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I. INTRODUCTION

The practice of providing "in-kind" perks to employees that go beyond the traditional benefits of health care coverage and retirement plans has spread throughout Silicon Valley technology companies at a rapid pace within the last decade.[1] At the same time, the value of these perks has increased exponentially.[2] The widespread adoption of this practice suggests that employers view the practice as beneficial to their business strategy in two interrelated ways. First, corporate directors and officials view the practice as a tool to recruit talent, boost productivity, and increase efficiency. Second, companies have typically been able to avoid paying taxes on the majority of the in-kind perks they provide to employees.[3]

From a shareholder governance perspective, however, there are substantial weaknesses in these two approaches. With respect to developing human resources in general, there is currently no accurate metric for measuring how the receipt of in-kind perks contributes to an employee's work performance. Thus, shareholders are unable to

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1. John F. Coyle & Gregg D. Polsky, *Acqui-Hiring*, 63 DUKE L.J. 281, 290 (2013).

2. Ian Sherr, *Vexed in the City: Working in Silicon Valley Tech Is Much More Lucrative Than You Think*, CNET (Aug. 21, 2014, 4:00 AM), http://www.cnet.com/news/vexed-in-the-city-working-in-silicon-valley-tech-is-much-more-lucrative-than-you-think/.

3. *Id.*

properly assess whether the costs associated with in-kind perks ultimately decrease or increase share value. In addition, should shareholders wish to question the use of corporate funds to provide lavish perks, there is no effective avenue of recourse under the current corporate legal framework. With respect to the tax advantages associated with providing in-kind perks, while this practice has enjoyed rapid exponential growth uninterrupted for the most part, the law is beginning to catch up. Several scholars have argued that the majority of perks offered fail to qualify for the type of tax breaks that the law intended.[4] In response, the Internal Revenue Service ("IRS") has expressed the intent to revise the tax code based on these recommendations.[5] The IRS's interest in monitoring and regulating in-kind perks in Silicon Valley thereby casts doubt on the financial advantages of this practice.

This Note addresses this issue by proceeding in three main parts: Part I surveys the types of perks offered by employers, Part II analyzes the impact of impending changes to the practice of employer-provided perks, and Part III criticizes the ineffectiveness of the current legal avenue shareholders might pursue to effect change and summarizes an interim solution. Ultimately, this Note seeks to identify significant gaps in the practice of employer provided perks, in order to foster a conversation between shareholders and management regarding the long-term consequences of this practice.

II. RISE OF EMPLOYEE PERKS IN SILICON VALLEY

In order to understand the implications of employer-provided perks, it is important to first examine the current landscape. This section will define the geographical boundaries of which the perks are concentrated; the demographic to which the perks are directed; and the perks themselves, in terms of type, scale, and value.

Starting in the 1990s, the technology industry in Silicon Valley

4. *See, e.g.*, Austin L. Lomax, Note, *Five-Star Exclusion: Modern Silicon Valley Companies Are Pushing the Limits of Section 119 by Providing Tax-Free Meals to Employees*, 71 WASH. & LEE L. REV. 2077, 2105 (2014).

5. Mark Maremont, *Silicon Valley Cafeterias Whet Appetite of IRS*, WALL ST. J., Sept. 2, 2014, at B1, http://www.wsj.com/articles/silicon-valley-cafeterias-whet-appetite-of-irs-1409612488.

has cultivated a reputation for not only offering employees substantial pay,[6] but also lavish perks.[7] In terms of location, the Silicon Valley area is generally known to encompass the following:[8] all of the Santa Clara, San Mateo, and San Francisco counties; Fremont, Newark, and Union City of Alameda County; and Scotts Valley of Santa Cruz County.[9] With respect to the beneficiaries of these perks, technology companies generally craft benefits packages specifically geared towards engineers, software experts, coding whizzes, and other key workers.[10] These employees are known as the "backbone of the industry's current boom."[11]

Silicon Valley technology companies offer perks in varying degrees of type, scale, and value. Some employers offer limited perks.[12] For example, a local research lab for IBM subsidizes lunches for employees.[13] Similarly, employees at Apple must pay to use the on-campus gym, but the company offers subsidized lunch, free coffee, tea, and apples.[14]

Yet, most companies provide completely subsidized perks frequently, or even daily. For example, Google employees are encouraged to dine at any one of the cafeterias and eateries on campus completely free of charge.[15] Smaller companies with more

6. Before the practice of providing employee perks began attaining momentum, Silicon Valley companies utilized stock options to attract and retain employees, which is now considered a standard benefit. *See* Alisa J. Baker, *Stock Options–A Perk that Built Silicon Valley*, WALL ST. J., June 23, 1992, at A20.

7. Paul Caron, *Who Pays for Employee Perks at High-Tech Companies?*, TAXPROF BLOG (Nov. 25, 2014), http://taxprof.typepad.com/taxprof_blog/2014/11/who-pays-for-employee-perks-.html.

8. While the Silicon Valley is generally known loosely as the "Bay Area," there is not a universal agreement on the precise geographical boundaries of the region.

9. While the Silicon Valley Index doesn't faithfully include the county of San Francisco, it is included in this note because of the increasing presence of high tech companies in San Francisco and consequently, the spread of employee perks. *See Profile of Silicon Valley*, SILICON VALLEY INDEX, http://www.siliconvalleyindex.org/index.php/profile-of-the-region (last visited Oct. 1, 2015).

10. Caron, *supra* note 7.

11. Sherr, *supra* note 2.

12. *Id.*

13. *Id.*

14. *Id.*

15. Lomax, *supra* note 4 (citing Kevin Smith, *Google Employees Reveal Their Favorite Perks Working for the Company*, BUS. INSIDER (Mar. 6, 2013, 11:02 AM), http:// www.businessinsider.com/google-employee-favorite-perks-2013-3?op=1 (listing a variety of employee reactions to the many perks that Google offers)).

limited office space employ the services of local catering companies.[16] Genentech, a biotechnology corporation headquartered in South San Francisco, provides take-home dinners and helps employees find last-minute care for sick children.[17] Many companies throughout Silicon Valley offer buses equipped with wireless Internet ("Wi-Fi") to transport employees to and from work, allowing them the luxury of working while commuting.[18] Evernote, a productivity app maker headquartered in Redwood City, offers free house-cleaning services twice a month to every full-time worker, from receptionists to top executives.[19] Employees at other companies, including Netflix and Twitter, enjoy unlimited vacation time.[20]

Other perks are offered intermittently. For instance, ThousandEyes, a network monitoring company based in San Francisco, brought employees to Lake Tahoe for three days in the summer.[21] For one of those days, the company provided employees with vouchers for recreational activities, including zip lining, golfing, and boating.[22] Employees at Evernote receive a $1,000 stipend to "disconnect from work" each year.[23]

Some perks verge on extravagant, or even excessive. At Dropcam, a company that manufactures live-streaming cameras, CEO Greg Duffy welcomes employees by offering free helicopter rides to the destination of their choice.[24]

Company perks even extend to employee families as well. For instance, some companies offer employees money to help offset costs of childbirth and adoptions.[25] When employees at Yahoo adopt or give birth to a child, they are given $500, a gift basket, and up to eight

16. Cadie Thompson, *Silicon Valley Start-Ups Take Perks to New Level,* CNBC (Aug. 19, 2013, 1:50 PM), http://www.cnbc.com/id/100971904.

17. John C. Goodman, *Silicon Valley Employers Go Wild with Lavish Employee Benefits*, FORBES (Oct. 30, 2012, 9:17 AM), http://www.forbes.com/sites/johngoodman/2012/10/30/silicon-valley-employers-go-wild-with-lavish-employee-benefits/.

18. Sherr, *supra* note 2.

19. Matt Richtel, *Housecleaning, Then Dinner? Silicon Valley Perks Come Home*, N.Y. TIMES (Oct. 20, 2012), http://www.nytimes.com/2012/10/20/us/in-silicon-valley-perks-now-begin-at-home.html?_r=0.

20. Sherr, *supra* note 2.

21. *Id.*

22. *Id.*

23. *Id.*

24. Thompson, *supra* note 16.

25. Sherr, *supra* note 2.

weeks of paid leave.[26] Similarly, Google gives $500 "baby bonding bucks" along with up to twenty-two weeks leave for biological moms.[27] At Facebook, employees are given a gift of $4,000 and approximately sixteen weeks of maternity leave.[28]

Still, other perks simply buck tradition. Two Silicon Valley giants, Apple and Facebook, now offer female employees the "game-changing" perk of covering the costs to undergo medical procedures to freeze and store their eggs.[29] At both companies, the benefits plan covers up to $20,000 in medical procedures and costs.[30] Employees at Facebook began taking advantage of the coverage in 2014.[31]

To be sure, not all companies participate in the perks game. For instance, the head of the human resources software startup Zenefits argued that he abstains from offering too many of the Silicon Valley staples to his employees for fear of attracting employees who join the company purely for perks.[32] However, companies that refrain from providing extensive perks "are becoming the exception, not the rule."[33]

The competition to see which companies can devise and dole out the most desired and original perks has been characterized as an "arms race."[34] Silicon Valley employers strive to outdo each other in terms of nonsalary and nonequity benefits.[35] ThousandEyes CEO Mohit Lad describes the practice as an effort to be original.[36] It goes beyond "just giving free lunches," but further, it is about cultivating a unique corporate "identity."[37] In fact, the practice has become so prevalent that a new sub-industry has surfaced.[38] Companies are

26. *Id.*
27. *Id.*
28. *Id.*
29. Danielle Friedman, *Perk Up: Facebook and Apple Now Pay for Women to Freeze Eggs*, NBC NEWS (Oct. 14, 2014, 2:56 PM), http://www.nbcnews.com/news/us-news/perk-facebook-apple-now-pay-women-freeze-eggs-n225011.
30. *Id.*
31. *Id.*
32. Sherr, *supra* note 2.
33. *Id.*
34. *Id.*
35. Flora Zhang, *Twitter Buys 19th Century Log Cabins for Cafeteria*, CNN: MONEY (Mar. 6, 2014, 10:38 AM), http://money.cnn.com/2014/03/06/technology/social/twitter-cabins/.
36. Sherr, *supra* note 2.
37. Sherr, *supra* note 2.
38. Rachel Feintzeig, *Lavish Perks Spawn New Job Category*, WALL ST. J. (Nov. 20, 2014, 7:19

retaining human resources ("HR") specialists and tasking them with looking for more creative, often valuable benefits.[39] For some companies and HR specialists, the expectations are beginning to become too much to handle. Jill Hernstat, a recruiter at executive search firm Hernstat & Co., observed that prospective or current employees would often broadcast the perks they received at their former job.[40] The expectation then would be for the new employer to offer more perks than the former employer, or at the very least, make a matching offer. This is the practice that Hernstat has characterized as spiraling to the point where it has become "out of hand."[41]

Obviously, the practice impacts two main classes of people: (1) the employers, including the management team, and (2) the employees. However, the increasingly prevalent role that employer-provided perks play in the human resources component of Silicon Valley technology companies should draw the attention of another class of key stakeholders: corporate shareholders.

III. THE SHAREHOLDER GOVERNANCE PROBLEM

Given the volume and enormous costs associated with the practice of providing perks, it follows that corporate shareholders have a strong interest in the underlying business rationale of the policy, and potentially, any options available to exercise their rights as shareholders. While these increasingly extravagant perks have garnered considerable attention from the government and the public, less attention has been paid to corporate shareholders. Specifically, there is little, if any, literature available analyzing how these perks affect shareholder value. If the value of employee benefits remained stagnant, then the concern would not be as pronounced. However, the alarming rate at which the benefits have spread throughout technology companies in Silicon Valley—combined with the soaring costs and value of the benefits—warrants a closer examination of the legal and business ramifications as they relate to shareholders. This

PM), http://online.wsj.com/articles/lavish-perks-spawn-new-job-category-1416529198; Caron, *supra* note 7.

39. Feintzeig, *supra* note 38.

40. Sherr, *supra* note 2.

41. *Id.*

section will outline the business rationales corporate executives offer to support the practice of providing employee perks, and explain how impending changes in tax law affect the wisdom of these business rationales.

A. INTENDED PURPOSES OF EMPLOYEE PERKS

The history of Silicon Valley involves intense competition for employees with competent engineering skills, a phenomenon described as an "insatiable demand for engineering talent."[42] As early as the 1970s, the practice of providing perks evolved as a method for companies to vigorously compete in the market for talent.[43] Companies began to offer "incentives such as generous signing bonuses, stock options, high salaries, and interesting projects to attract top people."[44] These aggressive recruiting practices progressed through the 1980s and into the 1990s.[45] While the demand for engineers diminished in the years following the burst of the dot-com bubble, it quickly swelled again less than a decade later.[46] One expert described the market for engineering talent in Silicon Valley by 2011 as "the most competitive" he had ever seen.[47] Today, companies continue to maintain the mindset that paying engineers "like superstars" is the only way to compete in Silicon Valley's "hypercompetitive" job market.[48] Despite the significant costs associated from these employee perks, companies nonetheless justify the practice on three main grounds: the perks serve to increase productivity, recruit talent, and retain valuable human resources.

1. *Efficiency*

42. Coyle & Polsky, *supra* note 1, at 290.

43. *Id.*

44. *Id.* (citing ANNALEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128 35 (9th prtg. 2000)).

45. Coyle & Polsky, *supra* note 1, at 290–91 (citations omitted).

46. *Id.*

47. *Id.* at 291 (citing Jessica Guynn, *What Recession? It's Boom Time Again in Silicon Valley*, L.A. TIMES (July 17, 2011), http://articles.latimes.com/2011/jul/17/business/la-fi-tech-boom-20110717).

48. Daniel Terdiman, *Silicon Valley Talent Wars: Engineers, Come Get Your $250K Salary*, CNET (Sept. 22, 2014, 4:00 AM), http://www.cnet.com/news/silicon-valley-talent-wars-engineers-come-get-your-250k-salary/.

First, most companies justify the policy of providing perks on the basis that the perks help employees perform more efficiently.[49] Scientific research seems to support this rationale. Research conducted by psychology experts revealed that social and relaxing activities, such as yoga and cardio-kickboxing, tend to increase creativity.[50] These activities cause a spike in the superior anterior temporal gyrus ("aSTG"), the part of the brain responsible for drawing together distantly-related information.[51] In turn, a spike of aSTG enhances creativity, engagement, and innovation.[52] As a result, engineers who experience this surge can more efficiently perform their job.[53]

On a practical level, the perks simply save employees time, freeing up valuable time that could otherwise be spent working.[54] For example, if the employer provides a barber on office premises, employees would not need to spend time waiting at a salon.[55] Hewlett-Packard, Facebook, Google, and Apple provide doctors and health clinics on campus, thereby saving employees from cutting their workday short to attend an off-site medical appointment.[56] Buses equipped with Wi-Fi allow employees to work during the commute.[57] One study conducted by the University of California, Berkeley,[58]

49. John Waggoner, *Do Happy Workers Mean Higher Company Profits*?, USA TODAY: MONEY (Feb. 20, 2013, 3:32 PM), http://www.usatoday.com/story/money/personalfinance/2013/02/19/ treating-employees-well-stock-price/1839887/.

50. John Kounios & Mark Beeman, *The Aha! Moment: The Neural Basis of Solving Problems with Insight*, THE CREATIVITY POST (Nov. 11, 2011), http://www.creativitypost.com/science/the_aha_moment._the_cognitive_neuroscience_of_insight#sthash.ztgdhNqU.dpuf; *see also* Jonah Lehrer, *How To Be Creative*, WALL ST. J., (Mar. 12, 2012, 6:25 PM), http://www.wsj.com/articles/SB10001424052970203370604577265632205015846.

51. *See supra* note 50.

52. *Id.*

53. Martha Mendoza, *Tech Firms Offering More Perks To Recruit, Retain Talent*, HUFFINGTON POST (Mar. 31, 2013, 10:54 AM), http://www.huffingtonpost.com/2013/03/31/tech-firms-increase-office-perks_n_2988687.html.

54. *Id.*

55. Sherr, *supra* note 2.

56. *Id.*; Zhang, *supra* note 35.

57. Sherr, *supra* note 2.

58. Danielle Dai & David Weinzimmer, *Riding First Class: Impacts of Silicon Valley Shuttles on Commute & Residential Location Choice* (U.C. Berkeley, Working Paper No. UCB-ITS-WP-2014-01, Feb. 2014), http://www.danielledai.com/academic/dai-weinzimmer-shuttles.pdf.

found that ten percent of technology employees surveyed would quit if their employers stopped providing shuttle service to and from the worksite.[59] Paul Saffo, Stanford University lecturer and managing director of Foresight at Discern Analytics stated, "[o]utsiders see these things as an extravagance; the companies see them as a productivity tool."[60]

2. *Recruiting and Retaining Talent*

Another driving force behind the practice of offering extensive perks is the necessity to attract and retain talent.[61] The perks benefit employers in two stages: when the employer is initially looking for suitable candidates, and when the candidates become employees. During the former stage, the benefit to the employers is fairly straightforward: the perks attract a larger pool of candidates, from which the employer may select qualified employees. As a general rule, more is better. Simply put: If a prospective employee were facing two job opportunities that offered the same salary—all other things being equal—the employee would likely choose the company that offered an additional perk over the other company.

During the latter stage, the employer benefits when the perks give employees a heightened sense of job satisfaction, inducing them to stay with the company. In addition to the obvious need to hold on to talent, employers need to retain employees in order to safeguard company secrets. Because of technological advances and greater employment mobility, employers are becoming increasingly concerned with trade secret misappropriation in the employment arena.[62] In Silicon Valley, trade secret law is particularly important because intellectual property is one of the most valuable assets to technology companies in the area.[63] Companies are concerned about trade secret misappropriation, both during the time an employee is away from the workplace, as well as during the period following an

59. Dai & Weinzimmer, *supra* note 58, at 12.
60. Zhang, *supra* note 35.
61. Mendoza, *supra* note 53.
62. Hanna Bui-Eve, Note, *To Hire or Not to Hire: What Silicon Valley Companies Should Know About Hiring Competitors' Employees*, 48 HASTINGS L.J 981, 993 (1997).
63. Bui-Eve, *supra* note 62.

employee's termination.[64] In the former situation, employers fear that employees could disclose company secrets off campus. Thus, companies often provide perks that encourage shorter breaks and longer hours spent at the office, such as the famous "sleep pods" provided at Google.[65]

In the latter situation, businesses have become more concerned with the prospect of losing their intellectual properties through departing employees.[66] Traditionally, fearing possible disclosure of its technological knowledge, loss of the employee's expertise, and the subsequent loss of its competitive advantage, former employers sue to enjoin the disclosure or use of its trade secrets; alternatively, former employers sue to enjoin the departed employee from assuming similar responsibilities in his new job.[67] However, because covenants not to compete are generally unenforceable in California, employers must rely on these perks to fill this gap.

Furthermore, there is an additional advantage to offering perks over a higher salary or stock options. Paying employees in perks delivers a substantial "amount of utility in the short term, none of which can be saved until later periods."[68] As some scholars suggest, good perks are generally "extravagant and non-fungible"—these types of perks "cannot be easily convertible to cash, as that would enable the employee to save."[69] For instance, paying for an employee's regular haircut is a non-extravagant and fungible perk, because this is an expense that the employee would normally incur anyway; "the employee simply pockets the amount of the transfer in

64. *Id.* at 984.

65. Michael Moran, *Google Has Sleep Pods, Yelp Has Beer—Why Don't We Just Live at Work?*, GUARDIAN (Sept. 11, 2014, 6:57 AM), http://www.theguardian.com/commentisfree/2014/sep/11/google-sleep-pods-yelp-beer-work-leisure-offices; Zoe Mintz, *IRS Plans to Tax Free Meals Silicon Valley Companies Dole Out*, INT'L BUS. TIMES (Sept. 4, 2014, 4:48 PM), http://www.ibtimes.com/irs-plans-tax-free-meals-silicon-valley-companies-dole-out-1679106.

66. *Silicon Valley's No-Poaching Case: The Growing Debate over Employee Mobility*, KNOWLEDGE @ WHARTON (Apr. 30, 2014), http://knowledge.wharton.upenn.edu/article/silicon-valleys-poaching-case-growing-debate-employee-mobility/; Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 577–78 (1999).

67. Bui-Eve, *supra* note 62, at 985–86.

68. M. Todd Henderson & James C. Spindler, *Corporate Heroin: A Defense of Perks, Executive Loans, and Conspicuous Consumption*, 93 GEO. L.J. 1835, 1863–64 (2005).

69. *Id.* at 1874–75.

cash."[70] In contrast, paying for a professional makeover would constitute a good perk, because it involves a luxury that the employee would not normally purchase.[71] These "good perks"—the type that a majority of Silicon Valley technology companies offer—give employees incentives to work harder, but do not allow employees to save for future periods. As a result, they provide an incentive for the employee to remain with the company in order to continue receiving such benefits.[72]

The need to recruit and retain talent is particularly acute when other potentially more effective, cost-efficient methods are impractical or no longer available. For instance, the practice of "acqui-hiring" is one such method that is not available to all companies.[73] "Acqui-hiring" is a "novel and increasingly common tool" by which the large and successful technology companies buy startups in order to satisfy their intense demand for engineering talent.[74] In an "acqui-hiring" transaction, the corporate buyer has little interest in acquiring the startup's projects or assets.[75] Instead, the primary motivation is to hire, by acquisition, the startup's engineers.[76] Thus, the buyer benefits by obtaining the services of engineers and entrepreneurs with expertise in a certain field.[77] Many Silicon Valley giants, including Facebook and Google, are engaging in "acqui-hiring" at a rapid pace.[78] However, smaller companies are priced out of this method because only the larger companies with sufficient capital can afford to execute such complex transactions. Therefore, the vast majority of Silicon Valley companies that wish to stay competitive in the market continue to use the practice of perks to attract and retain talent.

Companies have also attempted, unsuccessfully for the most part, to incorporate noncompete agreements or contracts to prevent

70. Henderson & Spindler, *supra* note 68, at 1874.
71. *Id.* at 1874–75.
72. *Id.* at 1863–64.
73. *See* Coyle & Polsky, *supra* note 1.
74. *Id.* at 281.
75. *Id.*
76. *Id.*
77. *Id.* at 294.
78. *Id.* at 283.

employees from working for competitors.[79] Peter Cappelli, Wharton Management Professor and Director of Wharton's Center for Human Resources, explained that one of the reasons this tactic is unlawful is because no-poaching agreements are unfair to employees.[80] The practice violates both antitrust principles and employment laws.[81] Fundamentally, it "benefits the companies at the expense of their employees."[82] In California particularly, this practice poses a "unique problem" because of the difficulty in enforcing noncompete agreements.[83] Therefore, the better practice in "terms of carrots and sticks" is for companies to make it attractive enough for employees not to leave and also more difficult for them to walk away with intellectual capital.[84]

A third method for recruiting talent which has become unavailable is a practice known as "no-poaching," in which companies conspire to avoid hiring each other's employees.[85] Professor of business economics and public policy at Wharton University, Joseph Harrington, describes the no-poaching agreement as "an unreasonable restraint of trade" and "a violation of Section 1 of the Sherman Antitrust Act of 1890."[86] When companies agree not to compete for each other's employees, the result is that workers receive lower wages because of the lack of competition.[87] This method is likely to have been shut down by a class action lawsuit brought against Apple, Google, Intel, and Adobe Systems that was recently settled.[88] While the companies avoided having to testify in court and risk the public peeking behind the curtain of their strategies, the negative attention and the threat of a lawsuit potentially serves as a deterrent to companies contemplating this method of retaining talent

79. Gilson, *supra* note 66, at 578.
80. *Silicon Valley's No-Poaching Case*, *supra* note 66.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. Jeff Elder, *Tech Companies Agree to Settle Wage Suit*, WALL ST. J. (Apr. 24, 2014, 6:58 PM), http://www.wsj.com/news/articles/SB10001424052702304788404579522012693196966?mg=reno64-wsj&url=http3A2F2Fonline.wsj.com2Farticle2FSB10001424052702304788404579522012693196966.html.
86. *Silicon Valley's No-Poaching Case*, *supra* note 66.
87. Elder, *supra* note 85.
88. *Silicon Valley's No-Poaching Case*, *supra* note 66.

in the near future.[89] Following this setback, the companies returned to depending on perks as a primary recruitment and retention tool.

In light of the diminishing effectiveness of these tried practices, it seems logical that Silicon Valley companies embrace and commit to a policy of offering lavish employee perks.

B. DO THE BENEFITS REALLY FULFILL THEIR INTENDED PURPOSE?

Proponents argue that statistical data supports a robust policy of providing employee perks.[90] One of the ways to determine whether employee perks actually fulfill their purpose is to measure return on investment ("ROI").[91] ROI is a commonly used performance measure that evaluates the efficiency of an investment or compares the efficiency of a number of different investments.[92] To calculate ROI, the benefit of an investment is divided by the cost of the investment.[93] According to Incentive Magazine, Fortune's "100 Best Companies to Work For" that offer "carefully crafted employee benefits package[s]" have reported a 10.6 percent annual return since 1998.[94] On the contrary, "companies with 40 percent or less employee engagement had a total shareholder return that was 44 percent lower than average."[95] Companies with more engaged employees produce twenty-nine percent more revenue on average, report a higher average customer loyalty, and boast higher retention rates of approximately forty-four percent.[96]

Another rationale propelled by Silicon Valley employers is that perks lead to employee satisfaction, and thus retention. Arguably, there is a direct correlation between happy employees and higher

89. *Silicon Valley's No-Poaching Case*, *supra* note 66.

90. John Feldmann, *Do Employee Perks Translate Into Employer ROI?*, UNDERCOVER RECRUITER, http://theundercoverrecruiter.com/employee-perks-translate-employer-roi/ (last visited Oct. 2, 2015).

91. *Id.*

92. *Return on Investment (ROI)*, ENTREPRENEUR: SMALL BUS. ENCYCLOPEDIA, http://www.entrepreneur.com/encyclopedia/return-on-investment-roi (last visited Oct. 2, 2015).

93. *Id.*

94. Bruce Shutan, *The Power of Perks*, INCENTIVE MAG. (Mar. 18, 2013), http://www.incentivemag.com/Strategy/Engagement/The-Power-of-Perks/.

95. Feldmann, *supra* note 90.

96. *Id.*

company profits, which in turn benefits shareholders. For example, Google, notorious for the assortment of perks it provides for its employees, has seen its stock soar 674 percent since the company began using perks in August 2004.[97] The simple reasoning that people enjoy the benefits of perks is not the only argument for which companies treat employees well.[98] Employers who endorse the policy refer to data, which strongly supports the "fact that organizations that focus on the engagement of their employees deliver stronger performance."[99] While the policy directly affects employee happiness, the policy is founded on sensible business strategies.[100] This business strategy involves providing employees with a sense of "engagement," which in turn results in higher productivity, lower turnover rates, cost savings, and an earnest desire to work for the good of the company.[101]

Slater Tow, a Facebook spokesperson, said the company was not trying to be New Age, but simply strategic. "We don't want to give aromatherapy for your dog," he said, "[w]e want things that are functional for you and your family."[102] Google's co-founders Larry Page and Sergey Brin expressed similar sentiments in their IPO letter: "We believe it is easy to be penny wise and pound foolish with respect to benefits that can save employees considerable time and improve their health and productivity." And that employees and shareholders alike should "[e]xpect [Google] to add benefits rather than pare them down over time."[103] These statements presume that the benefits are fulfilling their intended purposes.

To the extent that lavish employee perks recruit and retain talent and prevent the disclosure of proprietary information, the perks provide value to the companies, and consequently, corporate shareholders. However, the increasingly extravagant nature of employee perks begs the question of whether such perks are

97. Waggoner, *supra* note 49.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. Richtel, *supra* note 19.
103. *2004 Founders' IPO Letter*, GOOGLE INVESTOR RELATIONS (Aug. 18, 2004), https://investor.google.com/corporate/2004/ipo-founders-letter.html.

functional and optimal, or simply a waste of corporate resources.[104] Sophie Kitson, Vice President of Talent, People + Vibe at PagerDuty, insists that "the tech boom won't be here forever" and eventually employers "will regret inflating perks and salaries as the way to engage" employees.[105] As an immediate result, the immense competition and density of employers in the Silicon Valley could lead to retention problems.[106] Employees are "constantly tempted to jump employers, even if only to consistently bump up their compensation."[107]

C. THE EFFECT OF IMPENDING TAX LAW CHANGES

Even assuming that the perks are currently fulfilling their stated purposes, impending changes in tax law should concern shareholders with respect to corporate governance. Recruiters report that the difference in perk value may be as much as twenty percent above an employee's salary.[108] Thus, a software engineer at Facebook, Twitter, or Google who earns approximately $120,000 a year in salary on paper actually receives up to an additional $24,000 in benefits.[109] However, these additional benefits are not reflected in the employee's paycheck. These perks are not technically free, but rather an alternative to paying higher wages.[110] Under the current system, neither the company nor the employee is shouldering any taxes on the majority of employee perks.[111]

Economic policy expert John C. Goodman described the business rationale underlying the practice of providing extensive

104. Sophie Kitson, *Perks Don't Work*, TECHCRUNCH (Dec. 11, 2014), http://techcrunch.co m /2014/12/11/perks-dont-work.

105. Kitson, *supra* note 104.

106. *See* Ed Nathanson, *A Tale of Two Coasts: How Companies Compete for Talent in Boston vs. Silicon Valley* (Jan. 7, 2015), http://talent.linkedin.com/blog/index.php/2015/01/a-tale-of-two-coasts-how-companies-compete-for-talent-in-boston-vs-silicon-valley. Massachusetts-based CloudLock CEO Gil Zimmerman postulates that employer density and competition in Silicon Valley causes employees to leave businesses in search of greater compensation elsewhere.

107. *Id.*

108. Sherr, *supra* note 2.

109. *Id.*

110. *Id.*

111. *Id.*

perks, from an economic perspective.[112] Using the 2012 tax rates, Goodman explains how the perks make mathematical, and logical, sense to employers. Taking into account the highest marginal tax rate for the federal income tax of thirty-five percent, the 2.9 percent Medicare tax, and the maximum 9.3 percent state income tax, an individual in California would face a highest marginal tax rate of 47.2 percent.[113] Californians with a median income face high marginal tax rates, because a 9.3 percent rate is applied to those with less than \$100,000 annual income.[114] For a Californian in the twenty-five percent federal income tax bracket, facing a 15.3 percent (Federal Insurance Contributions Act) payroll tax and a 9.3 percent California income tax, the combined marginal tax rate reaches almost fifty percent.[115] Consequently, both the individual and the employer are incentivized to spend up to forty-nine cents to avoid a dollar of income.[116] Under this logic, California employers are presuming that employees would choose to receive a dollar's worth of goods and services in-kind rather than fifty-one cents in cash.[117] Thus, even if the benefit is worth half its cost, it would still "be a good deal for the employees."[118] This is the combined effect of the progressive tax system and the fact that neither employers nor employees are paying taxes on these perks.

This pattern is an outgrowth of the Internal Revenue Code § 132, which governs de minimis fringe benefits.[119] De minimis fringe benefits are defined as "any property or service the value of which is (after taking into account the frequency with which similar fringes are provided by the employer to their employees) so small as to make accounting for it unreasonable or administratively impracticable."[120] The Treasury Department provides a few examples of excludable benefits: personal use of the copying machine; occasional theater or

112. Goodman, *supra* note 17.
113. *Id.* (These tax rates are current through the writing of the article in 2012).
114. *Id.*
115. *Id.* (These tax rates are current through the writing of the artice in 2012).
116. *Id.*
117. *Id.*
118. *Id.*
119. Sherr, *supra* note 2.
120. 26 U.S.C. § 132(e)(1) (2013). For a detailed argument explaining why free meals provided by employers should be taxed, *see* Lomax, *supra* note 4.

sporting event tickets; occasional parties or group meals; holiday gifts of property; coffee, donuts, and soft drinks; and other similar incidentals.[121] It also provides instances of non-excludable fringe benefits, such as season tickets, country club or gym memberships, and use of corporate recreation facilities like hunting lodges or boats.[122] Whether a benefit is de minimis often turns on the frequency with which the employee receives the benefit.[123] A taxpayer must measure the frequency of the benefit in one of two ways. Primarily, frequency depends on how often an individual employee receives a particular benefit, rather than how often the total workforce receives a particular benefit.[124] If it is difficult to determine how often an individual employee receives a benefit, then the taxpayer can determine frequency based on how much the employer provides the benefit to the entire workforce.[125] These regulations indicate that receiving a daily benefit likely does not constitute de minimis fringe benefit.[126]

However, the extensive benefits that technology companies are giving their employees are eliciting questions about "who foots the bill for the perks."[127] In particular, these lavish benefits have attracted the attention of the IRS. A recent *Wall Street Journal* report reveals that the IRS could be targeting these fringe benefits, more specifically "employer-provided meals," for the next fiscal year.[128] In the agency's recently released Priority Guidance Plan for

121. *See* 26 C.F.R. § 1.132-6(e)(1) (2013) (listing these examples and others that are excludable under I.R.C. § 132).

122. *Id.*

123. *See* 26 U.S.C. § 132(e)(1) (2012) (noting that the taxpayers must account for the frequency they receive the benefit in question when determining that benefit's value).

124. *See* 26 C.F.R. § 1.132-6(b)(1) (noting that this "employee-measured" way of determining frequency does not allow an employee to exclude a benefit provided infrequently to the entire workforce if he receives that benefit every day).

125. *See* 26 C.F.R. § 1.132-6(b)(2) (stating the individual frequency is not important in circumstances when it is difficult to measure).

126. Several scholars have argued that perks such as free meals do not constitute de minimis fringe benefits, and thus should be taxed by the IRS. *See generally* Lomax, *supra* note 4, at 2090 (citing Treas. Reg. § 1.132-6(b)(1) ("For example, if an employer provides a free meal in-kind to one employee on a daily basis, but not to any other employee, the value of the meals is not de minimis with respect to that one employee")).

127. Erik Sherman, *Who Pays for Employee Perks at High-Tech Companies?*, CBS MONEYWATCH (Nov. 24, 2014, 12:32 PM), http://www.cbsnews.com/news/who-pays-for-perks-at-high-tech-companies/.

128. Maremont, *supra* note 5.

2014 to 2015, the IRS states that the free meals will now be considered a taxable fringe benefit, receiving the same treatment as that of a company car or phone.[129] As a result, employees who receive two meals a day, courtesy of their company, could be obligated to pay an additional $4,000 to $5,000 in taxes.[130]

One driving force behind the IRS's newfound attention is that taxpayers are beginning to realize and decry the consequences of these employee perks. The current tax policies regarding employer-provided perks benefit companies at the expense of public taxpayers.[131] If companies are not required to pay taxes for the meals, there will be fewer tax dollars to pay for government services and other programs.[132] Therefore, in a sense, taxpayers are subsidizing free cafeteria meals for some of the most profitable companies in the nation, which happen to be centrally located in one geographical area.[133]

Similarly, residents have expressed resentment towards shuttles transporting employees to and from San Francisco, a prime location where most Silicon Valley technology employees have chosen to live.[134] Many shuttle stops are located at public bus stops, and the shuttles occasionally impede access to public vehicles or block bicycles and auto traffic.[135] Residents have also raised complaints about noise and vibrations from shuttles, particularly on residential streets.[136] Moreover, there is anecdotal evidence that some technology employees choose to live close to shuttle stops, causing real estate prices to rise further and gentrify portions of San Francisco.[137] While perks such as these shuttle buses benefit Silicon

129. *See generally* Lomax, *supra* note 4, at 2090.

130. Mark Maremont, *Silicon Valley's Mouthwatering Tax Break*, WALL ST. J. (Apr. 7, 2013, 7:03 PM), http://www.wsj.com/articles/SB10001424127887324050304578408461566171752.

131. Kim Peterson, *IRS Says No to Free Silicon Valley Meals*, CBS NEWS (Sept. 3, 2014, 7:27 AM), http://www.cbsnews.com/news/irs-says-no-to-free-silicon-valley-meals/.

132. *Id.*

133. *Id.*

134. Neal J. Riley, *Supervisor Wants Rules for Shuttle Stops*, S.F. CHRON. (Oct. 25, 2012, 5:21 PM), http://www.sfgate.com/bayarea/article/Supervisor-wants-rules-for-shuttle-stops-3982606.php.

135. *Id.*

136. S.F. CNTY. TRANSP. AUTH., STRATEGIC ANALYSIS REPORT: THE ROLE OF SHUTTLE SERVICES IN SAN FRANCISCO'S TRANSPORTATION SYSTEM 5 (2011).

137. Rory Carroll, *Geek-Driven Gentrification Threatens San Francisco's Bohemian Appeal*, GUARDIAN (Mar. 5, 2013, 12:15 PM), http://www.theguardian.com/world/2013/mar/

Valley employees and employers,[138] they are beginning to impact third parties as well.

If the IRS makes good on its promise to begin taxing employee perks and Silicon Valley continues to offer these "expected" perks, the money spent will ultimately come out of shareholder value.[139] This becomes particularly problematic when a company that succumbed to pressure of offering generous perks suddenly begins to struggle. For example, Zynga, a social gaming company, used to serve employees fancy lunches and dinners every day.[140] However, as some of Zynga's former titles have begun to decline in popularity, the company's shares in turn have fallen eighty percent since 2012.[141] Unsurprisingly, Zynga cut back on certain perks, including ending haircuts to employees in early 2014.[142] However, regardless of whether Silicon Valley companies may continue providing perks under the current scheme, shareholders may still have a vested interest in examining employee perks more closely from a corporate governance perspective.

IV. AN INADEQUATE SYSTEM OF MEASURING THE VALUE OF PERKS

Even without the changes in tax law, shareholders face a considerable challenge in approaching the issue of employee perks: a deficient system in measuring the benefit the employee is receiving, and consequently, shareholder value. The practice of providing perks is premised on the theory that employees are receiving a benefit, and that benefit is what drives an employee's motivation, efficiency, productivity, or desire to stay at the employee's respective job. As

05/san-francisco-geek-gentrification-threatens; Miguel Helft, *Google's Buses Help its Workers Beat the Rush*, N.Y. TIMES (Mar. 10, 2007), http://www.nytimes.com/2007/03/10/technology/10google.html; Kevin Roose, *The Commuter Kings: Riding Along on Silicon Valley's Exclusive Shuttles*, N.Y. MAG. (Dec. 26, 2012, 10:54 AM), http://nymag.com/daily/intelligencer/2012/12/silicon-valleys-exclusive-shuttles.html; Jenny Pisillo, *Paying More to Be Near a Company Shuttle Stop*, SFGATE (Mar. 9, 2012, 9:30 AM), http://blog.sfgate.com/ontheblock/2012/03/19/paying-more-to-be-near-a-company-shuttle-stop/.

138. *See* Sherr, *supra* note 2.

139. Sherman, *supra* note 127.

140. *Id.*

141. *Id.*

142. *Id.*

Professor Jay Soled points out, receipt of in-kind benefits is profoundly difficult to value.[143] For example, how does one measure the value of a private helicopter ride with the CEO of the company?[144] When employees receive in-kind benefits, their consumption choices are typically constrained.[145] Consequently, a tax on the fair market value of the benefits the employee receives is improper.[146] Nevertheless, there is little doubt that those individuals who actually consume the benefit have experienced "a taxable accretion to wealth."[147] What emerges from this scheme is a "riddle" about just how much one has benefitted, and how to accurately measure the value of that benefit.[148]

A system of providing in-kind perks makes calculating employee compensation more complex. Under the traditional structure of compensation, employees are compensated in cash, with benefits such as health care standardized for the most part. Accordingly, shareholders would be able to access a reliable and transparent system of measuring employee compensation. Conversely, in-kind perks are not consumed by all employees, and for the ones who do benefit, it is difficult to measure the level of consumption. For example, engineers in a company may all have access to free cardio-kickboxing classes. One engineer may take advantage of this perk and attend every evening class available. In this scenario, the employee has received something of value that gives them motivation to work harder and the employer has benefitted from having a more satisfied and productive employee.[149] However, another engineer tries a class out, and decides to never come back. In this alternative situation, the employer has expended financial resources to fund the perk, but neither the employee nor the employer benefits from it. This is the complexity involved in

143. While Professor Soled's article discusses in-kind benefits in general, his arguments are equally applicable in the context of employer-provided perks. *See* Jay A. Soled, *Surrogate Taxation and the Second-Best Answer to the In-Kind Benefit Valuation Riddle*, 2012 BYU L. REV. 153, 158 (2012).

144. *See* Sherr, *supra* note 2.

145. Soled, *supra* note 143, at 154.

146. *Id.*

147. *Id.* at 154–55.

148. *Id.* at 155.

149. *See generally supra* note 49.

measuring the value of perks. From a corporate governance standpoint, this lack of transparency poses a threat to a healthy balancing of interests between shareholders and management.

A. PERKS LARGELY UNADDRESSED BY THE LAW

Shareholders may be upset that excessive perks have undervalued their share value. In addition to being crippled by an inadequate system of measuring the value of perks, shareholders are not afforded any meaningful legal recourse under the current state of the law. Several scholars have recognized that permitting this type of "value diversion" imposes a cost on shareholders that potentially reduces share value.[150] Assuming that shareholders perceive the costs of these perks as substantially outweighing their benefits, what legal remedies might shareholders employ to effect the change they desire?[151] The most applicable avenue to pursue is to file a derivative suit challenging the lavish perks as a waste of corporate assets, but the hurdles shareholders must jump through make this option virtually a nonoption.[152]

As part of the duty of care, directors have an obligation not to waste corporate assets by overpaying for property or employment services.[153] Corporate waste occurs when a corporation is caused to effect a transaction on terms that no person of ordinary and sound business judgment could conclude represents a fair exchange.[154] To succeed on a corporate waste claim, a shareholder plaintiff must prove that no such person could even "entertain the view that [the transaction under attack] represented a fair exchange."[155] Thus, for

150. Lucian Arye Bebchuk & Christine Jolls, *Managerial Value Diversion and Shareholder Wealth*, 15 J.L. ECON. & ORG. 487, 501 (1999).

151. *See* Michael J. Biles & Kimberly G. Davis, *Keeping Current: Corporate Compensation*, ABA BUS. LAW SECTION (2009), http://www.americanbar.org/content/dam/aba/publications/blt/2009/09/keeping-current-compensation-200909.authcheckdam.pdf.

152. While recent lawsuits demonstrate an emerging trend of shareholder plaintiffs raising allegations that directors' pay is excessive, less attention has been given to perks given to the average employee. *See Two Lawsuits Brought Over Alleged Excessive Director Compensation*, MERIDIAN COMP. PARTNERS (Aug. 19, 2014), http://www.meridiancp.com/insights/thought-leadership/two-lawsuits-brought-over-alleged-excessive-director-compensation/.

153. Saxe v. Brady, 184 A.2d 602, 610 (Del. Ch. 1962).

154. *Id.*

155. Saxe v. Brady, 184 A.2d 602, 610 (Del. Ch. 1962).

liability to exist, the defendants must have approved a transaction exchanging something of value for consideration so inadequate that "no person of ordinary, sound business judgment would deem it worth what the corporation has paid."[156] If, under the circumstances, any reasonable person might conclude that the deal made sense, then the judicial inquiry ends.

Because directors are presumed to have acted properly, the business judgment rule places the burden on the "party challenging the [board's] decision to establish facts rebutting the presumption."[157] If a shareholder plaintiff fails to meet this burden, the business judgment rule functions to protect the decisions that the officers and directors made in the course of their duties.[158] If, however, a plaintiff successfully establishes facts rebutting the rule's presumptions, "the burden shifts to the defendant directors to prove the 'entire fairness' of the transaction."[159]

The business judgment rule is a high hurdle, one that is very rarely satisfied by a shareholder plaintiff. For the most part, courts view that a finding of waste is appropriate only in "unconscionable cases" where the directors "irrationally squander or give away corporate assets."[160] The difficulty of this test reflects the law's understanding of what rules will help promote productive economic activity. If courts were permitted more freely to "second guess" business decisions, officers and directors will be less inclined to approve risky transactions.[161]

Corporate waste allegations have been lodged regarding compensation of senior officers and directors with varying degrees of success. *In re Walt Disney Co. Derivative Litigation* is one of the most prominent cases involving such corporate waste allegations.[162] In 2005, shareholders of the Walt Disney Company filed a lawsuit alleging waste and breach of fiduciary duty claims against the

156. *Id.*; *see also* Michelson v. Duncan, 407 A.2d 211, 224 (Del. 1979).
157. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1373 (Del. 1995).
158. Emerald Partners v. Berlin, 787 A.2d 85, 91 (Del. 2001).
159. McMullin v. Beran, 765 A.2d 910, 917 (Del. 2000); *see also* Krasner v. Moffett, 826 A.2d 277, 287 (Del. 2003) ("[W]hen the presumption of the business judgment rule has been rebutted, the entire fairness rule is implicated and defendants bear the burden of proof.").
160. Brehm v. Eisner, 746 A.2d 244, 263 (Del. 2000).
161. Steiner v. Meyerson, No. 13139, at *1 (Del. Ch. July 19, 1995).
162. *See In re* Walt Disney Co. Derivative Litig., et al., 906 A.2d 27 (Del. 2006).

directors.[163] The shareholder plaintiffs claimed that the $130-million exit package that executive president and director Michael Ovitz received after just fourteen months of work constituted waste.[164] After a thirty-seven-day trial before the Chancery Court, the shareholder plaintiffs did not prevail because they could not rebut the presumption of the business judgment rule.[165] The trial court found that a large severance package alone is not enough to show a lack of due care or to constitute waste. The Delaware Supreme Court affirmed the decision.[166] While the shareholders did not ultimately prevail, the fact that the corporate waste allegations survived through trial demonstrates two important points: excessive benefits is a cause of alarm to shareholders, and the courts are prepared to confront corporate waste claims.

Similarly, in 2009, a Delaware Chancery Court upheld a claim brought derivatively by shareholders for waste, where Citigroup awarded its outgoing CEO a retirement package worth $68 million.[167] Shareholder plaintiffs alleged that the multimillion-dollar compensation constituted waste because the departing CEO was allegedly responsible for the loss of billions of dollars to the company.[168] The court permitted the plaintiffs' suit to move forward because the complaint contained well-pleaded factual allegations regarding the claim for waste. The court's decision and this initial victory for shareholders "signaled that large executive compensation packages paid by corporations that lose money may not survive corporate waste analysis."[169]

Despite the attention given to executive compensation, employee compensation largely remains within the realm of the business judgment rule. While it might be good policy for judges to err on not questioning a company's compensation of its executives, which

163. *Id.* at 697.
164. *Id.*
165. *Id.* at 748.
166. *See supra* note 162, at 28 (Del. 2006).
167. *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 138 (Del. Ch. 2009).
168. *Id.*
169. Herbert F. Kozlov et al., *In Re Citigroup: Delware Court of Chancery Allows Claim for Corporate Waste Based on Executive Compensation to Proceed, But Dismisses "Hindsight" Fiduciary Duty Claims*, REED SMITH: CORPORATE ALERT (2009), http://www.reedsmith.com/files/Publication/217a3b75-30a4-40d5-b38b-b6967113eaf8/Presentation/PublicationAttachment/119c3ebf-553c-4453-aa74-2359c58e4fa2/alert09077.pdf.

involves only a handful of individuals in a corporation, is the same policy sensible when applied to employee perks? There is an important distinction between executive compensation and employee perks: the sheer volume of people involved is drastically different. For example, Google had 43,862 employees in 2013.[170] In contrast, its executive and senior leadership is comprised of only twenty members.[171]

To have a chance of success, or even a partial victory as in the case of Citigroup shareholders,[172] shareholders would have to persuade the court on one important point: The business judgment rule should be applied on a national context as opposed to a localized or industry standard.[173] That is, the decisions that directors make regarding employee perks should be compared to the decisions of all other employers in the nation, and not only to the technology companies in Silicon Valley.

It is difficult, if not impossible, for a court to consider the business judgment of a company's directors in a vacuum. The court must examine that company's decisions relative to the decisions of other companies. The question then becomes: what is the composition of this other group? Potentially, this other group might comprise of similarly situated companies: technology companies located in Silicon Valley. However, beyond their similar industrial classification and shared geographical location, the underlying rationale for the policy of providing perks remains the same. Logically, all companies strive to recruit and retain talented employees, so what makes the technology industry so different that they feel the need to set a new industry standard?

There is no reason why technology companies in Silicon Valley should be treated any differently than the rest of the nation. These companies have been characterized as "outliers" in terms of the

170. *2015 Financial Tables*, GOOGLE INVESTOR RELATIONS, https://investor.google.com/financial/tables.html (last visited Oct. 2, 2015).

171. *Management Team*, GOOGLE COMPANY, http://www.google.com/about/company/facts/management/#sectio-leadership (last visited Oct. 2, 2015).

172. *Supra* note 167, at 106.

173. In addition to this point, shareholders will still be bound by the standard requirements for bringing a corporate waste claim. Shareholders will have to be very specific on their allegations, rather than general claims, and provide concrete evidence. *See surpa* note *156,* at 223; Aronson v. Lewis, 473 A.2d 805 (Del. Ch. 1984).

benefits to provide to employees.[174] They are known to experiment with the types of perks they provide. But to what extent does deviating from the norm get rewarded, or exempted from the responsibilities of the rest of their peers? In fact, new developments in benefits in other parts of the economy reflect a trend going in the opposite direction.[175] Generally, employee benefits provided by companies located elsewhere in the United States do not resemble those provided in Silicon Valley.[176] Employers are increasingly cutting back on benefits, such as retirement plans and health care, which used to be a standard component of a full-time employment package.[177] According to the Employee Benefit Research Institute, the percentage of workers with a retirement plan from their employer dropped from forty-seven percent in 1992 to below thirty-five percent a decade later.[178] Additionally, between the year 2000 and 2010, the percentage of employees with employer provided health benefits had dropped by ten percent, and has continued to decline since then.[179]

Ultimately, this data suggests that technology companies in Silicon Valley are offering more perks, in terms of type, scale, and value. At present, more might be better for some employees. However, companies should consider other important factors, including tax consequences,[180] shareholder value,[181] and industry practices.[182] Once these factors are taken into account, the benefits of a practice of offering extensive perks become less apparent. Should shareholders wish to pursue legal recourse as a consequence, the current legal framework is ineffective.

174. Christina Farr, *Silicon Valley Takes Benefits "Arms Race" to Health Care*, REUTERS (Oct. 2, 2014, 7:00 AM), http://www.reuters.com/article/2014/10/02/tech-benefits-idUSL2N0RO28D20141002 (quoting Jennifer Benz, Chief Executive of Benz Consulting).

175. Peter Cappelli, *Google Adds Benefits, Walmart Cuts Them; Oddly, the Logic Is the Same*, HARV. BUS. REV. (Nov. 7, 2014), https://hbr.org/2014/11/google-adds-benefits-walmart-cuts-them-oddly-the-logic-is-the-same.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. Goodman, *supra* note 17.

181. Bebchuk & Jolls, *supra* note 150, at 501.

182. Cappelli, *supra* note 175.

B. INCREASED TRANSPARENCY AS AN INTERIM SOLUTION

Against this legal landscape, shareholders could move towards progress by requesting increased transparency about the in-kind perks Silicon Valley companies provide to employees. Here, shareholders should take inspiration from the executive compensation context, discussed previously relating to the business judgment rule.[183] There are substantial parallels between executive compensation and employee perks. For one, the impetus behind introducing legislation is similar: in the former context, the concern that executive pay has grown to be increasingly excessive,[184] and in the latter, the concern that perks have become extravagant. In both situations, this excessiveness has led to increased publicity, public outcries, and concerns from corporate shareholders. And in terms of shared objectives, both situations call for increased transparency for the benefit of shareholders.

There are two specific aspects of executive compensation that should provide guidance on implementing legislation that would increase transparency on employee perks: the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act")[185] and state laws governing corporate accounting.[186]

First, the Dodd-Frank Act mandates shareholder advisory voting for executive compensation in public corporations.[187] This vote, known as "say-on-pay," enables shareholders to provide input on the size and nature of executive compensation packages. Under the statute, at least "once every [three] years, a proxy or consent or authorization for an annual or other meeting of the shareholders for which the proxy solicitation rules of the Commission require

183. *See supra*, note 163 (discussing the litigation involving corporate waste allegations against directors for allegedly excessive executive compensation).

184. *See* Harwell Wells, *"No Man Can Be Worth $1,000,000 a Year": The Fight Over Executive Compensation in 1930s America*, 44 U. RICH. L. REV. 689, 690 (2010) (stating that the issue of excessive compensation in the U.S. arose first during the 1930s).

185. Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78n-1 (2010).

186. *See* Michael J. Biles & Kimberly G. Davis, *Corporate Compensation*, BUS. L. TODAY (A.B.A. Bus. L. Section: Keeping Current), http://www.americanbar.org/content/dam/aba/publications/blt/2009/09/keeping-current-compensation-200909.authcheckdam.pdf (last visited Oct. 29, 2015).

187. Dodd-Frank Wall Street Reform and Consumer Protection Act, *supra* note 185.

compensation disclosure shall include a separate resolution subject to shareholder vote to approve the compensation of executives."[188] Say-on-pay applies to the company's CEO as well as executives named in the company's proxy compensation table.[189]

The Dodd-Frank Act is instructive because it is a manifestation of shareholders' active efforts to demand increased transparency when corporate waste becomes a concern. It not only sends the message to corporate officers and directors that shareholders perceive a potential problem, but that shareholders will act to address the problem at the legislative level. Indeed, the passage of the Dodd-Frank Act and its continued presence in corporate law indicates that shareholders' will enjoy a degree of success in demanding increased transparency.[190] As a result, management may be more responsive to shareholders' calls for change.

It is important to note, however, that the limited nature of employee perks in the Silicon Valley region pales in comparison to the widespread growth of executive compensation throughout the nation. Employee perks is a unique phenomenon concentrated mainly in Silicon Valley. Thus, in requesting transparency for employee perks in Silicon Valley technology companies, shareholders should be mindful that national legislation like the Dodd-Frank Act may be difficult to achieve, and progressive change on a smaller scale, perhaps at the state level, may be the most progressive approach. This is where state corporate laws provide guidance.

Under some state corporation laws, shareholders may pursue change in a company's executive compensation structure by filing a "books and records" request.[191] This type of request allows shareholders, under certain circumstances, to inspect a company's

188. Dodd-Frank Wall Street Reform and Consumer Protection Act, *supra* note 185.

189. Sharholder Approval of Executive Compensation, Frequency of Votes for Approval of Executive Compensation and Shareholder Approval of Golden Parachute Compensation, 17 C.F.R. § 240.14a-21(a) (2011).

190. Though the Dodd-Frank Act may have addressed some of the concerns expressed by shareholders, its effectiveness continues to be debated. *See generally* Eric C. Chaffee, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: A Failed Vision for Increasing Consumer Protection and Heightening Corporate Responsibility in International Financial Transactions*, 60 AM. U. L. REV. 1431 (2011); *see generally* Jill E. Fisch, *Leave It to Delaware: Why Congress Should Stay Out of Corporate Governance*, 37 DEL. J. CORP. L. 731 (2013).

191. *See* Biles & Davis, *supra* note 186.

records.[192] For example, under Delaware General Corporations Law, a shareholder of a Delaware corporation has a statutory right to inspect the books and records of the corporation.[193] To exercise this right, the shareholder must satisfy form and manner requirements and have a proper purpose for the inspection. A "proper purpose" is defined as any purpose "reasonably related to such person's interest as a stockholder."[194] California's Corporations Code sets forth a similar minimum level of information that shareholders may access. Under section 1601, "[t]he accounting books and records and minutes of proceedings of the shareholders and the board and committees of the board . . . shall be open to inspection upon the written demand on the corporation of any shareholder . . . for a purpose reasonably related to the holder's interest as a shareholder."[195]

As with the Dodd-Frank Act, a right to access the "books and records" of a company has its shortcomings. Executive officers and directors may be reluctant to hand the documents over.[196] Shareholders may be forced to resort to filing a motion with the court. In 2009, a shareholder at Chesapeake Energy in Oklahoma did just that, after the company's directors awarded a $75-million bonus to its chief executive even as the company's stock plummeted.[197] Additionally, a filing with a court does not guarantee a right of inspection. A court may deny a request altogether "if the corporation can show that the request is adverse to the interests of the corporation, or if it would unreasonably burden the corporation."[198] Additionally, a "books and records" request can provide access to information, but does not ensure that a shareholder's concerns subsequent to the inspection will be acknowledged. The burden will fall to the shareholder to press for accountability and change.

192. *Id.*

193. DEL. CODE ANN. tit. 8, § 220 (West 2010).

194. *Supra* note 193.

195. CAL. CORP. CODE § 1601 (West 1977).

196. Jerry Burleson, *Shareholder Demand for Inspection of Records in California under Corporation Code § 1601*, JERRY BURLESON, http://www.jerryburleson.com/shareholder-rights/shareholder-demand-for-inspection-of-records-in-california-under-corporation-code-§1601/ (stating that requests to inspect corporate records may trigger corporate defensive interests) (last visited Oct. 29, 2015).

197. Gretchen Morgenson, *Shareholders Who Act Like Owners*, N.Y. TIMES (Mar. 28, 2009), http://www.nytimes.com/2009/03/29/business/29gret.html?_r=0.

198. Burleson, *supra* note 196.

Taking into account the advantages and shortcomings of the Dodd-Frank Act and the relevant corporations laws intended to increase transparency, shareholders can begin to craft legislation that will directly address concerns involving excessive employee perks. By leveraging this information in conjunction with a broad understanding of the corporate waste doctrine and the business judgment rule, shareholders will be able to adeptly shape the precise contours of effective legislation.

V. CONCLUSION

As the practice of providing employee perks climbs at an alarming rate, the need to pause and consider the practical and legal ramifications intensifies. While Silicon Valley technology companies have enjoyed economic advantages from this practice to date, corporate management and shareholders alike should take notice of impending changes in tax law relating to these perks. Shareholders will consequently see the challenges in measuring how the receipt of in-kind perks contributes to an employee's work performance. Shareholders who wish to challenge this practice will similarly realize that the corporate legal framework provides no effective means of recourse.

The technology sector in California is booming in a way not seen since the dot-com bubble,[199] and it is important for shareholders to prepare for changes in both the law and the economy. As shareholders should realize, employee perks—like executive compensation—can become a liability, if not kept in check.[200] Silicon Valley technology companies, as leading innovators, should proceed with caution rather than falling to peer pressure in an arms race. This Note seeks to foster a conversation regarding the long-term consequences of this practice in order to prepare companies and shareholders for impending changes in the law, so that all stakeholders can adequately protect their interests.

199. Paul Sebastien, *Silicon Valley's Maturity Problem*, RE/CODE (Apr. 21, 2015, 7:00 AM PDT), http://recode.net/2015/04/21/silicon-valleys-maturity-problem/.

200. Matt O'Brien, *What the Boss Makes: CEO Pay Getting More Ire from Shareholders*, SAN JOSE MERCURY NEWS, http://www.mercurynews.com/business/ci_28568465/what-boss-makes-ceo-pay-getting-more-ire (last visited Oct. 29, 2015).