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CORPORATE PHILANTHROPY, EXECUTIVES' PET CHARITIES AND THE AGENCY PROBLEM

JAYNE W. BARNARD*

Historically, charitable contributions often depended on the personal interests of the chief executive officer. Today the corporate culture is being redefined.¹

Once considered the whim of CEOs—or of their spouses—corporate giving these days is often a standard business expense for which results must be shown.²

In [the 1950s], the chief executive officer played an exaggerated role. He might identify a pet cause, one that had little or no connection to the core activities of the business, and proceed to commit the corporation to donating relatively large sums of money [Today], a [new] stage in corporate giving has emerged. This stage has been labelled strategic philanthropy. Strategic philanthropy attempts to link charitable giving to financial performance.³

I. INTRODUCTION

Corporate philanthropy in the mid-1990s is said to be governed by strict criteria, implemented by professionals who demand accountability from the donees, and evaluated in terms of stated corporate objectives. It is strategic, cost-conscious, and “‘Janus-faced’—one face serving the

* Vice Dean and Professor of Law, The College of William & Mary School of Law. Some of the thoughts in this paper originated in my Seminar in Corporate Governance. I am grateful to my students for discussing the issues surrounding corporate philanthropy with me. Thanks also to Glenn Coven, Toni Robinson, and Steve Bainbridge, who read earlier drafts of this commentary and whose comments and insights helped to make it more coherent. Lawrence Lederman and Alemante Selassie also made good suggestions. Most of all, thanks to Faith Kahn and the editors and members of the *New York Law School Law Review* for putting together this exciting symposium on a complex and interesting subject.

1. DIANE J. GINGOLD & ELIZABETH A.C. WEIL, *THE CORPORATE PATRON* 13 (1991).

2. P.J. Corkery, *What's in It for Me? Self-interest Is Guiding the Corporate Handouts of Today—Leaving Some Worthy Causes Out in the Cold*, *BUS. MONTHLY*, Nov. 1, 1989, at 46, 47.

3. MOSES L. PAVA & JOSHUA KRAUSZ, *CORPORATE RESPONSIBILITY AND FINANCIAL PERFORMANCE: THE PARADOX OF SOCIAL COST* 115-16 (1995).

community, the other serving [the corporation's] business units."⁴ The whims or "pet projects" of highly-placed executives no longer drive corporate charitable contributions as they once did.⁵

This scenario, though perhaps appealing, is a myth in many public companies. As has been the case throughout American history, corporate philanthropy today is often driven by the personal preferences of highly-placed executives. Executives' "pet projects" have not disappeared. To the contrary, subsidized "pet projects" are thriving in the arts, in education, in the environment, and in various programs for the indigent.

This commentary examines the phenomenon of "pet charity" funding by public companies. Without questioning that the corporate giving function in many corporations has become institutionalized in the last fifteen years, complete with grant-giving guidelines, standardized application procedures, glossy public reports of corporate giving and sophisticated "cause-related marketing" strategies, this commentary challenges the notion that Chief Executive Officers (CEOs) no longer influence corporate giving in significant and sometimes very personal ways.

Indeed, this commentary will explore several recent situations in which a corporation's CEO allocated corporate funds toward charitable activities that may fairly be placed in the "pet charity" category or at the very least cannot reasonably be assigned to the category of strategic philanthropy. There are many examples of such behavior, some of them captured in

4. Craig Smith, *The New Corporate Philanthropy*, HARV. BUS. REV., May-June 1994, at 105, 108.

5. The significance of the terms "pet project" and "pet charity" derives from the leading case addressing the propriety of corporate charitable contributions, *A. P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581 (N.J. 1953), *appeal dismissed*, 346 U.S. 861 (1953).

In that case, the New Jersey Supreme Court approved a corporate contribution to Princeton University where there was "no suggestion that it was made indiscriminately or to a pet charity of the corporate directors in furtherance of personal rather than corporate ends." *Id.* at 590. Accordingly, the contribution was found to be valid under both common and statutory law. *See id.*

One might question the conclusion that there was no "pet charity" involved in the *Barlow* case considering that the then-president of A.P. Smith, Hubert F. O'Brien, was an alumnus of Princeton, class of 1931. Telephone Interview with Mary Terrell, Princeton Alumni Council (Sept. 9, 1996). Regardless, the suggestion that gifts to "pet charities" might be inappropriate was challenged in a later decision:

And while the court [in *Barlow*] pointed out that there was no showing that the gift in question was made indiscriminately or to a pet charity . . . , the actual holding of the opinion appears to be that a corporate charitable or educational gift to be valid must merely be within reasonable limits both as to amount and purpose.

Theodora Holding Corp. v. Henderson, 257 A.2d 398, 404 (Del. Ch. 1969).

best-selling business books, journalistic exposés, and even some judicial opinions.

These examples serve as a reminder that corporate CEOs have often used their corporations' resources as if those resources were their own, and sometimes for very rational reasons. These CEOs have spent their shareholders' money on projects that offered little, if any, benefit to the corporation while providing substantial benefits to the CEOs in the form of psychic satisfaction, increased status, and visibility in the community of leaders in which they travel or to which they aspire.⁶ Occasionally, these executives have "matched" their corporate contributions with personal contributions; more often, however, they have not, finding the use of their corporation's resources to be an adequate expression of their charitable intent.⁷

This behavior, which in other contexts might amount to misappropriation, has long been thought to be acceptable, primarily because the benefitted charities have been "qualified" and are therefore worthy to receive corporate gifts, and because the gifts themselves have typically been immaterial, in an accounting sense, to the corporation.⁸ Little critical attention has been paid to this behavior, probably because progressives have viewed corporate philanthropy as desirable, regardless of its origins, and managerialists have viewed corporate philanthropy as a legitimate perquisite of leadership.

6. See generally *infra* Section IV. There are several reasons why a CEO may choose to orchestrate corporate charitable contributions: to enhance her personal prestige in her local community; to elevate her reputation as one who can make things happen; to reciprocate for earlier contributions made by business colleagues to other projects with which she is associated; or simply because, within her own belief system, a particular organization is a good, socially valuable organization to support.

7. Warren Buffett tells the story of an acquaintance who solicits funds from corporate leaders:

[I]t's rather interesting, in the last five years he's raised 8 million dollars. He's raised it from 60 corporations. It almost never fails And in the process of raising this 8 million dollars from 60 corporations from people who nod and say that it's a marvelous idea, its pro-social, etc., not one CEO has reached in his pocket and pulled out 10 bucks of his own to give to this marvelous charity. They've given 8 million dollars collectively of other people's money. And so far he's yet to get his first 10-dollar bill.

JOHN COFFEE ET AL., *KNIGHTS, RAIDERS AND TARGETS: THE IMPACT OF THE HOSTILE TAKEOVER* 14 (1988).

8. See Usha C.V. Haley, *Corporate Contributions as Managerial Masques: Reframing Corporate Contributions as Strategies to Influence Society*, 28 J. MGMT. STUD. 486, 503 (1991) ("[m]anagerial discretion over contributions may exist because contributions form such small percentages of corporate incomes.").

There are several ways, however, to approach those giving situations in which conflicts of interest are apparent: (1) one could ignore them on the theory that other corporate governance issues of arguably greater magnitude are more deserving of attention and legal reform; (2) one could prohibit these situations from occurring either by completely outlawing corporate charitable contributions or by outlawing corporate charitable contributions with a conflict of interest "profile"; (3) one could treat these contributions as taxable income to the CEO or disallow the corporation's deductions for such contributions; (4) one could, as Professor Kahn suggests,⁹ require that these and all charitable expenditures be disclosed under the federal securities laws; and (5) one could insist that such expenditures regularly be considered by the board of directors as part of an overall package that takes into account both executive compensation practices and corporate charitable objectives.

In this commentary, I will explore and reject the first three approaches, endorse a version of the fourth and argue in favor of the fifth. Before doing so, however, I will recapitulate the history of CEO involvement in corporate charitable contributions and examine some of the more notorious examples of CEOs who have commandeered the corporate charitable function. I will also examine some of the reasons why CEOs find corporate philanthropy such an alluring arena in which to exercise their power.

II. THE FIVE STAGES OF MODERN CORPORATE GIVING AND THE IMPORTANT ROLE OF THE CHIEF EXECUTIVE OFFICER

A. *From Unilateral Decisions to Complex Organization*

From 1935, when Congress first granted a tax deduction for corporate charitable contributions,¹⁰ until the mid-1970s, most corporate philanthropy was modest, informal, idiosyncratic, and characterized largely by localized expenditures.¹¹ Charitable allocations were typically driven by a company's chief executive officer, who unilaterally determined the objects of his corporation's philanthropic efforts, the amount to be devoted to

9. See Faith Stevelman Kahn, *Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579, 586 (1997).

10. See Revenue Act of 1935, Pub. L. No. 74-407, 49 Stat. 1014 (adding subsection (r) to section 23 of the Revenue Act of 1934, thereby allowing a corporation to deduct charitable contributions to the extent of five percent of its income).

11. See generally ERNEST W. LEFEVER ET AL., SCHOLARS, DOLLARS, AND PUBLIC POLICY 14-15 (1983); Peter Dobkin Hall, *Business Giving and Social Investment in the United States*, in PHILANTHROPIC GIVING: STUDIES IN VARIETIES AND GOALS 221-45 (Richard Magat ed., 1989).

particular projects, and the manner (if at all) in which the gifts would be monitored.¹² A corporation's charitable activity was often a measure of the CEO's power in his company as well as his status in the community. Thus, in stage one, or the "benevolent despot" stage of corporate philanthropy, the chief executive officer was unquestionably the key to corporate giving; little, if any, attention was given to the profit expectations or giving preferences of shareholders.

A significant transformation in corporate philanthropy occurred during the Watergate era:

Prior to [this period], many managers had adhered to a philosophy that stressed "sticking to business" and avoiding the media, but during the 1970s a managerial culture emerged that, by contrast, emphasized outreach and openness. Fearing increasing political isolation in a period of public disenchantment with established institutions, major corporations enlarged their public affairs operations, by opening Washington offices, creating political action committees, encouraging their managers to participate in community affairs and, not least, expanding their giving budgets.¹³

During this second, or "public citizen," stage of corporate philanthropy, decisions relating to charitable giving continued to reside in the highest precincts of the corporation and typically reflected the social and political values of the CEO. Some corporate leaders, like William C. Norris of Control Data Corporation, committed their companies to very ambitious visions of social change, often to the dismay of their subordinates.¹⁴ Other CEOs were less visible, though many inched their

12. An example of this type of CEO-driven philanthropy is David Rockefeller's creation at the Chase Manhattan Bank of a "corporate art" program in the late 1950s. Rockefeller, whose family had founded the Museum of Modern Art in New York City, put together a program by which Chase would purchase paintings, display them at bank offices around the world, then donate them (claiming appreciated valuations) to various art museums. See WILLIAM HOFFMAN, *DAVID* 84 (1971).

13. Michael Useem, *Corporate Support for Culture and the Arts*, in *THE COST OF CULTURE: PATTERNS AND PROSPECTS OF PRIVATE ARTS PATRONAGE* 45, 45 (Margaret Jane Wyzomirski & Pat Clubb eds., 1989) [hereinafter Useem, *Corporate Support*].

14. See JAMES C. WORTHY, WILLIAM C. NORRIS: PORTRAIT OF A MAVERICK (1987). Under Norris's direction, Control Data became a national leader in siting factories in urban ghettos. Moreover, at Norris's insistence, these plants were staffed largely by the so-called "hard-core unemployed" who lived in nearby neighborhoods. With force of will and painstaking management, these factories became efficient and, ultimately, successful. Norris became a critic of traditional corporate philanthropy, noting:

companies towards a more socially responsible profile.¹⁵ "In most cases, these gestures were responses to public demand or expressions of well-intentioned executives[' desire] to 'do good.'"¹⁶ In either case, the selection of a charitable agenda was typically dominated by the corporate chief executive or other high-level corporate officers.¹⁷ As in the "benevolent despot" stage of corporate philanthropy, little thought was given to the profit expectations or the charitable preferences of shareholders.¹⁸

Then came the third, or "technocratic," stage of corporate philanthropy, characterized by the professionalization of the giving process. Rather than distributing corporate charitable gifts from the executive suite or "out of the back pocket of the CEO,"¹⁹ corporations began designating professional gift managers to establish gift criteria and priorities, provide order and consistency in recordkeeping, develop ongoing ties with charitable recipients and report on the impact of the corporation's philanthropic program. As one observer noted in 1981,

"You look at the reports [of corporate and other foundations] and, hell, there are hundreds of little projects, \$10,000 here and \$5,000 there, and what have they got to show for it? You can see, they're really not accomplishing very much." Philanthropy [like this] "makes the boss feel like a white knight for a little while," [but these kinds of projects are] "peripheral to real problems . . ."

Id. at 132.

15. For example, following the Detroit riots of 1967, and at the request of the mayor and the governor, Henry Ford II announced the creation of 6,500 new jobs, five thousand of which would be filled by ghetto residents. "Written job tests were dispensed with, and special buses were put into service to ferry the new labor force to the plants." WALTER HAYES, HENRY: A LIFE OF HENRY FORD II 52 (1990).

16. Hall, *supra* note 11, at 237.

17. In a study conducted from 1980 to 1981 of 229 large companies, researchers found that the primary policy setter for corporate contributions was either a committee of senior executives (27.5% of respondents) or the CEO (22.7% of respondents). See John J. Siegfried et al., *The Management of Corporate Contributions*, in 5 RESEARCH IN CORPORATE SOCIAL PERFORMANCE AND POLICY: A RESEARCH ANNUAL 87, 92 (Lee E. Preston ed., 1983). Other sources of policy setting included the board of directors (17.9% of respondents) and the chairman of the board (10.9%). See *id.*

18. It is fair to say that the rhetoric accompanying many of these charitable projects suggested otherwise. Decisions to open factories in urban ghettos, for example, were often justified by the need to "create new markets."

19. Siegfried et al., *supra* note 17, at 97 (describing the method that some companies in his study used to determine to whom corporate charitable contributions would be made).

Giving . . . is now seen by most corporations as a matter of corporate policy, requiring a rational and systematic process of review by someone held responsible and accountable for the action taken. Many corporations now have highly qualified managers to administer contributions . . . a situation that differs vastly from that existing at the beginning of the [1970s].²⁰

During this stage, corporations began to be seen as moving toward a "more market-driven strategic management, bottom-line approach to philanthropy."²¹ Even during this third stage, however, corporate charitable giving was often more reactive than proactive.²² Corporations for the most part still responded to grant requests from unrelated nonprofit organizations, rather than shaping a process that uniquely identified a corporate philanthropic agenda.

Throughout this period, a growing number of corporations established separate charitable foundations through which to channel their giving. These foundations permitted a company to even out the "peaks and valleys" in contributions resulting from swings in corporate profits,²³ and allowed a corporation to maximize the impact of corporate gifts.²⁴ A few foundations were specifically designed to insulate the giving process from the influences of the CEO.²⁵ Studies show, however, that "[w]ith very few exceptions, foundation boards [were] composed entirely of company officers and management, and for practical purposes, there was no distinction between the giving programs of the corporations themselves and

20. 2 AMERICAN COUNCIL FOR THE ARTS, *CORPORATE GIVING IN THE ARTS* 3 (Robert A. Porter ed., 1981).

21. Timothy S. Mescon & Donn J. Tilson, *Corporate Philanthropy: A Strategic Approach to the Bottom-Line*, 29 CAL. MGMT. REV. 49, 49 (1987).

22. See E.B. Knauft, *The Management of Corporate Giving Programs*, in *PHILANTHROPIC GIVING: STUDIES IN VARIETIES AND GOALS* 261, 265 (Richard Magat ed., 1989).

23. See THE CONFERENCE BOARD, *CORPORATE CONTRIBUTIONS IN SMALLER COMPANIES* 4 (1973) (describing how companies utilize this mechanism).

24. See Benjamin T. White, *Consequences of Corporate Giving*, TR. & EST., Aug. 1987, at 35, 35 ("The immediate deductibility of gifts to the foundation means that in good years a corporation can 'endow' its foundation, and, as the earnings of that endowment build up, use those earnings to supplement the grants made possible by the company's annual contribution to the foundation."); see also CHARLES T. CLOTFELTER, *FEDERAL TAX POLICY AND CHARITABLE GIVING* 185 (1985) ("Contributions from a corporation to its foundation are deductible like other contributions and are subject to the percentage ceiling, but grants made by foundations are not subject to the ceiling.").

25. See Siegfried et al., *supra* note 17, at 92 (stating that "19 firms [out of 229] reported that a major purpose of their corporate foundation is to foster autonomous decisions in allocating contributions").

the giving programs of corporate foundations."²⁶ Consequently, as in the first and second stages of modern corporate philanthropy, corporate top executives maintained tight control over their companies' charitable giving programs. Shareholders' economic concerns were largely disregarded.²⁷

The fourth, or "decade of greed," stage of corporate giving emerged in the mid-1980s, as corporations began to conflate philanthropy with their marketing strategies. Increasingly, corporate giving was calculated to promote a particular corporate image, or to stimulate sales. By 1991, for example, "[t]he funds raised by the National Gallery's office of corporate relations . . . most often [came] from marketing, public relations, and advertising budgets, not corporate foundations."²⁸ "Cause-related marketing," conceived by American Express in 1983 when it (very publicly) promised to make a penny contribution to the Statue of Liberty restoration effort for every use of an American Express credit card, was embraced by many other American companies to the point that, for some, the marketing of the giving campaign to the public cost many times the amount actually given as a corporate charitable contribution.²⁹ By 1990, the use of cause-related marketing techniques was increasing by between ten and fifteen percent annually.³⁰

26. Knauff, *supra* note 22, at 266.

27. Shareholders' social concerns, on the other hand, became a preoccupying issue for many companies. The 1970s saw a dramatic rise in the submission of shareholder social proposals and labor and church organizations began orchestrating high-visibility proxy campaigns. See, e.g., Donald E. Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419 (1971) (describing this grass-roots effort).

28. GINGOLD & WEIL, *supra* note 1, at 13.

29. For example, the Coors Brewing Company's "Literacy, Pass it On" program has been described as a \$40 million effort. Of that amount, only a small percent represents a direct contribution to national, regional and local literacy organizations providing direct client services. The balance has been spent on an "extensive public awareness effort. The multimedia component of the program entails newspaper, magazine, radio and billboard advertising, as well as direct marketing to promote solutions to illiteracy. Other program components include advertising and public relations programs targeted to the general market, African-Americans, Hispanics, and women." L. LAWRENCE EMBLEY, *DOING WELL WHILE DOING GOOD: THE MARKETING LINK BETWEEN BUSINESS AND NONPROFIT CAUSES* 178 (1993).

In American Express's case, the company ultimately made a \$1.7 million contribution to the Statue of Liberty Foundation. The number of new cardholders increased 45 percent during the promotion period and American Express also noted higher than usual card usage. This, said a spokesman, proved that "helping others also can be good business." Useem, *Corporate Support*, *supra* note 13, at 50.

30. See *Corporate Giving: Who Spends Most, and for What?*, ACROSS THE BOARD, May 1990, at 30, 33.

During this period, it became more common for corporate gift managers to factor in the publicity value of a given gift, along with the merits of the beneficiary's request, when assessing whether to make a charitable contribution.³¹ Non-profits aggressively cultivated this mentality³² and many mutually beneficial projects resulted.³³ Corporations themselves sought out projects that offered a *quid pro quo*.³⁴ In short, by stage four, corporate giving had become "more than a passive product of business success. It [was now] used to stimulate income as well."³⁵

For the first time in history, the economic concerns of shareholders appeared to be playing a significant role in corporations' philanthropic decision-making. In the crassest possible way, notions of profit maximization had at last begun to make their way into the philanthropic equation. Significantly, many of the gifts that resulted were characterized for tax purposes as "ordinary and necessary business expenses" rather than

31. See Michael Useem, *Trends and Preferences in Corporate Support for the Arts*, in 4 AMERICAN COUNCIL FOR THE ARTS, CORPORATE GIVING IN THE ARTS ix, xiii (Robert A. Porter ed., 1987) (reporting that surveyed companies increased the attention given to a gift's "publicity value" between a survey conducted in 1979 and a second survey conducted in 1986) [hereinafter Useem, *Trends*].

32. New York's Metropolitan Museum, for example, circulated a prospectus to business leaders trumpeting the rewards of sponsoring an art exhibition: "Many public relations opportunities are available through sponsorship of outstanding special exhibitions at the [Met] . . . Learn how you can provide creative and cost effective answers to your marketing objectives by identifying your corporate names with Vincent Van Gogh . . . Canaletto . . . Remington, Fragonard, Rembrandt or Goya . . ." NICHOLAS VON HOFFMAN, CAPITALIST FOOLS: TALES OF AMERICAN BUSINESS, FROM CARNEGIE TO FORBES TO THE MILKEN GANG 166 (1992).

33. See Judith H. Dobrzynski, *The Metropolitan's Natori-ous Display*, BUS. WK., Apr. 5, 1993, at 64 (describing a costume show at the Metropolitan Museum, sponsored by a lingerie designer. "For less than the cost of staging a runway fashion show, Natori links up with a high-profile exhibition of 80 mannequins dressed in designs by the likes of Valentino, Balenciaga, Fortuny, and Gaultier—as well as four of her own. The Met predicts that 250,000 visitors will see the show before it closes on Aug. 15."); *What's in a Name? Art and Food*, N.Y. TIMES, Sept. 18, 1995, at C2 (describing how the Metropolitan Museum "wooed" Goya Foods Inc., a manufacturer of Hispanic foods, and secured funding for the museum's elaborate exhibition of 300 works by Francisco de Goya).

34. See Pamela Sebastian, *Attaching Strings: With Coffers Less Full, Big Companies Alter Their Gifts to Charities*, WALL. ST. J., Nov. 26, 1993, at A1 (describing a program by Chrysler Corporation to make donations to popular museums that would agree to exhibit their new model cars).

35. Useem, *Corporate Support*, *supra* note 13, at 48.

“charitable gifts.”³⁶ These expenditures—often substantial ones—thus began disappearing from statistics measuring corporate charitable contributions. “Real” corporate philanthropy began to decline.³⁷

Today, corporate philanthropy has entered the fifth, or “strategic retrenchment,” stage. In-kind gifts and release time programs for corporate employees³⁸ have been increasing.³⁹ Furthermore, the overall value of corporate giving, exclusive of cause-related marketing efforts, increased in 1995 to over seven billion dollars.⁴⁰

The format of today’s corporate giving is quite different than it was during earlier stages of corporate philanthropy. Corporate giving in 1996 no longer reflects an undisciplined, “smorgasbord” approach to charitable contributions; rather, it reflects a more selective, long-term investment-type approach to non-profit organizations.⁴¹ “Community partnerships” are being developed⁴² and collaborative alliances are being formed between corporations and their favored charities, or corporations and governmental

36. Payments made by a corporation to a non-profit organization may be treated as an ordinary and necessary business expense when the company has an expectation of financial return from the gift. Priv. Ltr. Rul. 93-09-006 (Mar. 5, 1993) (supermarket’s donation of one percent of its revenue to local charities, following an extensive advertising campaign in which the charities’ names were prominently featured, may be treated as a business expense rather than a charitable gift). See also Rev. Rul. 72-314, 1972-1 C.B. 44; Rev. Rul. 63-73, 1963-1 C.B. 35; Robert E. Harrison, *Payments to Charities by Business Enterprises: Sec. 162 v. Sec. 170*, TAX ADVISOR, Aug. 1995, at 473.

37. See AAFRC TRUST FOR PHILANTHROPY, GIVING USA 1995: THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 1994, at 76 (1995) (noting that corporate giving in inflation-adjusted dollars fell each year from 1987 to 1994).

38. See Marcia Vickers, *Keeping Valued Employees by Letting Them Go, for a While*, N.Y. TIMES, Sept. 22, 1996, at F11 (describing such programs).

39. See Paul Sweeney, *Corporate Giving Goes Creative*, N.Y. TIMES, May 15, 1994, § 3 (Business), at 6.

40. See William H. Miller, *Citizenship That’s Hard to Ignore*, INDUSTRY WK., Sept. 2, 1996, at 21.

41. See Lois Therrien, *Corporate Generosity is Greatly Depreciated*, BUS. WK., Nov. 2, 1992, at 118.

42. A community partnership is a close relationship between a company and a not-for-profit institution, in which the company agrees to contribute human and financial resources to the development of the institution on terms acceptable to both, so that the institution can produce better results for society. In return, the institution might agree to work with the company to enhance its public image or to cooperate with the marketing of its products in ways which will not compromise the integrity of either the company or the institution.

Everald Compton, *Community Partnerships*, 48 IPA REV. 42, 42 (1996).

agencies, and they are working together toward achievable ends.⁴³ Corporate giving is also decentralizing, with increasing sums following markets overseas.⁴⁴

Interestingly, executives in this new environment often speak as if cause-related marketing and residual "true philanthropy" involved similar profit-maximizing objectives: one philanthropic executive insists, "[i]f we're perceived as people who just give away shareholders' money, we're not going to last very long."⁴⁵ Another adds, "[i]t's shareholder equity we're spending here. You can't have a function like this without looking at the return to the shareholder"⁴⁶ While these statements may be disingenuous, they do reflect a continuing sensitivity to the lessons of the 1980s. Namely, investors may be willing to tolerate some corporate philanthropy, but they are not likely to support companies' profligacy at their expense.

B. *The Recurring Motif of the Chief Executive Officer*

Throughout the five stages of corporate philanthropic activity, the chief executive officer has always played an important role. At a minimum, the CEO has consistently been seen as providing guidance or "setting the tone" for corporate giving. Most observers believe that companies whose CEOs place a high value on charitable giving typically give more generously than companies whose CEOs do not. Indeed, a 1989 study reported that, "other factors being equal, the percentage of pre-tax net income allocated to contributions by firms with highly committed chief executives was double that of firms whose CEO's commitment was low."⁴⁷

Still another study, one of 672 corporations based in Massachusetts, reveals that companies whose chief executives were more vigorously involved in the contributions effort

43. "Instead of scattering their resources piecemeal, companies are involving all their business units around a project and building relationships." Sweeney, *supra* note 39.

44. See Stan Crock, *When Charity Doesn't Begin at Home*, BUS. WK., Nov. 27, 1995, at 6.

45. Therrien, *supra* note 41, at 118 (quoting Eugene R. Wilson, president of the Arco Foundation).

46. Molly McKaughan, *Is Corporate Philanthropy Drying Up?*, ACROSS THE BOARD, Apr. 1995, at 21, 22 (quoting Caroline O. Boitano, president and executive director of the BankAmerica Foundation).

47. Useem, *Corporate Support*, *supra* note 13, at 52.

experienced higher growth rates in their [philanthropic] budgets than did other firms.⁴⁸

These studies, like most studies of business giving, unfortunately included both public and closely-held companies. Therefore, they are of limited value in evaluating the influence over charitable giving of public company CEOs. At least one recent study, however, focused exclusively on public companies and found a significant relationship between the CEO's personal level of "community orientation" and his company's level of charitable giving.⁴⁹ In many companies today, public companies included, CEOs retain sole authority to determine the amount of corporate funds that will be allocated to charitable activities.⁵⁰

Moreover, a CEO's involvement in corporate philanthropy does not end at setting the budget. According to a 1982 study, "enterprises with a chief executive who backed more spending on the arts were more than twice as likely as other companies to have enlarged the proportion of their gifts budget allocated to culture."⁵¹ Another, more recent, survey confirmed the influence of top-level executives, especially when it came to allocating funds to arts organizations.⁵² In a study conducted in 1988,

48. *Id.* (citing John Bartolomeo, *The Attitudes and Motivations of Chief Executive Officers*, in CORPORATE PHILANTHROPY: PHILOSOPHY, MANAGEMENT, TRENDS, FUTURE, BACKGROUND (Council on Foundations ed., 1982)).

49. See Linda D. Lerner & Gerald E. Fryxell, *CEO Stakeholder Attitudes and Corporate Social Activity in the Fortune 500*, 33 BUS. & SOC. 58 (1994). Another study found that a public company whose CEO is well-entrenched and has been with the company for a long time is more likely to have a strong corporate social responsibility profile than a company whose CEO is a newcomer. See Anisya S. Thomas & Roy L. Simerly, *The Chief Executive Officer and Corporate Social Performance: An Interdisciplinary Examination*, 13 J. BUS. ETHICS 959, 965 (1994).

50. See The Conference Board, *Corporate Giving Strategies That Add Business Value*, CONF. BOARD RES., 1995 (No. 11 26-95-RR) at 15 (reporting that 14.3% of the 463 companies surveyed entrusted this decision solely to the CEO; 14.9% of the companies entrusted the decision to a management committee; 14.7% entrusted the decision to a contributions committee; 14.5% made the decision using a formula based on pre-tax net income; 6.7% based the decision on a strategic plan; and 21.4% made the decision based on some combination of the above).

51. Useem, *Corporate Support*, *supra* note 13, at 52 (citing John Bartolomeo, *The Attitudes and Motivations of Chief Executive Officers*, in CORPORATE PHILANTHROPY: PHILOSOPHY, MANAGEMENT, TRENDS, FUTURE, BACKGROUND (Council on Foundations ed., 1982)).

52. See William Grimes, *Business Said to Put More In Arts*, N.Y. TIMES, Oct. 12, 1995, at C15 ("In 1991, 82 percent of businesses reported that the chairman, chief executive officer or partner made decisions about charitable giving. In 1994, that figure dropped to 76 percent.").

two out of three CEOs described themselves as “the major influence on their companies’ corporate giving policy.”⁵³

These studies are of limited value because of the indiscriminate mixing of both public and closely-held companies and because of the limitations of self-reporting. However, they lend support to the proposition that corporate chief executives today, as in the past, are often deeply involved in decisions about which organizations will receive charitable contributions.⁵⁴ Certainly, these CEOs devote a substantial amount of their time to the corporate giving enterprise.⁵⁵

Consider two recent examples of public company CEOs whose role in corporate philanthropy is both apparent and pervasive. A 1996 *Economist* profile of John Bryan, the CEO of Sara Lee, notes that Bryan often conducts himself “as if Sara Lee were still a family firm and he [was] still its owner.”⁵⁶

His own convictions [about, for instance, racial diversity] and interests [in, for example, fine art] permeate the company. Sara Lee owns a fine collection of impressionist paintings. It gives away about 2% of its pre-tax profits, at the upper end of what is common for big American companies. Under Mr. Bryan’s influence this goes mainly to disadvantaged groups and cultural institutions. [] Another Bryan hobby-horse is the advancement of women in business.⁵⁷

53. COUNCIL ON FOUNDATIONS, *THE CLIMATE FOR CORPORATE GIVING: CURRENT AND FUTURE CEOs TALK ABOUT GIVING IN TODAY’S ENVIRONMENT* 12 (1988). The size of the company may be important in determining just what role the CEO will play in philanthropic decision-making: “The CEO plays a key role in determining the level of giving. The larger the company, the less the CEO is involved in decisions about individual grants.” *Id.*

54. A study of public companies only, conducted from 1981 to 1985, noted that in response to the question “why do you believe that your company gives money to charitable organizations,” 13.5% of the respondents answered that their companies did so to enable top level executives to support their favorite charities and 5.8% indicated that their companies’ charitable contributions reflected the religious commitment of the CEO. See JOSEPH GALASKIEWICZ, *SOCIAL ORGANIZATION OF AN URBAN GRANTS ECONOMY: A STUDY OF BUSINESS PHILANTHROPY AND NONPROFIT ORGANIZATIONS* 90 (1985).

55. In a 1988 survey of 255 chief executive officers, 71% of the respondents characterized themselves as “‘highly involved’ in corporate giving activities; indeed, the CEOs . . . report[ed that], on average, [they] spend[] four hours per week on corporate giving activities both during and after business hours.” COUNCIL ON FOUNDATIONS, *supra* note 53, at 6.

56. *The Cecil Rhodes of Chocolate-Chip Cookies*, *ECONOMIST*, May 25, 1996, at 74.

57. *Id.*

Nation's Business recently profiled Edwin Lupberger, chairman and president of Entergy Corporation, one of the world's largest investor-owned electric utilities, with more than \$22.5 billion in assets.⁵⁸ Lupberger's achievements include the creation of an ambitious region-wide literacy program and "implementing the first so-called Fair Share agreement between an electric utility holding company and the National Association for the Advancement of Colored People."⁵⁹ Mr. Lupberger is an active fund-raiser for the NAACP.⁶⁰

It is not that these men's philanthropies are inappropriate for their companies, or suboptimal (although they may be). The point is merely that, in many public companies today—including some very successful ones—the chief executive officer remains the driving force behind significant charitable decisions. To believe that CEOs' preferences have disappeared from the philanthropic mix is to underestimate both the power of many of today's CEOs and the importance that corporate philanthropy may play in their professional lives. These CEOs often fashion their self-image in part on what they are able to accomplish philanthropically.

To summarize, though the tradition of CEO micromanagement of corporate giving has surely waned in recent years, especially as "checkbook philanthropy" has declined, CEO influence over the specifics of corporate giving is very much alive and well. Today, as in the earlier stages of corporate philanthropy, the CEO's personal values and priorities often shape the giving practices in many public companies.

III. WHEN CORPORATE CHARITABLE GIVING REPRESENTS AN ABUSE OF EXECUTIVE POWER

While a CEO's influence on corporate philanthropy may be benign, socially productive, and in some cases even profit-maximizing, that influence may also be quite inappropriate and ultimately a sign of peril to the corporation. Consider some recent examples of what one might call "idiosyncratic corporate giving" but what more appropriately should be described as "opportunistic corporate giving." None of these examples can reasonably be said to represent an attempt at profit-maximizing philanthropy. Furthermore, most of the examples to follow in this section cannot even be said to have advanced the corporation's public image.

One such example is Charles Keating, CEO of Lincoln Savings, whose religious lay leadership often formed the basis for his company's charitable giving: using corporate funds, he generously supported India's Mother

58. See Albert G. Holzinger, *A Businessman on a Mission*, NATION'S BUS., May 1996, at 66.

59. *Id.* at 68.

60. See *id.*

Theresa, the Reverend Bruce Ritter of Covenant House and other Catholic charities around the world.⁶¹ He often loaned Mother Theresa use of his corporate jet or helicopter and loaned tens of millions of dollars to Father Bruce to renovate homeless shelters in New York City.⁶² In 1983, Keating announced that his company would give \$100,000 a year for ten years to the St. Vincent de Paul Society.⁶³ "In two years, 1984 to 1986, Keating's corporations [contributed a total of] \$6 million to charity."⁶⁴ Keating and his wife, on the other hand, reported almost no charitable contributions on their personal tax returns.⁶⁵ Lincoln Savings was ultimately (and notoriously) declared insolvent.

The use of corporate funds to advance a CEO's pet charities has not been limited to the thrift industry, however, or to executives who later turned out to be felons. One of the most calculating uses of corporate philanthropy was found in the tobacco industry, where Ross Johnson, then CEO of RJR Nabisco, used a number of techniques to cosset his board of directors and ensure their personal loyalty to him. "One of the most important jobs a CEO has is the care and feeding of the directors," Johnson said.⁶⁶ To this end, Johnson had RJR Nabisco endow academic chairs in his directors' names at the universities of their choice.⁶⁷ When he needed a critical vote from Paul Sticht, a former RJR executive serving on the company's board, Johnson offered Sticht a generous consulting contract and also arranged a \$6 million donation from RJR to the J. Paul Sticht Center on Aging at the Bowman Gray School of Medicine.⁶⁸ "Sticht soon came around," observers note.⁶⁹

At one point, Johnson arranged for the RJR Nabisco Foundation to make a "fat donation" to a small Florida college where one of his directors' wives was a trustee.⁷⁰ In return, both Johnson and his wife received honorary degrees.⁷¹ Johnson often insisted that "Team Nabisco," a group of retired sports heroes who played in charity golf tournaments

61. See MICHAEL BINSTEIN & CHARLES BOWDEN, *TRUST ME: CHARLES KEATING AND THE MISSING BILLIONS* 49 (1993).

62. See *id.*

63. See *id.* at 167.

64. *Id.* at 49.

65. See *id.* at 13.

66. See BRYAN BURROUGH & JOHN HELYAR, *BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO* 26 (1990).

67. See *id.* at 97.

68. See *id.* at 82.

69. *Id.*

70. See *id.* at 83.

71. See *id.*

around the country under the sponsorship of RJR, include the directors in their games.⁷² Not surprisingly, when Johnson ultimately launched a leveraged buyout for the company in 1988, many of these directors supported Johnson in the face of national outrage at the gluttonous terms Johnson had crafted for himself. Johnson ultimately lost in the competition to take over RJR Nabisco, but not before becoming the virtual poster child for corporate greed.

The entertainment industry, too, has seen examples of opportunistic corporate giving. The legendary Steve Ross, CEO of Time-Warner, Inc. until his death in 1992, was widely known for both his personal and his corporate generosity. He often took business associates on shopping sprees, acquiring expensive pieces of jewelry.⁷³ Business gifts valued at \$50,000 or \$100,000 were not uncommon.⁷⁴ Because of Ross's wife's interest in the Dallas Museum, Warner Communications (the predecessor to Time-Warner) made a million-dollar contribution to that museum;⁷⁵ the company, under Mrs. Ross's guidance, also purchased millions of dollars worth of "corporate art."⁷⁶

Ross sometimes whipped out a company checkbook to make substantial corporate contributions, never consulting with a committee.⁷⁷ Under Ross's direction, Warner Communications lavishly supported the pet charities of its directors⁷⁸ and sometimes made six-figure gifts in their honor.⁷⁹ As in the case of RJR's Ross Johnson, Steve Ross's behavior gave rise to a remarkably supine board of directors which often failed to rein in the CEO's excesses.⁸⁰

The heavy industry sector has also seen its share of opportunistic corporate giving: The since-deposed CEO of Morrison-Knudsen Co.,

72. *See id.* at 26.

73. *See* CONNIE BRUCK, *MASTER OF THE GAME: STEVE ROSS AND THE CREATION OF TIME WARNER* 103 (1994).

74. *See id.* at 204.

75. *See id.* at 212.

76. *See id.* at 168.

77. *See id.* at 212 (recounting a \$250,000 corporate check written to a California museum representative during a casual meeting in Ross's hotel room).

78. *See id.* at 223 (detailing gifts to the New York City Opera Company at the request of board member Beverly Sills).

79. *See id.* at 232 (noting a \$500,000 gift in honor of board member Mac Schwebel).

80. According to former Senator Abraham Ribicoff, who resigned from Warner's board, the board was completely manipulated by Steve Ross. *See id.* at 234. "I have never in all my life been with a board so subservient to the chairman or the chief executive officer of any company," Ribicoff said. *Id.*

William Agee, arranged substantial cash grants from the Morrison-Knudsen Foundation to his wife's pet charity, The Nurturing Network.⁸¹ The corporation itself made substantial in-kind contributions to the pro-life organization.⁸² Furthermore, Agee spent lavishly on personal travel, amenities and a corporate headquarters-in-exile in Carmel, California because he did not care for the lifestyle or cultural offerings of Boise, Idaho.⁸³ The company ultimately entered bankruptcy.

Perhaps the most audacious of the CEOs who have recognized the value of access to corporate charitable funds was Armand Hammer of Occidental Petroleum. The executive, who insisted on being called "Doctor" Hammer,

used the company treasury for his philanthropic activities and to buy works of art for the Armand Hammer Collection. Occidental subsidized the yearly Armand Hammer Conference on Peace and Human Rights. It financed Armand Hammer Productions, which produced films and books about Hammer's global activities, particularly his role as a self-appointed ambassador to establish peaceful relations between the United States and the Soviet Union Nearly a hundred million dollars of Occidental's funds had gone into the Armand Hammer Museum of Art and Cultural Center.⁸⁴

When Armand Hammer died, his successor immediately discontinued most of Occidental's ongoing charitable projects. The market had clearly recognized that Hammer's preoccupation with these activities had checked Occidental's growth. Upon news of Hammer's death, Occidental's stock value rose nearly \$600 million overnight.⁸⁵ The era when this colorful CEO could unilaterally direct his public company's "charitable" program for his own self-aggrandizement had at last come to an end.

These five stories are not exceptional, except insofar as each emerged from aggressive and effective journalistic projects; they are, rather,

81. See Diana B. Henriques, *Ties That Bind: His Directors, Her Charity*, N.Y. TIMES, Mar. 21, 1995, at D1.

82. See *id.*

83. See Brian O'Reilly, *Agee in Exile*, FORTUNE, May 29, 1995, at 50.

84. Edward Jay Epstein, *The Last Days of Armand Hammer*, NEW YORKER, Sept. 23, 1996, at 36, 36. When an Occidental shareholder challenged the art museum expenditures, the Delaware Supreme Court upheld them as being within the bounds of the business judgment rule. See *Kahn v. Sullivan*, 594 A.2d 48, 61 (Del. 1991) (declining to upset a settlement of the case).

85. See Susan Antilla, *When a C.E.O.'s Pain Is a Gain*, N.Y. TIMES, Nov. 1, 1992, at C15.

illustrative of the dark side of executives' pet charities. When powerful chief executives, especially those with long tenure, begin to treat the corporate coffers as their own, they are very likely to damage the company, the integrity of its internal control mechanisms, and the sense of fiduciary obligation that is at the center of the CEO's institutional role.

It is rare that a CEO's charitable projects are of financial significance themselves. However, time and time again CEOs who engage in abuses of the philanthropic function also lose control over the organizations they head. What I propose here is that usurpation of the corporate giving decision-making authority may be a signal of other managerial problems that are worthy of investors' attention.

IV. WHY A CHIEF EXECUTIVE OFFICER MAY CLAIM THE CORPORATION'S POWER TO MAKE A CHARITABLE GIFT

Sociologist Joseph Galaskiewicz has identified five primary reasons why corporations engage in philanthropy: (1) philanthropy stimulates marketing; (2) philanthropy serves as a positive public relations tool; (3) philanthropy may be motivated by "enlightened self-interest" in the sense that serving community needs may result in long term loyalty by workers, consumers and others; (4) philanthropy may provide some useful tax benefits to the corporation; and (5) "company contributions [may] be made to elicit the applause and approval of business peers and local philanthropic elites."⁸⁶ It is this last motivation—clearly a self-serving one for upper level executives—that is the practical focus of this commentary.

According to Galaskiewicz, corporate charitable giving may be stimulated by peer pressure brought to bear on CEOs, and by these CEOs' logical desire to be thought of as generous by other corporate leaders:

Through the institution of peer pressure, executives learn the expectations of their peers, are solicited, and are awarded certain status benefits [for responding]. Giving is the norm in many business elite subcultures, and those who want to remain in the inner circles had best conform and make the appropriate contributions.⁸⁷

Galaskiewicz's evidence for this scenario is derived from his study of corporate charitable behavior among public companies headquartered in Minneapolis in the early 1980s. The following were among his findings:

86. Joseph Galaskiewicz, *Corporate Contributions to Charity: Nothing More than a Marketing Strategy?*, in PHILANTHROPIC GIVING: STUDIES IN VARIETIES AND GOALS 251, 252 (Richard Magat ed., 1989).

87. *Id.*

(1) “companies gave more money to charity if their officers and directors were in the networks of locally prominent business persons active in philanthropic affairs. This effect was independent of pretax earnings, percent of sales to consumers, [or] the birthplace of the CEO;”⁸⁸ (2) “companies that were better integrated into the social circles of the corporate philanthropic elite tended to give more money to charities that the elite either supported or used themselves;”⁸⁹ (3) “[e]xecutives’ social positions influenced the specific allocations that their companies made, as well as the overall amount;”⁹⁰ (4) “companies that contributed more money to charity or supported nonprofit organizations that the philanthropic elite itself patronized were recognized by more members of the corporate philanthropic elite as being very generous;”⁹¹ and (5) “companies that gave more money to charity were recognized by more members of the corporate philanthropic elite as being very successful businesses, even controlling for pretax earnings and performance ratios.”⁹²

In other words, CEOs who are generally successful in increasing their corporations’ charitable contributions, and specifically successful in directing corporate charitable contributions toward organizations whose goals are favored among their social and business peers, are perceived by those peers as being more successful *in business*, and hence more valued colleagues, than other CEOs who are less influential in stimulating corporate charitable gifts. In economic terms, stimulating corporate charitable activity enhances one’s value in the market for managerial labor.

Galaskiewicz’s findings confirm what most observers have intuitively suspected for years—that just as non-profit organizations exploit corporate executives and other wealthy members of their boards of trustees,⁹³ corporate executives and other wealthy members of non-profit boards exploit those organizations in turn. One example of this reciprocal arrangement is the exchange of honorary degrees for sizeable contributions

88. *Id.* at 253.

89. *Id.*

90. *Id.*

91. *Id.* at 254.

92. *Id.*

93. See NANCY R. LONDON, *JAPANESE CORPORATE PHILANTHROPY* 117 (1991) (“[I]n the United States it is widely acknowledged that powerful corporate executives are often invited to sit on the boards of eleemosynary institutions precisely because of their connections to sources of funds—from their own corporate till and others”); Michael Useem, *Market and Institutional Factors in Corporate Contributions*, 30 CAL. MGMT. REV. 77, 86 (1988) [hereinafter Useem, *Market and Institutional Factors*] (“Drawing on the network of mutual influence and obligation within the highest circles of corporate leadership may have become one of the most effective avenues for attracting corporate support.”).

to a college or university.⁹⁴ For every chief executive officer who receives an honorary degree, one can reasonably expect to find a compensating donation to the institution, sooner or later. Both sides benefit from this bargain—the university receives needed funds and the CEO gains in prestige.

Similar reciprocity exists in other non-profit areas. Non-profits (including colleges and universities) that are persistent enough to lure an influential CEO onto their boards can often expect some corporate support to follow. At the same time, CEOs often accept board positions strategically; they use their service on “mid-level” non-profit boards to seek “promotion” to higher-status boards.⁹⁵

Galaskiewicz’s conclusions might be discounted as focusing on too localized a giving community, Minneapolis.⁹⁶ Corporate giving today has become more decentralized than in the early 1980s and more global.⁹⁷ Nevertheless, Galaskiewicz’s conclusion that corporate chief executives may have ulterior motives for seeking to influence their company’s charitable giving practices is just as valid today as it was when his study was conducted. CEOs still get personal gratification from making visible contributions to the communities in which they live⁹⁸ and otherwise in implementing their philanthropic priorities. That successful executives like John Bryan⁹⁹ or Edwin Lupberger¹⁰⁰ can enjoy that sense of gratification,

94. See *supra* note 71 and accompanying text.

95. See John A. Byrne, *Profiting from the Nonprofits*, BUS. WK., Mar. 26, 1990, at 66.

96. Minneapolis is an especially atypical community in that the tradition of corporate generosity has been institutionalized there for many years. CEOs in Minneapolis have long been encouraged to belong to the “Five Percent Club,” and to pledge up to five percent of their companies’ pre-tax earnings to philanthropic causes. Similar traditions are not commonly found in other American headquarters cities.

97. See Judy B. Rosener, *When Philanthropy Becomes Strategic, Something’s Gotta Give*, L.A. TIMES, July 14, 1996, at D5 (noting movement of corporate charitable funds from local to national and international venues).

98. Studies have shown a significant preference for donations in the city in which the corporate headquarters is located, even where company operations are widespread. See Useem, *Market and Institutional Factors*, *supra* note 93, at 82 (“According to one study, companies give approximately \$40 per employee to nonprofits near plant locations; by contrast, they give \$200 per employee to nonprofits near headquarters.”); see also Siegfried et al., *supra* note 17, at 93 (noting that when charitable giving is controlled by the CEO or a committee of executives, the percentage of funds allocated to charities in the headquarters city is much larger than where giving is controlled by a foundation staff or by the board itself).

99. See *supra* notes 56-57 and accompanying text.

100. See *supra* notes 58-59 and accompanying text.

and at the same time become CEO role models, perpetuates the tradition of opportunistic corporate giving.

V. THREE POSSIBLE RESPONSES TO OPPORTUNISTIC CORPORATE GIVING: IGNORE IT, PROHIBIT IT, OR DISCLOSE IT

What, if anything, is to be done about the kinds of behaviors documented in this commentary? One possibility is to do nothing. Investors seem to tolerate the practice,¹⁰¹ non-profits have benefitted from it, and executives can fairly characterize the practice as an alternative (and usually insignificant) form of non-cash compensation.

At first glance, maintaining the *status quo* appears to be an entirely legitimate response to concerns about opportunistic corporate giving. As a practical matter, truly egregious abuses are uncommon and the more common forms of abuses are innocuous. Hence, one might argue, there is no need for legal or other intervention. However, as noted below, the current system can easily be improved. To this end, I support a minor amendment to the current federal disclosure requirements so as to expose to public scrutiny those corporate charitable contributions of most immediate interest to investors. In addition, in Section VII, I urge a rethinking of current corporate governance practices so as to focus energy where it is most needed: On those situations in which a CEO (or other executive) is exceeding her authority or behaving irresponsibly. Both of these suggestions involve minimal cost and disruption to the current *status quo*.

A second possible response to opportunistic corporate giving is to ban corporate charitable contributions altogether. Many critics have argued that corporations should not make charitable contributions¹⁰² or should never do so absent a clearly identifiable corporate benefit.¹⁰³ One

101. This may be a function of a collective action problem. When asked to characterize shareholder proposals related to corporate philanthropy, the SEC in recent years has treated them as matters relating to the conduct of the Company's "ordinary business operations" and has permitted corporations to withhold these proposals from consideration by shareholders. See, e.g., Minnesota Mining and Manufacturing Co., SEC No-Action Letter, Jan. 3, 1996, available in 1996 WL 4291 (SEC). Shareholders therefore have no practical means of objecting to opportunistic giving practices.

102. This position has most forcefully been argued by Milton Friedman. See MILTON FRIEDMAN, CAPITALISM AND FREEDOM 135 (1962) ("Such giving by corporations is an inappropriate use of corporate funds in a free-enterprise society.").

103. There was a time when corporate charitable contributions were thought to be *ultra vires* expenditures because they generated no benefit for the corporation. Even where permitted, these contributions were deductible only if the corporation could demonstrate a corresponding benefit flowing directly to the corporation. See *Old Mission Portland Cement Co. v. Helvering*, 293 U.S. 289, 293 (1934). The rule regarding

commentator has suggested that, rather than condemning corporate charitable contributions outright, we should instead treat them as ordinary and necessary business expenses, but only where the conditions for such treatment, including the receipt by the donor of some measurable *quid pro quo*, are met.¹⁰⁴

The abolitionist position has the advantage of being relatively easy to administer. It overlooks, however, the real social value of many "true" corporate charitable contributions—those that cannot be disguised as a cause-related marketing project or those that have no direct impact on employee well-being or local good will. Prohibiting such charitable contributions altogether would have a grievously harmful effect on many valuable projects such as the funding of educational programs away from the headquarters city, or the support of important but controversial programs such as those associated with AIDS or family planning. In the absence of any foreseeable source of replacement funds for these groups, the abolitionist position is undesirable and, for most Americans, indefensible.

A more limited abolitionist position—one that would permit corporate charitable gifts generally but would prohibit certain opportunistic corporate gifts—might provide a more palatable option. The problem with outlawing a class of corporate gifts based on the motivations behind them, however, is one of definition. How would opportunistic corporate gifts be distinguished from similar, though "untainted" and therefore acceptable, corporate gifts?¹⁰⁵

One possibility—a bright line rule—would prohibit charitable gifts from a corporation where an executive officer of the corporation¹⁰⁶ (or

deductibility was changed with passage of the 1935 Revenue Act, which authorized corporate charitable deductions up to five percent (now ten percent) of pre-tax earnings, without regard to any corporate benefit. See Revenue Act of 1935, Pub. L. No. 74-407, 49 Stat. 1014.

104. See Nancy J. Knauer, *The Paradox of Corporate Giving: Tax Expenditures, the Nature of the Corporation, and the Social Construction of Charity*, 44 DEPAUL L. REV. 1, 10, 41-42 (1994) (advocating this approach).

105. This question suggests that every corporate gift would have to fall into one or the other category, which of course will not always be true. Many charitable gifts derive from both a "true" philanthropic motivation and some other, more self-serving one. See *United States v. American Bar Endowment*, 477 U.S. 105, 117 (1986) (discussing charitable contributions that have a "dual character").

106. Cf. 17 C.F.R. § 240.3b-7 (1991) (defining "executive officer" to include the president, any vice president, or any other officer who performs a policy making function or any other person who performs similar policy making functions for the registrant).

members of the executive's immediate family)¹⁰⁷ simultaneously sits on the board of the non-profit recipient. A more encompassing alternative to this simple "interlocking directorate" test would be to prohibit charitable gifts from a corporation where the charitable decision-maker has a demonstrable conflict of interest.¹⁰⁸

The problems with prohibitions of this sort are obvious: (1) effective prohibition of opportunistic corporate contributions would require legislation in all fifty states; such a campaign would be both costly, time-consuming and unlikely of success; (2) the process of defining the disqualifying conflicts of interest, though manageable, would consume many lobbying and legislative resources; (3) any such prohibition would inevitably give rise to evasive corporate behavior, including widespread resignations of corporate executives from non-profit boards. This course of action would do little to eliminate opportunistic corporate giving; it would instead simply injure the non-profit recipients. Alternative responses, such as "I'll make your contribution you make mine" arrangements among corporate executives in different firms, would offer little improvement over the current state of affairs.

In the end, any blanket prohibition (even of opportunistic corporate gifts, however defined) seems both impractical and undesirable.¹⁰⁹ Professor Kahn's proposal—that corporate charitable gifts be disclosed in public companies' annual filings¹¹⁰—makes far more sense. Disclosure is less likely than some form of prohibition to dry up legitimate corporate giving. It also has the advantage of being easier to implement, given that it would be imposed on public companies only and on a national, rather than a state by state, basis.

The nature and detail of the required disclosure will be an important factor in considering how the "sunshine" regime might best inhibit opportunistic corporate giving. An easily translatable model is the disclosure requirement now applicable to commercial conflicts of interest.

107. Cf. 17 C.F.R. 240.16a-1(e) (1991) (defining "immediate family" to include any child, stepchild, grandchild, parent, stepparent, grandparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, and including adoptive relationships).

108. Cf. REVISED MODEL BUS. CORP. ACT § 8.60 (1994) (defining "conflicting interest" to include those transactions in which an executive "is so closely linked to" the contracting party that the relationship would reasonably be expected to influence the executive's decision as to whether to authorize the transaction).

109. Corporate law has long recognized that not all managerial conflicts of interests are inappropriate. In the context of self-interested business transactions, both courts and legislatures have afforded wide leeway to corporate boards to determine when a particular transaction is desirable or undesirable.

110. See Kahn, *supra* note 9 and accompanying text.

Under the federal proxy rules, public companies must disclose all commercial transactions in which a director or executive officer, or members of their families, have a direct or indirect material interest and in which the amount in issue is at least \$60,000.¹¹¹ At a minimum, the definition of "transaction" in this context could easily be clarified to include corporate charitable contributions. If no other disclosures regarding corporate giving were compelled by federal law, this change alone would materially advance the interest of shareholders in monitoring opportunistic gifts.

VI. A PAIR OF ADDITIONAL POSSIBLE RESPONSES:
TREAT A CORPORATION'S "PET CHARITY" CONTRIBUTIONS AS INCOME
TAXABLE TO THE CEO OR DISALLOW THE CORPORATE DEDUCTION

Both the Tax Court and the Internal Revenue Service have taken the position that unless a corporate charitable contribution confers some measurable "economic benefit" on a corporate executive, it need not be treated as a constructive dividend¹¹² or otherwise as compensation to the executive.¹¹³ A better approach might be to recognize that there *is* some economic benefit that accrues to those who control corporate charitable contributions. The value of that benefit could be taxed to them individually.

A simple way to do this would be to treat an opportunistic corporate charitable contribution as cash compensation to the executive, followed by

111. See 17 C.F.R. § 229.404(a) (1994) (Regulation S-K, Item 404).

112. See *Knott v. Commissioner*, 67 T.C. 681 (1977) (explaining that where controlling shareholders directed that a corporate gift be made to one of their favored charities, but "did not receive property or other benefits" as a result of the gift, the amount of the gift was deductible to the corporation and not treated as dividend income to the shareholder); Rev. Rul. 79-9, 1979-1 C.B. 125 (acquiescing in *Knott* and revoking prior rulings to the effect that a charitable contribution by a closely-held corporation will be treated as a constructive dividend to the controlling shareholder(s) if the contribution serves only the personal interests of the shareholder(s)).

113. Similarly, when rank-and-file employees have been called upon merely to designate a charitable beneficiary, without receiving any personal benefit, they have not been treated as having received gross income in the amount of the corporation's charitable contributions in their names. See Gen. Couns. Mem. 1992 LEXIS 39877, at *26; see also Rev. Rul. 67-137, 1967-1 C.B. 63 (stating that where employees designate a charity, the corporation's gift paid directly to that charity will not be treated as compensation to the employee).

a personal charitable contribution made by her.¹¹⁴ Typically, these two payments would offset each other on the taxpayer's return but under some circumstances (for example, where the contribution exceeds fifty percent of the taxpayer's adjusted gross income)¹¹⁵ that would not be the case.¹¹⁶

There are some obvious pitfalls in this scheme—the first is the (largely hypothetical) risk that a corporation would use this approach as a means of circumventing the Internal Revenue Code's cap on the amount of charitable contributions that a corporation may deduct.¹¹⁷ More significantly, the same definitional problems relating to the prohibition of opportunistic corporate gifts described above would also apply to the characterization of corporate gifts for purposes of individual taxation. That is, which corporate charitable contributions would be treated as compensation to an executive and which as “real” corporate philanthropy? This problem might be solved as a matter of draftsmanship, but implementation of such a scheme would be problematic. A bright-line rule inclusive of family members' charitable activities would invade the family's privacy at a level likely to be unacceptable to most corporate executives. A more expansive definition of the triggering relationship between an executive and a charity would present even greater problems. In either case, such a definition would put lower-level corporate employees into an extremely difficult position. They could ignore the triggering relationship and hope the company does not get audited, or they could

114. A more radical way to treat opportunistic corporate charitable contributions might be to attach some economic value to the “psychic” or “status” rewards enjoyed by the corporate executive who authorizes corporate charitable contributions, and impute *that value only* to her as compensation. This approach, not surprisingly, would present a number of problems. Just how would one distinguish those benefits that would trigger imputation (e.g., an improved position in the business leaders' network; an enhanced likelihood that the CEO will come to the attention of executive recruiters) from those benefits that fall short of the necessary threshold (e.g., profound satisfaction at having helped a local art museum reach its fund-raising goal; a sense of religious fulfillment in seeing medical supplies delivered to third world countries)? Who in the corporate hierarchy would decide? And how would value be determined? The problems of enforcement under this scheme would be insurmountable.

115. See I.R.C. § 170(d) (1994) (limiting an individual's charitable deduction to 50% of adjusted gross income in a single tax year).

116. There could also be a problem if the value of the contribution, taken together with other forms of compensation, put the executive over the \$1 million “cap” for allowable executive compensation. See I.R.C. § 162(m) (1994). As Linda Sugin points out, treating corporate contributions as individual contributions “would likely produce some tax burden for managers.” Linda Sugin, *Theories of the Corporation and the Tax Treatment of Corporate Philanthropy*, 41 N.Y.L. SCH. L. REV. 835, 871-72 (1997).

117. This risk is hypothetical because so few corporations, and virtually no publicly-held corporations, ever get close to the 10% cap on charitable giving.

insist that the gift be treated as compensation to the boss. Neither option is attractive; trying to sort out the "mixed motive" cases would be even more impossible.

Rather than treating opportunistic corporate charitable contributions as compensation to the decision-maker, one might consider an alternative tax-based approach. A corporation could be denied a charitable deduction where the decision-maker authorizing the contribution anticipates some personal benefit from the gift.¹¹⁸ Under current law, corporate charitable contributions that confer *incidental* benefits on the corporation, its executives, or others, do not lose their characterization as a charitable contribution under the Internal Revenue Code.¹¹⁹ An exception to this rule could be made for opportunistic corporate contributions.

Any scheme that would deny a deduction at the corporate level for contributions made to an executive's pet charity would generate problems similar to those we have already explored. A bright line test might be devised to exclude those contributions to organizations on whose board the CEO (or her spouse) serves actively. A regulation might more broadly attempt to define and identify "conflict of interest" contributions.¹²⁰ Either way, the result would be wholesale resignations by corporate executives from non-profit boards. Many opportunistic gifts would still be made; the only difference would be a significant loss of leadership in the non-profit sector.

In the end, using the federal income tax system as a vehicle to discourage opportunistic corporate giving would inevitably create more

118. This treatment would be consistent with the rule that a charitable deduction is unavailable under Section 170, where the donor expects some *quid pro quo* for her contribution, even where the expected return is intangible or even spiritual. See Knauer, *supra* note 104, at 36, 39 (citing *Hernandez v. Commissioner*, 490 U.S. 680 (1989) (holding that a donor may not claim a deduction under § 170 where the donee (Church of Scientology) is expected to provide religious instruction in exchange for the gift)).

119. See Rev. Rul. 67-144, 1967-2 C.B. 119 (although retailers would receive an incidental benefit from charitable fund's efforts to remove ugly railroad facilities from the downtown area, their contributions to the fund were nevertheless deductible as a charitable contribution under § 170); see also Kenneth J. Yerkes, Note, *Corporate Charitable Contributions: Expanding the Judicial Analysis in a Post-Economic Recovery Act World*, 58 IND. L.J. 161, 181-82 (1982).

As long as a corporation or other transferring business entity does not receive a benefit commensurate with the value of the interest transferred and the general public is sufficiently benefited, there is no statutory or policy justification for denying a claimed charitable deduction. The state of mind or purpose behind the corporate decision to make the transfer is not relevant to the analysis.

Id.

120. See *supra* notes 104-108 and accompanying text.

problems than it would solve. A preferable alternative would be for boards of directors to monitor charitable giving practices—including the identity of individual recipients and the decision-makers who have selected them—in the same way they currently monitor other conflict-of-interest transactions. This would put oversight of opportunistic giving where it belongs—not in the hands of the SEC or the Internal Revenue Service but in the hands of those representing shareholders' interests.

VII. RAISE PHILANTHROPY TO A BOARD-LEVEL AGENDA ITEM

As I have suggested elsewhere,¹²¹ directors ought to include in their annual agendas a systematic periodic review of corporate charitable giving practices. Only a handful of corporations today set aside time, or appoint a committee, for this purpose.¹²²

There are several reasons why corporate philanthropy, among the hundreds of issues that might occupy the board's attention, is worthy of regular, board-level review. First, of course, is the inherently public nature of philanthropy—under state law in particular, non-profit organizations are held to high standards of public accountability and are consequently often the subject of critical, indeed, sanctimonious, press scrutiny.¹²³ Second, corporate philanthropy often implicates controversial

121. See Jayne W. Barnard, *Sovereign Prerogatives*, 21 J. CORP. L. 307, 319-20 (1996).

122. See KORN FERRY INTERNATIONAL, 23RD ANNUAL BOARD OF DIRECTORS STUDY 14 (1996) (noting that only 19% of surveyed companies have a standing board committee on corporate responsibility). Some corporations *do* elevate decisions relating to charitable contributions to the board level. For example, in resisting inclusion of a shareholder proposal regarding establishment of a scholarship fund in its 1993 proxy, NBB Bancorp., Inc. described the oversight role of a special committee of its board as follows:

A special committee of the Directors of the Corporation reviews the hundreds of requests for donations that are received each year and determines which of them meet the Corporation's established criteria. The approved requests are funded from a donation budget, which is based upon a percentage of estimated net income. A great amount of management and staff time is spent organizing the material to be presented at the special committee meetings. All requests are answered, whether approved or rejected.

NBB Bancorp Inc., SEC No-Action Letter, Feb. 25, 1993, available in 1993 WL 52189.

123. See Nancy R. Axelrod, *Behind the Board Room Doors: The Actions of Nonprofit Boards Are Increasingly Likely to be Held Up to Public Scrutiny*, WASH. POST, Mar. 30, 1995, at A27 (describing the intense press coverage of problems at blue-chip national charitable organizations including the United Way of America and the NAACP).

social issues,¹²⁴ invites criticism of the suitability of the donor,¹²⁵ and, where executives' involvement in a charity is deep, may give rise to embarrassing claims of management incompetence.¹²⁶ In any of these events, corporate charitable practices may (at best) become a lightning rod for unflattering press attention or (at worst) become items of concern to short sellers and institutional investors.

There are other reasons why a corporation's charitable giving program is an appropriate subject for the board's attention: (1) even moderate abuse of the charitable prerogative may give rise to corrosive employee disrespect for the CEO; and (2) excessive abuse of the corporate philanthropic function may serve as a distant early warning signal of other forms of management misconduct.¹²⁷

Still, does it make sense to require corporate directors to regularly review the details of a corporation's giving plan? In a universe of competing demands on directors, one must make a strong case for adding an additional, often financially immaterial, item to the list of issues they must regularly consider. The current wisdom is that directors should address themselves to just five thematic issues: (1) evaluation of the CEO and executive succession options; (2) approval of overall financial objectives; (3) general oversight of ongoing operations; (4) board succession; and (5) a "systems audit" function.¹²⁸

What may not be obvious from this list is the need to attend to several other areas that inevitably give rise to executive conflicts of interest: conflicting interest transactions themselves,¹²⁹ executive compensation issues, and corporate opportunities as they arise. In addition, boards need

124. A widely discussed example of controversial charitable activities centers on the abortion services provided by Planned Parenthood. Though abortion services represent only a small portion of the organization's total budget, Planned Parenthood has become a lightning rod for abortion opponents. One feature of the pro-life movement includes consumer boycotts against companies that have made charitable contributions to Planned Parenthood. See Richard Gibson, *Boycott Drive Against Pioneer Hi-Bred Shows Perils of Corporate Philanthropy*, WALL ST. J., June 10, 1992, at B1 (detailing company's decision to discontinue gifts to rural family planning clinics).

125. See Mervyn Rothstein, *Uneasy Partners: Arts and Philip Morris*, N.Y. TIMES, Dec. 18, 1990, at C15 (examining proposals that arts organizations refuse tobacco sponsorships).

126. See Axelrod, *supra* note 123 (noting criticisms of the boards of the United Way and the NAACP for failing, in each case, to effectively monitor those organizations' chief executives).

127. See, e.g., *supra* notes 61-65, 81-85.

128. THE BUSINESS ROUNDTABLE, CORPORATE GOVERNANCE AND AMERICAN COMPETITIVENESS 7 (1990).

129. See REVISED MODEL BUS. CORP. ACT § 8.60 (1994).

to attend periodically to other, facially neutral matters such as customer entertainment practices¹³⁰ or headquarters siting decisions¹³¹ that can give rise to appearances of impropriety, lead to adverse media attention, and may ultimately undermine investor confidence in management.

A. *Boards Need to Monitor Those Activities
Singularly Prone to Executive Opportunism*

Agency theory posits that boards of directors are uniquely situated in public companies to monitor and control the opportunistic behavior of incumbent management.¹³² Opportunistic behavior may manifest itself with respect to such issues as managerial compensation, perquisites, investment in unprofitable projects and excessive use of free cash flow.¹³³ In light of the personal advantages that may accrue to executives who authorize corporate charitable contributions, opportunism may also be evident when decisions are being made about the size of those contributions and the identity of the recipients.¹³⁴ This is where the board of directors, and especially outside directors, have an important moderating role to play.¹³⁵

A fair question to be raised at this point is whether the time devoted to reviewing charitable activities would be repaid by information that is useful to the board in other contexts. One of the reasons opportunistic

130. See Mark Maremont, *Abuse of Power*, BUS. WK., May 13, 1996, at 86 (describing the presence of prostitutes, abuse of alcohol and harassment of women employees at Astra USA sales functions).

131. See Alan R. Myerson, *Follow the Leader*, N.Y. TIMES, Oct. 13, 1995, at D1 (describing a number of companies whose CEOs have orchestrated a relocation of the corporate headquarters to be near to their home or favorite sporting site).

132. See Eugene F. Fama & Michael C. Jensen, *Agency Problems and Residual Claims*, 26 J.L. & ECON. 327 (1983); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301 (1983); Michael C. Jensen & W. H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Cost and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

133. See Michael C. Jensen, *Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers*, 76 AM. ECON. REV. 323 (1986).

134. See Jia Wang & Betty S. Coffey, *Board Composition and Corporate Philanthropy*, 11 J. BUS. ETHICS 771, 773 (1992) ("Corporate philanthropy is an issue about which principals and agents are likely to have conflicting views.").

135. Studies have shown that a company whose board is controlled by outsiders is less likely to make charitable contributions than one whose board has a lower proportion of outsiders. See *id.* at 775. Similarly, a company with a strong (more than five percent) non-executive owner gives less to charities than a company with widely-dispersed ownership. See Lisa Atkinson & Joseph Galaskiewicz, *Stock Ownership and Company Contributions to Charity*, 33 ADMIN. SCI. Q. 82, 93 (1988).

giving has flourished is presumably because boards of directors have believed that monitoring costs were excessive and that the issue of corporate philanthropy was unworthy of their regular attention.¹³⁶ Another reason, unfortunately, may be that outside directors have often been co-opted in the guise of corporate philanthropy and may have their own conflicts of interest. Donations in their names to special charities are a common perquisite of board service.¹³⁷ The rise of "charitable awards programs," in which corporations purchase substantial life insurance policies on the lives of their directors, payable to the director's chosen charity upon death,¹³⁸ makes it all the more uncomfortable for directors to challenge other forms of philanthropic behavior, and all the more unlikely they will do so.

In many cases, I must concede, an exacting review of a company's charitable giving activities will not reveal any information that is likely to be transportable to the overall assessment of management's performance. Excesses in philanthropy are seldom as useful an indicator of managerial profligacy as are, say, the purchase of a fleet of corporate vanity jets or the existence of low interest loans to insiders.¹³⁹ Nevertheless, a board level review of corporate philanthropy may have a positive spillover effect: just as bank regulators have found that some managerial behaviors are more effective signals of future bank failures than others,¹⁴⁰ investigators with decent data would likely conclude that opportunistic corporate philanthropy is a more effective signal of future corporate distress than many other executive behaviors. I cannot prove this relationship, but reason and real world observation suggests that often, opportunistic corporate giving is but one of many symptoms of what some have called "CEO disease,"¹⁴¹ and what all have observed as the perilous situation when a CEO becomes unable to distinguish between his own priorities and those of the corporation he heads. Time after time, this loss of boundaries

136. See James R. Boatsman & Sanjay Gupta, *Taxes and Corporate Charity: Empirical Evidence from Micro-level Panel Data*, 49 NAT'L TAX J. 193, 209 (1996).

137. See *supra* notes 67-68 and accompanying text.

138. See Dana Wechsler Linden & Robert Lenzner, *The Cosseted Director*, FORBES, May 22, 1995, at 168 (describing such programs). Typically the policies are for \$1 million. One financial advisory firm says it is now doing new charity plans for directors at the rate of one every two weeks. See *id.*

139. See Jayne W. Barnard, *Corporate Loans to Directors and Officers: Every Business Now a Bank?*, 1988 WIS. L. REV. 237 (1988).

140. See John P. Forde, *Study Shows Insider Loans May Signal Failure - Research Finds Many Loans to Bank Officials Portend Trouble*, AM. BANKER, July 9, 1987, at 3 (describing study suggesting that one-third of bank failures involve insider lending abuse).

141. John A. Byrne, *CEO Disease*, BUS. WK., Apr. 1, 1991, at 52.

and the sense that "I am the company and the company is me" is a chilling precursor of later corporate ruin.

B. *The Need for a Corporate Giving Policy that Clearly Articulates the Corporation's Objectives*

A board of directors can oversee corporate giving without micromanaging it. The steps involved in this process are simple: (1) ascertain that there is a rational giving plan in place; (2) confirm that the plan is being followed; and (3) ensure that the CEO is not interfering with, or substituting her judgment for, the plan that has been established and approved by the board. Using this approach, the board might also give the CEO some discretionary funds earmarked for use in rewarding her "pet charities." These funds, however, would be considered as part of the CEO's overall compensation package.¹⁴²

There are a number of specific ways in which corporate boards might oversee the charitable giving program. One way to approach this task might be to require that corporate giving executives articulate a medium to long-term "philanthropic contributions plan" in the same way, and with the same degree of specificity, that individual business units do. *At a minimum, boards ought to insist that management develop guidelines for charitable giving that are as subject to internal audit as all other corporate policies.* A more exacting approach would be to require management to identify and quantify the specific benefit(s) which they predict will accrue from the corporation's anticipated charitable contributions, and then weigh the results against those predictions, as part of the overall management assessment.

Regardless of the board's approach, however, a company's directors should be aware of the corporation's charitable objectives and have some means of measuring how well the company is meeting its charitable goals. More importantly, the board should have a strong sense of the role that the CEO is playing in setting the giving strategy and determining the identity of charitable recipients.

VIII. CONCLUSION

Whether one approaches the issue of corporate philanthropy from a traditional or a communitarian perspective, the current state of the law and practice of corporate philanthropy is unsettling. As a practical matter, corporate charitable gifts may be made without any regard to their impact on shareholder wealth, thus calling into question traditional corporate law

142. How these funds would be treated for tax purposes would be a separate issue, presumably not within the purview of the board.

norms;¹⁴³ at the same time, corporate charitable gifts need not be animated by any real corporate commitment to social betterment or shared community values, thus undermining and trivializing emerging communitarian theories about the essentially public nature of the corporation.¹⁴⁴

One need not commit, moreover, to either the traditional or the communitarian view of the corporation to recognize that a regime that permits unfettered CEO interference in corporate philanthropic activities is not a healthy one for the long-term integrity of the corporation. Permitting corporate executives to impose their personal values or status aspirations on the process of corporate giving is inconsistent with sound corporate governance practices and may ultimately be harmful to investors.

In this commentary, I have proposed that corporate boards of directors become more involved in, or at least more aware of, the philanthropic activities of the companies on whose boards they sit. This proposal does not require legislative enactment, the imprimatur of the American Law Institute, or even the wake-up call of a Delaware Supreme Court decision.¹⁴⁵ It does require a determination by individual directors that there is a limit to the degree to which they should indulge the company's top executives; that charitable expenditures, like other expenditures that may be colored by self-interest, are an essential subject for the board's attention; and that—whether or not self-interest is found—oversight of the corporate charitable function is a valuable use of their limited time.

143. As one commentator has pointed out, under existing law, virtually "any gift" to a bona fide charity can withstand the claims of shareholders that it represented corporate waste. See Shelby D. Green, *Corporate Philanthropy and the Business Benefit: The Need for Clarity*, 20 GOLDEN GATE U. L. REV. 239, 254 (1990).

144. See generally, Lawrence E. Mitchell, PROGRESSIVE CORPORATE LAW xiii (1995) ("It is time that the corporation be recognized as what it is: a public institution with public obligations.").

145. See *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985) (announcing new standards for boards of directors when approached with an acquisition offer).