

# Ripping Up the Astroturf: Regulating Deceptive Corporate Advertising Methods

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*ABSTRACT: Astroturfing is a practice in which a corporate sponsor pays a non-profit front group or public relations firm to disseminate a manufactured message to create the illusion of grassroots advocacy in support of a particular cause or for the company itself. This Note provides necessary background information, examples, and methods by which a manufactured message is dispersed to simultaneously mislead the public and lobby for support. This Note goes on to present the problems with the current regulatory and legislative frameworks, by referencing the Uniform Deceptive Trade Practice Act (“UDTPA”), the Federal Trade Commission’s disclosure guidelines, and the Securities and Exchange Commission’s mandatory disclosures for publicly traded companies. In conclusion, this Note argues that the State governments and Federal Agencies have the capability to update the laws and regulations surrounding the astroturfing problem, and that the states should amend the UDTPA to include astroturfing as a deceptive practice and require disclosure of associations between companies and front groups that disseminate manufactured messages. Alternatively, this Note argues that Congress should pass a law requiring public disclosure of these associations to allow consumers and investors alike to inform themselves of these practices and respond accordingly—thus allowing the market to self-correct.*

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## I. INTRODUCTION

In recent years, the Supreme Court's decision to grant First Amendment speech protections has garnered significant attention.<sup>1</sup> *Citizens United v. Federal Election Commission* opened the floodgates for “dark money” to flow through elections and campaigns in the United States.<sup>2</sup> But an analogous issue—one that affects the average person more directly—has largely been ignored. Astroturfing is a practice in which corporate sponsor employs a public relations firm, or maintains a non-profit front group, to serve as its voice while the company remains anonymous.<sup>3</sup> This front organization projects an image of public support for a social cause or for the business itself, when in reality, there is minimal public support. The hope is that the front group can convince enough people that widespread public support exists, and those people will then support the cause in the best interests of the hidden

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1. See generally *Citizens United v. FEC*, 558 U.S. 310 (2010) (granting corporations First Amendment protections); Mimi Marziani, *Growing Backlash Against 'Citizens United,'* NAT'L L.J. (Jan. 23, 2012, 12:00 AM), [https://www.law.com/nationallawjournal/almID/1202539063421&Growing\\_backlash\\_against\\_Citizens\\_United](https://www.law.com/nationallawjournal/almID/1202539063421&Growing_backlash_against_Citizens_United) [<https://perma.cc/GWF6-H5HT>].

2. Michael Beckel, *What is Political 'Dark Money'—And is it Bad?*, CTR. FOR PUB. INTEGRITY (Jan. 20, 2016), <https://www.publicintegrity.org/2016/01/20/19156/what-political-dark-money-and-it-bad> [<https://perma.cc/T4VH-YQL7>].

3. See *infra* Section II.C.

sponsor. Individuals continue to support companies that employ deceptive tactics to serve their interests, while citizens remain unaware.

This information deficit between individuals and the actual facts makes it difficult, if not impossible, for individuals to access the information necessary to make informed decisions. As individuals increasingly care about the social impact companies have on the world,<sup>4</sup> they are often not provided with sufficient information about what their money actually supports. The Federal Trade Commission (“FTC”) and the Securities and Exchange Commission (“SEC”) were created to protect consumers and investors, respectively.<sup>5</sup> Under the current regulatory regime, neither consumers nor investors are able to access adequate information to inform their monetary decisions.

This Note argues that these agencies, along with the states, have the tools available to combat astroturfing without banning corporate speech. Part II of this Note examines the history of grassroots movements, the adaptation of grassroots to the corporate astroturf context, and provides examples of the astroturf practices. Part III argues that the current regulations are not all-encompassing enough to ban, or even limit astroturfing practices and thus, fail to protect consumers and investors alike. Lastly, Part IV proposes a solution for both consumers and shareholders. For consumers, the states should recognize the FTC’s policies surrounding disclosure, and effectuate them by universally adopting and amending the Uniform Deceptive Trade Practices Act to cover astroturfing. For shareholders, the SEC should modernize its disclosure policies to reflect the growing influence of socially responsible investing. Alternatively, Congress should pass legislation regarding mandatory public disclosure for businesses generally, in effect allowing citizens to structure their behavior regarding practices that they might find objectionable.

## II. THE EVOLUTION OF GRASSROOTS AND THE EMERGENCE OF ASTROTURFING

This Part outlines the definition of a grassroots movement, provides a historical example, and juxtaposes traditional grassroots movements with modern astroturfing practices. It then defines astroturfing, outlining methods by which corporations attempt to achieve success by using the practice, and provides a historical example of corporate astroturfing. The Part concludes by discussing past attempts to regulate the practice and the associated complications involved with regulation.

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4. Libby MacCarthy, *New Report Reveals 86% of US Consumers Expect Companies to Act on Social, Environmental Issues*, SUSTAINABLE BRANDS (May 18, 2017, 10:00 AM), [https://www.sustainablebrands.com/news\\_and\\_views/marketing\\_comms/libby\\_maccarthy/new\\_report\\_reveals\\_86\\_americans\\_expect\\_companies\\_take](https://www.sustainablebrands.com/news_and_views/marketing_comms/libby_maccarthy/new_report_reveals_86_americans_expect_companies_take) [https://perma.cc/D4GY-M9AT].

5. See *infra* notes 94, 118 and accompanying text.

### A. CORPORATE AND CITIZEN INFLUENCE IN SOCIETY

Over the last few decades, corporations have become powerhouses of influence.<sup>6</sup> Similarly, citizen groups continue to play a major role in influencing other citizens and society as a whole.<sup>7</sup> The difference between the two types of group influence is that corporations often face issues in advancing their interests due to a credibility barrier.<sup>8</sup> It follows that corporations have an interest in emulating the power present in citizen groups to represent their own interests and to influence other citizens. This has led to a modern form of corporate advocacy, commonly known as “astroturfing.” Before delving into the specifics surrounding astroturfing practices, it is necessary to juxtapose traditional grassroots practices with modern corporate astroturfing practices.<sup>9</sup>

### B. GRASSROOTS ADVOCACY AND CHANGE THROUGHOUT HISTORY

Grassroots activism is a movement that “starts at the roots of the problem and develops to involve all applicable parties.”<sup>10</sup> The grassroots movement continues by mobilizing all interested parties, typically citizens, “and harnessing the power of their convictions to push for a different outcome.”<sup>11</sup> In other words, the citizen group identifies a problem, defines a solution, and rallies popular support for reform by engaging other citizens. From there, the

6. See Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, ATLANTIC (Apr. 20, 2015), <https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822> [<https://perma.cc/M7D5-CHNP>] (discussing the increasing role of corporate power, influence, and lobbying throughout the last few decades).

7. See *infra* Section II.B (discussing the role of grassroots organizations in history); see also *Communicating with Congress—Perceptions of Citizen Advocacy on Capital Hill*, CONG. MGMT. FOUND. (2011), [http://www.congressfoundation.org/storage/documents/CMF\\_Pubs/cwc-perceptions-of-citizen-advocacy.pdf](http://www.congressfoundation.org/storage/documents/CMF_Pubs/cwc-perceptions-of-citizen-advocacy.pdf) [<https://perma.cc/D4FY-ZNK3>] (discussing the high impact that constituent conversations have on legislator decisions).

8. See Walter Frick, *The Conundrum of Corporate Power*, HARV. BUS. REV. (May–June 2018), <https://hbr.org/2018/05/the-conundrum-of-corporate-power> [<https://perma.cc/FZB6-KQWX>] (discussing the fact that while big business influence has increased over time, “the public trusts them less: Roughly 40% of Americans say they have little or no confidence in big business, up from just 24% in 1985”); see also Matthew Harrington, *Survey: People’s Trust Has Declined in Business, Media, Government, and NGOs*, HARV. BUS. REV. (Jan. 16, 2017), <https://hbr.org/2017/01/survey-peoples-trust-has-declined-in-business-media-government-and-ngos> [<https://perma.cc/UJ3H-SZK5>] (“Just 52% of respondents to our survey said they trust business to do what is right. In 13 out of 28 countries, business was distrusted and respondents were eager for greater business reform . . .”).

9. Section II.B discusses the history and form of grassroots movements, while Section II.C discusses astroturfing practices.

10. Brent Willis, *What Is a Grassroots Advocacy Campaign?*, VOTILITY (Dec. 11, 2012, 8:07 AM), <https://web.archive.org/web/20130112082604/http://www.votility.com/blog/bid/247100/What-is-a-Grassroots-Advocacy-Campaign> [<https://perma.cc/PZ9R-UHVK>].

11. JoJo Swords, *Grassroots Activism: Make That Change*, THOUGHTWORKS (Nov. 16, 2017), <https://www.thoughtworks.com/insights/blog/grassroots-activism-make-change> [<https://perma.cc/C4NC-D26M>].

movement's power and influence flows upward to legislators, often times leading to the meaningful change sought by the group.<sup>12</sup> Throughout history, grassroots movements have been a prevalent force in bringing about meaningful change.

For example, consider the women's suffrage movement. Prior to the ratification of the Nineteenth Amendment, women in the United States did not have the right to vote.<sup>13</sup> The inability to vote presented a vicious cycle—women did not have the right to vote and their representatives did not have any interest in granting women this right. Therefore, women had no way to effectuate change in the political system. The activists addressed this problem by organizing and mobilizing support at the grassroots level. From the Seneca Falls Convention<sup>14</sup> to the creation of the National Suffrage Groups such as the National Women's Suffrage Association, groups organized and advocated for the right to vote.<sup>15</sup> Outside of the national organizations, "[m]ost work was done at the grass-roots level, with women holding luncheons, lectures, and letter-writing campaigns and traveling to state capitals to make their case."<sup>16</sup> By 1920, the efforts paid off and Congress ratified the Nineteenth Amendment, granting women the right to vote.<sup>17</sup>

The women's suffrage movement embodies the goals of grassroots activism. The core of the problem was the political system's failure to recognize women's equality. As a result of the efforts of leaders and citizen activists alike, women organized on both the national and local level. From there, the grassroots activists defined the solution, rallied support from other citizens, and after a long struggle, were able to make meaningful change in

12. See Joshua Habursky & Mike Fulton, *The Future of Politics is Grassroots*, HILL (Mar. 12, 2017, 7:20 AM), <https://thehill.com/blogs/pundits-blog/campaign/323480-the-future-of-politics-is-grassroots> [<https://perma.cc/S9KJ-42ST>].

Grassroots advocacy itself has the power to sway hearts and minds of elected officials, regulators and the media, tapping into public sentiment to feed itself and refresh its ranks with new activists that are unafraid to participate and anxious to contribute both in time and treasure to a cause in which they believe.

*Id.*

13. See generally *Women's Suffrage*, HIST., <https://www.history.com/topics/womens-history/the-fight-for-womens-suffrage> [<https://perma.cc/6QJE-F6TZ>] (last updated Aug. 19, 2019) (describing the timeline of the women's suffrage movement).

14. See generally *Seneca Falls Convention*, HIST., <https://www.history.com/topics/womens-rights/seneca-falls-convention> [<https://perma.cc/5ACU-SWCZ>] (last updated Aug. 21, 2018) (discussing the 1848 Seneca Falls Convention, where activists gathered to protest the unequal treatment of women in society).

15. See generally *19th Amendment*, HIST., <https://www.history.com/topics/womens-history/19th-amendment-1> [<https://perma.cc/LT92-D667>] (last updated Apr. 15, 2019) (discussing the history of the Nineteenth Amendment).

16. Jennifer Bortel, *The Women's Rebellion: A Story of Suffrage in 1909*, SATURDAY EVENING POST (Mar. 8, 2017), <http://www.saturdayeveningpost.com/2017/03/08/archives/historical-retrospectives/womans-rebellion-story-suffrage-1909.html> [<https://perma.cc/X373-5Z8F>].

17. U.S. CONST. amend. XIX.

the form of voting rights. Grassroots activism presents a powerful method of engaging citizens, harnessing collective power, and making change in the world.

### C. ASTROTURFING AND CORPORATE MANIPULATION

Many groups recognize the potential power in citizen activism through grassroots organizations. But not every cause has a sustaining level of popular support or the ability to engage citizens in a meaningful way. In contrast to grassroots activism, “astroturfing” seeks to harness the success of citizen-advocacy, while utilizing few of the traditional methods of organization. “Astroturfing is the attempt to create an impression of widespread grassroots support for a policy, individual, or product, where little such support exists.”<sup>18</sup>

The term is a play on words—while grassroots in nature are real and naturally occurring, astroturf presents an image of real grass, but it is artificial. Where grassroots movements harness real community activism, astroturfing attempts to present an image of widespread community support.<sup>19</sup> Former Texas Senator Lloyd Bentsen was one of the early adopters of the term, “who used it to describe the ‘mountain of cards and letters’ he [received] promoting what he saw as the interests of insurance companies.”<sup>20</sup> Senator Bentsen went on to state: “A fellow from Texas can tell the difference between grass roots and Astroturf . . . this is generated mail.”<sup>21</sup> The key difference between astroturfing and grassroots movements is the use of deception as a tool.<sup>22</sup> Rather than engaging groups, the corporation can simulate the appearance of support in an attempt to create more support for its position.

#### 1. Public Relations Firms and Front Groups

Corporations, like individuals, have interests that they would ideally pursue to achieve favorable outcomes, but consumer interests are not always aligned with these corporate interests. While corporations can engage in

18. Adam Bienkov, *Astroturfing: What Is It and Why Does It Matter?*, GUARDIAN (Feb. 8, 2012), <https://www.theguardian.com/commentisfree/2012/feb/08/what-is-astroturfing> [<https://perma.cc/L2K2-W4XF>]; Erik Sherman, *How to Stop Astroturfing by Special Interests*, DONALD W. REYNOLDS NAT'L CTR. FOR BUS. JOURNALISM (Feb. 22, 2018), <https://businessjournalism.org/2018/02/special-interests-want-to-astroturf-you> [<https://perma.cc/D9DW-467K>] (“Astroturfing, on the other hand, is the attempt by a political or business group to create a false impression of grassroots support for some position.”).

19. John McNutt & Katherine Boland, *Astroturf, Technology and the Future of Community Mobilization: Implications for Nonprofit Theory*, 34 J. SOC. & SOC. WELFARE 165, 167 (2007) (“[Astroturf efforts] create the impression that local people are engaged in the effort and doing the things that traditional community organizations do.”).

20. Ryan Sager, *Keep Off the Astroturf*, N.Y. TIMES (Aug. 18, 2009), <https://www.nytimes.com/2009/08/19/opinion/19sager.html> [<https://perma.cc/HH6D-RKPM>] (explaining the historical origins of astroturfing within the political system).

21. *Id.*

22. McNutt & Boland, *supra* note 19, at 169.

legitimate grassroots movements to pursue these ends, taking a stand on the issues can draw negative public feedback from those who disagree with a given issue. For instance, if a corporation is viewed as causing or enabling a type of societal harm, anticorporate activists might protest to put pressure on the corporation or raise public awareness to force the corporation to reverse its actions.<sup>23</sup> Corporate groups can combat this problem by employing public relations groups<sup>24</sup> or using non-profit groups<sup>25</sup> to do their advocacy for them. In other words, “a front group is created to mask the true identities and interests being represented.”<sup>26</sup> Corporate astroturfing “hides the financial and business associations between the originating company and the message”<sup>27</sup> to emulate the image of popular support for an issue, when in fact, there is little public support. This is a major reason why corporate astroturfing is popular—a corporation can support a cause in its best interests while

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23. See Charlotte Alter, *Activists Try to Turn Anti-Trump Protests Towards 9 Companies*, TIME (Apr. 27, 2017), <http://time.com/4755885/trump-protests-corporations-activists> [<https://perma.cc/EgA5-A6PZ>] (describing one group’s attempt to forcibly change corporate behavior by “nam[ing] and sham[ing]” companies they say are working with Trump or profiting from what they describe as his ‘anti-immigrant, anti-worker’ agenda”); Sheera Frenkel, *Microsoft Employees Protest Work With ICE, as Tech Industry Mobilizes Over Immigration*, N.Y. TIMES (June 19, 2018), <https://www.nytimes.com/2018/06/19/technology/tech-companies-immigration-border.html> [<https://perma.cc/U34Z-QW2F>] (discussing Microsoft employees’ protest in response to the company’s agreement with Immigration and Customs Enforcement).

24. Consider an example of the corporate grassroots’ problems and potential solution:

When a corporation wants to oppose environmental regulations, or support an environmentally damaging development, it may do so openly and in its own name. But it is far more effective to have a group of citizens or experts—and preferably a coalition of such groups—which can publicly promote the outcomes desired by the corporation while claiming to represent the public interest. When such groups do not already exist, the modern corporation can pay a public relations firm to create them.

Sharon Beder, *Public Relations’ Role in Manufacturing Artificial Grass Roots Coalitions*, 43 PUB. REL. Q. 20, 20 (1998).

25. See Melissa J. Durkee, *Astroturf Activism*, 69 STAN. L. REV. 201, 238 (2017) (discussing Astroturf in the international context and defining one method of corporate astroturfing: “Businesses form associations that appear to be dedicated to nonprofit, public-regarding causes but are, in fact, mouthpieces for covert business agendas”).

26. McNutt & Boland, *supra* note 19, at 168.

27. *What is Astroturfing, and Why Your Business Should Avoid It*, BIGCOMMERCE: ESSENTIALS, <https://www.bigcommerce.com/ecommerce-answers/what-is-astroturfing> [<https://perma.cc/P35M-2GXZ>].

remaining anonymous.<sup>28</sup> One public relations expert advised businesses to “manag[e] activist assaults”<sup>29</sup> by:

Put[ting] your words in someone else’s mouth. Research suggests that business and industry are not always held in high esteem in the eyes of the public. There will be times when the position you advocate, no matter how well framed and supported, will not be accepted by the public simply because you are who you are. Any institution with a vested commercial interest in the outcome of an issue has a natural credibility barrier to overcome with the public, and often, with the media.<sup>30</sup>

By distancing itself from the message, a corporation can enjoy the benefits of astroturf activism without the drawbacks of public scrutiny. When using non-profits as front groups, “[t]he intent is to create an apparently impartial third party that coincidentally happens to deliver statistics and talking points to reinforce the position of the sponsors.”<sup>31</sup>

## 2. Methods of Astroturf Advocacy

Once the intended message and the means of disseminating it are decided, astroturf organizations often use further methods to create an image of support for its position. The groups will use these methods to confuse and misdirect the general public, either to create an appearance of support or large-scale controversy on an issue that is uncontroversial. This involves several potential methods of advocacy, including: paying experts to support the astroturfer’s position,<sup>32</sup> using online personas to advocate for a cause,<sup>33</sup> or

28. According to Rick Berman, President of Berman & Co., the use of public relations firms to mask corporate funding is incredibly popular due to the anonymity. In pitching services to Western Alliance Energy, he stated:

People always ask me one question all the time, “How do I know that I won’t be found out as a supporter of what you’re doing?” We run all of this stuff through nonprofit organizations that are insulated from having to disclose donors. There is total anonymity. People don’t know who supports us.

Rick Berman, President, Berman & Co., Meeting with Western Energy Alliance (June 2014), available at [https://archive.org/stream/berman-at-western-energy-alliance-june-2014-doc/berman-at-western-energy-alliance-june-2014-doc\\_djvu.txt](https://archive.org/stream/berman-at-western-energy-alliance-june-2014-doc/berman-at-western-energy-alliance-june-2014-doc_djvu.txt) [<https://perma.cc/9XYAKLSL>]; see also Eric Lipton, *Hard-Nosed Advice from Veteran Lobbyist: ‘Win Ugly or Lose Pretty,’* N.Y. TIMES (Oct. 30, 2014), <https://www.nytimes.com/2014/10/31/us/politics/pr-executives-western-energy-alliance-speech-taped.html> [<https://perma.cc/U4E3-FCHH>] (describing one Western Energy Alliance Executive’s decision to record Berman’s speech).

29. Merrill Rose, *Activism in the 90s: Changing Roles for Public Relations*, 36 PUB. REL. Q. 28, 31 (1991).

30. *Id.*

31. Sherman, *supra* note 18.

32. See Beder, *supra* note 24, at 21 (discussing the American Council on Science and Health’s use of “industry-funded experts [posing] as independent scientists to promote corporate causes”).

33. George Monbiot, *The Need to Protect the Internet from ‘Astroturfing’ Grows Ever More Urgent*, GUARDIAN (Feb. 23, 2011), <https://www.theguardian.com/environment/georgemonbiot/>



by using online personas or front groups to inflate the perceived value of a business's products by manipulating user review websites.<sup>34</sup>

One method by which astroturfers exploit this public confidence is by projecting the appearance of scientific backing.<sup>35</sup> If a position is given scientific backing, that position is much more likely to be found credible.<sup>36</sup> "By sounding scientific, [the astroturfer and its experts] seek to manipulate the public's trust."<sup>37</sup> Once these deceptive studies are promulgated, astroturf groups and individuals who back the manufactured message often continue to rely on it "long after it has been disproved by further work."<sup>38</sup> Though the advocated position may be false, backing from the scientific community helps to reinforce the image of support for a corporate message.

Using online profiles is another popular method a group can use to astroturf.<sup>39</sup> In the internet context, this is referred to as "sockpuppeting," the

2011/feb/23/need-to-protect-internet-from-astroturfing [https://perma.cc/X392-HFYZ] [hereinafter Monbiot, *Protect the Internet*] (discussing the details of online persona management tools and implications for astroturfing).

34. Press Release, New York State Attorney General, A.G. Schneiderman Announces Agreement with 19 Companies to Stop Writing Fake Online Reviews and Pay More than \$350,000 in Fines (Sept. 23, 2013), available at <https://ag.ny.gov/press-release/ag-schneiderman-announces-agreement-19-companies-stop-writing-fake-online-reviews-and> [https://perma.cc/7NY6-6LQC] [hereinafter Schneiderman, Press Release] (discussing Operation Clean Turf and associated astroturfing practices).

35. See Beder, *supra* note 24, at 21 ("[I]ndustry front groups with scientific sounding names publish pamphlets that are 'peer reviewed' by industry scientists rather than papers in established academic journals."); see also MARK MEGALLI & ANDY FRIEDMAN, MASKS OF DECEPTION: CORPORATE FRONT GROUPS IN AMERICA 3 (1991) ("Contrary to their names, these groups often disregard compelling scientific evidence to further their viewpoints, arguing that pesticides are not harmful, saccharin is not carcinogenic, or that global warming is a myth.").

36. Cary Funk & Brian Kennedy, *Public Confidence in Scientists Has Remained Stable for Decades*, PEW RES. CTR. (Mar. 22, 2019), <http://www.pewresearch.org/fact-tank/2017/04/06/public-confidence-in-scientists-has-remained-stable-for-decades> [https://perma.cc/6358-MMQD] (discussing the stable rates at which the public has confidence in science); see also Cat Jackson, *The Public Mostly Trusts Science. So Why Are Scientists Worried?*, SCI. (Feb. 18, 2018, 5:00 PM), <http://www.sciencemag.org/news/2018/02/public-mostly-trusts-science-so-why-are-scientists-worried> [https://perma.cc/5DKD-QR8T] (claiming that there is no evidence to support the idea that public confidence in science will decline in the near future).

37. MEGALLI & FRIEDMAN, *supra* note 35.

38. See George Monbiot, *The Denial Industry*, GUARDIAN (Sept. 19, 2006), <https://www.theguardian.com/environment/2006/sep/19/ethicaliving.g2> [https://perma.cc/G8WF-XDXH] [hereinafter Monbiot, *The Denial Industry*] (discussing various examples of corporate groups and their astroturf fronts using selective science and then continuing to rely on the studies long after peer-reviewed studies disprove the selected sources).

39. See Schneiderman, Press Release, *supra* note 34 (discussing former New York Attorney General Eric Schneiderman's "Operation Clean Turf," which exposed 19 New York companies' use of fake profiles to astroturf and provide false positive reviews of the companies on Yelp); see also Danny Bradbury, *Keeping Social Media Clean: The War Against Astroturfing*, GUARDIAN (Oct. 13, 2013), <https://www.theguardian.com/technology/2013/oct/14/keeping-social-media-clean-the-war-against-astroturfing> [https://perma.cc/4AZU-9DQR] (discussing Operation Clean Turf and astroturfing in general).

creation of “a false identity, a made up person which is manipulated to appear as if they have done specific things or have a particular opinion about something.”<sup>40</sup> A front group can employ teams of individuals who make a living by posing as others in support of an artificially manufactured message. In an article discussing increased online astroturfing, a Guardian reporter relayed his contact with a whistleblower in the business of astroturfing:

He was part of a commercial team employed to infest internet forums and comment threads on behalf of corporate clients, promoting their causes and arguing with anyone who opposed them.

Like the other members of the team, he posed as a disinterested member of the public. Or, to be more accurate, as a crowd of disinterested members of the public: he used 70 personas, both to avoid detection and to create the impression there was widespread support for his pro-corporate arguments.<sup>41</sup>

By using these sockpuppet accounts, the task of convincing the general public—or public officials—that there is widespread support for (or opposition to) an idea becomes much easier.

Sockpuppets can also be used to influence consumer beliefs and preferences by manipulating product scores. The sockpuppets appear as consumers who have purchased a product and leave behind positive reviews. In some cases, individual users are paid to leave positive reviews for a product.<sup>42</sup> In other contexts, a company might hire a different company for the purpose of providing positive reviews for a particular product.<sup>43</sup> Manipulating product reviews is not directly analogous to imitating grassroots support, but the rationale is similar—influence people to buy a product based upon the false idea that it is more popular or reliable than it actually is.

In sum, all of these methods of projecting the image of support on a given issue attempt to confuse citizens and legislators by overwhelming them with information. Rick Berman described the effect of conflicting information on citizens during a sales pitch to Western Energy Alliance, stating: “You get in

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40. *Sockpuppeting*, CHANGINGMINDS, <http://changingminds.org/techniques/propaganda/sockpuppeting.htm> [<https://perma.cc/924R-R6FE>]; *Sock Puppet*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sock%20puppet> [<https://perma.cc/6P93-2Y6D>] (defining sock puppet as “a false online identity used for deceptive purposes”).

41. Monbiot, *Protect the Internet*, *supra* note 33.

42. Ryan Kailath, *Some Amazon Reviews Are Too Good to Be Believed. They're Paid For*, NPR (July 30, 2018, 12:03 PM), <https://www.npr.org/2018/07/30/629800775/some-amazon-reviews-are-too-good-to-be-believed-theyre-paid-for> [<https://perma.cc/STSL-BHCG>] (discussing the incentive for real people to make extra money by responding to requests for positive Amazon reviews).

43. Catherine Shu, *FTC Brings Its First Case Against Fake Paid Reviews on Amazon*, TECHCRUNCH (Feb. 26, 2019, 9:20 PM), <https://techcrunch.com/2019/02/26/ftc-brings-its-first-case-against-fake-paid-reviews-on-amazon> [<https://perma.cc/GY7E-3R2Y>] (detailing a recent FTC lawsuit against a company that solicited positive reviews from “a website called [www.amazonverifiedreviews.com](http://www.amazonverifiedreviews.com)”).

people’s mind a tie. They don’t know who is right. And you win all ties because the tie basically insures the status quo. . . . I’ll take a tie any day if I’m trying to preserve the status quo.”<sup>44</sup> Giving enough conflicting information in support of, or in opposition to an issue can confuse citizens enough that they do not know what to believe—halting any progress towards resolution. Citizens and legislators see these seemingly neutral messages, believe there is more controversy surrounding an issue than actually exists, and may begin to support the manufactured message without any suspicion as to its artificial nature or the astroturfer’s true intentions.

#### D. ASTROTURFING IN HISTORY

One of the most prominent examples of astroturfing in history is Philip Morris’s effort to discredit the health ramifications related to smoking cigarettes. In 1992, the Environmental Protection Agency (“EPA”) issued a report titled “Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders” which provided an overview of the effects of smoking and secondhand smoke on adults and children alike.<sup>45</sup>

In summary, the EPA found that “widespread exposure to environmental tobacco smoke (ETS) in the United States presents a serious and substantial public health impact.”<sup>46</sup> The tobacco industry, specifically Philip Morris, worried about the negative effects that this study would have on business.<sup>47</sup> Within months, Philip Morris executives decided on a plan of action. Their principal objective was “to discredit the EPA report” in order to maintain industry strength.<sup>48</sup>

Ellen Merlo, Philip Morris’s then Senior Vice-President of Corporate Affairs, brought this plan into action by employing a public relations firm called APCO.<sup>49</sup> In its initial contacts with Merlo, “APCO warned that: ‘[n]o matter how strong the arguments, industry spokespeople are, in and of

44. *Rick Berman Tells Fracking Advocates to ‘Win Ugly,’* BLOOMBERG (Oct. 31, 2014, 1:03 PM), <https://www.bloomberg.com/news/videos/2014-10-31/rick-berman-tells-fracking-advocates-to-win-ugly-audio> [<https://perma.cc/8TSP-7YVX>] (presenting an audio recording of Rick Berman advising Western Energy Alliance how to “win ugly”).

45. *See generally* EPA, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS (Dec. 1992), [https://www.epa.gov/sites/production/files/2014-09/documents/passive\\_smoke.pdf](https://www.epa.gov/sites/production/files/2014-09/documents/passive_smoke.pdf) [<https://perma.cc/US46-GU8L>] (presenting a scientific overview of the effects smoking has on an individual’s health and wellness).

46. *Id.* at 1-1 (summarizing the report and stating that: “In adults: ETS is a human lung carcinogen, responsible for approximately 3,000 lung cancer deaths annually in U.S. nonsmokers.” It also stated that exposure to ETS was causally related to a number of adverse health effects in children).

47. *See* Monbiot, *The Denial Industry*, *supra* note 38 (discussing the EPA report and Philip Morris’ plan to combat the situation).

48. *Id.* (quoting a letter from Ellen Merlo, Philip Morris’ Senior Vice-President of Corporate Affairs, following the EPA report).

49. NAOMI ORESKES & ERIK M. CONWAY, MERCHANTS OF DOUBT 143 (2010) (explaining the origins of the EPA disinformation campaign following the 1992 report).

themselves, not always credible or appropriate messengers.”<sup>50</sup> APCO wanted “to create the impression of a ‘grassroots’ movement—one that had been formed spontaneously by concerned citizens to fight ‘overregulation.’”<sup>51</sup> Soon after, APCO created The Advancement of Sound Science Coalition (“TASSC”) in an attempt to hide the group’s connection to Philip Morris.<sup>52</sup> TASSC appeared to be a citizen group whose goal was “to educate the media, public officials and the public about the dangers of ‘junk science;”<sup>53</sup> when in reality, the group was a front for Philip Morris and APCO, intending to discredit the EPA by painting the agency as one that relied on “junk science.”<sup>54</sup>

TASSC assembled a coalition of “experts” who had formerly argued against scientific evidence that was contrary to the business interests of the tobacco industry.<sup>55</sup> Soon after, the group launched on a public scale and gained traction by participating in a “five-city media tour,” often times appearing with local experts (who were also members of TASSC) “to highlight a regional ‘bad science’ problem” in a given area.<sup>56</sup> Meanwhile, other members wrote columns on national websites and attempted to further discredit what was otherwise scientific consensus.<sup>57</sup> Further, TASSC President Steve Milloy created JunkScience.com<sup>58</sup>—a website that “freely attacked science related to health and environmental issues.”<sup>59</sup> TASSC openly fought any group—including the EPA, and professionals in any given field—who presented scientific information that threatened the viability of a commercial product.<sup>60</sup> In addition, the tobacco industry recognized shared interests with the Alexis de Tocqueville Institution (“AdTI”)—a group whose mission was to promote democracy—and soon, the AdTI “promote[d] democracy by defending secondhand smoke.”<sup>61</sup> In sum, the tobacco industry wanted to ensure that it was not regulated. It accomplished this goal by creating an appearance of popular support and anti- “junk science” sentiment amongst citizens and experts alike, when in reality, that was not the prevailing view.

The Philip Morris relationship with APCO and TASSC embodies the astroturfing phenomenon. A corporate group (Philip Morris) sought to harness the power of a grassroots movement and retain support of its product

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50. Monbiot, *The Denial Industry*, *supra* note 38.

51. *Id.*

52. ORESKES & CONWAY, *supra* note 49, at 150.

53. Monbiot, *The Denial Industry*, *supra* note 38 (citations omitted).

54. ORESKES & CONWAY, *supra* note 49, at 143.

55. *Id.* at 150–51.

56. *Id.* at 151.

57. *Id.*

58. See generally JUNKSCIENCE, junkscience.com [https://perma.cc/8QDV-K7YB] (presenting an attempt to discredit and mock scientific articles, policy decisions, the media, and the like).

59. ORESKES & CONWAY, *supra* note 49, at 151.

60. *Id.*

61. *Id.* at 152.

in order to protect its interests following the EPA's report on the harmful effects. To gain support for its position, Philip Morris hired a public relations firm that subsequently created a non-profit organization, who then relied on the testimony of fake experts to disparage the EPA's credibility regarding the hazards of smoking cigarettes. By presenting environmental issues pertaining to secondhand smoke as more controversial and unsettled than they actually were, Philip Morris was able to preserve the status quo. Phillip Morris's astroturfing convinced some members of the public that the harms associated with smoking cigarettes were still in question, and that the EPA relied on junk science in formulating its report. Though the company eventually lost the battle and indoor smoking was banned, Phillip Morris' credibility war against the EPA was an effective astroturfing campaign at the time.<sup>62</sup>

#### E. POLICY CONSIDERATIONS AND PAST ATTEMPTS AT REGULATION

There has been little attempt to regulate astroturfing corporations, or the related public relations and nonprofit groups affiliated with corporations who astroturf. Public relations firms and nonprofit groups are only slightly regulated in their ability to exercise speech. In the context of astroturfing, no federal laws or regulations exist that limit a public relations firm's ability to engage in astroturfing. The Public Relations Society of America ("PRSA") encourages its member organizations "[t]o build trust with the public by revealing all information needed for responsible decision making."<sup>63</sup> As a guideline, the PRSA recommends that public relations groups: "Investigate the truthfulness and accuracy of information released on behalf of those represented," "[r]eveal the sponsors for causes and interests represented," and "[a]void deceptive practices."<sup>64</sup> Though the PRSA guidelines serve as a value-oriented framework for public relations professionalism, the Public Relations Society of America lacks any formal enforcement mechanism to ensure groups are compliant.<sup>65</sup>

Nonprofit organizations are limited in the types of speech that they can exercise. So long as these groups are "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes" nonprofits enjoy tax exempt status.<sup>66</sup> The Internal Revenue Code

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62. *Id.* at 151 (discussing the public launch of the TASSC group on a national and local level, estimating that "[i]n total TASSC created coverage that potentially reached approximately 3 million people").

63. *PRSA Code of Ethics: Preamble*, PUB. REL. SOC'Y OF AM., <https://www.prsa.org/ethics/code-of-ethics> [<https://perma.cc/WKS2-P7HR>].

64. *Id.*

65. The organization's code itself references this: "Emphasis on enforcement of the Code has been eliminated. But, the PRSA Board of Directors retains the right to bar from membership or expel from the Society any individual who has been or is sanctioned by a government agency or convicted in a court of law of an action that fails to comply with the Code." *Id.*

66. 26 U.S.C. § 501(c)(3) (2012) (listing the types of organizations qualifying for tax-exempt status).

goes on to include some limitations for “grass roots expenditures” but only if the organization devotes “a substantial part” of its activities to “influence legislation.”<sup>67</sup>

Corporations face some regulation, but only on certain types of speech. At issue in the astroturf context is both commercial and political speech. Political speech involves “matters of public concern.”<sup>68</sup> Matters of public concern include “‘any matter of political, social, or other concern to the community,’ or when it ‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.’”<sup>69</sup> Under the First Amendment, individuals enjoy a very broad right to free speech.<sup>70</sup> After *Citizens United v. Federal Election Commission*, corporations too, enjoy the right to exercise free speech under the First Amendment.<sup>71</sup> The Supreme Court held that “[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.”<sup>72</sup> Thus, when a corporation exercises its right to speech regarding matters of public concern, it has the same broad rights as individuals do. This creates significant limits on what the legislature can do to limit corporate speech, even if that corporation is engaged in astroturfing.

Originally, legislators attempted to regulate some of these problems by regulating corporate speech in a lobbying context. The Federal Lobbying Disclosure Act of 1995 provides the statutory framework for the registration, reporting, and disclosure requirements of lobbyists.<sup>73</sup> But the Act does not reference grassroots disclosure or any regulation of astroturfers.<sup>74</sup> Though astroturf lobbying campaigns can be identified, they often overlap with the traditional characteristics of grassroots campaigns.<sup>75</sup> For this reason, effective regulation presents a difficult task—the two practices are difficult to differentiate. Citizen grassroots organizations enjoy broad First Amendment rights including freedom of speech and freedom of association.<sup>76</sup> The rights

67. *Id.* § 501 (h) (discussing limitations on tax exempt organizations’ ability to influence legislation).

68. *Political Speech in Schools*, NAT’L COALITION AGAINST CENSORSHIP, <https://ncac.org/project/youth-free-expression-program/political-speech-in-schools> [<https://perma.cc/AJ3V-VNG7>].

69. *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (citations omitted).

70. U.S. CONST. amend. I.

71. *See generally* *Citizens United v. FEC*, 558 U.S. 310 (2010) (discussing a corporation’s constitutional right to exercise political speech).

72. *Id.* at 319.

73. *See generally* 2 U.S.C. §§ 1601–1614 (2012) (listing the requirements for lobbying registration, activities, and disclosure of contributors).

74. *Id.* §§ 1602–1604.

75. *See supra* Section II.C (discussing the characteristics of a successful astroturf campaign and the attempt to harness the power of citizen grassroots successes).

76. U.S. CONST. amend. I; William R. Maurer, *The Regulation of Grassroots Lobbying*, INST. FOR JUST. (Mar. 2010), [https://ij.org/wp-content/uploads/2015/03/20100331\\_MaurerEngage11.1.pdf](https://ij.org/wp-content/uploads/2015/03/20100331_MaurerEngage11.1.pdf) [<https://perma.cc/Z8W9-K82K>] (arguing that “[t]he regulation of citizen-to-citizen contact about political change is fully protected by the First Amendment” but the Court has allowed

of lobbyists and astroturfers are less clear. Although some Congressional representatives have proposed amendments to the disclosure acts to include grassroots groups and astroturf groups, these amendments have not made it into the final versions of the Act.<sup>77</sup> Some believe that inclusion of grassroots organizations in lobbyist regulations is overly broad and violates the First Amendment.<sup>78</sup> With a lack of any meaningful regulation, “persons and entities to whom current lobbying laws would otherwise apply can continue to evade them by posing as issue advocates, limiting what the public may learn about them and their activities.”<sup>79</sup>

### III. IMPEDING MARKET INFORMATION: ASTROTURFING AND THE PUBLIC

Astroturfing brings strong feelings of distrust and inauthenticity from the public.<sup>80</sup> Once the tactic is discovered, citizens may not know who to hold accountable because the vast web of online personas and front groups makes it difficult to determine who is pulling the strings.<sup>81</sup> As a result, the offending corporation is not held accountable for manipulating people and engaging in manipulative activities.<sup>82</sup> This Part discusses the ways in which astroturfing affects the general populace: as consumers, investors, and shareholders.

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regulation of lobbying where it involved “direct communication with members of Congress on pending or proposed federal legislation” (quotations omitted)).

77. Jonathan C. Zellner, Note, *Artificial Grassroots Advocacy and the Constitutionality of Legislative Identification and Control Measures*, 43 CONN. L. REV. 357, 366 (2010) (“Although drafts of the Lobbying Disclosure Act featured provisions requiring registration of Astroturf lobbyists and reports on their actions and contributors, the drafting committee did not include them in the final bill.”); see also *id.* at 366 n.46 (quoting Senator Carl Levin during a House Committee meeting after the failure to include any regulation of astroturf in the final version of the bill).

78. See Jay Alan Sekulow & Erik M. Zimmerman, *Weeding Them Out by the Roots: The Unconstitutionality of Regulating Grassroots Issue Advocacy*, 19 STAN. L. & POL’Y REV. 164, 165 (2008) (arguing that an attempt by legislators to broaden the definition of lobbyists to include grassroots organizations “is not narrowly tailored to achieve a compelling governmental interest” and thus, would violate the First Amendment).

79. Zellner, *supra* note 77, at 367.

80. See Irina Lock & Peter Seele, *The Consequences of Astroturf Lobbying for Trust and Authenticity: Findings and Implications from an Experiment*, 2 COMM. MGMT. REV. 30, 46 (2017).

81. See *supra* Section II.C.2 (describing the methods used to mask the ultimate sponsor of an astroturfed message).

82. Scott Goodstein, *How to Weed Out Astroturf: Identifying Fake Public Support*, REVOLUTION MESSAGING (Sept. 21, 2011), <https://revolutionmessaging.com/news/how-to-weed-out-astroturf-identifying-fake-public-support> [<https://perma.cc/6KKG-5YRA>] (“Despite innovations in the field of astroturf detection, companies and governments are becoming more sophisticated in avoiding the appearance of being truth[ful].”).

A. *ASTROTURFING'S EFFECT ON CONSUMERS AND THE INABILITY OF THE GOVERNMENT TO EFFECTIVELY ADDRESS IT*

In the consumerism context, astroturfing is problematic. Informed choice is a cornerstone of the free market<sup>83</sup> and attempts to limit the public's ability to inform their decisions undermines the principles of the free market. Astroturfing obstructs consumers' ability to make decisions about the companies that they support by shielding the corporate sponsor from public scrutiny. In other words, businesses who are successfully hidden can benefit from normalcy while also secretly engaging in controversial practices or supporting unpopular causes.

Astroturfing is a problem for consumers because it is deceptive at its very core—the practice is intended to confuse and disorient the general populace.<sup>84</sup> Deception is “the act of causing someone to accept as true or valid what is false or invalid.”<sup>85</sup> Businesses engaged in astroturfing practices attempt to deceive consumers by shirking accountability and distancing themselves from practices or social causes that consumers may find objectionable.<sup>86</sup> Though these practices may seem outwardly illegal, both the FTC and many state agencies fail to address astroturfing practices.

The current legislative and regulatory systems for addressing these problems are insufficient to fully combat astroturfing practices. On a national level, Congress has limited means of addressing these practices. Regulating astroturfing practices coincides with regulating speech. But, where the speech

83. Mary L. Azcuenaga, Former Comm'r, FTC, *The Role of Advertising and Advertising Regulation in the Free Market*, Speech at the Conference on Advertising for Economy and Democracy (Apr. 8, 1997), available at <https://www.ftc.gov/public-statements/1997/04/role-advertising-and-advertising-regulation-free-market> [<https://perma.cc/FXJ8-A2CL>] (“[T]he more fully consumers are informed, the better equipped they will be to make purchase decisions appropriate to their own needs.”); see also, e.g., *Key Elements for Informed Choice and Consumer Protection in the Wireless Telecommunications Marketplace*, AARP, [https://assets.aarp.org/rgcenter/consume/m\\_1\\_wireless.pdf](https://assets.aarp.org/rgcenter/consume/m_1_wireless.pdf) [<https://perma.cc/4ME8-DVCE>] (“Consumers make the best choices when clear, reliable, and meaningful information is easily accessible and comparable” in the wireless service provider context.); Christian Coff, *Informed Food Choice*, ENCYCLOPEDIA FOOD & AGRIC. ETHICS, [https://link.springer.com/content/pdf/10.1007/978-94-007-6167-4\\_246-1.pdf](https://link.springer.com/content/pdf/10.1007/978-94-007-6167-4_246-1.pdf) [<https://perma.cc/XBS9-XTX2>] (“[Informed choice] is a choice that is not made blindly. It is an enlightened choice made by the individual based on information, which has been obtained by the consumer.”).

84. Samuel Woolley, *Say Goodbye to Grassroots Politics. The Future Is Made of Astroturf*, QUARTZ (Sept. 25, 2018), <https://qz.com/1383626/say-goodbye-to-grassroots-politics-the-future-is-astroturf> [<https://perma.cc/FH88-S7PP>] (“The goal of [astroturfing] is to amplify or suppress . . . information through lies and confusion.”).

85. *Deception*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/deception> [<https://perma.cc/PG7S-ZZGV>].

86. Fight for the Future, *Don't Fall for AT&T's Latest Net Neutrality Astroturf Campaign*, MEDIUM (Jan. 24, 2018), <https://medium.com/@fightfortheft/dont-fall-for-at-t-s-latest-net-neutrality-astroturf-campaign-b8618460dc57> [<https://perma.cc/M7TQ-5T5R>].



is commercial,<sup>87</sup> the coordinate level of constitutional protection is lower than the First Amendment's broad protection of an individual's noncommercial speech.<sup>88</sup> And where the nature of the commercial speech is deceptive or false, the Supreme Court has stated that "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it."<sup>89</sup>

On the other side of the speech-spectrum is political speech.<sup>90</sup> Corporations are entitled to the benefits of political speech,<sup>91</sup> and the government is only able to restrict that speech if "the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"<sup>92</sup> In the consumerism context astroturfing is closer to advertising, because generally it attempts to influence consumers' perceptions of a company or its products.<sup>93</sup> Because these practices have an effect on consumers, Congress has enabled the FTC to regulate it at the federal level, and the coordinate state agencies are able to regulate it at the local level.

At the federal level, the regulation of astroturfing most closely aligns with the FTC's purpose. The FTC enacts rules to effectuate its mission of "[p]rotecting consumers and competition by preventing anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education without unduly burdening legitimate business activity."<sup>94</sup>

87. *Commercial Speech*, CORNELL L. SCH.: LEGAL INFO. INST., [https://www.law.cornell.edu/wex/commercial\\_speech](https://www.law.cornell.edu/wex/commercial_speech) [<https://perma.cc/85UR-L7FZ>] (defining commercial speech as "[s]peech which promotes at least some type of commerce").

88. *See* *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.C.*, 447 U.S. 557, 562–63 (1980) ("The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.").

89. *Id.* at 563.

90. *Speech*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "core political speech" as "[c]onduct or words that are directly intended to rally public support for a particular issue, position, or candidate").

91. *Citizens United v. FEC*, 558 U.S. 310, 342 (2010).

92. *Id.* at 340 (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)).

93. *See supra* Section II.C (discussing how astroturfing organizations attempt to manipulate individuals while retaining the sponsor's anonymity).

94. *About the FTC*, FTC, <https://www.ftc.gov/about-ftc> [<https://perma.cc/3Q5C-S9YY>]. Until recently, the FTC's mission explicitly included a goal of "enhancing informed consumer choice and public understanding of the competitive process." *See, e.g.*, FTC FISCAL YEAR 2017 PERFORMANCE SNAPSHOT (2017), available at [https://www.ftc.gov/system/files/documents/reports/2017-one-page-ftc-performance-snapshot/2017\\_snapshot.pdf](https://www.ftc.gov/system/files/documents/reports/2017-one-page-ftc-performance-snapshot/2017_snapshot.pdf) [<https://perma.cc/EC96-UELG>] (providing the relevant iteration of the FTC's mission statement). Though that goal is no longer explicitly stated, it is still very much implicit in the FTC's operations. *See generally* FTC, STRATEGIC PLAN FOR FISCAL YEARS 2018 TO 2022 (Feb. 2018), available at [https://www.ftc.gov/system/files/documents/reports/2018-2022-strategic-plan/ftc\\_fy18-22\\_strategic\\_plan.pdf](https://www.ftc.gov/system/files/documents/reports/2018-2022-strategic-plan/ftc_fy18-22_strategic_plan.pdf) [<https://perma.cc/A8LC-K5SX>] [hereinafter FTC, STRATEGIC PLAN 2018–2022] (outlining the FTC's goals until 2022, which includes explicit discussion of consumer choice, increased stakeholder understanding, and the like).

However, the FTC promotes self-regulation whenever possible.<sup>95</sup> In many instances, the FTC will only step in and label “a practice unfair if injury to the consumer cannot reasonably be avoided.”<sup>96</sup> The issue with this approach is that astroturfing is often masked by the use of front groups and public relations firms.<sup>97</sup> And those front groups are meant to be publicly visible—the consumer can see who is displaying astroturfed messages while the actual sponsor remains hidden. In other words, any injury as a result of astroturfing practices is easily traced back to the front group, providing angry consumers with a target while leaving the corporate sponsor unaffected. Even then, given the discretionary nature of FTC enforcement, one set of Commissioners might believe that the harm posed to consumers can reasonably be avoided by way of their own independent research and utilizing online tools to identify astroturfing businesses.<sup>98</sup> This particular group of Commissioners might therefore decline to regulate the deceptive practices and inadvertently leave consumers vulnerable.

In 2009, the FTC took a step towards regulating one method of astroturfing: It updated the Endorsement Guidelines for the first time since 1980<sup>99</sup> and required disclosure of material connections between the endorser

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95. During a meeting of the National Advertising Division, one Commission member remarked that “[t]he [FTC] has a long history of promoting self-regulation when it will adequately protect consumers’ interests.” Pamela Jones Harbour, Chairman, FEC, Helping the FTC Help You: Effective Self-Regulation is Better Business, Keynote Address at the National Advertising Division Meeting (Sept. 26, 2005), available at [https://www.ftc.gov/sites/default/files/documents/public\\_statements/helping-ftc-help-you-effective-self-regulation-better-business/050926selfreg.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/helping-ftc-help-you-effective-self-regulation-better-business/050926selfreg.pdf) [<https://perma.cc/9Y6L-2F2M>]; see also FTC, STRATEGIC PLAN 2018–2022, at 9 (“The FTC recognizes that stakeholders other than government are at times better placed to address certain consumer protection issues. The agency, therefore, encourages self-regulatory efforts and partners with the private sector to disseminate consumer education content developed by the agency.”).

96. Katharine Gallagher, Research Note, *Astroturfing: 21st Century False Advertising*, ANNIE SEARLE & ASSOCIATES LLC 6 (2014), [https://www.anniesearle.com/web-services/Documents/ResearchNotes/ASAResearchNote\\_2014-12\\_Gallagher\\_Astroturfing.pdf](https://www.anniesearle.com/web-services/Documents/ResearchNotes/ASAResearchNote_2014-12_Gallagher_Astroturfing.pdf) [<https://perma.cc/P6ZW-YXDC>]; see generally James P. Nehf, *Shopping for Privacy Online: Consumer Decision-Making Strategies and the Emerging Market for Information Privacy*, 2005 U. ILL. J.L. TECH. & POL’Y 1 (discussing the FTC’s “hands off” approach to regulation).

97. See *supra* Section II.C.

98. Dr. Mercola, *How Astroturfing and Other Media Manipulation Compromise Your Ability to Get Truthful Information*, MERCOLA (Oct. 28, 2017), <https://articles.mercola.com/sites/articles/archive/2017/10/28/astroturfing-media-manipulation.aspx> [<https://perma.cc/H2U6-2XS4>] (describing methods for individuals to identify astroturfing). See generally *SourceWatch*, CTR. FOR MEDIA & DEMOCRACY, <https://www.sourcewatch.org/index.php/SourceWatch> [<https://perma.cc/ZS43-G7A2>] (providing a source of information about known instances of astroturfing, groups that participate, and corporate sponsors funding such groups).

99. 16 C.F.R. § 255.5 (2018); Press Release, FTC, FTC Publishes Final Guides Governing Endorsements, Testimonials (Oct. 5, 2009), available at <https://www.ftc.gov/news-events/press-releases/2009/10/ftc-publishes-final-guides-governing-endorsements-testimonials> [<https://perma.cc/EgM6-DSGG>] [hereinafter FTC, Endorsement Guidelines Press Release].

and the seller of the advertised product.<sup>100</sup> By “material connections,” the FTC was specifically concerned with “connections that consumers would not expect.”<sup>101</sup> In the case of those companies that post online reviews from sock-puppet accounts, this updated guideline can disrupt astroturfing endeavors.<sup>102</sup> Though this regulation is a move in the right direction, violation of this set of guidelines alone does not impose civil penalties.<sup>103</sup> Recently, the FTC took another step towards regulating astroturfing: It sued a company that purchased positive Amazon reviews from a third party.<sup>104</sup> Although this is a positive first step against online review astroturfing, it is unclear what the suit means for the future of astroturf regulation.<sup>105</sup> The Associate Director for Advertising Practices at the FTC noted that state attorney generals might also pursue cases against astroturfing companies,<sup>106</sup> indicating that states might prove to be the more effective actors to combat widespread astroturfing.

At the state level, every state has enacted legislation regarding deceptive business practices or false advertising.<sup>107</sup> These statutes vary to a degree: some grant broad prohibitions on deceptive practices,<sup>108</sup> some allow citizens to

100. FTC, Endorsement Guidelines Press Release, *supra* note 99.

101. *Id.*

102. Press Release, FTC, FTC Approves Final Consent Order Stopping False Advertising, Phony Reviews by Online Trampoline Sellers (July 18, 2017), available at <https://www.ftc.gov/news-events/press-releases/2017/07/ftc-approves-final-consent-order-stopping-false-advertising-phony-reviews> [hereinafter FTC, Final Consent Order Press Release].

103. 16 C.F.R. § 255.0 (“The Guides provide the basis for voluntary compliance with the law by advertisers and endorsers.”); see also *Advertisement Endorsements: The FTC’s Endorsement Guides: Being Up-Front with Consumers*, FTC, <https://www.ftc.gov/news-events/media-resources/truth-advertising/advertisement-endorsements> [https://perma.cc/QNA6-DPV9] [hereinafter FTC, *Being Up-Front with Consumers*] (“The Guides are not regulations, and so there are no civil penalties associated with them. But if advertisers don’t follow the guides, the FTC may decide to investigate whether the practices are unfair or deceptive under the FTC Act.”).

104. Press Release, FTC, FTC Brings First Case Challenging Fake Paid Reviews on an Independent Retail Website (Feb. 26, 2019), available at <https://www.ftc.gov/news-events/press-releases/2019/02/ftc-brings-first-case-challenging-fake-paid-reviews-independent-retailer> [https://perma.cc/MA4B-JG2X] [hereinafter FTC, First Paid Reviews Case Press Release].

105. Tom Huddleston Jr., *The FTC Just Prosecuted a Fake Paid Amazon Review for the First Time—Here’s What That Means for Users*, CNBC (Mar. 4, 2019, 3:10 PM), <https://www.cnbc.com/2019/03/01/ftc-cracking-down-on-fake-amazon-reviews.html> [https://perma.cc/99VT-UCAK] (quoting an FTC spokesperson as saying, the FTC “does not comment about what future actions it may or may not take”).

106. See Gallagher, *supra* note 96, at 6 (“According to Mary Engel (Associate Director for Advertising Practices at the FTC), ‘certain cases involving smaller local or regional businesses may be more appropriately resolved by a state attorney general’s office.’”).

107. See generally *Deceptive Trade Practices Laws: Information on the Law About Deceptive Trade Practices*, L. LIBR.—AM. L. & LEGAL INFO., <http://law.jrank.org/pages/11799/Deceptive-Trade-Practices.html> [https://perma.cc/WJQ3-SK4C] (comparing the 50 states’ laws regarding treatment of deceptive business practices).

108. CONSUMER PROTECTION IN THE STATES, NAT’L CONSUMER LAW CTR. 5–8 (March 2018), available at <http://www.nclc.org/images/pdf/udap/udap-report.pdf> [https://perma.cc/4AAG-78QQ] (evaluating the strength of the state UDAP provisions regarding broad statutory language).

bring suit and recover high civil damages,<sup>109</sup> while others immunize certain industries from enforcement action.<sup>110</sup> Further, the scope of these statutes varies significantly.<sup>111</sup> States like North Carolina, for example, broadly prohibit deceptive trade practices, stating that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.”<sup>112</sup> While this may appear sufficient to combat astroturfing, it is unclear whether or not these statutes were intended to include astroturfing practices. Typically, the scope of state Deceptive Trade Act statutes focuses on defective products and outright false advertising rather than astroturfing and similar practices.<sup>113</sup> Considering the ambiguity in the state statutes, slow developments at the FTC, and the adaptive nature of astroturfing practices, the existing policies and regulations fail to adequately protect consumer choice from deceptive influence.

In sum, astroturfing in the consumerism context is regulated inconsistently by both federal and state agencies. Although the FTC has recently challenged astroturfing practices in online review solicitation,<sup>114</sup> it will not intervene unless “injury to the consumer cannot reasonably be avoided.”<sup>115</sup> This presents an opportunity for inconsistency in administration of the FTC’s purpose and cannot always adequately protect consumers from manipulative business practices. Further, state statutes provide varying levels of protection against astroturfing practices.<sup>116</sup> Both the federal and state regulatory schemes leave too much ambiguity and do not account for the adaptive nature of astroturfing practices and thus, consumers remain vulnerable to the effects.

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109. *Id.* at 42–44.

110. *Id.* at 18–23.

111. *See id.* (evaluating the strength and features of state laws related to deceptive business practices).

112. N.C. GEN. STAT. ANN. § 75-1.1 (West 2017) (listing North Carolina’s unfair business practice policies). Note that the statute provides an exemption for “acts done by the publisher, owner, agent, or employee of a[n] . . . advertising medium in the publication or dissemination of an advertisement” when such person “did not have knowledge of the false, misleading or deceptive character of the advertisement and . . . did not have a direct financial interest in the sale or distribution of the advertised product or service.” *Id.*

113. *See Deceptive Trade Practices Laws: Information on the Law About Deceptive Trade Practices*, *supra* note 107 (discussing the scope of such statutes, but not addressing astroturfing directly).

114. *See* FTC, Final Consent Order Press Release, *supra* note 102; FTC, First Paid Reviews Case Press Release, *supra* note 104.

115. Gallagher, *supra* note 96, at 6.

116. *See generally* CONSUMER PROTECTION IN THE STATES, NAT’L CONSUMER LAW CTR., *supra* note 108 (listing the specifics of each state deceptive trade practice act).

B. *ASTROTURFING'S EFFECT ON INVESTORS AND SHAREHOLDERS, AND THE ROLE OF THE SEC*

When a person chooses to invest in a company, they weigh several competing considerations in how to use their money.<sup>117</sup> The free market can have a major effect on many aspects of a person's financial future.<sup>118</sup> Individuals should have sufficient information available when making major financial decisions.<sup>119</sup> One important consideration when investing is trust. Trust in the company is inherent in an individual's decision to invest in that company.<sup>120</sup> Generally, shareholders do not trust corporations who engage in astroturfing.<sup>121</sup> As one study notes, "[t]he more astroturf lobbying is perceived as a standard practice, the less trust and authenticity is displayed toward the organizations behind such activities."<sup>122</sup> This phenomenon presents a disconnect between the shareholder's interest in access to information and corporate interest in anonymity.

The U.S. Securities and Exchange Commission's mission "is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."<sup>123</sup> At issue in the astroturfing context is the SEC's purpose of protecting investors. Protecting investors includes ensuring that they have

117. See *Financial Navigating in the Current Economy: Ten Things to Consider Before You Make Investing Decisions*, SEC, <https://www.sec.gov/investor/pubs/tenthingstoconsider.htm> [<https://perma.cc/99V7-R8QL>] [hereinafter SEC, *Investing Decisions*] (listing the SEC's recommended considerations a consumer should make before investing in a company); see also Drew Hendricks, *5 Things Goldman Sachs Looks for in a Company Before Investing*, INC. (Sept. 29, 2014), <https://www.inc.com/drew-hendricks/5-things-goldman-sachs-look-for-in-a-company-before-investing.html> [<https://perma.cc/5ECM-DZCU>] (detailing a Goldman Sachs director's recommendations on things to consider before investing in a company).

118. *What We Do*, SEC, <https://www.sec.gov/Article/whatwedo.html> [<https://perma.cc/2337-9HF4>] [hereinafter SEC, *What We Do*] ("As more and more first-time investors turn to the markets to help secure their futures, pay for homes, and send children to college, our investor protection mission is more compelling than ever").

119. *Fund Disclosure at a Glance*, SEC, <https://www.sec.gov/investment/fund-disclosure-at-a-glance> [<https://perma.cc/RD5D-5ED6>] [hereinafter SEC, *Fund Disclosure*] (describing the SEC's role in reviewing company disclosures to protect shareholders and "ensure that [those] investors have [access to] the information they need to make informed investment decisions").

120. See Barbara Brooks Kimmel & Jordan Kimmel, *Building Trust Into Investment Decision-Making*, WEALTHMANAGEMENT.COM (June 30, 2016), <https://www.wealthmanagement.com/asset-management/building-trust-investment-decision-making> [<https://perma.cc/966V-2SED>] ("Trust matters in every transaction, with every person, every day. . . . Over the past decade, a series of qualitative and quantitative studies have built a strong case for senior business leaders to place building trust among stakeholders high on their priority list.").

121. See, e.g., Lock & Seele, *supra* note 80. Here, the researchers performed an empirical study and questioned the effect astroturfing has on shareholder perceptions of trustworthiness and authenticity. *Id.* The "findings indicate that, overall, levels of perceived organizational trust and authenticity are quite low when it comes to astroturfing." *Id.* at 46.

122. *Id.* The authors also note that the study is subject to some limitations based on the necessary form of the methodology. *Id.* at 46-47.

123. SEC, *What We Do*, *supra* note 118.

access to ample information to adequately inform their investing decisions.<sup>124</sup> The SEC Ombudsman commented that the mission to “protect investors” means to “mak[e] sure they have all the information that a reasonable investor would need to make a sound investment decision.”<sup>125</sup>

The SEC emphasizes major financial considerations in this respect because traditionally financial information is the relevant information that investors want to know before deciding to become shareholders.<sup>126</sup> The SEC accomplishes this goal by requiring companies to make certain annual disclosures. These disclosures are listed under SEC Regulation S-K.<sup>127</sup> The SEC requires that a company disclose: a description of “the general development of the business;”<sup>128</sup> a “[d]escription of property” owned by the company or its subsidiaries;<sup>129</sup> pending legal proceedings;<sup>130</sup> details regarding general market information related to the stock;<sup>131</sup> a “[d]escription of registrant’s securities;”<sup>132</sup> specified financial data;<sup>133</sup> information related to the management, board of directors, their respective levels of compensation;<sup>134</sup> and additional miscellaneous information.<sup>135</sup>

124. *Id.*; see also Public Statement, Luis A. Aguilar, Commissioner, SEC, Shareholders Need Robust Disclosure to Exercise Their Voting Rights as Investors and Owners (Feb. 20, 2013), available at <https://www.sec.gov/news/public-statement/2013-spcho22013laahtm> [<https://perma.cc/LJX4-EZ98>] (“I share the desire expressed by many investors for additional information that would enhance their ability to make informed voting and investment decisions.”).

125. *The Mission: Episode 3—How Does the SEC Protect Investors?*, SEC (Aug. 10, 2018), [https://www.sec.gov/files/The%20Mission%20Episode%203%20Transcript\\_o.pdf](https://www.sec.gov/files/The%20Mission%20Episode%203%20Transcript_o.pdf) [<https://perma.cc/TE8E-S9NE>] (transcribing a podcast episode featuring an interview with a panel of SEC commissioners).

126. See SEC, *Fund Disclosure*, *supra* note 119.

127. *Rules, Regulations and Schedules*, SEC, <https://www.sec.gov/divisions/corpin/ecfrlinks.shtml> [<https://perma.cc/C6TS-B7UQ>] (last modified Oct. 13, 2017) (providing a list of “[i]ntegrated disclosure requirement[s]”). Regulation S-K is codified at 17 C.F.R. § 229 (2018).

128. 17 C.F.R. § 229.101 (“Describe the general development of the business of the registrant, its subsidiaries and any predecessor(s) during the past five years, or such shorter period as the registrant may have been engaged in business.”).

129. *Id.* § 229.102 (“State briefly the location and general character of the principal plants, mines and other materially important physical properties of the registrant and its subsidiaries.”).

130. *Id.* § 229.103 (“Describe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject.”).

131. *Id.* § 229.201 (listing the required disclosures related to stocks, dividends, market price, etc.).

132. *Id.* § 229.202 (listing the various securities that must be disclosed, including: capital stock, debt securities, warrants and rights, and other securities).

133. *Id.* §§ 229.301–.305 (including specified accounting information, factors “that materially affect the comparability of the information reflected in selected financial data,” risk information, and more).

134. See generally *id.* §§ 229.401–.407 (listing required disclosures involving the internal management of the company).

135. For a complete list of additional disclosure requirements and report specifics, see generally *id.* § 229.

Potential investors rely on the abundance of financial data that these disclosures provide, but the current regime does not account for the shift in emphasis taking place in many investors' minds. Recent trends show that investors increasingly care about the causes that their money supports.<sup>136</sup> Socially responsible investing<sup>137</sup> provides an opportunity for investors to invest in companies that align with their value structures.<sup>138</sup> Though this practice has become more prominent in recent years,<sup>139</sup> the SEC does not require any sort of disclosure related to social causes to which a corporation donates. This lack of required disclosure poses an issue because on one hand, the SEC seeks to promote the dissemination of information necessary for investors to make informed decisions;<sup>140</sup> while on the other hand, corporations can still freely engage in astroturfing practices without any required disclosure of these activities, leaving shareholders without adequate information to structure their own behaviors accordingly.<sup>141</sup> The shareholders remain blind to the nature of what the corporation supports with little assistance in discovering the truth. This discrepancy hinders the shareholder's ability to decide whether to continue to support the company, or whether to consider passing

136. Adam Shell, *Millennial 401(k)s: A Peek Inside Their "Socially Responsible" Investments*, USA TODAY (May 13, 2018, 8:34 PM), <https://www.usatoday.com/story/money/2018/05/11/millennials-socially-responsible-investing/580434002> [<https://perma.cc/3FE3-E6GB>] ("Americans in their 20s and 30s are twice as likely as the overall investor population to put their money in companies targeting [socially responsible investing] according to Morgan Stanley's Institute for Sustainable Investing's 2017 Sustainable Signals report.").

137. *Id.* (describing socially responsible investing as "a strategy that aims to deliver competitive returns while trying to bring about social, environmental and workplace change").

138. Kellie Ell, *Socially Responsible Investing Is Gaining in Popularity. And It May Help You Make More Money*, CNBC (Apr. 10, 2018, 5:23 PM), <https://www.cnbc.com/2018/04/09/socially-responsible-investing-may-help-you-make-more-money.html> [<https://perma.cc/G43Y-LN23>]; see also *SRI Basics*, F. FOR SUSTAINABLE & RESPONSIBLE INV., <https://www.ussif.org/sribasics> [<https://perma.cc/UBX7-76MK>] (detailing the motivations of investors when participating in socially responsible investing practices).

139. See Shell, *supra* note 136 ("At the end of 2017, there were 234 mutual funds and exchange traded funds (ETFs) that invested in funds that were screened for environmental, social and governance factors, according to fund-tracker Morningstar. That's more than double the funds offered in 2012. Assets in these funds have risen 142% since then to \$100.2 billion, Morningstar says."); see also Jennifer Pryce, *Legendary Investor's Embrace of Sustainable Investing Is New, But the Movement Isn't*, FORBES (July 6, 2018, 11:00 AM), <https://www.forbes.com/sites/jenniferpryce/2018/07/06/legendary-investors-embrace-of-sustainable-investing-is-new-but-the-movement-isnt> [<https://perma.cc/D3GV-PQBB>] (analyzing the historical roots of socially responsible investing and its increased popularity in recent years).

140. See *supra* notes 127–35 and accompanying text.

141. See 2018 U.S. Trust *Insights on Wealth and Worth: Findings Overview*, U.S. TRUST, <https://ustrustaem.fs.ml.com/content/dam/ust/articles/pdf/insights-on-wealth-and-worth-2018/Findings-Overview.pdf> [<https://perma.cc/RU3Z-ZXTF>] (discussing the impact social causes have on millennials' investing decisions); see also 2018 U.S. Trust *Insights on Wealth and Worth: Detailed Findings*, U.S. TRUST, [https://ustrustaem.fs.ml.com/content/dam/ust/articles/pdf/insights-on-wealth-and-worth-2018/Detailed\\_Findings.pdf](https://ustrustaem.fs.ml.com/content/dam/ust/articles/pdf/insights-on-wealth-and-worth-2018/Detailed_Findings.pdf) [<https://perma.cc/CL9E-Y6XK>] (stating that 87% of millennials surveyed consider "[a] company's environmental, social, political and governance track record . . . important to the decision on whether or not to invest in it").

a shareholder resolution at the annual meetings to make change within the company.

The current SEC regulatory scheme also does not account for the variation of astroturfing closer to the lobbying context<sup>142</sup>—when companies astroturf in favor of politicians. Often times this influx of money is referred to as “dark money.”<sup>143</sup> Though the issue of campaign finance is outside the scope of this Note, it is worth stating that this problem is analogous to the astroturfing problem in the shareholder context. Investors do not always know what front organizations their investment-prospects sponsor or donate to, and as a result, the investor cannot easily discern which candidates their investment may be indirectly supporting.

In sum, the SEC cannot effectively protect investors or shareholders if those individuals cannot access material information for making investment decisions. The current SEC regulatory scheme requires that publicly held companies disclose specified financial information.<sup>144</sup> Though these disclosures are useful for investors making decisions based purely on the financial landscape of an investment prospect, they do not provide adequate protection for those investors who would prefer to invest in companies that align with their social values, but are unaware of astroturfing practices.<sup>145</sup> This information deficit between the investor and the corporation can cause problems: Individual investors may be contributing to astroturfing companies that support social causes, or candidates, that are contrary to the individual’s interests or conscience, and that individual has limited ability to discover and remedy the discrepancy.

#### IV. REQUIRED DISCLOSURES: ARMING THE PUBLIC WITH INFORMATION TO RIP UP THE ASTROTURF

While the various speech implications may pose a problem with an outright prohibition of astroturfing practices, banning astroturfing is not the only possible solution. This Part recommends that in the consumerism context, the States should handle the bulk of the regulation by enacting and modernizing the Uniform Deceptive Business Practice Act to ensure that the scope of that statute is broad enough to combat astroturfing practices.<sup>146</sup> Further, in response to the investor/shareholder problem, the SEC should recognize the growing prominence in socially responsible investing and

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142. As previously stated, the shareholder disclosures under Regulation S-K are primarily related to financial information. Changing this regulatory scheme would be a step beyond what is proposed by this Note. *See supra* note 127–35 and accompanying text.

143. *See* Beckel, *supra* note 2.

144. *See supra* notes 127–35 and accompanying text.

145. *See generally* 17 C.F.R. § 229 (2018) (listing the required disclosures that corporations must make to shareholders, while not mentioning anything related to the considerations investors make when engaging in socially responsible investing practices).

146. *See infra* Section IV.A (proposing opportunity for litigation and statutory prohibition).



update its disclosure policies to ensure the free flow of necessary investment information.<sup>147</sup> In addition, this Part argues that if the government would like to let the market regulate itself, it should require that companies publicly disclose all of the organizations or causes that they fund.<sup>148</sup>

A. *MODERNIZING THE UNIFORM DECEPTIVE TRADE PRACTICES ACT TO COMBAT ASTROTURFING*

The FTC's main concern is protecting consumers, but due to a combination of the agency's preference for hands off regulation,<sup>149</sup> and the United States' system of distributing power between both the federal and the state governments,<sup>150</sup> the States are often better equipped to handle problems like astroturfing. In order to more effectively hold astroturfing companies accountable, the drafters should modernize the Uniform Deceptive Trade Practice Act ("UDTPA") and the States should unanimously adopt these provisions.

At its inception, the UDTPA was a response to calls for a national model for assessing unfair trade practices.<sup>151</sup> It was intended to bridge the gap after the *Erie* decision forced courts to apply state law rather than federal common law.<sup>152</sup> Currently, 20 states have implemented the UDTPA.<sup>153</sup> The Act broadly defines deceptive acts—the provisions most relevant to astroturfing include the following:

A person engages in a deceptive trade practice when, in the course of business, vocation, or occupation, the person: . . .

(2) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

. . .

147. See *infra* Section IV.B (proposing opportunity for investors to benefit from enhanced disclosures).

148. See *infra* Section IV.C (proposing general disclosure of associations between corporations and other organizations to allow people to respond accordingly).

149. Gallagher, *supra* note 96 (detailing the FTC's preference to let the market regulate itself unless injury to consumers cannot reasonably be avoided).

150. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); see also *Federalism*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/federalism> [<https://perma.cc/UWY9-XNAB>] ("[T]he distribution of power in an organization (such as a government) between a central authority and the constituent . . . units.").

151. Richard F. Dole, Jr., *The Uniform Deceptive Trade Practices Act: Another Step Toward a National Law of Unfair Trade Practices*, 51 MINN. L. REV. 1005, 1006 (1967) (discussing the history of the Uniform Deceptive Trade Practice Act).

152. *Id.* ("[P]rior to *Erie R.R. v. Tompkins*, most unfair trade practices cases were brought in federal courts and decided without reference to state law." (footnote omitted)).

153. *Deceptive Trade Practices Laws: Information on the Law About Deceptive Trade Practices*, *supra* note 107.

(5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have . . .<sup>154</sup>

Though these provisions appear broad, it is unclear whether they would cover astroturfing in its modern form.

The current statutory provisions may be insufficient because while astroturfing does manipulate consumers generally, it does not necessarily cause a “likelihood of confusion or misunderstanding.”<sup>155</sup> Rather, astroturfing misrepresents the character of sponsorship or approval by internally generating the promotion. Subsection five comes closer to addressing the astroturfing problem, but still provides a loophole by presumably allowing a company to employ a front group to approve of the business. The front group would still be voicing *actual approval* of the company’s goods or services consistent with the statute, without disclosing the fact that the company itself is funding the endorsement.

To ensure that astroturfing companies are covered by the UDTPA, the states should amend their statutes to include the following language:

A person engages in a deceptive trade practice when, in the course of business, vocation, or occupation, the person: . . .<sup>156</sup>

(12) misrepresents or fails to disclose material connections between an individual or organization purporting to advocate for a good or service, and the company that promulgates such good or service;<sup>157</sup>

This recommended provision supports the FTC’s stated preferences in its updated Endorsement Guidelines, which requires disclosure of “‘material connections’ . . . between advertisers and endorsers.”<sup>158</sup> Further, the FTC has an interest in enabling state Attorney Generals to combat astroturfing practices in defense of consumers.<sup>159</sup> If the States were to enact this recommendation and amend the statutes, they could effectuate the FTC’s goal and more effectively protect consumers from astroturfing by providing

154. See Dole, *supra* note 151, at 1015–16. The UDTPA was originally drafted by the National Commissioners of Uniform State Laws, however the Act is no longer listed on its website. The text of the Act was included in Richard F. Dole’s Article and is consistent (though sometimes with minor adaptation) with the adopting states. Compare *id.* (listing the text of the Uniform Deceptive Trade Practice Act), with MINN. STAT. ANN. § 325D.44 (West 2018) (listing Minnesota’s deceptive trade practice act, consistent with that of Dole’s statement of the UDTPA).

155. Dole, *supra* note 151, at 1016.

156. *Id.* at 1015 (quoting the UDTPA).

157. For ease of reading, states that follow the numbering system used by the Uniform Act should classify this proposed addition as (12) and renumber the former (12) catch-all provision, “engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding,” as (13). See *id.* at 1016 (quoting the UDTPA).

158. FTC, Endorsement Guidelines Press Release, *supra* note 99.

159. Gallagher, *supra* note 96.

for civil or criminal penalties where the Endorsement Guidelines are unable to provide such a remedy.<sup>160</sup>

B. *MODERNIZING THE SEC'S DISCLOSURE POLICIES TO INFORM INVESTORS OF  
ASTROTURFING PRACTICES IN COMPANIES*

Part of the SEC's primary purpose is to "protect investors"<sup>161</sup> and under its current set of required disclosures,<sup>162</sup> it is not providing adequate information for investors focused on modern socially responsible investing trends. To address this information gap, the SEC should recognize the changing investment landscape and modernize its disclosure policies. Specifically, the SEC should engage in agency rulemaking that recognizes and accommodates investors who engage in socially responsible or environmental, social, and governance ("ESG") investing practices.<sup>163</sup>

Socially responsible investing provides individuals with an opportunity to invest based upon their values.<sup>164</sup> These investors "are strongly interested in investing [in a socially responsible] way and in looking at sustainability, and they are making an impact with their investments that goes beyond returns."<sup>165</sup> The practice has become increasingly popular over the last few years,<sup>166</sup> and that popularity does not show signs of dissipating any time soon. The largest group of people who practice socially responsible investing fall between ages 18 and 34,<sup>167</sup> meaning that the value-based practice will likely remain prominent for the foreseeable future. Though critics of the practice argue that socially responsible investing is not cost-effective or that it does not

160. 16 C.F.R. § 255 (2018) ("The Guides provide the basis for voluntary compliance with the law by advertisers and endorsers."); see also FTC, *Being Up-Front with Consumers*, *supra* note 103 (stating that there are no penalties attached with violating the Endorsement Guidelines).

161. SEC, *What We Do*, *supra* note 118.

162. See *supra* notes 127–35 and accompanying text (listing the current disclosure policies).

163. As a threshold matter, it is worth noting that socially responsible investing does not align with one specific political ideology. Though there are some specific issues sometimes associated with ESG practices, these investing decisions depend upon the individual's beliefs and preferences.

164. Shell, *supra* note 136.

165. Leslie Kramer, *As Millennials Age into Investors, Socially Conscious Funds Boom*, OBSERVER (Sept. 29, 2017, 1:00 PM), <https://observer.com/2017/09/socially-conscious-funds-increase-in-popularity-as-millennials-become-investors> [<https://perma.cc/QZX4-PBKJ>] (quoting Jon Hale, the Director of Sustainable Investing Research at Morningstar).

166. *Sustainable Investing Is Moving Mainstream*, JPMORGAN (Apr. 20, 2018), <https://www.jpmorgan.com/global/research/esg> [<https://perma.cc/T8HU-5AKK>] (analyzing trends in ESG and socially responsible investing practices and finding that "[t]he growth of ESG assets statewide is up over 200% from the past decade"); see also James Kynge, *The Ethical Investment Boom*, FIN. TIMES (Sept. 3, 2017), <https://www.ft.com/content/9254dfd2-8e4e-11e7-a352-e46f43c5825d> [<https://perma.cc/Y6WE-Y7ZW>] (discussing the growing popularity in ESG investing and positive outlook in the success of some funds).

167. Kramer, *supra* note 165 (noting that millennials make up "the largest living generation" in the United States and also the largest group to engage in socially responsible investing practices).

actually bring about change in company behaviors,<sup>168</sup> this does not change the fact that modern investors care about what types of causes and candidates that companies support.

Academics,<sup>169</sup> investors,<sup>170</sup> SEC Commissioners,<sup>171</sup> and the International Organization of Securities Commissions<sup>172</sup> are already calling for modernized disclosure policies that better enable investors to make informed decisions. These proposals include required disclosure of information relevant and useful to socially responsible investors.<sup>173</sup> The SEC has the statutory authority to make disclosure requirements “necessary or appropriate in the public interest or for the protection of investors.”<sup>174</sup> Given the effect socially responsible investing has on investor preferences, the SEC should update its disclosure policies and require that companies disclose the causes and organizations that they fund.

The required disclosures generally include purely financial information but can be amended to include information relevant to investor decisions regarding environmental, social, governance, and other causes. The SEC should require that companies disclose information regarding the social, political, and environment nature of its spending each year. One such proposal is currently in the notice-and-comment phase of the rulemaking process;<sup>175</sup> however it does not call for sufficient information for the purpose of combatting corporate astroturfing. The proposed rulemaking should:

168. Henry Blodget, *The Conscientious Investor*, ATLANTIC (Oct. 2007), <https://www.theatlantic.com/magazine/archive/2007/10/the-conscientious-investor/306192> [https://perma.cc/26KP-6EF8].

169. Letter from Cynthia A. Williams & Jill E. Fisch, to Brent J. Fields, Secretary, SEC (Oct. 1, 2018), <https://www.sec.gov/rules/petitions/2018/petn4-730.pdf> [https://perma.cc/RGL7-ZY9M] (petitioning the SEC for rulemaking “to develop a comprehensive framework requiring issuers to disclose identified environmental, social, and governance (ESG) aspects of each public-reporting company’s operations”).

170. *Id.*

171. Hazel Bradford, *SEC Should Ensure Investors Get ‘Truthful and Useful’ Information, Commissioner Tells CII Conference*, PENSIONS & INV. (Oct. 23, 2018, 6:25 PM), <https://www.pionline.com/article/20181023/ONLINE/181029946/sec-should-ensure-investors-get-truthful-and-useful-information-commissioner-tells-cii-conference> [https://perma.cc/QDZ4-FBXQ] (“One example of where the SEC could improve disclosure is ESG . . .”).

172. Rob Kozlowski, *Regulators Should Urge Public Companies to Disclose ESG Information—IOSCO*, PENSIONS & INV. (Jan. 18, 2019, 4:00 PM), <https://www.pionline.com/article/20190118/ONLINE/190119833/regulators-should-urge-public-companies-to-disclose-esg-info-8211> [https://perma.cc/P3GC-6EgK]; *Statement on Disclosure of ESG Matters by Issuers*, IOSCO (Jan. 18, 2019), <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD619.pdf> [https://perma.cc/AFV9-J8Q8].

173. Bradford, *supra* note 171 (quoting SEC Commissioner Kara Stein in a discussion of modernized disclosure requirements: “Quite simply, the commission needs to focus on information that is relevant to today’s investors”).

174. 15 U.S.C. § 77g(a)(1) (2012).

175. See *File No. 4-731—Petitions for Rulemaking Submitted to the SEC*, SEC, <https://www.sec.gov/rules/petitions.shtml> [https://perma.cc/PGJ3-68ME] (listing File No. 4-730 “Request for rulemaking on environmental, social, and governance (ESG) disclosure” as open to public comment).

(1) require that public companies disclose the names of organizations or non-profits that they substantially fund; (2) provide the names of public relations or media firms that the company does business with; and (3) the specific purpose of associating with said non-profit or media firm. This will provide conscientious investors with the information they need to make informed investing decisions by exposing astroturfers. Investors who find astroturfing practices objectionable can evaluate the information and decide whether to continue investing in a given company. SEC policy states that disclosure policy should protect investors by helping them “find what they need[,] understand what they find[, and] use what they find to make informed investment decisions.”<sup>176</sup> Updating disclosure policies to include ESG information would better accomplish this goal.

Though some companies already disclose information for socially responsible investing purposes, often times the lack of uniformity in reporting fails to provide investors with sufficient information to allow for company-to-company comparison.<sup>177</sup> Other companies face shareholder proposals to broaden disclosures.<sup>178</sup> Because of the growing pressure for uniform practices, the SEC should step in to provide uniformity to allow individuals to compare companies for investment purposes, while also helping to guide corporate behavior.<sup>179</sup> In short, by adopting a disclosure policy that reflects socially responsible concerns, the SEC will provide greater protections for those investors who care about the causes that their money supports, and structure for companies looking to increase transparency. In turn, this change will limit the effectiveness of astroturfing practices.

### C. DISCLOSURE AND MARKET SELF-REGULATION

Lastly, if neither the FTC, the state legislatures, nor the SEC choose to change the existing policies surrounding astroturfing practices, Congress should step in and legislate. By enhancing disclosure policy to include mandatory disclosure of associations between non-profit front groups, public relations firms, and business partners, Congress could arm the public with the tools to expose astroturfing practices.<sup>180</sup> The public has shown time and time

176. SEC, *Fund Disclosure*, *supra* note 119.

177. See Williams & Fisch, *supra* note 169, at 9–11 (discussing the need for standardized disclosure requirements regarding ESG information in order to provide investors with comparable information to make investing decisions).

178. *Id.* at 12–13 (discussing shareholder proposals and growing pressure for uniform disclosure policy); see also Hazel Bradford, *SEC Urged by Institutions to Mandate ESG Disclosures*, PENSIONS & INV. (Oct. 2, 2018, 3:22 PM), <https://www.pionline.com/article/20181002/ONLINE/181009935/sec-urged-by-institutions-to-mandate-esg-disclosure> [<https://perma.cc/DK6E-JCHD>].

179. Williams & Fisch, *supra* note 169, at 9–10 (discussing problems for companies associated with voluntary disclosure efforts).

180. Note that in the context of corporate political speech, the Supreme Court stated that “[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.” *Citizens United v. FEC*, 558 U.S.

again that if provided information about a company's decisions, individuals are willing to speak up and respond accordingly.<sup>181</sup> Presumably, this principle also applies to consumers and investors when provided with information about astroturfers. Both groups can choose to boycott companies that participate in practices that they find objectionable. Boycotts can in turn, alter a company's behavior.<sup>182</sup> The free market can regulate itself and limit the effectiveness of astroturfing, but only if consumers and investors are first able to access the information necessary to make fully informed decisions.

## V. CONCLUSION

Astroturfing is problematic for a number of reasons, and regulation is difficult because the practice touches on many different aspects of the law. Consumers and investors are being manipulated and deceived by groups who are shielded from accountability through their use of front groups and public relations firms. The public has little recourse against this kind of deception under the current regulatory regime. But various state actors, the FTC, and the SEC, all have the tools necessary to combat the practice. This Note proposes that those actors refine the existing regulatory scheme by: (1) adopting and updating the Uniform Deceptive Trade Practice Act to formally classify astroturfing as deceptive, (2) modernizing mandatory disclosure to shareholders to include information relevant to socially responsible investors, and (3) publicly disclosing material associations between companies and non-profits or public relations firms, enabling members of the public to respond in accordance with their consciences. Disclosure presents a method by which the public is able to inform themselves and protest practices they find objectionable. If the public is armed with more

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310, 319 (2010). Though not directly applicable in the astroturfing context because of Citizens United's campaign finance background, this still demonstrates that the Supreme Court left the door open to regulating corporate speech through mandatory disclosures in the corporate context.

181. Bruce Watson, *Do Boycotts Really Work?*, GUARDIAN (Jan. 6, 2015, 10:14 AM), <https://www.theguardian.com/vital-signs/2015/jan/06/boycotts-shopping-protests-activists-consumers> [<https://perma.cc/U3W9-BZRB>] (discussing qualities of successful boycotts versus unsuccessful ones).

182. Maura Judkis, *Land O'Lakes Withdraws Support for GOP Rep. Steve King After Boycott Calls*, WASH. POST (OCT. 30, 2018), <https://www.washingtonpost.com/news/food/wp/2018/10/29/land-olakes-faces-boycott-calls-over-its-donation-to-gop-rep-steve-king> [<https://perma.cc/QM4Y-KXKH>] (describing Land O' Lakes' decision to discontinue donations to a controversial politician after consumers discovered the ties between that politician and the company). Compare Paul R. La Monica, *Nike Investors Aren't Happy About the Colin Kaepernick Ad*, CNN BUS. (Sept. 5, 2018, 8:04 AM), <https://money.cnn.com/2018/09/04/news/companies/nike-stock-down-colin-kaepernick/index.html> [<https://perma.cc/M263-3MJ5>] (discussing investors' concerns over Nike's decision to partner with Colin Kaepernick and subsequent boycotts as a result), with Randy Tucker, *Nike Stock Hits New Record Following Kaepernick 'Just Do It' Ad Controversy*, USA TODAY (Sept. 17, 2018, 7:37 AM), <https://www.usatoday.com/story/money/2018/09/16/nike-sales-brisk-despite-kaepernick-controversy/1307506002> [<https://perma.cc/VHC5-QRVE>] (stating that while some consumers boycotted following the Nike decision, stock prices reached an all-time-high and stores sold out of Nike products; demonstrating that consumers will respond to practices they find praiseworthy as well as objectionable).

information, genuine grassroots might lead the charge in ripping up the astroturf.