds generate lucrative business for investment advisers.[64]

Explaining why a rule was needed to curb pay to play for public pensions, Andrew J. Donohue, Director of the SEC's Division of Investment Management, explained, "[p]ay-to-play serves the interests of advisers to public pension plans rather than the interests of the millions of pension plan beneficiaries who rely on their advice. The rule we are proposing today would help ensure that advisory contracts are awarded on professional competence, not political influence."[65]

Just like the municipal bond dealers in Rule G-37, under Rule 206(4)-5, the investor advisers can choose to be big fundraisers for municipal and state candidates or they can advise public pension funds, but they cannot do both simultaneously.

SEC Rule 206(4)-5 prevents investment advisers from exchanging large contributions for the ability to manage a public pension fund's investments.[66] Just like the municipal bond dealers in Rule G-37, under Rule 206(4)-5, the investor advisers can choose to be big fundraisers for municipal and state candidates or they can advise public pension funds, but they cannot do both simultaneously.[67]

A. Scandals that Motivated the Rule 206(4)-5

One motivation for the SEC's investor adviser rule was the down fall of the Connecticut Treasurer Paul Silvester.[68] As Professor Richard Hasen recounts, "[i]n 1999, Connecticut's state treasurer pled guilty to racketeering charges. He later admitted in court to collecting campaign contributions in exchange for 'placing $500 million in state pension investments with certain equity funds.'"[69]

Also prominent in the minds of regulators was the down fall of New York Comptroller Alan Hevesi.[70] Then-New York Attorney General "Cuomo's lengthy investigation into pay-to-play allegations … against several individuals in the New York State Comptroller's office…was capped off when Hevesi pleaded guilty to accepting almost $1 million in kickbacks. In exchange for the kickbacks, Hevesi admitted, he approved $250 million in pension funds investments with a California private equity firm."[71] Hevesi's scheme involved hundreds of investment firms.[72] Hevesi's elaborate gambit was not just a fraud on the political system; it was also a fraud on the market, which presumed that investment advisors were being picked because of their acumen and skill instead of their political connections.[73]

At the time that the Commission's new anti-pay-to-play rule was announced in 2010, then-Chair Mary Schapiro made the following pointed statement articulating the justification for the rule:

> An unspoken, but entrenched and well-understood practice, pay to play can also favor large advisers over smaller competitors, reward political connections rather than management skill, and — as a number of recent enforcement cases have shown — pave the way to outright fraud and corruption…. Pay to play practices are corrupt and corrupting. They run counter to the fiduciary principles by which funds held in trust should be managed. They harm beneficiaries, municipalities and honest advisers. And they breed criminal behavior.[74]

As the Commission recognized, campaign spending could have a distorting impact and it rightly chose to act to safeguard the integrity of the market from this tempting conflict of interest.[75]

B. Rule 206(4)-5 and Governor Rick Perry

Rule 206(4)-5 gained 15 minutes of fame during the 2012 Republican presidential primary as reporters noticed with puzzlement that Wall Street bankers were steering clear of donating large amounts to candidate Governor Rick Perry.[76] As Eliza Newlin Carney put it, "Texas Gov. Rick Perry has a Wall Street problem. … Perry's [ ] problem is that federal rules actually bar certain finance-sector professionals from donating to his campaign."[77] As the corporate law firm Skadden Arps alerted its clients during the 2012 election, "[b]oth Rules 206(4)-5 and G-37 prohibit a covered firm, its covered employees or any Political Activity Committees (PAC) they control from making, soliciting or coordinating contributions on behalf of a covered official. Such officials include a covered state official running for federal office. Gov. Perry is covered in that he appoints members to various Texas state pension funds and entities that may select an investment adviser … or issue municipal bonds …."[78]

While at first blush the rules may seem unfair since they allowed ex-Governor Romney to raise funds from investment bankers, while severely limiting such fund raising for Governor Perry, on closer inspection the rules are well crafted to prevent pay to play. While Governor Perry enjoyed a brief moment in the sun as the Republican frontrunner, his campaign for the Presidency faltered. Yet he never stopped being the Governor of Texas where he has control of appointing those who run the large Texas pension funds and their investment portfolios.[79] He may well remember who helped in his presidential bid. But for the SEC rules, Governor Perry would have the power through his appointees to award lucrative contracts to those who were particularly generous during his run for president. The SEC rules ensure that those who benefit from Texas investment fees can only give *de minimis* campaign donations to sitting governors. As a sitting governor, Perry raised a risk of pay to play that was not presented by ex-Governor Romney or any other candidate running for president in 2012.

Part IV. Fresh Thinking is Needed in Light of the Flood of Corporate Money from *Citizens United*

While Watergate, municipal bond pay-to-play corruption and public pension fund pay-to-play abuses, all prompted the SEC to intervene, does the current post-*Citizens United* environment merit the SEC's action? It does. And here's why.

President Barack Obama was one of the first to recognize the sea change caused by *Citizens United*, the case that allows corporations to spend an unlimited amount of money in state and federal American elections. The President, in his State of the Union Address delivered just days after the Supreme Court handed down *Citizens United* told the members of the Supreme Court sitting in the gallery:

> With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests — including foreign corporations — to spend without limit in our elections. I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities. They should be decided by the American people.[80]

Inspired by the Supreme Court's January 2010 decision in *Citizens United*, in the fall of 2011, 10 corporate law professors petitioned the SEC asking for a new rule on transparency of corporate political spending (Petition No. 4-637).[81]

The idea behind the petition was not original with these 10 professors. Fourteen years before, in 1999, Professor Cynthia Williams suggested in the Harvard Law Review that the SEC should expand social responsibility reporting for public companies including "information on domestic and international political contributions,"[82] such as "(i) Support of candidates …(ii) Direct contributions to political parties …(iii) Support for ballot initiatives … [And] statewide or federal lobbying efforts [as well as] lobbying efforts of any trade associations to which the company belongs ....[83]

And as University of Pennsylvania Professor Jill Fisch suggested eight years ago, "political activity [should be included in] the disclosure requirements applicable to publicly-traded companies... to enabl[e] shareholders to monitor the activities of a corporation's officers and directors, … to police against possible waste or self-dealing…."[84]

Indeed one day after *Citizens United* was decided in January of 2010, a lone shareholder of AT&T stock asked the SEC to promulgate a new transparency rule on corporate political spending.[85] No matter who thought of it first, the idea is a good one. The SEC should promulgate a new rule to require transparency of corporate political spending.

Thanks to the current Supreme Court, shareholders have one more potential problem of self-dealing by managers to monitor: spending corporate treasury funds on U.S. elections.

A. Corporate Political Spending in the U.S. Lacks Transparency

The Supreme Court did shareholders of publicly-traded companies a grave disservice when it ruled in *Citizens United*[86] that corporations have the right to spend unlimited corporate treasury funds in American elections.[87] Previous Supreme Courts had protected shareholders from such spending.[88] Thanks to the current Supreme Court, shareholders have one more potential problem of self-dealing by managers to monitor: spending corporate treasury funds on U.S. elections.

This post-*Citizens United* corporate political spending has been unleashed into an American regulatory environment rife with loopholes. In short, the way the tax code, corporate and securities laws, and campaign finance laws interact enables publicly-traded U.S. corporations to legally mask their political spending, thereby thwarting accountability from customers, shareholders, and potential investors.

The 2010 Midterm federal election showed the scale of undisclosed political spending. Studies have shown that between one third and one half of the independent spending in 2010 was from unnamed sources.[89] Initial data from the 2012 federal election cycle gathered by Dēmos and U.S. PIRG shows there was over $315 million in dark money spent.[90] This dark spending is only poised to increase in future elections unless transparency is increased.

Money can get from a publicly-traded corporation into the political system without detection in the following way:

- First, the SEC currently requires no reporting of political spending. This enables a publicly-traded company to gives a donation to a politically active nonprofit (usually organized under the Internal Revenue Code §§ 501(c)(4) or 501(c)(6))[91] without reporting this donation to the Commission.[92]
- Second, the politically active nonprofit, such as a § 501(c)(6) trade association, purchases a political ad supporting a federal candidate. This nonprofit will report these corporate donations to the Internal Revenue Service ("IRS"), but not to the public.[93]

- And third, the nonprofit reports to the Federal Election Commission ("FEC") that it has purchased a political ad. The FEC only requires the nonprofit to report earmarked donations.[94] If the publicly-traded corporation did not "earmark" the donation, which nearly no sophisticated donor would, then the role of the corporation will never be revealed to the public.

In a nutshell, the investing public can see that the nonprofit bought a political ad, but they cannot discern the role of the publicly-traded company in underwriting the purchase.

> "If investors are going to be able to send some kind of a market reaction to this political speech by corporations, we have to have better disclosure."
>
> — *Nell Minow, expert in corporate governance*

As Peter Stone at the Center for Public Integrity reported on the eve of the 2010 Midterm election, "[m]any corporations seem inclined to give to groups that are allowed by tax laws to keep their donations anonymous."[95] This theme was repeated on a larger scale in the 2012 election as Eliza Newlin Carney reported for Congressional Quarterly, "[w]hatever the moniker, secret money is playing an ever-larger role in the 2012 election."[96] The campaign finance system often hides the original source of funds from both investors and voters.

The urgency for a new rule has been stepped up with the advent of post-*Citizens United* corporate political spending in federal elections and in an additional 23 states.[97] The need for the SEC to act on Petition No. 4-637 now is clear. In 2010, Nell Minow, an expert in corporate governance gave the Diane Sanger Memorial Lecture and addressed the impact of *Citizens United*. Ms. Minow urged,

> If investors are going to be able to send some kind of a market reaction to this political speech by corporations, we have to have better disclosure. We are currently facing a situation where some companies are taking public positions in favor of one thing and then [funneling] money to intermediary groups to oppose it. We can't have that any more. So, we need better disclosure about the contributions and other kinds of political speech pay, that is paid out.[98]

Shareholders are already clamoring for more disclosure of political expenditures.[99] Fortune 500 companies don't have to read the writing on the wall; they can read the shareholder proposals in their proxies demanding more transparency.[100] Many public companies are already voluntarily disclosing.[101] But comparing these voluntary disclosure "apples to apples" is nearly impossible since each company is disclosing a different set of data.

Because of this lack of transparency, determining the exact amount of money from public companies in American elections is impossible. Most corporate political spending is likely being concealed in plain sight through politically active trade associations.

Nonetheless, some publicly traded corporations spent in the 2012 federal election through various Super PACs under their DBA names. According to the Center for Responsive Politics, Chevron (ticker CVX) gave $2.5 million to the Congressional Leadership Fund Super PAC. Clayton Williams Energy (ticker CWEI) gave $1 million to American Crossroads Super PAC. Chesapeake Energy (ticker CHK) gave $250,000 to the Make Us Great Again Super PAC. Scotts Miracle Gro (ticker SMG) gave $200,000 to Restore our Future Super PAC. CONSOL Energy (ticker CNX) and Hallador Energy (ticker HNRG) each gave $150,000 to Restore our Future Super PAC. And Pilot Corp (Ticker 7846 on the Tokyo Nikkei) gave $100,000 to the American Crossroads Super PAC.[102] Public companies have also spent in state elections through 527s like the Republican Governors Association and the Democratic Governors Association.[103] This peek into the spending of public companies shows that millions of dollars have been spent on politics in the most recent election cycle and in previous cycles as well. Without full transparency, investors cannot judge whether these figures are outliers or the new normal.

B. SEC Has Statutory Authority to Promulgate a New Disclosure Rule

The United States federal securities laws have their genesis in a desire to never repeat either the Stock Market Crash of 1929 or the Great Depression which followed it.[104] John Kenneth Galbraith explained, "[t]he fact was that American enterprise in the [nineteen] twenties had opened its hospitable arms to an exceptional number of promoters, grafters, swindlers, impostors, and frauds. This, in the long history of such activities, was a kind of flood tide of corporate larceny."[105]

The Securities Act of 1933, and the Securities Exchange Act of 1934 (the "1933 and 1934 Acts", respectively) were federal efforts built on the shoulders of state blue sky laws, which sought to regulate the sales of securities within each of the states. "These statutes were popularly known as blue sky laws after the complaint of one state legislator that some securities swindlers were so barefaced that they 'would sell building lots in the blue sky.'"[106] The inherent flaw with the blue sky laws is that they could not capture interstate fraudsters.

John Kenneth Galbraith describes the securities that were offered during the roaring twenties as a horror show of worthless schlock: "stock was sold in companies 'to make Salt Water Fresh – For building Ships against Pirates – For importing a Number of large Jack Asses from Spain,' or even 'For a Wheel of Perpetual Motion…'"[107] Galbraith also summarized the reforms after the 1929 Stock Market Crash:

> In the Securities Act of 1933, and … the Securities Exchange Act of 1934, the government had sought to prohibit some of the more spectacular extravagances of 1928 and 1929…. Most important, the principle was enunciated that the New York Stock Exchange and the other exchanges were subject to public regulation and the Securities and Exchange Commission was established to apply and enforce such regulation.[108]

In sum, the federal securities laws were a stark break with the previous laissez faire approach to securities sales. In the modern era, the SEC regulates stock sales and the foundation of that regulation would be transparency to facilitate informed investor decisions.

American securities laws arguably start and end with disclosure under the 1933 and 1934 Acts.[109] Congress has stepped in throughout the years to bolster the original 1933 and 1934 Acts with additional disclosure requirements.[110] The rule making contemplated by File No. 4-637 to bring transparency to corporate political spending is within the Commission's authority to safeguard the nation's capital markets under the 1933 and 1934 Acts.[111]

C. Potentially Bad for Business & Bad for Democracy

Moreover, a new rule is needed because there is growing empirical evidence that corporate political spending is bad for firms, endangering shareholder value. For example, economist Dr. Michael Hadani reported to the SEC in his comment to File No. 4-637, after analyzing a 11 year sample of 1110 small-, mid- and large cap S&P firms, "the regression analysis reveals that PAC expenditures and cumulative PAC expenditures have a statistically significant negative affect on firms' market value, both when examining their year to year PAC expenditures and also when examining their cumulative, 11 years, PAC expenditures."[112]

> These empirical findings indicate that investors have more than a prurient interest in knowing the scope of corporate political spending: rather, they have a financial interest in knowing so that they can protect their investments.

In a soon to be published piece Dr. Hadani with co-author Dr. Douglas Schuler, found, "[a]lthough many believe that companies' political activities improve their bottom line, empirical studies have not consistently borne this out. We investigate … a set of 943 S&P 1500 firms between 1998 to 2008. We find that firms' political investments are negatively associated with market performance and cumulative political investments worsen both market and accounting performance."[113]

Professors Hadani's and Schuler's findings are consistent with previous work from Professors Aggarwal, Mischke and Wang, as well as Professor John C. Coates IV.[114] These empirical findings indicate that investors have more than a prurient interest in knowing the scope of corporate political spending: rather, they have a financial interest in knowing so that they can protect their investments. Increased transparency of corporate political spending would reduce monitoring costs for shareholders and would increase market efficiency.[115]

Corporate political spending could be a wasteful brand of rent-seeking. As Professor Richard Hasen suggests, "[m]inimizing rent-seeking therefore may be a necessary component of an effort to improve U.S. economic productivity and decrease the deficit. Unchecked rent-seeking may retard long-term economic growth. In their look back at the Gilded Age in the United States, Glasser et al. suggest that an earlier round of regulation to curb rent-seeking was necessary to sustain U.S. economic growth."[116] But getting to the truth of the matter of whether this is a waste of money or a sound investment is unattainable when such a significant chunk of money in elections is untraceable. According to a joint Dēmos and U.S. PIRG study, 31% of the money spent independently in the 2012 election was untraceable, totaling over $315 million.[117]

D. Scope of a New Rule

> The new rule should cover political contributions, independent expenditures and electioneering communications.

Given that a new rule is needed, what should the contours of new rule be? The new SEC rule should be expansive in its definition of political spending. The federal government and state governments have long been able to require disclosures of not only contributions to candidates, political parties and PACs, but also disclosures of money purchasing political ads that expressly advocate the election or defeat of a candidate.[118] In 2003, the Supreme Court expanded the state's disclosure power to cover electioneering communications—broadcast ads which mention a candidate directly before an election and are targeted to that candidate's electorate.[119] The new rule should cover political contributions, independent expenditures and electioneering communications.

In addition, the new SEC rule should cover corporate spending in local, state and federal campaigns so that investors get a fulsome picture of where the company is spending money. While federal races garner the most attention from the press and hold the potential for the most expensive media buys, many companies are focused on narrow regional or even local political fights.[120] A rule that only covered federal spending would miss the corporate money flowing into state races, including increasingly costly state judicial races.[121]

The new Commission disclosure rules should cover not just corporate money for candidate elections, but rather, any item that appears before an American voter including ballot initiatives. Ever since the Supreme Court's *Bellotti* case in 1978, corporations have had the right to spend on ballot measures. And they do. For example, the pharmaceutical trade association known as PhRMA funded 311 ballot measures in the past eleven years in California alone.[122]

The new rule would have a significant loophole in it if it left out contributions from companies to 527s, 501(c)(4)s and 501(c)(6)s.[123] Corporate contributions to trade associations and other nonprofit organizations are one way that companies hide their role in politics. As I explained in more detail in a recent law review article, the use of opaque nonprofits thwarts transparency of money from for-profit corporations.[124]

There should be specificity about which candidate or ballot initiative is being supported by the corporation and in what amount. For example, disclosures should list the candidate supported and the amount spent in favor of that candidate both directly and indirectly through nonprofit intermediaries.[125] Only a rule that covers all political spending will end the asymmetry of information among managers and investors.

Periodic updating is also in order as political spending ebbs and flows along with the election cycle. As Professor Milton Cohen explained about securities disclosure more generally, "for the purposes of the continuing trading markets, the value of the original disclosures under the 1934 Act will gradually diminish to the vanishing point unless stale information is constantly replaced by fresh."[126]

The information reportable under the rule should be aggregated on the SEC's webpage in a sortable and downloadable format for easy access for the public.[127] In this respect, we can learn from the experience of the U.K., which had had corporate transparency for political donations since 1967, that it is not enough to have companies merely reporting to their particular shareholders.[128] For true clarity, the data across companies needs to be accessible in a single repository.

Finally, the SEC needs to include an enforcement mechanism to make the new transparency rule meaningful. Clearly, one of the reasons Rules G-37 and 206(4)-5 have a high compliance rate is that the SEC enforces these rules.[129]

Compliance with a new rule would likely have a low to negligible cost. Companies are already required to keep track of lobbying and political expenses in order to file accurate tax returns since these expenses are not tax deductible.[130] As Dr. Susan Holmberg explained in her public comment on Petition No. 4-637: "So long as the reporting categories chosen by the SEC …mirror the categories that the IRS [uses in] … § 162(e), the cost of compliance may be as little as the hours it would require an employee to copy and paste data from an internal file into a public one."[131]

E. The Supreme Court Supports Transparency

1. Disclosure under the Securities Laws

The Supreme Court has embraced transparency regulations as an appropriate use of governmental power in both securities regulations and in campaign finance laws. In fact, the Supreme Court has focused on disclosure as the telos of the 1934 Act as means of deterring securities fraud.[132] In *Santa Fe Industries*, the Supreme Court held:

> Section 10(b)'s general prohibition of practices deemed by the SEC to be 'manipulative' in this technical sense of artificially affecting market activity or in order to mislead investors is fully consistent with the fundamental purpose of the 1934 Act 'to substitute a philosophy of full disclosure for the philosophy of caveat emptor.' Indeed, nondisclosure is usually essential to the success of a manipulative scheme."[133]

The Court in *Santa Fe* went on to state: "the Court repeatedly has described the 'fundamental purpose' of the Act as implementing a 'philosophy of full disclosure'; once full and fair disclosure has occurred, the fairness of the terms of the transaction is at most a tangential concern of the statute."[134]

In 1995, the Court repeated this stance with respect to the pro-disclosure purpose of the 1933 Act:

> The primary innovation of the 1933 Act was the creation of federal duties-for the most part, registration and disclosure obligations-in connection with public offerings. [T]he 1933 Act "was designed to provide investors with full disclosure of material information concerning public offerings…" [And] "[t]he 1933 Act is a far narrower statute [than the Securities Exchange Act of 1934 (1934 Act) chiefly concerned with disclosure and fraud in connection with offerings of securities-primarily, as here, initial distributions of newly issued stock from corporate issuers"...[135]

Section 14(a) of the Securities Exchange Act of 1934 empowers the SEC to require proxy disclosure "as necessary or appropriate in the public interest or for the protection of investors."[136]

As the Supreme Court stated in the *Zandford* case, "[a]mong Congress' objectives in passing the [1934] Act was 'to insure honest securities markets and thereby promote investor confidence' after the market crash of 1929."

As the Supreme Court explained in *Capital Gains Research Bureau*, "[a] fundamental purpose, common to these [securities] statutes, was to … achieve a high standard of business ethics in the securities industry. As we recently said in a related context, 'It requires but little appreciation *** of what happened in this country during the 1920's and 1930's to realize how essential it is that the highest ethical standards prevail in every facet of the securities industry."[137] Or as the Supreme Court stated in the *Zandford* case, "[a]mong Congress' objectives in passing the [1934] Act was 'to insure honest securities markets and thereby promote investor confidence' after the market crash of 1929."[138]

2. Disclosure under the Campaign Finance Laws

The Supreme Court has also remained steadfast in its belief that transparency is needed in campaign finance.[139] Recognizing the state's interest in preventing corruption and fraud, the constitutionality of disclosure of money in politics has been repeatedly upheld by the Supreme Court.

Over the past four decades, the Supreme Court has recognized a number of state interests in disclosure of money in politics including *Buckley v. Valeo's* voter information interest, anti-corruption interest, and anti-circumvention interest; *Caperton v. Massey's* due process interest in judicial elections; as well as *Doe v. Reed's* interest in ballot measure integrity.[140]

There is language in the *Citizens United* opinion, which gives the government the ability to protect shareholders. As Justice Kennedy wrote for the *Citizens United* eight-person majority:[141]

> Shareholder objections raised through the procedures of corporate democracy . . . can be more effective today because modern technology makes disclosures rapid and informative. . . . With the advent of the Internet, 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. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits. . . .[D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.[142]

The language of the *Citizens United* opinion is clear that shareholders have the right to hold corporations accountable for their political spending. But such accountability is frustrated unless shareholders know in the first instance which companies are spending in politics and which are not.

F. The Public Supports a New SEC Rule

Americans of all stripes have expressed their dismay with the Supreme Court's decision in *Citizens United*. For example, a *Washington Post-ABC News* poll conducted found "[e]ight in 10 poll respondents say they oppose the high court's Jan. 21 decision to allow unfettered corporate political spending, with 65 percent 'strongly' opposed." [143]

The American public also wants better corporate controls in light of *Citizens United*. Another poll from February 2010 found "[a] majority of voters strongly favor both requiring corporations to get shareholder approval for political spending (56 percent strongly favor, 80 percent total favor) and a ban on political spending by foreign corporations (51 percent strongly favor, 60 percent total favor)."[144]

Polling in 2012 shows little has changed in the intervening two years. Democracy Corps found in November 2012, "Two thirds (64 percent) of 2012 voters said that democracy was undermined in this election by big donors and secret money that control which candidates we hear about…. Voters give strong support across the board to a series of reforms like closing the revolving door (81%), [and] increased disclosure of outside money (85%)…"[145]

According to the poll, 81 percent of Americans agree that companies should only spend money on political campaigns if they disclose their spending immediately.

The 2012 polling has shown how sick American voters are of corporate money in politics. Nearly nine in 10 Americans agree that there is too much corporate money in politics according to a poll released by Bannon Communications on behalf of the Corporate Reform Coalition in late October 2012. This poll also found overwhelming support for corporate governance reforms in light of *Citizens United*. According to the poll, 81 percent of Americans agree that companies should only spend money on political campaigns if they disclose their spending immediately.[146] These polls show that the American public supports responding to *Citizens United*, including by improving corporate governance.

Furthermore, the public has shown its support for Petition No. 4-637. At this time, over a record-breaking 600,000 public comments have been filed with SEC in support of the petition.[147] Only bureaucratic inertia is standing in the way. The time has come for the SEC to protect investors with a post-*Citizens United* transparency rule for corporate political spending.

Conclusion

The attention generated by *Citizens United* has sparked calls for the SEC to take a new step in regulating campaign finance by requiring across the board disclosure of political spending by registered issuers.[148] A transparency rule, like the SEC's previous anti-pay-to-play rules and its post-Watergate investigations, shares the similar goal of ensuring the integrity of the market.

In this post-*Citizens United* regulatory environment, the Commission should require that publicly-traded corporations disclose all political expenditures so that shareholders have a full and complete picture of how much corporate money is being placed into the political sphere.

The Securities and Exchange Commission is uniquely positioned to act as the guardians of the integrity of America's capital markets to protect current shareholders and potential investors.[149] It has been a leader before in Watergate, the municipal bond market and the public pension fund market. In this post-*Citizens United* regulatory environment, the Commission should require that publicly-traded corporations disclose all political expenditures so that shareholders have a full and complete picture of how much corporate money is being placed into the political sphere.

Endnotes

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[2] HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS, & POLITICAL REFORM 18 (4TH ED. 1992).
[3] *Id.*
[4] *Trevor Potter's Keynote Address at Conference Board's Symposium on Corporate Political Spending*, CAMPAIGN LEGAL CTR. BLOG (Oct. 21, 2011), http://www.clcblog.org/index.php?option=com_content&view=article&id=437%3Atrevor-potters-keynote-address-at-conference-boards-symposium-on-corporate-political-spending-10-21-11.
[5] *See* S. REP. NO. 93--981, at 507–10 (1974), *available at* http://www.maryferrell.org/mffweb/archive/viewer/showDoc.do?mode=searchResult&absPageId=1477617. [hereinafter Senate Select Report] (listing corporate contributions solicited by the Nixon reelection campaign); *id.* at 446–92 (detailing illegal corporate contributions from 13 companies); STANLEY I. KUTLER, THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON 435 (1990) (listing corporations breaking campaign finance laws).
[6] *See* BLACK MONEY: TRANSCRIPT, FRONTLINE (Apr. 7, 2009), http://www.pbs.org/wgbh/pages/frontline/blackmoney/etc/script.html; Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices Submitted to the Senate Banking, Housing and Urban Affairs Committee 2 (May 12, 1976), *available at* http://c0403731.cdn.cloudfiles.rackspacecloud.com/collection/papers/1970/1976_0512_SECQuestionable.pdf ("In 1973, as a result of the work of the Office of the Special Prosecutor, several corporations and executives officers were charged with using corporate funds for illegal domestic political contributions. The Commission recognized that these activities involved matters of possible significance to public investors, the nondisclosure of which might entail violations of the federal securities laws. …The Commission's inquiry into the circumstances surrounding alleged illegal political campaign contributions revealed that violations of the federal securities laws had indeed occurred.").
[7] *See* FRONTLINE, *supra* note 6; Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act--1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, 92 (2010) ("Although the focus of the Watergate hearings was the attempted burglary of the DNC headquarters, what former SEC enforcement chief Stanley Sporkin found most interesting were illegal contributions to the Nixon reelection campaign made by corporate executives.").
[8] *Id.*
[9] SEC REPORT ON ILLEGAL CORPORATE PAYMENTS, *supra* note 6, at 36. At nearly the same time that the SEC was looking into foreign payments because of Watergate, the Chair of United Brands Corporation, Eli Black committed suicide by jumping off the Pan Am building in New York City on Feb. 3, 1975 prompting the SEC to investigate his company. It found that $1,250,000 had been paid to Honduras to lessen a tax on bananas. *See* NOONAN, *supra* note 1, at 656.
[10] H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 3-4 (1998) (arguing that the Watergate scandal sparked an SEC investigation which ultimately led Congress to enact the Foreign Corrupt Practices Act).
[11] *See* Nixon Deposition, 25-26, June 23, 1975 (first part), available at http://www.gpo.gov/8a20eab6--7d53--4113--a75d--725544a2b97e/finaldownload/downloadid--c65dfded43d49f1b5dc571ffda6995e9/8a20eab6--7d53--4113--a75d--725544a2b97e/fdsys/pkg/gpo--nara--wspf--nixon--grand--jury--records/pdf/gpo--nara--wspf--nixon--grand--jury--records--.
[12] J. ANTHONY LUKAS, NIGHTMARE: THE UNDERSIDE OF THE NIXON YEARS 127 (1976), *see also* SEC REPORT ON ILLEGAL CORPORATE PAYMENTS, *supra* note 6, at 36-39 (same).
[13] ALEXANDER, *supra* note 2, at 20 (reporting U.S. corporations' international political spending revealed by the Watergate investigation, including "millions of [corporate] dollars known to have been given to politicians in Italy, Korea and other countries . . .").

[14] SEC REPORT ON ILLEGAL CORPORATE PAYMENTS, *supra* note 6, at 3-5 (describing the SEC's voluntary disclosure program).
[15] NOONAN, *supra* note 1, at 674.
[16] SEC REPORT ON ILLEGAL CORPORATE PAYMENTS, *supra* note 6, at 2.
[17] *Id*.
[18] *Id*. at 16-35 (listing firms involved).
[19] A. A. Sommer, Jr., *Crisis and the Corporate Community*, Midwest Securities Commissioners Association Conference, Aspen, Colorado, July 21, 1975, http://c0403731.cdn.cloudfiles.rackspacecloud.com/collection/papers/1970/1975_0721_Sommer_CrisisT.pdf.
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[21] 15 U.S.C. § 78m.
[22] A.A. Sommer Jr., Address, *The Four Musts of Financial Reporting*, (Washington D.C. Jan. 8, 1974), *available at* www.sechistorical.org/collection/papers/1970/1974_0108_SommerAICPA.pdf.
[23] NOONAN, *supra* note 1, at 680 ("One aspect of the FCPA was absolutely unique. Its prohibitions applied only to payments intended to influence a country other than the United States… For the first time, a country made it criminal to corrupt officials of another country.").
[24] Statement on Signing S. 305 into Law, 2 PUB. PAPERS 2157 (Dec. 20, 1977) (Statement by President Jimmy Carter) ("Corrupt practices between corporations and public officials overseas undermine the integrity and stability of governments. . . ."); *see also* H.R. Rep. No. 95-640, at 7 (1977), *available at* http://www.justice.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf ("The payment of bribes to influence the acts or decisions of foreign officials . . . is unethical. . . . But not only is it unethical, it is bad business as well. . . . In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business.").
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[26] MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., R41466, FOREIGN CORRUPT PRACTICES ACT (FCPA): CONGRESSIONAL INTEREST AND EXECUTIVE ENFORCEMENT 1 (2010), available at http://www.fas.org/sgp/crs/misc/R41466.pdf; 15 U.S.C. § 78m(b)(2)(B) (2010).
[27] SEITZINGER, *supra* note 26, at 1; 15 U.S.C. §§ 78dd-1 and dd-2 (2010).
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[30] *Id*. at 149 (explaining United States v. Titan).
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[44] Kiplinger, *Municipal Bonds*, http://www.kiplinger.com/basics/archives/2007/08/bonds8.html (accessed Sept. 27, 2012) (stating that the average sales commission for municipal bonds is 4.5 percent); Securities Industry and Financial Markets Association, *What You Should Know: Bonds and Bond Funds*, http://www.investinginbonds.com/learnmore.asp?catid=3&id=43 (accessed Sept. 27, 2012) (stating that the average municipal-bond-sales commission is 1 to 5 percent); Alan Walter Steiss, *Local Government Finance: Capital Facilities Planning and Debt Administration*, http://www-personal.umich.edu/~steiss/page68.html (accessed Sept. 27, 2012) (stating that the average profit for underwriters of municipal bonds is between 0.25 and 2 percent).
[45] Jon B. Jordan, *The Regulation of "Pay-To-Play" and the Influence of Political Contributions in the Municipal Securities Industry*, 1999 COLUMBIA BUS. L. REV. 489, 493 (1999).
[46] Alexander W. Butler, Larry Fauver, & Sandra Mortal, *Corruption, Political Connections, and Municipal Finance*, 22 REV. OF FIN. STUDIES 2873, 2890 (2009) (internal citation omitted).
[47] Saiying Deng & David A. Rakowski, *Geography and Local (Dis)Advantage: Evidence from Muni Bond Funds* at 30 (Nov. 16, 2010), http://ssrn.com/abstract=1571380 (working paper) ("In general, fund managers earn a premium on raw returns when investing in [municipal bonds in] states with more corruption…").
[48] Mary Williams Walsh, *Nationwide Inquiry on Bids for Municipal Bonds*, N.Y. TIMES, Jan. 9, 2009, at A1, available at 2009 WLNR 441316 (quoting Charles Anderson).
[49] 15 U.S.C. § 78o. The MSRB was created in 1975 in response to the fraudulent sale of New York City municipal bonds and the near financial collapse of the city. Ann Judith Gellis, *Municipal Securities Market: Same Problems - No Solutions*, 21 DEL. J. CORP. L. 427, 433-35 (1996).
[50] Jordan, *supra* note 45, at 498. The MSRB has continued its leadership in battling pay to play practices. As this article is being written pursuant to the Dodd-Frank Act, the Board has a proposed rule which would expand the pay to play restrictions in the industry. Key aspects of the proposed rule G-42 include the following: "a municipal advisor from engaging in 'municipal advisory business' with a municipal entity for compensation for a period of time beginning on the date of a non-de

minimis political contribution to an 'official of the municipal entity' and ending two years after all municipal advisory business with the municipal entity has been terminated…[and] would prohibit municipal advisors and municipal advisor professionals from soliciting contributions, or coordinating contributions, to officials of municipal entities with which the municipal advisor is engaging or seeking to engage in municipal advisory business or from which the municipal advisor is soliciting third-party business…" Mun. Sec. Rulemaking Bd., MSRB Draft Municipal Advisor Pay to Play Rule (Feb. 3, 2011), http://www.msrb.org/Home/News-and-Events/~/media/Files/Training-Events/Outreach/MSRB-Draft-Rule-G-42.ashx; Securities & Exchange Commission, 17 CFR Part 275 [Release No. IA–3418; File No. S7–18–09], *Political Contributions by Certain Investment Advisers: Ban on Third- Party Solicitation; Extension of Compliance Date* (June 13, 2012), http://www.gpo.gov/fdsys/pkg/FR-2012-06-13/pdf/2012-14440.pdf.

[51] SEC Release No. 34-33868 (Apr. 7, 1994).

[52] *Id*. at 34-35.

[53] *Webcast Transcript SEC Historical Society Fireside Chat on Pay to Play*, Apr. 28, 2011, http://c0403731.cdn.cloudfiles.rackspacecloud.com/collection/programs/sechistorical_042811_transcript.pdf (quoting Mr. Clapp).

[54] Nicholas Reade Everett, *Kicking Back Corruption in the Public Fund Advisory Selection Process: the SEC's Proposed Rule to Curtail Pay-to-Play Practices by Investment Advisors*, 29 REV. BANKING & FIN. 557 (Spring 2010) (student note) (discussing the details of the Hevesi and other pay to play scandals).

[55] *Id*. at 942.

[56] *Id*. at 943.

[57] *Id*. at 944-45 (citing *Morning Edition* (National Public Radio, June 1, 1994), *available in* LEXIS, News Library, Transcript No. 1358-9.).

[58] *Id*. at 945.

[59] Jose Martinez & Kenneth Lovett, *Disgraced Former Controller Alan Hevesi Gets up to 4 Years in Jail for Pension Fund Scandal*, NEW YORK DAILY NEWS, Apr. 15, 2011, http://articles.nydailynews.com/2011-04-15/local/29452968_1_hank-morris-assemblyman-andrew-hevesi-pension-fund; Mike Allen, *Treasurer's Downfall in Kickback Scheme Shakes Connecticut Political Establishment*, N.Y. TIMES, Oct. 25, 1999, http://www.nytimes.com/1999/10/25/nyregion/treasurer-s-downfall-kickback-scheme-shakes-connecticut-political-establishment.html?pagewanted=all&src=pm ("Mr. Silvester … now faces up to six years in prison.").

[60] *See* Political Contributions by Certain Investment Advisors, 17 Fed. Reg. 41,018 (July 14, 2010) (codified at 17 C.F.R. § 275.206(4)-5).

[61] Mary Williams Walsh, *Political Money Said to Sway Pension Investments*, N.Y. TIMES (Feb. 10, 2004) ("Nationwide, about 2,600 state and local pension plans hold some $2.1 trillion for more than 20 million teachers, firefighters, garbage collectors, judges and other public employees and retirees. (The figures do not include federal workers.")).

[62] Towers Watson, *Global Pension Asset Study 2012* (January 2012), http://www.towerswatson.com/assets/pdf/6267/Global-Pensions-Asset-Study-2012.pdf (total pensions in the U.S. have $16.1 trillion in assets and 29% of those U.S. pensions are public for a total of $4.6 trillion in U.S. public pensions).

[63] Jeffrey L. Barnett & Phillip M. Vidal, *State and Local Government Finances Summary: 2010*, at 4 (Sept. 2012), http://www2.census.gov/govs/estimate/summary_report.pdf.

[64] Robert Reed & Brett Chase, *Sticker Shock: Lofty Fees, Low Returns*, http://www.bettergov.org/sticker_shock_lofty_fees_low_returns/ (Apr. 18, 2012) (reporting that a $30 billion pension fund paid $1.3 billion in investment advisor fees); Mike Alberti, *Private Consultants Rake in Public Pension Fund Fees*, http://www.remappingdebate.org/map-data-tool/private-consultants-rake-public-pension-fund-fees (Apr. 4, 2012) (reporting that, in fiscal year 2011, California Public Employees' Retirement System paid financial advisers $48.7 million, 1/3 the amount it paid its own employees).

[65] Curtis C. Verschoor, *We Need to Stop Pay-to-Play Corruption*, STRATEGIC FIN. at 16 (Sept. 2009), http://www.imanet.org/PDFs/Public/SF/2009_09/09_09_ethics.pdf.

[66] For a good summary of the details of the new Rule, *see* Covington & Burling LLP, *Summary of the SEC's Pay-To-Play Rule 206(4)-5* (2010), http://www.cov.com/files/Uploads/Documents/Summary%20of%20the%20SEC's%20Pay%20to%20Play%20Rule.pdf.
[67] Following the SEC's lead, the Commodity Futures Trading Commission (CFTC) issued its own pay-to-play rules in 2012 imposing business conduct standards (BCS) on swap dealers (SDs) and major swap participants (MSPs). *See* Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 Fed. Reg. 9734 (Feb. 17, 2012).
[68] Sec. Exch. Comm'n v. Paul J. Silvester et al., Litigation Release No. 16759, 73 SEC Docket 1255 (Oct. 10, 2000) (reporting a pay-to-play scheme involving Connecticut state pensions funds and alleging violations of Section 17(a) of the Securities Act, Section 10(b) of the Securities Exchange Act, Rule 10b-5, and Sections 206(1) and 206(2) of the Investment Advisers Act); *see also* SEC v. William A. DiBella et al., Litigation Release No. 20498 (Mar. 14, 2008), available at http://www.sec.gov/litigation/litreleases/2008/lr20498.htm; 2007 U.S. Dist. Lexis 73850 (D. Conn., May 8, 2007), *aff'd* 587 F.3d 553 (2d Cir. 2009) (DiBella was fined for his role in the Treasurer Silvester scandal).
[69] Richard L. Hasen, *Lobbying, Rent Seeking and the Constitution*, 64 STAN. L. REV. 191, 252 (Jan. 2012).
[70] Times Topic Profile: Alan G. Hevesi, http://topics.nytimes.com/top/reference/timestopics/people/h/alan_g_hevesi/index.html.
[71] Bruce Carton, *The SEC's Newest Targets? Muni-Bonds and Pension Funds*, Securities Docket (Nov. 11, 2010, 4:47 pm), http://www.securitiesdocket.com/2010/11/11/the-sec%E2%80%99s-newest-targets-muni-bonds-and-pension-funds/.
[72] Danny Hakim & Mary Williams Walsh, *In State Pension Inquiry, a Scandal Snowballs*, N.Y. TIMES, Apr. 18, 2009, at A1; Sec. Exch. Comm'n v. Henry Morris, et al., Litigation Release No. 21036, 2009 WL 1309715 (May12, 2009), http://www.sec.gov/litigation/litreleases/2009/lr21036.htm (reporting action brought for alleged fraudulent scheme involving New York State's largest pension fund, the Common Retirement Fund (the "CRF") in violation of Section 10(b) of the Securities Exchange Act, Rule 10b-5, and Sections 206(1) and 206(2) of the Investment Advisers Act).
[73] Arthur Allen & Donna Dudney, *Does the Quality of Financial Advice Affect Prices?*, 45 THE FINANCIAL REVIEW 387, 412 (2010) ("It is also possible that cronyism or corruption results in the selection of lower-quality advisors."); James King Thu, *Alan Hevesi Paroled; Told to Avoid Criminals. Return to New York Politics Officially Illegal*, VILLAGE VOICE (Nov. 15 2012 at 1:04 PM), http://blogs.villagevoice.com/runninscared/2012/11/alan_hevesi_par.php.
[74] Mary L. Schapiro, *Speech by SEC Chairman: Opening Statement at the SEC Open Meeting* (June 30, 2010), http://www.sec.gov/news/speech/2010/spch063010mls.htm.
[75] Press Release, SEC, *SEC Adopts New Measures to Curtail Pay to Play Practices by Investment Advisers* (June 30, 2010), http://www.sec.gov/news/press/2010/2010-116.htm.
[76] Mark Hemingway, *The Perils of Donating to Perry the SEC's Curious Role in Campaign Finance*, WEEKLY STANDARD, Oct. 17, 2011, http://www.weeklystandard.com/articles/perils-donating-perry_595199.html ("As the only sitting governor in the race for the White House, Perry is much more negatively impacted by the SEC rules than anyone else in the race," says campaign communications director Ray Sullivan. "It has and will continue to hamper our efforts to raise money, especially from the financial sector. It has made things quite challenging in New York, for example.").
[77] Eliza Newlin Carney, *Rules of the Game: Wall Street Donation Rules May Cost Perry*, ROLL CALL, Sept. 22, 2011, http://www.rollcall.com/issues/57_33/Wall-Street-Donation-Rules-May-Cost-Perry-208924-1.html.
[78] Skadden, Arps, Slate, Meagher & Flom LLP, *Governor Perry's Presidential Candidacy Issues Under SEC Rule 206(4)-5 and MSRB Rule G-37* (Aug. 15, 2011), https://www.skadden.com/insights/governor-perry%E2%80%99s-presidential-candidacy-issues-under-sec-rule-2064-5-and-msrb-rule-g-37.
[79] *Id.*
[80] President Barack Obama, State of the Union Address (Jan. 27, 2010).

[81] The 10 are Professors Lucian A. Bebchuk, Bernard S. Black, John C. Coffee, Jr., James D. Cox, Ronald J. Gilson, Jeffrey N. Gordon, Henry Hansmann, Robert J. Jackson, Jr., Donald C. Langevoort, and Hillary Sale.
[82] Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1310-11 (Apr. 1999).
[83] *Id*. at 1299.
[84] Jill Fisch, *How Do Corporations Play Politics? The Fedex Story*, 58 VANDERBILT L. REV. 1495, 1565 (2005).
[85] James Evan Dallas, Sec. Exch. Comm'n Petition No. 4-593 (Jan. 22, 2010) (seeking a "Rulemaking in Reaction to *Citizens United*").
[86] For a discussion of the shareholder rights implicated by *Citizens United*, *see* Lucian Bebchuk & Robert Jackson, *Corporate Political Speech Who Decides?* 124 HARV. L. REV. 83, 84 (Nov. 2010) (arguing for rules that "mandate detailed and robust disclosure to shareholders of the amounts and beneficiaries of a corporation's political spending, whether made directly by the company or indirectly through intermediaries"); Ciara Torres-Spelliscy, *Corporate Campaign Spending, Giving Shareholders a Voice* (Brennan Center 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1550990 (arguing for shareholder disclosure and consent); Jack Bogle, Comment on SEC Petition File No. 4-637 (Jan. 17, 2012), http://www.sec.gov/comments/4-637/4637-22.pdf ("I urge the Commission to stand back for a moment from the issue of full disclosure of corporate contributions to decide whether corporate shareholders should not first decide whether a corporation should make any political contribution whatsoever without the approval of its shareholders.").
[87] *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).
[88] See Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 675 & n.5 (1990), *overruled by Citizens United v. FEC*, 130 S. Ct. 876 (2010) (Brennan, J. concurring) ("We have long recognized the importance of state corporate law in 'protect[ing] the shareholders' of corporations chartered within the State…" and "shareholders in a large business corporation may find it prohibitively expensive to monitor the activities of the corporation to determine whether it is making expenditures to which they object."); FEC v. Mass. Citizens for Life, 479 U.S. 238, 258 (1986) ("*MCFL*") ("The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political ideas."); Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 415 n.28 (1972) ("We are of the opinion that Congress intended to insure against officers proceeding in such matters without obtaining the consent of shareholders by forbidding all such [political] expenditures."); United States v. Cong. of Indus. Orgs., 335 U.S. 106, 113 (1948) (explaining Taft-Hartley was motivated by "the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders...").
[89] Bill De Blasio, Citizens United *and the 2010 Midterm Elections,* 3 (Public Advocate for the City of New York Dec. 2010), http://advocate.nyc.gov/files/12-06-10CitizensUnitedReport.pdf (finding 36% of outside spending in the 2010 federal election was funded by secret sources); Congress Watch, *12 Months After: The Effects of* Citizens United *on Elections and the Integrity of the Legislative Process*, 12 (Public Citizen Jan. 2011), http://www.citizen.org/documents/Citizens-United-20110113.pdf (finding "[g]roups that did not provide any information about their sources of money collectively spent $135.6 million, 46.1 percent of the total spent by outside groups during the election cycle.").
[90] Blair Bowie & Adam Lioz, *Billion-Dollar Democracy: The Unprecedented Role of Money in the 2012 Elections*, at 5 (2013), http://www.demos.org/sites/default/files/publications/BillionDollarDemocracy_Demos.pdf ("For the 2012 election cycle, 31% of all reported outside spending was 'secret spending,' coming from organizations that are not required to disclose the original source of their funds").
[91] 26 U.S.C. § 501(c)(4); § 501(c)(6).
[92] The SEC requires no disclosure of corporate political spending. Bebchuk et al, Committee on Disclosure of Corporate Political Spending Petition for Rulemaking at Securities and Exchange Commission (Aug. 3, 2011), http://www.sec.gov/rules/petitions/2011/petn4-637.pdf ("Because the Commission's current rules do not require public companies to give shareholders detailed

information on corporate spending on politics, shareholders cannot play the role the Court described.").

[93] L. PAIGE WHITAKER, ERIKA K. LUNDER, KATE M. MANUEL, JACK MASKELL, & MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., R41096, LEGISLATIVE OPTIONS AFTER *CITIZENS UNITED V.* FEC: CONSTITUTIONAL AND LEGAL ISSUES 6 n.41 (2010), http://www.fas.org/sgp/crs/misc/R41096.pdf ("Under the Internal Revenue Code, § 501(c) organizations that file an annual information return (Form 990) are generally required to disclose significant donors (typically those who give at least $5000 during the year) to the Internal Revenue Service (IRS). 26 C.F.R. § 1.6033-2(a)(2)(ii)(f). No identifying information of donors to § 501(c) organizations is subject to public disclosure under the tax laws except in the case of private foundations (which are a type of § 501(c)(3) organization). IRC § 6104(b), (d).").

[94] According to the instructions for FEC Form 9, "[i]f you are a corporation, labor organization or Qualified Nonprofit Corporation making communications permissible under [11 C.F.R.] 114.15 and you received no donations made specifically for the purpose of funding electioneering communications, enter '0' (zero)." Fed. Election Comm'n, Instructions for Preparing FEC Form 9 (24 Hour Notice of Disbursements for Electioneering Communications) 4 (undated), http://www.fec.gov/pdf/forms/fecfrm9i.pdf; *see also* Fed. Election Comm'n, FEC Form 5 Report of Independent Expenditures Made and Contributions Received to be Used by Persons (Other than Political Committees) including Qualified Nonprofit Corporations (2009) http://www.fec.gov/pdf/forms/fecfrm5.pdf.

[95] Peter Stone, *Campaign Cash: The Independent Fundraising Gold Rush Since 'Citizens United' Ruling* (Ctr. for Public Integrity Oct. 4, 2010), http://www.publicintegrity.org/articles/entry/2462/.

[96] Eliza Newlin Carney, *Politicking Under Cover*, CQ WEEKLY (Sept. 15, 2012 – 1:12 p.m.), http://public.cq.com/docs/weeklyreport/weeklyreport-000004152999.html.

[97] National Conference of State Legislatures, *Life After* Citizens United (Jan. 4, 2011), http://www.ncsl.org/legislatures-elections/elections/citizens-united-and-the-states.aspx (listing 23 states impacted by *Citizens United*).

[98] Nell Minow, *Diane Sanger Memorial Lecture*, March 17, 2010, http://c0403731.cdn.cloudfiles.rackspacecloud.com/collection/programs/sechistorical-podcast-031710-transcript.pdf.

[99] SEC, *Bank of America No Action Letter*, Feb. 29, 2012, http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2012/trilliumassetstephen022912-14a8.pdf (allowing shareholders at Bank of American to file a shareholder proposal regarding the company's political spending); SEC, *Home Depot No Action Letter*, Mar. 25, 2011, http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2011/northstarasset032511-14a8.pdf (allowing shareholders at Home Depot to file a shareholder proposal regarding the company's political spending).

[100] Sustainable Investments Institute (Si2), *FACT SHEET: Corporate Political Spending Shareholder Resolutions, 2010-2012*, *available at* http://www.sec.gov/comments/4-637/4637-1149.pdf ("Investors filed 282 shareholder resolutions about corporate political spending from 2010 to 2012. These proposals accounted for 41 percent of all votes on social and environmental issues in 2012. … The vast majority (79 percent) asked companies to disclose more about spending before and after elections.").

[101] Carolyn Mathiasen, Erik Mell & Alex Gallimore, 2012 U.S. Proxy Season Review Environmental & Social Issues, ISS, Aug. 29, 2012, http://www.issgovernance.com/files/private/2012USProxySeasonReviewES.pdf ("In the wake of intensified controversy over corporate contributions, political issues in 2012 took the top spot for the first time in the list of shareholder resolutions raising environmental and social (E&S) questions."); Press Release, Center for Political Accountability, *Corporate Disclosure Expands as Political Spending Surges, New CPA-Zicklin Index Reveals* (Sept. 25, 2012), http://politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/6906 ("almost 60 percent of companies in the top echelons of the S&P 500 are now disclosing some political spending information…"); Robert Ludke, *Is It Worth It? Political Spending and Corporate Governance*, BUSINESS ETHICS MAGAZINE (Nov. 17, 2012), http://business-ethics.com/2012/11/17/10419-is-it-worth-it-political-spending-and-corporate-governance/ ("it is imperative that companies take a much more proactive and transparent approach to the governance of their political giving.").

[102] Center for Responsive Politics, *2012 Top Donors to Outside Spending Groups*, http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=D&type=O&superonly=S.

[103] Ciara Torres-Spelliscy, *The $500 Million Question: Are the Democratic and Republican Governors Associations Really State PACs Under* Buckley*'s Major Purpose Test?,* 15 NYU J. of Legislation & Public Policy 485, 489-90 (Spring 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988603 (finding "IRS reporting reveals that much of the money filling the coffers of the Governors Associations is actually corporate in origin. A majority of the corporate contributions (over 65%) comes from publicly traded corporations…"); *see also* Paul Abowd, *Million-Dollar Donation in Indiana Race May Skirt Limits on Corporate Giving*, CENTER FOR PUBLIC INTEGRITY CONSIDER THE SOURCE (July 26, 20126:00 am), http://www.publicintegrity.org/2012/07/26/10229/million-dollar-donation-indiana-race-may-skirt-limits-corporate-giving ("The RGA's 527 raised $16.7 million since April, nearly twice as much as its Democratic counterpart. Fifty-seven percent of that money came from corporate treasuries and corporate PACs, according to a Center for Public Integrity analysis of IRS records."); John Dunbarel & Alexandra Duszake, *D.C.-Based Governors' Associations Provide Back Door for Corporate Donors Organization Raises Millions from Energy Interests*, CENTER FOR PUBLIC INTEGRITY (Oct. 18, 2012 6:00 am) ("Companies with an interest in the development of the natural gas industry in the state, including Chesapeake, gave at least $4 million in corporate treasury funds to the RGA in the 2009-2010 election, according to a Center for Public Integrity analysis of CRP data. Among them were Exxon Mobil ($704,900), CONSOL Energy ($338,200), Encana ([$]151,400), the American Natural Gas Alliance ($101,000) and two natural gas-consuming electrical utilities.").

[104] Steve Thel, *The Original Conception of Section 10(b) of the Securities and Exchange Act*, 42 STAN. L. REV. 385, 407 (Jan. 1990) ("Securities legislation has historically been the product of calamity.").

[105] JOHN KENNETH GALBRAITH, THE GREAT CRASH 1929, 178 (2009).

[106] Joel Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. CORP. L. 1, 20 (Fall 1983).

[107] GALBRAITH, *supra* note 105, at 46.

[108] *Id*. at 166.

[109] Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 727-28 (1975) ("During the early days of the New Deal, Congress enacted two landmark statutes regulating securities. The 1933 Act was described as an Act 'to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes.' The Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. s 78a et seq. (1934 Act), was described as an Act 'to provide for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes.'").

[110] Dennis J. Block, Nancy E. Barton, Alan E. Garfield, *Affirmative Duty to Disclose Material Information Concerning Issuer's Financial Condition and Business Plans*, 40 BUS. LAW. 1243, n.8 (Aug. 1985) ("Section 5, 7, and 10 of the Securities Act of 1933, 15 U.S.C. §§ 77e, 77g and 77j, require extensive disclosures in connection with a public offering of securities; § 14(c) of the 1934 Act, 15 U.S.C. §§ 78n(c), requires disclosure in connection with the solicitation of proxies; and §§ 13(d), 13(e), 14(d), 14(e) and 14(f) of the 1934 Act, 15 U.S.C. §§ 78m(d), 78m(e), 78n(d) 78n(e), and 78n(f), require disclosure in connection with stock accumulation programs and tender offers.").

[111] George S. Branch & James A. Rubright, *Integrity of Management Disclosures Under the Federal Securities Laws*, 37 BUS. LAW. 1447, 1453 (1982) (citing H.R. Rep. No. 85-73, at 1-2 (1933)) (address by President Franklin Roosevelt) (investments "should only be made on the basis of full disclosure of all information necessary 'to bring into the full glare of publicity those elements of real and unreal values which lie behind a security.'"); *see* SEC v. Ralston Purina Co., 346 U.S. 119, 124 (1953) (holding that the Securities Act of 1933 "protect[s] investors by promoting full disclosure of information thought necessary to informed investment decisions"); Michael W. Ott, *Delaware Strikes Back: Newcastle Partners and the Fight for State Corporate Autonomy*, 82 INDIANA L. J. 159 (2007) (Ott notes that, since the stock market crash of 1929, "the states regulate the internal governance of a corporation, and the federal government, through delegation to the SEC, regulates a company's external affairs-that is, the relationship between the company and the market.").

[112] Comment of Dr. Michael Hadani on SEC File 4-637.
[113] Michael Hadani & Douglas A. Schuler, *In Search of El Dorado: The Elusive Financial Returns on Corporate Political Investments*, STRATEGIC MANAGEMENT JOURNAL (article first published online July 13, 2012), http://onlinelibrary.wiley.com/doi/10.1002/smj.2006/abstract.
[114] Michael Hadani, *Institutional Ownership Monitoring and Corporate Political Activity: Governance Implications*, J. OF BUS. RES. (2011); John Coates C. IV, *Corporate Politics, Governance, and Value Before and After* Citizens United, 9(4) JOURNAL OF EMPIRICAL LEGAL STUDIES 657–696 (Dec. 2012), http://onlinelibrary.wiley.com/doi/10.1111/j.1740-1461.2012.01265.x/abstract; Remarks of John Coates, *Can Shareholders Save Democracy*, Accountability After *Citizens United* Symposium (Apr. 29, 2011), http://www.brennancenter.org/content/pages/accountability_after_citizens_united; Rajesh Aggarwal, Felix Meschke & Tracy Wang, *Corporate Political Donations: Investment or Agency?,* 14(1) BUSINESS AND POLITICS, Article 3 (2012).
[115] *See* Comment of Dr. Susan Holmberg on SEC Petition File No. 4-637 at 8 ("The expected benefits of mandatory disclosure of corporate political spending would be substantial. Disclosure would help to mitigate the moral hazard problems inherent in CPA [corporate political activity] by diminishing the monitoring costs for shareholders, allowing them to make more informed investment decisions.").
[116] Hasen, *Lobbying, Rent Seeking and the Constitution*, *supra* note 69, at 232.
[117] Bowie & Lioz, *supra* note 90; *see also* Paul Blumenthal, *'Dark Money' In 2012 Election Tops $400 Million, 10 Candidates Outspent By Groups With Undisclosed Donors*, HUFFINGTON POST (Nov. 2, 2012 1:36 pm) (finding $412 million was dark money in the 2012 federal election).
[118] Ciara Torres-Spelliscy, *Transparent Elections After* Citizens United, 9Brennan Center 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1776482.
[119] McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).
[120] LIAM ARBETMAN ET AL., THE LIFE OF THE PARTY: HARD FACTS ON SOFT MONEY IN NEW YORK STATE 1 (Common Cause/New York 2006), available at http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/SOFT_MONEY_REPORT.PDF (finding between 1999 and 2006, corporations and other business entities gave over thirty-two million dollars to New York State political parties' Housekeeping Accounts); House Report 111-492 - Part 1 - DISCLOSE Act, 111th Cong., at n.7 ("In a 2007 Colorado ballot measure election, a group called `Littleton Neighbors Voting No' spent $170,000 to defeat a [local] zoning restriction that would have prevented a new Walmart. When the disclosure reports for these groups were filed, it was revealed that 'Littleton Neighbors' was exclusively funded by Walmart.").
[121] Committee for Economic Development, *Partial Justice: The Peril of Judicial Elections* (2011), http://www.ced.org/images/content/events/moneyinpolitics/2011/38751_partialjustice.pdf; Adam Skaggs, *Buying Justice: The Impact of* Citizens United *on Judicial Elections* 2 (Brennan Center 2010).
[122] Coulter Jones & Elizabeth Titus, *State's Top 100 Political Donors Contribute $1.25 Billion*, CALIFORNIA WATCH, June 4, 2012.
[123] Nonprofits do not enjoy a blanket privilege of anonymity. *See* Nat'l Ass'n of Mfrs v. Taylor, 582 F.3d 1, 22 (D.C. Cir. 2009) (upholding lobbying disclosure as applied to a trade association).
[124] Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax--Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws,* 26 NEXUS: CHAP. J. OF L. & PUB. POL'Y 59, 60 (2011); *see also* Adam Liptak, *A Blockbuster Case Yields an Unexpected Result*, N.Y. TIMES, Sept. 19, 2011, http://www.nytimes.com/2011/09/20/us/disclosure-may-be-real-legacy-of-citizens-united-case.html?_r=1&hp.
[125] BRUCE F. FREED & JAMIE CARROLL, HIDDEN RIVERS: HOW TRADE ASSOCIATIONS CONCEAL CORPORATE POLITICAL SPENDING, ITS THREAT TO COMPANIES, AND WHAT SHAREHOLDERS CAN DO, Ctr. For Political Accountability, 1-2 (Jan. 1, 2006), http://www.politicalaccountability.net/index.php?ht=a/getdocumentaction/i/932.
[126] Milton H. Cohen, *"Truth in Securities" Revisited*, 79 HARV. L. REV 1340, 1356 (May 1966).
[127] Sunlight Foundation Blog, *Bringing Sunlight to Campaign Contributions*, Feb. 2, 2010, ("All information should be online, searchable, sortable, downloadable and machine-readable.").
[128] Aileen Walker, Parliament and Constitution Centre, House of Commons Library, *The Political Parties, Elections and Referendums Bill –Donations,* 30 (Jan. 7, 2000),

http://www.parliament.uk/commons/lib/research/rp2000/rp00-002.pdf ("The Companies Act 1967 imposed a duty on companies to declare in the directors' report any political donations above a certain limit. ... There is no central record of such donations…").

[129] Press Release, SEC, SEC Charges Goldman Sachs and Former Vice President in Pay-to-Play Probe Involving Contributions to Former Massachusetts State Treasurer (Sept. 27, 2012), http://www.sec.gov/news/press/2012/2012-199.html ("Goldman Sachs agreed to settle the charges by paying $7,558,942 in disgorgement, $670,033 in prejudgment interest, and a $3.75 million penalty, which is the largest ever imposed by the SEC for Municipal Securities Rulemaking Board (MSRB) pay-to-play violations."); *see also* Andrew Ackerman, *Southwest Securities Settles With SEC, Financial Planning* (Mar. 25, 2010), http://www.financial-planning.com/news/cahill-southwest-securities-sec-2666312-1.html ("Southwest Securities Inc. has agreed to pay $470,147 to settle charges with the Securities and Exchange Commission for violating an anti-pay-to-play rule by co-underwriting Massachusetts bond deals within two years after its former senior vice president made political contributions to state Treasurer Timothy Cahill."); Enforcement Proceedings, SEC NEWS DIGEST, Iss. 2005-237 (Dec. 12, 2005) ("The Commission today announced the institution and settlement of administrative proceedings against CIBC World Markets Corporation (CIBC), a registered broker-dealer, for violations of Rule G-37(b) of the Municipal Securities Rulemaking Board (MSRB) …").

[130] Hasen, *Lobbying, Rent Seeking and the Constitution*, *supra* note 69, at 203 ("in 1993, Congress repealed the deduction as to certain lobbying expenses, including for 'influencing legislation.'"); 26 I.R.C. § 6113.

[131] Comment of Dr. Susan Holmberg on SEC Petition File No. 4-637 at 7 (2011), http://www.sec.gov/comments/4-637/4637-12.pdf.

[132] Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 6-7 (1985) (*quoting* Santa Fe Indus. v. Green, 430 U.S. 462, 476-77 (1977), *quoting* Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972), *quoting* SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186 (1963)) ("fundamental purpose of the . . . Act [is] to substitute a philosophy of full disclosure for the philosophy of caveat emptor.").

[133] Santa Fe Indust. v. Green, 430 U.S. 462, 476-77 (1977) (internal citations omitted).

[134] *Id*. at 477-78 (internal citations omitted); *see also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 528 n.6 (1974) (Douglas, J., Brennan, J., White, J. & Marshall, J., dissenting) ("Requirements promulgated under the 1934 Act require disclosure to security holders of corporate action which may affect them. Extensive annual reports must be filed with the SEC including, *inter alia*, financial figures, changes in the conduct of business, the acquisition or disposition of assets, increases or decreases in outstanding securities, and even the importance to the business of trademarks held. *See* 17 CFR ss 240.13a-1, 249.310; 3 CCH Fed.Sec.L.Rep. 31,101 et seq. (Form 10-K).").

[135] Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 571-72 (1995) (internal citations omitted); *see also* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 760 n.4 (Powell, J., Stewart, J., & Marshall, J. concurring) (1975) ("The stated purpose of the 1933 Act was '(t)o provide full and fair disclosure of the character of securities sold in interstate and foreign commerce . . ..' See preamble to Act, 48 Stat. 74. The evil addressed was the tendency of the seller to exaggerate, to 'puff,' and sometimes fraudulently to overstate the prospects and earning capabilities of the issuing corporation. The decade of the 1920's was marked by financings in which the buying public was oversold, and often misled, by the buoyant optimism of issuers and underwriters.").

[136] Exchange Act § 14(a), 15 U.S.C. § 78n.

[137] SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963).

[138] SEC v. Zandford, 535 U.S. 813, 819 (2002); The Supreme Court referred to the 1933 Act: "The primary innovation of the 1933 Act was the creation of federal duties--for the most part, registration and disclosure obligations—in connection with public offerings." Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 571 (1995).

[139] Justice Clarence Thomas is the lone Justice who does not share this belief.

[140] Buckley v. Valeo, 424 U.S. 1 (1976); Caperton v. A.T. Massey Coal Co., 129 S.Ct. 2252 (2009); Doe v. Reed, 130 S. Ct. 2811 (2010). On remand, the district court in *Doe* reaffirmed the state's interest in disclosure in an as-applied challenge based on alleged risk of harassment. *See* Doe v. Reed, No. C09-5456BHS, slip op. at 33 (D. W. Washington Oct. 17, 2011), http://electionlawblog.org/wp-

content/uploads/doevreed-summary-judgment.pdf ("The facts before the Court in this case, however, do not rise to the level of demonstrating that a reasonable probability of threats, harassment, or reprisals exists…").

141 Eight Justices voted in favor of disclosure and disclaimers in both 2010's *Citizens United* and in 2003's *McConnell*.

142 Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

143 Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST, Feb. 17, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html.

144 Greenberg Quinlan Rosner Research, Common Cause, Change Congress, Public Campaign Action Fund, Strong Campaign Finance Reform: Good Policy, Good Politics 2 (Feb. 8, 2010), http://www.greenbergresearch.com/articles/2425/5613_Campaign%20Finance%20Memo_Final.pdf.

145 Greenberg Quinlan Rosner & Democracy Corps, *Voters Push Back Against Big Money Politics*, Nov. 13 2012 http://www.democracycorps.com/National-Surveys/voters-push-back-against-big-money-politics-full-report/.

146 Liz Kennedy, *Citizens Actually United: The Bi-Partisan Opposition to Corporate Political Spending And Support for Common Sense Reform*, DEMOS, Oct. 25, 2012, http://www.demos.org/publication/citizens-actually-united-bi-partisan-opposition-corporate-political-spending-and-support.

147 SEC, *Comments on Rulemaking Petition: Petition to Require Public Companies to Disclose to Shareholders the Use of Corporate Resources for Political Activities* [File No. 4-637], http://www.sec.gov/comments/4-637/4-637.shtml (last visited Nov. 28, 2012).

148 Bebchuk et al, Committee on Disclosure of Corporate Political Spending Petition for Rulemaking at Securities and Exchange Commission (Aug. 3, 2011), http://www.sec.gov/rules/petitions/2011/petn4-637.pdf ("Because the Commission's current rules do not require public companies to give shareholders detailed information on corporate spending on politics, shareholders cannot play the role the Court described.").

149 SEC, *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation* (Oct. 24, 2011) ("The mission of the U.S. Securities and Exchange Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.").

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