

A CASE FOR THE STATUS QUO: VOLUNTARY DISCLOSURE

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I appreciate the opportunity to contribute to the *Harvard Business Law Review*'s symposium on corporate political spending by commenting on Lucian A. Bebchuk and Robert J. Jackson's recent article in the *Georgetown Law Journal* entitled "Shining Light on Corporate Political Spending."¹ I have worked with Professors Bebchuk and Jackson in other contexts and have a high regard for their work in this and other corporate governance areas as well as their steadfast commitment to advancing these issues. It is quite clear from their paper and views shared in other forums that they have devoted significant efforts to research the issues and carefully argue their points, which they do quite well.

It is not my intention in this paper to respond to all of their points or even the majority of them. What I offer here is one alternative point of view on some of the issues raised in their paper and in the petition that they, along with other academics, submitted to the SEC on August 23, 2011 (the "Petition").² Importantly, the point of view expressed in this paper is mine and not of my employer, Pfizer Inc. My opinion stems from having spent a significant amount of time focusing on the various issues that relate to a company's political spending and disclosures.³ As a result, I have some direct

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¹ Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923 (2013).

² Petition from Comm. on Disclosure of Corp. Political Spending, to Elizabeth M. Murphy, Sec'y, Sec. & Exch. Comm'n (Aug. 3, 2011), available at <http://www.sec.gov/rules/petitions/2011/petn4-637.pdf>.

³ Specifically, I have been directly involved in (1) engaging with both individual and institutional shareholders during the proxy season and, often more importantly, in the off-season about this issue and Pfizer's disclosures in this space, which have been cited by outside groups in the past as strong and as an example of best practices; (2) speaking on the issue at numerous governance and legal meetings, forums and other gatherings; (3) working with industry groups, like The Conference Board's Committee on Corporate Political Spending, the RAND Center for Corporate Ethics and Governance, and advocacy groups, including The Center for Political Accountability, on issues related to corporate political spending; (4) spending a significant amount of time with Pfizer colleagues who work every day making decisions related to corporate political spending in order to fully comprehend the issues and the impact of some of the requests we receive; (5) working with Pfizer colleagues to meet all required disclosure requirements at the federal, state and local levels; (6) preparing and commenting on numerous and rigorous internal processes and procedures at Pfizer related to corporate political spending; (7) sitting on Pfizer's Political Contributions Policy Committee, which governs the Political Action Committee and reviews all corporate political contributions, and is comprised of members of the company's senior management in communications, policy, compliance, our operating business units, and other areas; and (8) engaging with Pfizer's senior leadership and the Board on the issue of corporate political spending.

and relevant experience with this subject and feel well-positioned to provide at least one, well-informed perspective on why I believe some of the arguments being made today—in the name of greater disclosure through regulation—are misguided and represent a minority viewpoint.

In short, I favor private ordering and voluntary disclosure of corporate political spending (that is, voluntary beyond the existing state and federal disclosure obligations). While certainly not without its challenges, I believe the current system best reflects the perspectives held by the majority of the investor community. While some investors may be interested in the political landscape and find this issue to be particularly interesting today in the space of corporate governance (I certainly do), I do not believe a majority of investors are seeking or would benefit from mandatory and costly disclosures as sought by Bebchuk and Jackson⁴ or by the authors of the Petition.⁵

There have been several detailed surveys and studies conducted on the topic of corporate political spending, and these always seem to include a discussion of investor sentiment.⁶ While I find all of these assessments of interest, my views on this topic are defined mostly by what investors tell us at Pfizer through our ongoing outreach. For many years, shareholder engagement has been perhaps the single most important feature of the corporate governance group at Pfizer. Through letters, emails, phone calls, and meetings, we talk to the largest and smallest holders of Pfizer stock on an ongoing basis about a variety of corporate governance issues. Shareholder engagement at Pfizer has led to a number of governance changes. We do not shy away from it; we welcome investor feedback, and we always benefit from the dialogue.

Today, especially in light of the strong media interest resulting from the Supreme Court's 2010 decision in *Citizens United*⁷ and the perceived impact of that decision on federal and state elections, we regularly raise with investors our political policies and practices to make sure they feel sufficiently informed about our corporate political spending. We always try to understand whether our disclosures on all issues are helpful to investors in terms of both their clarity and substance. Accordingly, just like executive compensation and board composition, Pfizer's corporate political contributions policies and practices, as well as related disclosures, are regularly on our agenda during shareholder discussions.

⁴ See Bebchuk & Jackson, *supra* note 1, at 949–53.

⁵ See Comm. on Disclosure of Corp. Political Spending, *supra* note 2, at 9–10.

⁶ See generally JAMES R. COPLAND ET AL., PROXY MONITOR 2012: A REPORT ON CORPORATE GOVERNANCE AND SHAREHOLDER ACTIVISM (2012); ROBERT J. SHAPIRO & DOUGLAS DOWSON, CORPORATE POLITICAL SPENDING: WHY THE NEW CRITICS ARE WRONG (2012), available at http://www.manhattan-institute.org/pdf/lpr_15.pdf; HEIDI WELSH & ROBIN YOUNG, HOW COMPANIES INFLUENCE ELECTIONS: POLITICAL CAMPAIGN SPENDING PATTERNS AND OVERSIGHT AT AMERICA'S LARGEST COMPANIES (2010), available at http://www.followtheflow.org/press/Reports/Sustainable_Investments_Institute-How_Companies_Influence_Elections.pdf.

⁷ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

Based on many conversations over several years, most of our investors do not seem to feel that they need this type of information from companies on a regular basis. Even though investors may be interested to talk politics and pleased to know of Pfizer's rigorous, internal decision-making processes and robust policies related to political engagement, when the issue is raised, most investors do not seem to be looking at our current disclosures regarding corporate political spending as a regular matter as they assess our governance. Analysts also do not appear to place any emphasis on this issue as they make their investment decisions. In most of my interactions with investors, I have never gotten the sense that they want a new set of mandated regulatory requirements in this area. They certainly do not appear to want the sort of, "additional measures that might be necessary to give shareholders the authority they need to hold directors and executives accountable for political spending,"⁸ described in the article by Bebchuk and Jackson, including a shareholder "right to approve public companies' budgets and targets for spending on politics."⁹ When I have asked investors their thoughts on a possible say on political spending, the prevailing view has been negative.

Of course, we also speak to some investors who do care passionately about these issues. These investors are highly engaged and we have an excellent relationship with them—they provide Pfizer with extremely useful feedback in this and other governance areas. I am in no way claiming to summarize the views of all investors or of any one investor in particular. That being said, I firmly believe that I have fairly stated the prevailing view of Pfizer's shareholders on this issue at this time. Data other than investor conversations also supports this view. For example, it is noteworthy that our significant disclosures related to political spending on the Pfizer website consistently receive much less than 1% of all annual traffic to our website.¹⁰ Likewise, while our shareholder services area fields hundreds of phone calls from retail investors on a variety of governance items each year, corporate political spending almost never comes up during these calls.¹¹ So, while an active but small group of investors may be calling for greater disclosures, within the larger universe of all Pfizer investors, a very small percentage actually appears interested in discussing the information once disclosed.

Many proponents of additional mandatory disclosure cite shareholder proposal trends in support of their arguments, as noted by Bebchuk and Jackson¹² and in the Petition.¹³ These are examples of surveys that attempt to

⁸ Bebchuk & Jackson, *supra* note 1, at 945.

⁹ *Id.*

¹⁰ Internal Staff Memorandum on 2012 Corporate Governance Traffic on Pfizer.com for the Period Between Jan. 1, 2012 to Dec. 31, 2012, Pfizer, Inc. (2013) (internal report on file with author); Internal Staff Memorandum on 2012 Lobbying/Political Contributions Traffic on Pfizer.com for the Period Between Jan. 1, 2012 to Dec. 31, 2012, Pfizer, Inc. (2013) (internal report on file with author).

¹¹ Internal Staff Memorandum on Pfizer Corporate Governance, Pfizer, Inc. (last updated May 8, 2013).

¹² See Bebchuk & Jackson, *supra* note 1, at 938–40.

assess the current trend of shareholder sentiment on various issues by looking at the number of proposals and resulting votes. In my view, it is difficult to draw clear conclusions from this data. While it may seem that a large number of proposals may have been filed on this issue over the last few years, only a relatively small number of large-cap public corporations receive these proposals—small and mid-caps generally do not.¹⁴ In addition, it is possible that these surveys may not classify proposals on political spending and disclosure consistently, and thus should be carefully reviewed for this potential inconsistency before generalizing from the data they present.

The data also fails to distinguish among the various proposals that do, in fact, address the issue of corporate political spending. For example, while some proposals make modest requests for certain disclosures or process enhancements at a company, others may make significant requests, such as a ban or an advisory vote on all political spending,¹⁵ or even more extraordinary requests, such as asking a company to publish in several newspapers all of its corporate spending on a regular basis.¹⁶ It is difficult to reach conclusions based on shareholder proposal data because it can be subject to multiple interpretations. As a result, I am curious as to whether the data actually supports the view expressed by Bebchuk and Jackson that shareholders want greater and mandatory disclosures, or whether the data suggests either that shareholders don't want this information or are satisfied on a company-by-company basis with what is already being disclosed. According to statistics compiled by Pfizer's proxy solicitor, Morrow & Co., the number of political contribution disclosure resolutions on proxy ballots, as well as the votes in support of such resolutions in 2012, actually declined in 2012 compared to 2011.¹⁷ Specifically, in 2012, 37 of these resolutions appeared on company ballots, compared to 41 in 2011. Moreover, these proposals received an average supporting vote of 26.7% in 2012, compared to 32.1% in 2011.¹⁸ So, at least according to one organization that is highly active and experienced in this area, both the number of proposals on proxy ballots and the support for such proposals trended downward from 2011 to 2012. Also of interest is the fact that many of these proposals are submitted by the same organizations and individuals year after year, which lends further support to the idea that the level of interest in disclosure is not as great as Bebchuk and Jackson suggest. This is particularly noteworthy given the fact that in 2012 we witnessed the first real test of how *Citizens United* would impact the elections.

¹³ See Comm. on Disclosure of Corp. Political Spending, *supra* note 2, at 3–6.

¹⁴ See Internal Memorandum from Morrow & Co. to Pfizer, Inc. Summarizing Key Stockholder Proposals and Historical Voting Results, Pfizer, Inc. (Apr. 19, 2013) (confidential report on file with author).

¹⁵ See BANK OF AMERICA, 2013 PROXY STATEMENT 71 (2013).

¹⁶ See Pfizer, Inc., Proxy Statement for 2012 Annual Meeting of Shareholders and 2011 Financial Report 36 (2012).

¹⁷ See Internal Memorandum from Morrow & Co. to Pfizer, Inc., *supra* note 14 (confidential report on file with author).

¹⁸ See *id.* (confidential report on file with author).

In addition, the bar is not set particularly high on the requirements for submission of a shareholder proposal today, and proponents can vary widely in their long-term interest in a company, motives, understanding of the issues, and willingness to engage. It is not uncommon to receive proposals seeking information that is already readily available, and such proposals are often withdrawn once we are able to speak directly with the proponents.

With respect to institutional investors, we also often look at their proxy voting policies, and Bebchuk and Jackson cite a few in support of their views.¹⁹ While it is true that a few institutional investors recently updated their policies to be more supportive of shareholder proposals seeking greater disclosure of political spending,²⁰ most seem to treat the issue on a case-by-case basis. This sort of case-by-case analysis appears to support private ordering because if a particular shareholder feels strongly that a company should provide greater information on its political processes and submits a shareholder proposal to this effect, most investors are happy to discuss the issue with the company to make sure they understand the company's practices and disclosures in light of the proposal. But most investors do not support these proposals on a regular basis, and a very small percentage of investors actually submit these proposals. All of this suggests to me that most investors believe that the current process should not be revised to impose mandatory, uniform disclosures at all public companies.

While over 3,000 comment letters were submitted to the SEC in support of the Petition,²¹ many appear to have been form letters generated by a small group of individuals, including those who also submitted shareholder proposals on the topic.²² There is no evidence that a majority of these individuals were actually shareholders.

Mandatory disclosures of the sort sought in the Petition should not be considered absent much stronger and valid investor sentiment regarding the usefulness of and the desire for this information. There can be no doubt that it is costly and time-consuming to compile this data. At Pfizer, for example, it takes approximately four months to gather the necessary information and publish one of our reports on corporate political contributions. We produce two reports per year, taking up a combined eight months to produce this information for our shareholders. While Pfizer has made the decision to compile this data, it bears considering whether imposing this burden on all companies across the board is warranted. Other companies should have the ability to make their own decisions about disclosure through engagement with their shareholders.

¹⁹ See Bebchuk & Jackson, *supra* note 1, at 940–41.

²⁰ See *id.*

²¹ See Letter Type G, *Comments on Rulemaking Petition, Petition to require public companies to disclose to shareholders the use of corporate resources for political activities*, SEC. & EXCH. COMM'N, <http://www.sec.gov/comments/4-637/4-637.shtml#comments> (last visited Apr. 18, 2013).

²² See *id.*

Given the nature of what is being sought, disclosures in this space are regularly highlighted in press stories and used to advance certain political agendas. This does not mean that shareholders who are interested in certain information should not have the right to request it. But it does mean we need to be wary about imposing a new disclosure regime on corporations in an area where there is no consensus among investors about the need for such disclosure and which could be motivated by personal political viewpoints of a small number of vocal shareholders.

For some companies, disclosure beyond the existing requirements may make sense, and the manner in which detailed information is presented may vary by company. To the extent that certain interested shareholders are involved in helping to shape voluntary disclosures, all the better, as customizing disclosures that incorporate shareholder feedback is an effective practice that results in useful information for a majority of shareholders. That being said, I do not believe we should rush into a regulatory scheme that will likely require a level of disclosure that is not beneficial or important to the majority of shareholders while imposing burdensome requirements on companies and exposing them to unwarranted scrutiny.

Lastly, there is always the concern that mandated disclosures may set the bar lower than a company's current level of disclosure or lower than a company would want to set its disclosure levels absent requirements. Of course, these companies can go beyond what the law requires. But I believe that legislating disclosure across the board would not serve to incentivize this behavior.

A one-size-fits-all approach is not the best solution. Companies are unique, investors are unique, and an investor's need for information about a company is unique. Diversity in the area of corporate political spending disclosure is a good thing that our regulatory agencies should support. Moreover, Pfizer's shareholder outreach program indicates that a customized approach to addressing the issue of corporate political spending and disclosures is the prevailing desire among the shareholder community. Shareholders want shorter and clearer proxy disclosures, not longer ones that contain information that is of interest to only a small number of investors.