PICKET SIGNS VERSUS POCKET BOOKS: USING U.S. SECURITIES LAW TO COMPEL CORPORATE LOBBYING DISCLOSURE

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I. INTRODUCTION

Returning to their eighteenth century roots, American consumers are borrowing a strategy of political mobilization and resistance first employed by American patriots to oppose the British Empire—consumer protests.[1] Years before signing the Declaration of Independence, American colonists boycotted British goods, and the merchants who sold them, to protest British policies.[2] For provincial consumers boycotting British imports, "everyday goods became a measure of patriotism."[3] Their private choices in the marketplace symbolized a steadfast refusal to detach their consumption of British goods from its political consequences.[4]

Now, more than two centuries later, modern American consumers are emulating their Revolution-era ancestors. Once limited to bumper stickers and yard signs, the expression of political preference has returned to the marketplace—but corporations, not the government, bear the brunt of this modern political resistance. Fueled by socially-conscious "Millennials" and motivated by hot button social issues, modern consumers are reforming their private acts of consumption into overt political acts. Business executives call modern consumer culture the "new battleground . . . beyond the nation's capital"—and corporations are caught in the crosshairs.[5]

Modern consumers closely scrutinize corporations' political ideologies and, if negatively perceived, transform goods and services into vehicles for protesting the underlying policies. For example, GoDaddy, the world's largest web-hosting service, became the target of a boycott after privately expressing support for a controversial bill to the House Judiciary Committee.[6] GoDaddy lost more than 37,000 customers in only two days.[7] Moreover, consider Uber, the world's largest ridesharing company, whose Chief Executive Officer served on President Donald J. Trump's economic advisory council.[8] After President Trump issued a controversial executive order, consumers perceived Uber's ambiguous response as endorsing the President's order and organized a consumer boycott, which went viral and resulted in more than 200,000 Uber customers permanently deleting their accounts.[9]

Just as modern consumers are transforming their consumption into political power, shareholders are demanding corporations disclose their lobbying activities, which are

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1. See T.H. BREEN, THE MARKETPLACE OF REVOLUTION: HOW CONSUMER POLITICS SHAPED AMERICAN INDEPENDENCE (2004), for a discussion of how American colonists politicized British goods, created a shared public sacrifice, and contributed to the success of the American Revolution through political solidarity in the marketplace.

2. *Id*. at 257–58.

3. *Id.* at XVI.

4. *Id.*

5. Richard Levick, *The 'Trump Effect': Consumer Boycotts Could Become Pervasive on Both Sides*, FORBES (Dec. 5, 2016, 1:32 PM), http://www.forbes.com/sites/richardlevick/2016/12/05/the-trump-effect-consumer-boycotts-could-become-pervasive-on-both-sides/#52685f131e04 [hereinafter *The Trump Effect*].

6. CRUNCHBASE, GODADDY OVERVIEW, https://www.crunchbase.com/organization/godaddy#/entity (last visited Feb. 23, 2017); Tom Cheredar, *Go Daddy Loses Over 37,000 Domains Due to SOPA Stance*, VENTURE BEAT (Dec. 24, 2011, 5:36 PM), http://venturebeat.com/2011/12/24/godaddy-domain-loss.

7. Cheredar, *supra* note 6.

8. Mike Isaac, *Uber C.E.O. to Leave Trump Advisory Council After Criticism*, N.Y. TIMES (Feb. 2, 2017), https://www.nytimes.com/2017/02/02/technology/uber-ceo-travis-kalanick-trump-advisory-council.html.

9. *Id.*

aimed at influencing government action and policy.[10] For some shareholders, the motive prompting their demand for disclosure is ideological: they want to avoid investing in a company whose political spending advances causes or candidates they do not support.[11] For others, the motive is financial: disclosing lobbying activities "safeguards corporate reputation and protects shareholder value."[12]

Motives aside, the trend for increased transparency in corporate lobbying is undeniable: "disclosure of political spending has in recent years been a more frequent subject of shareholder proposals at U.S. public companies than any other corporate governance issue."[13] Such shareholder proposals seek to amend corporate policies to mandate annual disclosure of lobbying information.[14] Consistent with this position, this Note argues that corporate lobbying activities are "material investor information," and thus, federal law requires disclosure of such information.

Part I of this Note defines "lobbying," recounts the history of lobbying in the corporate context, and describes several reasons for its increased prevalence in the last forty-five years. Part II discusses the recent increase in investor engagement—by way of shareholder proposals, petitions to the U.S. Securities and Exchange Commission (the "SEC"), and lawsuits—seeking corporate lobbying disclosures, as well as three key concerns presented by opaque corporate spending. Part II also provides two illustrations of investors' concerns realized: the Chesapeake Corporation example demonstrates how corporations may use lobbying to undermine investor protection, and the network neutrality example reveals the potential negative effects that lobbying can have on corporate reputation and share value. Finally, Part II concludes that, regardless of whether lobbying detracts or enhances company performance, investors are demanding increased transparency at unprecedented rates because lobbying implicates reputational and commercial risks.

Part III of this Note begins with a review of Supreme Court jurisprudence and SEC guidance establishing the "materiality standard," which provides the foundation for this Note's argument: corporate lobbying activities create material information that reasonable investors consider significant in their deliberations. Focusing on the impacts of lobbying on corporate reputation and share value, Part III establishes the materiality of corporate lobbying information by demonstrating that a reasonable investor would consider such information important. Ultimately, Part III states that corporate lobbying poses both commercial and reputational risks to a company's financial performance and share value, and

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10. John Keenan, *Corporate Lobbying Disclosure is Material Investor Information*, PROXY PREVIEW 2016, at 29, https://higherlogicdownload.s3.amazonaws.com/GOVERNANCEPROFESSIONALS/a8892c7c-6297-4149-b9fc-378577d0b150/UploadedImages/Society%20Alert%20Docs/Proxy-Preview-2016.pdf.

11. *See, e.g.*, Letter from Adam Skaggs, Senior Counsel, Brennan Ctr. for Justice to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n at 5, 7 (Dec. 21, 2011), *available at* https://www.brennancenter.org/sites/default/files/legacy/Democracy/CFR/Brennan%20Center%20Comments%20-%20File%20No%20%204-637.pdf (providing, as an example, shareholder outrage following the revelation of Target's donations to a political committee that opposed gay marriage).

12. Keenan, *supra* note 10.

13. Letter from Lucian A. Bebchuk, Professor, Harvard Law Sch. & Robert J. Jackson, Jr., Professor, Columbia Law Sch. to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n 2 (Apr. 30, 2013), *available at* https://www.sec.gov/comments/4-637/4637-1701.pdf.

14. AS YOU SOW, PROXY PREVIEW 2016, at 29–30 (2016), https://higherlogicdownload.s3.amazonaws.com/GOVERNANCEPROFESSIONALS/a8892c7c-6297-4149-b9fc-378577d0b150/UploadedImages/Society%20Alert%20Docs/Proxy-Preview-2016.pdf [hereinafter PROXY PREVIEW 2016].

therefore, constitutes material investor information that corporations must disclose to investors under federal securities law.

II. BACKGROUND

A. What is "Lobbying"?

At its most broad, the consensus definition of lobbying is any attempt to influence actions of the government.[15] While that definition seems simple enough, dictionary and statutory definitions of "lobbying" vary considerably in scope and substance.[16] *Black's Law Dictionary* defines "lobbying" as "talk[ing] with or curry[ing] favor with a legislator, usually repeatedly or frequently, in an attempt to influence the legislator's vote."[17] While *Black's* confirms that attempting to influence policy is the common definitional focus for "lobbying," it still leaves many questions unanswered, such as by what methods a lobbyist may influence the passage or defeat of a bill.[18]

Unfortunately, the statutory definitions of "lobbying" that apply to corporations, all of which differ in certain respects, raise similar questions and provide few answers.[19] For example, the Internal Revenue Code (the "Code") defines lobbying solely by the type of government action that charitable and private foundations seek to influence; in effect, the same definition applies to corporate lobbying.[20] Under the Code, the key is whether a substantial part of an organization's activities "is carrying on propaganda, or otherwise attempting, to influence *legislation*."[21] While consistent with the consensus definition of lobbying, the Code's definition limits lobbying only to legislative branch officials, implicitly excluding executive branch officials, administrative agencies, and the judiciary.[22]

In contrast, the Lobbying Disclosure Act of 1995 (the "LDA") focuses primarily on the government actor sought to be influenced and provides two categories of actors: "[c]overed executive branch official[s]" and "[c]overed legislative branch official[s]."[23] The LDA defines "lobbying activities" more broadly, including "preparation and planning activities, research and other background work that is intended . . . for use in contacts, and coordination with the lobbying activities of others."[24] Although the LDA mandates disclosure of lobbying activities, it confines the disclosure requirements only to lobbyists, which it defines as "individuals or organizations that are hired by a client to engage in lobbying,

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15. Lloyd Hitoshi Mayer, *What Is This "Lobbying" That We Are So Worried About?*, 26 YALE L. & POL'Y REV. 485, 486 n.2 (2007).

16. *Id.* at 508.

17. *Lobby*, BLACK'S LAW DICTIONARY (10th ed. 2014).

18. Brian W. Schoeneman, Comment, *The Scarlet L: Have Recent Developments in Lobbying Regulation Gone Too Far?*, 60 CATH. U. L. REV. 505, 508 (2011).

19. *Id.*; Mayer, *supra* note 15, at 508 ("The tax laws provide three definitions of lobbying, while the [LDA] provides another definition," and "[e]ven more confusingly, the [LDA] permits some organizations to use tax law definitions instead of the [LDA] definition.").

20. *See* I.R.C. §§ 501(c)(3), 4945(d)(1), (e)(1)-(2) (2000); Mayer, *supra* note 15, at 511 (noting that "the determinative issue is whether the target of the attempted influence is legislation.").

21. *See* I.R.C. § 501(c)(3) (2000) (emphasis added).

22. Mayer, *supra* note 15, at 509–10.

23. 2 U.S.C.A. § 1602(3)-(4) (West 2007).

24. § 1602(7).

or individuals or organizations that lobby on their own behalf."[25] Thus, because corporations are "clients" instead of "lobbyists," the LDA does not require corporations disclose lobbying information.[26]

Based on the competing definitions of lobbying, it is clear that legislators have not devised an all-purpose definition of lobbying, and this has led to puzzling and, at times, ineffectual laws.[27] Nevertheless, for purposes of this Note, we adopt the consensus definition among interest-group scholars: all activities seeking to influence the policy process.[28] Under this definition, lobbying includes, "grassroots campaigns, use of the mass media," and "contacts in the bureaucracy, the office of the president, . . . the courts, . . . [and] the legislature."[29] Moreover, for purposes of this Note, we focus our analysis on lobbying at the federal level, though it should be noted that corporations spend billions of dollars per year to influence state lawmakers as well.[30]

B. The History of Corporate Lobbying

The First Amendment right to "petition the Government for a redress of grievances" provides constitutional protection for the practice of lobbying.[31] The Supreme Court has concluded that the right to petition for a redress of grievances is "among the most precious of the liberties safeguarded by the Bill of Rights."[32] Nevertheless, it took nearly 200 years, a shifting global economic landscape, and a tide of labor reform legislation before American businesses seriously organized their lobbying efforts.[33]

Only a few corporations lobbied Congress in the 1950s and 1960s, typically through trade associations.[34] To a large degree, those efforts were "poorly financed, ill-managed, [and] out of contact with Congress."[35] Following their 1963 landmark study of corporate lobbying, three prominent political scientists wrote, "When we look at a typical lobby, we find that its opportunities for maneuver are sharply limited, its staff mediocre, and its major

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25. Mayer, *supra* note 15, at 501–02.

26. William V. Luneburg & Thomas M. Susman, *Lobbying Disclosure: A Recipe for Reform*, 33 J. LEGIS. 32, 40 (2006) ("Disclosure under the LDA is required only if an individual is hired for compensation to influence federal policy or its implementation.").

27. FRANK R. BAUMGARTNER & BETH L. LEECH, BASIC INTERESTS: THE IMPORTANCE OF GROUPS IN POLITICS AND POLITICAL SCIENCE 29 (1998).

28. *Id.* at 33–34 (stating that the common thread for the scholarly definition of lobbying is seeking to influence the policy process).

29. *Id.* at 34.

30. Reid Wilson, *Amid Gridlock in D.C., Influence Industry Expands Rapidly in the States*, WASH. POST (May 11, 2015), https://www.washingtonpost.com/blogs/govbeat/wp/2015/05/11/amid-gridlock-in-d-c-influence-industry-expands-rapidly-in-the-states/?utm_term=.3304fe66fda3 (noting that in the twenty-eight states where lobbying data was available, lobbyists reported spending at least $2.2 billion during the 2013 to 2014 biennium).

31. U.S. CONST. amend. I. See Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right to Lobby*, 16 HARV. J.L. & PUB. POL'Y 149, 158–72 (1993), for a study of Supreme Court cases regarding lobbying as a First Amendment-protected activity.

32. United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n, 389 U.S. 217, 222 (1967).

33. BENJAMIN C. WATERHOUSE, LOBBYING AMERICA: THE POLITICS OF BUSINESS FROM NIXON TO NAFTA 2–3 (2014).

34. *Id.* at 19.

35. RAYMOND A. BAUER, ITHIEL DE SOLA POOL & LEWIS ANTHONY DEXTER, AMERICAN BUSINESS AND PUBLIC POLICY: THE POLITICS OF FOREIGN TRADE 324 (1972).

problem not the influencing of Congressional votes but the finding of clients and contributors to enable it to survive at all."[36] However, the political, economic, and cultural changes of the 1960s and 1970s shifted the political landscape in Washington, D.C. and the mentality of business executives, thereby laying the foundation for the historically unprecedented degree of political influence American corporations wield today.[37]

Politically, the burgeoning regulatory state disconcerted business leaders. Between 1965 and 1977, Congress enacted forty-four major regulatory laws, which were largely focused on worker's rights and safety.[38] In 1970, Congress formed subject-oriented federal regulatory agencies, like the Environmental Protection Agency (the "EPA"), and adopted laws like the Clean Air Act and the Occupational Safety and Health Act.[39] Within a few years, public interest activists occupied high-level agency positions—executives from the Natural Resources Defense Council headed both the EPA and the Council on Environmental Quality.[40] Under activist leadership, the focus of regulatory politics quickly shifted from "protecting a range of interests from business abuses, especially other businesses, to protecting *people* from business."[41] A brief look at the federal budget illustrates the explosion of social regulations: between 1970 and 1975, the budget for federal regulatory agencies increased from $1.5 to $4.3 billion.[42]

The laws of the 1960s and 1970s imposed billions of dollars in compliance costs on businesses, and many corporate leaders also took umbrage with the new regulations, as though the laws implicated their good faith to treat workers and the law with respect.[43] In August 1971, just two months prior to his nomination to the Supreme Court, Lewis F. Powell wrote a memorandum to a leader of the U.S. Chamber of Commerce, portentously titled "Attack on American Free Enterprise System."[44] Powell wrote that "[n]o thoughtful person can question that the American economic system is under broad attack" and "in terms of political influence . . . the American business executive is truly the 'forgotten man.'"[45]

Perhaps politicians had forgotten the American business executive, but he occupied the minds of many—and mostly in a negative regard.[46] Polling figures from the same era reflected the public's pessimistic view of American industry. In the early 1970s, only twenty-eight percent of Americans expressed "a great deal of confidence" in business executives, down from more than one-half of Americans in the mid-1960s.[47] By 1975, Gallup

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36. *Id.*

37. WATERHOUSE, *supra* note 33, at 2–3.

38. LEE DRUTMAN, THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE 55 (2015). See MICHAEL W. MCCANN, TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM 29–35 (1986), for a discussion of the origins and successes of the public interest liberalism movement during the 1960s and 1970s.

39. WATERHOUSE, *supra* note 33, at 32–33.

40. MCCANN, *supra* note 38, at 63.

41. WATERHOUSE, *supra* note 33, at 32.

42. DRUTMAN, *supra* note 38, at 55.

43. *Id.*; WATERHOUSE, *supra* note 33, at 33.

44. Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Educ. Comm. Chairman, U.S. Chamber of Commerce (Aug. 23, 1971), *available at* http://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumTypescript.pdf.

45. *Id.* at 1, 25.

46. *See* WATERHOUSE, *supra* note 33, at 37 (describing the "cultural assault" on business in the form of social regulations).

47. *See* KIM PHILLIPS-FEIN & JULIAN E. ZELIZER, WHAT'S GOOD FOR BUSINESS: BUSINESS AND AMERICAN

Polls indicated that Americans had less confidence in big business than in any other major national institution, including Congress, organized labor, the Armed Forces, and organized religion.[48]

Suffering poor publicity in the court of public opinion, the economic landscape provided little reprieve, as the American economy "got progressively sicker by almost every indicator of economic health."[49] The after-tax profit rate for corporations hit an all-time high in 1965—a rate corporations would never see again.[50] In 1971, the U.S. experienced its first manufacturing trade deficit in more than a century, and the Bretton Woods system of international monetary policy collapsed.[51] The next few years witnessed a recession, which saw unemployment rates reach 8.9%, severe supply shocks, and high inflation.[52] Most compellingly, after-tax corporate profit rates, which averaged 13.7% in 1965, rapidly declined to about eight percent in the early 1970s.[53]

It became apparent to business executives that the free enterprise system—a system they believed to be "the very fabric of free society"—was under attack, and that they must end "the impotency of business" by taking direct political action to influence the government.[54] In response, America's corporate giants founded the Business Roundtable in 1972.[55] Three existing organizations merged to form the Business Roundtable,[56] though it would quickly become a massive organization led by the chief executive officers ("CEOs") of America's largest corporations.[57]

The first merging organization, the March Group, was comprised solely of CEOs of large corporations, and began meeting informally at the Links Club in New York City in the 1960s to discuss public policy issues.[58] The other two merging organizations, the Construction Users Anti-Inflation Roundtable and the Labor Law Study Committee, handled

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POLITICS SINCE WORLD WAR II 237–38 (2012) (citing "Confidence in Leaders of Ten Institutions, 1966–1984," Box 132, Robert M. Teeter Papers, Gerald R. Ford Library, Ann Arbor, Mich.).

48. WATERHOUSE, *supra* note 33, at 39.

49. JEROME L. HIMMELSTEIN, TO THE RIGHT: THE TRANSFORMATION OF AMERICAN CONSERVATISM 132–34 (1990).

50. U.S. BUREAU OF ECON. ANALYSIS, SHARES OF GROSS DOMESTIC INCOME: CORPORATE PROFITS: PROFITS AFTER TAX WITH INVENTORY VALUATION AND CAPITAL CONSUMPTION ADJUSTMENTS (2016), https://fred.stlouisfed.org/series/W273RE1A156NBEA (last visited Mar. 3, 2017). Corporate profit rates were approximately 7.2% in 1965, but rates fell to 4.1% by 1970. Profit rates reached seven percent in 2012, but never again reached the 1965 rate.

51. Yusen Liu & Stacy Vollmers, *A Tale of Two Deficits: US Trade Deficit and US Trade Deficit with China*, 1 INNOVATIVE MARKETING 121, 123 (2005); M.J. Stephey, *A Brief History of Bretton Woods System*, TIME (Oct. 21, 2008), http://content.time.com/time/business/article/0,8599,1852254,00.html.

52. Stephey, *supra* note 51; Kevin L. Kliesen, *Recession or Depression?*, ECON. SYNOPSES (Fed. Reserve Bank of St. Louis, St. Louis, Mo.), Mar. 23, 2009, at 2, *available at* https://files.stlouisfed.org/files/htdocs/publications/es/09/ES0915.pdf.

53. HIMMELSTEIN, *supra* note 49, at 132.

54. WATERHOUSE, *supra* note 33, at 14; Memorandum from Lewis F. Powell, Jr., *supra* note 44, at 25.

55. *History of Bus. Roundtable*, http://businessroundtable.org/about/history (last visited Feb. 24, 2017). The Roundtable vigorously opposes any measure that would require public companies to disclose their political spending, stating that "[r]ecent efforts to . . . use the federal securities laws to address general societal concerns are harmful to investors and must be stopped." *See* BUS. ROUNDTABLE, THE MATERIALITY STANDARD FOR PUBLIC DISCLOSURE: MAINTAIN WHAT WORKS 12 (2015), *available at* http://businessroundtable.org/sites/default/files/reports/Materiality%20White%20Paper%20FINAL%2009-29-15.pdf.

56. *History of Bus. Roundtable*, http://businessroundtable.org/about/history (last visited Feb. 24, 2017).

57. *About Bus. Roundtable*, http://businessroundtable.org/about (last visited Feb. 24, 2017).

58. *See* WATERHOUSE, *supra* note 33, at 76–77.

labor relations and inflations issues in the construction industry.[59] With a number of Fortune 100 CEOs at its reins, the Roundtable quickly became a streamlined, efficient organization.[60] It "maintained a very small administrative staff, did not register as a lobbyist in its own name, and did not actively coordinate fund-raising for political campaigns."[61] Instead, the Roundtable formed a number of issue-specific task forces, each chaired by a CEO who utilized his own company's resources to influence legislative actions.[62]

In 1972, only a few short months after its formation, the Roundtable organized its first major lobbying endeavor, which opposed Congress's reauthorization of the Economic Stabilization Act of 1970 (the "ESA").[63] The ESA authorized President Richard Nixon to "stabilize prices, rents, wages, and salaries."[64] Even though business executives were hostile towards price controls, they initially promised the "wholehearted cooperation of the industrial community to supporting President Nixon's efforts to control inflation."[65] Yet, while publicly offering support for the ESA, Roundtable leaders met privately with the chairmen of the Federal Reserve and the Council of Economic Advisors to lobby for an immediate end to the ESA.[66] The strategy proved fruitful: Roundtable members reaped much-needed positive publicity as President Nixon openly defended the importance of corporate profits, even as Roundtable leaders privately advocated for repeal.[67]

In 1973 the tide turned as the Roundtable began publicly opposing the ESA.[68] Roundtable members, relying upon their personal experiences running America's corporate giants, testified before Congress that the price controls hurt businesses and stifled economic growth.[69] Partnering with third-party trade associations like the U.S. Chamber of Commerce, Roundtable members shared evidence of widespread public opposition to the Act, including "explicit examples from legislators' own constituents" to lobby against reauthorization.[70] The Roundtable celebrated its first major success in 1974 when Congress terminated the ESA.[71]

Over the next forty years, the Roundtable would achieve many more successes, ranging from its opposition of labor law reform and antitrust legislation to its support of corporate tax cuts.[72] Its ideological focus shifted from "How can we keep the government out

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59. *Id*. at 78.

60. *Id.* at 95. *See also* SAR A. LEVITAN & MARTHA R. COOPER, BUSINESS LOBBIES: THE PUBLIC GOOD AND THE BOTTOM LINE 34 (1984) (noting that CEOs established the Roundtable, in part, because other organizations were poorly managed, resulting in "rather slow decisionmaking and difficulties in focusing business lobbying efforts.").

61. WATERHOUSE, *supra* note 33, at 95.

62. *Id.*

63. *Id.* at 118, 122.

64. John J. Rigby, *The Administration of Economic Controls: The Economic Stabilization Act of 1970*, 29 CASE W. RES. L. REV. 458, 458 (1979).

65. WATERHOUSE, *supra* note 33, at 115.

66. *Id.* at 118–19. *See also* LEVITAN & COOPER, *supra* note 60, at 38. This meeting exemplifies what the authors call "the decisive advantage of the Roundtable," which is "the direct access to high level policymakers it enjoys by virtue of its members' positions as the most powerful business leaders in the country." *Id.*

67. WATERHOUSE, *supra* note 33, at 117.

68. *Id.* at 120.

69. *Id.* at 121–22.

70. *Id*.

71. Rigby, *supra* note 64, at 459 n.2.

72. HIMMELSTEIN, *supra* note 49, at 140.

of our business?" to "How can we make the government our partners?"[73] Working towards such a partnership, the Roundtable has become one of the most powerful lobbying organizations in the world.[74] It describes itself as an "association of chief executive officers of leading companies working to promote a thriving U.S. economy . . . through sound public policy."[75] The face of the Roundtable's membership has not changed, but its membership has expanded; today, the CEOs of corporate giants, such as Wal-Mart Stores, ExxonMobil, General Electric, MasterCard, American Express, and AT&T, compose the executive committee.[76] According to the Roundtable's website:

> Business Roundtable CEO members lead companies with more than $6 trillion in annual reserves and nearly 15 million employees. The combined market capitalization of Business Roundtable member companies is the equivalent of nearly one-quarter of total U.S. stock market capitalization, and Business Roundtable members invest $103 billion annually in research and development—equal to 30 percent of U.S. private [research and development] spending. Our companies pay $226 billion in dividends to shareholders and generate $412 billion in revenues for small and medium-sized businesses annually.[77]

Undoubtedly, the Roundtable is extremely influential in American politics; in fact, since 1998, it has spent more than $233 million on lobbying alone.[78] The U.S. Chamber of Commerce, with whom the Roundtable regularly collaborates, has spent more than $1.3 billion on lobbying since 1998.[79] Still, the budgets of the Roundtable and the Chamber pale in comparison to the billions of dollars spent each year by corporations lobbying on their own behalf.[80] Likewise, while the Roundtable employs a considerable number of lobbyists—seventy-seven—that number loses significance compared to the thousands of lobbyists employed by corporations and corporate lobbying firms.[81] Ultimately, the success of the Roundtable foreshadowed the unprecedented degree of political influence American corporations yield today.

C. The Expansion of Modern Corporate Lobbying

In 2015, corporations spent about $2.6 billion per year on reported lobbying expenditures—$600 million more than taxpayers spent to fund both the House of Representatives

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73. Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, ATLANTIC (Apr. 20, 2015), https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822.

74. *See, e.g.*, WATERHOUSE, *supra* note 33, at 77 (describing the Roundtable as a "political powerhouse that . . . [made] an indelible imprint on the history of business and politics in the United States.").

75. *About Bus. Roundtable*, http://businessroundtable.org/about (last visited Feb. 24, 2017).

76. *Bus. Roundtable's Exec. Comm.*, http://businessroundtable.org/about/executive-committee (last visited Feb. 24, 2017).

77. Press Release, Bus. Roundtable, Business Roundtable: Trump Economics Team is Right to Focus on Growth, Jobs, Tax Reform (Nov. 30, 2016), *available at* http://businessroundtable.org/sites/default/files/news-releases/BRT%20Commerce-Treasury%20Release%2011-30-16%20FINAL.pdf.

78. TOP LOBBYING SPENDERS, CTR. FOR RESPONSIVE POLITICS, https://www.opensecrets.org/lobby/top.php?indexType=s (last visited Feb. 24, 2017).

79. *Id.*

80. *Id.* For example, during the same period, General Electric spent over $345 million, Blue Cross/Blue Shield spent over $296 million, Northrop Grumman spent over $243 million, and Boeing Company spent over $242 million. *Id.*

81. BUS. ROUNDTABLE PROFILE, CTR. FOR RESPONSIVE POLITICS, https://www.opensecrets.org/orgs/summary.php?id=D000032202 (last visited Feb. 24, 2017).

and the Senate in 2015.[82] The Roundtable represented big business's first major foray into Washington politics, but corporations quickly grew comfortable with the lobbying industry and began operating separate lobbying offices.[83] Quantitative data highlights the explosion of lobbying in Washington, DC: "Between 1971 and 1982, the number of firms with registered lobbyists in Washington grew from 175 to 2445."[84] While only eighty-three corporations employed lobbyists in 1960, more than 3000 corporations retained lobbyists in 1980.[85]

Some corporations have more than one hundred lobbyists on staff or contract, allowing them to constantly influence public policy.[86] Large corporations and third party trade associations, like the Roundtable, spend thirty-four dollars for every dollar labor unions and public-interest groups spend combined.[87] Ninety-five of the hundred highest-spending lobbying organizations consistently represent big businesses.[88]

Moreover, lobbying expenses are by far the largest form of corporate political activity in the United States, far outpacing federal campaign contributions by a margin of twenty-to-one.[89] For example, in 2010, corporations spent $350 million on federal political campaigns, but spent $5.1 billion on federal lobbying.[90] Likewise, between 2009 and 2010, the U.S. Chamber of Commerce spent only $33 million on federal campaign contributions compared to more than $302 million on federal lobbying.[91]

The old adage you must spend money to make money may echo soundly in the practice of corporate lobbying. A study on the effect of lobbying on subsequent financial performance found a correlation between corporate profits and lobbying intensity.

> [B]ased on a pooled regression including all firms (i.e., those with zero and those with positive lobbying spending), we find evidence that lobbying expenditures are on average positively correlated with financial performance. . . . Some of the more interesting findings appear when we take a portfolio approach [and consider stock market returns]. Here, we compare the returns of firms that lobby based on their lobbying intensity, to the returns generated by portfolios of non-lobbying firms. We find that portfolios of firms with the highest lobbying intensities outperform their benchmarks of non-lobbying firms [by 5.5% per year, for the three years following their intense lobbying]. . . . Firms with the highest lobbying intensity outperform other firms.[92]

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82. Drutman, *supra* note 73; R. ERIC PETERSEN & IDA A. BRUDNICK, CONG. RESEARCH SERV., R43557, LEGISLATIVE BRANCH: FY2015 APPROPRIATIONS 6–7 (2014).

83. WATERHOUSE, *supra* note 33, at 248.

84. DRUTMAN, *supra* note 38, at 58.

85. WATERHOUSE, *supra* note 33, at 248.

86. Drutman, *supra* note 73.

87. *Id*.

88. *Id*.

89. *See* Hui Chen et al., Corporate Lobbying and Financial Performance 4 (Nov. 23, 2012) (unpublished manuscript), *available at* https://mpra.ub.uni-muenchen.de/21114/1/MPRA_paper_21114.pdf.

90. Adam Bonica, Avenues of Influence: On the Political Expenditures of Corporations and Their Directors and Executives 8 (August 20, 2013) (unpublished manuscript), *available at* https://www.princeton.edu/csdp/events/Bonica11072013/SSRN-id2313232.pdf.

91. *Id.* at 9.

92. Chen et al., *supra* note 89, at 25. The study also found that $1 spent on lobbying was associated with an additional $24 to $44 in corporate income. *Id.* at 20. *But see* John C. Coates IV, Corporate Governance and Corporate Political Activity: What Effect Will *Citizens United* Have on Shareholder Wealth? 1 (Sept. 21, 2010) (unpublished manuscript), *available at* https://ssrn.com/abstract=1680861 (finding that "[p]olitical activity . . .

However, studies also support the argument that corporate lobbying has negative effects on corporate governance and leads to suboptimal levels of investor protection.[93] For example, describing the factors that contribute to "inefficiently low levels of investor protection," one study notes that "corporate insiders may be able to use some of the resources of the publicly traded companies under their control in order to influence politicians," and "offer positions or business to politicians' relatives or associates," all while "their firms (and in turn, other shareholders in their firms) bear some of the costs of such lobbying."[94]

Finally, studies show that the public may ultimately be paying for any benefits that lobbying activities bestow on corporations since "part of the value from lobbying may arise from potentially unethical arrangements with policy makers."[95] Described as "a new weapon" in lobbyists' arsenals, "quid-pro-quo corporate-based lobbying" is leverage that lobbyists hold over elected officials in this form: "[I]f you vote wrong, my company . . . will spend unlimited sums explicitly advertising against your re-election. . . . We have got a million we can spend advertising for you or against you – whichever one you want."[96]

Undoubtedly, concerns about the impact of undisclosed corporate lobbying on investor protection is one motivating factor in the push for greater transparency in corporate lobbying information.[97] Investors do not contend that corporate lobbying is inherently bad.[98] Not only is lobbying a First Amendment-protected activity, but it also facilitates public involvement in government policy and provides useful empirical information to policymakers.[99] Instead, consistently with this Note, investors argue that corporate lobbying activities pose material risks to corporate reputation and share value, and therefore, companies must disclose lobbying information.[100]

III. INVESTOR ENGAGEMENT FOR DISCLOSURE: INTERESTS, MOTIVATIONS, AND ILLUSTRATIONS

Given the rapid proliferation of corporate lobbying activity and the sheer amount of aggregate spending, it is unsurprising that investors demand greater transparency in their companies' lobbying policies and practices. Unfortunately, companies have not been forthcoming with such information.[101] Even facing annual shareholder resolutions, law-

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is strongly negatively correlated with firm value").

93. *See* Lucian A. Bebchuk & Zvika Neeman, *Investor Protection and Interest Group Politics*, 23 REV. FIN. STUD. 1089, 1090, 1092 (2010).

94. *Id.* at 1091.

95. Alexander Borisov et al., *The Corporate Value of (Corrupt) Lobbying*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE & FIN. REG. (Aug. 18, 2014), https://corpgov.law.harvard.edu/2014/08/18/the-corporate-value-of-corrupt-lobbying.

96. E-mail from John Keenan, Corp. Governance Analyst, AFSCME Capital Strategies, to author (Mar. 6, 2017, 6:08 PM CST) (on file with author); David D. Kirkpatrick, *Lobbyists Get Potent Weapon in Campaign Ruling*, N.Y. TIMES (Jan. 21, 2010), http://www.nytimes.com/2010/01/22/us/politics/22donate.html.

97. Robert Menendez, *Corporate Executives Should Tell Investors Whether They Are Spending Company Resources for Political Purposes*, PROXY PREVIEW 2014, at 8, http://www.asyousow.org/wp-content/uploads/2014/03/ProxyPreview2014.pdf.

98. PROXY PREVIEW 2016, *supra* note 14, at 28 ("[R]ather than an end to corporate spending on politics," shareholders instead seek "full disclosure with board oversight.").

99. Mayer, *supra* note 15, at 486.

100. Keenan, *supra* note 10.

101. *Id.* The author notes that most companies oppose lobbying disclosure primarily to avoid making public

suits, and intense public scrutiny, companies remain steadfast in their refusal to adopt policies that would increase transparency and board oversight of lobbying activities.[102] As a result, investors have employed a variety of methods to push for increased disclosure, including shareholder resolutions, lawsuits, and petitions for SEC regulation. Primarily, investors have used shareholder resolutions as a vehicle for greater transparency.[103]

A. Shareholder Resolutions

Rules promulgated by the SEC empower investors to submit shareholder resolutions, which are ballot items that contain a recommended "course of action that [shareholders] believe the company should follow."[104] At annual meetings, company shareholders cast votes on ballot items (generally by proxy) in approval or disapproval of resolutions.[105] The SEC, investors, and corporate executives are mindful of shareholder resolutions because they "serve as an important indicator of investor interest in particular matters."[106]

1. Increasing Shareholder Resolutions and Their Demands

Since 2010, "disclosure of political spending has . . . been a more frequent subject of shareholder proposals at U.S. public companies than any other corporate governance issue."[107] For example, resolutions seeking corporate political information, including corporate lobbying activities, dominated other subjects as the most popular in 2012 through 2014, peaking at one-third of all shareholder resolutions in 2013.[108] Although the language of lobbying disclosure resolutions may vary, they all seek nearly identical information. The proposals "ask companies to disclose their lobbying, including federal and state lobbying, payments to trade associations and third parties used for indirect lobbying, and any payments to tax exempt organizations that write and endorse model legislation."[109] One resolution, filed nearly verbatim in at least 190 different corporations since 2012, also seeks information about the company's policies, requesting a "[d]escription of the decision making process and oversight by management and the Board for making [direct or indirect lobbying] payments."[110]

2. The Success of Shareholder Resolutions

Shareholder resolutions are unique because even when they do not earn majority

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their payments to trade associations, which "spend hundreds of millions of dollars annually to influence policy decisions." *Id.*

102. *Id.*

103. *Id.*

104. 17 C.F.R. § 240.14a-8(a) (2015).

105. § 240.14a-8(a).

106. Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 938 (2013) [hereinafter *Shining Light*].

107. Letter from Lucian A. Bebchuk, Professor, Harvard Law Sch. & Robert J. Jackson, Jr., Professor, Columbia Law Sch. to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n 2 (Apr. 30, 2013), *available at* https://www.sec.gov/comments/4-637/4637-1701.pdf.

108. *See* AS YOU SOW, PROXY PREVIEW 2012, at 3 (2012), *available at* http://www.asyousow.org/publications/2012/ProxyPreview2012.pdf; AS YOU SOW, PROXY PREVIEW 2013, at 5 (2013), *available at* http://www.asyousow.org/ays_report/proxy-preview-2013; AS YOU SOW, PROXY PREVIEW 2014, at 6-7 (2014), *available at* http://www.asyousow.org/wp-content/uploads/2014/03/ProxyPreview2014.pdf.

109. Keenan, *supra* note 10.

110. PROXY PREVIEW 2016, *supra* note 14, at 29.

support, resolutions still often meaningfully impact company policies.[111] Therefore, the traditional approach for gauging success—whether a measure obtained majority support—is not appropriate for shareholder resolutions because it is possible to affect change with a much lower threshold of support.[112] The figures vary, but the general consensus is that "management very likely pays close attention," and seeks to negotiate with sponsoring shareholders, "[w]hen twenty-five percent of company shares are voted in favor of a shareholder-sponsored resolution."[113]

Based on the consensus measure of success, shareholder resolutions seeking corporate lobbying disclosure have been extremely successful. In 2016, these shareholder resolutions occupied ballots at ten companies.[114] On average, 28.65% of shareholders supported the resolutions, and five resolutions received more than thirty percent support.[115] In fact, forty percent of Suncor Energy and 39.8% of Emerson Electric shareholders supported resolutions for increased disclosure.[116] Since 2010, six resolutions have earned majority support, and thirty-five resolutions earned more than forty percent support.[117] Undoubtedly, shareholder resolutions have successfully earned the attention of corporate executives, as well as investors, the media, and the public.

Even if success is measured by the toughest metric—affecting change in a company's policies—shareholder resolutions have been successful because many companies, apparently recognizing that the information is material to investors, now disclose lobbying information. In a process called negotiated withdrawal, corporate executives, in exchange for shareholders withdrawing pending resolutions, agree to modify company policies to comply with disclosure requests.[118] Negotiated withdrawals have proved to be a successful approach—since 2003, shareholders have reached negotiated withdrawal agreements to increase political spending disclosures at sixty-one S&P 500 companies.[119]

To illustrate a negotiated withdrawal, consider this example. In 2013, an Accenture

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111. *See, e.g.*, John Keenan, Interpreting the Effectiveness of Shareholder Proposals 1 (July 2013) (unpublished article) (on file with author) (noting that "proposals have effect when gaining significant levels of support, including twenty percent"); SUSTAINABLE INVS. INST., THE INVESTOR CAMPAIGN FOR CORPORATE POLITICAL ACTIVITY DISCLOSURE 1 (2016), *available at* http://corporatereformcoalition.org/wp-content/uploads/2016/06/Corporate-Political-Spending-Shareholder-Resolutions-2010-2016.pdf [hereinafter THE INVESTOR CAMPAIGN] (noting that in response to investor pressure, including shareholder resolutions with significant support, "an increasing number of companies have put in place formal board oversight and reporting mechanisms.").

112. *See, e.g.*, Christopher P. Skroupa, *Success and Shareholders—Why Companies Should Engage*, FORBES (July 24, 2016, 7:09 AM), http://www.forbes.com/sites/christopherskroupa/2016/07/24/success-and-shareholders-why-companies-should-engage/#8b992feb62a1 (noting that "successful shareholder votes are generally measured not in the typical electoral sense of receiving a majority, but by getting the votes necessary to re-file the resolution the following year.").

113. Catherine Fredman, *The Power of a Shareholder Proxy*, CONSUMER REP. (Feb. 19, 2016), http://www.consumerreports.org/personal-investing/the-hidden-power-of-a-shareholder-proxy.

114. PROXY PREVIEW 2016, *supra* note 14, at 30; CERES, 2016 SHAREHOLDER RESOLUTIONS, https://www.ceres.org/investor-network/resolutions/#!/subject=Political%20Spending (last visited Feb. 24, 2017).

115. PROXY PREVIEW 2016, *supra* note 14, at 30; CERES, *supra* note 114 (Devon Energy Corporation: 31.1%; Emerson Electric: 39.8%; Pfizer Inc.: 30.7%; Pinnacle West Capital Corporation: 34.5%; Suncor Energy: 40%).

116. PROXY PREVIEW 2016, *supra* note 14, at 30; CERES, *supra* note 114.

117. THE INVESTOR CAMPAIGN, supra note 111, at 4.

118. *See* PROXY PREVIEW 2016, *supra* note 14, at 4.

119. CTR. FOR POLITICAL ACCOUNTABILITY, 2016 CPA-ZICKLIN INDEX OF CORPORATE POLITICAL DISCLOSURE AND ACCOUNTABILITY 32 (2016), http://files.politicalaccountability.net/index/2016_Index.pdf [hereinafter 2016 CPA-ZICKLIN].

shareholder resolution seeking increased lobbying disclosure received 31.2% support at the company's annual meeting.[120] Accenture shareholders renewed the resolution in 2014, but withdrew the proposal after Accenture agreed to disclose its lobbying policies and practices, "including identifying [its] major trade association memberships, dues paid, and how much of these [dues] are used for lobbying."[121] Noting that 305 companies have adopted voluntary disclosure policies since 2003, including 141 companies that did so without shareholder engagement, the Center for Political Accountability declared, "Indisputably, a voluntary trend toward greater [transparency], board oversight and restrictions on political spending continues."[122]

3. The Shortcomings of Successful Shareholder Resolutions

Even successful shareholder resolutions, however, do not resolve many shareholders' concerns. Shareholder resolutions are precatory, meaning even when a shareholder resolution achieves majority support, it is not binding on the actions of the company or its board.[123] Therefore, even as investors push for increased support of their resolutions, a majority-support result may not lead to the transparency they desire.

Additionally, even when shareholders negotiate a voluntary disclosure agreement, the fact that the company self-regulates its compliance with the agreement concerns many shareholders.[124] Voluntary disclosure agreements are undoubtedly useful developments, but "where else in the realm of corporate spending do we just leave it to corporations to tell us whatever they want to?"[125] Signaling their agreement, scholars and shareholders alike question the effectiveness and accuracy of voluntarily-adopted disclosure policies, arguing that "they are no substitute for . . . a clearly delineated, unambiguous, and uniform set of disclosure requirements for all public companies."[126]

This pessimistic view of corporate self-regulation is not without support: A 2014 study by the Citizens for Responsibility and Ethics in Washington ("CREW") revealed that more than forty percent of companies fail to comply with their voluntary disclosure policies.[127] Most disturbing, CREW opted to study these particular companies because they ranked highest on the CPA-Zicklin Index of Corporate Political Disclosure, which described them as "the vanguard of public companies voluntarily laying the foundation for a new route to disclosure and accountability."[128] Of the sixty companies studied, twenty-five failed to disclose more than $3.1 million in political spending.[129]

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120. PROXY PREVIEW 2014, *supra* note 108, at 41.

121. *Id*.

122. 2016 CPA-ZICKLIN, *supra* note 119, at 9.

123. Doron Levit & Nadya Malenko, *Nonbinding Voting for Shareholder Proposals*, 66 J. FIN. 1579, 1579 (2011).

124. *See* CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *Amended Petition for Rulemaking on Disclosure by Public Companies of Corporate Resources Used for Political Activities* Ex. A, 1 (2014), https://www.sec.gov/rules/petitions/2014/petn4-637-2-amended.pdf [hereinafter CREW].

125. Eleanor Bloxham, *What's Behind All the Corporate Secrecy Over Political Spending?,* FORTUNE (Jan. 9, 2013, 12:13 PM), http://fortune.com/2013/01/09/whats-behind-all-the-corporate-secrecy-over-political-spending (quoting Robert J. Jackson, Jr., Director of the Columbia Law School program on Corporate Law and Policy).

126. CREW, *supra* note 124, at 16–17.

127. *Id*. at Ex. A, 1.

128. *Id*. at Ex. A, 5; 2016 CPA-ZICKLIN, *supra* note 119, at 9.

129. CREW, *supra* note 124, at Ex. A, 1.

CREW also revealed that in addition to omitting political expenditures, some companies' spending also contradicted their stated principles and policies.[130] For example, Ford Motor Company's 'Policy on Political Contributions' reads, "Ford does not make contributions to political candidates or political organizations as a matter of policy. . . . Nor do we take positions for partisan political purposes."[131] CREW revealed, however, that between 2011 and 2013, Ford Motor Company contributed more than $200,000 to partisan political organizations.[132]

B. Investor Motivations for Engagement

As the sharp increase in shareholder engagement for lobbying disclosure demonstrates, investors are increasingly interested in information regarding their companies' lobbying activities. Shareholders regularly cite three key concerns caused by the lack of transparency in corporate lobbying activities.

First, shareholders are concerned about the reputational, commercial, and legal risks to shareholder value posed by corporate lobbying activities.[133] Researchers have estimated that the value of reputation contribution, which is "the proportion of a company's market [value] attributable to its reputation," represents as much as fifty-eight percent of a company's market capitalization.[134] The CEOs of leading global companies also recognize this fact; sixty percent of CEOs surveyed at the World Economic Forum stated that reputation contribution represented more than forty percent of the market capitalization of their company.[135] Eighty-seven percent of executives "rate reputation risk as more important or much more important than other strategic risks their companies are facing."[136] Likewise, investors believe that "[c]ompanies with a high reputational rank perform better financially" than lower ranked companies which, in turn, causes serious concern about the reputational risks of corporate lobbying activities.[137] The network neutrality example discussed in Section D provides one such example of these risks.

Secondly, shareholders raise corporate governance concerns, noting that executives may not properly oversee lobbying activities to ensure that spending is in congruence with the corporation's self-defined values or in the best interests of shareholders.[138] For example, the Conference Board, a global non-profit that disseminates best business practice information, issued a report stating: "Companies that adopt robust approval and oversight

130. *Id.* at Ex. A, 2.

131. FORD MOTOR CO., SUSTAINABILITY REPORT 2014–2015, at 198 (2015), http://corporate.ford.com/microsites/sustainability-report-2014-15/doc/sr14.pdf.

132. CREW, *supra* note 124, at Ex. A, 19.

133. Keenan, *supra* note 10.

134. Simon Cole, *The Impact of Reputation on Market Value*, 13 WORLD ECON. 47, 58, 61 (2012).

135. Alexander F. Brigham & Stefan Linssen, *Your Brand Reputational Value is Irreplaceable. Protect It!*, FORBES (Feb. 1, 2010, 5:15 PM), http://www.forbes.com/2010/02/01/brand-reputation-value-leadership-managing-ethisphere.html.

136. DELOITTE, 2014 GLOBAL STUDY ON REPUTATION RISK 5 (2014), *available at* https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Governance-Risk-Compliance/gx_grc_Reputation@Risk%20survey%20report_FINAL.pdf.

137. Keenan, *supra* note 10.

138. *See, e.g.*, Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 91 (2010) [hereinafter *Who Decides?*] ("Corporate political spending can be expected to affect corporate governance rules in general," but unfortunately "[o]ne area in which . . . executives may be particularly likely to have views divergent from those of shareholders involves rules concerning corporate governance and shareholder rights.").

policies . . . are better positioned to avoid the serious financial, legal, and reputational risks associated with political spending while protecting shareholder value and promoting the company's best interests."[139] Nevertheless, NorthStar Asset Management, a socially responsible investment firm, "has yet to find one corporation that regularly compares its values to an analysis of the . . . political groups it supports."[140]

The underlying concern is that executives may use the corporate treasury to advance their political ideologies or their personal political ambitions, even when the corporation itself receives no benefit.[141] After all, CEOs of corporations that engage in lobbying activities are five times more likely than CEOs of non-lobbying corporations to be appointed or nominated to political office after retiring.[142] Indeed, of the 298 CEOs who retired in 2000, 32 CEOs—more than eleven percent—had received political appointment or nomination by 2011.[143]

Shareholders argue that if corporations are not going to adopt oversight and approval policies to ensure the propriety of lobbying activities, then shareholders themselves must step in to minimize risk to shareholder value.[144] The idea of shareholder oversight flows from *Citizens United v. Federal Election Commission*, in which Justice Anthony Kennedy declared that "[w]ith the advent of the Internet, prompt disclosure of expenditures can provide shareholders . . . with the information needed to hold corporations . . . accountable," enabling shareholders to "determine whether their corporation's political speech advances the corporation's interest in making profits."[145] If the spending failed to do so, shareholders could correct executive misconduct through "the procedures of corporate democracy."[146] However, if companies refuse to disclose lobbying activities, a potential source of executive misconduct, the procedures of corporate democracy fail, and shareholder intervention becomes impossible.

Finally, opaque lobbying activities pose significant risks to investor protections.[147] The decision to engage in lobbying activities is "governed by the same rules as ordinary business decisions, which give directors and executives virtually plenary authority."[148] The

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139. THE CONFERENCE BD., HANDBOOK ON CORPORATE POLITICAL ACTIVITY 4 (2010).

140. Julie N.W. Goodridge & Christine Jantz, *Corporate Political Spending: Why Shareholders Must Weigh In*, 5 J. VALUES-BASED LEADERSHIP 1, 4 (2012).

141. *See, e.g.*, John C. Coates IV, *Corporate Politics, Governance, and Value Before and After Citizens United*, 9 J. EMPIRICAL LEGAL STUD. 1, 2 (2012) (finding that corporate political activity "correlates negatively with measures of shareholder power, . . . positively with signs of managerial agency costs (corporate jet use by CEOs), and negatively with shareholder value."). For example, two weeks after Wisconsin Governor Scott Walker emailed Larry Nichols, chairman of Devon Energy, Devon Energy contributed $50,000 to the Wisconsin Club for Growth, a political action committee that supported Governor Walker during his 2012 gubernatorial recall election. Devon Energy, however, had no business interests in Wisconsin. *See* Steven Elbow, *Donald Trump's WI Club for Growth Donation Among Those Detailed in New Records*, CAPITAL TIMES (Oct. 29, 2014), http://host.madison.com/ct/news/local/writers/steven_elbow/donald-trump-s-wi-club-for-growth-donation-among-those/article_d005b560-1ab3-524c-ae68-594380484455.html.

142. Coates, *supra* note 141, at 21. "The odds that a CEO obtained post-CEO political employment were significantly higher [fifteen percent] for CEOs of firms that engaged in lobbying prior the CEO leaving the company," compared to three percent for CEOs of firms that do not engage in lobbying activities. *Id.*

143. *Id*.

144. Goodridge & Jantz, *supra* note 140, at 5.

145. Citizens United v. FEC, 558 U.S. 310, 370 (2010).

146. *Id.*

147. *See* Menendez, *supra* note 97.

148. *Who Decides?*, *supra* note 138, at 83.

rules provide no process for direct, binding shareholder input.[149] Therefore, some shareholders are concerned that executives may use corporate resources to weaken shareholders' rights or "to support . . . repealing corporate disclosure and shareholder voting protections."[150] A recent example from Oklahoma illustrates these concerns and shows why shareholders cannot rely on politicians alone for protection.

C. Illustrations of Investors' Concerns Realized

Shareholders have cause for concern, as examples of shareholder abuse by corporate executives are not difficult to find. In the Chesapeake Energy Corporation example below, the company's executives, at the expense of Chesapeake shareholders, lobbied for legislation that prohibited unitary board governance systems, which a majority of shareholders supported in two consecutive shareholder resolutions. In the network neutrality example below, the companies' executives raided corporate treasuries for tens of millions of dollars to oppose a policy that most Americans, and most shareholders, supported.

1. Undermining Investor Protection: Chesapeake Energy Corporation

In 2010, Chesapeake Energy Corporation's board of directors faced a number of threats.[151] Aside from rapidly declining share prices and intense public scrutiny, Chesapeake's directors were particularly concerned about a takeover attempt by Carl Icahn, the famed shareholder activist who had become Chesapeake's second largest owner.[152] Even from within, Chesapeake's board was under attack; its shareholders opposed Chesapeake's staggered-board system and instead sought a unitary board system, which provides shareholders more influence over directors by requiring annual elections.[153] In addition, "staggered boards are associated with a reduced firm value" in an "economically meaningfully" way.[154] On recognizing the merits of unitary boards, shareholders of companies nationwide filed resolutions demanding their companies modify their board system. Interestingly, most listened: in 2010, seventy percent of S&P 500 companies utilized unitary boards, up from less than sixty percent in 2009.[155]

In both 2008 and 2009, Chesapeake shareholders filed resolutions requesting the company eliminate its staggered-board structure and implement a unitary board; both proposals received majority support.[156] The proposing shareholder, in a statement supporting the 2009 resolution, described Chesapeake's CEO and directors as overpaid and, citing their inaction on the 2008 resolution, unaccountable to shareholders.[157] A majority of

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149. *Id.* at 87 ("[S]hareholders are generally not able to enact binding resolutions" and "do not have the right to vote directly on, or enact bylaws addressing, the ordinary business decisions of the corporation.").

150. Menendez, *supra* note 97.

151. Steven J. Cleveland, *A Failure of Substance and a Failure of Process: The Circular Odyssey of Oklahoma's Corporate Law Amendments in 2010, 2012, and 2013*, 67 OKLA. L. REV. 221, 226–27 (2015).

152. *Id.* at 226–27, 229–30.

153. *Id.* at 228–29.

154. *See* Lucian A. Bebchuk & Alma Cohen, *The Costs of Entrenched Boards*, 78 J. FIN. ECON. 409, 430 (2005).

155. Carol Bowie, *Institutional Shareholder Services 2016 Board Practices Study*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE & FIN. REG., (June 1, 2016), https://corpgov.law.harvard.edu/2016/06/01/iss-2016-board-practices-study.

156. Cleveland, *supra* note 151, at 228–29.

157. Ryan DeArman, Shareholder, Chesapeake Energy Corp., Supporting Statement of Shareholder Proposal

shareholders apparently agreed, as the two proposals averaged sixty percent approval.[158] Chesapeake's board, it seemed, had no choice but to fold to shareholder pressure and adopt a unitary board system.

Nevertheless, Chesapeake did not amend its charter, as the majority of shareholders demanded; instead, it lobbied the Oklahoma Legislature to amend Oklahoma's corporate code.[159] Speaking three years later, an Oklahoma legislator recalled, "Chesapeake . . . told us we had to do this in order to protect Oklahoma corporations."[160] The Oklahoma Legislature complied with Chesapeake's requests and, on May 27, 2010, it amended Oklahoma's corporate code "without question, objection, or debate."[161] The 2010 amendment required all large, publicly traded Oklahoma corporations to adopt a staggered-board structure, which effectively rendered it unlawful for Chesapeake to comply with its shareholders' demands to adopt a unitary board.[162]

Three years and two more corporate code amendments later, legislators characterized the 2010 amendment as "a sweetheart deal."[163] One legislator flatly recalled that the 2010 amendment "was run especially for one corporation in Oklahoma."[164] Another cautioned future legislators: "Just because a lobbyist comes in and tells you [an amendment is] . . . for the shareholder, [that] doesn't actually mean it's for the shareholder."[165] Two facts support this special-interest view of the 2010 amendment; both demonstrate why shareholders cannot simply rely on politicians for protect.

First, the Oklahoma Legislature relied on Chesapeake's outside counsel to draft the 2010 amendment, rather than the Oklahoma Bar Committee, which typically drafts Oklahoma's corporate code updates.[166] Notably, if the Legislature had "turned to the . . . Bar Committee to draft the 2010 amendment, the Committee would have rebuffed the request, as a majority of the Committee opposed the staggered-board requirement."[167] Second, the Oklahoma Legislature intimately involved Chesapeake, while failing to even notify other large Oklahoma companies, including Oklahoma's largest publicly traded corporation.[168] This is particularly concerning considering that the 2010 amendment rendered the use of unitary board systems in any Oklahoma corporation to be unlawful.[169] Ironically, many

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at the 2009 Annual Meeting of Stockholders (June 12, 2009), *available at* https://www.sec.gov/Archives/edgar/data/895126/000089512609000119/ex99_1.htm.

158. *Id.* Sixty-one percent of votes casted supported the 2008 resolution, and fifty-nine percent of outstanding shares supported the 2009 resolution. *Id.*

159. Cleveland, *supra* note 151, at 232.

160. *Id.* at 249 (quoting Rep. Cory Williams).

161. *Id.* at 234.

162. *Id.* at 232.

163. *Id.* at 249 (quoting Rep. Mike Reynolds).

164. Cleveland, *supra* note 151, at 249 (quoting Rep. Mike Reynolds).

165. *Id.* (quoting Rep. Cory Williams).

166. *Id.* at 250.

167. *Id.* at 250–51.

168. Joe Wertz, *Declassified: Chesapeake Wants 'Relief' from an Oklahoma Law It Helped Write*, NAT'L PUB. RADIO: STATEIMPACT OK., (June 8, 2012, 9:00 AM), https://stateimpact.npr.org/oklahoma/2012/06/08/declassified-chesapeake-wants-relief-from-an-oklahoma-law-it-helped-write (noting that ONEOK, Inc. and OG&E Energy Corp. "didn't know about the [2010 amendment] until a *Wall Street Journal* reporter reached out for comment.").

169. *Id.* The Oklahoma Legislature later amended the corporate code again "to grandfather in companies such as ONEOK so that they could keep their declassified board structure." *Id.*

companies affected by the 2010 amendment had previously utilized staggered-board systems but implemented a unitary board after shareholder resolutions demanding the change earned majority support.[170]

This example demonstrates why shareholders are concerned about the risks undisclosed lobbying activities pose to investor protections. In a 2013 amendment reversing the staggered-board requirement, one Oklahoma legislator alluded to their concerns, asking, "If we're doing it for the shareholders [of Chesapeake] this time, does that mean I was duped into doing it for the CEO [of Chesapeake] the first time?"[171] Here, the Oklahoma Legislature failed to protect Chesapeake's shareholders from executives who wished, in part, to limit shareholder power. Likewise, many shareholders are concerned their companies may, like Chesapeake, use shareholder resources to lobby politicians to enact legislation diminishing shareholders' powers, even though most shareholders would oppose the legislation.[172] This example illuminates the problems inherent in relying on politicians for protection: when faced with a potential takeover that may move jobs out of state, legislators will opt to protect the jobs, and therefore the corporation, even if it means sacrificing shareholders' powers.[173]

While Chesapeake's shareholders, like most Oklahomans, were unaware of Chesapeake's lobbying for the 2010 amendment, similar problems may arise when shareholders are aware of a company's actions to influence legislation. Indeed, when shareholders are aware, the problem may be even more pronounced if companies lobby to advance the very causes that their shareholders oppose.[174] The fierce debate about network neutrality provides one such example.

2. Implicating Reputational Risks: Big Telecomm and Network Neutrality

Headlines criticizing corporate giants such as Verizon, Comcast, and AT&T for their enormous anti-network neutrality lobbying expenditures were commonplace in the media in 2014 and 2015. "They're Putting Their Money Where Your Open Internet Is."[175] "Verizon Killed Net Neutrality."[176] Network neutrality ("net neutrality") is the idea that "individuals should be free to access all content and applications equally, regardless of the source, without Internet service providers [("ISPs")] discriminating against specific online services or websites."[177] The debate surrounding net neutrality, aimed mostly at the Federal Communications Commission (the "FCC"), polarized the U.S. with each side painting

170. Cleveland, *supra* note 151, at 260–61.

171. *Id.* at 285 (quoting Rep. Cory Williams).

172. *See* Menendez, *supra* note 97.

173. *See, e.g.*, Cleveland, *supra* note 151, at 252–53, 258 (providing examples of state legislatures in Massachusetts, Oklahoma, and Washington enacting measures to protect in-state corporations from out-of-state acquirers).

174. *See, e.g.*, Megan Tady, *Shareholders Want to Vote on Comcast, AT&T's Net Neutrality Stance*, FREEPRESS (Oct. 12, 2013), http://www.savetheinternet.com/blog/10/12/13/shareholders-want-vote-comcast-att%E2%80%99s-net-neutrality-stance (noting that as more shareholders realize that net neutrality is "critical for competition, entrepreneurship, innovation and free expression," shareholder protests will likely increase).

175. Lee Drutman & Zander Furnas, *Who's Putting the Most Money Against Net Neutrality?,* DAILY DOT (Dec. 11, 2015, 12:50 PM), http://www.dailydot.com/layer8/lobbyists-net-neutrality-fcc.

176. CREDO ACTION, *Verizon Killed Net Neutrality. But The FCC Can Save It*, http://act.credoaction.com/sign/verizon_netneutrality (last visited Feb. 25, 2017).

177. PUB. KNOWLEDGE, *Net Neutrality*, https://www.publicknowledge.org/issues/net-neutrality (last visited Feb. 25, 2017).

an ominous portrait of the future.

Proponents argued that without net neutrality, ISPs could control Internet access and abuse it to increase their profits by, for example, "redirect[ing] users from one website to a competing website" or "prevent[ing] users from visiting some websites" altogether.[178] These concerns led proponents, such as Senator Al Franken, to call net neutrality "the most important First Amendment issue of our time."[179] Opponents, on the other hand, insisted that net neutrality was classic government overreach that granted the FCC "almost unfettered discretion" over the Internet[180]—and displayed a "reckless disregard for . . . free market principles."[181] The regulations, they argued, would constrain the market, hinder economic growth, and cause "higher prices and less service for consumers."[182]

While some major content providers like Apple and Google supported net neutrality measures, the vast majority of net neutrality proponents were "average people."[183] Average people—these "Internet freedom activists"—formed grassroots organizations like Save the Internet,[184] gathered hundreds of thousands of signatures on petitions,[185] and picketed in front of the FCC's headquarters and in dozens of cities across the country.[186] Most troublesome for shareholders, Internet freedom activists organized a number of boycotts targeting the corporations that opposed net neutrality.[187] Meanwhile, net neutrality opponents—mostly large corporate ISPs—focused on lobbying the FCC.[188] Corporations outspent the grassroots proponents by a margin of five to one from 2003 to 2011 and three to one from 2011 to 2013.[189] In 2012 alone, Verizon, Comcast, AT&T, and one third-party trade association spent more than $66 million opposing net neutrality measures.[190]

Verizon, Comcast, and AT&T shareholders took umbrage with the massive anti-net

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178. *Id.*

179. Al Franken, Opinion, *Net Neutrality is Foremost Free Speech Issue of Our Time*, CNN (Aug. 5, 2010, 8:05 AM), http://www.cnn.com/2010/OPINION/08/05/franken.net.neutrality.

180. Ajit Pai & Joshua Wright, Opinion, *The Internet Isn't Broken. Obama Doesn't Need to 'Fix' It.*, CHI. TRIB. (Feb. 18, 2015), http://www.chicagotribune.com/news/opinion/commentary/ct-internet-regulations-fcc-ftc-obama-broadband-perspec-0219-20150218-story.html.

181. Vern Buchanan, Opinion, *Net Neutrality Fight: We Can't Let FCC Internet Ruling Undermine Free Market*, FOX NEWS (Mar. 9, 2015), http://www.foxnews.com/opinion/2015/03/09/net-neutrality-fight-cant-let-fcc-internet-ruling-undermine-free-market.html.

182. Pai & Wright, *supra* note 180.

183. Mike Snider et al., *What Is Net Neutrality and What Does It Mean for Me?*, USA TODAY (Feb. 27, 2015, 12:19 AM), http://www.usatoday.com/story/tech/2015/02/24/net-neutrality-what-is-it-guide/23237737.

184. *See* SAVE THE INTERNET, http://www.savetheinternet.com/sti-home (last visited Feb. 25, 2017).

185. *See, e.g.*, Press Release, Save the Internet, More Than 1 Million People Call on FCC to Save Net Neutrality (Jan. 30, 2014), *available at* http://www.savetheinternet.com/press-release/105672/more-1-million-people-call-fcc-save-net-neutrality (reporting that a coalition of organizations delivered more than one million signatures to the FCC in support of net neutrality). S*ee also* Edward Wyatt, *White House Responds to Net Neutrality Petition*, N.Y. TIMES (Feb. 18, 2014, 6:57 PM), http://bits.blogs.nytimes.com/2014/02/18/white-house-responds-to-net-neutrality-petition/?_r=0 (reporting that, in response to a petition with more than 100,000 signatures, President Barack Obama reiterated that he "strongly supports" net neutrality measures).

186. Mary Alice Crim, *Open Internet Activists Speak Out at May 15 Rallies Across the Country*, FREE PRESS (May 16, 2014), http://www.freepress.net/blog/2014/05/16/open-internet-activists-speak-out-may-15-rallies-across-country.

187. *E.g.*, FIGHT FOR THE FUTURE, PLEDGE TO BOYCOTT CORPORATIONS UNDERMINING NETWORK NEUTRALITY, https://cms.fightforthefuture.org/neutrality (last visited Feb. 25, 2017).

188. Drutman & Furnas, *supra* note 175.

189. *Id*. The authors compiled aggregate lobbying expenditures per corporation by searching LDA disclosure reports submitted by lobbyists. Of course the figures were not disclosed by the corporations and likely do not fully account for all lobbying expenditures. *Id.*

190. *Id.* at fig.3.

neutrality expenditures, particularly because many shareholders supported net neutrality measures.[191] Some shareholders took action because they did not approve of corporations spending resources to oppose a measure that they, and the majority of the public, supported.[192] Most dissenting shareholders, however, were not motivated by personal politics; instead, they worried about the reputational and commercial risks posed by lobbying activities, especially for corporations who professed to support the "Open Internet."[193] To contest Verizon, Comcast, and AT&T's lobbying activities, shareholders filed resolutions at all three corporations, requesting information describing how executives planned to respond to "regulatory, competitive, legislative and public pressure to ensure . . . network management policies and practices support network neutrality."[194]

Verizon shareholders were particularly active. In cooperation with Trillium Asset Management, a socially responsible investment firm managing more than $2 billion in assets, and the Nathan Cummings Foundation, a non-profit organization supporting political accountability projects, a coalition of individual and institutional shareholders filed a resolution requesting information on how Verizon planned to support network neutrality and an Open Internet.[195] These concerns stemmed from a troublesome incompatibility: while Verizon's self-defined values stated that it supported the Open Internet, Verizon's lobbying activities indicated otherwise.[196] Indeed, writing to fellow Verizon shareholders in support of the resolution, the proposing shareholders cited the "growing number of risks brought about by the [sic] Verizon's strategy of voicing support for network neutrality principles [publicly] while actively seeking to undermine them [privately]."[197] On May 1, 2014, 26.4% of shareholders, representing more than $30 billion in Verizon shares, voted in favor of the resolution.[198]

Verizon, Comcast, and AT&T shareholders argued that the corporations may suffer reputational and commercial losses as a result of their anti-net neutrality stances, especially those which purported to support the Open Internet—and their concerns seem warranted.[199] Petitions to boycott the corporations due to their net neutrality opposition trended across the Internet.[200] In support of the FCC's proposed net neutrality rules, the

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191. Press Release, Trillium Asset Mgmt., Investors to Telecom Companies: Do the Right Thing and Let Shareholders Vote on Open, Free Internet Access For All (Dec. 13, 2010), *available at* http://www.trilliuminvest.com/investors-to-telecom-companies-do-the-right-thing-and-let-shareholders-vote-on-open-free-internet-access-for-all.

192. *E.g.*, Tady, *supra* note 174.

193. TRILLIUM ASSET MGMT. & NATHAN CUMMINGS FOUND., *Verizon Shareholder Resolution on Wireless Network Neutrality*, http://www.nathancummings.org/sites/default/files/v_reso_13.pdf [hereinafter Verizon Resolution].

194. *Id.*

195. *Id*.

196. *Verizon's Commitment to Our Broadband Internet Access Customers*, VERIZON WIRELESS, https://www.verizon.com/about/sites/default/files/Verizon_Broadband_Commitment.pdf (last visited Aug. 6, 2017).

197. Press Release, Nathan Cummings Found., Verizon Shareholder Proposal on Open Internet Issues Receives Support from Leading Proxy Advisory Firm ISS (Apr. 17, 2013), http://www.nathancummings.org/sites/default/files/vz_iss_recommendation_17april2013_final.pdf.

198. *Open Internet Proposal at Verizon Wins $30.6 Billion of Shareholder Vote*, OPEN MIC (May 8, 2014), *available at* http://www.openmic.org/issue-articles/2016/7/11/open-internet-proposal-at-verizon-wins-306-billion-of-shareholder-vote.

199. Verizon Resolution, *supra* note 193.

200. *E.g.*, FIGHT FOR THE FUTURE, *supra* note 187.

public filed more than 3.9 million comments—making it the most commented upon rulemaking in the FCC's history[201]—with more than ninety-nine percent of comments in favor.[202] More than one hundred organizations sent letters to the FCC expressing their support for the rules, from technology industry associations and small Internet businesses to the Leadership Conference on Civil and Human Rights and the American Library Association.[203]

The weight of public opinion clearly supported net neutrality measures and, because of the media's headlines identifying corporate opponents, the public knew which corporations opposed net neutrality.[204] At the same time, corporations advised their shareholders that their "ability to compete effectively depend[ed] on [their] perceived image and reputation among . . . customers, consumers, advertisers, [and] investors."[205] For example, CenturyLink, in its 2015 Form 10-K, noted: "Negative publicity may have an adverse impact on our reputation . . . which could adversely affect our business, results of operations, financial condition and cash flows."[206] Nevertheless, CenturyLink and other ISPs collectively spent hundreds of millions of dollars opposing net neutrality measures.[207]

In light of this information, shareholders were concerned because the public heavily scrutinized the corporations and some consumers even boycotted their products, implicating reputational and commercial risks that could adversely affect shareholder value. These risks were even more pronounced for corporations like Verizon, which voiced public voiced support for the "Open Internet" but still lobbied against net neutrality.[208] Nevertheless, shareholders could not assess how their corporations would address these serious policy concerns.[209] Therein lies the crux of this Note: since corporate lobbying activities implicate reputational and commercial risks, and because it is shareholders who are penalized by such risks in the form of declining share value, lobbying activities create material investor information that corporations must disclose under federal securities law.

D. Other Forms of Investor Engagement: Litigation, Legislation, and SEC Petitions

Perhaps recognizing the limitations of even successful shareholder resolutions, investors have not restricted their disclosure strategies to only shareholder resolutions. Instead, they have also turned to the SEC and the courts for rules and judgments mandating disclosure of corporate lobbying information. While these measures enjoy limited success,

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201. Gigi B. Sohn, *FCC Releases Open Internet Reply Comments to the Public*, FCC BLOG (Oct. 22, 2014, 4:07 PM), https://www.fcc.gov/news-events/blog/2014/10/22/fcc-releases-open-internet-reply-comments-public.

202. Elise Hu, *3.7 Million Comments Later, Here's Where Net Neutrality Stands,* NAT'L PUB. RADIO: ALL TECH CONSIDERED (Sept. 17, 2014, 3:12 PM), http://www.npr.org/sections/alltechconsidered/2014/09/17/349243335/3-7-million-comments-later-heres-where-net-neutrality-stands.

203. Letter from Jonas Kron, Senior Soc. Res. Analyst, Trillium Asset Mgmt. to Meredith Cross, Dir., Div. of Corp. Fin., U.S. Sec. & Exch. Comm'n 3 (March 2, 2011), *available at* https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2011/trilliumassetrecon030411-14a8.pdf.

204. *E.g.*, *supra* text accompanying notes 174–76.

205. COMCAST CORP. & NBCUNIVERSAL MEDIA, ANNUAL REPORT (FORM 10-K), at 31 (Feb. 27, 2015), *available at* http://www.cmcsa.com/secfiling.cfm?filingID=1193125-15-68526.

206. CENTURYLINK, INC., ANNUAL REPORT (FORM 10-K), at 22 (Feb. 24, 2015), *available at* https://www.sec.gov/Archives/edgar/data/18926/000001892616000047/ctl-2015123110k.htm.

207. Drutman & Furnas, *supra* note 175.

208. *See* Verizon Resolution, *supra* note 193.

209. *Id.*

they indicate the level of investor interest in corporate lobbying information.

In *New York State Common Retirement Fund v. Qualcomm Incorporated*, New York State Comptroller Thomas DiNapoli sued Qualcomm after it refused to disclose its political spending to shareholders.[210] DiNapoli brought the complaint under Section 220 of the Delaware General Corporation Law, which permits shareholders to inspect a company's books and records for "any proper purpose."[211] Regarded as a novel approach, DiNapoli announced this was "the first time that a lawsuit has been brought under Section 220 with regard to the use of political funds."[212] The legal theory had both supporters and critics, but Harvey Pitt, Chairman of the SEC under President George W. Bush, notably called it "'a pretty compelling circumstance' under the state law."[213] The courts, however, never tested the legal theory as DiNapoli withdrew the lawsuit after Qualcomm agreed to fully disclose its corporate political spending twice yearly, including direct and indirect lobbying activities.[214]

Shareholders have also pressured the SEC to promulgate rules "to require public companies to disclose to shareholders the use of corporate resources for political activities." [215] In 2011, a bipartisan committee of leading corporate and securities law scholars petitioned the SEC to initiate a rulemaking to require disclosure of corporate political spending to public company shareholders.[216] The petition drew unprecedented support, receiving more than 1.2 million comment letters—more than any other issue in the history of the SEC.[217] Supporters included seventy U.S. Representatives, eighteen U.S. Senators, one sitting SEC Commissioner, a number of former SEC Chairmen and Commissioners, five state treasurers, and the Council of Institutional Investors, a non-profit association of institutional investors managing more than $3 trillion in assets.[218] In response to the outpouring of support, the Chairman of the SEC placed the rulemaking on the Commission's

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210. Verified Complaint for Inspection of Books and Records, at 4, N.Y. State Common Ret. Fund v. Qualcomm Inc., No. 8170-CS, (Del. Ch. Jan. 2, 2013), *available at* http://op.bna.com.s3.amazonaws.com/srlr.nsf/r%3FOpen%3dywik-93mncd.

211. *Id.* at 1; DEL. CODE ANN. tit. 8, § 220 (West 2010).

212. Yin Wilczek, *Fund Files Novel Suit in Delaware to Inspect Qualcomm Records on Political Expenditures*, BLOOMBERG BNA (Jan. 7, 2013), http://www.law.harvard.edu/programs/corp_gov/MediaMentions/01-07-13_BNA.pdf.

213. Nicholas Confessore, *State Comptroller Sues Qualcomm for Data About Its Political Contributions*, N.Y. TIMES (Jan. 3, 2013), http://www.nytimes.com/2013/01/04/nyregion/new-york-comptroller-sues-qualcomm-for-data-on-political-giving.html.

214. Press Release, Office of the New York State Comptroller Thomas P. DiNapoli, Qualcomm Implements Industry-Leading Political Spending Disclosure Policy; DiNapoli Commends Action (Feb. 2, 2013), *available at* http://osc.state.ny.us/press/releases/feb13/022213.htm.

215. *E.g.*, Letter from Comm. on Disclosure of Corp. Political Spending to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n 1 (Aug. 3, 2011), *available at* https://www.sec.gov/rules/petitions/2011/petn4-637.pdf.

216. *Id.* Although the 2011 Petition largely targeted corporate political contributions, the rule it proposed would encompass lobbying expenditures as well, particularly non-deductible trade association spending. *See id.* at 8, 10; E-mail from John Keenan, Corp. Governance Analyst, AFSCME Capital Strategies, to author (Mar. 6, 2017, 6:08 PM CST) (on file with author).

217. Lisa Gilbert, *Political Spending Disclosure and the SEC*, THE HILL (Mar. 28, 2016, 7:30 AM), http://thehill.com/blogs/pundits-blog/finance/274433-political-spending-disclosure-and-the-sec; Lucian Bebchuk & Robert J. Jackson, *The Million-Comment-Letter Petition: The Rulemaking Petition on Disclosure of Political Spending Attracts More Than 1,000,000 SEC Comment Letters*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE & FIN. REG. (Sept. 4, 2014), https://corpgov.law.harvard.edu/2014/09/04/the-million-comment-letter-petition-the-rulemaking-petition-on-disclosure-of-political-spending-attracts-more-than-1000000-sec-comment-letters.

218. *See* Gilbert, *supra* note 217; PUBLIC CITIZEN, THE HISTORIC CAMPAIGN FOR CORPORATE POLITICAL SPENDING DISCLOSURE 6 (2016), http://corporatereformcoalition.org/wp-content/uploads/2016/10/Corporate-

agenda in 2013, but then-SEC Chair Mary Jo White removed it from the Commission's agenda following considerable congressional pressure.[219]

Collaborating with CREW, a shareholder petitioned the SEC again in 2014. Asking the Commission to reconsider the rulemaking, the shareholder noted that "the need for and public interest in these regulations have increased exponentially" since the 2011 petition.[220] Like the 2011 petition, the 2014 petition drew widespread public support, including supportive comments from "forty-four U.S. senators, seventy investing endowed foundations, the founder of the largest mutual fund in the country, [and] a bipartisan group of former Chairs and members of the SEC."[221]

The SEC, however, took no action regarding the 2014 petition, citing Section 707 of the Consolidated Appropriations Act, in which the Republican-controlled Congress barred the SEC from using its funds to "finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions, contributions to tax exempt organizations, or dues paid to trade associations."[222] Ironically, major trade organizations, like the U.S. Chamber of Commerce, lobbied Congress to attach this rider, which effectively forbade the SEC from working on a rule requiring that such organizations disclose their lobbying activities.[223]Addressing future appropriations acts, forty-one senators wrote a letter to the Senate Majority Leader requesting he "reject any language that would limit the [SEC's] ability to develop, propose, issue, finalize, or implement a rule requiring public companies to disclose political spending to shareholders."[224]

Finally, shareholders have advocated for legislation addressing corporate political spending, both campaign and lobbying expenditures, at the local, state, and federal levels. Federal legislators have proposed legislation requiring corporate lobbying disclosure nearly every year since 2009, but Republicans have prevented its passage by filibustering and by keeping legislation in committee.[225] Many state legislatures, however, have enacted legislation to mandate disclosure and provide greater shareholder oversight of political activities. For example, in Iowa, a company's board of directors must now approve all political spending, and in Maryland, all corporate political spending must now be disclosed

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Political-Spending-Disclosure-report.pdf; Letter from Glenn Davis, Senior Research Assoc., Council of Institutional Inv'rs, to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n (Oct. 19, 2011), *available at* https://www.sec.gov/comments/4-637/4637-9.pdf.

219. Letter from Anne L. Weismann, Chief Counsel, Citizens for Responsibility and Ethics in Washington, to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n 4 (May 8, 2014), *available at* https://www.sec.gov/rules/petitions/2014/petn4-637-2-amended.pdf [hereinafter 2014 Petition].

220. *Id.* at 1.

221. Gilbert, *supra* note 217.

222. Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 707, 129 Stat. 3029–30 (2016).

223. Dan Dudis, *Chamber of Commerce Wages War Against Political Transparency*, THE HILL (Oct. 20, 2016, 3:37 PM), http://thehill.com/blogs/pundits-blog/finance/302067-chamber-of-commerce-wages-war-against-political-transparency.

224. Letter from forty-one senators to Mitch McConnell, Senate Majority Leader, (Sept. 15, 2016), *available at* https://www.menendez.senate.gov/news-and-events/press/41-senate-democrats-to-mcconnell-reject-efforts-to-block-corporate-political-spending-disclosure.

225. *See* Investors Rights and Corporate Accountability Act of 2009, S. 2813, 111th Cong. (2009); Shareholder Protection Act of 2010, H.R. 4537, 111th Cong. (2010); Shareholder Protection Act of 2011, S. 1360, 112th Cong. (2011); Shareholder Protection Act of 2013, S. 824, 113th Cong. (2013); Shareholder Protection Act of 2015, S. 214, 114th Cong. (2015). *See also* HARV. L. SCH. & PUBLIC CITIZEN, FULFILLING KENNEDY'S PROMISE: WHY THE SEC SHOULD MANDATE DISCLOSURE OF CORPORATE POLITICAL ACTIVITY 6–7 (2011), https://www.citizen.org/documents/Fulfilling-Kennedys-Promise.pdf.

to shareholders.[226] In total, nineteen states and 737 municipalities have passed resolutions or ballot initiatives calling for increased transparency in corporate political activities, as well as requesting a constitutional amendment to overturn the Supreme Court's 2010 decision in *Citizens United*, which made possible unlimited corporate contributions to political action committees.[227]

In conclusion, investors have employed a number of creative strategies and novel legal theories to demand companies disclose their lobbying information. Shareholder resolutions earned substantial investor support, and SEC rulemaking petitions set records for public comments. Yet, even when shareholders manage to change corporate policies to mandate disclosure, shareholders' three key concerns remain unresolved because companies self-regulate compliance with the disclosure agreements. Nevertheless, collective widespread investor interest, as measured through various forms of investor engagement with companies, courts, Congress, and the SEC, demonstrates that corporate lobbying activities create material investor information that, under federal securities law, companies must disclose.

IV. MATERIALITY APPLIED: THE CASE FOR REQUIRED DISCLOSURE

A. The Materiality Standard

Established by the Securities Act of 1933 and the Securities Exchange Act of 1934 (collectively, the "Securities Acts"), the U.S. securities regulation system is premised on one simple, straightforward concept: "[A]ll investors, whether large institutions or private individuals, should have access to certain basic facts about an investment prior to buying it, and so long as they hold it."[228] Inspired by Justice Brandeis's notion that transparency is the antidote for an ailing market, drafters of U.S. securities laws believed that exposing corporate conduct to public scrutiny would help protect investors.[229] The drafters created the SEC to enforce the new protections promulgated by the Securities Acts and "empowered it to require disclosure of corporate [information] *material* to the public interest and the protection of investors."[230]

In response, the SEC wrote "hundreds of pages of confounding, cross-referenced disclosure requirements in schedules and rules, backstopped by an additional requirement

226. Ciara Torres-Spelliscy, *Four Years After* Citizens United*: The Good, the Bad, and the Ugly*, BRENNAN CTR. FOR JUSTICE (Jan. 17, 2014), https://www.brennancenter.org/blog/four-years-after-citizens-united-good-bad-and-ugly.

227. 2014 Petition, *supra* note 219, at 3; UNITED FOR THE PEOPLE, STATE AND LOCAL SUPPORT, http://united4thepeople.org/state-and-local-support-2/#Numbers (last visited Feb. 11, 2017).

228. *What We Do*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/about/whatwedo.shtml (last visited Feb. 26, 2017).

229. See Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1211–26 (1999), for a history of the intellectual and individual influences on the mandatory disclosure provisions of U.S. securities laws.

230. INITIATIVE FOR RESPONSIBLE INV., ON MATERIALITY AND SUSTAINABILITY: THE VALUE OF DISCLOSURE IN THE CAPITAL MARKETS 6 (2012), http://iri.hks.harvard.edu/files/iri/files/on_materiality_and_sustainability_-_the_value_of_disclosure_in_the_capital_markets.pdf (emphasis added).

of a disclosure of all '*other material*' information."[231] However, the SEC never once defined what the term "material" meant.[232] Today, both courts and the SEC use an identical test for determining whether information is material.[233] Thus, examining both Supreme Court jurisprudence and SEC guidance is instructive for applying the materiality standard.

1. The Federal Courts on Materiality

Left to define the SEC's foundational term without SEC guidance, the Supreme Court adopted a deceptively simple legal standard for determining what is "material." The simple but vague standard, developed in the following two cases, provides that information is material if a substantial likelihood exists that a reasonable investor would consider the information important in making an investment or voting decision.[234] Although the "reasonable investor" is a common figure in securities laws, "courts have not spoken with one clear voice on its identity," leaving him "anonymous, elusive, and the subject of much inquiry."[235] For purposes of this Note, the reasonable investor is a "rational but non professional participant in the capital markets," who "grasps market fundamentals," but is not a "trained investment analyst."[236]

The Court's seminal case on materiality is *TSC Industries, Incorporated v. Northway, Incorporated*.[237] In *TSC Industries*, the Court held that information is material "if there is a substantial likelihood that a reasonable shareholder would consider it important" in making an investment or voting decision, and the information "would have assumed actual significance in the deliberations of the reasonable shareholder."[238] Notably, the standard does not require that the information cause a reasonable investor to change his or her investment or voting decision, but instead simply that the information be important in reaching the decision.[239]

More than a decade later, the Court addressed the materiality standard again in *Basic Incorporated v. Levinson*.[240] There, the lower court attempted to adapt the materiality standard into an "easier to follow" bright-line rule.[241] Rejecting the lower court's test, the Court wrote, "ease of application alone is not an excuse for ignoring the purposes of the Securities Acts," which "implement[] 'a philosophy of full disclosure.'"[242] Indeed, the

231. Dale A. Oesterle, *The Overused and Under-Defined Notion of "Material" in Securities Law*, 14 U. PA. J. BUS. L. 167, 168 (2011) (emphasis added).

232. *Id*.

233. *Compare* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) (holding that information "is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote"), *with* Selective Disclosure and Insider Trading, 17 C.F.R. pts. 243.100 to -.103 (2000) [hereinafter Selective Disclosure] (providing that information "is material if 'there is a substantial likelihood that a reasonable shareholder would consider it important' in making an investment decision") (quoting *TSC Indus., Inc.*, 426 U.S. at 449).

234. *See TSC Indus., Inc.*, 426 U.S. at 449.

235. Amanda M. Rose, *The "Reasonable Investor" of Federal Securities Law: Insights from Tort Law's "Reasonable Person" and Suggested Reforms*, 43 J. CORP L. (forthcoming 2017) (manuscript at 19) (on file with author).

236. *Id.* at 20.

237. *TSC Indus., Inc.*, 426 U.S. at 438.

238. *Id.* at 449.

239. *Id.*

240. Basic Inc. v. Levinson, 485 U.S. 224 (1988).

241. *Id.* at 232–33, 236.

242. *Id*. at 230, 236 (quoting SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963)).

Court noted, "any approach that designates a single fact or occurrence as always determinative of . . . materiality, must necessarily be overinclusive or underinclusive."[243] Further, in rejecting the lower court's rigid test, the Court reiterated that materiality is a flexible standard, one which "requires the exercise of judgment in the light of all the circumstances" and is "to be determined on the basis of the particular facts of each case."[244]

Although the facts and context differed in *TSC Industries* and *Basic*, the Court has since applied the materiality standard articulated in those cases to nearly all areas of federal securities law.[245] In cases regarding disclosure, the Court has carefully avoided a low materiality threshold, which would "bury the shareholders in an avalanche of trivial information."[246] Therefore, the requirement that a reasonable investor view the information as *significant* ensures that only important information is disclosed to investors.[247]

2. SEC Guidance on Materiality

The SEC has adopted the Court's materiality standard by reference in its guidance materials and final rules.[248] Further, to assist companies in "discharging 'the onerous duty of making materiality decisions,'" the SEC has also provided additional guidance in interpretative rules.[249] Three pieces of SEC guidance are particularly relevant for this Note's analysis of the materiality of corporate lobbying information.

First, the SEC has consistently reminded companies that because the materiality standard is dependent upon whether information is important to a reasonable investor, it evolves over time to address new issues and investor concerns.[250] For example, in a 1998 guidance regarding the materiality of Year 2000-related information, the SEC stated that the materiality standard is "dynamic and responsive to changing circumstances," such that information not previously material to investors may become so based on heightened public interest.[251] As the world grew concerned that technology problems would occur after

243. *Id*. at 236.

244. *Id.* at 236, 238.

245. Wendy Gerwick Couture, *Materiality and a Theory of Legal Circularity*, 17 U. PA. J. BUS. L. 453, 509–10 (2015) (noting that courts apply the materiality standard when considering cases involving common law fraud, mail and wire fraud, criminal securities fraud, and private securities litigation).

246. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 448 (1976).

247. *Id*. at 449.

248. *See, e.g.*, Selective Disclosure, *supra* note 233, (providing that information "is material if 'there is a substantial likelihood that a reasonable shareholder would consider it important' in making an investment decision") (quoting *TSC Indus., Inc.*, 426 U.S. at 449).

249. *See* SEC STAFF ACCOUNTING BULLETIN NO. 99—MATERIALITY, U.S. SEC. & EXCH. COMM'N, Release No. SAB 99 (Aug. 12, 1999), *available at* https://www.sec.gov/interps/account/sab99.htm (quoting FIN. ACCOUNTING STANDARDS BD., STATEMENT OF FINANCIAL ACCOUNTING CONCEPTS NO. 2, at 37 (1980) [hereinafter SAB 99].

250. *See, e.g.*, U.S. SEC. & EXCH. COMM'N, STATEMENT OF THE COMMISSION REGARDING DISCLOSURE OF THE YEAR 2000 ISSUES, Release No. 34-40277 (Aug. 4, 1998) (noting that information concerning a company's "Year 2000 readiness" may be material, and therefore require disclosure to shareholders, due to widespread public and investor concern about technology problems) [hereinafter Year 2000 Disclosure]. *See also* DIV. OF CORP. FIN., U.S. SEC. & EXCH. COMM'N, CF DISCLOSURE GUIDANCE: TOPIC NO. 2—CYBERSECURITY (Oct. 13, 2011), *available at* https://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm (noting that information regarding cybersecurity risks and cyber incidents may be material, and thus require disclosure to shareholders, due to investor concern about the risks posed by cyber attacks).

251. Year 2000 Disclosure, *supra* note 250.

December 31, 1999, the SEC advised companies to reevaluate the materiality of information about their technology systems.[252] This example demonstrates that materiality is largely derived from measures of public, governmental, and shareholder interest in information.[253] In other words, the reasonable investor's interest in information is based largely on the level of public attention to and interest in information about a topic.[254]

The SEC's second relevant guidance is Staff Accounting Bulletin Number Ninety-Nine ("SAB 99"). Staff Accounting Bulletins are SEC staff interpretations of the disclosure requirements of federal securities laws.[255] The SEC published SAB 99 as guidance for auditors regarding misstatements, but it was nonetheless a "must read[] for all securities lawyers" because it was "applicable to all 'materiality' determinations."[256] The SEC issued SAB 99, in part, because companies had developed erroneous quantitative "rules of thumb" for materiality, believing that information was material only if it could result in a financial impact on net income of at least five percent.[257] SAB 99 dispelled this rule of thumb, noting that reliance on a threshold percentage for determining materiality had "no basis in the accounting literature or the law."[258]

Instead, SAB 99 stated that companies "must consider both 'quantitative' and 'qualitative' factors in assessing [information's] materiality."[259] Two factors identified by SAB 99 are especially germane to corporate lobbying information. First, SAB 99 "identifie[d] possible market reaction as a factor to be considered in assessing materiality."[260] "Market reaction" is the change in share price resulting from, among other things, investor and consumer confidence.[261] Second, and most importantly, SAB 99 provided that even "[i]f management does not expect a significant market reaction, [information] still may be material."[262] Therefore, even if information does not impact share price, the reasonable investor still may consider it significant in making investment and voting decisions.[263]

Lastly, the SEC's "Guidance Regarding Disclosure Related to Climate Change" ("Climate Change Guidance") is relevant. To the surprise of many, the SEC weighed in on the topic of climate change because it had "become a topic of intense public discussion in recent years," in which investors and "the public at large ha[d] expressed heightened interest."[264] Therefore, the SEC promulgated Climate Change Guidance, which provided

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252. *Id.*

253. *Id. See also* INT'L CORP. ACCOUNTABILITY ROUNDTABLE, KNOWING AND SHOWING: USING U.S. SECURITIES LAW TO COMPEL HUMAN RIGHTS DISCLOSURE 16 (2013), *available at* http://icar.ngo/wp-content/uploads/2013/10/ICAR-Knowing-and-Showing-Report4.pdf [hereinafter HUMAN RIGHTS DISCLOSURE].

254. HUMAN RIGHTS DISCLOSURE, *supra* note 253, at 16.

255. *Selected Staff Accounting Bulletins*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/interps/account.shtml (last visited Feb. 21, 2017).

256. CORP. DEP'T, LATHAM & WATKINS, *SAB 99: The SEC Defines "Materiality"*, CLIENT ALERT, (Dec. 29, 1999), at 1.

257. SAB 99, *supra* note 249.

258. *Id*.

259. *Id.*

260. *Id.*; LATHAM & WATKINS, *supra* note 256, at 2.

261. Haidan Li, Morton Pincus & Sonja Olhoft Rego, *Market Reaction to Events Surrounding the Sarbanes-Oxley Act of 2002 and Earnings Management*, 51 U. CHI. J.L. & ECON. 111, 122 (2008) (classifying negative stock returns following the announcement of accounting fraud at WorldCom as a "market reaction" caused by declining investor and consumer confidence).

262. SAB 99, *supra* note 249, at n.17.

263. *Id*.

264. U.S. SEC. & EXCH. COMM'N, COMMISSION GUIDANCE REGARDING DISCLOSURE RELATED TO CLIMATE

a three-part framework for analyzing the materiality of information in response to increasing public interest.

The SEC's outline for determining materiality in light of popular relevancy focuses on three factors.[265] The first factor examines materiality by analyzing federal regulatory efforts, state and local laws, and international community actions.[266] The second factor analyzes the potential direct and indirect impacts on long-term corporate value, such as commercial and reputational risks.[267] The third factor considers whether shareholders are demanding disclosure, whether institutional investors or other groups are petitioning the SEC for guidance regarding materiality, and whether businesses have acknowledged its materiality by voluntarily disclosing the information.[268]

While the SEC's 2010 guidance addressed only climate change-related information, its framework is nevertheless instructive for addressing other emerging issues of public interest and concern. For example, the International Corporate Accountability Roundtable utilized the three-factor framework to propose to the SEC that human rights policies and practices were material information because, like climate change, human rights had become a topic of widespread public discussion.[269] Likewise, corporate lobbying activities are a topic of widespread public discussion, and therefore, the framework is instructive for assessing the materiality of corporate lobbying information.

3. Conclusion

In summary, both the Supreme Court and the SEC acknowledge that materiality judgments can be difficult, but nevertheless, both have rejected bright-line tests and exhaustive lists of material information or events.[270] Instead, the Court and the SEC concur that information is material whenever, in the light of the surrounding circumstances, there is a significant likelihood that a reasonable investor would consider the information important when making an investment or voting decision.[271] Moreover, SEC guidance provides that materiality is partially a product of investors, businesses, and the public "treating a particular area or impact of business activity with heightened interest."[272]

B. Demonstrating Materiality: Applying the Materiality Standard

1. Reasonable Investors are Interested in Corporate Lobbying Information

As shown in Part II, investors are demanding disclosure of corporate lobbying information at unprecedented levels. The level of investor engagement assumes particular importance in determining materiality because materiality is, in part, a product of the

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CHANGE 1, Release Nos. 33-9106, 34-61469, FR-82 (Jan. 27, 2010), *available at* https://www.sec.gov/rules/interp/2010/33-9106.pdf [hereinafter Climate Change Guidance].

265. *Id.* at 3, 5, 7.

266. *Id.* at 3–4.

267. *Id.* at 5–6, 26.

268. *Id.* at 7–8.

269. *See* HUMAN RIGHTS DISCLOSURE, *supra* note 253, at 16. *See also* Letter from Amol Mehra, Dir., Int'l Corp. Accountability Roundtable to Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n 2–4 (July 19, 2016), *available at* https://www.sec.gov/comments/s7-06-16/s70616-161.pdf.

270. *See* Basic Inc. v. Levinson, 485 U.S. 224, 236 (1988); Selective Disclosure, *supra* note 233.

271. *See* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); Selective Disclosure, *supra* note 233.

272. HUMAN RIGHTS DISCLOSURE, *supra* note 253, at 16.

heightened interest.[273] Therefore, because the materiality standard is "dynamic and responsive to changing circumstances," information not previously material to the reasonable investor may become so based on increased attention from investors and the public.[274] Such is the case for corporate lobbying information.

Undoubtedly, many investors are interested in corporate lobbying information. Investors have filed more than 300 resolutions since 2010[275]—making "disclosure of political spending . . . a more frequent subject of shareholder proposals at U.S. public companies than any other corporate governance issue."[276] Resolutions seeking disclosure of corporate political spending information dominated other topics as the most popular from 2012 to 2014, peaking at one-third of all shareholder resolutions in 2013.[277] The slight decline in resolutions in recent years is due to the fact that many companies, recognizing the materiality of lobbying information, have agreed to disclose such information.[278] For example, of the 209 S&P 500 companies at which shareholders have filed resolutions seeking disclosure, sixty-one have agreed to disclose lobbying information.[279]

To illustrate the significant level of investor interest in corporate lobbying information, consider the degree of investor engagement—which ultimately led to SEC rules requiring disclosure—in two other instances. First, in June 1992, the SEC responded to increasing investor engagement by proposing amendments to its corporate executive compensation rules.[280] Such amendments would require disclosure of senior executive pay and compensation awards.[281] In the preamble to its proposed rules, the SEC noted substantial investor interest in the information and cited the "shareholder proposals on executive compensation at nine well-known public companies," which received an average of 11.2% of shareholder support.[282] The SEC received 20,000 comments supporting the proposal.[283]

Compare this to investor engagement regarding corporate lobbying information. In 2016 alone, investors filed more than fifty resolutions requesting companies disclose lobbying information.[284] On average, 28.65% of shareholders supported the resolutions, and

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273. *Id.*

274. Year 2000 Disclosure, *supra* note 250.

275. THE INVESTOR CAMPAIGN, *supra* note 111, at 2.

276. Letter from Lucian A. Bebchuk, Professor, Harvard Law Sch. & Robert J. Jackson, Jr., Professor, Columbia Law Sch. to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n 2 (Apr. 30, 2013), *available at* https://www.sec.gov/comments/4-637/4637-1701.pdf.

277. *See* PROXY PREVIEW 2012, *supra* note 108, at 3; PROXY PREVIEW 2013, *supra* note 108, at 5; PROXY PREVIEW 2014, *supra* note 108, at 6.

278. *See, e.g.*, *Shining Light*, *supra* note 106, at 939 (noting that shareholder resolution figures "actually *underestimate* investor interest in information on political spending" because "many public companies have already voluntarily agreed to provide some disclosure of political spending to shareholders.").

279. 2016 CPA-ZICKLIN, *supra* note 119, at 32.

280. Patrick J. Straka, *Executive Compensation Disclosure: The SEC's Attempt to Facilitate Market Forces*, 72 NEB. L. REV. 803, 804, 807–08 (1993). The author attributed the new disclosure rules to investor activism, writing, "Without the increase in shareholder activism, primarily through institutional investors, the impetus for change in the disclosure rules might not have occurred." *Id.* at 808.

281. *Id.* at 804–05.

282. *Shining Light*, *supra* note 106, at 929, 963.

283. U.S. SEC. & EXCH. COMM'N, EXECUTIVE COMPENSATION AND RELATED PERSON DISCLOSURE 9, Release Nos. 33-8732A, 34-54302A, IC-27444A (issued Aug. 29, 2006), *available at* https://www.sec.gov/rules/final/2006/33-8732a.pdf [hereinafter EXECUTIVE COMPENSATION DISCLOSURE].

284. Keenan, *supra* note 10.

five resolutions received more than thirty percent support.[285] The total number of shareholder resolutions demanding lobbying disclosure is six times the number of proposals demanding executive compensation information. Resolutions demanding lobbying disclosure earned more than twice as much shareholder support as resolutions demanding executive compensation information. And while the SEC received "over 20,000 comment letters in response to . . . [the executive compensation] proposal," the SEC received more than one million comment letters supporting the 2011 petition for lobbying disclosure.[286]

Next consider the SEC's Climate Change Guidance, referenced above, in which it advised companies to reevaluate the materiality of climate change-related information in light of the "increasing calls for climate-related disclosures by shareholders" that occurred between 2007 and 2009.[287] Significantly, during this same period, more shareholders demanded disclosure of corporate lobbying information than climate-related information.[288]

As shown in Part II, investors have not confined their engagement strictly to shareholder resolutions, but have instead sought increased disclosure in lawsuits, legislation, and in rulemaking petitions to the SEC. The SEC rulemaking petition of 2011, as a measure of investor interest, is notable because it produced a record-breaking number of public comments, including from politicians, institutional investors, non-profit organizations, and investors who believe that disclosure is "a critically needed risk management tool for shareholders, corporate management, and directors."[289]

Collectively, these examples demonstrate that investors are demanding corporate lobbying information more frequently and with greater support than other areas in which the SEC has recognized investor interest as an impetus for its actions. Therefore, because materiality is a product of investor and public interest in information, the unparalleled degree of investor engagement regarding corporate lobbying information signifies that the reasonable investor is interested in corporate lobbying information. While heightened investor interest is a major aspect of analyzing materiality, the reasonable investor must also consider the information significant when deliberating on investment or voting decisions.

2. Reasonable Investors Consider Lobbying Information Significant in Their Deliberations.

A reasonable investor considers corporate lobbying information significant when deliberating on investment or voting decisions because lobbying activities pose risks to

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285. PROXY PREVIEW 2016, *supra* note 14, at 30; CERES, *supra* note 114.

286. EXECUTIVE COMPENSATION DISCLOSURE, *supra* note 283, at 9; Lucian Bebchuk & Robert J. Jackson, *The Million-Comment-Letter Petition: The Rulemaking Petition on Disclosure of Political Spending Attracts More Than 1,000,000 SEC Comment Letters*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE & FIN. REG. (Sept. 4, 2014), https://corpgov.law.harvard.edu/2014/09/04/the-million-comment-letter-petition-the-rulemaking-petition-on-disclosure-of-political-spending-attracts-more-than-1000000-sec-comment-letters.

287. Climate Change Guidance, *supra* note 264, at 7.

288. *See* AS YOU SOW, PROXY PREVIEW 2010, at 5 (2010), *available at* http://www.asyousow.org/ays_report/proxy-preview-2010 (noting that "for the fourth year in a row, political [disclosure] continues to be the largest single social issue generating proposals.").

289. *See* Letter from a Coalition of Investment Professionals to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n 1 (Nov. 1, 2011), *available at* https://www.sec.gov/comments/4-637/4637-11.pdf; PUBLIC CITIZEN, THE HISTORIC CAMPAIGN FOR CORPORATE POLITICAL SPENDING DISCLOSURE 6 (2016), *available at* http://corporatereformcoalition.org/wp-content/uploads/2016/10/Corporate-Political-Spending-Disclosure-report.pdf; Letter from Glenn Davis, Senior Research Assoc., Council of Institutional Inv'rs, to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n (Oct. 19, 2011), *available at* https://www.sec.gov/comments/4-637/4637-9.pdf.

share value.[290] Indeed, a series of surveys revealed that directors, shareholders, and business leaders alike recognize the risks posed by undisclosed political activity. A survey of 255 members of boards of directors revealed "a substantial percentage [believe] political activity poses risks to their company."[291] Similarly, eighty-five percent of shareholders and sixty-six percent of business leaders believe that undisclosed political activity "puts corporations at legal risk and endangers corporate reputations."[292] Therefore, for a number of reasons, it is likely that a reasonable investor would consider information about a company's lobbying practices and policies significant when making an investment or voting decision.

For instance, corporate reputation is invaluable—and undisclosed lobbying activities endanger it. Research indicates that "the proportion of a company's market cap[italization] attributable to its reputation" represents as much as fifty-eight percent of a company's total market capitalization.[293] Even CEOs of leading global companies agree; specifically, sixty percent of CEOs surveyed at the World Economic Forum answered that corporate reputation constituted more than forty percent of their company's market capitalization.[294] A reasonable investor would be aware of this because companies routinely acknowledge as much in their Form 10-K filings, reminding shareholders that their "ability to compete effectively depends on [their] perceived image and reputation among . . . customers."[295]

Both controversial and uncontroversial lobbying activities endanger companies' reputation among customers, which can have direct and prolonged impacts on shareholder value. Most obviously, controversial lobbying activities may lead to consumer boycotts. While boycotts are not a recent invention, modern social media proliferates boycotts and allows them to reach more consumers—and thereby cause more severe consequences—than ever.[296] A study of twenty-one boycotted companies found "statistically significant decreases in stock prices for the target firms," which led to each of the twenty-one companies suffering "an average [loss] of more than $120 million [in market capitalization] over the two-month post-announcement period."[297] Another study found that boycotts cause a 2.7% decline in share price in the ten days following announcement, with an eventual loss of 3.4% one hundred days later.[298] For companies "that are sensitive to their image

290. Keenan, *supra* note 10.

291. MASON-DIXON POLLING & RESEARCH, NATIONWIDE SURVEY OF MEMBERS OF CORPORATE BOARDS OF DIRECTORS 3 (2008), *available at* http://files.politicalaccountability.net/reports/cpa-reports/Survey_of_Directors.pdf.

292. MASON-DIXON POLLING & RESEARCH, CORPORATE POLITICAL SPENDING: A SURVEY OF AMERICAN SHAREHOLDERS 6 (2006), *available at* https://zicklin.baruch.cuny.edu/centers/zcci/downloads/cpa-mason-dixon-survey-poll-and-analysis-03.pdf/at_download/file; ZOGBY INT'L, COMMITTEE FOR ECONOMIC DEVELOPMENT: OCTOBER BUSINESS LEADER STUDY 16 (2010), *available at* https://www.ced.org/pdf/Zogby-Poll2010.pdf.

293. Cole, *supra* note 134, at 61.

294. Brigham & Linssen, *supra* note 135.

295. COMCAST CORP. & NBCUNIVERSAL MEDIA, ANNUAL REPORT (FORM 10-K), at 31 (2014), *available at* http://www.cmcsa.com/secfiling.cfm?filingID=1193125-15-68526.

296. *The Trump Effect*, *supra* note 5 (noting that "[t]hanks to Reddit, Twitter, [and] Facebook, . . . a single spark of dissent or misinformation can quickly become an inferno.").

297. Stephen W. Pruitt & Monroe Friedman, *Determining the Effectiveness of Consumer Boycotts: A Stock Price Analysis of Their Impact on Corporate Targets*, 9 J. CONSUMER POL'Y 375, 382 (1986). The authors concluded that consumer boycotts have "a highly significant negative effect on the stock prices of the target firms" and deal "substantial damage to the wealth positions of stockholders of target firms." *Id.*

298. Richard E. White & Dilip D. Kare, *The Impact of Consumer Boycotts on the Stock Prices of Target Firms*,

and directly serve customers," this can be particularly devastating.[299]

Moreover, politically motivated boycotts are on the rise. One CEO recently forecasted that changing consumer culture would bring more "pocketbook protests" than ever before, calling corporate boycotts "the new political battleground."[300] Indeed, anti-Trump boycotts during and following the 2016 election cycle support this forecast.[301] One public boycott, the #GrabYourWallet campaign, trended on social media, targeted more than fifty companies, and garnered in excess of 700 million views.[302] Like aligning with a controversial candidate, lobbying for controversial legislation can pose serious public boycott risks. For example, GoDaddy, a publicly traded web-hosting service, became the target of a boycott after a U.S. House Judiciary Committee report revealed that it had privately expressed support for the controversial Stop Online Piracy Act.[303] GoDaddy initially ignored the boycott, but after it lost more than 37,000 domain customers in only two days, it reversed its stance, announcing it opposed the measure.[304]

A lesser known, but perhaps more threatening risk posed by undisclosed lobbying activities, "conscious consumerism," describes a growing subset of consumers who attach ethical consequences to their purchasing decisions.[305] Unlike boycotts, which are generally limited in length, conscious consumerism describes the habitual propensity of certain customers to purchase products from companies that have positive social impacts.[306] It may sound foreign and unthreatening, but the Millennial generation is ushering in this new era of socially-conscious consumerism.[307] For example, sixty-eight percent of Millennials considered a company's social and environmental commitment "important or extremely important" to their purchasing decision.[308] Additionally, forty-five percent of Millennials stated they would refuse to purchase a company's products if they learned the company's products or policies carried negative social impacts.[309] Simply put, there is an increasing number of consumers that consider the ethical consequences of their purchases. Even without a public boycott, the modern consumer may consciously choose to avoid a company's products or services due to negatively perceived lobbying activities by the company. As a result, companies that engage in undisclosed lobbying activities create serious risks for their investors.

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6 J. APPLIED BUS. RES. 63, 67 (2006).

299. *The Trump Effect*, *supra* note 5.

300. *Id.*

301. *E.g.*, #GRABYOURWALLET, WHAT WE'RE ABOUT, https://grabyourwallet.org/What%20We're%20About.html (last visited Feb. 27, 2017). A "brand strategist and a grandmother" launched a consumer boycott "both as a response to Donald Trump's infamous hot mic[rophone] remark and a reference to women's epic consumer power." *Id.*

302. *Id.*

303. Cheredar, *supra* note 6.

304. *Id.*

305. NETWORK FOR BUS. SUSTAINABILITY, SOCIALLY CONSCIOUS CONSUMERISM PRIMER 1 (2009), *available at* http://nbs.net/wp-content/uploads/NBS-Consumerism-Primer.pdf.

306. NIELSEN CO., *Global Consumers are Willing to Put Their Money Where Their Heart Is When It Comes to Goods and Services From Companies Committed to Social Responsibility* (June 17, 2014), http://www.nielsen.com/us/en/press-room/2014/global-consumers-are-willing-to-put-their-money-where-their-heart-is.html.

307. CONE INC., THE 2006 CONE MILLENNIAL CAUSE STUDY 9 (2006), *available at* http://www.centerforgiving.org/Portals/0/2006%20Cone%20Millennial%20Cause%20Study.pdf.

308. *Id.*

309. *Id.*

The SEC recognized this risk, albeit in different terms, in its Climate Change Guidance. It noted that public perception of a company's environmental impact "could expose it to potential adverse consequences to . . . its financial condition resulting from reputational damage."[310] As Millennials, the majority of whom are conscious consumers, become the dominant consumer group, companies whose practices and policies have negative social impacts will be punished by decreased product demand, not to mention difficulty retaining and recruiting a talented workforce.[311] Therefore, a reasonable investor would consider corporate lobbying information significant in deliberations about an investment or voting decision because such information illuminates long-term risks to corporate reputation and, in turn, shareholder value.

The risks that undisclosed lobbying activities pose to companies do not end with the *indirect* risks to corporate reputation. Corporate lobbying activities can also implicate serious direct risks, including litigation, financial penalties, and direct impacts on shareholder value. *New York State Common Retirement Fund v. Qualcomm Incorporated* demonstrated that undisclosed lobbying activities—even if uncontroversial—pose legal risks, especially considering that DiNapoli, the New York State Comptroller, cited Qualcomm's "deficient" CPA-Zicklin Index score in the complaint.[312] After six weeks of negotiations, the parties reached an agreement for full disclosure of political spending.[313] The costly litigation and lengthy negotiations, however, could have been avoided entirely if Qualcomm's political spending policies were more transparent.

In addition, corporate lobbying activities also pose regulatory risks. For example, in 2015, Lockheed Martin agreed to pay a $4.7 million fine to settle charges that it engaged in illegal lobbying activities to secure the extension of a $2.4 billion per year contract with the U.S. Department of Energy.[314] While this penalty alone may seem minimal, the direct risks of corporate lobbying cannot be considered in a vacuum because the discovery of such violations also implicates indirect risks. For example, the contract Lockheed Martin illegally lobbied to extend had, since 1993, been a no-bid contract, meaning the government never solicited competing bids from other companies.[315] However, following the $4.7 million settlement, the U.S. Department of Energy announced that, for the first time in twenty-four years, it would solicit competitive bids for the contract.[316]

Undisclosed lobbying activities can also directly benefit management at the expense of shareholder value and investor protections. Consider, for example, the Chesapeake En-

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310. Climate Change Guidance, *supra* note 264, at 26.

311. *See, e.g.*, CONE INC., *supra* note 307, at 9 (finding that fifty-six percent of Millennials are likely to refuse to work at a company that is not socially or environmentally responsible).

312. Verified Complaint for Inspection of Books and Records, N.Y. State Common Ret. Fund v. Qualcomm Inc. 18, ¶ 51, No. 8170-CS, (Del. Ch. Jan. 2, 2013), *available at* http://op.bna.com.s3.amazonaws.com/srlr.nsf/r%3FOpen%3dywik-93mncd.

313. Alison Frankel, *NY Pension Fund's Bold Tactic to Force Campaign Spending Disclosure*, REUTERS (Jan. 3, 2013), http://blogs.reuters.com/alison-frankel/2013/01/03/ny-pension-funds-bold-tactic-to-force-campaign-spending-disclosure.

314. Lisa Rein, *Lockheed Martin Pays $4.7 Million to Settle Charges It Lobbied for Federal Contract with Federal Money*, WASH. POST (Aug. 24, 2015), https://www.washingtonpost.com/news/federal-eye/wp/2015/08/24/after-allegations-that-it-lobbied-with-federal-money-to-block-competition-lockheed-martin-agrees-to-pay-almost-5-million/?utm_term=.15ed949b5f98.

315. *Id.*

316. *Id.*

ergy Corporation. As noted in Part II, Chesapeake's executives—at the expense of shareholders—lobbied for legislation that prohibited governance by a unitary board system, which the majority of shareholders desired.[317] The alternative was governance by a staggered-board system that benefitted management by shielding directors from a proxy contest with Carl Icahn.[318] Chesapeake's sponsored legislation, as noted above, negatively affected investor rights because the staggered-board system "unduly insulated the board members and rendered them insensitive to shareholder concerns."[319]

In addition to negatively affecting investor rights, the legislation lobbied for by the Chesapeake executives directly harmed shareholder value in two ways. First, the legislation damaged future earnings potential because "staggered boards are associated with a reduced firm value" in an "economically meaningfully" way.[320] Second, the legislation may have directly thwarted a takeover attempt by Carl Icahn, from which shareholders could potentially have realized substantial capital gains from their shares.[321] Indeed, "there's no more rapid source of share price gains than when a company becomes a takeover target," but the legislation mandating a staggered-board system rendered such a takeover much less likely.[322] A reasonable investor would certainly be aware of, and consider, this missed opportunity when deliberating on future voting and investment decisions, and would surely consider such information significant.

V. CONCLUSION

Modern consumers are reforming their private acts of consumption into overt political declarations and transforming goods and services into vehicles for protesting corporate political activities. On recognizing this growing consumer trend, shareholders are demanding increased transparency in corporate lobbying because it poses serious reputational, commercial, and legal risks to shareholder value. The materiality of corporate lobbying information is reflected in the unprecedented demand and support for such information, as well as in the substantial number of corporations that now disclose lobbying information to their shareholders.

While modern consumers seemingly have little in common with their eighteenth century ancestors, one thing is certain: like the colonists who refused to purchase British goods at the price of political dependence, Millennial consumers refuse to associate with companies whose political practices are opaque and whose policies have negative social impacts. Unlike American patriots, who could gather boycott support only by passing petitions door-to-door, modern consumers need only send a tweet or draft a Facebook post to share their narrative of resistance with hundreds of millions of people. Unfortunately

317. Daniel Gilbert, *Oklahoma Board Rule Benefits Chesapeake*, WALL ST. J. (July 11, 2011), https://www.wsj.com/articles/SB10001424052702303763404576418091195332896.

318. *See* Cleveland, *supra* note 151, at 229-31.

319. *Id.* at 228.

320. *See* Bebchuk & Cohen, *supra* note 154, at 430.

321. *See* Cleveland, *supra* note 151, at 223 (noting that Oklahoma legislators "candidly admitted to enacting [the] legislation in 2010 to protect [CEO] Aubrey McClendon" and Chesapeake Energy Corporation "from famed corporate raider Carl Icahn.").

322. Crista Huff, *What to Do When Your Stock is a Takeover Target*, CABOT WEALTH (Feb. 2, 2016), https://cabotwealth.com/daily/how-to-invest/what-to-do-when-your-stock-is-a-takeover-target.

for the modern shareholder, this translates into fewer competitive advantages in the marketplace, including decreased consumer demand and difficulty attracting and retaining employees and investors. Ultimately, consumer dissonance will have negative impacts on revenues, profits, and share prices.

The Supreme Court repeatedly has "described the 'fundamental purpose' of the [Securities Acts] as implementing a 'philosophy of full disclosure,'" aimed at protecting investors by providing them all *significant* information.[323] Corporate lobbying disclosure furthers the purpose of the Securities Acts by protecting investors. Indeed, such information is necessary for investors to make fully informed voting and investment decisions. Political expression—once relegated to bumper stickers and yard signs—has returned to the marketplace, motivated by opaque corporate lobbying activities. Federal securities law, in congruence with its "philosophy of full disclosure," mandates that corporations must disclose lobbying information to investors because it is material.

323. Basic Inc., 485 U.S. 224, 230 (1988) (quoting SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963)).