

# Franchisor Political Speech: The Disclosure Question

Daniel J. Oates

The 2010 U.S. Supreme Court case *Citizens United v. Federal Election Commission*<sup>1</sup> has dramatically altered the framework for financing elections. The case and its progeny have made it clear that most restrictions on corporate campaign contributions are unconstitutional.<sup>2</sup> In effect, the Court has concluded that the contribution of money to a political cause or campaign is entitled to the same protection as speech under the First Amendment.<sup>3</sup>

Although the wisdom of the Court's decision is best addressed by historians, there is no question that it has radically altered the status quo.<sup>4</sup> By nearly every estimate, the amount of corporate money that has flowed into political



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1. 558 U.S. 310 (2010).

2. As we now know, *Citizens United* was only the first of several decisions by the Court that are fundamentally remaking America's campaign finance laws. See *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011); *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012); *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014).

3. Whether money is speech has long been in debate. J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1005 (1976) (“[N]othing in the First Amendment commits us to the dogma that money is speech.”); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) (“Money is property; it is not speech.”). Nonetheless, in *Buckley v. Valeo*, 424 U.S. 1, 6 (1976), “the Court determined that any regulation of the quantity of money spent on campaigns for office ought to be viewed as a direct regulation of speech itself.” *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 750 (2008) (Stevens, J., concurring in part and dissenting in part). *Citizens United* has seemingly ended that debate by cementing the idea first articulated in *Buckley* that money is speech for purposes of the First Amendment. *Citizens United*, 558 U.S. at 314 (“All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech, and the First Amendment protects the resulting speech.”); see also *McCutcheon*, 134 S. Ct. at 1441 (“The right to participate in democracy through political contributions is protected by the First Amendment. . .”).

4. Jennifer S. Taub, *Money Managers in the Middle: Seeing and Sanctioning Political Spending After Citizens United*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 443, 452 (2012) (noting that the Court's decision in *Citizens United* “reversed two significant Supreme Court decisions, struck down twenty-two state laws, and ended a century-old precedent that state legislatures had consistently relied upon to limit electioneering by corporations”) (footnotes omitted).

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campaigns has grown exponentially following the Court's decision.<sup>5</sup> And existing campaign finance laws will not stem the flood of money into political causes and campaigns.<sup>6</sup> To the contrary, viewed through the prism of the majority opinion in *Citizens United*, more money simply means more speech, which the Court views as a positive development.<sup>7</sup>

Most Americans appear to believe that the Court got it wrong.<sup>8</sup> As a result, a variety of organizations are advocating for changes to existing law, including changes to securities<sup>9</sup> and franchise disclosure laws.<sup>10</sup> This article reviews the case for disclosure of franchisor political speech and explains why disclosure is unnecessary. Although there is some anecdotal evidence suggesting that franchisees may be harmed by franchisor political speech, there is no good legal basis for imposing disclosure requirements and little evidence suggesting that additional disclosure would benefit franchisees.

### I. *Citizens United* Provokes Activism

Although *Citizens United* effectively precludes any restrictions on political contributions, the Court left open the door for other regulatory measures to combat the influence of money in politics, including disclosure

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5. Kent Greenfield, *The Third Way*, 37 SEATTLE U. L. REV. 749, 757-58 (2014) ("As a result [of *Citizens United*], we saw a massive inflow of money into the mid-term elections in 2010 and then again in 2012, mostly by way of 'Super-PACs,' corporate entities organized for the purpose of collecting and spending the money of very rich individuals. So-called 'independent expenditures' exploded by a factor of 10, from less than \$100 million to over \$1 billion."); Monica Youn, *Small-Donor Public Financing in the Post-Citizens United Era*, 44 J. MARSHALL L. REV. 619, 622-23 (2011) ("[I]ndependent spending and electioneering in Congressional elections grew to \$280.2 million in 2010. This was more than double the \$119.9 million spent by outside groups on Congressional elections in 2008, and more than five times the \$53.9 million spent by outside groups in 2006."); Richard L. Hasen, *Three Wrong Progressive Approaches (and One Right One) to Campaign Finance Reform*, 8 HARV. L. & POL'Y REV. 21, 21 (2014) ("Since *Citizens United*, outside spending in federal elections has increased markedly—as much as 245% in presidential elections, 662% in House elections, and 1338% in Senate elections. . . .").

6. The Court's subsequent decisions have made it clear that a majority of the justices believe that most of the campaign finance laws enacted over the past century violate the First Amendment. See cases cited *supra* note 3.

7. *Citizens United*, 558 U.S. at 361 ("[I]t is our law and our tradition that more speech, not less, is the governing rule.").

8. *Examining a Constitutional Amendment to Restore Democracy to the American People Before the S. Comm. On the Judiciary*, 112th Cong. 3 (2014) (statement of Jamie Raskin, Professor of Law and Director of the Law and Government Program, American Univ., Washington College of Law) ("80% of Americans—including 82% of Dems, 84% of Independents and 72% of Republicans—oppose *Citizens United* and the practice of unlimited spending in elections.").

9. Specifically, the Securities and Exchange Commission (SEC) has considered requiring publicly traded companies to disclose corporate political contributions to shareholders. See Petition to Require Public Companies to Disclose to Shareholders the Use of Corporate Resources for Political Activities, Securities and Exchange Commission, File No. 4-637 (Aug. 3, 2011) [hereinafter Petition], available at <http://www.sec.gov/rules/petitions/2011/petn4-637.pdf>.

10. Robert W. Emerson & Jason R. Parnell, *Franchise Hostages: Fast Food, God, and Politics*, 29 J.L. & POL'Y 353, 387 (2014) ("The FTC could clarify the Franchise Rule by mandating notification to franchise applicants about any franchisor policy, or lack thereof, concerning a corporate employee's or a franchisee's prominent, public display of partisan beliefs while associated with the franchised brand.").

requirements.<sup>11</sup> Specifically, eight of the nine justices agreed that disclosure of the “identity of the speaker was a necessary pre-condition for both the general public and shareholders to analyze the merits and weigh the value of the speakers’ messages about candidates for political office.”<sup>12</sup> As a result, campaign finance reform advocates have called for heightened disclosure requirements.<sup>13</sup> Yet efforts to impose more comprehensive disclosure obligations on corporations have stalled in Congress.<sup>14</sup> Stymied in their efforts to impose greater transparency on corporate political donations through congressional action, proponents of campaign finance reform have turned to existing regulatory mechanisms. In 2011, a collection of prominent academics petitioned the SEC, requesting that the Commission commence rulemaking proceedings with the purpose of requiring public companies to disclose to shareholders the use of corporate resources for political activities.<sup>15</sup> Public interest in the petition has been unprecedented.<sup>16</sup>

Proponents of additional disclosure in the securities context need look no further than the text of *Citizens United* itself. The majority opinion expressly noted that disclosure requirements are an essential component of informed decision-making in a corporate democracy.<sup>17</sup> “If corporate electioneering

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11. *Citizens United*, 558 U.S. at 319 (“The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.”).

12. Taub, *supra* note 4, at 472.

13. Dan Eggen, *More Companies Open Up on Spending*, WASH. POST, Sept. 27, 2012, at A15; see also Bradley A. Smith, *Separation of Campaign and State*, 81 GEO. WASH. L. REV. 2038, 2081 (2013) (“Beginning with legislation in 2000 to require more disclosure of issue advocacy, there has been a steady effort, accelerating since *Citizens United* was decided in 2010, to increase mandatory disclosure.”) (footnote omitted).

14. H.R. 2517, 112th Cong. (2011); S. 1360, 112th Cong. (2011); H.R. 4790, 111th Cong. (2010); H.R. 5175, 111th Cong. (2010); S. 3628, 111th Cong. (2010); Dan Eggen, *Senate Democrats Again Fail to Pass Campaign Disclosure Law*, WASH. POST, Sept. 23, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/23/AR2010092304578.html>.

15. See Petition, *supra* note 9, at 7 (“Disclosure of corporate political spending is necessary not only because shareholders are interested in receiving such information, but also because such information is necessary for corporate accountability and oversight mechanisms to work. . . . [S]hareholders must have information about the company’s political speech; otherwise, shareholders are unable to know whether such speech advances the corporation’s interest in making profits.”) (internal quotation marks omitted).

16. Of the ninety-seven petitions for rulemaking filed with the SEC between the years 2000 and 2012, only thirty-nine received any public comments. The other thirty-eight petitions received on average eighty-one comments. By contrast, the Petition has received more than 750,000 comments. The vast majority of the comments support the Petition. See <http://www.sec.gov/comments/4-637/4-637.shtml>. “Institutional investors—including a coalition representing investors with more than \$3 trillion in assets under management—have sent comment letters to the SEC supporting this petition.” Taub, *supra* note 4, at 445.

17. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 370 (2010) (“With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”) This assumes, of course, that the procedures of corporate democracy offer a legitimate alternative means of policing corporate conduct, a topic that remains hotly debated. See, e.g., Laurence H. Tribe, *What Should Congress Do About Citizens United?*, SCOTUSBLOG, (Jan. 24, 2010, 10:30 PM), <http://www.scotusblog.com/?p=15469> (“[S]hareholder democracy is largely illusory in a world where there are countless obstacles to vigilant oversight of corporate

is allowed to proceed with no disclosure requirement, then shareholders cannot adequately evaluate their bargain—i.e., their decision to invest or to continue holding stock in any particular company.”<sup>18</sup>

Past Supreme Court precedent also supports the SEC’s rulemaking authority to regulate the disclosure of corporation political contributions. The Court’s First Amendment analysis has long given the SEC considerable deference in the development of rules that provide investors with information necessary to facilitate the functioning of securities markets.<sup>19</sup> So it is likely that, should the SEC choose to act on the petition,<sup>20</sup> the restrictions would pass constitutional muster.

## II. Franchisor Political Speech May Pose a Threat to the Franchise System

In the wake of the petition, a similar proposal has begun making the rounds in franchising.<sup>21</sup> Some anecdotal evidence seems to suggest that reforms might benefit some franchisees because franchisor political activities present at least two potential problems. First, such activities can injure the franchisor’s brand.<sup>22</sup> Unsurprisingly, surveys seem to suggest that there is a direct correlation between franchisor political controversies and consumers’ opinions about franchisor brands. For example, after the founder and CEO of the Papa John’s franchised restaurant chain, John Schnatter, claimed

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management by the widely dispersed ‘owners’ of the underlying enterprise, especially when most of those owners have only the most attenuated link to their stock holdings, a link made all the more tenuous by the fact, noted in the Stevens dissent in *Citizens United*, that ‘[m]ost American households that own stock do so through intermediaries such as mutual funds and pension plans, . . . which makes it more difficult both to monitor and to alter particular holdings.’”) (alteration in original) (quoting *Citizens United*, 558 U.S. at 477 (Stevens, J., concurring in part and dissenting in part)).

18. Joseph F. Morrissey, *A Contractarian Critique of Citizens United*, 15 U. PA. J. CONST. L. 765, 824–25 (2013).

19. Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 955 (2013); see also SEC v. Wall St. Publ’g Inst., Inc., 851 F.2d 365, 373 (D.C. Cir. 1988) (“If speech employed directly or indirectly to sell securities were totally protected, any regulation of the securities market would be infeasible—and that result has long since been rejected.”); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1779–80 (2004) (noting that speech “restrictions and requirements that in other contexts would set off a host of First Amendment alarm bells—prior restraint by virtue of mandatory government approval in advance of publication, content regulation, compelled speech, and official management of representations made in elections—are not seriously thought to pose free speech issues in the contexts of [securities] registration and proxy regulation”) (footnotes omitted).

20. Shortly after the Petition was submitted, the SEC added disclosure of political contributions to its list of regulatory priorities. Bebchuk & Jackson, *supra* note 19, at 926 n.11 (“In addition, the SEC included rules requiring disclosure of corporate spending on politics among the regulatory priorities it recently identified to the Office of Management and Budget.”). Beginning in late 2013, however, the SEC removed mention of regulating the disclosure of corporate political contributions from its annual list of priorities. Dina ElBoghady, *SEC Drops Disclosures of Corporate Political Spending From Its Priority List*, WASH. POST, Nov. 30, 2013, at A08.

21. Emerson & Parnell, *supra* note 10, at 387.

22. *Id.* at 354–56.

that the Affordable Care Act (ACA) would add \$.20 to the cost of every pizza, Papa John's reputation among consumers plunged.<sup>23</sup> Other franchisors who have voiced public opposition to the ACA have faced a similar backlash.<sup>24</sup> Although franchisees often play no part in a political controversy, they nonetheless feel the damage because a large part of their success is bound to the success of the brand.<sup>25</sup>

Second, in addition to the threat of reputational injury, political activists are increasingly using economic boycotts as a means of encouraging changes in corporate behavior.<sup>26</sup> As has been noted by at least one scholar,

[t]he economic boycott, which the U.S. Supreme [C]ourt has long considered protected First Amendment activity, has increasingly become an effective and popular weapon in the arsenal of dissent to counteract the political influence of individuals, large corporations, special interest groups, and issue-based organizations with access to large accumulations of wealth. . . .<sup>27</sup>

Moreover, the potential for franchisees to suffer harm from economic boycotts may be exacerbated by the growing political divide along regional boundaries.<sup>28</sup> In some cases, franchisors may not feel the sting of a political controversy as deeply if the bulk of the franchised locations are in a region of the country that generally agrees with the franchisor's political speech. One such example involves the Chick-fil-A restaurant chain. In 2012, Chick-fil-A's president, Dan Cathy, gave an interview in which he attributed the company's success to its adherence to "biblical values," including its

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23. Ted Marzilli, *Anti-Obamacare Rhetoric and Restaurant Buzz*, YOUGov (Nov. 30, 2012) ("Papa John's CEO John Schnatter's post-Election Day comments about passing on health care reform costs by reducing worker hours and raising prices coincides with a swift negative reaction among casual food diners. . . ."), <http://www.brandindex.com/article/anti-obamacare-rhetoric-buzz>. Indeed, in the immediate aftermath of Schnatter's comments, polling performed by YouGov, a brand perception and public opinion survey, showed that on a scale of 100 (totally positive) to -100 (totally negative), the company's reputation dove from a score of 32 to 4. *Id.*

24. See, e.g., Joe Van Brussel, *Jimmy John's Franchisee Looks for Ways to Make Obamacare Work*, HUFFINGTON POST (Nov. 28, 2012) (noting backlash to comments made by the CEO of franchisor Jimmy John's regarding the ACA), available at [http://www.huffingtonpost.com/2012/11/28/jimmy-johns-obamacare\\_n\\_2200178.html](http://www.huffingtonpost.com/2012/11/28/jimmy-johns-obamacare_n_2200178.html).

25. Emerson & Parnell, *supra* note 10, at 355–56 ("Franchisees and franchisors can be, in effect, 'hostage to fortune'—to the attention that any franchise network leader or member garners through words or deeds. Publicity, good or bad, redounds to the benefit or detriment of all.") (footnote omitted).

26. Elian Dashev, Note, *Economic Boycotts as Harassment: The Threat to First Amendment Protected Speech in the Aftermath of Doe v. Reed*, 45 LOY. L.A. L. REV. 207, 211 (2011); see also Laurent Belsie, *Papa John's Pizza Controversy: Another Fast-Food Chain Embroiled in Culture War*, CHRISTIAN SCI. MONITOR, Aug. 8, 2012; Eric D. Lawrence, *Restaurant Boycott Urged Over Plan to Cut Employees' Hours*, DETROIT FREE PRESS, Nov. 20, 2012, at Metro.

27. Dashev, *supra* note 26, at 211.

28. Gerard N. Magliocca, *Don't Be So Impatient*, 88 NOTRE DAME L. REV. 2157, 2161 (2013) ("Years of polling data also suggest that there is something real behind the idea that there are red-state and blue-state voters who are not inclined to renounce their differences.") (citing Lydia Saad, *In the U.S., Blue States Outnumber Red States, 20 to 12*, GALLUP (Jan. 30, 2013), available at <http://www.gallup.com/poll/160175/blue-states-outnumber-red-states.aspx>).

long-standing tradition of closing outlets on Sundays.<sup>29</sup> Cathy also espoused his personal support for traditional marriage,<sup>30</sup> a position advocated by Chick-fil-A's charitable arm, the WinShape Foundation, which had for years given millions of dollars to organizations fighting same-sex marriage.<sup>31</sup>

Reaction to the interview and the revelations about the WinShape Foundation's financial contributions was swift. One group of opponents moved to stop construction of a Chick-fil-A location in California.<sup>32</sup> Petitions began circulating at the University of Louisville and several other universities nationwide, requesting that the schools close existing Chick-fil-A restaurants on campus.<sup>33</sup> The mayor of Boston wrote an open letter to Cathy, urging Chick-fil-A to abandon its plans to open a new franchise in that city.<sup>34</sup> City officials in Chicago, New York, San Francisco, and Washington, D.C., also voiced their opposition to new Chick-fil-A restaurants in their cities.<sup>35</sup> Even the late Jim Henson's Muppets joined in the condemnation, withdrawing their support for the restaurant chain.<sup>36</sup>

Supporters of Cathy's political position quickly came to Chick-fil-A's defense. Former Arkansas Governor Mike Huckabee publicly supported Cathy's remarks and called for like-minded citizens to join him in holding

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29. K. Allan Blume, 'Guilty as Charged,' *Cathy Says of Chick-fil-A's Stand on Biblical & Family Values*, BAPTIST PRESS, July 16, 2012 ("We know that it might not be popular with everyone, but thank the Lord, we live in a country where we can share our values and operate on biblical principles.") (internal quotation marks omitted). Cathy's statement should come as no surprise to franchisees, however, since Chick-fil-A makes no secret of the fact that it is a corporation that is guided by biblical principles and values. Emerson & Parnell, *supra* note 10, at 363–64 ("Chick-fil-A presents itself as a Christian-based corporation. . . . The fact that Chick-fil-A President, Dan Cathy, expressed views opposing same-sex marriage should not have surprised any franchisee.").

30. Blume, *supra* note 29 ("We are very much supportive of the family—the biblical definition of the family unit. We are a family-owned business, a family-led business, and we are married to our first wives.").

31. Kim Severson, *Chick-fil-A Thrust Back Into Spotlight on Gay Rights*, N.Y. TIMES, July 25, 2012, at A13 ("Equality Matters, an online investigative organization dedicated to gay and lesbian issues, last year obtained tax records that showed that the company's operators, its WinShape Foundation and the Cathy family had given millions of dollars to groups whose work includes defeating same-sex marriage initiatives and providing therapy intended to change people's sexual orientation."). It appears that much of the outrage generated by Cathy's comments was a political tactic, however, since opponents have known for years that the WinShape Foundation was contributing millions of dollars to support groups opposing gay marriage and groups that provide therapy intended to change people's sexual orientation. *Id.*

32. Jason Green, *Opponents Can't Stomach Chick-fil-A's Plans in Mountain View*, SAN JOSE MERCURY NEWS, July 20, 2012.

33. Joseph Gerth, *University of Louisville to weigh calls for Chick-fil-A shutdown over 'traditional marriage' remarks*, COURIER-J., July 28, 2012; Hal Dardick & Annemarie Mannion, *Mayor Gets Local Chick-fil-A Invite; Franchise Owner Wants to Meet Amid Gay Marriage Controversy*, CHICAGO TRIB., July 27, 2012, at C4 ("Petitions also seek to pressure colleges to evict Chick-fil-A restaurants from seven campuses across the nation, including the University of Illinois at Urbana-Champaign.").

34. Andrew Ryan & Martine Powers, *Menino Clarifies Chick-fil-A Stance; View the Same but Admits He Can't Bar Chain from Boston*, BOSTON GLOBE, July 27, 2012, at B1.

35. Drake Bennett, *Chick-fil-A: Deep Fried Civil War*, BUS. WK., Aug. 2, 2012.

36. Tony Hicks, *Muppets Break Ties with Chick-fil-A Over Gay Marriage*, SAN JOSE MERCURY NEWS, July 23, 2012.

a national “Chick-fil-A Appreciation Day.”<sup>37</sup> A chorus of other political pundits joined in, including the Rev. Billy Graham, former Alaska Governor Sarah Palin, and former Pennsylvania Senator Rick Santorum.<sup>38</sup> Protests and counterdemonstrations followed.<sup>39</sup>

Chick-fil-A is based in Georgia, a reliably conservative state in the heart of the reliably conservative South, and the vast majority of Chick-fil-A’s restaurants are located in politically conservative regions.<sup>40</sup> As a result, the company likely saw an increase in sales and, by extension, franchisee royalties, following Cathy’s interview, as supporters turned out in droves for the Huckabee-championed Chick-fil-A appreciation day. But the remaining minority of franchisees located in less politically conservative regions presumably suffered greatly as a result of the controversy and boycotts. On balance, while Chick-fil-A undoubtedly lost revenue from these outlets, the overall impact on the system was probably negligible due to the increase in sales at other locations. The fact that a franchisor such as Chick-fil-A suffers little injury is small comfort, however, to the franchisee that faces the potential loss of its business.<sup>41</sup>

37. Ryan Smith, *Self-Righteousness with That Order?*, CHI. TRIBUNE, July 27, 2012, at 4.

38. Bennett, *supra* note 35.

39. Gay and lesbian groups called for same-sex couples to hold a “kiss-in” at Chick-fil-A locations nationwide on August 3, 2012, in protest of Cathy’s statements. Elise Hu, *Chick-fil-A Gay Flap a ‘Wakeup Call’ for Companies*, National Public Radio, All Things Considered, July 27, 2012.

40. As of February 2015, Chick-fil-A boasted 1,141 outlets located in states that have voted for the Republican candidate in at least three out of the last four presidential elections (Idaho, Wyoming, Utah, Arizona, Nebraska, Kansas, Oklahoma, Texas, Missouri, Arkansas, Louisiana, Indiana, Kentucky, Tennessee, Mississippi, Alabama, Georgia, North Carolina, South Carolina, and West Virginia); approximately 313 outlets located in states that voted for the Democratic candidate in at least three out of the last four presidential elections (California, Connecticut, New Mexico, Minnesota, Iowa, Wisconsin, Illinois, Michigan, Pennsylvania, New York, New Hampshire, Massachusetts, New Jersey, Maryland, Delaware, and Rhode Island); and approximately 372 outlets in the four “purple” states that have voted for each party’s candidate twice (Colorado, Ohio, Virginia, and Florida). See <http://www.chick-fil-a.com/Locations/Locator>.

41. The Chick-fil-A controversy is only one recent example of a franchisor that has become embroiled in a national debate as a result of the political activities of the franchisor and its representatives. Other examples abound. Liberal political activists protested and sponsored boycotts against franchisors such as Carl’s Junior, Domino’s Pizza, and Curves gyms, after the companies’ respective founders had donated substantial amounts of money to organizations opposing abortion. Lisa Mascaro, *NOW Unit Pickets Carl’s Jr. in Irvine on Abortion Issue*, L.A. TIMES, Oct. 29, 1989, at B3; Paul Feldman, *Pro-Choice Unit Targets Food Outlet*, L.A. TIMES, Aug. 31, 1989, at 3; Renee Graham, *The Issue for NOW*, BOSTON GLOBE, May 6, 1989, at 17; Elaine McArdle, *Sweating With the Enemy*, BOSTON GLOBE, June 19, 2005, Mag. at 18 (“Activists at the March for Women’s Lives, an April 2004 rally in Washington, D.C., in support of abortion rights, handed out fliers calling for a national boycott of Curves. That summer at Curves gyms in Berkeley, California, signs and banners were knocked over or stolen, and in Seattle, anti-Curves fliers were posted on telephone poles.”); Susan Paynter, *Curves News Gives Women’s Choices a Workout*, SEATTLE POST-INTELLIGENCER, June 28, 2004, at D1. Similarly, conservative activists have called for boycotts of the Ford Motor Company to protest the company’s support for gay rights and advertisements in gay-themed publications. Christine Tierney, *Group Backs Off Boycott of Ford*; *American Family Association, Irked by Support of Gay Issues, Will Meet With Execs*, DETROIT NEWS, June 7, 2005, at 1C; David Shepardson, *Gay Ads Spur Ford Boycott*; *Conservative Coalition Says Automaker Reneged on Agreement to Stop Ads in Alternative Media*, DETROIT NEWS, Mar. 14,

In short, franchisor political activities can have potentially serious consequences for franchisees and the brand.<sup>42</sup> Although these problems are not new, the Court's decision in *Citizens United* has drawn an unprecedented level of attention to political speech. In these days of extreme partisanship,<sup>43</sup> incidents with franchisors becoming involved in national political controversies will undoubtedly increase in frequency. Franchisees will demand accountability, if not compensation, when the controversies start affecting their bottom line. Given the movement toward increased transparency and disclosure of political contributions in securities regulations, it is not surprising that there are now calls for changes to existing disclosure rules to require franchisors to disclose information about their political activities to prospective franchisees.<sup>44</sup> But even though franchise disclosure laws evolved out of existing securities disclosure laws,<sup>45</sup> the logic supporting enhanced disclosures in securities laws does not extend to disclosures in the franchise context.

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2006, at 1C (“The proposed yearlong boycott, led by the Tupelo, Miss.-based American Family Association, stems from the groups’ belief that Ford has not ‘remained neutral in the cultural battles.’”); Bryce G. Hoffman, *Ford Sales Hit by Gay Ad Protest*, DETROIT NEWS, May 2, 2006, at 1A (“A conservative Christian group has seized upon Ford Motor Co.’s sponsorship of an upcoming gay pride event in Ferndale to intensify its call for a nationwide boycott of the automaker, and dealers in some parts of the country say the campaign is starting to hurt sales.”). Coffee giant Starbucks has offended conservative and liberal activists alike for its positions on gay marriage and firearms. Wendy Leung, *Should They Have Faith in Boycotts?*, GLOBE & MAIL (CANADA), Feb. 28, 2012, at L1; Rachel La Corte, *Anti-Gay Marriage Group Wants Starbucks Boycott*, ASSOCIATED PRESS, Mar. 21, 2012; Frank Bruni, *Java and Justice*, N.Y. TIMES, Feb. 6, 2012, at A31; Patrik Jonsson, *How Starbucks Became the Darling of American Gun Owners*, CHRISTIAN SCI. MONITOR, Feb. 16, 2012; Melissa Allison, *Socially Responsible Image Cuts Both Ways for Starbucks; Influences Profits, Creates Pressures—Schultz Expected to Discuss Values*, SEATTLE TIMES, Mar. 21, 2012, at A8.

42. Emerson & Parnell, *supra* note 10, at 354 (“[P]olitical or social commentary can be very costly for both franchisors and franchisees insofar as it impacts how consumers view the franchised trademark or brand.”).

43. “As a number of studies have concluded, political parties today are far more ideologically unified and cohesive than they were in the past.” Yasmin Dawood, *Democratic Dysfunction and Constitutional Design*, 94 B.U. L. REV. 913, 919 (2014) (citing THOMAS E. MANN & NORMAN J. ORNSTEIN, IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 44–45 (2012)).

44. See, e.g., Emerson & Parnell, *supra* note 10, at 386–87 (“[T]o ensure transparency, the safest course is to reform the disclosure rule . . . by mandating notification to franchise applicants about any franchisor policy, or lack thereof, concerning a corporate employee’s or a franchisee’s prominent, public display of partisan beliefs while associated with the franchised brand.”).

45. David J. Kauffmann & David W. Oppenheim, *Selected Business and Legal Issues in the Acquisition of Franchisors or Franchisees*, 23 FRANCHISE L.J. 141, 148 (2004) (“Federal and state franchise registration/disclosure laws had their genesis in, and were modeled after, the federal securities laws. Courts determining franchise disclosure disputes or construing the provisions of franchise registration/disclosure statutes frequently cite and rely upon their securities law analogs.”); see Rochelle B. Spandorf, *Charting Courses in the Debate Over Mandatory Earnings Claims*, 15 FRANCHISE L.J. 1, 36 (1995) (“[G]iven the common policy objectives of franchise and securities regulations, franchise regulators may be criticized if they fail to address the fact that forward-looking disclosures have been demanded from securities issuers for almost twenty years.”).

### III. Franchises Are Not Like Securities

Although the regulation of franchise sales was originally based on prior securities laws, the two legal areas have evolved distinctly different standards and requirements. In terms of disclosure of political activities, at least two key differences between securities law and franchise law weigh against requiring such disclosures in franchise sales.

First, one of the primary arguments in favor of requiring disclosure of political activities in securities regulation is that it will provide existing public shareholders with the information that they need to make reasoned decisions in the context of a corporate democracy. But franchises, unlike corporations, are not a democracy, and as such disclosure will not further the same purposes. Second, as a more fundamental matter, the SEC's authority to regulate securities is far broader than the Federal Trade Commission's (FTC) authority to regulate franchises.

#### A. *Franchises Are Not a Democracy*

Government-imposed disclosure requirements in the securities context pass constitutional muster to the extent that they are narrowly tailored to further the government's compelling interest in affording shareholders of public corporations access to information that is relevant to their ability to make reasoned decisions in a corporate democracy.<sup>46</sup> This is consistent with one of the main purposes of securities regulations, which are "intended to keep the markets and the investing public informed of the status of a company from quarter to quarter, to enable investors to make decisions about selling securities as well as buying."<sup>47</sup> But in the context of franchising, the argument makes no sense, because unlike in a corporate democracy, where the shareholders have the ultimate say in how the business conducts itself, franchisees do not have a vote in how the franchisor chooses to run its business. Put simply, "[a] franchise system is not a democracy."<sup>48</sup> "[A] franchise is and should be a dictatorship when it comes to overall system direction, including system change. This means that the decision of the franchisor should not be subject to review by a judge, jury, or arbitrator—or franchisee for that matter."<sup>49</sup> The franchisor's freedom to control the franchise system is fundamental to the protection of its trademark rights, as well as the franchisor's ability to innovate over time.<sup>50</sup> Franchisors therefore

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46. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 370 (2010); see also *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (holding that the government has a compelling interest in "provid[ing] the electorate with information" about the sources of election-related spending).

47. Thomas M. Pitegoff, *Y2K Implications for Franchising*, 18 *FRANCHISE L.J.* 1, 25 (1998).

48. William L. Killion, *Putting Critical Decision Making Where It Belongs: Scouring the Franchise Agreement of the "D" Word*, 24 *FRANCHISE L.J.* 228, 228 (2005).

49. *Id.*

50. See *id.* at 229 ("Rather than take risks necessary to preserve or grow its system, the franchisor's drive may be tempered by its fear that one judge or six jurors viewing some of the same considerations several years later with the benefit of hindsight may not see eye-to-eye with it.").

“must be free to take all varieties of risks without a concern that the wisdom of its decision might be second-guessed in a courtroom.”<sup>51</sup>

Moreover, franchisees, unlike shareholders, are locked into long-term contractual arrangements that preclude them from terminating their relationship with the franchisor.<sup>52</sup> They therefore cannot “vote with their feet” by selling their franchise in the same way that an investor may simply sell company stock if it becomes dissatisfied with the manner in which the corporation conducts itself politically.<sup>53</sup> Accordingly, to the extent that franchisees desire ongoing disclosures of franchisor political activities, franchisees simply do not have the same interests as a shareholder in a corporation.

### B. *FTC Regulatory Authority Is Much Narrower Than SEC Regulatory Authority*

Although franchisees do not have the same interests as shareholders in receiving regular updates about franchisors’ political activities, the same cannot be said for prospective franchisees. Much like an investor contemplating purchasing a stock, a prospective franchisee has an interest in receiving information that may be material to its decision to purchase a franchise.

Under the Securities Exchange Act of 1934, the SEC is granted broad authority to regulate securities.<sup>54</sup> Thus, the SEC’s regulation of securities includes disclosure requirements for the benefit of prospective investors who are interested in purchasing stock, existing shareholders so that they may make an informed decision in a corporate democracy or whether to sell their stock altogether, and the general public.<sup>55</sup> The broad scope of the SEC’s regulatory mandate gives the agency virtually unlimited power to change disclosure requirements. Thus, the SEC may modify and extend disclosure requirements simply in response to increased investor interest in receiving a particular type of information,<sup>56</sup> even in the absence of any evidence tending to show that investors have been (or might be) injured in the absence of greater disclosure.

51. *Id.* at 230 n.1.

52. Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927, 937 (1990) (noting that “most franchises are intended to be long-term arrangements” and citing studies showing that a majority of franchise agreements have a duration of ten years or more).

53. “Selling a franchise amounts to selling a business and is very different from selling a passive investment. Given these differences between securities law and franchise law, it is not surprising that the disclosure obligations are very different.” Pitegoff, *supra* note 47, at 25.

54. *See, e.g.*, 15 U.S.C. § 78n(a) (granting the SEC authority to promulgate “such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.”).

55. *See id.*

56. Petition, *supra* note 9, at 2 (“Over time, the [SEC]’s disclosure rules have changed in response to increased investor interest in receiving particular types of information about the companies they invest in, changes in disclosure practices, or external events that increase the importance of certain types of information for shareholders.”); *see also id.* at 2–3 (citing several examples of the SEC’s modifying of existing securities disclosure requirements in response to investor interest in different types of information).

Conversely, the FTC's regulatory authority is currently limited<sup>57</sup> to addressing the imbalance of information that exists between a franchisor and prospective franchisees before the sale of a franchise.<sup>58</sup> The presale disclosures that are currently required by the FTC's Disclosure Requirements and Prohibitions Concerning Franchising (Franchise Rule)<sup>59</sup> are further limited "to those areas in which the Commission has found there to be misrepresentations and nondisclosure of information."<sup>60</sup> This limitation exists because under the Federal Trade Commission Act, the FTC cannot impose new obligations on a franchisor without evidence of specific unfair acts or practices.<sup>61</sup> "To justify an industry-wide rule, such practice [must] be prevalent."<sup>62</sup> Thus, unlike the SEC, the FTC is statutorily constrained in its authority to impose regulations only if there is a demonstrated need for additional disclosure obligations to counteract an actual and prevalent pattern of unfair acts or practices.<sup>63</sup> As discussed in more detail below, to the limited extent that securities and franchise regulations share a common purpose of providing relevant information to prospective purchasers, there are insufficient grounds to warrant amending the Franchise Rule.

#### IV. FTC's Criteria for Modifying Existing Disclosure Requirements Are Not Satisfied

To impose new limitations on franchisors, the FTC would require evidence demonstrating widespread misconduct that is "likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."<sup>64</sup> When the FTC amended the Franchise Rule in 2007,

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57. In some respects, the FTC's regulatory authority is actually broader than the SEC's. For example, the SEC has the authority to regulate disclosure only in the context of the sale of a publicly traded corporation. Thus, even though shareholders of private corporations presumably have the same interest in obtaining information about corporate political activities when making informed decisions in a corporate democracy, the SEC has no power to require disclosures in that context. Conversely, the FTC has the authority to regulate all franchise sales, whether a sale is made by a public or private entity.

58. Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 43 Fed. Reg. 59614, 59638 (Dec. 21, 1978) (noting that the FTC "has promulgated the disclosure requirements . . . to redress the fundamental imbalance of information that exists between the franchisor and the prospective franchisee.").

59. 16 C.F.R. § 436 et seq.

60. 43 Fed. Reg. at 59638.

61. *Id.*; see also Disclosure Requirements and Prohibitions Concerning Franchising, 72 Fed. Reg. 15444, 15447 (Mar. 30, 2007) (rejecting calls to amend the Franchise Rule to include post-sale limitations on franchisor conduct because "[t]o address post-sale relationship issues by adopting rule provisions that prohibit or limit the use of certain contract terms would require record evidence demonstrating specific unfair acts or practices.").

62. 72 Fed. Reg. at 15447.

63. 15 U.S.C. § 57a(b)(3) ("The Commission shall issue a notice of proposed rulemaking pursuant to paragraph (1)(A) only where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent.").

64. 72 Fed. Reg. at 15447 (quoting 15 U.S.C. § 45(n)).

it applied this standard when considering calls to include, among other things, provisions addressing post-sale relationship issues.<sup>65</sup> Specifically, the FTC noted that

[w]ith regard to the first prerequisite, substantial injury, the record shows that some franchisees in several franchise systems have suffered post-sale harm in the course of operating their franchises, and in some instances this injury may be ascribable to acts or practices of a franchisor. The record, however, leaves open the related questions of whether such franchisor acts or practices are prevalent and whether the injury resulting from acts or practices is substantial, when viewed from the standpoint of the franchising industry as a whole, not from just a particular franchise system.<sup>66</sup>

Having found that there was no evidence that injuries to franchisees arising out of post-sale misconduct are prevalent in the industry, the FTC declined to impose any post-sale disclosure or other obligations on franchisors.<sup>67</sup>

Because the FTC has not yet addressed the potential implications of disclosures relating to political activities since the Supreme Court's decision in *Citizens United*, the question now is whether there is sufficient evidence to suggest that franchisor political activities have caused substantial injury to franchisees and that such injuries are prevalent in the franchise industry. There does not appear to be clear evidence that shows either component.

For example, there does not appear to be any evidence to suggest that franchisees are suffering substantial injuries as a result of the political activities of their franchisor. It also does not appear that the reputational damage associated with any recent political controversies has a permanent or even long-term effect on the value and stability of any brand.<sup>68</sup> Although, in the short term, an economic boycott of franchised businesses may cause some injury to franchisees, the same can be said for nonpolitical controversies that result in the ordinary course of business.<sup>69</sup> The mere fact that a franchisor happens to make a poor business decision that affects the

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65. *Id.*

66. *Id.*; see also *id.* at 15447 n.43 (“There are many factors that influence the success or failure of a franchisee, including downturns in the economy, shifting consumer preferences, or even franchisees’ own conduct. Accordingly, franchisor conduct post-sale may be only one factor that leads to injury to franchisees. The record is inconclusive, with respect to franchising overall, as to whether franchisor acts or practices are a direct and primary cause of poor performance or failure by franchisees.”).

67. *Id.*

68. Marzilli, *supra* note 23 (noting that Denny’s reputation score had recovered following statements made by large franchisee); see also Ted Marzilli, *Chick-Fil-A Staging Comeback After July Remarks*, YouGov (Oct. 1, 2012) <http://www.brandindex.com/article/chick-fil-staging-comeback-after-july-remarks>.

69. For example, in 2014, the Chili’s restaurant chain was embroiled in controversy when it implemented a national fund-raising drive to support the National Autism Association, a non-profit organization that has been roundly criticized for claiming that autism is caused by vaccinations. Associated Press, *Chili’s Nixes Autism Event After Backlash*, CHICAGO SUN-TIMES, Apr. 8, 2014, News at 14 (“Chili’s has canceled a fundraiser for a group that says that autism can be triggered by vaccinations, a position widely discredited by the medical community.”).

brand or results in an economic boycott should not give rise to a claim by a franchisee.<sup>70</sup>

There also is no evidence to suggest that controversial political speech by franchisors is prevalent in the industry. Although a handful of anecdotal examples demonstrate the potential negative consequences of franchisor's political activities,<sup>71</sup> they are by no means specific to the franchise industry. Moreover, most of the examples involve statements and positions taken personally by the franchisor's founder and do not appear to reflect the franchisor's official policy.<sup>72</sup> As a result, any injury suffered by a franchisee is not always traceable to the franchisor.<sup>73</sup> In light of the absence of the type of compelling evidence that is a prerequisite to amending the Franchise Rule, any calls for such amendments are at best premature.<sup>74</sup>

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70. If anything, it is just as likely that the franchisee will be guilty of tarnishing the brand by becoming involved in political controversies as it is for the franchisor. For example, consumer opinions about the reputation of the Denny's restaurant chain experienced a similar dip following statements made by a large franchisee about the impact that the ACA would have on the operation of its businesses. Emerson & Parnell, *supra* note 10, at 374 ("In the wake of Metz's comments, Denny's saw a loss of brand value and sales even though Denny's Corporation attempted to distance itself as much as possible from Metz.")

71. See sources cited, *supra* notes 23–25, 29–41.

72. See, e.g., *Chick-fil-A: Who We Are. A Response to Recent Controversy* (Sept. 20, 2012), available at <http://media.chick-fil-a.com/Media/pdf/who-we-are.pdf>.

73. Some may argue that franchisors should be obligated to disclose the political activities of their owners and corporate officers. Such disclosures would not be unprecedented; the current Franchise Rule requires disclosures relating to the franchisor's principals. 16 C.F.R. § 436.5(b) (requiring disclosure of business experience of franchisor's directors, trustees, corporate officers, general partners, and individuals with management responsibilities); *id.* § 436.5(c) (requiring disclosure of litigation history and criminal convictions, if any, of franchisor's principals); *id.* § 436.5(d) (requiring disclosure of bankruptcies by franchisor's principals). But requiring franchisors to disclose the political activities of individuals involved in the management or operation of the franchisor may ultimately be unconstitutional if applied. The Supreme Court has been extremely skeptical of regulations that impose disclosure obligations relating to individuals because they can constitute "an unconstitutional burden since it not only infringes on one's right to privacy and results in the chilling of speech, but it also triggers acts of retaliation or harassment by those of different ideological or political persuasions." *Dashev, supra* note 26, at 214; see also *John Doe No. 1 v. Reed*, 561 U.S. 186, 201 (2010) (noting that disclosure "would be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed.") (internal quotation marks and citations omitted).

74. Although beyond the scope of this article, in addition to the FTC, it is also possible that some states will consider imposing new disclosure obligations on franchisors in addition to those set forth in the Franchise Rule. But it is unlikely that states will do this, given that most defer to the North American Securities Administrators Association (NASAA) in order to improve uniformity and consistency of disclosure requirements. George Lee Flint, Jr., *Securities Regulation*, 62 SMU L. REV. 1435, 1440 (2009) ("NASAA intends to have many states adopt their guidelines to achieve national uniformity in forms as well as consistency in standards to facilitate nationwide registration."). Some franchisees might also argue that existing state statutory antifraud laws already require franchisors to disclose the information on the grounds that franchisors have an affirmative duty to disclose all material facts. See, e.g., *Abbo v. Wireless Toyz Franchise, LLC*, No. 304185, 2014 WL 1978185, at \*8 (Mich. Ct. App. May 13, 2014) (holding that the franchisor had "a legal duty to accurately disclose material information concerning the Wireless Toyz franchise"). But that argument is premised on the belief that franchisors have an affirmative duty to disclose information beyond what is required by the Franchise Rule, which is inconsistent with the typical franchise arrangement. *Papa John's Int'l, Inc. v. Dynamic Pizza, Inc.*, 317 F. Supp. 2d

## V. Conclusion

Franchisors already bear the substantial expense of complying with the disclosure requirements in the Franchise Rule.<sup>75</sup> The FTC's reluctance to impose new disclosure obligations in the absence of compelling need is in part an acknowledgment of the significance of those burdens.<sup>76</sup> Moreover, while the expense of additional disclosure obligations is substantial, the threat posed by inaction is steadily declining. The current trend among companies, particularly large public companies, appears to be moving toward the voluntary disclosure of political activities, including the imposition of express limitations on political expenditures.<sup>77</sup> In a 2012 study,

[t]he Center for Political Accountability found that nearly sixty percent of leading Fortune 500 companies either disclose their corporate political contributions or have adopted policies refraining from making such donations.<sup>78</sup>

"Despite the fierce attack on public disclosure policies over the past year, companies continue to adopt disclosure, and it's going along at a very steady pace . . ." <sup>79</sup> The trend includes some prominent franchisors.<sup>80</sup> As a result, to

740, 749 (W.D. Ky. 2004) (holding that "[m]any courts hold that a franchisor-franchisee relationship does not give rise to [an affirmative disclosure] duty because [the relationship] is not fiduciary in nature"). The topic is sufficiently broad and debatable, however, to merit its own article.

75. James R. Sims III & Mary Beth Trice, *The Inadvertent Franchise and How to Safeguard Against It*, 18 FRANCHISE L.J. 54, 54 (1998) ("The process and cost of obtaining audited financial statements, preparing a disclosure document, registering it with appropriate state officials, keeping that document up to date, and ensuring that franchise sales representatives always provide prospective franchisees with the right disclosure package at the right time represent administrative or financial obstacles to quick expansion.")

76. See, e.g., Disclosure Requirements and Prohibitions Concerning Franchising, 72 Fed. Reg. 15444, 15452–53 (Mar. 30, 2007) (noting that the FTC took all steps to reduce compliance costs when adopting the 2007 amendments to the Franchise Rule, including by refusing to add more disclosure obligations).

77. "[T]hree-fifths of the [100] largest publicly traded companies in the United States[] disclose their direct corporate political spending and have adopted board oversight, or they prohibit spending corporate cash on politics." Center for Political Accountability, *The CPA-Zicklin Index of Corporate Political Accountability and Disclosures*, at 5 (2011) (footnote omitted).

78. Eggen, *supra* note 13, at A15. But see Taub, *supra* note 4, at 477 ("In 2010, only 23 of 57 S&P 500 companies with policies against making political contributions kept their word.") (citing Heidi Welsh & Robin Young, IRRC Inst. & Sustainable Inv. Inst., *Corporate Governance of Political Expenditures: 2011 Benchmark Report on S&P 500 Companies 26* (Nov. 2011), available at <http://www.irrcinstitute.org/projects.php?project=51>).

79. Eggen, *supra* note 13, at A15.

80. For example, two of the largest publicly traded franchisors, Yum! Brands, Inc. and the McDonald's Corporation have adopted company policies requiring disclosure of political contributions. See Yum! Brands, Inc. Political Contributions & U.S. Government Advocacy Policy at 3 ("Any approved corporate political contribution in excess of \$150 per year is voluntarily disclosed on an annual basis on the Company's website."), available at <http://www.yum.com/investors/governance/media/YumPoliticalExpenditurePolicy.pdf>; see also McDonald's Corporation Political Contribution Policy at 3 ("[O]n a semi-annual basis, McDonald's Corporation will publish the corporate Political Contributions made in the United States pursuant to this Policy. . . .") available at [http://www.aboutmcdonalds.com/content/dam/AboutMcDonalds/Investors/Investor%202014/Political\\_Contribution\\_Policy\\_January\\_27\\_2011.pdf](http://www.aboutmcdonalds.com/content/dam/AboutMcDonalds/Investors/Investor%202014/Political_Contribution_Policy_January_27_2011.pdf).

the extent that a risk remains that franchisees will be injured by the absence of disclosure requirements, that threat is steadily diminishing.

Although political controversies resulting from the activities of the franchisor or one of its principals undoubtedly pose potential problems for franchisees, the solution to those problems is not more disclosure. To impose new disclosure requirements without compelling evidence of harm is precisely the type of knee-jerk reaction that leads to bad policy. Accordingly, the FTC should not even consider imposing additional disclosure obligations on franchisors.

