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Manipulative Games of Gifts by Corporate Executives[+]

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Abstract: Executives use a variety of manipulative games to maximize the value of their gifts, including backdating, spring-loading, bullet-dodging and insider information. We find that executives exploit a legal loophole to backdate their gifts. Stock prices rise abnormally about 6% during the one-year period before the gift date and they fall abnormally by about 5% during the one year after the gift date. We find this pattern is stronger for late-reported gifts, which is consistent with the backdating hypothesis. We suggest policy recommendations that should improve the compliance of gifts with the requirements of anti-fraud provisions of federal securities laws.

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Introduction

Studies have shown that corporate insiders tend to make favorable charitable gifts just prior to a severe decline in the company's share prices.[1] The timing of these gifts is troubling, as it seems to suggest that the corporate insiders may have acted using material, non-public information to reap an unfair benefit. Many of these donations were made at a time when it would have been illegal to make a sale of the same securities due to their access to this information.

To explore whether these timing games are general and whether these manipulations continue to this day, we analyze these timing games around gifts of common stock by corporate executives using a comprehensive dataset covering 1986-2014. Specifically, we investigate five non-mutually-exclusive hypotheses for executives' motivations regarding the timing of their gifts in their own firms' stock: 1) wait until after the stock has appreciated naturally to maximize their donation as well as their tax-deduction (passive-timing); 2) accelerate the good news prior to the gifts to further increase their donation and tax deductions (spring-loading); 3) delay the release of bad news until after the gifting of the stock to again increase their donation as well as tax deductions (bullet-dodging); 4) engage in backdating of the gift date in order to maximize their donation and tax deductions (backdating); and 5) use material, undisclosed inside information about the future prospects of their own firms stock to maximize their donation and tax-deductions (inside-information).

Unlike previous studies that use very limited sample of firms or very limited time periods, we investigate these motivations for the timing of gifts by utilizing a comprehensive database that includes all gifts of common stock where executives gift the stock of their own firms, in all publicly listed firms in the United States. Our data covers all reported gifts of common stock and contains over 200,000 observations. The total volume of gifts contained in our dataset is approximately 9.5 billion shares, with a dollar value of approximately $300 billion. Consequently, our findings are general and apply to all executives' gifts of their firm's stock.

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[1] *See* David Yermack, *Deductio ad absurdum: CEOs Donating their own Stock to their own Family Foundations*, 94 J. FIN. ECON. 107 (2009).

Given the large dollar volume of gifts covered and the comprehensive nature of the study, our findings are important from legal, economic, as well as public policy perspectives.

Overall, we find that gifts are well-timed over the time period of 1986-2014. Our research demonstrates that each of our five hypotheses explain at least some of the timing behavior of gift-giving of stock in the United States during this time period. Stock prices rise abnormally about 6% during the one-year period before the gift date and they fall abnormally by about 5% during the one year after the gift date. We find this pattern is stronger for late-reported gifts, which is consistent with the fraudulent backdating hypothesis. We also find that almost two-thirds of gifts are reported late, taking advantage of an exception in the Sarbanes-Oxley Act of 2002 (SOX),[2] further contributing to the lax regulatory conditions that make it easy to manipulate the timing of gifts. We suggest policy recommendations that should improve the compliance of gifts with the requirements of SOX as well as general anti-fraud provisions of federal securities laws.

Our finding that executives' gifts are well-timed also has economic and policy implications for the federal tax laws. Under U.S. tax law, the donor of gifts of stock to public or private charitable foundations may obtain a personal income tax deduction for the market value of the shares while simultaneously avoiding the capital gains tax that would be due if the shares were sold.[3] Furthermore, although open market sales of stock are undoubtedly within the purview of federal insider trading law, whether stock gifts to charity are so constrained is an unresolved question.[4] These loopholes create an opportunity for exploitation: empirical evidence suggest that corporate insiders use their access to inside information to time their stock donations prior to price declines, increasing their federal income tax deductions.[5]

To address these issues, this paper proceeds as follows. Section I offers, by way of background, a discussion of previous studies on executives' gifts of common stock. Section II analyzes the legal issues presented by timing gifts of stock. Section III contains our empirical findings together with the legal implications of those findings. In Section IV we offer proposals

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[2] Pub. L. No. 107-204, 116 Stat. 745 (codified in sections of 11, 15, 18, 28 and 29 U.S.C.).
[3] Suppose that a stock purchased at $100 was gifted when the stock price reached $200 and subsequently, the stock price declined back to $50 after the gifting. In this case, the individual can take a deduction for $200 instead of holding a share worth $50.
[4] Yermack, *supra* note 1, at 107.
[5] *Id.*

for reform followed by our concluding remarks.

I. Background – Previous Studies

Three types of motivation determine an individual's desire to donate. [6] The intrinsic motivation represents the subjective value of donating for its own sake, which is shaped by the individual's altruism and other private preferences.[7] The extrinsic motivation is related to external benefits gained from donations.[8] Image (signaling) motivation links to the individual's desire to be positively perceived by others, which affects both the individual's reputation with others and her own self-esteem.[9] Finance literature basically seeks answers for the second motive.

Studies on charitable gifting have focused on the income and price elasticities of donations.[10] One of the earlier studies in this topic, conducted by Professors Martin Feldstein and Amy Taylor, explores income tax benefits of donations by analyzing special tax returns filed in 1962 and 1970.[11] The study concludes that tax deductibility of donations provides an efficient subsidy for charities.[12] Alternative tax policies affecting the volume and distribution of gifts and

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[6] *See, e.g.,* Roland Bénabou & Jean Tirole, *Incentives and Prosocial Behavior*, 96 AM. ECON. REV. 1652 (2006) [hereinafter Bénabou & Tirole, *Prosocial Behavior*].

[7] Dan Ariely et al., *Doing Good or Doing Well? Image Motivation and Monetary Incentives in Behaving Prosocially*, 99 AM. ECON. REV. 544 (2009).

[8] Roland Bénabou & Jean Tirole, *Intrinsic and Extrinsic Motivation*, 70 REV. ECON. STUD. 489, (2003) [hereinafter Bénabou & Tirole, *Intrinsic & Extrinsic*]. Extrinsic motivation is often described as a reinforcement mechanism or contingent reward in behavioral economics and human resources management literature.

[9] Bénabou & Tirole, *Prosocial Behavior*, *supra* note 6, at 1653-54; *see also* Zachary Grossman, *Self-Signaling Versus Social-Signaling in Giving* 1-2 (Nov. 4, 2010) (unpublished manuscript) (describing how social signaling, actions taken to influence others' perceptions of oneself, and self-signaling, "efforts to maintain positive beliefs about oneself," underscore image motivation in the context of giving).

[10] *See, e.g.,* Michael K. Taussig, *Economic Aspects of the Personal Income Tax Treatment of Charitable Contributions*, 20 NAT'L TAX J. 1 (1967); Martin Feldstein & Charles Clotfelter, *Tax Incentives and Charitable Contributions in the United States: A Microeconometric Analysis*, J. PUB. ECON. 1 (1976); Feinstein & Taylor, *infra* note 11; Daniel Feenberg, *Are Tax Price Models Really Identified: The Case of Charitable Giving*, 42 NAT'L TAX J. 629 (1987); Randolph, *infra* note 13; Auten et al., *infra* note 13; Laura Tiehen, *Tax Policy and Charitable Contributions of Money*, 54 NAT'L TAX J. 707 (2001).

[11] Martin Feldstein & Amy Taylor, *The Income Tax and Charitable Contributions*, 44 ECONOMETRICA 1201 (1976). In the 1970s, the charitable tax break was generally equivalent to the fair market value of the donated item(s), just like today. *See id.* at 1203. However, the federal income tax marginal rates have varied significantly over the past half-century, arguably affecting the prevalence of, and trends in, charitable giving. *See* List, *infra* note 14, at 170.

[12] That is, charitable giving is "price elastic," meaning that the marginal benefits of giving (the value of donations charities receive) exceed the marginal costs (lost tax revenue). John A. List, *The Market for Charitable Giving*, 25 J. ECON. PERSP. 157, 169-70 (2011).

distribution of tax liabilities, and net disposable income among donors and donees, are important determinants of donations as well as matters of public policy.[13]

Very few studies have looked specifically at CEOs' stock gifts. Four studies are of note: the first conducted by Yang-Ho Kim and Man-U Lee,[14] the second by Woon-Oh Jung and Sung Ook Park,[15] the third by David Yermack[16] and the last by Sudip Ghosh and Maretno A. Harjoto.[17] In the first paper, Professors Kim and Lee examine the transfers and subsequent cancellations of stock gifts in the period between 1993 and 2002 by South Korean controlling shareholders attempting to minimize their gift tax.[18] They discover that prior to 2000, executives donated stocks to their families on the days they estimated that the stock prices would be at local minimums.[19] If stock prices went on dropping after the donation dates, executives cancelled the gifts. [20] After a more restrictive gift-tax valuation rule for stock gifts was enacted in Korea in 2000, however, the incidence of this form of passive timing manipulation decreased significantly.[21] Professors Jung and Park, in the second study, analyze stock gifts of controlling shareholders to their families in Korea for the 2000- 2004 period. Their study finds that companies would depress their stock prices close to these transfer dates by disclosing negative

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[13] Studies typically support the importance of tax policy on donor behavior. Although they suggest other factors affecting donor behavior exist, studies have provided conflicting evidence about the relative significance of these factors. For example, Professor William Randolph finds evidence that income elasticity is important, and because people have a tendency to smooth their consumption over time, the volume of donations is affected by transitory income elasticity as well as permanent price elasticity. William C. Randolph, *Dynamic Income, Progressive Taxes, and the Timing of Charitable Contributions*. 103 J. POL. ECON. 709 (1995). On the other hand, Professor Gerald Auten and colleagues argue that transitory income and tax effects have no impact on gift-giving behavior – what matters are the persistent tax and income effects. Since tax policies have long-lasting effects on company income level, they are the most important elements that determine the amount and timing of donations. Entities adjust donations more on based on tax regulation than on based on income shocks. *See* Gerald E. Auten et al., *Charitable Giving, Income, and Taxes: An Analysis of Panel Data*, 92 AM. ECON. REV. 371 (2002).

[14] Yang Ho Kim & Man-U Lee, *A Study on the Gift Time Management of Listed Stocks*, 20 KOREAN J. TAX'N RES. 57 (2003). Because this article is published in Korean, we refer to Jung & Park, *infra* note 18, for a helpful description of its contents.

[15] Woon-Oh Jung & Sung-Ook Park, *Do Controlling Shareholders Manage the Timing of Information Disclosure When Making a Stock Gift?*, 39 ASIA-PAC. J. FIN. STUD. 831 (2009).

[16] Yermack, *supra* note 1.

[17] Sudip Ghosh & Maretno A. Harjoto, *Insiders' Personal Stock Donations from the Lens of Stakeholder, Stewardship and Agency Theories*, 20 BUS. ETHICS: A EUR. REV. 342 (2011).

[18] Jung & Park, *supra* note 15, at 835.

[19] *Id.* at 835-36.

[20] *Id.* at 836.

[21] Prior to 1997, the Korean valuation rule for gifts of stock was the closing market price on the gift date. In 1997, this changed to the average of the daily closing prices over the three month period prior to the gift date. In 2000, the rule became the average market price in the two months before and two months after the gift date. *Id.* at 834. This is the rule in force as of 2014. *See* Republic of Korea Ministry of Strategy and Finance, KOREAN TAXATION 163 (2014).

news to or withholding positive news from the market, thereby reducing the donor's gift taxes.[22] In the third study, Professor Yermack considers 150 stock gifts made by public company Chairmen and CEOs to their family charities in the US,[23] and finds inflated stock prices around the days of gift. Increased stock prices provide income tax shields, and an opportunity to offset capital gains yields to donors in the US. In the last study, Professors Ghosh and Harjoto find price movements in the US market similar to those described in Professor Yermack's study. Executives time their donations to benefit from tax advantages.

The motivations that affect stock prices around gift dates in Korea are different from those that affect such prices in the U.S. Historically, most Korean companies were effectively managed by their controlling shareholders and their families,[24] and aspects of the huge, multi-conglomerate, family-controlled "chaebol" system still persist today.[25] Controlling families maximize and propagate their personal wealth by donating shares to their children.[26] However, the extremity of inheritance and gift taxes, which maxes out at 50% in Korea, force executives to look for astute ways to protect their level of wealth.[27] Professors Kim and Lee document that before the Korean law began to use time periods after the gift date to calculate the gift tax on stock gifts, executives gave stocks to their families when they estimated the stock prices would not drop further.[28] In line with this policy, they cancelled donations if stock prices continued to drop.[29] This is a passive strategy: executives do not change the timing of information disclosures, nor do they attempt back dating in order to minimize stock prices around the date of donation; rather, they use their insider information to find the most appropriate date.[30]

In 2000, the Korean law changed its valuation base for assessing the gift tax on a stock gift to the average market value of the underlying stock over the four-month period encompassing the two months before and two months after the gift date.[31] Under this law, Korean executives are expected to keep stock prices low before and after gift dates. To test this

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[22] Jung & Park, *supra* note 15, at 858.
[23] Yermack, *supra* note 1.
[24] *See* Jung & Park, *supra* note 15, at 832.
[25] *See* Charlotte M. Powers, *The Changing Role of Chaebol: Multi-Conglomerates in South Korea's National Economy*, 10 STANFORD J. EAST ASIAN AFFAIRS 105, 105 (2010).
[26] Jung & Park, *supra* note 15, at 832.
[27] *See id.*
[28] *See id*. at 835-36.
[29] *Id*. at 836.
[30] *See id*.
[31] *Id*. at 834.

hypothesis, Jung and Park analyze timing of information disclosures when company executives made stock gifts.[32] In accordance with the stock price valuation period, they analyze the prices of stock starting from two months prior to two months after the gift date. During the valuation period for a gifted stock, its price would remain low, but after the valuation period ended, the price would go up again.[33] This suggests that Korean executives consciously keep stock prices low during the valuation period of gifted stocks so that donations seem less valuable. The study finds that executives delay good news and bring bad news forward during the valuation period, and release good news only after the valuation period is over.[34] To control for possible endogeneity resulting from up- and down- markets, they compare donating firms with non-donating peers, and conclude that their results are robust. [35]

In contrast, the American legal system provides incentives for U.S. executives to make donations of stock gifts. First, U.S. executives generally do not need to worry about gift tax in the case of charitable contributions, and the larger the value of their donation, the larger their tax benefit.[36] Consequently, executives in the United States are interested in maximizing the value of their stock donations, not minimizing them. Second, personal stock gifts in the U.S. are exempted from various insider trading laws that would restrict their open market sales and purchases, enabling executives to make stock gifts (as opposed to open market sales) even during company blackout periods.[37] Executives are also subject to more relaxed reporting requirements (Form 5 instead of Form 4) with respect to gifts, and the short-swing profit prohibitions of Section 16(b) do not apply to gifts.

Stock gifts provide two additional types of benefits to managers. First, they provide income tax deductions, and second, they can offset the personal capital gains tax they would owe if they sold the shares at a premium in lieu of donating them. Consequently, we should interpret the findings in US studies in the light of these facts.

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[32] Jung & Park, *supra* note 15, at 832.
[33] *Id*. at 852.
[34] For a discussion of the study's empirical results, *see id*. at 844-846.
[35] *See id*. at 851-57.
[36] Generally, charitable contributions are deducted from the base for computing gift tax. *See* 26 U.S.C. § 2522 (2015).
[37] *See* Coles C. Bettis & M. Lemmon, *Corporate Policies Restricting Trading by Insiders*. 57 J. FIN. ECON. 191(2000). Professor Evelyn Brody emphasizes this problem and brings recommendations to tackle it. *See* Evelyn Brody, *Charities in Tax Reform: Threat to Subsidies Overt and Covert*, 66 TENN. L. REV. 687 (1999).

Professor Yermack's study considers 150 stock gifts made by public company chairmen and CEOs to their family charities.[38] He found that the stock price creates a local maximum at the actual reported gift date, with the stock price rising and falling by an irregular three percent in the two-month period around that date.[39] Yermack found a pattern of "excellent timing," observing that CEOs tend to donate shares following run-ups in their companies' stock prices.[40] On average, the gift date coincided with a peak in the stock price trajectory, with prices falling in the months after the date of gift.[41] Furthermore, this post-gift price drop was more dramatic for larger gifts than for smaller ones, regardless of the methodology used to calculate abnormal stock returns.[42]

Professor Yermack presents two possible explanations for the favorable timing of these stock gifts. First, he suggests that this is the result of insider information, wherein corporate insiders time their donations of stock on the basis of material, non-public information in a manner which will increase their personal income tax deductions.[43] Executives may thus wait to gift stock just prior to negative earnings announcements or just after positive ones.[44] Second, he suggests that perhaps the executives are backdating the date of the stock donation to increase their tax deductions. Ex-post, CEOs may increase the value of their tax deduction for charitable contributions by backdating the date of their stock gifts to local peaks in the company's stock price trajectories.[45] Stock gift backdating is likely to violate IRS regulations, which look to the date the stock gift is donated when assessing its value for tax purposes.[46]

Yermack found evidence consistent with both theories. The data suggest CEOs are taking advance information about earnings releases into account when choosing the timing of stock gifts.[47] He noted a pattern where some CEOs would make their donations just before negative earnings announcements, and others would delay them until just after positive

[38] Yermack, *supra* note 1.
[39] *Id*. at 108.
[40] *Id.*
[41] *Id.* at 114.
[42] *Id*. at 114-15.
[43] *Id*. at 118-19.
[44] *Id*. at 119.
[45] *Id.*
[46] *See* 17 C.F.R. § 1.170A-1(b) (2015) ("Ordinarily, a contribution is made at the time delivery is effected").
[47] *Id.* at 108.

announcements.[48] Yermack also found evidence consistent with the backdating of stock gifts by CEOs to their family foundations for gifts made outside the month of December.[49] The data showed a positive relationship between the favorable timing of CEO stock gifts to family foundation and the time lag between the purported gift date and the date the donor filed the donation with the Securities and Exchange Commission (SEC), which did not hold true for CEO's gifts of stock to other donees.[50] This finding is consistent with backdating, as it implies that non-December donations tend to be better timed when CEOs have a larger temporal range of dates on which to report the gift. Yermack's data also shows that for all stock gifts, favorable timing is positively associated with the size of the stock gift.[51]

Yermack drew a number of conclusions from these results. First, many corporate executives opportunistically time their gifts on the basis of inside information or backdate their gifts to increase the value of their income tax benefits in the guise of charity.[52] Second, less-than-charitable motives illuminate the popular use of private family foundations as recipients of charitable contributions.[53] The majority of the family foundations in the sample fail to follow the prudent investor rule of investment management: the trustees, which are usually comprised of the CEO and his family members, retain stock gifts instead of diversifying their assets.[54] Yermack's conclusion indicates that there is "a surprising mix of motives by corporate executives who make large charitable contributions: while seeking so subsidize good works in society, they simultaneously follow aggressive tax evasion strategies."[55]

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[48] *Id.(*"Some CEOs made gifts of stock just before adverse quarterly earnings announcements, a time when company blackout periods would almost always prohibit open market sales.")

[49] *Id*. at 121. Many of the CEO's stock gifts occurred in December, which is when most tax-motivated charitable donations are made. Many taxpayers wait until the end of the taxable year to determine their charitable contributions once they have full knowledge of their annual taxable income.

[50] *Id.* at 108.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 109.

[54] *Id*. The "Prudent Investor" rule, which grew out of the "Prudent Man" rule first articulated in Harvard College v. Amory, 26 Mass. 446 (1830), requires that a trustee "manage a trust portfolio with 'an overall investment strategy having risk and return objectives reasonably suited to the trust' and to 'diversify the investments of the trust.'" Max M. Schanzenbach & Robert H. Sitkoff, *The Prudent Investor Rule and Market Risk: An Empirical Analysis* 1 (Harvard Public Law Working Paper No. 15-06, 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2583775. "Under the rule a trustee must minimize idiosyncratic risk, align market risk with beneficiary risk tolerance, and manage market risk exposure on an ongoing basis." *Id.*

[55] Yermack, *supra* note 1, at 122.

Professors Ghosh and Harjoto analyze the personal stock donations of top executives and board directors in the US for the 1993- 2005 period.[56] The study focuses on executives' timing of stock gifts in relation to the shareholder returns and corporate social responsibility of their companies.[57] Ghosh and Harjoto separate stock price data into two groups: stocks of companies whose "insiders" make stock donations and stocks of companies whose insiders do not.[58] They find evidence that corporate executives opportunistically time their gifts to obtain tax benefits. The price patterns around stock gift announcement dates support Yermack's "inside information" and backdating theories.[59] They then analyze the relationship between insider stock donations and returns to shareholders. By comparing the "no insider donation" and "insider donation" data, they find evidence that short- term and long- term returns of donating companies are inferior to peers whose managers do not donate.[60] This result shows that stock donations provide personal benefits to executives but reduces holdings of shareholders. Thus, executives' personal donations of company stock may be described as a principal-agent problem.[61] Ghosh and Harjoto also find that top executives make fewer insider stock gifts in companies with stronger corporate social responsibility.[62] This indicates the greater the company's corporate social responsibility, the less the shareholders are harmed by executives opportunistically extracting personal benefits from stock donations. This behavior is consistent with stakeholder theory.[63]

II. Legal Analysis

A. Federal Tax Laws

[56] *See* Ghosh & Harjoto, *supra* note 17.
[57] *Id.* at 343.
[58] *Id.* at 347.
[59] *Id.* at 348-49.
[60] *See id*. at 349-50.
[61] Principal-agent problems refers to situations where the agent acts to maximize their own preferences and not those of the principal. In general, agents do not make the same choices as would the principal. In the current context, when executives donate stock, they look to maximize their personal benefit instead of those of their shareholders. See *Id.* at 346.
[62] *See id.* at 351.
[63] *Id.* at 354.

The tax benefits stemming from the charitable donation of stock depend on the length of time the stock is held, whether the stock is closely or publicly held, and whether the recipient of the gift is a public or private entity. Generally, for the charitable contribution of stock, any excess not deductible in the year of contribution is carried forward for up to five subsequent tax years.[64] The contribution of any stock held long-term – that is, for more than one year[65] – permits the donor to deduct the fair market value of contributed stock.[66] The contribution of any securities held short-term – for one year or less – limits the deduction to the lower of the donor's cost basis and the fair market value of the security.[67]

The contribution of long-term marketable stock to public charities permits the donor to deduct the fair market value of the donated stock in an amount up to 30% of the donor's adjusted gross income (AGI), with a five-year carry-forward; cost basis is not taken into account.[68] In the case of short-term marketable stock contributed to public charities, the donor's deduction is the lower of donor's cost basis and the stocks' fair market value, and is limited to 50% of the donor's AGI.[69] The fair market value of the contributed marketable stock is the mean between the high and low price on the date of the contribution.[70]

Taxpayers who contribute marketable stock to a private foundation receive more limited tax benefits. Donors are subject to a maximum deduction of 20% of AGI for contributions to private foundations.[71] Generally, for contributions of stock held long-term, the donor is still entitled to deduct the full fair market value of the donated shares; however, if the donor contributes stock valued at over 10% of all of the corporation's outstanding shares, the deduction becomes the donor's cost basis for the additional amount.[72] For contributions of short-term stock, the donor's cost basis deduction is limited to 30% of AGI.

Contributions of closely held stock to public charities or donor-advised funds are subject to the same deduction, AGI limitation, and carry-forward rules as those for contributions of marketable securities. For transfers of closely held stock to private foundations, donors are

[64] 26 U.S.C. § 170(d)(1).
[65] *Id.* § 1222(3) (defining long term capital gain as "gain from the sale or exchange of a capital asset held for more than 1 year, if and to the extent such gain is taken into account in computing gross income").
[66] *Id*. § 170(b)(1)(c).
[67] 26 U.S.C. § 170(e)(1)(A).
[68] *Id*. § 170(b)(1)(C).
[69] *Id*. § 170(b)(1)(A).
[70] 26 C.F.R. § 20.2031-2(b)(1).
[71] 26 U.S.C. § 170(b)(1)(D)
[72] *Id*. § 170(e)(5)(C).

permitted only a deduction equal to the lower of their cost basis or fair market value, subject to a cap of 20% of AGI with the five-year carry-forward.[73] Furthermore, if the donor claims a value in excess of $5,000 for the donation of securities that are not publicly traded, the value of the donation must be established by an independent appraisal conforming to Internal Revenue Service (IRS) Regulations.[74] In a nutshell, the appraisal must be prepared by a qualified appraiser who has earned a designation from a recognized professional organization.[75] The appraisal must include a description of the property transferred, the date of contribution, any terms or conditions put on the property transferred, information on the qualified appraiser, the basis for making the valuation, the appraiser's signature, and the date of the appraisal.[76] Further, the appraisal must be made within 60 days of the date of gift.[77] The donor must attach an appraisal summary (IRS Form 8283), signed by both donee and appraiser, to her tax return.[78]

The federal income tax law may also impose an "excess business holdings" tax on private foundations.[79] This rule limits a private foundation's ownership of voting stock in a particular corporation to 20%, less the percent of voting stock owned by "any disqualified persons."[80] This 20% ceiling is increased to 35% if the voting control of the corporation is effectively held by unrelated third parties who are not disqualified persons.[81] A private foundation that violates this rule will be subject to an initial tax equal to 10% of the excess holdings.[82] If the foundation continues to have excess business holdings, it will be penalized with an additional 200% excise tax.[83]

[73] *Id*. § 170(b)(1)(C).
[74] 26 C.F.R. § 1.170A-13(c)(7)(xi)(C).
[75] According to the IRS Regulations, a qualified appraiser is an individual who (a) "holds himself or herself out to the public as an appraiser or performs appraisals on a regular basis," (b) pursuant to 26 C.F.R. § 1.170A-13(c)(3)(ii)(F), "is qualified to make appraisals of the type of property being valued," and (c) is *not* i) the donor, donee, or a party to the transaction in which the donor acquired the relevant property, ii) any employee or relative of any persons described in (c)(i), iii) any appraiser who performs the majority of her appraisals for a person described in (c)(i). 26 C.F.R. § 1.170A-13(c)(5). However, a person cannot be a qualified appraiser if "the donor had knowledge of facts that would cause a reasonable person to expect the appraiser falsely to overstate the value of the donated property." *Id*. § 1.170A-13(c)(5)(ii).
[76] *Id.* § 1.170A-13(c)(4)(ii).
[77] *Id*. § 1.170A-13(c)(3).
[78] *Id*. § 1.170A-13(c)(2)(i).
[79] 26 U.S.C. § 4943.
[80] *Id*. § 4943(c)(2)(A).
[81] *Id*. § 4943(c)(2)(B).
[82] *Id*. § 4943(a).
[83] *Id*. § 4943(b).

The category of disqualified persons include "any person . . . in a position to exercise substantial influence over the affairs" of the foundation, such as substantial contributors, officers, directors, trustees, and related parties.[84] Thus, a high-level corporate executive, such as a CEO, who wishes to contribute her company's stock to her own foundation may be particularly likely to be subject to the excess business holdings tax. The federal tax law provides very limited safe harbors: 1) a de minimis exception which allows the private foundation to hold up to 2% of the voting stock, regardless of the percent of voting stock held by disqualified persons,[85] and 2) a five-year time frame for the foundation to reduce its excess business holdings if the foundation receives the stock by gift or bequest before imposing the tax.[86]

The corporate insider benefits from the gift in two ways. First, the fair market value of a gift of stock held long-term is deductible from her taxable income, decreasing the overall tax paid. The tax benefits are especially substantial for top-bracket taxpayers. A donor who is a corporate executive is likely to be subject to the highest marginal tax bracket of the Alternative Minimum Tax, which is 28%;[87] such a donor would receive a federal tax benefit of 28% of the fair market value of the stock.[88] Second, the donor is able to escape the capital gains tax on the difference between the fair market value of the stock and her cost basis, which is particularly advantageous if the stock has significantly appreciated in value.

B. Analysis of Liability under Federal Securities Laws

When the donor of securities is also a corporate insider, the question of liability for insider trading becomes important.[89] This Part addresses the securities laws at issue with respect to potential liability for insider trading. This includes Sections 16(b) and 10(b) of the Securities

[84] *Id*. § 4943(f)(3).
[85] *Id*. § 4943(c)(2)(C).
[86] *Id*. § 4943(c)(6).
[87] 26 U.S.C. § 55. An individual U.S. taxpayer must pay the lower of regular tax and the alternative minimum tax. The AMT ostensibly limits the tax benefits available to "taxpayers with high economic income." Internal Revenue Service, *Topic 556 – Alternative Minimum Tax* (Jan. 6, 2016), *accessible at* https://www.irs.gov/taxtopics/tc556.html.
[88] The donor would potentially also benefit from any charitable deductions available in state income taxes.
[89] Richard A. Tulli, *Insider Gifts of Securities to Charities*, FROM THE SOX UP (Dec. 20, 2011), *accessible at* http://www.fromthesoxup.com/2011/12/insider-gifts-of-securities-to-charities.

Exchange Act,[90] as well as Rule 10b-5.[91] In addition, implications for the charity arising under Rule 144 are discussed.

1. Short Swing Profits: Section 16(b) of the Securities Exchange Act

The short-swing profit prohibition of Section 16(b) of the Securities Exchange Act of 1934 mandates that corporate insiders may not obtain a security and dispose of it at a higher price (or vice versa) in less than six months.[92] This rule requires that corporate officers, directors, and 10 percent shareholders publicly report all attainment and disposition of stock, which includes gifts.[93] This implies that a charity with at least 10 percent ownership of a publicly traded company's stock is also subject to Section 16.[94]

SOX provides further details regarding time requirements for reporting. According to SOX, all open market sales and purchases must be disclosed on Form 4 within two business days.[95] SOX, however, did not update the reporting rules for bona fide gifts of stock, which are subject to less stringent requirements: gifts are reported on Form 5, which must be filed within 45 days after the end of the company's fiscal year.[96] Yermack finds that nearly half of the executives in his study sample delayed reporting their gift beyond two business days.[97] Importantly, current law provides an exemption to insider trading liability for bona fide gifts. In proposing an amendment to Rule 16b-5(a), which removed gifts from the scope of short-swing profit liability, the SEC stated that it believed "[b]ona fide gifts represent less likelihood for opportunities for abuse."[98] This exemption originated in *Truncale v. Blumberg*, where the court stated: **"**[b]y no stretch of the imagination . . . can a gift to charity . . . when made in good faith

[90] Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified at 15 U.S.C. §§ 78a–78pp).
[91] 17 C.F.R. § 240.10b-5.
[92] 15 U.S.C. § 78p(b)..
[93] *Id*. § 78p(a).
[94] *Id.*
[95] Sarbanes-Oxley Act of 2002 ("SOX"), Pub. L. No. 107-204, § 403, 116 Stat. 745.
[96] *See* 17 C.F.R. § 240.16a-3.
[97] Yermack, *supra* note 1, at 110.
[98] *Id.* at 111, n. 8 (quoting Ownership Reports on Trading by Officers, Directors, and Principal Stockholders, Exchange Act Release No. 26,333, Investment Company Act Release No. 16,669, 53 Fed. Reg. 49,997 (Dec. 13, 1988)).

and without pretense or subterfuge, be considered a sale or anything in the nature of a sale" within the meaning of Section 16(b).[99]

Furthermore, Section 16(b) requires that any insider's "short-swing" profit (the difference between purchase and sale prices for any two transactions within any six-month period) be forfeited to the company.[100] The short-swing profit rule bars corporate insiders from acquiring a security and then disposing of it at a higher price (or vice versa) within any interval shorter than six months. But bona fide gifts to a charity are exempt from Section 16(b) matching.[101]

Any charity that owns at least 10% of a publicly traded company's stock will be subject to Section 16.[102] A donor who is required to report under Section 16 and who transfers shares to a charity, including a private foundation created by the donor and for which the donor serves as a director, must report the transfer in the annual filing of (the more lenient) Form 5, or voluntarily reported earlier on Form 4.[103] Ordinarily, assuming the shares cannot be used for the donor's benefit, the donor will no longer have beneficial ownership in the stock once the charity owns the shares. The charity will be the Section 16 reporting party as long as it owns at least 10% of the shares. The donor will no longer have any Section 16 reporting responsibility, with respect to the transferred shares.

2. Anti-Fraud Provisions: Section 10b and SEC Rule 10b-5

Section 10b of the 1034 Act[104] and corresponding SEC Rule 10b-5[105] prohibits fraud "in connection with the purchase or sale of any security."[106] Unlike Section 16(b), there is no exemption for anti-fraud liability. Those who violate this prohibition will have to disgorge any profit, may be liable for damages, and may face criminal charges.[107] A corporate insider making a charitable gift and realizing a tax benefit may be in violation of Rule 10b-5 if the donation was

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[99] *Id*. (quoting Truncale v. Blumberg, 80 F.Supp 387, 391 (S.D.N.Y. 1948)).
[100] 15 U.S.C. § 78p(b).
[101] 17 CFR § 240.16b-5.
[102] Sec. & Exch. Comm'n, *Exchange Act Section 16 and Related Rules and Forms* (Aug. 11, 2010), *available at* https://www.sec.gov/divisions/corpfin/guidance/sec16interp.htm
[103] *Id.*
[104] 15 U.S.C. § 78j(b).
[105] 17 C.F.R. § 240.10b5.
[106] 15 U.S.C. § 78j(b).
[107] Carole B. Silver, *Penalizing Insider Trading: A Critical Assessment of the Insider Trading Sanctions Act of 1984*, 1985 DUKE L.J. 960, 983-84 (1985).

made with knowledge of yet to be announced negative news that will drive the value of the stock down shortly after the grant.[108] As Yermack points out, although a charity could sue a donor under Rule 10b-5 if it relied upon the fair market value of the stock donated, such litigation would have a "chilling effect" on future donations.[109]

There is a question regarding whether an ostensibly charitable transfer should be considered a sale under Section 10(b) of the Act. This question has not yet been considered by the courts. The 1934 Act defines "sale" broadly: "[t]he terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of [securities]."[110] Therefore, the main question that arises is whether the gift is a "sale" or is "in connection with" a sale for the purposes of a violation of Section 10b and Rule 10b-5. To determine whether a gift will be treated like a sale under the anti-fraud provision, case law establishes a three-prong test: (1) change of ownership, (2) donor receives consideration of pecuniary value, and (3) the treatment is "consistent with the remedial purposes of the 1934 Act."[111] Furthermore, there must be intent "to deceive, manipulate or defraud,"[112] or scienter.[113]

Generally, the gift is not a sale as there is no consideration for the donor for the transfer of the securities.[114] Yet, the gift may be a disguise for a sale if the donor receives some type of economic benefit from the transfer. Courts have construed the personal benefit requirement quite broadly, including elusive expectation of future economic gain, improvement of friendship, or reputation.[115] It can quite easily be argued that the donor receives a personal benefit when making a gift, as there is a tax benefit. A corporate insider who "controls or significantly influences" the organization to which the securities are being donated is more likely to be perceived by a court to have a personal benefit.[116]

In addition, if the charity has knowledge of material inside information through the insider, it also follows that it should be prohibited from transferring those shares until the information becomes public. If the charity will immediately or shortly thereafter sell the

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[108] Yermack, *supra* note 1, at 111.
[109] *Id*. at 112 n. 9.
[110] 15 U.S.C. § 78c(a)(14).
[111] SEC v. Capital Gains Research Bureau Inc., 375 U.S. 180 (1963).
[112] In re Ceridian Corp. Sec. Litig., 542 F.3d 240, 244 (8th Cir. 2008).
[113] Carol Sulcoski, *Looking a Gift of Stock in the Mouth: Donative Transfers and Rule 10b-5*, 88 MICH. L. REV., 604, 614 (1989).
[114] Tulli, *supra* note 89.
[115] *Id*.
[116] *Id*.

securities, a gift may be an action "in connection with" a sale of securities, making the donor potentially liable.[117] This establishes a similar tipper and tippee relationship discussed in *Dirks v. SEC*,[118] where the Supreme Court stated that "an insider's tipping with a prompt trade by the tippee resembles the insider's (improper) trading followed by a gift of the proceeds."[119] Therefore a corporate insider's gift of securities that are then quickly sold seems to resemble tipping with a prompt trade and thus could be in violation of Rule 10b-5 for both parties.[120]

Although there are no court cases specifically addressing what type of charitable donation may constitute a "sale" within the context of insider trading, the SEC has brought a number of actions in federal court based on, at least in part, claims of illicit profits by insiders through charitable donations of stock. Although not involving donation of stock specifically, in *SEC v. Zomax*,[121] the SEC successfully brought an insider-trading action against executives who sold stock through a charitable remainder annuity trust. The SEC filed a civil injunction alleging that James T. Anderson, the former Chairman of the Board of Directors and CEO, and his wife, Michelle Bedard-Anderson, the former Executive Vice-President of Sales and Marketing of Zomax conducted insider trading when they liquidated their 821,250 shares of stock on the basis of material, non-public information that the company's revenue and earnings would be considerably lower than expected in the third quarter of 2000.[122] The two executives sold hundreds of thousands of shares in August 2000 on the open market and later used the Jim and Mikki Anderson Charitable Reminder Annuity Trust (the Trust) to sell the rest. By doing so, the two allegedly avoided $9 million in losses. The Commission also claims that Anderson tipped his friend to sell shares of the company as well.[123]

The SEC argued that Zomax violated Section 10(b) and 13(a) of the Securities Exchange Act of 1934 and Rules 10b-5, 12b-20, and 13a-13 when it filed a materially misstated Form 10-Q.[124] In addition, it claimed Anderson and James Flaherty, Zomax's previous CFO, violated Section 10(b) and Rule 10b-5 when they made material misstatements or omissions and aided

[117] *Id*.
[118] 463 U.S. 646, 664 (1983).
[119] Tulli, *supra* note 89.
[120] *Id*.
[121] SEC v. Zomax, Inc. et al. (U.S. Dist. Ct. Minn. No. 05-1128), Litigation Release No. 19262 (June 9, 2005).
[122] SEC v. Zomax, Inc. et al., Litigation Release No. 19262.
[123] *Id*.
[124] *Id*.

and abetted Zomax in violating Section 13(a) and Rules 12b-20 and 13a-13.[125] It further alleged Anthony Angelini, Zomax's former COO and President, also aided and abetted Zomax's violations and that Anderson, his wife, friend, and the Trust violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 by trading the securities and tipping others.[126] Anderson was also said to have violated Section 16(a) of the Exchange Act and rules promulgated thereunder when he failed to report the sales of the stock by the Trust.

Zomax, Flaherty, and Angelini consented to the permanent injunction against them without admitting or denying the wrongdoing.[127] Zomax agreed to pay $2 million in civil penalties.[128] Flaherty agreed to disgorge over $16,000 (plus prejudgment interest) and pay a $75,000 civil penalty, and Angelini agreed to disgorge over $43,000 and pay $50,000 in civil penalties.[129] Litigation against all other parties continues.

In another case, *SEC v. Buntrock*,[130] the SEC alleged that "[t]hrough the gift of inflated stock, Buntrock was unjustly enriched in form of the increased tax benefit."[131] The executives in the case committed fraud and misrepresented the financial situation of the company for years and also gave away the company's stock to non-profit organizations, thereby, recognizing an inflated tax benefit. Buntrock, Waste Management's CEO, gave a gift of 100,000 shares to his college alma mater 10 days before the new management stated that the previous year's statements were inflated.[132] The case was settled with entry of an injunction against future violations of the Exchange Act and disgorgement.[133]

3. Rule 144

Rule 144 of the Securities Act of 1933 applies to 1) sales of unregistered stock ("restricted securities," that is, shares that were not issued in registered public offerings) and 2)

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[125] *Id.*
[126] SEC v. Zomax, Inc. et al., Litigation Release No. 19262.
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] SEC v. Buntrock et al. (N.D. Ill. No. 02C 2180), Litigation Release No. 17435 (Mar. 26, 2002).
[132] SEC v. Buntrock, Litigation Release No. 17435.
[133] *Id.*

sales of stock by "affiliates" of a public corporation ("control securities").[134] Restricted securities are subject to information availability, minimum holding period, and a variety of other requirements before they may be publicly resold without registration.[135] For shares in reporting companies, the required holding period is a minimum of six months after the shares have been fully paid for, and for shares in non-reporting companies, the minimum holding period is one year after the shares have been fully paid for.[136] Once the restricted securities are donated to a charitable organization, the organization is treated as having acquired the shares at the time they were acquired by the donor.[137]

Even when the stock earmarked for donation is already registered, if the donee organization is deemed to be an "affiliate" of the issuer corporation (due to, for example, significant ownership of the issuer corporation's shares), Rule 144 requirements – other than the holding period requirement – may apply to any subsequent sales of the stock by the donee.[138] It would not, however, apply to the gifting of the stock from the donor to the donee.

III. Empirical Results and Legal Implications

A. Empirical Results

1. The Data

We obtain stock price information from Center for Research in Security Prices (CRSP). The insider trading data come from the union of the Thomson Reuters Insider Filing Data Feed (1986 to 2014) and backward extensions using archived annual purchases from the National Archives (1975 to 1995). Our sample includes U.S. common stocks that are covered by all three databases. The time period is from January 1986 through December 2014. Our final dataset has

[134] *See generally* 17 C.F.R. § 230.144. An "affiliate" of a stock-issuing corporation is "a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer. *Id*. § 230.144(a)(2).
[135] 17 C.F.R. § 230.144
[136] *Id*. § 230.144(d).
[137] Note to § 230.144(d)(3)(ii), 17 C.F.R. § 230.144.
[138] *See* Securities Act Release No. 33-8869 (Dec. 6, 2007), *available at* https://www.sec.gov/rules/final/2007/33-8869.pdf.

over 9,000 unique Committee on Uniform Securities Identification Procedures numbers (CUSIPs) and over 200,000 observations.

The Insider Filing Database includes all trades reported to the SEC - Ownership Reporting System. The data contains all open market gifts by officers, directors, and beneficial owners (direct or indirect owners of more than 10% of any equity class of securities) of publicly traded firms.[139] To focus on executive gift-giving, we exclude all gifts by large shareholders. Gifts are designated by the transaction code G. The final sample is limited to firms for which stock return data are available in CRSP. Finally, in order to deal with potential misreports and incorrect outliers, we use cleansed data from Thomson-Reuters.

Our gift database also provides two dates associated with an insider gift. The *transaction date* is the date of the actual gift giving, when an insider donates the shares of their own company. The *report date* is the date when an insider transaction is made public by the SEC. Although our main emphasis is on the information content of insider gifts, we also consider the report dates to analyze potential timing games by insiders.

2. Sample Characteristics

Table 1 shows the sample characteristics of our dataset. Our sample is large and covers a 29-year period, from 1986 to 2014, inclusive. It includes all gifts of their firms' shares by all executives in all publicly listed firms. As shown in Table 1, the overall sample contains gifts by insiders in 9,676 unique firms from 1986 to 2014. The total number of gifts equals 222,561. Given the comprehensive nature of our dataset, our conclusions apply to all gifts by corporate executives and are not sample specific.

Table 1 also shows that the average gift size is about 43,000 shares. Gift size increases with the size of the firms. In small firms, gift size equals about 35,000 shares, doubling to about

[139] For most of the sample period analyzed here (prior to August 29, 2002), Section 16(a) of the Securities and Exchange Act requires that insider gifts be disclosed within the first 10 days of the month following the month of the trade. SOX modified insider trading regulations in many significant ways. First, the new reporting requirement states that insider transactions (including gifts) must be reported electronically by the end of the second business day following the day on which the transaction is executed both through EDGAR and corporate public websites. SOX § 404.

69,000 shares in large firms. The total number of shares gifted is also large, equaling about 9.5 billion shares: about 5.6 billion shares were gifted by top executives and the remaining 3.9 billion shares by officers and directors. The average number of shares gifted per firm is about one million shares. Insiders in large firms appear to gift a lot more shares than insiders in small firms. The average number of shares gifted by small firms equals about half a million shares. This number rises about 15-fold to 7.4 million shares gifted by large firms.

The average stock price of the gifted shares is about $30 during the sample period. Consequently, the dollar magnitude of the total gifted shares in our sample is about $300 billion per year. This large amount makes the regulations about executive gift-giving important from legal, economic, as well as policy perspectives.

3. Measurement of Abnormal Returns

To explore whether insiders time their gifts, we compute abnormal returns[140] by subtracting the return to the equally weighted index of New York Stock Exchange (NYSE), American Stock Exchange (AMEX) and the National Association of Securities Dealers Automated Quotations (NASDAQ) stocks from the returns for the stocks gifted by insiders.[141] This approach controls for market movements and implicitly assumes that average beta or risk-exposure is one. Given that our sample contains over 9,000 firms, this assumption is satisfied. Hence, abnormal return $AR_{i,t}$ for stock i and day t is computed as:

$$AR_{it} = (R_{it} - R_{mt}) \qquad \text{for each firm i and day t,}$$

where R_{it} is the simple daily return on the stock i gifted by insiders on day t, R_{mt} is the daily return to the equally weighted index of NYSE, AMEX, and NASDAQ stocks on day t. For each event date t, these returns are first averaged across all gifting firms i to compute average abnormal returns:

[140] The term "abnormal returns" refers to the movements on stock price that cannot be attributed to market movements. They are abnormal in the sense that there are not explained by normal market relation.
[141] Although not reported here, using as the bench mark the total return to the S&P 500 index or to the value-weighted market portfolio instead of the total return to the equally-weighted market portfolio gives similar results. We prefer the equally weighted returns because most of the firms in our sample are small firms and the equally-weighted index of NYSE, AMEX and NASDAQ firms is a better match for small firms.

$$AAR_t = \frac{1}{n_t}\sum_{i=1}^{n_t} AR_{it}$$

The average abnormal returns are then cumulated across the event dates as follows:

$$CAR_T = \sum_{t=1}^{T} AAR_t$$

These cumulative abnormal returns are then graphed to examine the behavior of abnormal returns around gifting dates.

4. Empirical Findings

At this point, it is useful to summarize our five hypotheses regarding executives' motivations for gifting of their own company stock: 1) wait until after the stock price has appreciated naturally to maximize their donation as well as their tax-deduction (passive-timing); 2) accelerate the good news prior to the gifts to further increase their donation and tax deductions (spring-loading); 3) delay the release of bad news until after the gifting of the stock to again increase their donation as well as tax deductions (bullet-dodging); 4) engage in backdating of the gift date in order to maximize their donation and tax deductions (backdating); and 5) use material, undisclosed inside information about the future prospects of their firm's stock to maximize their donation and tax-deductions (inside-information).

Next, we examine the evidence to determine which of these five hypotheses best explain insiders' behavior. Figure 1 shows the pattern of abnormal returns for the overall sample period. To get a clear picture about timing games, we provide abnormal stock price behavior before from one year before (250 trading days) to one year after the gifting date. Figure 1 further confirms the timing games. Stock prices rise about 5.5% abnormally relative to the market index during the one-year before executives gift their stock. Hence, if the overall market was up, the gifted stocks rose 5.5% more than the market. If the overall market was down, the gifted stocks fell 5.5% less than the market during this period. Following gifting date, stock prices fall abnormally by about 5% relative to the overall stock market. The absolute maximum stock price occurs on the precise day of the gift.

The conclusion from Figure 1 is that executives are able to avoid a 5% decline in the value of their gifts by acting when they did rather than accelerating or delaying another year. Hence, by carefully timing their gifts, executives are able to increase the size of their gifts by 5%. Furthermore, for their donations to tax-sheltered institutions, executives are able to take 5% bigger tax deductions as well.

This evidence is consistent with all five hypotheses. That stock prices rise abnormally prior to the gifting date is consistent with both the passive-timing and spring-loading hypotheses. That the stock prices drop abnormally after the gifting date is consistent with the bullet-dodging, backdating and inside information hypotheses. To further distinguish among our five different hypotheses and to see if we can reject any of these hypotheses, we then conduct additional tests described below.

In Figure 2, we group our sample by the role of the executives into two separate groups: 1) top executives, including the CEO, CFO, and Chairperson of the Board of Directors; and 2) all other executives including officers and directors. All shareholders without executive titles are excluded. Figure 2 shows a similar picture for both officers and top executives. Stock prices run up more prior to top executives' gifting dates and they decline less after the top executives' gifting dates. Hence, this evidence tells us that all insiders, regardless of title, use similar devices to time their gifts.

In Figure 3, we group our sample by decades to explore the time-series properties of executive gift-giving decade by decade. During the first decade of our sample, 1986-1994, executives appear to gift stocks when the stock price was declining by about 7% prior to the gift date. After the gift date, stock prices continue their decline and fall another 17%. This evidence of the decade of 1986-1994 is inconsistent with the natural timing and spring-loading hypotheses, but consistent with the other three.

During the second decade (1995-2004), stock prices rise abnormally by about 6% during the one-year before the gift date. Gifting takes place at the maximum relative stock price. Furthermore, the stock prices fall abnormally by about 6% during the one-year after the gifting date. This decade appears to be characterized by a classic pump-and-dump pattern.[142] This evidence is again consistent with all five hypotheses.

During the most recent decade (2005-2014), stock prices rise by about 9% prior to the gifting date and they fall about 1% after the gifting date. The gifting still takes place near the maximum prices, at least in the short-run. This picture suggests that recent scandals and publicity about backdating may have played a role in influencing executives to scale back in some of the timing games they play around the gifting of their stock. This evidence is most consistent with the natural timing and spring-loading hypotheses.

Next we explore the relation between the size of the gifts and potential timing games. This evidence is shown in Figure 4, which indicates a strong relation between the number of shares gifted and the price patterns. Large gifts (greater number of shares gifted) appear to be associated with larger stock price increases before the gift date, while smaller gifts are associated with bigger stock price declines after the gift date. Stock prices rise the most (by about 10% abnormally) for the largest category of more than 100,000-shares gifted (approximately more than $3 million). The increase in stock prices are smaller for the fewer-share groups. For the smallest share groups, stock prices rise abnormally by about 5%.

The post-gift-date stock price behavior also depends on the size of the gift. For the largest size category, stock prices do not decline at all. For the smallest share-categories, stock prices decline between 4% and 7% during the year after the giving date.

The evidence shown in Figure 4 indicates that the motivation behind gift-giving may be different depending on the amount of the gift. For small and mid-sized gifts (up to about $3 million or less), executives not only receive a larger deduction as a result of the gift, but they also avoid the subsequent stock price decline. This evidence is consistent with all five hypotheses.

For very large gifts (more than $3 million), there is no subsequent stock price decline. In this case, the gifting individuals are simply able to take a larger deduction by giving recently

[142] This evidence suggests that executives donate stocks that are experiencing extreme declines in price as the stock price falls abnormally by about 30% over the two years. The perpetrator of a classic pump and dump scheme "pumps" the price of a stock by misleading the public about the future profits or health of the company; after the market has absorbed this misleading information and it is reflected in the stock price, the perpetrator "dumps" her position and realizes a gain. Meanwhile, the price often reverts to what it was before the misleading information was injected into the market. David B. Kramer, *The Way It Is and the Way It Should Be: Liability Under §10(b) of the Exchange Act and Rule 10b-5 Thereunder for Making False and Misleading Statements as Part of a Scheme to "Pump and Dump" a Stock*, 13 U. MIAMI BUS. LAW REV. 243, 245-46 (2005).

appreciated stock. This evidence is most consistent with natural timing and spring-loading hypotheses.

To explore the backdating hypothesis in more detail, we group our sample by reporting delays as shown in Figure 5. Because reporting requirements for gifts changed in September 2002 due to SOX, we restrict our attention in Figure 5 to gifts reported after September 1, 2002.[143] In the post-SOX period, our sample contains 83,909 gifts with valid transaction and reporting dates.

Our backdating hypothesis suggests that if executives engage in fraud and backdate their gifts, then these gifts will necessarily appear to be reported with delays, even if in reality they are reported promptly. Furthermore, the greater the reporting delay, the greater the degree of fraud.

To explain this further, an example may be useful. Suppose that executives decide to gift their stock on March 2, when the stock price is $50. Also suppose that the stock price started at about $50 last April and had risen to a peak of $100 on January 2 before declining back to $50 at the time of gifting in March. In order to maximize their donation, suppose that executives report January 2 as the date of their donation and take a tax deduction for the trading price on that date, when the stock price was $100. Executives then immediately report their donation in March on Form 4 to the SEC without any further delays.

At this point, anyone examining Form 4 who is unaware of the fraud committed by the executive will deduce the following: 1) executives donated $100 worth of stock on January 2 and 2) executives reported this donation on March 2 with a two month delay. Consequently, all that can be inferred is a late-reported gift. Furthermore, given that gifts are allowed to be reported late in general, these late filings should not raise any suspicion.

To the extent executives go back into stock price history and backdate their donations, these gifts will be necessarily be associated with reporting delays. Furthermore, to the extent executives go further back into stock price history to find even higher stock prices in the past, those with greater delays will have a bigger peaks and bigger declines (ex-post). Thus, the greater the reporting delays, the greater will be the degree of fraud.

Our evidence is consistent with backdating. First, although not shown in the figure, many gift transactions are reported late, taking advantage of an exemption created by SOX,

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[143] Before the enactment of SOX in 2002, corporate insiders had between 10 days and 40 days to report their gifts to the SEC (they could report by the 10th day of the following month in which the gift took place.) SOX reduced this delay to a maximum of two business days for open market sales and purchases.

which allows executives to report gift transactions on Form 5 (instead of Form 4) up to 45 days after the end of the fiscal year. In our sample, of the total of 83,909 observations post-September 1, 2002 where gifting and reporting dates are both available, 53,379 observations are reported late. This corresponds to almost two-thirds of the entire sample. Although legal under SOX, this high proportion of late reporting certainly raises a red flag.

Second, the evidence in Figure 5 clearly indicates that there is a relation between reporting time lags and the inverse-V-shaped stock price patterns. In the promptly reported group (33,487 observations), stock prices rise about 7% prior to the gift date and they decline 1% to 1.5% during the one-year after gifting. For those gifts with small reporting delays of 3-20 days (19,892 observations), stock prices rise about 6.5% prior to the gift date and they decline between 0.5% and 1% during the one-year after gifting. Finally, for those gifts with large reporting delays of more than 20 days (30,520 observations), stock prices rise about 6% prior to the gift date and they decline between 2% to 2.5% during the one-year after gifting.

That those gifts with the greatest reporting delays show the greatest stock price declines after the gift date is consistent with the backdating hypothesis. Furthermore, that there are over 30,000 observations during the past 12 years in this category indicates that backdating could still be a problem with the timing of gifts. Overall, our evidence suggests that executives are likely exploiting the exemption granted to them under SOX to backdate their gifts. This finding indicates that immediate policy intervention is necessary to bring executive stock donations into compliance with anti-fraud statutes.

As an additional test of backdating, we also classify the gifts by the abnormal stock returns around the gift date. Since backdating involves picking a date with the highest stock price, we group gifts into two categories, one groups showing an abnormal stock price decline 30-days before the grant date, and the other showing an abnormal stock price increase during the 30 days before the grant date. The backdating hypothesis predicts that the group with a stock price increase should show a greater stock price decline subsequently.

The evidence is shown in Figure 6. Consistent with the backdating hypothesis, the group with a prior 30-day stock increase shows about a 7.7% drop during the next 250 days. In contrast, the group with a prior 30-day stock price decline before the grant date shows only a 6.2% drop during the next 250 days. Once again, this evidence corroborates the finding at least some gifts grants are still being backdated.

B. Legal Implications of the Study

As described above, our study demonstrates that all five of our hypotheses may be in play in various ways. That is, the results can be explained by executives 1) waiting until after the stock has appreciated naturally to maximize their donation as well as their tax-deduction (passive-timing); 2) accelerating the good news prior to the gifts to further increase their donation and tax deductions (spring-loading); 3) delaying the release of bad news until after the gifting of the stock to again increase their donation as well as tax deductions (bullet-dodging); 4) engaging in backdating of the gift date in order to maximize their donation and tax deductions (backdating); and 5) using material, undisclosed inside information about the future prospects of their firm's stock to maximize their donation and tax-deductions (inside-information). The legal implications of these hypotheses are analyzed below.

1. Waiting for Natural Appreciation of Stock Value

The first behavior which may explain some executive gift timing, waiting until the stock appreciates naturally then making a donation, does not raise any of the tax or securities law issues described in Part IIB above. Although this pattern provides a way for the owner of securities to avoid paying capital gains on the appreciation, this is no different than donating other property that has appreciated in value. This would be a legally appropriate way for an insider to donate stock to a charity.

Under federal tax law, charitable contributions receive significant preferred treatment. The charitable deduction, which is available to corporations and individuals who choose to itemize their deductions, has continued to be one of the largest federal tax expenditures in terms of estimated revenue cost.[144] This tax subsidy ostensibly motivates donors to provide financial support for a variety of organizations that the U.S. Tax Code has designated as charities.[145] The

[144] Joseph J. Cordes, *Re-Thinking the Deduction for Charitable Contributions: Evaluating the Effects of Deficit-Reduction Proposals*, 64 NAT'L TAX J. 1001, 1001 (2011).
[145] *Id.* at 1002.

tax preference is greater for higher-income individuals because the amount of the charitable deduction is a function of the donor's marginal tax bracket.[146]

Donating appreciated property, such as stock that has increased in value, provides further tax advantages by allowing the donor of such property to avoid paying capital gains tax on the appreciation.[147] Furthermore, charitable contributions of appreciated property are treated differently from other transfers of appreciated property because the allowable deduction is equal to the fair market value of the entire property, rather than the difference between fair market value and basis – that is, cost basis is disregarded for purposes of the charitable deduction.[148]

Although recent studies have shown that the tax deduction for charitable giving may be an inefficient tax subsidy,[149] there is no debate about its legality. Maximizing one's charitable deduction by waiting for the value of stock to appreciate before donating it is comparable to maximizing one's stock option compensation by waiting for the underlying stock to appreciate before exercising the option. In both scenarios, the owner of the relevant securities does not take any steps to mislead the public, nor does she use any material inside information to increase her personal wealth. Waiting for stock to appreciate naturally before donating it to charity is consistent with the 1933 and 1934 Acts' "philosoph[ies] of full disclosure."[150]

2. Spring-Loading and Bullet-Dodging

The second and third hypotheses of executive behavior, accelerating good news prior to the gifts, or spring-loading and delaying the release of bad news, or bullet-dodging, raise securities law concerns. These behaviors have not been without controversy when occurring in the context of dating games played to maximize executive compensation through stock options.[151] In the options context, spring-loading refers to the practice of either manipulating the date of the options grant so that it occurs just before information is released or delaying the release of positive information to a date just after the option is granted. In either case, the

[146] Cordes, *supra* note 144, at 1002.
[147] *Id.*
[148] *See* 26 U.S.C. § 170.
[149] *See* Cordes, *supra* note 144 (discussing various criticisms of the tax subsidy for charitable contributions).
[150] SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186 (1963).
[151] *See, e.g.*, Matthew E. Orso, Comment, *"Spring-Loading" Executive Stock Options: An Abuse in Need of a Federal Remedy*, 53 ST. LOUIS U. L.J. 629 (2009).

executive's stock options become immediately more valuable after the release of good news. This is analogous to spring-loading the donation of securities, in that the executive is manipulating information to the market in order to make the gift of stock provide greater personal benefit – in this case a higher tax deduction – although the practice involves acceleration of the release of positive information rather than delay.

Bullet-dodging, in the context of the grant of executive stock options, refers to the practice of accelerating the release of bad news to just before the grant of options, or to manipulating the grant date of the option so that the option is granted just after the release of bad news. Our data shows analogous behavior with respect to the executives' gifting of securities, except that rather than accelerate the release of bad news, the news is delayed until after the gift, yielding a higher tax deduction than the executive would be afforded had the news been released prior to the gift.

It would seem against the legislative intent of the federal securities laws to allow executives to manipulate information flow to shareholders solely for personal benefit. Indeed, one of the major purposes of the 1934 Act was the hope of Congress to curb an "unscrupulous insider . . . [from using] inside information for his own advantage."[152] Increased transparency was a key motivator of the 1934 Act: "devices designed to create a misleading appearance of activity with a view to enticing the unwary into the market on the hope of quick gains" were explicitly frowned upon,[153] and Congress called on "the corporate managers of companies whose securities are publicly held of their responsibilities as trustees for their corporations"[154] to spur a renewal of investor confidence. Executives who engage in spring-loading and bullet-dodging practices – whether in the context of executive stock options or charitable contributions of stock – harm investor confidence by deliberately misrepresenting the value of their stock. Decreased investor confidence may also lead to stock values plummeting, and stockholders may have a viable argument that executives' manipulation of information flow to increase their own tax deductions runs contrary to executives' fiduciary duties of care and loyalty to the corporation and its shareholders.[155]

[152] H.R. REP. NO. 73-1383, at 13 (1934).
[153] *Id*. at 10.
[154] *Id.* at 13.
[155] *See id*. at 14 (noting that one primary purpose of the bill is to "encourage the voluntary maintenance of proper fiduciary standards by those in control" of registered companies).

Assuming that charitable contributions of stock could be viewed as disguised sales, bullet-dodging and spring-loading such contributions should violate Rule 10b-5's anti-fraud provisions. Bullet-dodging – the practice of withholding negative information until after the gift is made – is particularly egregious because it involves actively concealing material information from the public. It also artificially inflates the value of the donation at the time it is made; the later release of the negative information reduces the value of the stock in the hands of the charity, while the donor is still permitted a high tax deduction for the contribution.

In addition, particularly with respect to bullet-dodging, the practice also seems to run afoul of the disclose or abstain from trading rules a articulated by the court in *SEC v. Texas Gulf Sulphur Co.*[156] In that case, where stock options were at issue, the court found that the recipients were required to disclose the positive information before accepting stock options.[157] It follows that executives should not be permitted to gift shares of stock until the negative information, in their possession, has been disclosed. In the stock donation context, the "disclose or abstain" requirement articulated in *Texas Gulf Sulphur* would seem to dictate that CEOs disclose negative information before donating the stocks to charity.

3. Backdating

Changing the date that a gift of securities was granted in order to reap higher tax deductions is clearly fraudulent behavior under the federal tax laws. The IRS rules analyze the stock gift's value on the actual transfer date.[158] Backdating, in the charitable stock-gift context, occurs when the transfer date of the stock gift is changed ex-post to artificially increase the amount of appreciation, and in turn, the amount of the associated tax deduction.

Backdating of executive option grants was discovered simultaneously by Professors Lie, Heron, Narayanan and Seyhun and reported in the financial press as early as February 2005.[159]

[156] 401 F.2d 833 (2d Cir. 1968).
[157] *Id.* at 848.
[158] *See* IRS, PUBLICATION 561, DETERMINING THE VALUE OF DONATED PROPERTY (2007), available at https://www.irs.gov/pub/irs-pdf/p561.pdf.

[159] *See* Erik Lie, *On the Timing of CEO Stock Option Awards*, 51 MGMT. SCI. 802 (2005); M. P. Narayanan & H. Nejat Seyhun, *Do Managers Influence Their Pay? Evidence from Stock Price Reversals Around Executive Option Grants* (Ross Sch. of Bus., Working Paper No. 927, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=649804 (finding that executive options are backdated); M. P. Narayanan & H. Nejat Seyhun, *Effect of Sarbanes-Oxley Act on the Influencing of Executive Compensation* (Nov.

Researchers showed that managers falsified grant dates to receive options with lower strike prices.[160] The stock price of the company would decline right before the exercise of the grant and increase thereafter.[161] Research conducted in more recent years further suggests that managers are likely to make accounting adjustments favorable to the CEO before option grant dates.[162]

Options backdating is a practice whereby the date of the option grant is changed to a date prior to when the option was in fact granted. This practice was even easier when the SEC rules did not require reporting of the issuance of stock options until two months after the grant date.[163]

2005) (unpublished academic article), *available at* http://ssrn.com/abstract=852964 (again finding that options are backdated and that SOX mandatory grant date reporting decreases, but does not eliminate opportunism); Randall A. Heron & Erik Lie, *Does Backdating Explain the Stock Price Pattern Around Executive Stock Option Grants?*, 83 J. FIN. ECON. 271 (2007) [hereinafter Heron & Lie, *Does Backdating Explain*] (finding significantly less abnormal stock returns after SOX passed, and that "in those cases in which grants are reported within one day of the grant date, the pattern has completely vanished, but it continues to exist for grants reporting with longer lags, and its magnitude tends to increase with the reporting delay"); M.P. Narayanan & Nejat Seyhun, *The Dating Game: Do Managers Designate Option Grant Dates to Increase Their Compensation?,* 21 REV. FIN. STUD. 975 (2008). *See also* Jesse M. Fried, *Option Backdating and Its Implications*, 65 WASH. & LEE L. REV. 853, 856-57 (2008) (stating that "thousands of firms continued to secretly backdate options by weeks or months after SOX, even though it entailed—in addition to other legal violations—a blatant disregard of the Act's two-day requirement"); Jay Ritter, *infra* note 160, at 133; Mark Hulbert, *Timing of managers' options a good litmus test*, MARKET WATCH (Feb. 18 2005, , 12:15 AM), http://www.marketwatch.com/story/timing-of-managers-option-grants-a-good-litmus-test.

[160] Jay Ritter writes:

> "On January 19, 2000, when computer manufacturer Apple's stock closed at $106.56 per share, Apple announced that one week previously it had granted options to buy 10 million shares to CEO Steve Jobs with an exercise price of the January 12 closing market price of $87.19. The January 12th close was the lowest closing price of the two months prior to January 19. Seven years later, Apple admitted that the dates of many options grants had been chosen retroactively, and that documents purporting to show that the board of directors had approved the grants on the dates chosen had in some cases been fabricated. Wealth transfers from option backdating can be large. For the January 2000 grant alone, if there was a 70 percent chance that the options would eventually be exercised, the difference between the January 12th and 19th dates for the exercise price was worth almost $140 million to Jobs due to the difference between the $87.19 and $106.56 exercise prices."

Ritter, *Forensic Finance*, 22 J. ECON. PERSP. 127, 131-32 (2008). *See also* Robert M. Daines et al., *Right on schedule: CEO Option Grants and Opportunism* 2 (Mar. 31, 2015) (unpublished manuscript) [hereinafter Daines et al.]; Heron & Lie, *Does Backdating Explain*, *supra* note 159; Randall Heron & Erik Lie, *What Fraction of Stock Option Grants to Top Executives Have Been Backdated or Manipulated?,* 55 MGMT. SCI. 513-25 (2009) [hereinafter Heron & Lie, *What Fraction*].

[161] This is illustrated by a V-shape on a graph.

[162] *See, e.g.*, Mary L. McAnally et al., *Executive Stock Options, Missed Earnings Targets, and Earnings Management*, 83 ACCT. REV. 185 (2008); Terry A. Baker et al., *Incentives and Opportunities to Manage Earnings around Option Grants*, 26 CONTEMP. ACCT. RES. 649 (2009).

[163] Christopher Cox, Chairman of the SEC, Testimony Concerning Options Backdating (Sept. 6, 2006), *available at* https://www.sec.gov/news/testimony/2006/ts090606cc.htm

This reporting delay allowed companies to wait until the company's stock price fell low and moved higher within that two-month period.[164] The option would then be backdated at its lowest point or near that point, so that this lower exercise price could then be reported to the SEC.[165] Backdating of stock options thus allows the person who owns the stock options to realize larger potential gains, without requiring the company to show these gains as compensation on the financial statement.[166]

Shortly after SOX was signed into law, the SEC changed its rule to also require disclosure within two days of the option grant.[167] This information must be disclosed electronically, allowing shareholders access to the information almost instantly.[168] Furthermore, the SEC approved changes to New York Stock Exchange and the NASDAQ Stock Market listing standards, which require shareholder approval of nearly all equity compensation plans.[169] The terms of the grant must be disclosed, as well as whether the option grant allows for the exercise price to be less than the fair market value at the time of the grant.[170] However, the evidence in options backdating scandal also shows that executives easily avoided SEC's new rules by simply ignoring the timely reporting requirements. Because the SEC did not explicitly provide for penalties for late-reporting, executives simply ignored the SEC's rule. The SOX requirements and the SEC Rule have been completely ineffective in controlling executives' incentive or their opportunities to backdate their option grants.

In December 2004, the Financial Accounting Standards Board (FASB) issued the Statement of Financial Accounting Standards (FAS) 123R, which again attempted to eradicate the accounting advantage of stock options issued at-the-money.[171] The Standards require that all stock options granted to an employee be recorded as an expense on the financial statements regardless of whether the exercise price is at fair market value.[172] In 2006, the SEC began to require all public companies to also report information including: "the grant date fair value under

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164 *Id*.
165 *Id*.
166 *Id*.
167 *See* Final Rule: Ownership Reports and Trading By Officers, Directors and Principal Security Holders, Rel. No. 34-46421, Sec. II.B (Aug. 27, 2002), *available at* https://www.sec.gov/rules/final/34-46421.htm.
168 Cox, *supra* note 163.
169 *Id*.
170 *Id*.
171 Statement of Financial Accounting Standards No. 123, Fin. Acct. Series (revised Dec. 2004), http://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1218220124271&acceptedDisclaimer=true.
172 Cox, *supra* note 163.

FAS 123R (which is aggregated in the total compensation amount that is shown for each named executive officer); the FAS 123 grant date; the closing market price on the grant date if it is greater than the exercise price of the option; and the date of the compensation committee or full board of directors took action to grant the option, if that date is different than the grant date."[173] Companies are also required to explain the goals and policies of the executive compensation plans.[174] Reports to investors must discuss whether the company has engaged in backdating or might do so in the future and, if so, how.[175]

In addition, in 2007, the SEC enacted rules requiring full disclosure of all aspects of executive and director pay and benefits, including stock options. These rules require the company to disclose the full amount of an executive's compensation in a single number, and whether a stock option was backdated.[176] If the stock option is backdated, the corporation must provide the reason why. The goal of the rule is to make executive compensation more transparent to the shareholders and thereby end the practice of executive backdating. However, as we demonstrate in this paper, additional regulatory supervision is still needed to ensure the end of the backdating practice.

Backdating gifts of stock involves many of the same economic and legal concerns that arise with backdating executive stock options. Although the link is less obvious than in the case of executive stock options, backdating charitable gifts also weakens the link between shareholder value and management incentives. Executives who backdate their donations receive the benefit of a larger deduction, without a corresponding performance in the underlying stock. Furthermore, the treasury and taxpayers in general lose when donors of backdated stock underpay their taxes. In order to raise a given amount of revenue, other taxpayers must pay higher taxes. To the extent that executive backdating practices and the executive is denounced for tax fraud, the company may incur litigation costs and costs associated with reputational damage, which in turn harm the company's investors.

4. Using Insider Information

[173] *Id*.
[174] *Id*.
[175] *Id*.
[176] SEC, Executive Compensation and Related Person Disclosure, Release Nos. 33-8732A, 34-54302A, IC-27444A, 17-18, *available at* https://www.sec.gov/rules/final/2006/33-8732a.pdf.

The final hypothesis presented and evidenced in the data is the inside information hypothesis – executives use inside information to time their gifts for the highest deduction. For example, they may choose to donate stock just prior to a negative announcement that causes the stock prices to plummet. Unlike in the case of spring-loading, the insider-executive does not necessarily manipulate the flow of information. She does, however, time her stock donations based on material information that, at the date of donation, is not available to the public. This behavior is analogous to the type of insider trading that is prohibited under Section 10(b) of the 1934 Securities and Exchange Act.

As mentioned previously, insider trading cases are generally brought under Section 10(b) of the Securities Exchange Act, which prohibits "any manipulative or deceptive device or contrivance" used "in connection with the purchase or sale of any security," and Rule 10b-5 promulgated thereunder; or Section 16(b). Although Section 16(b) was initially drafted with the express purpose of targeting insider trading, today it is Rule 10b-5 that is more commonly used to bring insider trading cases.[177]

One of Congress's primary concerns when drafting the 1934 Act was "to insure the maintenance of fair and honest markets."[178] This concern was articulated in In re *Cady, Roberts, & Co.*, in which the administrative law court indicated that section 10(b) and Rule 10b-5 "are not intended as a specification of particular acts or practices which constitute fraud, but rather are designed to encompass the infinite variety of devices by which undue advantage may be taken of investors and others."[179] In other words, even if nondisclosure of inside information does not constitute fraud, it nonetheless "may be viewed as a . . . practice which operate[s] as a fraud or deceit upon the purchasers" in violation of Rule 10b-5.[180] Although recent insider trading cases have not read Section 10(b) and Rule 10(b)-5 so broadly, the "disclose and abstain" principle articulated in *Cady, Roberts*, whereby an insider in possession of material nonpublic information must disclose the information before trading, and further addressed in *Texas Gulf Sulphur*, still

[177] *See* Michael P. Dooley, *Enforcement of Insider Trading Restrictions*, 66 VA. L. REV. 1, 56-57 (1980) ("[t]he conventional wisdom is that Congress . . . expressed its concern with insiders' informational advantage by enacting section 16").
[178] 15 U.S.C. § 78b.
[179] 40 S.E.C. 907, 911 (1961).
[180] *Id*. at 913.

remains. In addition to encouraging "vigorous market competition,"[181] the "disclose and abstain" rule promotes fairness to public investors.[182]

Using inside information to opportunistically time gifts of stock presents similar problems of unfairness as insider trading "in connection with the purchase or sale" of stock. The ability to maximize the value of a tax deduction on the basis of inside information places insider-executives at an unfair advantage relative to other taxpayers. Moreover, like many tax loopholes, this advantage is available primarily to those in high income tax brackets, creating skewed distributional effects favoring high-income individuals.[183] Other taxpayers are indirectly harmed by strategic timing of stock gifts as they bear the brunt of decreased funding for government-funded public facilities and services, and higher tax rates than if the charitable contributions had not been opportunistically timed.[184] Further, to the extent that executives often time stock donations just before a decrease in the underlying stock price, the use of inside information to time stock gifts is dishonest to the charities who receive the contributions, who believe that they are receiving something of greater value. Such behavior, if made public, may lead to further erosion of investor confidence.

V. Proposals for Reform

Taxpayers are hurt by opportunistic stock gifting by insiders.[185] Yet, some argue that there is no easy solution. Executives often donate to take advantage of the tax subsidies and if there were stricter rules and harsher insider trading liability, perhaps insiders would not donate stock as frequently. Many studies conclude that donations increase substantially as the availability of tax deductions increase.[186] The government, however, also has an interest in ensuring that gift tax exemptions are appropriately applied for those donations that will serve the

[181] Jennifer D. Antolini et al., *Securities Fraud*, 34 AM. CIM. L. REV. 983, 984 (1997).
[182] Micah A. Acoba, *Insider Trading Jurisprudence After United States v. O'Hagan: A Restatement (Second) of Torts 551(2) Perspective*, 84 CORNELL L. REV. 1356, 1365 (1999).
[183] Furthermore, "CEOs who make major stock gifts to family foundations tend to be older and considerably richer than the general population of CEOs." Yermack, *supra* note 1, at 116.
[184] Joel Slemrod, *Cheating Ourselves: The Economics of Tax Evasion*, 21 J. ECON. PERSP. 25, 41 (1999).
[185] Yermack, *supra* note 1, at 122.
[186] *See id*.

public good. Further, the government has an interest in upholding the integrity of the securities markets.

We thus propose four regulatory reforms to address these issues. First, we propose that the late-reporting exemption given to the gifts should be eliminated. Under current law, gifts can be reported up to 45 days late after the end of the fiscal year. Our research finds that executives are exploiting this exemption to backdate their gifts. We propose that the reporting requirements for gifts be similar to any other insider transactions, namely within two business days of the gift transaction. Second, we propose increased penalties for late reporting of gift transactions. These penalties must be stated as a percentage of the amount of the gift and must be increasing with the number of days gifts are reported late. Third, if any gift transactions are reported late, we propose that the executives be required to explain the circumstances that led to the late reporting and certify that the gift was not backdated.

Because insiders use a variety of manipulative games to time their gifts, insiders' incentives to use inside information, spring-loading or bullet-dodging must also be controlled. To address these issues, we suggest an ex-post settlement device. Following the lead of the Private Securities Litigation Reform Act of 1995, we suggest that a look-back provision be implemented for tax-deductions for insider gifts of stock.[187] If the stock price drops over the 90 days following the date of gift-giving, then the average share price during the 90-day period following the gift should be used for the purpose of the corresponding tax deduction, instead of the price at the date of the gift. This provision will help de-incentivize both inside information motivated donations as well as spring-loading and bullet-dodging. Executives would have little or no incentive to manipulate information flow in the immediate short-term to increase the tax deduction because the deduction allowed would be a value averaged over a 90-day period.

[187] Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in various sections of 15 U.S.C.). The Private Securities Litigation Reform Act (PSLRA) was enacted in response to concerns that large damage awards potentially available in securities fraud class action lawsuits was encouraging the proliferation of frivolous suits. *See, e.g.*, Novak v. Kasaks, 216 F.3d 300, 306 (2d Cir. 2000) ("Legislators were apparently motivated in large part by a perceived need to deter strike suits wherein opportunistic private plaintiffs file securities fraud claims of dubious merit in order to exact large settlement recoveries"). The PSLRA addresses this in part by a 90-day "look back provision," which reduces a plaintiff's recovery to the difference between the purchase price and mean price of the security at issue during the ninety day period after corrective disclosure. 15 U.S.C. § 78u-4(e).

Conclusion

This paper explores five non-mutually exclusive hypotheses regarding executives' motivations timing the gifting their own firms' stock: 1) wait until after the stock has appreciated naturally to maximize their donation as well as their tax-deduction (passive-timing); 2) accelerate the good news prior to the gifts to further increase their donation and tax deductions (spring-loading); 3) delay the release of bad news until after the gifting of the stock to again increase their donation as well as tax deductions (bullet-dodging); 4) engage in backdating of the gift date in order to maximize their donation and tax deductions (backdating); and 5) use material, undisclosed inside information about the future prospects of their firm's stock to maximize their donation and tax-deductions (inside-information). The first timing motivation involves no illicit behavior, however, as discussed above, there are serious legal and policy issues raised by the other four motives.

Overall, we find that gifts are well-timed. Using a comprehensive database of over 200,000 gifts during 1986-2014, our research demonstrates that each of the five hypotheses, including the backdating hypothesis explain at least some of the timing behavior of gift-giving in the United States. Stock prices rise abnormally about 6% during the one-year before the gift date and they fall abnormally by about 5% during the one year after the gift date. We find that this pattern on inverse-V shape is stronger for late-reported gifts, which is consistent with the back-dating hypothesis. We also find that almost two-thirds of gifts are reported late, thus exploiting an exemption given to them under SOX, further contributing to the regulatory conditions that make it easier to manipulate the timing of gifts.

Due to the differing motives that may be in play when gifts are well-timed and the difficulty in determining whether the motive is legitimate, we propose relatively simple regulatory reforms to curb incentives for illicit timing. Our policy recommendations should improve the compliance of gifts with anti-fraud provisions and decrease tax fraud, by eliminated the exemption for late-reporting and imposing a penalty, as well as support the general anti-fraud provisions of securities laws, by imposing a 90-day look-back period for determining the stock value for purposes of the tax deduction. Furthermore, these proposals should strike a balance among competing policy considerations – by continuing to provide incentives for insider charitable donations of stock while at the same time reducing tax and securities fraud.

Finally, in light of our data showing that stock returns following gifts of insider stock are negative, a charity receiving shares of executives' own firm's stock as a donation might be well be advised to sell the stock immediately, provided that the charity is not subject to Section 16(b). It is probably also a good idea to institutionalize this rule for all stock donations in order combat any resistance from the donors.

Table 1				
Sample Characteristics of Common Stock Gifts by Executives, 1986-2014				
	Small- Cap Firms	Mid-Cap Firms	Large-Cap Firms	All firms
	Market Capitalization is less than $1 Billion	Market Capitalization is between $1 Billion and $5 Billion	Market Capitalization is more than $5 Billion	
	Executive Stock Gifts			
Number of Firms	7,767	1,444	465	9,676
Number of Gifts	114,993	58,002	49,566	222,561
Average Gift Size (Number of shares)	34,996.8	35,948.9	69,069.6	42,833.2
Total Gifts by Officers and Directors (million shares)	1,601.77	963.79	1,335.85	3,901.42
Total Gifts by Top Executives (million shares)	2,422.62	1,121.32	2,087.65	5,631.58
Average number shares gifted per firm (million shares)	0.52	1.44	7.36	0.99
Total Shares Gifted (in Million)	4,024.39	2,085.11	3,423.50	9,533.00

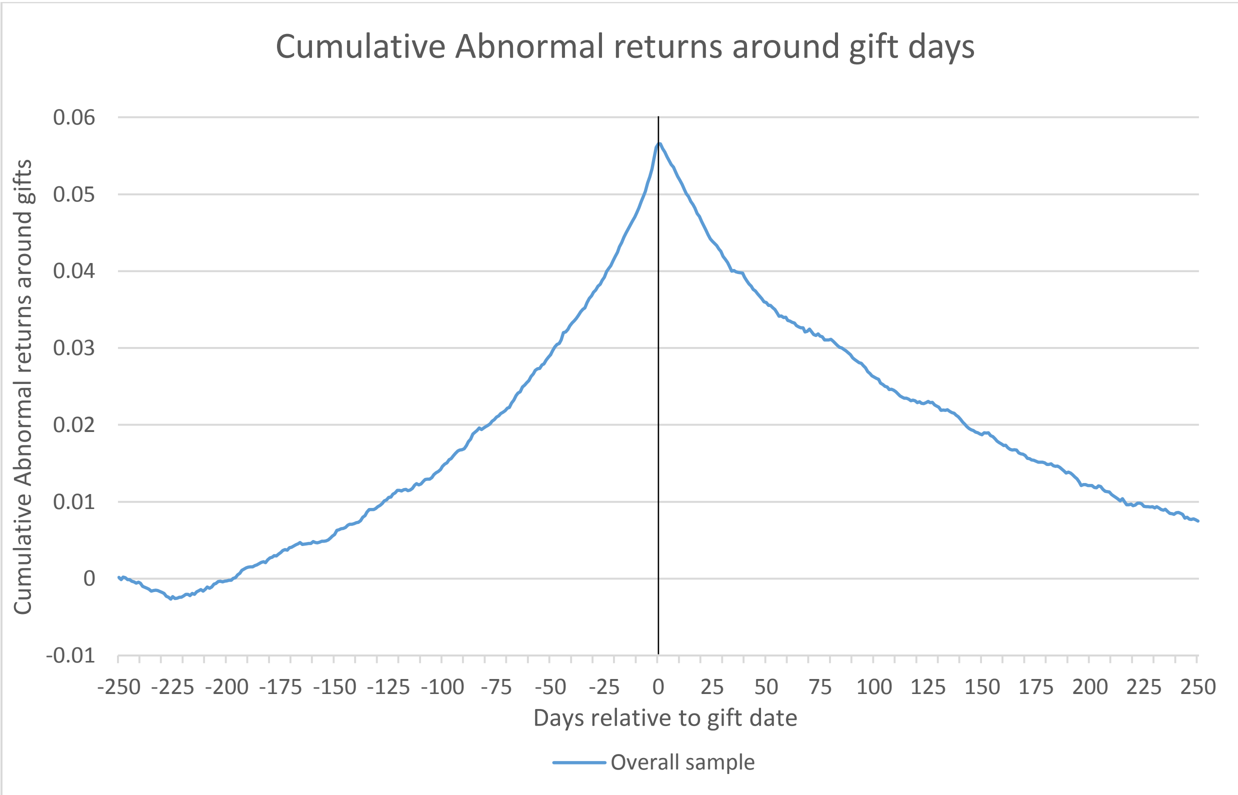

Figure 1: Cumulative abnormal returns around executives' gift dates. Abnormal returns are computed using market adjusted model. Day 0 refers to the gift day. Day 10 refers to the 10th trading day after the gift date, while day -10 refers to the tenth trading day before the gift date. Executives have the title of CEO, CFO, CI, CO, CT, President, Chairman of the Board, Director, Officer, Vice President, Vice Chair and members of the various board committees.

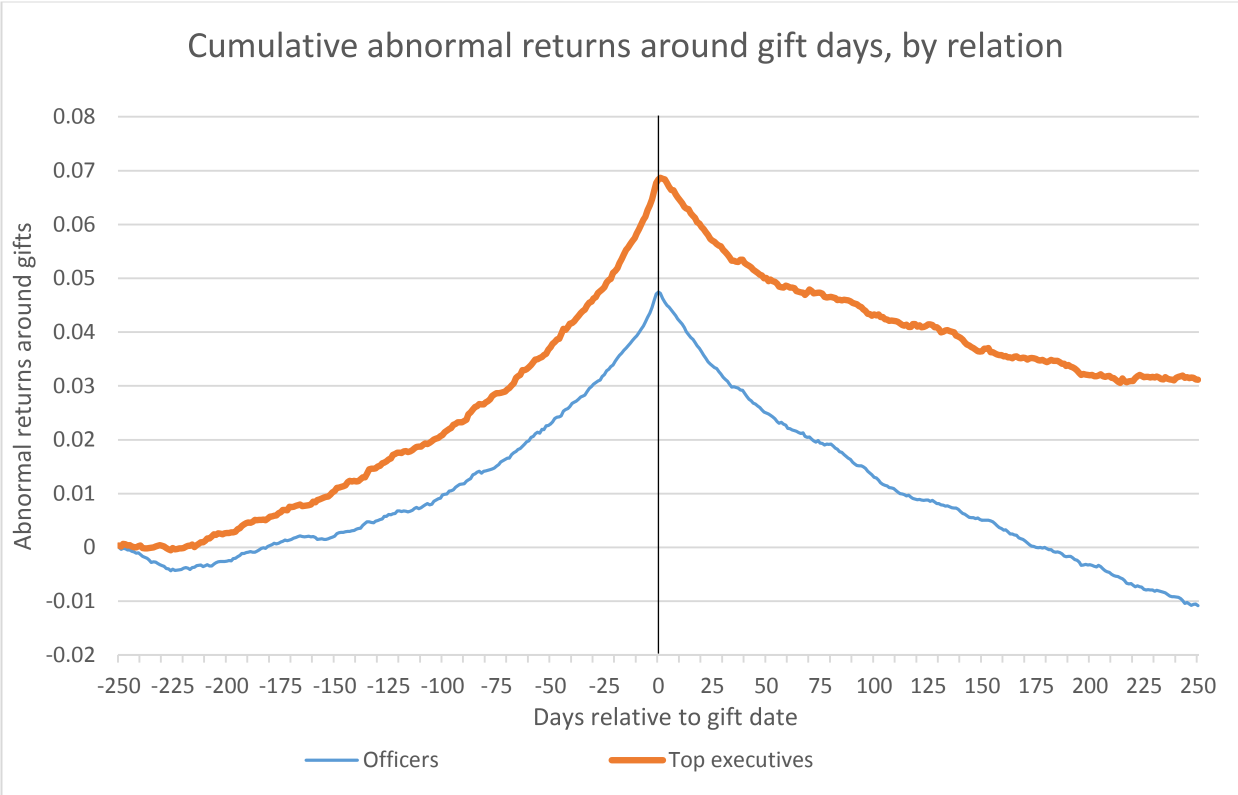

Figure 2: Cumulative abnormal returns around executives' gift dates. Abnormal returns are computed using market adjusted model. Day 0 refers to the gift day. Day 10 refers to the 10^{th} trading day after the gift date, while day -10 refers to the tenth trading day before the gift date. Executives have the title of CEO, CFO, CI, CO, CT, President, Chairman of the Board, Director, Officer, Vice President, Vice Chair and members of the various board committees. Top executives are defined as CEO, CFO, CI, CO, CT, President, and Chairman of the Board.

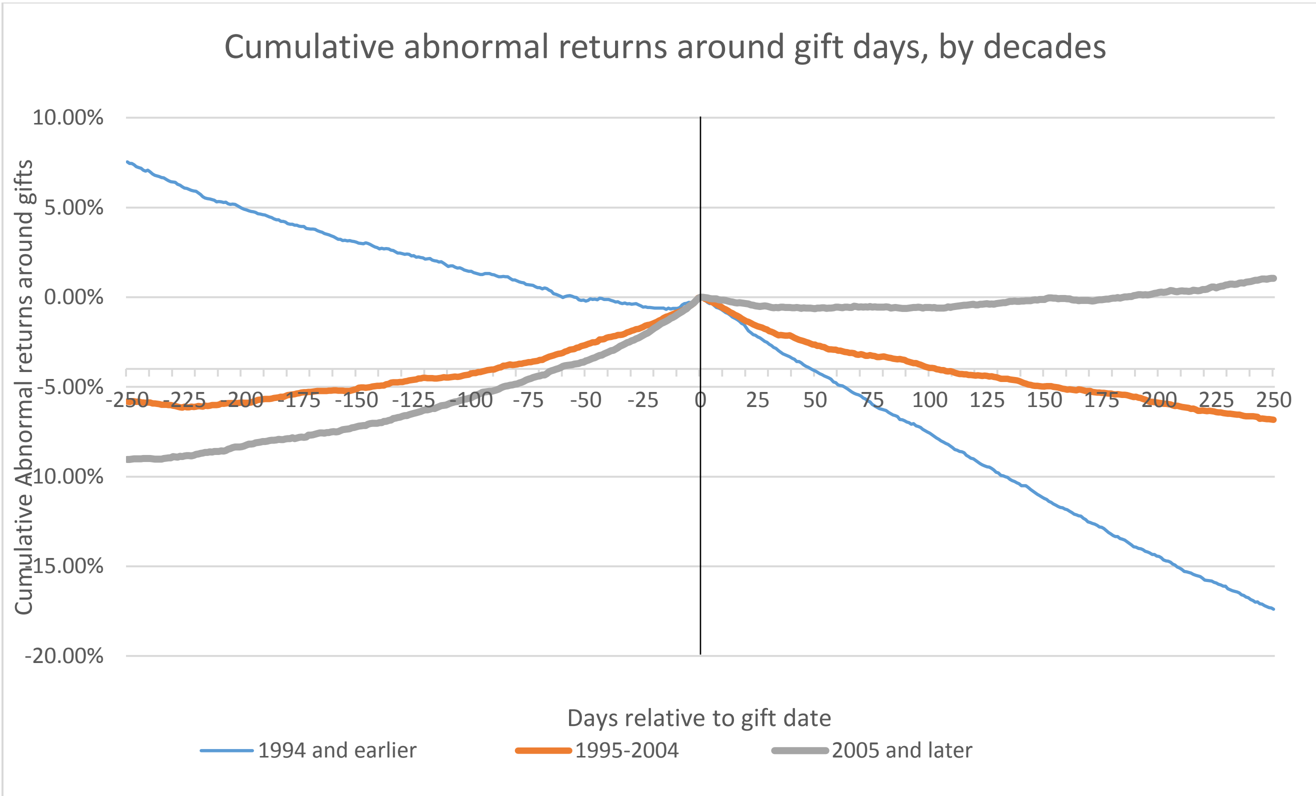

Figure 3: Cumulative abnormal returns around executives' gift dates. Abnormal returns are computed using market adjusted model. Day 0 refers to the gift day. Day 10 refers to the 10th trading day after the gift date, while day -10 refers to the tenth trading day before the gift date. Executives have the title of CEO, CFO, CI, CO, CT, President, Chairman of the Board, Director, Officer, Vice President, Vice Chair and members of the various board committees.

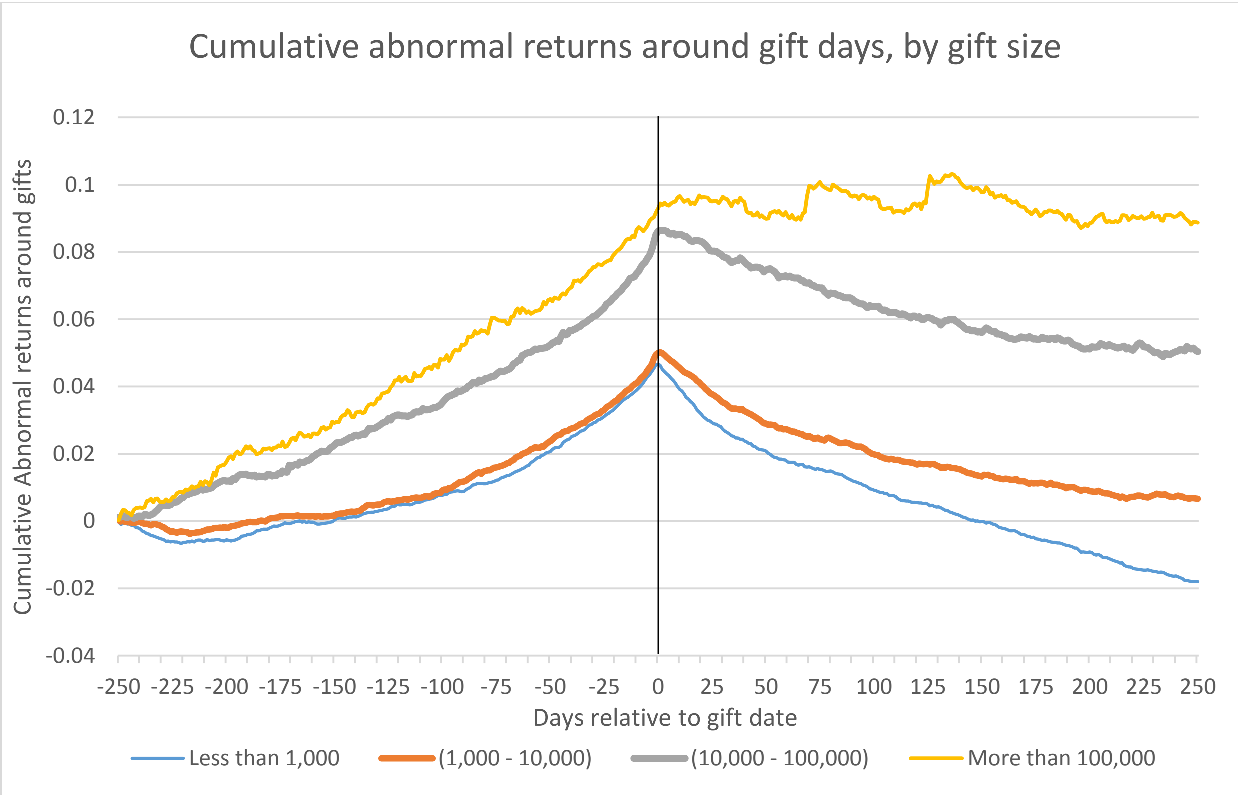

Figure 4: Cumulative abnormal returns around executives' gift dates. Abnormal returns are computed using market adjusted model. Day 0 refers to the gift day. Day 10 refers to the 10th trading day after the gift date, while day -10 refers to the tenth trading day before the gift date. Executives have the title of CEO, CFO, CI, CO, CT, President, Chairman of the Board, Director, Officer, Vice President, Vice Chair and members of the various board committees.

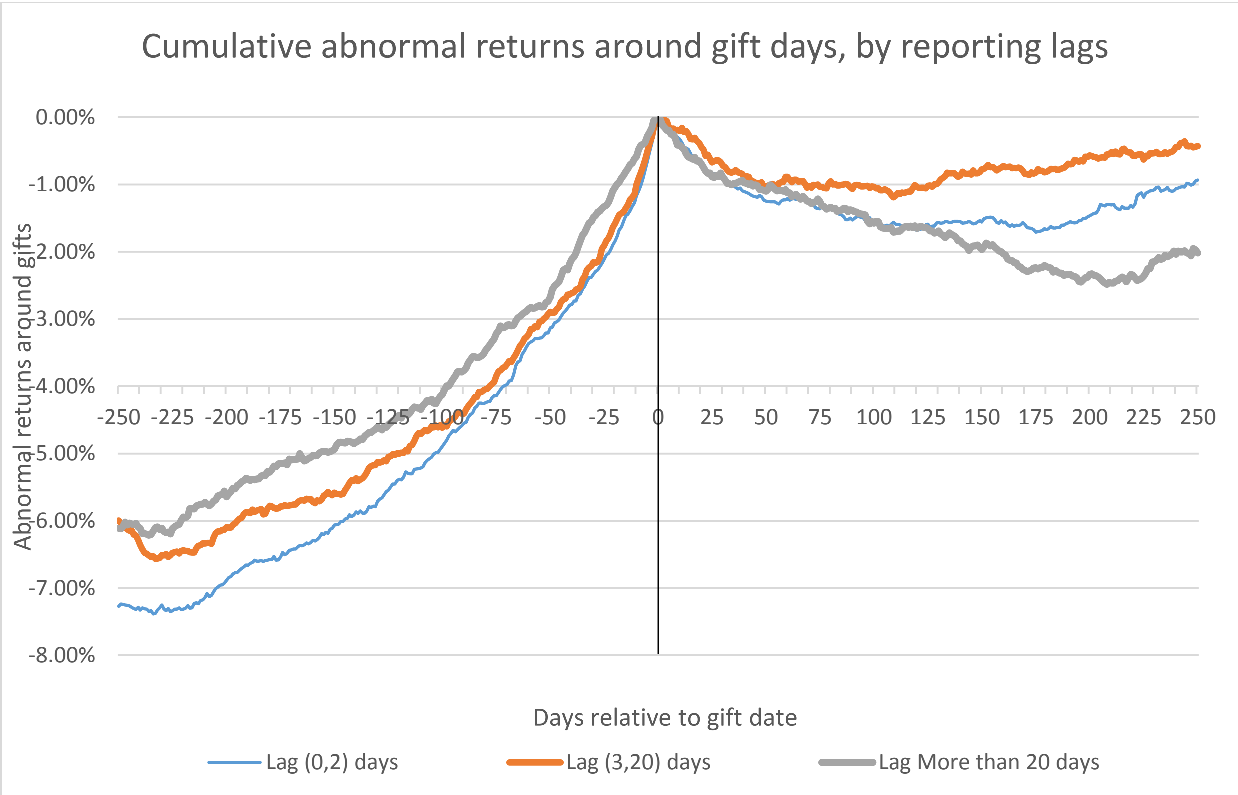

Figure 5: Cumulative abnormal returns around executives' gift dates. Abnormal returns are computed using market adjusted model. Day 0 refers to the gift day. Day 10 refers to the 10th trading day after the gift date, while day -10 refers to the tenth trading day before the gift date. Executives have the title of CEO, CFO, CI, CO, CT, President, Chairman of the Board, Director, Officer, Vice President, Vice Chair and members of the various board committees. Reporting delays (lags) are computed from the gift date to the SEC receipt date.

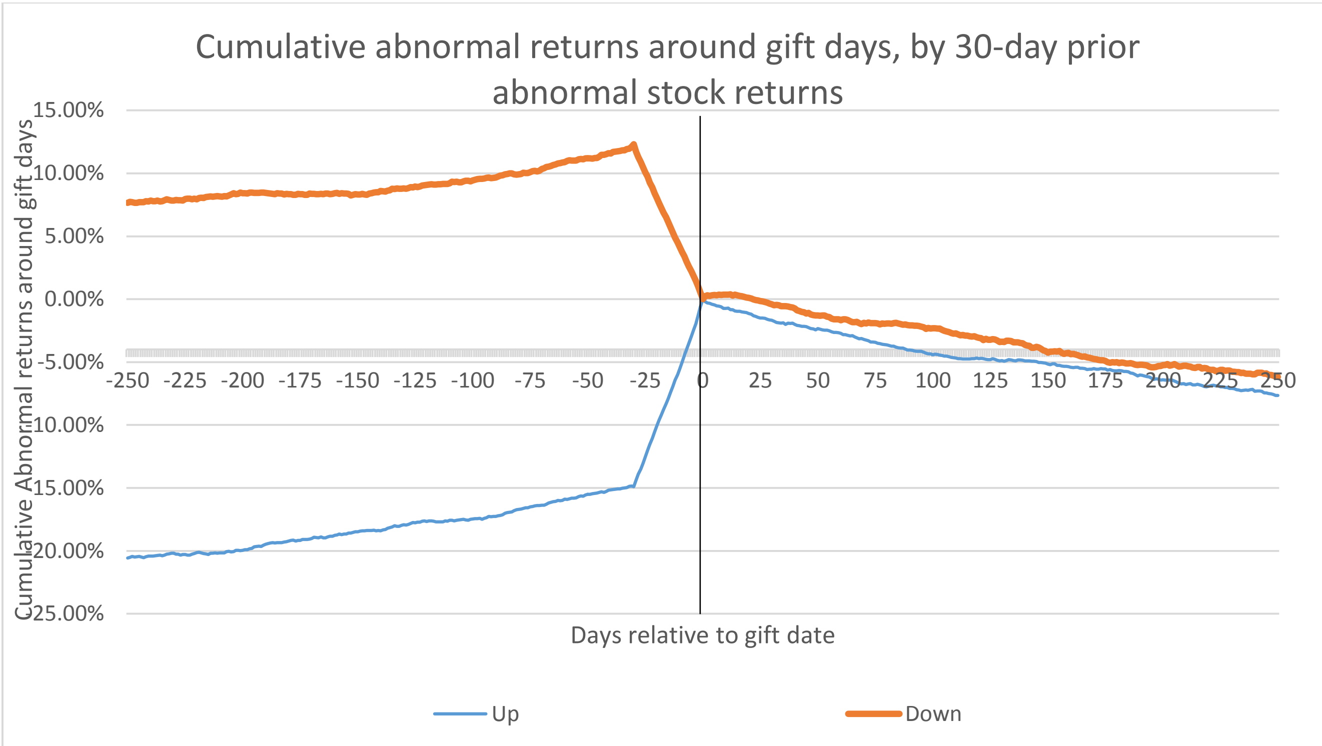

Figure 6: Cumulative abnormal returns around executives' gift dates. Abnormal returns are computed using market adjusted model. Day 0 refers to the gift day. Day 10 refers to the 10^{th} trading day after the gift date, while day -10 refers to the tenth trading day before the gift date. Executives have the title of CEO, CFO, CI, CO, CT, President, Chairman of the Board, Director, Officer, Vice President, Vice Chair and members of the various board committees. Reporting delays are computed from the gift date to the SEC receipt date. If the 30 day cumulative abnormal return from day -30 to day -1 is positive, then prior return is classified as "Up." If the 30 day cumulative abnormal return from day -30 to day -1 is negative, then prior return is classified as "Down."