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James D. Cox; Randall S. Thomas, Revolving Elites: The Unexplored Risk of Capturing the SEC, 107 Geo. L.J. 845 (2019)
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Revolving Elites: The Unexplored Risk of Capturing the SEC

JAMES D. COX* & RANDALL S. THOMAS**

Fears have abounded for years that the sweet spot for capture of regulatory agencies is the "revolving door" whereby civil servants migrate from their roles as regulators to private industry. Recent scholarship on this topic has examined whether America's watchdog for securities markets, the Securities and Exchange Commission (SEC), is hobbled by the long-standing practices of its enforcement staff exiting their jobs at the Commission and migrating to lucrative private sector employment where they represent those they once regulated. The research to date has been inconclusive on whether staff revolving door practices have weakened the SEC's verve. In this Article, we offer a different perspective on the source of risks of the SEC's capture as a consequence of revolving door practices. We focus on all the key divisions of the SEC, not just its Division of Enforcement, and we examine the individuals who lead the staff and set its agenda.

We find that the SEC's day-to-day work is highly collaborative and staff output is subject to review at multiple levels. These characteristics greatly reduce the likelihood of staff rent-seeking. On the other hand, agenda setting and the shaping of the discourse around regulatory and enforcement objectives is very much subject to individual action by SEC officials that lead the five main operations of the SEC. We therefore focus our discussion of revolving door concerns on SEC directors.

Here we show a disquieting departure in the last thirty years from practices that prevailed at the SEC during its first half century of existence: whereas SEC division heads through the early 1980's were, with very few exceptions, regularly internally promoted from the staff, this practice sharply ended in the late 1990s when division directors began to be recruited with increasing frequency from the private sector. In addition to documenting this development, we explore the likely causes for this sharp change in selecting senior leadership at the SEC as well as exploring the benefits, costs, and fears of this significant change in practice. We conclude by offering strategies that could be pursued to moderate any such risk of capture.

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INTRODUCTION

There has long been fear of industry capture of regulatory bodies. The theoretical basis for such fear is built on public choice theory, which holds that regulators seek to maximize their own level of political support rather than seeking to advance some notion that their action creates a public good.[1] Pursuant to this view, agency personnel seek to maximize their personal utility and not that of the more distant and diffuse public interest; it is argued they do this through regulatory and enforcement choices that favor the regulated.[2] In other words, regulators make choices that benefit themselves and correlatively favor the regulated rather than those they are charged to protect[3]—this is the natural economic consequence of the group to be regulated being not only better organized, but better able to provide the rewards regulators seek. This process is normally referred to as the "capture" hypothesis.[4]

For years, fears have abounded that the sweet spot for capture of regulatory agencies is the "revolving door" whereby civil servants migrate from their roles

1. *See* Wentong Zheng, *The Revolving Door*, 90 NOTRE DAME L. REV. 1265, 1270–75 (2015).

2. Some commentators have "strongly disagreed" with this view. *See, e.g.*, ROBERTA S. KARMEL, REGULATION BY PROSECUTION 83 (1982) ("The so-called revolving door, by which individuals pass from private enterprise into the government, and from public service into private business, provides a constant renewal of talent for both sectors.").

3. *See generally* Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL'Y 203 (2006) (providing a detailed survey of the various models of regulatory capture). For a similar survey of regulatory capture theory within the context of the SEC, see generally Zheng, *supra* note 1, at 1270–75 ("This exchange relationship between the demander and supplier of regulation forms the central critique of the regulatory process by George Stigler and other members of the public choice school, which has become the most notable strand of the capture theories.").

4. *See generally* William W. Bratton & Joseph A. McCahery, *Regulatory Competition, Regulatory Capture, and Corporate Self-Regulation*, 73 N.C. L. REV. 1861 (1995) (providing a summary of much of this literature).

as regulators to private industry. Recent scholarship on this topic has examined whether America's watchdog for securities markets, the Securities and Exchange Commission (SEC), is hobbled by the long-standing practices of its enforcement staff exiting their jobs at the Commission and migrating to lucrative private-sector employment where they represent those they once regulated.[5] The research to date has been inconclusive as to whether such revolving door practices have weakened the SEC's verve.

This Article offers a different perspective on whether the risks of capturing the SEC can be traced to revolving door practices. Our perspective is broader than prior studies because we focus on all key divisions of the SEC, not just its Division of Enforcement. Most significantly, our focus is not at the staff level, but rather on the individuals who supervise the staff and set the agenda for the division.

As developed below, the SEC's day-to-day work is often highly collaborative: staff output is not only subject to review but to review at multiple levels. It is our view that, in combination, these characteristics greatly reduce the likelihood of repeated—or for that matter isolated—instances of staff rent-seeking; we view these overlooked features of how the SEC functions as an important bulwark against staff sacrificing the public interest so as to win a lucrative position in the private sector. On the other hand, agenda-setting and the shaping of the discourse around regulatory and enforcement objectives is subject to individual action by SEC officials who lead the SEC's five main operations. We therefore focus our discussion of revolving door concerns on SEC directors.

Here, we show a disquieting departure in the last thirty years from practices that prevailed at the SEC during the first half-century of its existence. Indeed, through the early 1980s, SEC division heads were, with few exceptions (most notably the SEC's general counsel), regularly selected from the staff. This practice ended in the late 1990s, when division directors began to be recruited with increasing frequency from the private sector. In addition to documenting this development, we explore the likely causes for this sharp change in selecting the senior leadership at the SEC; the benefits, costs, and fears of this significant change in practice; and strategies that could be pursued to moderate any such risk of capture.

I. BACKGROUND TO THE PROBLEM

In recent years, the revolving door phenomenon—where attorneys transition between positions at the SEC and positions in private practice—has become commonplace.[6] Many times, an attorney will leave the SEC for the private sector

5. Stephen J. Choi & Adam C. Pritchard, *SEC Enforcement Attorneys: Should I Stay or Should I Go?* (N.Y.U. Law & Econ. Research Paper Series, Working Paper No. 17-07, 2017), http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1238&context=law_econ_current [https://perma.cc/782W-6WYD].

6. *See* Tom McGinty, *SEC Lawyer One Day, Opponent the Next*, WALL ST. J. (Apr. 5, 2010, 12:01 AM), https://www.wsj.com/articles/SB10001424052702303450704575160043010579272 [https://perma.cc/9LV3-V7GV] (discussing how former SEC employees leave the agency for private practice).

where she represents clients in the very same industry that the agency regulates.[7] This door works in both directions: young attorneys frequently transition back into private practice after working at the SEC for a few years, but established attorneys, often with deep ties to Wall Street, regularly accept top positions at the SEC as political appointees.[8] This dynamic has not gone unobserved by critics, particularly in light of the heightened scrutiny placed on the SEC in the wake of the financial crisis.[9] In fact, some commentators in both academia and the media have expressed grave concern over the impact that this movement has on SEC enforcement.[10] Others have not been as quick to condemn the revolving door, opting instead to emphasize how the movement between the public and private sectors may actually improve SEC enforcement and policy.[11]

Many view the tenure of former SEC Chair Mary Jo White as the paradigmatic example of the revolving door.[12] Before being nominated to the SEC, White had transitioned back and forth between the private and public sectors.[13] She had alternated between employment as a private defense attorney at the law firm Debevoise & Plimpton, where her clients included prominent financial institutions and their executives, and employment as a prosecutor in both the Southern and Eastern Districts of New York.[14] During her time as Chair of the SEC, White

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7. *See id.* (describing various instances in which former SEC employees began to represent clients in matters regarding SEC enforcement, sometimes within days of leaving the agency).

8. The SEC's administration is overseen by its chair who is one of five commissioners appointed by the President with the advice and consent of the U.S. Senate. Securities Exchange Act of 1934, Pub. L. No. 73-291, § 4, 48 Stat. 881, 885 (codified as amended at 15 U.S.C. § 78 (2012)); *see* Michael Lewis & David Einhorn, Opinion, *How to Repair a Broken Financial World*, N.Y. TIMES (Jan. 3, 2009), http://www.nytimes.com/2009/01/04/opinion/04lewiseinhornb.html?pagewanted=3&em [https://nyti.ms/2mxlWX6J] (calling to "close the revolving door between the [SEC] and Wall Street," but arguing to "keep the door open the other way" to fill the SEC with "experienced, respected investors").

9. *See* Andrew Ross Sorkin, *Revolving Door at S.E.C. is Hurdle to Crisis Cleanup*, N.Y. TIMES: DEALBOOK (Aug. 1, 2011, 9:54 PM) https://query.nytimes.com/gst/fullpage.html?res=9C05E6DA113EF931A3575BC0A9679D8B63 [https://nyti.ms/2AblHqg] (acknowledging that "the revolving door [has been] such a dominant fact about the S.E.C.'s culture" for some time, but recent events have "raise[d] questions about the revolving door between Washington and Wall Street at a time when public distrust about the agency and its lack of enforcement action against the culprits of the crisis is running high").

10. *See* Peter J. Henning, *The Revolving Door and S.E.C. Enforcement*, N.Y. TIMES: DEALBOOK (Apr. 8, 2010, 3:07 PM) https://dealbook.nytimes.com/2010/04/08/the-revolving-door-and-s-e-c-enforcement/ [https://nyti.ms/2DvnZ5x] (discussing how news reports have "raise[d] questions about the effectiveness of the enforcement division at the Securities and Exchange Commission").

11. *See* David Zaring, *Against Being Against the Revolving Door*, 2013 U. ILL. L. REV. 507, 517 (arguing that the revolving door may incentivize government officials to do a better job and exploring the legal challenges of trying to close the door).

12. *See, e.g.*, William D. Cohan, *Mary Jo White Spins the SEC's Revolving Door*, BLOOMBERG (Mar. 17, 2013, 6:30 PM), https://www.bloomberg.com/view/articles/2013-03-17/mary-jo-white-spins-the-sec-s-revolving-door [https://perma.cc/URC2-W7WM] (discussing the potential conflicts that Mary Jo White will face as Chair of the SEC).

13. *See* Dina ElBoghdady, *Mary Jo White Faces No Opposition at SEC Confirmation Hearing*, WASH. POST (Mar. 12, 2013), https://www.washingtonpost.com/business/economy/mary-jo-white-faces-no-opposition-at-sec-confirmation-hearing/2013/03/12/812608ac-8b39-11e2-b63f-f53fb9f2fcb4_story.html?utm_term=.d9bcfef34929 [https://perma.cc/8DFR-TFSH] (discussing how senators saw White's employment experience as beneficial during the nomination process).

14. *See id.*

was forced to recuse herself in more than four dozen cases involving either her previous firm or previous clients, or in cases involving the law firm at which her husband worked.[15] Some have argued that these recusals had the effect of "delaying settlements and opening the door, in at least one case, to a lighter punishment."[16] Almost immediately after White's departure from the SEC in January, 2017, she announced that she would return to Debevoise & Plimpton.[17]

Another example commonly cited when discussing the impact of the revolving door is the SEC commissioners' failure to support then-Chair Mary Schapiro's money market fund initiative—a failure characterized by another former SEC Chair, Arthur Levitt, as a "national disgrace."[18] In 2012, Schapiro proposed a money market fund initiative that she believed would minimize the susceptibility of these institutions to runs.[19] That reform effort was dropped after three commissioners had informed her that they would not support the reform.[20] Critics of the revolving door attribute the initiative's failure to the efforts of various SEC alumni who were working as industry lobbyists at the time.[21] It cannot ultimately be determined if the initiative failed due to the influence of the revolving door or

15. Peter Eavis & Ben Protess, *She Runs S.E.C. He's a Lawyer. Recusals and Headaches Ensue.*, N.Y. TIMES: DEALBOOK (Feb. 23, 2005), https://www.nytimes.com/2015/02/24/business/dealbook/sec-hamstrung-by-its-leaders-legal-ties.html [https://nyti.ms/1BgJ3H1] ("In the nearly two years since Ms. White took over the agency, she has had to recuse herself from more than four dozen enforcement investigations, the interviews and records show, sometimes delaying settlements and opening the door, in at least one case, to a lighter punishment.").

16. *Id.* Aside from the recusals, Ms. White's tenure was not otherwise free from controversy. In fact, Senator Elizabeth Warren openly criticized the regulator and even publicly called for White's termination by President Barack Obama. *See* Andrew Ackerman, *Elizabeth Warren to Obama: Fire SEC Chief Mary Jo White*, WALL ST. J. (Oct. 14, 2016, 6:15 PM), https://www.wsj.com/articles/elizabeth-warren-to-obama-fire-sec-chief-mary-jo-white-1476439200 [https://perma.cc/8Y6R-MY8R] (discussing Senator Warren's actions).

17. Elizabeth Olson, *Mary Jo White to Rejoin Debevoise & Plimpton*, N.Y. TIMES: DEALBOOK (Feb. 15, 2017), https://www.nytimes.com/2017/02/15/business/dealbook/mary-jo-white-debevoise-plimpton.html [https://nyti.ms/2lkoeaH]. Indeed, controversy surrounds her return to private practice because when asked during her confirmation to become chair of the SEC she stated it was her intent to retire following service at the SEC. Pam Martens & Russ Martens, *Mary Jo White Seriously Misled the U.S. Senate to Become SEC Chair*, WALL ST. ON PARADE (Feb. 16, 2017), http://wallstreetonparade.com/2017/02/mary-jo-white-seriously-misled-the-u-s-senate-to-become-sec-chair/ [https://perma.cc/89U7-NL3L].

18. Laura Marcinek & Tom Keene, *Levitt Says SEC Money-Fund Punt a 'National Disgrace,'* BLOOMBERG (Aug. 23, 2012, 1:49 PM), https://www.bloomberg.com/news/2012-08-23/levitt-says-sec-inaction-on-funds-national-disgrace-tom-keene.html/ [https://perma.cc/R62T-MCRZ].

19. Press Release, Mary L. Schapiro, Chair, Sec. & Exch. Comm'n, Statement on Money Market Fund Reform (Aug. 22, 2012), https://www.sec.gov/news/press-release/2012-2012-166htm [https://perma.cc/MK6M-B77S] (describing the aim of the reform).

20. *See id.* (explaining why Schapiro chose to abandon the initiative).

21. *See* MICHAEL SMALLBERG, PROJECT ON GOV'T OVERSIGHT, DANGEROUS LIAISONS: REVOLVING DOOR AT SEC CREATES RISK OF REGULATORY CAPTURE 3 (2013), http://pogoarchives.org/ebooks/20130211-dangerous-liaisons-sec-revolving-door.pdf ("Many of the people who lobbied the SEC on this issue on behalf of the investment industry had traveled a familiar path: they once worked at the SEC but had gone through the revolving door to join the industry.").

to some other factor, but the incident certainly increased awareness of the connection between the SEC and Wall Street.[22]

Several highly publicized events have drawn further attention to the revolving door. In recent years, we have seen the exposure of two elaborate Ponzi schemes. Some claim that the revolving door contributed to the failure of the SEC to detect the schemes of Bernard Madoff and Allen Stanford because former SEC employees represented both individuals.[23] In the aftermath of the Madoff scheme, Michael Lewis and David Einhorn penned an op-ed piece in *The New York Times* that questioned why the SEC failed to uncover the scheme despite the presence of multiple warning flags.[24] The authors cited the SEC's revolving door as one of the contributing factors to the failure, writing, "If you work for the enforcement division of the S.E.C. you probably know in the back of your mind, and in the front too, that if you maintain good relations with Wall Street you might soon be paid huge sums of money to be employed by it."[25] Therefore, the familiar capture narrative asserts that actions by the SEC's staff are shaped by the incentive to "curry favor" and appeal to the "Wall Street elite."[26]

Others, however, are skeptical of Lewis and Einhorn's treatment of Wall Street as one "monolithic," responsive entity.[27] Instead, they question whether there would have been any negative impact on the future career prospects of SEC employees in exposing Madoff, or if those incentives were driving the investigation in the first place.[28] Indeed, we can easily surmise that a staff attorney's career is more likely advanced by successfully prosecuting Madoff and other violators

22. Although this revolving door phenomenon is not unique to the SEC, some have suggested that the agency is particularly susceptible to disproportionate influence from its former employees. *See* Henning, *supra* note 10 ("Yet, the perception is that the S.E.C. may be more prone to responding favorably to entreaties from its former staff. While decision making in the Justice Department tends to be diffuse, most S.E.C. enforcement decisions ultimately are approved in Washington, so that is usually the focus for lobbying efforts.").

23. Zaring, *supra* note 11, at 509 ("The revolving door has been blamed for the Securities and Exchange Commission's (SEC) failure to catch Ponzi schemers such as Bernard Madoff and R. Allen Stanford, both of whom were represented by former SEC officials while they carried out their frauds.").

24. Michael Lewis & David Einhorn, *The End of the Financial World as We Know It*, N.Y. TIMES (Jan. 3, 2009), http://www.nytimes.com/2009/01/04/opinion/04lewiseinhorn.html [https://nyti.ms/2lJvBZ1]. Cited among the warning signs is the report penned by Harry Markopolos (former investment officer with Rampart Investment Management) that was sent to the SEC in 2005. *Id.* Markopolos advanced two explanations for Mr. Madoff's profits: he was either "front-running" his customers or his investment model was a Ponzi scheme. *Id.* As an additional warning sign, Goldman Sachs had refused to do business with Madoff prior to the uncovering of the scheme. *Id.*

25. *Id.*

26. *See id.* ("A casual observer could be forgiven for thinking that the whole point of landing the job as the S.E.C.'s director of enforcement is to position oneself for the better paying one on Wall Street.").

27. *See* Donald C. Langevoort, *The SEC and the Madoff Scandal: Three Narratives in Search of a Story*, 2009 MICH. ST. L. REV. 899, 905–06 ("The disconnect in the Lewis-Einhorn story, surprisingly, is that they treat 'Wall Street' as monolithic, an assembly of the economic gods that is either angry or pleased by what the regulators do. In fact, within the investment community there are nasty rivalries and dramatically differing interests, with some segments liking nothing more than aggressive regulation that hurts their competitors or counterparties more than themselves.").

28. *See id.* at 905 ("Put simply, I can't imagine that the future careers of anyone at the SEC would have been hurt by exposing him as a fraud. Quite the contrary, I suspect.").

than by slothfulness. The former signals qualities valued in labor markets, whereas the latter is not prized by prospective employers.

Another situation that drew attention to the revoling door phenomenon was the exposure of false accounting practices at Deutsche Bank during the financial crisis.[29] Eric Ben-Artzi, former risk officer at Deutsche, refused the monetary reward offered to him for uncovering the fraud. In a bold public statement,[30] explaining his rejection of the substantial reward, he took issue with the SEC's decision to pursue only Deutsche Bank and to not prosecute the executives involved with the violation.[31] In his statement, he raised concern that the SEC's decision was the product of revolving door practices, observing how "top SEC lawyers had held senior posts at the bank, moving in and out of top positions at the regulator even as the investigations into malfeasance at Deutsche were ongoing."[32] Although Ben-Artzi acknowledged that he could not be certain that the revolving door was the reason the SEC chose not to pursue civil enforcement actions against the executives, he asserted that there was enough potential conflict present to cast doubt on the investigation.[33] In particular, Ben-Artzi questioned whether the recusal of Robert Rice, Chief Counsel to Chair Mary Jo White, from the investigation was sufficient to remove this conflict.[34] Before assuming his position in the Chair's office, where his duties included advice on enforcement strategies, Rice was a lead counsel for Deutsche Bank where he specialized in regulatory and governance matters before joining the SEC in the midst of the ongoing investigation.[35]

Such headline-grabbing events certainly have spurred debate regarding the revolving door at the SEC. Although many acknowledge the existence of movement between the SEC and private practice, the precise impact and desirability of

29. *See* Tom Braithwaite & Kara Scannell, *Deutsche Bank Fined for Misstating Value of Derivatives*, FIN. TIMES (May 26, 2015), https://www.ft.com/content/f9d4d8e8-03b2-11e5-b55e-00144feabdc0 [https://perma.cc/FF4R-LAKQ] (describing the scandal and resulting SEC action).

30. *See* Gabe Friedman, *Whistleblower Decries Revolving Door Between SEC and Deutsche Bank*, BLOOMBERG L. (Aug. 19, 2016) [https://perma.cc/RS5R-HH3Y] (reacting to the refusal).

31. Guy Rolnik, *SEC and Revolving Doors: Q&A with Eric Ben-Artzi, the Deutsche Bank Whistleblower Who Rejected a Multimillion Dollar Award*, PROMARKET (Aug. 29, 2016), https://promarket.org/sec-revolving-doors-qa-eric-ben-artzi-12-billion-dollar-deutsche-whistleblower/ [https://perma.cc/9NEV-XFKJ] ("In fact I think that bringing civil charges against the executives would be a higher deterrent than the criminal deterrent because it's so hard to bring criminal cases against these executives apparently." (quoting Eric Ben-Artzi)).

32. Eric Ben-Artzi, *We Must Protect Shareholders from Executive Wrongdoing*, FIN. TIMES (Aug. 18, 2016), https://www.ft.com/content/b43d2d96-652a-11e6-8310-ecf0bddad227 [https://perma.cc/3W4B-SAA2].

33. *See* Rolnik, *supra* note 31 ("Yes, admittedly I expressed it as a concern rather than as a fact that I know, because I don't know it for a fact. I don't have direct proof, but there is so much smoke there." (quoting Eric Ben-Artzi)).

34. *See id.* ("It's clear that when your boss' boss' boss is potentially one of the people who are being accused, I don't see how you could really make reasonable . . . how you could be considered to be a prosecutor who's really trying to bring a case." (quoting Eric Ben-Artzi)).

35. Press Release, U.S. Sec. & Exch. Comm'n, Robert E. Rice, Chief Counsel to SEC Chair, to Leave SEC (Jan. 29, 2015), https://www.sec.gov/news/pressrelease/2015-17.html [https://perma.cc/MU9R-68AC] (describing Rice's employment history).

the revolving door remains unclear.[36] In discussing the impact of the revolving door on SEC enforcement, many broad accusations of regulatory capture are made without much concrete evidence for support. Additionally, hardly any attention has been devoted to how the revolving door impacts top officials, as opposed to lower level staffers at the SEC. Therefore, the question of exactly how the revolving door impacts the SEC remains still unresolved. We next summarize the literature on competing theoretical efforts to explain the revolving door.

II. THEORETICAL ATTEMPTS AT EXPLAINING THE REVOLVING DOOR

A threshold question in examining the revolving door is, why do some attorneys choose to enter the private sector while others pursue careers in public service? Even more precisely, why do private-sector employees want to work at the SEC? Multiple scholars have attempted to model the private- versus public-sector choice. For example, based on his job choice model that focused on wage differentials, Burton Weisbrod concluded that "those lawyers who choose public interest work have different 'preferences' from those who choose private law practices."[37] Weisbrod acknowledged that the choice to enter the public sector is partially impacted by an attorney's "nonpecuniary" preferences.[38] Using this model, Choi and Pritchard theorized that attorneys might choose to work at an agency like the SEC to satisfy their inherent preference for a career in public service, perhaps "enjoying the opportunity to wear the 'white hat.'"[39]

John Goddeeris extended Weisbrod's model to account not only for nonpecuniary preferences, but also the difference in an attorney's potential earnings between the public and private sectors.[40] By accounting for the potential wage differential, Goddeeris tried to control for self-selection into the private sector.[41] The results of the model reaffirmed the claim that "preferences for public-interest work are related to personal characteristics."[42] However, Goddeeris acknowledged that his model did not account for the possibility that the decision to enter

36. *See* Daniel Indiviglio, *More Light Needed on Wall Street's Revolving Door*, N.Y. TIMES: DEALBOOK (Nov. 20, 2014, 2:32 PM), https://dealbook.nytimes.com/2014/11/20/more-light-needed-on-revolving-door/ [https://nyti.ms/2sYU6SF] ("The passage between Washington and Wall Street needs to be clearly lit, but blocking it would do more harm than good.").

37. *See* Burton A. Weisbrod, *Nonprofit and Proprietary Sector Behavior: Wage Differentials Among Lawyers*, 1 J. LAB. ECON. 246, 246 (1983).

38. *Id.* at 254–55 (discussing forms of nonpecuniary compensation).

39. Choi & Pritchard, *supra* note 5, at 4 ("Attorneys may vary in their motivation for working at the SEC. Some will be attracted to a career in public service, enjoying the opportunity to wear the 'white hat.'").

40. John H. Goddeeris, *Compensating Differentials and Self-Selection: An Application to Lawyers*, 96 J. POL. ECON. 411, 412 (1988) (extending the work of Weisbrod and finding that "[t]he results suggest that preferences for public-interest work are related to personal characteristics").

41. *See id.* at 411 ("The model leads to simultaneous estimation of earnings and job choice functions in a manner that takes account of self-selection of individuals into the sector of highest utility.").

42. *Id.* at 412.

the public sector may be viewed as an investment—by "sacrificing current for future income."[43]

Robert Sauer further elaborated on Weisbrod and Goddeeris's models with a dynamic model that accounts for the private- versus public-sector choice at various points over time, thus allowing for the "investment" element missing from Goddeeris's work.[44] Using data on University of Michigan Law School graduates, Sauer considered "the future-oriented job choice decisions of attorneys among five employment sectors."[45] He found that lawyers choose among the different sectors by considering "pecuniary and nonpecuniary returns, promotion and dismissal probabilities, and the extent of transferability of human capital."[46]

Once one acknowledges that employment in one sector (public) can be an investment accruing benefits toward employment prospects in another sector (private), it raises a new set of concerns: How can employees maximize returns on their "investment," and, conversely, how can private-sector employers abuse this dynamic to advance their own interests? Some scholars have suggested that employees use their government experience "as a steppingstone to private practice" so that during their public service they focus on gaining valuable skills.[47] Others add the cynical insight that staffers gain not only transferable skills but also a platform from which to ingratiate themselves to future employers by being more lenient toward them during their time at the agency.[48]

A vast body of literature regarding "regulatory capture" has developed around the latter proposition.[49] Arguments that the revolving door is detrimental mostly focus around the idea that the SEC has been "captured."[50] Though an exact

43. *Id.* at 424 ("It assumes that sector choice is based only on *current* income and nonpecuniary factors, thus ruling out, for example, the possibility that job decisions by lawyers may include an investment component: sacrificing current for future income.").

44. Robert M. Sauer, *Job Mobility and the Market for Lawyers*, 106 J. POL. ECON. 147, 148–49 (1998).

45. *Id.* at 167.

46. *Id.* at 168.

47. *See* Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 86 (1969) ("The principal attraction of [FTC] service to lawyers who wish to use it as a steppingstone to private practice lies in the opportunities it affords to gain trial experience of an amount and at a level of responsibility usually denied young men in private firms.").

48. *See* Zheng, *supra* note 1, at 1273 ("For regulators who are contemplating moving from government to industry, they are said to have incentives to signal their appeal to prospective industry employers by being lenient to them.").

49. For a detailed survey of the various models of regulatory capture, see Dal Bó, *supra* note 3, at 204–19. For a similar survey of regulatory capture theory within the context of the SEC and a discussion of the most prominent theories of regulatory capture (George Stigler school of thought), see Zheng, *supra* note 1, at 1270–75 ("This exchange relationship between the demander and supplier of regulation forms the central critique of the regulatory process by George Stigler and other members of the public choice school, which has become the most notable strand of the capture theories.").

50. *See* Zheng, *supra* note 1, at 1267 ("Among the concerns voiced about the revolving door, the most enduring one is the risk of regulators being captured by industry interests. Discussions of regulatory capture and its impact on the regulatory process permeate scholarly literatures in law, political science, and economics.").

definition of "capture" may be difficult to articulate, one definition offered is "whenever a particular sector of the industry, subject to the regulatory regime, has acquired persistent influence disproportionate to the balance of interests envisaged when the regulatory system was established."[51] There exists an extensive body of literature discussing regulatory capture across a myriad of different government agencies.[52] As one commentator describes it, regulatory capture is reflected in "the unseemly appearance, if not reality, of an incestuous relationship between regulators and industry that must surely risk fostering an improper influence of industry over the regulators."[53]

Critics do not expect movement through the revolving door to slow anytime soon due to the growing demand for talent and specialized expertise.[54] Regardless of whether any such "improper influence" exists, even the appearance of disproportionate influence is a concerning dynamic. Personal contact and close relationships between former and current SEC employees "may create the appearance of conflicts of interest . . . even without direct evidence that undue influence has affected an enforcement action, [and this] appearance of a conflict of interest could undermine confidence in the enforcement process and the SEC."[55] In the wake of the financial crisis, various post-mortems of its causes have pointed toward regulatory laxity. A growing number of academics have studied the attendant forces to regulatory capture.[56] The SEC has been among the

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51. Lawrence G. Baxter, *"Capture" in Financial Regulation: Can We Channel It Toward the Common Good?*, 21 CORNELL J.L. & PUB. POL'Y 175, 176 (2011).

52. *See e.g.*, Bratton & McCahery, *supra* note 4; Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337 (2013); Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); David Thaw, *Enlightened Regulatory Capture*, 89 WASH. L. REV. 329 (2014).

53. Baxter, *supra* note 51, at 197.

54. *Id.* ("As both our need for expert regulators and the skill of regulators increase, the doors between regulators and the industry will spin faster.").

55. U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-654, SECURITIES AND EXCHANGE COMMISSION: EXISTING POST-EMPLOYMENT CONTROLS COULD BE FURTHER STRENGTHENED 12 (2011) [hereinafter GAO REPORT].

56. Although our analysis primarily focuses on the revolving door phenomenon at the SEC, other commentators have discussed revolving door links to the financial crisis at other banking regulators and financial agencies. *See* Arthur E. Wilmarth, Jr., *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. CIN. L. REV. 1283, 1328–30 (2013) (discussing how industry influence undermined the supervision of financial institutions by federal banking agencies (such as the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision), ultimately leading these agencies to adopt the "deeply flawed polices that enabled large financial institutions to originate trillions of dollars of high-risk mortgages and to spread the risks of those mortgages . . . [and] helped to inflate the nonprime lending boom, which in turn led to the financial crisis"); *see also* Timothy A. Canova, *Central Bank Independence as Agency Capture: A Review of the Empirical Literature*, 30 BANKING & FIN. SERVS. POL'Y REP. 11 (2011) (discussing how lack of industry independence among central banks, including the Federal Reserve, contributed to the global financial crisis); Timothy A. Canova, *Financial Market Failure as a Crisis in the Rule of Law: From Market Fundamentalism to a New Keynesian Regulatory Model*, 3 HARV. L. & POL'Y REV. 369, 284–88 (2009) (discussing how the revolving door contributed to the failure of financial regulation during time leading up to the financial crisis, noting that "[t]he officials who have been responsible for

agencies targeted by such research.[57]

Three prominent theories have emerged to predict how the revolving door might impact SEC outcomes and regulatory action: the human-capital hypothesis, the rent-seeking hypothesis, and the market-expansion hypothesis. These theories frame regulatory and enforcement decisions in relation to the impact that those decisions will have on an attorney's future employment prospects in the private sector. All three theories rely on first identifying the *ex ante* incentives that a revolving door generates for individual regulators. Once those incentives are identified, predictions can be made about whether the result will be more or less aggressive regulatory action.

According to the human-capital hypothesis, the presence of a revolving door between a regulator and the regulated industry may actually be desirable.[58] During his or her time at the agency, a regulator (the individual actor within a regulatory agency) is incentivized by the prospect of gaining valuable qualifications that are needed for their next job.[59] Implicit in this model is the assumption that regulators will be hired in the future based on their knowledge of the regulatory environment and technical expertise.[60] Regulators therefore have an incentive to invest their human capital, also commonly referred to as "career capital,"[61] during their time at the agency.[62] This capital includes not only the relevant skills acquired through the job, but also the reputation of the attorney in the private sector.[63]

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designing our financial regulatory system are so often only a revolving door away from reaping the rewards of unregulated speculation"); Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 CALIF. L. REV. 327, 348–50 (2013) (discussing prominent examples of "revolvers" at top government agencies and how many critics believe that the financial industry's lobbying efforts undermined regulation and monitoring of markets prior to the financial crisis); Dieter Zinnbauer, *The Vexing Issue of the Revolving Door* 15 (Harvard University, Edmond J. Safra Working Paper No. 61, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2600633 [https://perma.cc/CPL6-GMBQ] (discussing a number of studies measuring the impact of the revolving door on the financial sector and concluding that these studies "at a minimum further corroborate the premise that revolving door practices have played a significant role in building the close ties between government and business that may have stymied effective oversight and stoked the financial crisis").

57. *See infra* Part IV.

58. *See* Yeon-Koo Che, *Revolving Doors and the Optimal Tolerance for Agency Collusion*, 26 RAND J. ECON. 378, 378 (1995) ("[T]hese seemingly undesirable features of the regulatory system may serve the interests of the government.").

59. *See id.* at 380.

60. *See* Ed deHaan et al., *The Revolving Door and the SEC's Enforcement Outcomes: Initial Evidence from Civil Litigation*, 60 J. ACCT. & ECON. 65, 66 (2015) ("Crucial to whether revolving doors enhance or compromise regulatory effort is the reason why the regulator is being hired by industry.").

61. Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259, 263 (2000) (measuring the returns to "career capital" for prosecutors enforcing drug crimes).

62. *See* deHaan et al., *supra* note 60, at 66 ("If the SEC official is being hired primarily for his knowledge of the complex regulatory environment and technical expertise, he will have an incentive to invest in and/or demonstrate his human capital skills while at the regulatory agency to increase his future prospects in industry, which, in turn, will make him enforce regulations more aggressively.").

63. *See* Glaeser et al., *supra* note 61, at 263 ("Career capital is meant to include building a reputation (which has value in both the public and private sectors), exposure to private attorneys, and increasing skill.").

In addition to merely obtaining this human capital, regulators must also demonstrate these qualifications to the industry in which they desire to be employed in the future.[64] This "signaling" is accomplished by aggressive enforcement of agency policies.[65] It is thus unsurprising that lead prosecutors in high-profile cases consistently leave the public sector to join some of the largest and most prestigious law firms in the country.[66] Such signals of competence, even though directed to future employers, benefit the SEC; the aspiring staff member will understand that a greater investment in her human capital, as well as a successful pursuit of the agency's objectives, will attract attention in the private sector.[67] So viewed, the human-capital hypothesis leads to the conclusion that the strong levels of performance and vigorous enforcement efforts of revolving door attorneys furthers the SEC's overall objectives.

The rent-seeking hypothesis, on the other hand, works under the assumption that a government agency official might instead be hired by future private-sector employers because of their ability "to lobby and influence decision makers at the agency."[68] This hypothesis encompasses the classic theory of regulatory capture—it posits that regulation will be compromised in an effort to appeal to industry.[69] Regulators therefore have incentives to invest and develop their networking skills, as opposed to investing in her own human capital or tirelessly working to advance the agency's interests.[70] According to this theory, an SEC employee might sacrifice agency efficacy in an attempt to curry favor and network with prospective employers from the private sector.[71]

64. *See* Zheng, *supra* note 1, at 1268 ("According to this 'human-capital' theory, when industry employers could not perfectly observe regulators' human-capital, revolving-door regulators would want to be more aggressive, not less aggressive, in their enforcement actions as a way of signaling their qualifications to industry employers.").

65. *See* Che, *supra* note 58, at 380 ("When the regulator's industry qualifications are not observable to the industry, aggressive monitoring may become an effective way to signal her qualifications for the industry job."); Zaring, *supra* note 11, at 520 ("The right way to signal worth to private prospective employers may be, among enforcement officials, at least, aggressive pursuit of wrongdoing while in the public sector.").

66. *See* Zaring, *supra* note 11, at 520 (discussing how the three lead prosecutors in the Enron case went on to practice at Wachtell Lipton and Latham & Watkins).

67. *See* deHaan et al., *supra* note 60, at 67 ("Open revolving doors, whether they encourage some lawyers to work harder or attract talented lawyers that seek to gain experience and move to future employers, are associated with aggressive enforcement outcomes.").

68. *Id.* at 66; *see* Zheng, *supra* note 1, at 1267 ("[I]n order to secure a post-government position in the private sector, the theory goes, regulators must bend the rules to curry favor with their prospective employers.").

69. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 23 (2010) ("[C]apture operates because of the revolving-door phenomenon: the heads of agencies often anticipate entering or returning to employment with the regulated industry once their government service terminates. As a result, they do not want to make enemies within the industry by regulating with what the industry will view as a heavy hand."); Zheng, *supra* note 1, at 1267 ("The revolving door has long been considered an important mechanism of regulatory capture . . . .").

70. *See* Che, *supra* note 58, at 384 ("For example, if a regulator could be hired by a firm for her abilities to influence her colleagues in the regulatory agency, she will try to accumulate her influence contacts, which will divert her time or resources away from monitoring.").

71. *See id.*

Recently, the Public Company Accounting Oversight Board (PCAOB), the watchdog of auditors for public companies that is overseen by the SEC, experienced harmful rent-seeking by its staff. Some PCAOB professionals were indicted for tipping the Big Four accounting firm KPMG of the likely inspection targets of its audits for various clients.[72] The government alleged that the PCAOB staffers conveyed this sensitive information to KPMG while negotiating their future employment relationships there with high-ranking KGMG personnel.[73] Incentive-fueled behavior such as this results in a different prediction for SEC regulatory and enforcement efforts, one that is consistent with assertions that the SEC has been captured by the industry.[74] The rent-seeking hypothesis predicts that SEC regulatory and enforcement efforts will be compromised, resulting in less aggressive action on the part of individual regulators and the agency as a whole.[75]

Yet another theory, the market-expansion hypothesis, contends that an entirely different set of incentives steers SEC regulatory and enforcement behavior: regulators seek to expand demand for the services and expertise that they will be able to provide once they leave the agency.[76] In the enforcement setting, this theory predicts that regulators will increase demand for themselves in the future by pursuing aggressive agency enforcement, seeking higher penalties for violations, and attempting to expand the scope of their agency's enforcement authority.[77] This theory has implications for the rulemaking setting as well. Under this model, regulators may seek to expand the rulemaking authority of the agency, actively pursue the use of flexible standards rather than bright-line rules, and may prefer

72. *See* Brian Sweet, Exchange Act Release No. 82,557, 2018 WL 495694 (Jan. 22, 2018) (disciplining CPAs for their roles in providing confidential information regarding PCAOB inspections to KPMG which was deeply concerned that in the most recent inspections of its audits of public companies KPMG audit deficiencies had spiked to forty-six percent of the reviewed audits).

73. *Id.* ¶¶ 18–20, 31–38.

74. *See* Dal Bó, *supra* note 3, at 214 (suggesting that regulators who are contemplating moving from government to industry are said to have incentives to "signal their appeal to prospective industry [employers] by being lenient to [them]").

75. deHaan et al., *supra* note 60, at 66 ("In contrast, if the SEC official is being hired primarily for his ability to lobby and influence decision makers at the agency, he is likely to under-emphasize or even compromise enforcement outcomes to curry favor with prospective employers.").

76. *See* Zheng, *supra* note 1, at 1280 (describing author's market-expansion theory for SEC enforcement); *see also* Jennifer Nou & Edward H. Stiglitz, *Strategic Rulemaking Disclosure*, 89 S. CAL. L. REV. 733, 752 (2016) (citing Zheng's work and discussing how the goals of agencies may diverge from those of the Legislative or Executive branch); Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 68–69 (2017) ("By pursuing more enforcement actions, seeking broader jurisdiction, and recovering higher penalties, regulators may make more private employers interested in their personal expertise when they ultimately go through the revolving door.").

77. Zheng, *supra* note 1, at 1269, 1280–81 ("In the enforcement setting, the market-expansion incentive may result in more enforcement actions, broadened jurisdictional reach of the enforcement actions, and higher penalties in the enforcement actions."); *see also* Zachary J. Gubler, *Public Choice Theory and the Private Securities Market*, 91 N.C. L. REV. 745, 774 (2013) ("[I]n order to flourish at these post-SEC jobs, it helps to have grown the Agency's breadth and depth while employed there, thereby facilitating bureaucratic imperialism, and in the process ensuring the continued relevance of the Agency and the value of one's own expertise as a former bureaucrat.").

the establishment of complex rather than simple policies and standards.[78] The normative implication of the market-expansion hypothesis from the SEC's perspective is less clear than those of the previous two theories. Increased enforcement where market abuses exist certainly seems desirable, but self-serving decisions regarding the structure and quality of the typical enforcement action or agency rulemaking are likely to be detrimental to overall agency performance.

These categories of incentives are not mutually exclusive and may work in conjunction with each other.[79] Professor Langevoort describes the impact of career effects on enforcement as follows:

> [T]he career value for an SEC enforcement official is not from pandering to potential target-employers, but from having a reputation for being quite aggressive. That aggressiveness generates increased fear within the targeted community and hence greater opportunities for the defense bar (who are also well represented in the ABA and comparable groups). The most savvy SEC enforcers may well push quite hard, but still leave something on the table for opposing counsel to take credit for with his or her clients, remembering that the tables will soon enough be turned.[80]

According to this view, the SEC regulators act in accordance with all three of the previously discussed hypotheses—this demonstrates their competence to future employers, increases the market for their post-SEC services, and still curries favor with opposing counsel. Just as the revolving door likely does not have a categorically detrimental or beneficial impact, the incentives it creates for SEC enforcers are similarly nuanced and overlapping.[81]

These theories demonstrate how the revolving door may create various performance incentives for regulators. These different categories of *ex ante* incentives result in different predictions for SEC enforcement behavior. Consequently, these theories also help guide an analysis of the costs and benefits of the revolving door.

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78. Zheng, *supra* note 1, at 1269 ("In the rulemaking setting, [the market-expansion incentive] may result in agencies' expanded rulemaking authority, the use of flexible standards rather than bright-line rules, and agencies' preference for complex as opposed to simple rules or standards. In either case, revolving-door regulators' focus may not be on finding the best way to appeal to industry interests as the capture and human-capital theories suggest, but on finding the best way to maximize, through their own efforts, the market demand for their post-government services.").

79. *See* Gubler, *supra* note 77, at 774–76 (discussing iterations of all three hypotheses and concluding that "it is far from clear that the financial crisis provides evidence that undermines public choice theory's validity").

80. Donald C. Langevoort, *The SEC as a Lawmaker: Choices About Investor Protection in the Face of Uncertainty*, 84 WASH. U. L. REV. 1591, 1621 (2006).

81. This produces varying levels of agency capture. *See* James Kwak, *Cultural Capture and the Financial Crisis*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 71, 74 (Daniel Carpenter & David A. Moss eds., 2014) ("There is a range of possibilities ranging from a 'bad' agency that consciously favors industry over a clearly identifiable public interest to a 'good' agency that seeks only to identify and serve the general welfare.").

III. COST AND BENEFITS OF THE REVOLVING DOOR

Regardless of one's normative views about the existence of the revolving door, most agree the revolving door is a fact of life at the SEC.[82] During her confirmation hearing, former SEC Chair Mary Schapiro acknowledged deep concerns about the ramifications of the revolving door, as well as the potential negative impact that restrictions on that movement might have on recruitment.[83] She expressed her desire to attract and retain talented employees who are knowledgeable about the industry, but also stressed the need to avoid "conflict by their walking out the door and going to a firm and leaving everybody to wonder whether they showed some favor to that firm during their time at the SEC."[84] In her testimony, Schapiro highlighted the inherent tension between the ability to recruit talented attorneys and the risk of industry influence and regulatory capture.

Despite the outrage displayed in much of the popular press, not all commentators view the revolving door as having a categorically negative impact on SEC enforcement. Perhaps unsurprisingly, former Chair Mary Jo White herself falls within this camp. White rejected characterizing the movement of attorneys between private practice and public service as a "revolving door problem."[85] She expressed that she did not believe her employment contributed to this problem; rather, she viewed her experience in both private and public practice as integral to her career development.[86] She described the choices she made merely as "what you did if you could to become a better lawyer."[87] Although she acknowledged that the concerns about avoiding regulatory capture are valid, she also warned against any policy that would completely foreclose the movement from or to the private sector.[88] White maintained that her private-sector experience and intricate knowledge of the industry improved her ability to make informed policy

82. *See, e.g.*, Sorkin, *supra* note 9 ("The revolving door is such a dominant fact about the S.E.C.'s culture." (quoting Professor John C. Coffee, Jr.)).

83. *Nominations of Mary Schapiro, Christina D. Romer, Austan D. Goolsbee, Cecilia E. Rouse, and Daniel K. Tarullo: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 111th Cong. 28 (2009) [hereinafter *Nominations*] (statement of Mary Schapiro) ("I worry about the revolving door very much. I hope that we can keep the best people at the SEC for the longest possible time. I worry, on the other hand, about restrictions that will make it impossible for people to come to the Commission in the first place.").

84. *Id.*

85. CTR. FOR STRATEGIC & INT'L STUDIES, THE FUTURE OF THE SECURITIES AND EXCHANGE COMMISSION IN A CHANGING WORLD 22 (2015), https://americanassembly.org/sites/default/files/download/events/the_future_of_the_sec_in_a_changing_world.pdf ("The 'revolving door problem' is not, in my view, an accurate description of movement between private practice and public service.").

86. *Id.* at 22–23 ("And, I think both the private sector and the public sector are benefitted by that kind of career path. . . . [M]y private sector experience provided me with knowledge about how much leverage the SEC had in using its power in appropriate cases. I would not have known that had I not been in the private sector.").

87. *Id.* at 22 ("For example, I did pretty well in law school, went to practice in a good law firm, went to the US attorney's office, and then returned to private practice. Others did the same. I never thought of that as a 'revolving door,' just what you did if you could to become a better lawyer.").

88. *Id.* at 22–23 ("A policy prohibiting government agencies from bringing in experts from the private sector, from the markets, would redound to the significant detriment of the public.").

decisions during her tenure at the SEC.[89] She stressed that we need to evaluate the restrictions placed on those coming to the SEC from the private sector, but she also called for an examination about "whether the public is ill-served or better-served by the 'revolving door.'"[90]

Other commentators such as Professor Zaring believe that the costs of the revolving door have been "remarkably overstated."[91] To Zaring, multiple factors lessen the extent to which enforcers can shirk their duties in an effort to curry favor.[92] Shirking is considered "costly" in the sense that it may lead to less "professional advancement" within the agency, or it may be unwelcomed or even punished by a regulator's superior.[93] Further, the door to a higher paying private-sector job is not a viable option for every SEC attorney; rather, it is an opportunity that is only available to a select few.[94] Zaring also questions the underlying assumption that private-sector employment is viewed as superior to government work for an overwhelming number of attorneys.[95] Some attorneys simply prefer government work and its corresponding benefits.[96] Contrary to the rent-seeking hypothesis, these attorneys will not compromise their enforcement decisions in an attempt to maximize their employment prospects in the private sector. Later in this paper, we offer other reasons why we believe the risk of staff capture via the revolving door, particularly of the rent-seeking hypothesis variety discussed earlier, is greatly overstated.

As part of a report discussed below, the Government Accountability Office (GAO) conducted a series of interviews with former and current SEC employees, academics, advocacy groups, representatives from regulated financial institutions, and attorneys at private law firms in an effort to document the costs and benefits associated with the revolving door.[97] The interviewees noted that the revolving door may positively impact performance in both the private- and public-sector by promoting a greater understanding of regulatory requirements and

89. *Id.*

90. *Id.* at 23 ("We do have to be sensitive to appearance, and we have all kinds of restrictions on what people coming from the private sector can do at the Commission, depending on their respective prior positions. That is good. But I think we need to step back and focus on whether the public is ill-served or better-served by the 'revolving door,' and be clear about precisely what we are taking about.").

91. Zaring, *supra* note 11, at 507 ("But the revolving door's explanatory power is remarkably overstated, especially when the subject is law enforcement.").

92. *See id.* at 517–18 (discussing why "shirking is costly").

93. *Id.* at 518 ("We can assume that such supervisors are unlikely to prefer employees who kowtow to defense attorneys, instead of hanging tough with them. More broadly, no political leader wants to be known as the supervisor of an agency that cannot deliver the services it is meant to provide.").

94. *See id.* at 519 ("The vast majority of regulators, even legally trained regulators, do not have these sorts of private sector alternatives."). Zaring cites statistics regarding the overall tenure of attorneys at the EPA as evidence of this assertion. *Id.*

95. *See id.* at 519–20 ("In addition, the prospect of private sector employment is not always obviously an attractive alternative to the prospect of staying within the government, as any state-employed law professor, all of whom have given up the prospects of better paid work in practice, can attest.").

96. *See id.* at 520 (citing reasons why attorneys may prefer public work such as advancement prospects, more manageable hours, and comparable pay in certain areas).

97. GAO REPORT, *supra* note 55, at 11.

increased levels of compliance.[98] That is, the revolving door is central to the symbiosis of regulation and compliance. The basis for this proposition is that SEC experience lends greater credibility to attorneys who presumably share their well-founded understanding of securities regulation and "encourag[e] firms to adopt a culture of compliance."[99] In other words, SEC experience may "promote[] law abidingness in the private sector by salting it with former public officials."[100] Similarly, the revolving door may result in enhanced communication between the SEC and regulated industries.[101] Experience and knowledge infused in the private sector through SEC alumni will lead to open communication and an environment of compliance.[102]

The movement from the agency to industry is seen by many as necessary for the government to recruit attorneys with specialized market expertise.[103] Restrictions placed on post-SEC employment hinder the recruitment of knowledgeable, top-performing attorneys from the industry.[104] After all, a great deal of the career value in performing a stint in a government agency is the ability for the alumni to bring their knowledge and contacts with them to the private sector.[105] Nonetheless, restrictions exist for the purpose of dampening, but not barring entirely, the migration from the regulator to the regulated. Among the detrimental effects cited by academics and advocacy groups in support of such impediments is the concern that SEC employees, incentivized by future employment prospects, may compromise the regulatory and enforcement efforts of the SEC as a means

98. *Id.* at 11 ("SEC experience may bring about a better understanding of securities regulation and compliance in the private sector, which could benefit SEC and securities firms or firms that represent securities firms. Former SEC personnel who take positions in the regulated industry or their representatives, including law firms, may have enhanced credibility as a result of their SEC experience, and thus greatly aid in encouraging firms to adopt a culture of compliance.").

99. *Id.*; *see also* Dorit Rubinstein Reiss, *The Benefits of Capture*, 47 WAKE FOREST L. REV. 569, 569–70 (2012) ("Furthermore, working with industry can substantially improve the impact of regulation; voluntary compliance is cheaper and can be more effective than enforced compliance, and industry can help regulators minimize negative unintended consequences.").

100. Zaring, *supra* note 11, at 546.

101. *See* GAO REPORT, *supra* note 55, at 11 ("When employees of regulated entities or law firms representing regulated entities are familiar with SEC regulations and the context of securities investigations and enforcement, SEC and the employees of regulated entitles or law firms may communicate more efficiently and openly about the matter being discussed.").

102. *See id.*

103. *See id.* ("Attracting specialized market experts, as well as those with the expertise that SEC traditionally has sought (including lawyers, accountants, and compliance personnel) helps the agency fulfill its mission of investor protection.").

104. *See Nominations*, *supra* note 83, at 28 ("If I can't leave and go to the industry after 5 years or 10 years, if I am doomed to stay at the SEC for life, maybe I will never go in the first place, and I don't think that would be a good result either."); *see also* deHaan et al., *supra* note 60, at 66 ("Revolving doors are natural in that the SEC needs industry specific expertise to monitor and regulate effectively, and regulated firms need experience and knowledge of complex regulations to minimize the cost of compliance.").

105. *See* Baxter, *supra* note 51, at 197 ("[A]s such rules become more absolute, the career paths for incoming or outgoing regulators would become less valuable because part of the value former regulators bring to private industry is that their privileged access to, and networks within, the agencies they leave.").

to curry favor with future employees.[106] That is, the fear is that SEC staffers will act consistent with the earlier described rent-seeking hypothesis. David Freeman Engstrom refers to this form of capture—the "classic" story—as "materialist capture."[107] The concern is that current SEC employees might encourage less aggressive enforcement as a quid pro quo for future employment prospects.[108]

IV. CONTEMPORARY EMPIRICAL FOCUS

With so much debate over whether the revolving door has a net positive or net negative effect on the SEC, commentators have attempted to resolve this matter empirically. The general thrust of empirical examinations of this question have focused on whether the data support the earlier described human-capital or rent-seeking hypotheses. Because there are inherent limitations on data regarding links between actions by the SEC and its staff, there are limits to the insights that can be derived from available data. Accordingly, contemporary empirical work has narrowly focused on revolving door practices and outcomes where observable linkages exist. This has caused researchers to focus on the SEC's Division of Enforcement in the federal courts, even though much of what the SEC does is not enforcement related and much of the SEC's enforcement efforts are before administrative law judges, not federal judges. The research is further limited because the identity of which precise staff member is involved in a particular regulatory matter is not known, thus making it impossible to match a particular regulatory outcome with a particular member of the staff (who may have subsequently departed for the private sector). Similar identification problems plague administrative enforcement actions as the release of information regarding individual attorney participation is not at all mandated for administrative proceedings or settlement actions.[109] And there is the significant qualification flowing from the fact the decision not to prosecute a case in the first place is not observable and hence beyond empirical assessment.[110]

The leading empirical study of the impact of the revolving door on SEC enforcement is by Ed deHaan, Simi Kedia, Kevin Koh, and Shivaram Rajgopa,[111]

106. GAO REPORT, *supra* note 55, at 12 ("For example . . . a current SEC employee could seek enforcement compromises through settlements rather than pursue prosecution actions."). A more benign explanation of SEC laxity, but no less harmful to the public interest, is that the staff and directors of the SEC are too comfortable with the status quo. *See* Jonathan R. Macey, *Wall Street in Turmoil: State-Federal Relations Post-Eliot Spitzer*, 70 BROOK. L. REV. 117, 117–18 (2004) (explaining what enabled the New York attorney general to become such a force in the financial frauds in the early years of this century is that the SEC staff had become accustomed to existing market practices of those they regulated).

107. David Freeman Engstrom, *Corralling Capture*, 36 HARV. J.L. & PUB. POL'Y 31, 31–32 (2013) ("The materialist version of capture is the classic account. Concentrated and diffuse costs and benefits create asymmetric stakes among interest groups.").

108. *See* Stavros Gadinis, *The SEC and the Financial Industry: Evidence from Enforcement Against Broker-Dealers*, 67 BUS. LAW. 679, 725 (2012).

109. *See* Choi & Pritchard, *supra* note 5, at 4.

110. deHaan et al., *supra* note 60, at 67 ("It is potentially even more likely that rent seeking behavior manifests not in the choices of *how* a case is prosecuted, but rather in the choice of whether or not to pursue a case at all.").

111. *Id.*

who examined a hand-collected dataset of SEC litigation comprised of accounting related violations (1990–2007) and information about the SEC attorneys involved in the matter, including whether they left the SEC.[112] Even though they observed no statistically significant differences in the monetary sanctions imposed in cases with revolving staffers (those who depart the agency for private practice) and non-revolving staffers, their other findings are largely consistent with the human-capital hypothesis and inconsistent with the rent-seeking hypothesis. For example, revolving staffers are much more likely associated with cases that charge the firm's CEO and a recommendation to the Department of Justice of a criminal prosecution than cases overseen by non-revolvers. These findings are even more dramatic for revolving staffers who migrate to a private law firm that specializes in SEC matters (as measured by the number of cases in which the law firm defends opposite the SEC).[113] These two findings are consistent with aggressive enforcement: levying a charge against the CEO and recommending a criminal prosecution each reflect aggressive enforcement by the attorney since seeking a respondent's personal liability or introducing a criminal prosecution can be expected to provoke influential people in the industry and to elicit the respondent to defend more forcefully.[114] Overall, when the authors studied the particular subset of lawyers who left to join private firms that specialized in SEC defense work, they found that such departing attorneys were involved with stronger enforcement outcomes in terms of higher monetary sanctions (that were statistically significant vis-à-vis non-revolvers), a greater probability that criminal proceedings were recommended, and a higher likelihood that the respondent firm's CEO would be charged. Importantly, their data reflected no significant difference in the enforcement outcomes for "inbound revolvers"[115] in comparison to other lawyers; however, it did reflect "some evidence of rent seeking behavior [] for revolver lawyers located in Washington DC, [as well as revolvers whose destinations are] defense firms [with] numerous former SEC lawyers on staff."[116]

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112. *See id.* ("About 58% (or 196) of the 336 lawyers continue to work for the SEC by the end of our data collection period. About 11%, or 37 lawyers, leave the SEC to join employers other than law firms, and the remaining 31% of the lawyers quit to join private law firms (referred to as 'revolvers').").

113. *See id.* ("The SEC_SPECIALIST variable captures each law firm's level of SEC specialization based on the count of the number of cases the firm defends against the SEC in our sample.").

114. *Id.* at 66 ("Charging the CEO is considered aggressive because: (i) naming individual officers antagonizes influential people who might hinder the SEC lawyers' future employment prospects; and (ii) individuals are likely to defend their case more vigorously relative to only when their company is named." (citing Jean Eagelsham, *At SEC, Strategy Changes Course*, WALL ST. J., (Sept. 11, 2011), https://www.wsj.com/articles/SB10001424052970203405504576601251693560910 [https://perma.cc/2727-GQ96])).

115. Inbound revolvers are "lawyers who join the SEC after working for private law firms." *Id.* at 67.

116. *Id.* at 91.

> As the SEC's headquarters is located in Washington DC, most public firms, government agencies and private law firms that deal with the SEC are likely to have a presence in Washington DC. This will lead to greater external opportunities for SEC lawyers that are employed in the Washington DC office. Further, the potential to lobby and build social and political networks through which influence can be exercised is likely to be greater if the SEC lawyer is located in in Washington DC. If such access to SEC decision makers facilitates

The authors concluded that the results of their study were consistent with the human-capital hypothesis, as well as the notion that future employment prospects will impact SEC regulatory action by incentivizing attorneys to be more aggressive in their enforcement.[117]

A related concern is that staffers may migrate to particular law firms. Not surprisingly, several studies have found that law firms with an established securities law practice account for a significant portion of the representation of those regulated by the SEC.[118] To illustrate this concern, consider the probable connection between the revolving door concerns and the common practice of respondents in successful SEC enforcement actions seeking a waiver of certain "bad actor" disqualifiers as a component to settling the enforcement action. In multiple locations throughout the securities laws are provisions that bar one from participating in certain commercial transactions if that person has been subject to an SEC enforcement action. For example, an investment bank that is subject to certain types of SEC enforcement orders is thereafter barred from participating in the private placement of securities.[119] To avoid this commercially costly bar, enforcement respondents who are market intermediaries and fear being barred from further commercial activities regularly seek as part of their defensive strategy a waiver of bad actor disqualifications. Professor Velikonja found that the bulk of the formal waivers that the SEC granted to enforcement respondents were to large investment banks;[120] such firms are presumably themselves represented in such requests by law firms with deep securities regulation experience.

Professor Gadinis expressed disquiet surrounding the likely connection among the relative size of an entity involved in an SEC enforcement matter, its representation by a law firm with expertise in securities regulatory matters and the existence of revolvers in that firm. He analyzed outcomes of SEC enforcement actions against investment banks and brokerage houses from 2007 to 2008.[121] His data ultimately reflected that "defendants associated with big firms fared better in SEC enforcement actions as compared to defendants associated with smaller

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> rent seeking, then lawyers located in the DC office should be associated with less aggressive enforcement outcomes.
>
> . . . The results suggest some partial support for rent seeking behavior among WASHDC lawyers.

Id. at 81.

117. *Id.* at 92 ("In our particular setting, future job prospects, on average, appear to make SEC lawyers increase their enforcement efforts in trying civil cases.").

118. *See, e.g.*, deHaan, et. al., *supra* note 60, at 78–83 (collecting and examining employment experiences of SEC enforcement staff including their migration to firms that appear frequently before the SEC).

119. *See* Exemption for Limited Offers and Sales Without Regard to Dollar Amount of Offering, 17 C.F.R. § 230.506(d)(iv), (v) (2018) (barring use of the private placement safe harbor which has the correlative impact on the investment bank engaging in the lucrative and large Rule 144A syndications where resort to the safe harbor provided by Rule 506 is a step toward utilizing Rule 144A).

120. *See* Urska Velikonja, *Waiving Disqualification: When Do Securities Violators Receive a Reprieve?*, 103 CALIF. L. REV. 1081, 1115 (2015).

121. *See* Gadinis, *supra* note 108, at 679.

firms in three important dimensions": they were less likely to face individual, as opposed to corporate charges; they had a higher likelihood of being dealt with in an administrative proceeding, rather than an enforcement proceeding in a federal court; and they likely faced fewer or lower sanctions.[122] Gadinis stressed that his results "do not appear to be the product of small sanctions against a few high-profile firms. Instead, they appear to result from systematic differences in enforcement outcomes between big- and small-firm employees."[123] Therefore, the results show that the SEC does not enforce equally against all defendants.[124] Larger firms seem to enjoy more lax enforcement. In discussing how these results implicate regulatory capture, Gadinis hypothesized that the revolving door may have influenced regulatory enforcement through socialization or cultural capture.[125]

However, Gadinis did not inquire into the extent to which there were revolvers within the law firm that represented the large investment banks and broker-dealers in his study. Nevertheless, the connection between the revolving door fears, waivers, and law firms with expertise in securities law is the focus of two reports by the Project on Government Oversight (POGO), an independent non-profit organization.[126] The SEC requires that any SEC alumnus who, within two years of employment at the SEC, wishes to represent a client in a matter before the Commission must file a disclosure statement.[127] Evidence that SEC experience is prized by the private sector is reflected in the fact that in a five-year period revolvers filed a total of 789 post-employment disclosure statements; the majority of these statements were filed by former employees who worked in the Division of Enforcement.[128] Moreover, among the 219 filing SEC alumni, 131—nearly sixty percent of all filing parties—were employed by the same law firm as another filer; one former SEC staffer filed twenty statements and one filing occurred within two days of leaving the agency.[129]

Pursuant to a mandate in the Dodd–Frank Act, the Government Accountability Office (GAO) similarly examined SEC post-employment disclosure statements.[130] The GAO examined both the movement of SEC alumni into private practice and the internal controls that the agency has placed in order to mitigate the resulting conflicts.[131] According to the data, only about thirty-seven percent of departing employees moved to employment as "examiners, accountants, economists, and attorneys."[132] The report noted there was an overall decrease in

122. *Id.*
123. *Id.* at 724.
124. *See id.*
125. *See id.* at 725–26.
126. PROJECT ON GOV'T OVERSIGHT, REVOLVING REGULATORS: SEC FACES ETHICS CHALLENGES WITH REVOLVING DOOR 2 (2011).
127. *Id.*
128. *Id.* at 13 (documenting that 403 out of the 789 statements emanated from the enforcement division).
129. *Id.* at 7, 10–12.
130. *See* GAO REPORT, *supra* note 55, at 2.
131. *See id.*
132. *Id.* at 8.

employee departure from 2006 to 2010 and surmised that this decline was likely due to diminished private-sector employment opportunities in light of the financial crisis.[133] Using the same notice of appearance requests that POGO relied upon in its report, the GAO acknowledged that SEC alumni filing these notices were concentrated in certain employers: "Sixteen entities accounted for approximately 35 percent of the individuals filing notices of appearance . . . . Of the 16 entities, 9 were law firms, 5 were consulting firms, 1 was a financial firm, and 1 was an independent regulatory entity."[134]

In a follow-on 2013 report, POGO examined the revolvers' linkage to a range of exemptions and waivers, such as the "bad actor" disqualifiers discussed above.[135] The report asserts that because so many of these accommodations were requested by SEC alumni on behalf of their clients, this connection supports the idea that the revolving door negatively impacts enforcement. POGO noted that "if an SEC official used to represent companies seeking waivers or envisions himself doing so in the future, it's hard to see how he could remain completely neutral in evaluating such requests."[136] The report also raised the importance of the tone at the top when considering the revolving door question. POGO stressed that the two recent SEC Chairs had deep industry ties,[137] such that "the close linkage between the regulators and the regulated can influence the culture, the values, and the mindset of the agency—not to mention its regulatory and enforcement policies—both from the bottom up and from the top down."[138]

In a 2017 working paper, Choi and Pritchard report that only forty-eight percent of the attorneys working in the SEC Division of Enforcement in 2004 were still employed by the SEC in June 2016.[139] Choi and Pritchard found that those attorneys who were "NLJ 250"[140] partners in private practice prior to joining the SEC and those who were top managers at the agency had a higher likelihood of

133. *Id.* at 9.

134. *Id.* at 10. The report undertook a thorough examination of the current controls in place at the agency, discussing the "training and information for employees, staffing decisions, work process controls, ethics advice, exit requirements for departing employees, and supplemental post-employment rules for certain employees." *Id.* at 12. Even though the report looked favorably on the SEC's existing efforts, it called for more information to be given to employees regarding ethics rules, conflict-of-interest issues, and post-employment restrictions. *Id.* at 1, 12–15. The GAO recommended documentation of the post-employment and conflict-of-interest advice that is given to current and departing employees to increase transparency and assuage concerns regarding the movement of SEC alumni into the regulated industry. *Id.* at 21.

135. PROJECT ON GOV'T OVERSIGHT, DANGEROUS LIAISONS: REVOLVING DOOR AT SEC CREATES RISK OF REGULATORY CAPTURE (2013).

136. *Id.* at 9.

137. *Id.* at 4, 6.

138. *Id.* at 7.

139. Choi & Pritchard, *supra* note 5, at 14.

140. The National Law Journal conducts an annual survey of the nation's largest 250 law firms. Firms that are listed among the largest 250 firms are referred to as "NLJ 250" law firms. *See, e.g.*, *The NLJ 250: Our Annual Survey of the Nation's Largest Law Firms*, NAT'L LAW J. (2012), https://www.law.com/nationallawjournal/almID/1202546739310/ [https://perma.cc/YB8C-HE57].

departure.[141] This is consistent with the idea that talented recruits travel through the revolving door more quickly, and with the idea that lawyers who entered the SEC from successful private practices can easily return to their former practice. Perhaps most relevant to the debate, the authors found that attorneys who worked on what they characterize as the more complex cases, such as Rule 10b-5 cases where scienter is a much litigated issue, were more likely to leave the SEC.[142] The post-employment experiences of such attorneys are consistent with their having greater talent than attorneys involved in other types of enforcement cases; Choi and Pritchard noted that high performance is positively correlated with both a greater overall likelihood of departure, as well as an increased likelihood that these attorneys will achieve partnership status at the firm.[143] This movement is consistent with the idea that "attorneys who produce tangible results for the agency appear to be more likely to have attractive outside employment options."[144]

Choi and Pritchard concluded that their results also contradicted the rent-seeking hypothesis as their data does not reveal that there was any compromised SEC enforcement.[145] Instead, they concluded that "longer term SEC attorneys tend to underperform other SEC attorneys, consistent with the hypothesis that higher performers may leave the SEC before becoming a long termer."[146] This implies that those revolving through the door are more aggressive in terms of enforcement than those who choose to stay at the agency for some time. That is, such evidence of a revolving door reflects not capture but instead a meritocracy. The authors also posited that the threat of losing top employees to more lucrative jobs in the private sector could prompt the SEC to offer greater incentives to retain those attorneys who are particularly susceptible to leaving.[147] Unlike the deHaan study, Choi and Pritchard do not examine outcomes achieved by revolvers when at the SEC but instead report on their relative mobility.

The preceding review of empirical studies have made important steps toward measuring the impact of the revolving door at the SEC. However, there is still room for additional research.[148] Although much of the attention given to the revolving door in the popular press is negative and characterized by claims of regulatory capture, the preliminary quantitative research has caused people to

141. *See* Choi & Pritchard, *supra* note 5, at 15. The results also demonstrated that those attorneys at a regional office were less likely than attorneys at the Washington, DC or New York City office to leave the SEC. *Id.* Choi and Pritchard found that female attorneys were more likely to stay at the SEC, with the exception of female attorneys with a long tenure at the agency. *Id.*

142. *Id.* at 8, 16.

143. *Id.* at 16.

144. *Id.* at 16, 18.

145. *See id.* at 18.

146. *Id.* The study defines long term attorneys as those "who started in 1990 or earlier . . . (corresponding to attorneys with 15 years or more experience as of the end of 2004)" and short-term attorneys as those "who started in 2000 or later . . . (corresponding to attorneys with five years or less experience at the SEC as of the end of 2004)." *Id.* at 8–9.

147. *Id.* at 19.

148. *See supra* Part II.

reevaluate whether the revolving door should be unconditionally condemned.[149] Studies such as those done by deHaan and his coauthors and Choi and Pritchard suggest that the revolving door may actually result in increased enforcement at the SEC.[150] A recent study by Heese, Khan, and Ramanna adds further support to this idea.[151] They found that regulated firms which have more extensive "political connections" are more likely to receive comment letters from the SEC. This finding is inconsistent with the common narrative of regulatory capture that suggests such well-connected firms might enjoy lax enforcement as comment letters are indicative of a proactive regulator, not one given to laxity in the particular case.[152] Though the question is far from being resolved, the assumption that regulatory capture compromises agency enforcement has been called into question. What we develop in the remaining portions of this Article are that the rent-seeking hypothesis by the SEC staff —the dominant focus of the discussion thus far—has deflected attention from the subtle forces that can bias the SEC's leadership team.

V. THE OVERLOOKED THREAT: DIVISION HEADS

With the exception of Choi and Pritchard,[153] recent studies have not closely examined what we believe is the more realistic fear of revolving door practices: the recent practice of SEC division heads being mostly filled by partners from large corporate-oriented law firms instead of by internal promotions. Internal promotion to division head was the norm for the first sixty years of the SEC's existence.[154] We believe a focus on division directors, where they come from and where they return, is a far more significant issue than where their subordinates migrate. The important focus in the revolving door debate should be on the agency's division heads and not the staff. This is, in part, because the collaborative internal operations of the SEC cause us to believe that there is little opportunity for SEC staffers to behave pursuant to the rent-seeking hypothesis.[155] Equally significant is that division heads have many opportunities to engage in agenda control. After briefly reviewing the organizational structure of the SEC, we explore the recent shift in the backgrounds of division heads and the key issues of collaborative action and agenda control.

To set the stage for our analysis, it is first necessary to look at the overall goals of the SEC and its structure. Broadly stated, the SEC's missions are investor protection and the maintenance of vibrant securities markets that it pursues through

149. *See supra* Parts II–III.

150. *See supra* Part III.

151. *See generally* Jonas Heese, Mozaffar Khan, & Karthik Ramanna, *Is the SEC Captured? Evidence from Comment-Letter Reviews* (Harv. Bus. Sch. Acct. & Mgmt. Unit Working Paper No. 17-087, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947752 [https://perma.cc/VM52-PQNY] (finding in review of SEC comment letters that depth of review and seniority of the reviewing staff are strongly correlated with political connections of reviewed party).

152. *Id.* at 26.

153. *See* Choi & Pritchard, *supra* note 5, at 7.

154. *See infra* Section V.A.

155. *See infra* Section VI.B.

its broad rulemaking authority, initiating either administratively or in the federal courts enforcement actions, or invoking many mediums to provide administrative guidance regarding the content of the securities laws.[156] At the top of the agency are five commissioners appointed by the President and confirmed by the U.S. Senate, but the bulk of its work occurs through its five divisions: Corporation Finance, Enforcement, Investment Management, Economic and Risk Analysis, and Trading and Markets.[157] In addition to these five principal divisions, there are twenty-five offices, including the Office of Compliance Inspections and Examinations, the Office of the General Counsel, and the Office of the Chief Accountant. The SEC's overall operations include substantial staff in eleven regional offices.[158] One of the appointed commissioners is designated by the President to be the Chair of the Commission who has the added responsibility to oversee the agency's administration; the Chair appoints division heads and directors of the offices. As a practical matter, with so many appendages housing the Agency's 4,794 full-time staff, most decisionmaking is highly decentralized so that a good deal of management, including supervision of staff and the setting of priorities, occurs within its five principal divisions.[159]

A. DOCUMENTING THE SEC'S HIRING PRACTICES AND THE RECENT SHIFT TO HIRING REVOLVER DIRECTORS

How have the SEC's hiring practices for division heads and general counsels changed over time and why? In this section, we show that the Commission has transitioned from internally promoting lifetime employees to top management positions to a system that mostly employs outsiders for these top positions. In Appendix I, we present data showing a dramatic and recent shift in the SEC's managerial hierarchy toward being outsider-oriented rather than focused on internal promotions.[160]

To construct Appendix I, we consulted a variety of sources beginning with the SEC Historical Society's website,[161] which we used to find the names and years of service for directors of the SEC General Counsel's office, Division of Corporation Finance, Division of Trading and Markets, Division of Investment Management, Division of Enforcement, and Division of Economic and Risk

156. *See* JAMES D. COX ET. AL., SECURITIES REGULATIONS: CASES AND MATERIALS 15–16 (8th ed. 2017).

157. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-621, SECURITIES AND EXCHANGE COMMISSION: IMPROVING PERSONNEL MANAGEMENT IS CRITICAL FOR AGENCY'S EFFECTIVENESS 6, Fig. 1 (2013) [hereinafter GAO REPORT]

158. *See* U.S. SEC. & EXCH. COMM'N, AGENCY FINANCIAL REPORT FISCAL YEAR 2017, at 8 (2017) [hereinafter AGENCY FINANCIAL REPORT]; GAO REPORT, *supra* note 157, at 6, fig.1.

159. *See* AGENCY FINANCIAL REPORT, *supra* note 158, at 8. Of that number, 4,672 are listed as permanent positions. *Id.*

160. *See* Appendix I.

161. SEC. & EXCH. & COMM'N HIST. SOC'Y, http://www.sechistorical.org/ [https://perma.cc/S6Q5-YP7C] (last visited Jan. 22, 2019).

Management. Because it is derived from the data on the historical society website, we are highly confident that this information is correct.[162]

The more difficult project was compiling information about each of these individuals' pre-directorship positions either inside or outside the SEC. A preliminary consideration was how to define the relevant time period for purposes of classifying the directors as either "revolvers" or "non-revolvers" for our analysis. The issue here is how long a director needs to be separated from private practice before we consider him or her to be a non-revolver. After some debate, we settled on eighteen months as a sufficient "cooling off" period for this purpose.[163] In other words, if an individual director had been away from the private sector for at least eighteen months, we classified that director as a non-revolver. Conversely, directors that came to the SEC less than eighteen months after leaving private law firms were classified as revolvers.[164] Revolvers are indicated with italics in Appendix I to make it clear how we are coding them.

To ascertain the pre-SEC employment history of the division directors, we used the SEC Historical Society website and a variety of secondary sources, as well as a series of Internet searches. Because of the relatively new development of the Internet, information was more widely available for the recent division directors than for the older appointments. There were a few instances in which we were unable to uncover enough information to categorize a director, and we coded these directors as "Insufficient Information Available."

Table 1 uses the information contained in Appendix I to calculate the frequency of revolver director appointments over time for the major divisions and General Counsel's office of the SEC. However, to put this table together, we also made some simplifying assumptions. First, to calculate the number of revolvers and the number of total directors for each of the twenty-year time periods, we counted each individual as a director only in the first time period in which they were a director. Thus, a director who held that position from 1953 to 1956 would count as a director only in the time period from 1934 to 1954 and not as a director for the time period from 1955 to 1975.[165] We made the same assumption for their status as revolvers or non-revolvers.

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162. We omit from our calculations in Table 1 consideration of revolvers for the Division of Economic and Risk Management because that division has been in existence for only a decade. As such, making historical reference to the division is unlikely to add value to our analysis here.

163. We decided that eighteen months was an appropriate balance between the time needed for an individual to divorce his or herself from the prior experiences in private practice and the difficulties associated with documenting some directors' previous job experiences. We do not believe that our results would be changed materially by using a longer or shorter period of time.

164. Similar reasoning supports our treatment of the person who moves from the private sector to become an SEC division head and thereafter, even more than eighteen months after first entering the SEC, assumes the directorship of another division. We view such a serial division head as being a revolver in each of the two divisions.

165. We make this assumption because we lack precise data on the dates which these directors are coming and going from the SEC. As a result, the statistics in Table 1 should be viewed solely as descriptive data that provide a sense of the magnitude of the shift over time in the background of the directors.

TABLE 1: FREQUENCY OF REVOLVER DIRECTOR APPOINTMENTS OVER TIME BY DIVISION

Year Interval	**General Counsel**	**Corporation Finance**	**Trading and Markets**	**Investment Management**	**Enforcement**	**Total**
1934–1954	1/5 (20%)	0/2 (0%)	1/6 (16.6%)	0/1 (0%)	0 (N/A)	2/14 (14.3%)
1955–1975	3/7 (42.9%)	0/4 (0%)	0/4 (0%)	2/6 (33.3%)	0/2 (0%)	5/23 (21.7%)
1976–1996	3/6 (50%)	1/5 (20%)	1/6 (16.6%)	1/6 (16.6%)	1/3 (33%)	7/26 (26.9%)
1997–2017	6/8 (75%)	6/6 (100%)	4/5 (80%)	3/5 (60%)	4/7 (57.1%)	23/31 (74.2%)
Total	13/26 (50%)	7/17 (41.2%)	6/21 (28.6%)	6/18 (33.3%)	5/12 (41.7%)	37/94 (39.4%)

Second, we counted a director whose job tenure includes any month in a year to have held that position for a full year.[166] For example, a director who assumed their position in February 2010 and ended their directorship in November 2011 would be counted as having served two years as a director. We apply the same assumption to their status as a revolver or non-revolver.

Table 1 summarizes the data on how frequently revolver directors are appointed in each major division and the General Counsel's Office between 1934 and 2017.

What is apparent in the data is a sharp shift toward hiring more revolver directors in the late 1990s. We turn next to trying to explain why this change occurred.

B. THE SHIFTING SOURCE OF DIRECTORS AND ITS IMPACTS

1. Explaining the Shift from Internal Promotions to Revolver Hires: Outside Expertise

Prior to the 1980s, the SEC had always promoted from within when it needed to fill an open position for a director at the Division of Corporation Finance. By relying on its own internal candidates, the agency was able to create strong incentives for capable staff members to engage in lifelong careers at the Commission. At that time, staff positions at the Division were considered good jobs: the compensation was fair (and the disparity between government and private practice compensation was not as great as it later became), there was prestige in working for the agency, and staffers enjoyed plenty of responsibility and oversight. However, as a former Corporation Finance director, Director One, remembered in a lengthy interview with the authors, entry-level employees were permanent staffers, almost none of whom had private experience and all of whom were career employees.[167] The seeds for change in selecting Corporation Finance heads were contained in the pathbreaking SEC Special Study.

The SEC released its Special Study in 1963.[168] The project was funded by a special appropriation of $6 million (adjusted for inflation),[169] and was carried out by a team of lawyers, economists, financial analysts, and statisticians led by Milton Cohen, a career SEC staffer who had the requisite understanding of the SEC.[170] The resulting report entailed three distinctive contributions that occurred in three phases over the life of the project. The first phase involved mapping and evaluating changes in capital markets. The second phase reviewed the then-existing regulatory structure of capital markets. The third phase raised questions about overall institutional design. The Special Study was a mix of qualitative and quantitative analyses, surveys, case studies, and statistics that presented a

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166. As with the previous note, we make this assumption because of data limitations.

167. Independently, Director Two noted that this earlier system was similar to the UK model for agencies, which are staffed by individuals who spend their entire career with the agency.

168. *See* ANNE M. KHADEMIAN, THE SEC AND CAPITAL MARKET REGULATION: THE POLITICS OF EXPERTISE 60–62 (1992).

169. ED BALLEISEN ET AL., A SECOND STUDY OF CAPITAL MARKETS: WHETHER, WHAT AND HOW? 2 (2013).

170. *See* KHADEMIAN, *supra* note 168, at 64.

broad overview of financial markets and their participants, trading strategies, the roles and performance of government regulators, and a set of policy recommendations.[171]

Among the findings of the Special Study was that the enormous growth in securities markets had led to destabilization; that there had been a rapid increase in the number of brokers such that many were inexperienced; that industry was increasingly impacted by anticompetitive practices; that there were inefficiencies in "back-room" practices; and that there existed troubling practices by floor traders and specialists.[172] The Special Study is credited with placing the Commission on a firm intellectual footing equal to Wall Street so that it was better able to carry out the mandates of the laws entrusted to it.[173] The Special Study is also recognized as having set the policy trajectory for both Congress and the SEC, especially in areas of disclosure for then-unlisted securities as well as a range of broker-dealer practices.[174] Although the Special Study is credited with placing the SEC on a level equal to market professionals in terms of mapping the multiple forces then shaping American capital markets, the Special Study also documented how rapidly changes were taking place in how markets operated and the practices of market participants and their advisors.[175]

Despite the Special Study underscoring the importance of regulators having a deep understanding of developing securities practices, it was not until President Carter's appointment of SEC Chair Harold Williams that the Special Study impacted personnel choices for leadership of the SEC's key divisions.[176] Williams wished to implement the Special Study and believed the SEC needed "on-the-street" experience if disclosure mechanisms and requirements were to both be efficient and serve the public interest. The Special Study's central message was that better regulation begins with a deep understanding of how capital markets operate. Director One recounted increasing frustration with how long it took for the SEC to take action; Chair Williams wanted to make the SEC more efficient. The perception at the time was that the agency needed people from private practice with deep knowledge of industry practices in financial markets. Director Three remembers that markets in the 1980s became increasingly complex so that

171. *See id.*

172. *See id.* at 60.

173. One of the authors was the convener and reporter of a roundtable convened in Washington D.C. on June 4, 2013 to discuss whether a second SEC Special Study should be undertaken. The discussion was synthesized into a "white paper" that included analysis of the structure and contributions of the SEC's Special Study that is discussed in this paragraph. *See* BALLEISEN ET AL., *supra* note 169, at 6.

174. *Id.*

175. *Id.* at 5.

176. In the text between notes 177–87, within section V.C, and the text beginning with note 246 through the conclusion of Part VI, there are multiple references to insights regarding the SEC provided by four individuals, each of whom either had served as a director of a division of the SEC or as its general counsel. The authors interviewed these former directors and general counsels individually over the phone: telephone interview with Director One (Jan. 12, 2018); telephone interview with Director Two (Jan. 17, 2018); telephone interview with Director Three (Jan. 24, 2018); telephone interview with Director Four (June 15, 2018).

there was a need to bring in "high levels of knowledge" that existed on "the street" that were not otherwise likely to be found internally.

Williams took action to hire someone with this background. Director Three recalled that the practice of regularly bringing in outsiders to head SEC divisions began when Williams hired Ed Greene. Greene was brought into the Corporation Finance Division as an assistant to Dick Rowe for several months. Greene was a partner at the law firm Willkie Farr & Gallagher LLP before moving to the SEC. He replaced Rowe as director of that division six months after joining the SEC and then served as its director from 1979 to 1981.[177] He was the first director of the Corporation Finance Division that had previously been a law firm partner. Greene later became General Counsel for the SEC from 1981 to 1982.[178] Subsequently, he reentered private practice as a partner at the law firm Cleary Gottlieb Steen & Hamilton LLP.[179]

Greene's hiring was followed in the late 1990s by many others as the SEC tried to find experienced lawyers from the private sector that wished to serve the public instead of their clients' private interests. The SEC needed these lawyers' deep industry experience gained through years of private practice to advance the objectives of securities laws. Director Two observed that this model has benefits in terms of the real-world experience brought to bear on regulatory and enforcement questions, although Director Two acknowledged that it did create more conflicts of interest.

What was the effect of this shift on SEC policy? One possible effect is that these more experienced directors were willing to undertake new policies. For example, the early 1980s were a transformative era for the SEC as it undertook a sweeping review of its disclosure guidelines and developed a basic information package that was required for all transactions regulated by the SEC.[180] Whereas in the SEC's first fifty years, mandated disclosure about a company varied widely depending on whether the disclosure was in its annual report, registration of a public offering, or in a proxy statement, once the SEC developed the core features of the basic information package, the disclosure guidelines became identical for each of these regulated events. This then set the stage for established companies to access capital markets more quickly through the SEC's integrated disclosure process, insofar as information that companies had already filed with the SEC could be incorporated by reference.[181] The upshot of this disclosure revolution was allowing established companies to engage in "shelf registration" whereby mandated disclosure could be satisfied days, weeks, or even months before the securities were sold.[182] Shelf registration had the effect of reducing companies'

177. *Edward F. Greene*, CLEARY GOTTLIEB, https://www.clearygottlieb.com/professionals/edward-f-greene [https://perma.cc/LD87-Y4GG] (last visited Jan. 22, 2019).

178. *Id.*

179. *Id.*

180. *See* COX ET AL., *supra* note 156, at 178–80.

181. *See id.*

182. Shelf Registration, 48 Fed. Reg. 52,889, 52,889 (Nov. 23, 1983) (promulgating Rule 415, codified at 17 C.F.R. § 230.415 (2014)).

exposure to market risk with the consequent reduction in commissions garnered by underwriters for such offerings.[183] Each of these developments—which represented radical shifts in the regulatory structure of the American securities laws—required detailed experience in the functioning of capital markets. Such experience was not present within the career staff of the SEC.

The data in Table 1 shows some support for our expertise hypothesis. For example, if we examine director appointments to the Division of Corporation Finance over time, Ed Greene was the sole revolver appointed to run that Division between 1934 and 1999, when David Martin was appointed.[184] As we discussed, Greene's appointment was the result of the SEC's need for additional expertise in its drive to implement the Special Study. This event required unique skills, consistent with our hypothesis that division director appointments can be driven by a need for expertise. Since 1999, *every* director of the Corporation Finance Division has been a revolver.[185]

Another explanation for hiring revolvers relates to the need for expertise in the Office of the General Counsel. The General Counsel is, according to Director Four, the SEC Chair's lawyer. Director Four believes that SEC Chairs want to have their lawyer in that position. Table 1 shows that the General Counsel's office, and *only* that office, has a long history of employing a high percentage of revolvers.[186] One possible explanation for this unique aspect of the Office of the General Counsel is that it has a longstanding need for expert practitioners that are up-to-date on the legal issues that it handles. The Office's continuing need for expertise could explain its relatively heavy dependence on outside lawyers, which is consistent with the expertise hypothesis discussed earlier for the Division of Corporation Finance.

A second potential explanation for the stark difference in the historical hiring patterns for the Office of the General Counsel versus those of the five principal SEC divisions relates to Director Four's observation that SEC Chairs want their personal lawyer in that position. We hypothesize that an SEC Chair who is appointed from a staff position is more likely to select SEC staff members to be General Counsel, whereas an SEC Chair hired from private practice is more likely to select attorneys from private practice. The intuition behind this hypothesis is that SEC staffers are more likely to be comfortable and have first-hand experience working with other SEC staffers, whereas private practitioners have a similar propensity for other private practitioners.

To test this hypothesis, we first compiled Appendix II, a historical summary of the SEC Chairs and their experience eighteen months prior to their appointment.[187] Each of the Chairs whose names are followed by the symbol "+" were SEC Commissioners prior to their appointment as SEC Chair. The data show that

183. *Id.* at 189–92.
184. *See* Appendix I.
185. *Id.*
186. *See* Table 1.
187. *See* Appendix II.

this was quite common until the 1970s and has since ended completely. Chairs whose names are in italics all came to the position from private practice.[188] Fifteen Chairs were either law firm partners or heads of investment firms prior to joining the SEC.[189] Finally, the four names in bold typeface, as best as we can tell given the information available, became Chairs from SEC staff positions. Appendix III takes this data and adds to it the names and affiliations of the SEC General Counsel that served with each Chair.[190] All revolvers have their names in italics in Appendix III.

Did these Chairs follow the pattern that we predicted in making their General Counsel appointments? In Table 2, we present data that connects each Chair to the General Counsels that they appointed or served with.[191]

TABLE 2. SEC CHAIR AND GENERAL COUNSELS: CORRELATIONS OF REVOLVERS/ NON-REVOLVERS

Dates (1953–2018)	**Revolver Chair**	**Non-Revolver Chair**
All General Counsel Revolvers	6	3
All General Counsel Non-Revolver	2	5
Multiple General Counsels: Mixed Revolver and Non-Revolver	3	2

We recognize that there are two limitations on our conclusion. First, due to the limited number of data points available, we are unable to test for statistical significance. Second, we have excluded data for years prior to 1953 because all General Counsel were insiders prior to this year.

With those two caveats in mind, Table 2 shows that SEC Chairs who are themselves revolvers more frequently hire other revolvers as their General Counsel than non-revolvers. Conversely, SEC Chairs that are non-revolvers are also more likely to hire internal candidates to be their General Counsel than to hire revolvers. We also see some instances where Chairs may have a revolver General Counsel for some of their tenure and a non-revolver for another part of their tenure. Overall, we view these data as consistent with our hypothesis that revolver Chairs are more likely to hire revolvers as their lawyers, whereas non-revolver Chairs are more likely to select internal candidates.

188. *Id.* An SEC Chair who was both an SEC Commissioner prior to their appointment as Chair *and* who became Chair after private practice would therefore have their name in italics followed by the + symbol.

189. *Id.* Four of these were SEC Commissioners prior to assuming the Chairmanship.

190. *See* Appendix III.

191. Because the Chair can remove a General Counsel at will, we consider General Counsels that served during the tenure of a Chair to have been implicitly selected to serve in the position.

2. Explaining the Shift from Internal Promotions to Revolver Directors: The Politicization of the SEC

The need for outside expertise, however, is not the only force shaping leadership selections at the SEC; politics matter, too. Here the story begins in the 1970s, when the once-nascent SEC Division of Enforcement flexed its muscles. Under the inspired leadership of two career employees who led its enforcement efforts, Irving Pollock and Stanley Sporkin, there was a growth in the number of enforcement actions; moreover and significantly, the enforcement actions during this period frequently tested the outer limits of the SEC's ability to regulate conduct through enforcement.[192] In particular, Stanley Sporkin's aggressive pursuit of bribery of public officials not only prompted enactment of the Foreign Corrupt Practices Act, but earned the SEC's enforcement efforts the ire of the business community.[193]

During the 1980s, the SEC arrived on the political stage in which the role of government and government regulation enjoyed a central role in national political discourse. Following the Reagan landslide, the SEC turned away from its prior aggressive pursuit of cases and focused its enforcement efforts on traditional areas.[194] Indeed, in 1981, the transition team for the newly elected President called for a thirty-percent reduction in the SEC's budget and a three-quarters reduction in its enforcement staff.[195] This development stands in sharp contrast with the long-standing view that the SEC was a technocratic monitor of unscrupulous practices in U.S. securities markets whose functions were beyond politics.[196]

The Reagan Administration's deregulatory agenda swept across many federal agencies,[197] but the SEC was a large focus.[198] President Reagan nominated John Shad, a Wall Street banker, to serve as Chair,[199] who in turn installed John

192. *See* Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 YALE J. ON REG. 149, 192–97 (1990) (reviewing several areas where the SEC during the 1970s blazed new enforcement paths); *see also* KHADEMIAN, *supra* note 168, at 167 ("[M]ore than any other representative of the agency, Sporkin had been closely identified with SEC activism throughout the 1970s.").

193. Sporkin had become a "symbol of the commission's reputation for vigorous nonpartisan independence," Jeff Gerth, *S.E.C.'s Future Focus in Doubt*, N.Y. TIMES (Jan. 29, 1981), https://www.nytimes.com/1981/01/29/business/sec-s-future-focus-in-doubt.html [https://nyti.ms/29KswBF], and his removal took "a big headache out of Wall Street." Robert A. Rosenblatt, *Stanley Sporkin, SEC's Toughest Cop, Gets General Counsel Post at CIA*, L.A. TIMES (Apr. 22, 1981), at F1. *See also*, KHADEMIAN, *supra* note 168, at 167 (noting that the activities of the Enforcement Division under Stanley Sporkin were criticized in the Reagan transition team's report which recommended replacing him and reducing the resources of the Enforcement Division).

194. *See* Pitt & Shapiro, *supra* note 192, at 154–55. A recurrent theme was that the regulatory focus should be on creating enduring economic incentives and not government enforcement as a means to motivate compliance with the law. *Id.* at 198–99.

195. *Final Report of SEC Transition Team*, 587 Sec. Reg. & L. Rep. (BNA) K-1, K-1 (Jan. 21, 1981); Gerth, *supra* note 193.

196. KHADEMIAN, *supra* note 168, at 153.

197. *See* Michael Fix & George C. Eads, *The Prospects for Regulatory Reform: The Legacy of Reagan's First Term*, 2 YALE J. ON REG. 293, 300 (1985).

198. Gerth, *supra* note 193.

199. KHADEMIAN, *supra* note 168, at 156–57.

Fedders, a partner from a D.C. law firm, to head the Enforcement Division.[200] In such a politically sensitive environment, not only was the SEC's Chair to reflect the sentiment of the President, but the Chair also needed assurance that his vision would be implemented by the Commission's staff.

A second political dimension contributing to the practice of appointing individuals from the private sector was the increased politicization of regulatory agencies that began in the 1980s and accelerated in the mid-1990s.[201] Like so many other regulatory agencies, presidential appointments of SEC commissioners are subject to partisan balance requirements, which mandate that no more than a simple majority of agency members may come from a single party.[202] Through the 1980s, Presidents regularly complied with this requirement by appointing ideologically aligned members of the opposite party. For example, a Republican president might appoint a Libertarian commissioner when the Commission already had three Republican members and a Democratic president could appoint a liberal Republican. This congenial arrangement came to an end in the mid-1990s such that agencies generally—the SEC being no exception—became more divided at the commissioner level.[203] Regulatory agencies, including the SEC, were swept up in the increasing partisan divide that has been underway since the 1980s.[204] This development coincided with, and likely caused, Presidents to more

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200. John Fedders was appointed despite strong agency precedent that would have led to the selection of one of the Division's associate directors. KHADEMIAN, *supra* note 168, at 167 ("[T]his pattern of secession had existed within the division for years.").

201. We also observe that the agenda for the SEC has become more politically sensitive as its mandate has expanded beyond disclosures believed to protect investors and nurture capital formation. This marks the date of the historic Sarbanes–Oxley (SOX) Act. *See, e.g.*, J. Robert Brown, Jr., *The Politicization of Corporate Governance: Bureaucratic Discretion, the SEC, and Shareholder Ratification of Auditors*, 2 HARV. BUS. L. REV. 501, 502 (2012) (discussing how starting in 2002, Congress transferred to the SEC direct substantive authority over many aspects of the corporate governance process, so that the SEC increasingly is called upon to develop substantive standards and to arbitrate the often irreconcilable positions of interest groups vying to influence the governance process). However, our data shows that the practice of appointing division heads from the private sector was pervasive by 2002, so that congressional mandates such as SOX are at best an important contributing force.

202. Securities Exchange Act of 1934, Pub. L. No. 73-291, § 4(a), 48 Stat. 881, 891 (1943) (codified as amended at 15 U.S.C. § 78d (2012)); *see* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 797 tbl.4 (2013) (listing agencies subject to party balancing requirement).

203. Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9, 45–48 (2018) (analyzing 578 appointees to twenty-three agencies over six Presidents to conclude that dramatic politicization occurred across the agencies in the mid-1990s mirroring the partisan "sort" occurring across the electorate generally).

204.

> Opposition-party senators agree with each other and disagree with the policy priorities of the President and his party. Consequently, opposition-party senators make use of holds and other delaying strategies to see to it that the President nominates opposition-party Commissioners loyal to the opposition party, not to the President. At the same time, party polarization also explains why today's independent agencies are more likely to agree with presidential preferences *once* the President appoints a majority of his party to the agency. In particular, party polarization between Democrats and Republicans means that party identity is an especially good proxy for commissioner ideology. . . . Before 1980, modest party polarization was the

closely link the work of independent regulatory agencies such as the SEC with the policies sought to be carried out by the White House by appointing agency heads who share the president's regulatory objective.[205] For example, Reagan's SEC Chair shared the President's deregulatory agenda in contrast to the Carter appointee's emphasis on subject-matter expertise.[206]

Within an administrative environment bounded by deep ideological divisions and links to the national policies set at the White House, staying on message is essential for SEC Chairs. Achieving this objective requires maintaining division heads on whom the Chair can rely to carry out the Chair's agenda. Such a person could, of course, be found within the SEC. However, a career staffer poses uncertainty regarding institutional loyalties: the staffer might enjoy a working relationships with others in the agency, including, perhaps, opposition-party commissioners with whom she has worked collaboratively. Such concerns, and the ongoing ideological divisions, are ultimately consistent with the dramatic shift toward appointing division heads from outside the SEC.

Thus, we can see that resorting to the private sector to staff the directorships of the SEC was not only in response to the Special Study, which found that the SEC needed individuals with a deep understanding of contemporary markets to carry out its mission and it was also in response to a political desire to have individuals whose allegiance to the Chair was not adversely impacted by the protections afforded career employees through the independence provided by civil service. Looking at Table 1 and the overall averages over time, there is a slow creep in the percentage of revolvers hired as division directors and general counsels from the inception of the SEC until the period from 1976 to 1996. However, this is followed by a marked increase in the frequency of revolvers from 1997 to 2017. If we consider the two theories explaining the rise of revolvers that we have previously discussed—the SEC's need for increased expertise beginning in the 1980s (as evidenced by the appointment of Ed Greene) and the increased politicization of the SEC during and after the Reagan years—this data seems most consistent with the politics story. In other words, once the Reagan team made its revolver

> norm and, correspondingly, opposition-party senators did not use delaying strategies to advance their agenda. . . . [W]e see the Reagan presidency as transformative—separating a period of modest party polarization from a period of ever-increasing polarization.

See Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 461 (2008).

205. *Id.* at 477; *see also* MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 131 (2003) ("[T]he one constant in Clinton's appointments . . . was relatively strong confidence in the nominee's fidelity to the president's agenda."); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248 (2001) ("[P]residential control of administration . . . expanded dramatically during the Clinton years, making the regulatory activity of the executive branch agencies more and more an extension of the President's own policy and political agenda.").

206. Devins & Lewis, *supra* note 204, at 481.

appointments, the genie was out of the bottle on politically motivated appointments and the frequency of revolver appointments soared. Note, however, that although this raises the likelihood of agenda-control motives for SEC directors, the type of agenda-control issues we might anticipate becoming more likely are those that arise from political differences (left against right battles) as opposed to those that involve more mundane financial conflicts of interest, that is, the traditional revolving door issues.[207]

3. Explaining the Shift from Internal Promotions to Revolver Hires: Financial Forces

Although not apparent from Table 1, prospective outside directors' financial incentives have changed over time as well. Director Three recalls that by the mid-1980s, the economics of private lawyers taking several years away from their practice to work at much lower compensation in government service improved significantly. On the one hand, Director Three notes, most transactional law partners were enjoying rising incomes from private practice so that they could afford to take a break and have financial resources to absorb substantial temporary cuts in pay while they were at the Commission. Equally important, because of the strong market for experienced attorneys, these same practitioners could be assured that, upon leaving the SEC, there would be a strong demand for they services so that their could reenter private practice after their time at the SEC.

For junior attorneys, a move to the SEC was a means of enhancing their understanding of the regulatory environment.[208] Director Three recalled that SEC work was seen as a way to get additional training, and most attorneys thereafter moved to law firms or related regulators such as then-NASD (now, FINRA) and NYSE. It was also understood that broadening one's appeal post-SEC required not only obtaining such knowledge and training, but also demonstrating a record of zeal.[209]

Director Four recalled that over time it became harder to keep good in-house personnel at the SEC for their entire careers. The pay differentials between the public and private sector widened for lawyers with regulatory experience. Talented people had good alternative options. Washington D.C. and New York

207. It is, of course, possible that the greater presence of politically motivated division directors may be associated with a higher incidence of financial conflicts of interest if these directors are especially susceptible to outside lobbyists' influence. If this is true, then the rise of political division directors may be a driver leading to increased financial conflicts of interest and traditional revolving door issues.

208. KHADEMIAN, *supra* note 168, at 89. Additionally, the work that is available to junior attorneys at the SEC is far more interesting and challenging than what they would have received at a private law firm. *Id.* at 90.

209. *See id.* at 89–91 (discussing how good lawyers come to the SEC because of the opportunity to gain legal experience that is in high demand at private law firms, but what they gained was legal expertise and that "there is no incentive to favor a particular economic interest in agency decision making"). Khademian also notes that departing SEC employees go to work for law firms, not brokerage firms, and therefore they cannot be captured by industry. *See id.*

grew more expensive over time and difficult for public servants to afford living in. The net result of these financial factors was to make it difficult for SEC lawyers to maintain a reasonable standard of living and to encourage them to move into the private sector.

C. THE EFFECTS OF INCREASED REVOLVER APPOINTMENTS ON STAFF MORALE AND RETENTION OF LONG-TERM EMPLOYEES

In our interviews with former directors, it became evident that these changes had an impact on the SEC's internal labor market and employee morale. Director Two observed that today, a high percentage of the SEC's staff could be seen as lifetime employees, coming to the SEC after a few years in private practice, hired for their legal skills experience, and then staying at the SEC. Those who developed skills while at the SEC could later return to private practice, if they had developed strong marketable skills. Director Two said that those with such skills had good employment options.

Director Three felt that the revolving door had some impact on the SEC's personnel. Although the old practice of promoting from within retained staff for long periods of time, such staff did not have sufficient outside knowledge. Increased use of outsiders at top levels changed the career path for staffers: some became permanent staffers, others became revolvers that returned to practice quickly. Cutting off internal promotion opportunities by hiring outsiders is likely to have negative effects on lifetime staff employees because they would see little likelihood of moving up within the SEC once they reach the level just below Associate Director.

Director Four also believed that the politicization of the SEC had a negative effect on staff morale. Director Four pointed to the impact of the Reagan administration as having a detrimental effect on the way that people viewed public service. For example, with the SEC commissioners, although it was once true that Presidents would appoint career staff as commissioners, recently these have become almost exclusively political appointments. This cuts off an internal route for promotion of senior staff. Director Four was quite clear that the SEC should be a nonpolitical agency.

VI. CULTURAL ROOTS AND ADMINISTRATIVE REACH OF DIVISION HEAD'S INFLUENCE

The preceding section described the Darwinian effects on agency appointments caused by the growing and hardening political division within American politics. The development in the 1980s of appointing division heads from the private sector—and acceleration of the practice in the 1990s—brought to the SEC's managerial center individuals steeped in years of representing the regulated. This Part explores why this change in practice might pose special capture risks. Such risks, however, may well be ameliorated, in much the same way as the rent-seeking hypothesis is deeply qualified, by the strong collaborative culture within the SEC. Both considerations are examined in this Part.

A. THE CULTURAL CAPTURE HYPOTHESIS

A newer conceptualization of capture is referred to as "cognitive" or "cultural capture."[210] This non-materialist category of capture occurs when industry shapes the underlying beliefs and perspectives of regulators.[211] Attorneys who join the SEC from employment in the regulated industry may be "socialized" toward the industry.[212] In other words, their prior experience may skew their perspective on regulatory issues.[213] They may become conditioned to think in ways that favor the regulated industry.[214] One scholar has identified three particular mechanisms in the financial industry through which cultural capture shapes regulators' beliefs:

(1) **Identity**: Regulators are more likely to adopt positions advanced by people whom they perceive as being in their in-group.

(2) **Status**: Regulators are more likely to adopt positions advanced by people whom they perceive to be of higher status in social, economic, intellectual, or other terms.

(3) **Relationships**: Regulators are more likely to adopt positions advanced by people who are in their social networks.[215]

The forces that shape cultural capture raise concerns in the face of persistent and growing frequency of revolving senior officials. "[T]he normalcy of moving from an administrative agency to the financial sector [and the reverse] and the sheer numbers of people making the transition imply that the regulators and the representatives of financial institutions are really the same people, only at different points in their careers."[216]

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210. Kwak, *supra* note 81, at 79 ("I use the label *cultural capture* for this phenomenon: *cultural* because it operates through a set of shared but not explicitly stated understandings about the world; *capture* because it can produce the same outcome as traditional capture – regulatory actions that serve the ends of industry."). Kwak observes that although cultural capture is distinct from the more traditional notion of capture being driven by economic self-interest, it is just as powerful in how it can impact belief systems. *Id.* at 79; *see also* Baxter, *supra* note 51, at 183 (noting that regulation is shaped by the background, education, experiences and intermingling shared by those presiding over the formation of public policy).

211. *See* Kwak, *supra* note 81, at 79 ("It contributes to the ongoing contest between rival ideological systems, which helps to shape the belief systems of governmental actors.").

212. *See* Gadinis, *supra* note 108, at 725 ("The 'revolving door' between an agency and the industry it supervises may also affect regulatory performance through socialization mechanisms.").

213. *See id.* at 725–26 ("Theorists have long argued that regulators with industry origins have become 'socialized' toward that industry's concerns and aspirations, carrying that perspective into their regulatory tasks.").

214. *See* Engstrom, *supra* note 107, at 32 ("Thus, an industry can somehow convince regulators to think like it.").

215. Kwak, *supra* note 81, at 80.

216. *Id.* at 83.

Gormley provides the seminal study of cognitive and cultural capture involving his analysis of the background of commissioners of the Federal Communications Commission (FCC) with their voting behavior as a commissioner.[217] Overall, the study found that commissioners appointed from the industry were more likely to vote for matters that supported industry interests[218] and that votes on particular issues that could be classified as pro-regulatory or deregulatory were explainable by whether the matter helped the industry and not by whether the commissioner was being philosophically consistent.[219] Cohen's later, more extensive study of the voting behavior of FCC commissioners provided important qualifications to Gormley's findings.[220] Using many more variables, Cohen found that, although those with industry experience before becoming a commissioner were fourteen percent more supportive of industry positions than commissioners without any prior industry experience,[221] the factor which is far more predictive of a commissioner's voting vis-à-vis an industry-preferred position is the party of the appointing President and how dominant the controlling party is in the U.S. House of Representatives when the commissioner votes.[222] Of particular interest, a strong predictor of supporting industry positions appears in the case of commissioner votes in his or her last year of service when the commissioner, regardless of industry association when appointed, assumes employment in the industry at the end of the commissioner's tenure.[223]

True, we might expect that a commissioner or division head with prior sustained employment with the regulated may find their views at least temporized by interactions with SEC commissioners or personnel. They may even feel pressure to conform to the SEC's culture favoring certain pro-regulatory conventions and attitudes. Nonetheless, the "creeping colonization of ideas"[224] is particularly dangerous when dealing with financial regulation due to the close relationship between the regulators and the regulated.[225] Often, financial regulation is both "highly discretionary," and relationships are necessarily "continuous," due to ongoing monitoring of institutions.[226] Some commentators have expressed concern that the disparity between agency and industry resources may add to this

217. *See* William T. Gormley, Jr., *A Test of the Revolving Door Hypothesis at the FCC*, 23 AM. J. POL. SCI. 665, 681–82 (1979).

218. *See id.* at 679.

219. *See id.* at 681.

220. *See* Jeffrey E. Cohen, *The Dynamics of the "Revolving Door" on the FCC*, 30 AM. J. POL. SCI. 689, 689–90 (1986).

221. *See id.* at 694.

222. *See id.* at 701–05.

223. *See id.* at 695–96.

224. Engstrom, *supra* note 107, at 32.

225. *See* Baxter, *supra* note 51, at 187 ("One need not be totally cynical to recognize that the highly discretionary and continuous nature of bank regulation is dependent on and nurtures an environment in which the regulators and the regulated are engaged in such close, daily relationships as to nurture intense mutual empathy—perhaps even a kind of 'transference'—between the two sides.").

226. *See id.*

vulnerability because the SEC may be willing to accept fewer sanctions or, conversely, more settlements so that they can focus on other matters.[227] Further, this gap in resources appears to be growing.[228] It also should be noted that "regulators are human beings and are subject to the same set of cognitive shortcomings as other human beings," and the environment in which their beliefs are formed may have a large impact on the substance of those views.[229] Many scholars have explored behavioral biases in financial regulation,[230] as well as in other industries.[231] Cognitive biases on the part of a division head poses serious concerns when the division head is deeply involved in agenda setting—thereby shaping approaches to regulatory or enforcement strategies—and more broadly when participating in the highly collaborative culture that surrounds so much of the work of the SEC.

B. THE SEC'S COLLABORATIVE CULTURE

With this background about director appointments in mind, we turn next to how revolver directors may affect SEC decisionmaking. As observed earlier, prior revolving door studies have limitations. They not only are narrowly focused on enforcement but also overlook the collaborative-team approach that is present with so much of what the SEC does. Focusing on the rent-seeking hypothesis as applied to SEC staffers overlooks the collaborative and supervisory culture in which individual staff members operate.

To illustrate the staff's collaborative role, consider the process by which the SEC considers and issues no-action letters. Since its formation, the SEC has provided informal guidance to the regulated communities.[232] The most visible[233]

227. *See* Gadinis, *supra* note 108, at 724 ("The first concern is that the SEC has limited bureaucratic resources, and thus might be willing to accept a less aggressive settlement against defendants with sophisticated legal teams in order to turn its attention to other cases.").

228. *See id.* (citing various GAO Reports regarding SEC operations).

229. *See* Kwak, *supra* note 81, at 76.

230. *See* Stephen J. Choi & A.C. Pritchard, *Behavioral Economics and the SEC*, 56 STAN. L. REV. 1, 20–36 (2003) (applying the field of behavioral economics to "catalog a series of biases that SEC officials may face" that can impact regulatory decisions).

231. Gadinis, *supra* note 108, at 726 nn.169–71 (citing various studies regarding how socialization impacted decisions of "FCC Commissioners, central bankers, and state insurance commissioners"); *see also* Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 553–55 (2002) ("We contend that bad public policy can often be traced to flaws in human judgment and choice among governmental actors. Aligning and channeling self-interest toward pursuing the public interest will not guarantee good policy outcomes.").

232. *See e.g.*, Robert M. Blair-Smith, *Forms of Administrative Interpretation Under the Securities Laws*, 26 IOWA L. REV. 241 (1941) (providing an early review of the SEC's mediums to give informal guidance). Today, this is formally contemplated in 17 C.F.R. § 202.1(d) (2018).

233. Adoption of Section 200.81, Concerning Public Availability of Requests for No-Action and Interpretative Letters and the Responses Thereto by the Commission's Staff, and Amendment of Section 200.80, Securities Act Release No. 5098, [1970-1971 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,921 (Oct. 29, 1970) (announcing a policy that thereafter no-action letters are to be publicly accessible).

form is through its very active no-action letter process where the SEC's staff responds to individual inquiries regarding the staff's interpretation of the federal securities laws. No-action letters are compliance-oriented and customarily reflect only the view of the SEC's staff, with the consequential effect that they are binding only as to the requesting party for the very transaction carefully set forth in the request. Nonetheless, no-action letters are a substantial component of the "lore" of the securities laws including even as guidance in private and public litigation as reflecting policies and practices followed by the staff. Most no-action letters are issued by the Division of Corporation Finance, but other divisions engage in the practice where internal procedures require that the requesting letter is directed to the Chief Counsel within the division having responsibility for that particular area of the securities laws. For example, a request involving mutual funds would be within the Division of Investment Management.

The no-action letter process has changed little over the many decades of its existence.[234] The Chief Counsel assigns the letter to a staff attorney to research the questions raised and to prepare a draft response.[235] The response and supporting memorandum of authorities are reviewed by the attorney's supervisor.[236] The work products are reviewed by several levels within the division. In most cases, the SEC's response is set forth in two or three paragraphs. This process is a highly collaborative effort.[237]

SEC enforcement activities, much like the no-action letter process, are at the staff level, and most parts of the enforcement process are outside the immediate purview of the appointed commissioners. However, most enforcement efforts are collaborative with the staff subject to multiple levels of oversight by different supervisors.[238] Targets for possible investigation come from a variety of sources;[239] the decision to launch an inquiry must be approved by the Associate Director, the Regional Director, or a Unit Chief within the Division of Enforcement.[240] SEC procedures distinguish between informal and formal investigations, with the latter occurring only with the approval of the Director of the

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234. *See* Thomas P. Lemke, *The SEC No-Action Letter Process*, 42 BUS. LAW. 1019 (1986) (providing a close description of the process as well as the three forms of a response: favorable, adverse, no response on the merits); Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921 (1998) (examining critically the no-action letter process and analysis of impact of no-action letters in the courts).

235. *See* Lemke, *supra* note 234, at 1027–28.

236. *See id.* at 1029.

237. *See id.* ("A proposed response that involves a novel or significant issue may be reviewed on several levels within the division or by the Commission itself before the response is issued.").

238. *See generally* U.S. SEC. & EXCH. COMM'N, DIVISION OF ENF'T, ENFORCEMENT MANUAL (2017) [hereinafter SEC ENFORCEMENT MANUAL] (describing in detail the various considerations that underlie the many facets of the enforcement actions by the SEC).

239. *See* COX ET. AL., *supra* note 156, at 828 (noting that sources include whistleblowers, news reports, and periodic reviews of market professionals by the SEC).

240. SEC ENFORCEMENT MANUAL, *supra* note 238, at § 2.3.1 (describing the formalities to open a "matter of inquiry"). Similar approval levels are required to open an "investigation" or even close a matter of inquiry. *Id.* at § 2.3.2.

Division of Enforcement, based on a memorandum prepared by staff and reviewed by supervisors requesting a formal order;[241] the principal effect of a formal as opposed to informal investigation is that, thereafter, with the approval of the Director, the SEC can issue subpoenas to obtain information relevant to the investigation's focus. The commencement of an enforcement action must be authorized by the commissioners;[242] even though this process, as discussed earlier, follows the staff first having obtained the approval of the investigation by the Associate Director or Regional Director, the recommendation to the commissioners is made by the Division of Enforcement after consultation with the Office of Chief Counsel, the Office of the General Counsel, and any other interested division.[243] Most enforcement actions result in settlements, which must be approved by the commissioners. Staff are called on in drafting a settlement agreement to consult with senior managers, the Office of Chief Counsel within the division, and, when appropriate, the Office of General Counsel.[244] Cooperation agreements including deferred prosecution or non-prosecution agreements must be approved by the Director of the Division of Enforcement.[245] These multiple levels of review and approval pose serious challenges for an individual wishing to act in accordance with the rent-seeking hypothesis. Indeed, Director Two was skeptical that staff were able to engage in rent-seeking activities at the SEC as a consequence of revolving door practices because the agency's internal processes were rich with multiple individuals involved and multiple levels of review. There are lots of steps within the process so that people are rarely working on their own. Director Two felt that this made rent-seeking a difficult strategy to pursue.

In addition, the directors of other SEC divisions do a wide variety of other team-oriented activities in their jobs. For example, Director One recalls many internal discussions at the SEC about how to best implement initiatives that would respond to calls for reform that came out of earlier studies. Director One spent a good deal of time with career SEC employees fashioning appropriate responses. Director One also held many meetings with private-sector parties that were interested in making the system better.

Agenda control was a different issue. Director Two acknowledged that in some situations there is a zone of discretion for the director or deputy director. In these situations, Director Two admitted that it can make a difference who is making the decision, but in limited circumstances. Director Two devoted a good deal of time to agenda setting. Directors also spent time in industry outreach efforts as well as internal matters. In outreach efforts, Director Two described the time demands of attending and participating in many programs that brought the director into contact with industry groups and their lawyers. These contacts may potentially have affected the SEC's agenda.

241. *See id.* §§ 2.3.2, 2.3.4.
242. *See id.* § 2.5.1.
243. *See id.* § 2.5.2.
244. *See id.* § 2.5.1.
245. *See id.* § 6.2.1 (the approval can also be by a senior officer designated by the Director).

Director Three devoted a good deal of time to many administrative interfaces, most importantly working with the Chair to establish and implement the Chair's priorities. During Director Three's time at the agency, agency agenda implementation included a substantial involvement of the General Counsel as that office has a broad overview and involvement in all aspects of the SEC operations. Rulemaking particularly provides substantial interaction with the Office of General Counsel. Director Three suggested that directors and deputy directors had some ability to influence practices and policies within their division; that is, directors can exert agenda control, but there were few instances where staff recommendations were changed (although Director Three went on to say that there were initial consultations with staff before they began work on projects). Directors have the power to change recommendations, and are deeply involved in agenda setting, but it is a collegial process overseen by the Chair's office.

Director Three emphasized that working collaboratively within the agency consumed a fair amount of time. As a division head, Director Three reviewed memoranda and proposals on rulemaking, rule interpretation, and the examination of regional offices. Director Three observed that all directors spend a fair amount of time reviewing the work of the staff in their performance of two major tasks of the division: rulemaking and interpretations. Director Three noted that there were few instances where major changes in either rulemaking or interpretations that were supported by the staff were not made. The consensus among the directors we interviewed is that any director depends heavily on recommendations of the staff. The directors interviewed observed that they expended a lot of effort on congressional interactions. This was time consuming for senior staff because of the importance of the legislative process in the workings of the agency.

Deputy Directors were another important managerial player. Director Two remembered that the role of deputy directors and associate directors was to make sure the "trains run on time," that is, to make sure that projects moved along in their areas. Such direct reports also handled the evaluation of individual staffers' work. The SEC has long had a formal process for such reviews and the interviewed directors reported that much of this was carried out by their direct reports. The process is collegial and overseen by the Chair's office.

From the above, we see that the day-to-day regulatory and enforcement activities of the SEC are highly collaborative, with lots of input from all levels and with the engagement of directors, their direct reports, and the staff. At the same time, division heads are the leaders of their respective division and that position accords the director great influence on the division's agenda and direction policy might take that division or the SEC. Although the collaborative culture of the SEC should dampen considerably the angst caused by staff

revolvers, division heads have an important voice in shaping the course the SEC pursues on individual regulatory and enforcement matters. As the data discussed earlier reflect, we now see a dramatic increase in the overall percentage of division heads from the private sector, such that their now-strong presence at the SEC raises fears of cultural capture. Possible antidotes to this existing practice are discussed in the next Part.

VII. MODERATING THE RISK OF COGNITIVE-CULTURAL CAPTURE

The transition from the Carter to the Reagan Administration led to changes at the SEC as John Shad replaced Harold Williams as Chair. As we have seen, both Chairs were in the vanguard of what soon became the new normal in appointing individuals from the private sector to lead key SEC divisions, rather than continuing the half-century practice of elevating career staffers to lead divisions. What separates Williams from Shad is that Williams believed the mission of the SEC could best be advanced by leaders from the private sector who possessed a deep understanding of rapidly evolving changes in capital markets. In contrast, Shad's appointment of Fedders was responsive to pressure to muzzle SEC enforcement that had become an issue in the political campaign just won by Reagan.

The Williams and Shad illustrations reflect how two starkly different objectives can be served when the SEC Chair eschews career staffers and appoints division heads from private practice; indeed, the Williams and Shad illustrations invite us to consider what legal or organizational structure exists or can be introduced to lead to outcomes that advance the missions of the SEC to protect investors and nurture capital markets. Restated, what can be done to prevent this heretofore unexplored dimension of the SEC's revolving door from providing a broad entryway through which the regulated can capture its regulator? In this Part, we consider possible mechanisms to address the risk of capture posed by the growing practice of SEC division heads coming from private practice. Such mechanisms include judicial review of agency actions, placement of agenda setting elsewhere than the division head's office, and buffer provided by those who report directly to the division head.

A. JUDICIAL REVIEW

A natural lawyer-based response to address risks of capture is through judicial review. Courts become entangled in SEC actions. Rules adopted by the SEC can be judicially reviewed on petition by a person aggrieved by the rule and the discretion the SEC exercises to settle an enforcement action brought in the federal court requires the approval of the presiding court. In this respect, consider the ongoing debate whether SEC enforcement action is uniformly lax because too many defendants are able to settle their disputes without admitting fault on their part, and any monetary sum is paid by the entity and not

individuals who were engaged in the transaction causing the alleged violation.[246] In the enforcement realm, whether courts can play a role in addressing weak prosecutions and settlements through judicial review of SEC actions depends on whether courts take the approach employed by the Second Circuit, one of the most recent circuits to consider this question. In *SEC v. Citigroup Global Markets*, the district court rejected a settlement between the SEC and the defendant and set the dispute for trial.[247] Indeed, Judge Rakoff held that the settlement was not adequate because, among other bases, even though serious misconduct was alleged in the complaint and the settlement included a $95 million payment by the corporation (and hence indirectly borne by its shareholders), the defendant

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246. *See, e.g.*, Andrew Ackerman, *SEC's Khuzami Defends "Admit-Nor-Deny" Settlements*, WALL ST. J., (June 9, 2018, 3:55 PM), https://www.wsj.com/articles/SB10001424052970204012004577072462404708198 [https://perma.cc/77H7-TFXQ]. Following Judge Rakoff's decision in *Citigroup*, SEC Enforcement Chief Robert Khuzami argued that "pursuing litigation solely to obtain an admission of guilt [was] unlikely to result in greater penalties." *Id.* According to Khuzami, the SEC has a policy of only settling cases it "'reasonably' expects to win at trial." *Id.* Khuzami noted that companies would refuse to admit guilt in settlements because private litigation would soon follow. *See* Priyah Kaul, *Admit or Deny: A Call for Reform of the SEC's "Neither-Admit-Nor-Deny" Policy*, 48 MICH. J. L. REF. 535, 535 (2015) (arguing that the SEC's "no-admit" policy fails to serve the deterrent function of securities regulation, is too ambiguous, affords too much discretion to the SEC, and does not sufficiently punish wrongdoers, and as a result, the policy reduces agency transparency and accountability—and, ultimately, credibility).

Brandon Garret argues that the corporate entity allows individuals to escape liability because the corporation, which cannot physically receive or serve jail time, takes most of the blame and that even when individuals are charged, the prosecutions are either unsuccessful or result in light sentences. Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1790 (2015). Garrett concludes by discussing three types of reform to enhance individual criminal accountability: (i) enacting new substantive crimes; (ii) making legislative changes, e.g. extending statutes of limitations or tightening sentencing rules; and (iii) using corporate settlements to change the incentives for the firm's employees and officers. *Id.* at 1796.

For a discussion of how the SEC has implemented its new policy of requiring some defendants to admit wrongdoing along with their settlements, see generally Verity Winship & Jennifer K. Robbennolt, *An Empirical Study of Admissions in SEC Settlements*, 60 ARIZ. L. REV. 1 (2018). Winship and Robbennolt observe that the number of settlements including admissions has been low, and that many of such settlements were against individuals rather than entities. *Id.* at 1. They also distinguish between factual admissions and admissions of violations or state of mind, stating that factual admissions are relatively weak but still important in building a public account of the events. *Id.* at 47–48.

Samuel Buell acknowledges that public lawsuits are not brought primarily for compensation, but for their deterrent effects, and he analyzes the deterrent effects of the three aspects of enforcement settlements: liability, admission, and remedy. Samuel W. Buell, *Liability and Admissions of Wrongdoing in Public Enforcement of Law*, 82 U. CIN. L. REV. 505, 506 (2013) (acknowledging that public lawsuits are not brought primarily for compensation but for their deterrent effects). Buell further argues that admissions should be included in settlements, as their exclusion reduces the public benefits of government enforcement. *Id.*

Lyndon Groff notes that "no-admit" consent judgments are not necessarily effective in deterring future misconduct, even though they do reduce the costs and uncertainty of litigation. Lyndon Groff, *Is Too Big to Fail Too Big to Confess?: Scrutinizing the SEC's "No Admit" Consent Judgment Proposals*, 54 B.C. L. REV. 1727, 1728 (2013). He expresses concern over the possibility that the settlements could conceal the full truth. *Id.* at 1727. Nevertheless, he argues that the SEC, not the courts, is in the best position to assess whether settlements in fact promote the public interest and to implement suitable changes. *Id.*

247. 827 F. Supp. 2d 328, 330 (S.D.N.Y. 2011).

neither admitted nor denied wrongdoing and the settlement did not identify any culpable company employee.[248] The Second Circuit vacated the order, holding that the trial court should not assess the *adequacy* of an agency's settlement.[249] Judge Rakoff had questioned the size of the fine to be imposed relative to other fines the SEC had recently extracted from other investment banks and whether the fine was too slight to provide a meaningful deterrent. Such comparative questions under the Second Circuit's formulation of the review standard went beyond the range of permissible inputs. Indeed, the court set forth very limited areas for review of a consent decree:

> A court evaluating a proposed S.E.C. consent decree for fairness and reasonableness should, at a minimum, assess (1) the basic legality of the decree; (2) whether the terms of the decree, including its enforcement mechanism, are clear; (3) whether the consent decree reflects a resolution of the actual claims in the complaint; and (4) whether the consent decree is tainted by improper collusion or corruption of some kind. . . . The primary focus of the inquiry . . . should be on ensuring the consent decree is procedurally proper, using objective measures similar to the factors set out above, taking care not to infringe on the S.E.C.'s discretionary authority to settle on a particular set of terms.[250]

The court held that the SEC is entitled to *Chevron* deference on whether the settlement it struck is in the public interest.[251] Moreover, the court held that the trial court abused its discretion by withholding approval solely on the ground it disagreed with how the SEC exercised its judgment but made no finding that the public interest was disserved by the settlement.[252]

A conflicting approach involving the SEC was taken thirty years earlier by the Ninth Circuit in *SEC v. Randolph*,[253] on facts similar to *Citigroup Global*. In *Randolph*, the district judge had rejected the settlement, reasoning the sanction was not in the public interest because it did not require the defendant to pay prejudgment interest on gains derived through its violation.[254] The Ninth Circuit reversed the district court, holding that the district court should, upon being persuaded that the remedy under the facts is adequate, defer to the SEC regarding whether the sanction imposed was in the public interest.[255] Thus, in the Ninth Circuit, adequacy *was* a central consideration when approving enforcement settlements. Its holding on this issue mirrors the position of other circuits in assessing settlements supported by regulatory agencies.[256] Even though *Citigroup*

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248. *Id.*

249. SEC v. Citigroup Glob. Mkts., 752 F.3d 285, 294 (2d. Cir. 2014).

250. *Id.* at 294–95 (internal citations omitted).

251. *Id.* at 296.

252. *Id.* at 297.

253. 736 F.2d 525, 529 (9th Cir. 1984).

254. *Id.* at 528.

255. *Id.* at 530.

256. For a wide-ranging—but penetrating—critique of *Citigroup Global Markets*, see generally Theodore D. Edwards, *Of Truth, Pragmatism, and Sour Grapes: The Second Circuit's Decision in* SEC

Global and *Randolph* each reversed their respective district courts and upheld the settlement supported by the SEC, a wide gulf separates their approaches.

We do not believe the quest for the public interest, one of the criteria accepted even by the Second Circuit, should be divorced from considering the settlement's terms in light of such factors as the strength of the government's case and the harm to the public interest. Simply stated, an adequate settlement is consistent with the public interest and an inadequate settlement is not. With the predominance of settlements in SEC enforcement actions, a robust review standard consistent with *Randolf* is essential to addressing any fears of industry bias. Moreover, *Chevron* deference is a doctrine founded in the context of administrative rulemaking where the agency's expertise has a stronger foundation, especially in arcane technical areas,[257] so that deference is less applicable in the litigation arena where the presiding court is similarly disabled.

At the same time, the safeguard provided by judicial review to curb agency capture in SEC enforcement actions is not present when such enforcement occurs not in the courts but within the SEC's administrative procedures. The SEC has discretion to pursue enforcement actions within its internal administrative process for which there is no similar judicial review of settlements reached with the respondent in such an administrative procedure.[258] The antidote for any industry bias within the administrative enforcement arena would thus need to rely on other strategies advanced here.

Another dimension of SEC discretion in enforcement is the granting of waivers of provisions that disqualify individuals from certain regulated activities if they are the subject of an SEC order. These so-called "bad boy" provisions both protect investors from someone who has been successfully prosecuted for violating securities laws and add immensely to the deterrence of violating securities laws. Bad boy provisions make unavailable important regulatory dispensations to individuals or entities that are subject to an order by judgement or settlement arising from a violation of the securities laws.[259] However, the SEC has the authority to waive bad boy consequences and conditions, by granting a waiver on there being

v. Citigroup Global Markets, 65 DUKE L. J. 1241 (2016) (pointing out that, in addition to being out of step with review standards in other circuits, the Second Circuit ignored other important issues such as serious Article III concerns that arise if the court is expected to defer to the settlement to exercise its authority to grant an order).

257. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (establishing that deference be given to administrative agencies with respect to their regulatory actions).

258. *See generally* Danne L. Johnson, *SEC Settlements: Agency Self-Interest or Public Interest*, 12 FORDHAM J. CORP. & FIN. L. 727, 645 (2007) (reviewing administrative enforcement processes available to the SEC in which there is no judicial approval of settlements); *see also* David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 102 (2016). Data support the view that the SEC pursues before its administrative tribunal weaker cases that have a lower enforcement priority. *See* Steven Choi & Adam Pritchard, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment*, 34 YALE J. ON REG. 1 (2017).

259. For example, the SEC accords great freedom with an issuer's registration of publicly offered securities if the issuer is a "well-known seasoned issuer." *See, e.g.*, FORM S-3: REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/about/forms/forms-3.pdf. However, the regulatory dispensations are not available if the issuer is an

"good cause" for doing so.[260] One study of the 201 waivers granted during nearly a twelve-year period found that eighty-two were granted to large financial firms.[261] The predominance of waivers to such firms likely reflects that large defendant organizations operate through multiple divisions so that violations committed in one division—for example—trading of securities, are unlikely to suggest any risk of misconduct in another division—for instance, underwriting. Nonetheless, that large organizations appear to enjoy more influence than individual actors or small firms continue to engender disquiet, such that concerns for capture lurk in the shadows of the predominance of waivers being garnered by large financial institutions.[262] No court has yet had the opportunity to review any such waivers; however, if such a review were to occur it would appear that the highly deferential position taken in *Citigroup Global Markets* would be applicable so that rejecting a waiver would be unlikely.

Even though the SEC enjoys deference when its rules are challenged in the courts, in recent years there have been several instances in which its rulemaking was struck down because of the agency's failure to consider a rule's impact on "efficiency, competition, and capital formation."[263] Most prominent among the SEC's recent reversals is that suffered in *Business Roundtable v. SEC*, where the court held the SEC acted inappropriately by not fully considering the costs and benefits of the proposed rule.[264] Although such case holdings pose serious headwinds for the SEC when engaged in rulemaking, the winds do not fill the sails that will lead the SEC to adopt a more aggressive regulatory position. With one exception, discussed below, there is simply no SEC rulemaking jurisprudence where the agency has been reversed for a rule that has not gone far enough, or for that matter, further than it did. That is, with a single exception, successful challenges to SEC rulemaking have been by those targeted by the challenged rule who successfully argued that the SEC did not reasonably develop its case for increasing the industry's regulatory burden. The lone exception to this outcome followed Congress's enactment of the National Environmental Policy Act of 1969 (NEPA),[265] mandating that every federal agency "to the fullest extent possible" interpret and administer federal laws "in accordance with the policies" set

"ineligible issuer" because it is, for example, subject in the prior three years to an SEC enforcement order. *See* 17 C.F.R. § 230.405 (2018).

260. *See, e.g.*, Raymond James Fin., Inc., [2011 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 76,743, 2011 WL 12888019 (July 1, 2011) (waiver granted to permit respondent to preserve status as a well-known seasoned issuer).

261. Velikonja, *supra* note 120, at 1116.

262. *See* Gadinis, *supra* note 108, at 725 (discussing apparent bias favoring larger broker-dealers in enforcement of the securities laws). The SEC discloses only grants of waivers and not requests for waivers; thus, it is not possible to assess more fully any disparity in treatment in granting waivers between individual violators and large financial institutions. Velikonja, *supra* note 120, at 1136.

263. *See, e.g.*, Am. Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166, 177 (D.C. Cir. 2010); Chamber of Commerce v. SEC, 412 F.3d 133, 144 (D.C. Cir. 2005).

264. 647 F.3d 1144, 1153–55 (D.C. Cir. 2011).

265. Pub. L. No. 91-190, §§ 102, 205, 83 Stat. 852, 853, 855 (1970) (NEPA's most significant requirement is that all executive federal agencies prepare environmental assessments and environmental impact statements).

forth in NEPA. Believing that the SEC's rulemaking in response to NEPA was weak, the Natural Resources Defense Council sought review of the SEC's action. In *Natural Resources Defense Council, Inc. v. SEC*,[266] the court faulted the SEC for failing to develop an adequate record supporting the modest regulatory changes it adopted in response to NEPA and ordered the SEC to conduct further rulemaking. Thereafter, the SEC developed an extensive record, but its position remained unchanged: it reasoned that NEPA did not change the historical focus of disclosure of economically significant information.[267] No further litigation ensued on the possible impact of NEPA on the mission of the SEC.

Review standards for SEC regulations that have developed focus on whether the position taken in a given rule is justified. Thus, we may conclude that regulatory asymmetry exists within the SEC rulemaking orbit. The regulated have enjoyed success by complaining that the SEC insufficiently considered the burdens of its rule on the regulated, but there is, at best, too thin a record for the intended beneficiaries of a rule to meet with success in arguing the SEC should have gone further. And even if investors were successful in attacking a rule for not going far enough, the "victory" may be hollow. The SEC may decide that no rule on that topic will be forthcoming, as it did after the *Business Roundtable* decision in which the industry successfully attacked a rule providing shareholders with modest access to the process of nominating directors for election to the board of public companies—a total win for the regulated.[268]

B. MOVE AGENDA SETTING OUTSIDE THE SEC

As seen earlier, division heads can derive a good deal of their influence by their role in setting the agenda for their division as well as the overall agenda of the Commission. To the extent a division's agenda is controlled or influenced by others through collaboration, any harmful bias on the part of a division head is weakened. Thus, one strategy that could ameliorate the risks of capture through directors' revolving door practices is to locate agenda setting outside the Commission.[269] This is not a radical solution, and regularly happens with Congress's amendments to the securities laws that necessarily call for agency rulemaking to implement Congress's vision. Recent examples are the multiple rulemaking initiatives Congress set in motion with the enactment of the Sarbanes–Oxley Act, the Dodd–Frank Act, and the JOBS Act. Each of these

266. 389 F. Supp. 689, 701 (D.D.C. 1974).

267. Environmental and Social Disclosure, 40 Fed. Reg. 51,656 (Nov. 6, 1975) (to be codified at 17 C.F.R. pts. 239–40, 249).

268. *See* 647 F.3d at 1146–48.

269. Agenda setting is an important source of power in the formulation of public policy. Accordingly, it has been much studied and discussed in the context of the legislative process. *See generally* David W. Rohde, Edward H. Stiglitz & Barry R. Weingast, Dynamic Theory of Congressional Organization (Feb. 17, 2013) (unpublished manuscript), https://web.stanford.edu/group/mcnollgast/cgi-bin/wordpress/wp-content/uploads/2013/10/rsw_dynamics_1302171.pdf (providing an extensive review of the literature addressing how Congress allocates positive and negative legislative powers). How agenda setting occurs within agencies, however, is an understudied topic.

legislative actions introduced dramatic changes to the federal securities laws that, in many instances, required the SEC to engage in extensive rulemaking to implement Congress's vision. But, in a few isolated instances, the SEC's response sometimes reflects the time-worn expression, "You can lead a horse to water, but you can't make it drink." For example, Congress enacted section 404(b) of the Sarbanes–Oxley Act to require the auditors of *all* SEC reporting companies to attest to management's assessment of internal controls. However, for several years following SOX's passage, in response to industry pressure, the SEC repeatedly extended its initial temporary exemption from the provision for small public companies, essentially excusing sixty percent of all reporting companies from what Congress had mandated.[270] With the exemption well ingrained, the Congress made it permanent in 2010.[271] In another example of SEC lethargy, Dodd–Frank section 971G amended section 14 of the Securities Exchange Act to authorize the SEC to adopt rules providing mechanism whereby shareholders could nominate individuals to stand for election in public companies. The SEC quickly pounced on its new authority, but did so with a rule so limited in its possible application as to render it nearly unusable. Despite the weak threat it posed to public companies' historical control of the nominating process the SEC's rule was rejected by the District of Columbia Court of Appeals as being arbitrary and capricious for failing to fully consider the rule's possible burdens.[272] Even though the circuit court's decision was likely vulnerable on many bases,[273] the SEC never sought support from the Solicitor General for a review before the Supreme Court. Moreover, the SEC never again returned to exercising the express statutory authority to provide a means for shareholders of public companies to nominate directors. These two examples reflect that Congress can indeed lead, but remains far short of being able to command the agency to act.

Congressional oversight can be an effective tool to influence agency action. In broad terms, congressional oversight occurs in response to scandals or crises ("fire alarm" oversight) or to prevent problems before they occur ("police patrol"

270. COX ET AL., *supra* note 156, at 598–99.

271. *See* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 989G, 124 Stat. 1376, 1948 (2010) (codified at 15 U.S.C. § 7262(c) (2012)) (adding section 404(c) to the Sarbanes–Oxley Act); *see also* Internal Control Over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers, Securities Act Release No. 9142, Exchange Act Release No. 62,914, 75 Fed. Reg. 57,385, 57,386 (Sept. 21, 2010) (codified at 17 C.F.R. pts. 210, 229, 249) (formalizing the dispensation for auditor attestation for small issuers).

272. *See* Business Roundtable v. SEC, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011) (reasoning the SEC "inconsistently and opportunistically framed the costs and benefits" in adopting Rule 14a-11 to authorize shareholders meeting certain requirements to nominate a small portion of the board of directors).

273. *See* James D. Cox & Benjamin J.C. Baucom, *The Emperor Has No Clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority*, 90 TEX. L. REV. 1811 (2012) (reviewing judicial and legislative authorities to conclude that SEC's rulemaking authority is not conditioned on formal cost–benefit analysis and setting forth strategies the SEC can pursue to nonetheless reduce reversal of rulemaking in the wake of *Business Roundtable*).

oversight).[274] Congressional involvement can occur through a variety of media, ranging from formal hearings to less formal contacts such as discussion between committee members or members of their staff and agency personnel. Media also include imposing reporting requirements on the agency, or invoking the investigative efforts of congressional support agencies such as the Government Accountability Office.

Congressional committees, however, are themselves subject to constraints and forces that impact congressional oversight.[275] One obvious concern is the effect that interest groups may have on a congressional committee or its members' interest in an issue. A further constraint, at least on formal hearings, is that because committee memberships reflect the interest of a committee member in that committee's subject, each committee's membership is hardly a microcosm of interest across Congress. Such divergence of interests or preferences between members of a committee and Congress naturally leads committees to act strategically when considering what issues to engage openly, and thus limits the potential areas for hearings.[276] Nonetheless, the force of hearings is observable on agency conduct and informal interactions between committee members or their staffs, and can be expected to also have an impact on the agency.[277] But the overarching concern is that risks of industry capture may appear on two fronts—at the agency and within Congress—so that the efficacy of congressional oversight would thus be greatly compromised.[278]

Dodd–Frank introduced three initiatives that can be seen as Congress's concern with industry capturing the SEC: the creation of an Investor Advocacy Committee, the Office of the Investor Advocate, and an ombudsman who is

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274. *See* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

275. *See* Kagan, *supra* note 205, at 2347 (arguing that collective action problems within Congress, not to mention the necessity of presidential agreement in many instances, necessarily makes meaningful congressional oversight uncertain to occur). The number of congressional hearings has declined over the past few decades. *See* Norman J. Ornstein & Thomas E. Mann, *When Congress Checks Out*, BROOKINGS (Nov. 1, 2006), https:/www.brookings.edu/opinions/when-congress-checks-out [https://perma.cc/7DAC-PJF8]; *see also* Douglas Kriner, *Can Enhanced Oversight Repair "The Broken Branch"?*, 89 B. U. L. REV. 765, 774–75 (2009) (reporting that congressional oversight had, as of the writing of the article, "reached its nadir during the first six years of the George W. Bush Administration").

276. Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. 1187, 1203–07 (2018).

277. For example, Professor Feinstein examined 14,431 agency infractions, such as instances of adverse reports of inspector generals. *Id.* at 1191. He found that a recurrence of the infraction was 18.5% less likely to occur where there was a congressional hearing within one year of the observed infraction than in a control group where no hearing occurred. *Id.* at 1235–36. The data is consistent with the conclusion that oversight matters. *Id.* at 1225.

278. *See* Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1701–02 (2009) (examining the process by which interest groups capture congressional committees); Seymour Scher, *Conditions for Legislative Control*, 25 J. POL. 526, 533–34 (1963) (noting that congressional review is weakened when the agency and the involved members of Congress share a mutually rewarding relationship); *cf.* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 582–83 (1994) ("There is no such thing in Washington as a politically 'independent' agency." (footnote omitted)).

appointed by the Investor Advocate. Each of these steps can be seen as reflecting the belief that institutionalizing advocacy of a particular point of view within an agency can address to some extent, forces toward industry capture.[279] The legislation calls for the Investor Advocate to annually set forth objectives sought by the office and to report on actions taken during the year. Each of the reports are sent directly to Congress so that neither is subject to review by the SEC's Chair or her designate. A review of the Investor Advocate's annual reports reflect that, despite having a relatively modest-sized staff, the Office of the Investor Advocate has taken serious positions in a variety of rulemaking and policy discussions in the years since its creation. The ombudsman also reports directly to Congress and has the broad mandate to make recommendations on behalf of an individual investor. These developments may well reflect not only fears of industry capture, but fears that Congress placed its "thumb on the scale" for investors in light of the tensions within the SEC's charge when rulemaking to "consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."[280] That is, "efficiency, competition, and capital formation," at least in combination, can tug in a direction different from that pointed toward investor protection.[281] Nonetheless, an in-house advocate championing specifically for investor interests can be seen as broadening the inputs surrounding regulatory and enforcement approaches before a division of the SEC. We believe this can be an important force to moderate perspectives that may be held by division heads whose experiences were previously honed by years of representing those regulated by the SEC.

C. SUPPORTING REVOLVER DIRECTORS WITH INTERNAL DEPUTY DIRECTORS

A further moderating force is surrounding division heads when possible with career staffers. We observe that revolving directors, at least partially, insulate the SEC from any cultural bias arising from their prior private-sector activities by regularly surrounding themselves with direct reports—deputy, associate, and assistant directors of their division—that have *significant* SEC tenures. We observed this practice by identifying who the direct reports were for each of the revolvers in our study and then matching for each such report the years of

279. *See, e.g.*, Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 62 (2010); *see also* Daniel Schwarcz, *Preventing Capture Through Consumer Empowerment Programs: Some Evidence from Insurance Regulation*, *in* PREVENTING REGULATORY CAPTURE, *supra* note 81, at 365, 365–66.

280. Securities Act of 1933 § 2(b), 15 U.S.C. § 77b(b) (2012); Securities Exchange Act of 1934 § 3(f), 15 U.S.C. §78(c)(f) (2012).

281. For example, the SEC Small Business Advocate Act of 2016 established the Office of the Advocate for Small Business Capital Formation as well as an advisory committee focused on facilitating capital formation by small businesses. SEC Small Business Advocate Act of 2016, Pub. L. 114–284, 130 Stat. 1447. One focus of both the Advocate and the committee is advocating against application of regulations that are deemed overly burdensome for small businesses.

continuous service with the SEC prior to becoming such a report.[282] Recall that Ed Greene was the first revolver for the Division of Corporation Finance; his five direct reports averaged nine years of experience at the SEC, with two having an average tenure at the SEC of over twenty years. The direct reports of the next revolver, David Martin, had each served in the SEC more than fourteen years before being appointed to their office by Martin. And, most recently, Keith Higgins's direct reports had been at the SEC for an average of 20.5 years. The tenure of a revolver's direct reports is shorter in the Division of Enforcement; for example, for a period commensurate with that of Higgin's directorship in Corporation Finance the average tenure of direct reports is twelve years. We surmise that the shorter tenure of direct reports in Enforcement is due to enforcement staff having more generalized skills, coupled with the greater private-sector demand for those skills and allied experiences.

To elaborate, the work of the SEC is highly collaborative with the junior staff's work involving multiple levels of review by various managers. We earlier observed that opportunities for harmful rent-seeking by staff members are likely reduced by the fact that so much of the output of the SEC is formulated in collaborative opportunities. We also believe that a revolving director's engagement with the staff, and particularly those at the senior level (a senior associate, deputy, or assistant director) who have been with the SEC for an extended period of time to merit promotion to a supervisory position provides a likely "agency" perspective on issues within the division.[283] Certainly we believe that where there are multiple such reports to a revolving director, this can be expected to assure a fulsome discussion of regulatory or enforcement choices and hence a governor on any possible industry perspective the revolving director may possess. Indeed, we

282. To identify direct reports, we relied on a variety of sources, including the annual reports made each year by the SEC. We focused on who was a direct report to a revolver the year following the revolver's assumption of a directorship. Thus, if a revolver assumed her office in 2001, we identified who reported to her in 2002. The one-year lag reflects our belief that who is a direct report a year after a revolver assumes a position is more likely to reflect the director's free choice than who that director might have inherited upon her appointment.

We determined the SEC tenure of each direct report using two sources. Our first source is the comprehensive government database—Buzzfeed—which lists each year that a government employee, at an agency such as the SEC, was employed. Buzzfeed is an electronic dataset of all full-time government employees from 1974–2016. This data is derived from the Office of Personnel Management (U.S. Federal Government) CPDF-EHRI personnel database of all federal employees and was provided by Professor John de Figueiredo of Duke Law School. The data is described more fully in Alex Bolton et al., *Elections, Ideology, and Turnover in the U.S. Federal Government* 50 & t.B12 (Nat'l Bureau of Econ. Research, Working Paper No. 22,932, 2019) (on file with authors). We gathered information about director reports' tenure by searching within the Buzzfeed subset for the SEC using the direct report's name and year of beginning work as a direct report per the heuristic used in this study described within section V.A. That database, however, did have some null responses. Therefore, we also turned to alternative sources, including SEC news releases, to provide the missing information. We set aside from our determination of averages any direct report we were unable to determine reliably their length of continuous service at the SEC.

283. *See* Michael A. Livermore & Richard Revesz, *Can Executive Review Help Prevent Capture?*, *in* PREVENTING REGULATORY CAPTURE, *supra* note 81, at 420 (observing that regular contact with staff can influence positions held by agency heads).

believe that the practice of combining revolving directors with SEC-seasoned direct reports is likely optimal. This combination brings the deep knowledge and understanding of contemporary challenges and practices in securities markets possessed by the revolver with career personnel whose perspective is shaped by their years of being a government regulator.

CONCLUSION

In this Article, we have shown that prior studies of the SEC and revolving staff, especially those focusing on its enforcement activities, provide an incomplete, partial view of the revolving door phenomenon. We have demonstrated that it is unlikely that many of the alleged rent-seeking behaviors that are the focus of those prior studies actually occur, at least in part, because of the collaborative nature of many of the activities that take place at the SEC. Multiple layers of review and numerous exchanges among SEC personnel are likely to weed out rent-seeking actions by rogue actors.

We nonetheless raise what we believe is a far greater concern with the revolving door: its application to SEC division heads. Ours is the first study of how the practice of appointing division heads has evolved over the past few decades. We identify multiple forces that have combined to make it so that today division heads are regularly appointed from the private sector, specifically from those who counsel the regulated. We believe we are correct in being concerned about the potential for agenda control by division directors and the SEC's general counsel, and the existence of a cultural bias that arises out of these individuals' exposure to corporate clients. These top managers frequently determine what issues are considered and what issues are not, raising the likelihood that they may be subject to a cultural bias regarding the appropriate directions to be taken by the SEC. Although we see this as an important area for further research, we also note that the problem may be mitigated by the current practice, employed by many division directors, of recruiting deputy directors with many years of SEC staff experience as their principal lieutenants.

Nonetheless, we are cautiously optimistic that the new normal in making division heads appointments is the best approach. Our reasons for this belief mirror the wisdom of a key contribution of the SEC Special Study, discussed earlier, that effective regulation calls for the leadership of the SEC to have a deep and acute understanding of current developments in world capital markets. This is even more important today than it was in the era when the Special Study was having its impact on the SEC's agenda; today's capital markets are more fragmented, financial products are more diverse, and financial practices and developments are changing more rapidly, with each of these happening with less transparency because of the tremendous growth in private markets for trading and capital formation. To be sure, the SEC has a dedicated and knowledgeable staff, but the best knowledge is, as is frequently stated, "on the street." Moreover, our study yields no measurable evidence that cultural bias has placed a heavy industry thumb on the scale.

The unease we have with the regulated companies' former counselors being at the helms of the SEC's key divisions is salved by our data presented earlier that division heads are surrounded by not years, but now decades, of collective regulatory experience in their direct reports. This factor is especially important within the collegial collaborative culture that pervades the SEC's work. Moreover, we are heartened by the dialogue within the SEC that flows from a vibrant, well-staffed Office of the Investor Advocate, discussed earlier. Our study supports the office's existence and hopefully points a way forward for the Investor Advocate to raise alternative regulatory and enforcement approaches where needed. Similarly, Congress's important watchdog function, we hope, can also serve as an important check on cultural bias, especially in agenda setting within the agency. Finally, in combination we have personally known a high proportion of the division heads since the mid-1980s. Neither of us is identified with the regulated, and we like to think of ourselves as consistent spokesmen for the public interest that surrounds securities regulations issues. From this perspective, we do believe new directors take on government service because they are similarly spirited. Nonetheless, they, like we, should have a high consciousness that from whence they came may beget bias in their regulatory agenda which may not be congruent with the public interest.

APPENDIX I: HISTORICAL DATA ON SEC DIRECTOR AND GENERAL COUNSEL APPOINTMENTS OVER TIME

(Revolver Appointments in Italics)[284]

A. GENERAL COUNSEL

SEC General Counsel		
Name	**Appointed**	**Posts Before Appointment**
	1934–1954	
John J. Burns	1934	Associate Judge – Massachusetts Superior Court
Allen E. Throop	1936	Assistant General Counsel – SEC
Chester T. Lane	1938	Assistant General Counsel – SEC
Roger S. Foster	1948	Solicitor – SEC
William H. Timbers	1953	Partner – Cummings & Lockwood LLC
	1955–1975	
Thomas G. Meeker	1956	*Insufficient Information Available*
Walter P. North	1960	Associate General Counsel – SEC
Peter A. Dammann	1961	Private Practice in Chicago
Philip A. Loomis, Jr.	1963	Director of Trading and Exchanges – SEC
George (G.) Bradford Cook	1971	Partner – Winston & Strawn LLP
Lawrence Nerheim	1973	Partner – Cant, Taylor, Haverstock, Beardsley & Gray
Harvey Pitt	1975	Executive Assistant to the Chair – SEC; Chief Counsel of Division of Market Regulation – SEC

284. We compiled Appendix I according to the methodology outlined in section V.A. of this Article.

SEC General Counsel		
Name	**Appointed**	**Posts Before Appointment**
	1976–1996	
Ralph Ferrera	1978	Executive Assistant to the Chair – SEC
Edward F. Greene	1981	Director of Corporation Finance – SEC
Daniel L. Goelzer	1983	Executive Assistant to the Chair – SEC
James R. Doty	1990	Partner – Baker Botts LLP
Simon Lorne	1993	Partner – Munger, Tolles & Olson LLP
Richard Walker	1996	Regional Director of the Northeast Regional Office – SEC
	1997–2017	
Harvey Goldschmid	1998	Professor – Columbia Law School
David M. Becker	2000	Partner – Wilmer Cutler Pickering Hale & Door LLP Deputy General Counsel – SEC
Giovanni Prezioso	2002	Partner – Cleary Gottlieb Steen & Hamilton LLP
Brian Cartwright	2006	Partner – Latham Watkins LLP
David M. Becker	2009	Partner – Cleary Gottlieb Steen & Hamilton LLP
Mark D. Cahn	2011	Deputy General Counsel – SEC; Partner – Wilmer Cutler Pickering Hale & Door LLP
Anne K. Small	2013	Special Assistant to the President & Associate Counsel to the President – White House Counsel's Office; Deputy General Counsel for Litigation and Adjudication – SEC
Robert Sebbins	2017	Partner – Willkie Farr & Gallagher LLP

B. SEC DIVISION HEADS (CORPORATION FINANCE)

Director of Corporation Finance[285]		
Name	**Appointed**	**Posts Before Appointment**
	1934–1954	
Baldwin B. Bane	1934	Executive Administrator of the Examination Division – SEC
Byron Woodside	1952	Assistant Deputy Administrator for Resources Expansion – National Securities Resources Board & Defense Production Administration; Member – Army Decartelization Commission, Japan
	1955–1975	
Manuel Cohen	1960	Chief Counsel of Corporation Finance – SEC
Edmund Worthy	1962	Assistant Director of Administrative Proceedings, Investigations and Branch of Small Issues, Division of Corporation Finance – SEC
Charles Shreve	1969	Chief Counsel of Corporation Finanace – SEC
Alan Levenson	1970	A mutual fund in California; Attorney, Branch of Administrative Proceedings and Investigation, Division of Corporation Finance – SEC
	1976–1996	
Richard Rowe	1976	Head of Administrative Proceedings and Investigation, Division of Corporation Finance – SEC
Edward F. Greene	1979	Deputy Director of Corporation Finance – SEC; Partner – Willkie Farr & Gallagher LLP
Lee B. Spencer Jr.	1982	Deputy Director of Corporate Finance – SEC; Associate Director of Investment Management – SEC
John J. Huber	1984	Deputy Director of Corporation Finance – SEC

285. Until 1942, this division was called the Registration Division. *See Records of the Securities and Exchange Commission [SEC]*, NAT'L ARCHIVES, https://www.archives.gov/research/guide-fed-records/groups/266.html [https://perma.cc/4EPR-YQGD] (last visited Jan. 10, 2019).

Director of Corporation Finance[285]		
Name	**Appointed**	**Posts Before Appointment**
Linda Quinn	1986	Executive Assistant to the Chair – SEC; Associate Director of Corporation Finance – SEC
Brian Lane	1996	Legal Counsel to SEC Commissioner & SEC Chair – SEC
	1997–2017	
David Martin	1999	Partner – Hogan & Hartson LLP
Alan Beller	2002	Partner – Cleary Gottlieb Steen & Hamilton LLP
John W. White	2006	Partner – Cravath Swaine Moore LLP
Meredith Cross	2009	Partner – Wilmer Cutler Pickering Hale and Dorr LLP
Keith Higgins	2013	Partner – Ropes & Gray LLP
William H. Hinman	2017	Partner – Simpson Thacher & Bartlett LLP

C. SEC DIVISION HEADS (TRADING AND MARKETS)

Director of Trading and Markets[286]		
Name	**Appointed**	**Posts Before Appointment**
	1934–1954	
David Saperstein	1934	Assistant Counsel – Senate Committee on Banking & Currency
Ganson Purcell	1937	Assistant Director of Trading and Markets – SEC
James Treanor	1941	Assistant Director of Trading and Markets – SEC
Edward Cashion	1948	Chief Counsel of Corporation Finance – SEC
Anthon H. Lund	1950	Associate Director of Trading and Markets – SEC
Harold Patterson	1954	Partner – Auchincloss, Parker and Redpath
	1955–1975	
Philip A. Loomis, Jr.	1955	Associate Director of Trading and Exchanges – SEC
Ralph S. Saul	1963	Associate Director of Trading and Markets – SEC
Irving Pollack	1965	Associate Director of Trading and Markets – SEC; Staff Attorney, Office of the General Counse – SEC
Lee Pickard	1973	Special Counsel to the Chair – SEC; Associate – Nixon, Mudge, Rose, Guthrie, Alexander, & Mitchel; Associate – Seward & Kissel LLP

286. *See About the Division of Trading and Markets*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/tm/Article/mrabout.html [https://perma.cc/VPR8-TV6B] (last visited Jan. 10, 2019). This Division has also been called "Trading and Exchange," "Trading and Exchanges," and "Market Regulation."

Director of Trading and Markets[286]		
Name	**Appointed**	**Posts Before Appointment**
	1976–1996	
Andrew Klein	1977	Special Counsel of Market Regulation – SEC; Small security law firm
Douglas Scarff	1979	Associate Director of Market Regulation – SEC; Assistant Director of Market Structure and Trading Practices – SEC
Richard Ketchum	1984	Associate Director of Market Structure – SEC
William H. Heyman	1991	Managing Director & Head of Arbitrage Department – Smith Barney (now part of Morgan Stanley Wealth Management)
Brandon Becker	1993	Deputy Director of Market Regulation – SEC
Richard Lindsey	1996	Chief Economist – SEC; Assistant Professor of Finance – Yale School of Management
	1997–2017	
Annette L. Nazareth	1999	Senior Counsel to Chair & Interim Director of Investment Management – SEC; Managing Director– Smith Barney (now part of Morgan Stanley Wealth Management)
Eric Sirri	2006	Visiting Scholar – Harvard Law School; Associate Professor – Babson College
Robert Cook	2009	Partner – Cleary Gottlieb Steen & Hamilton LLP
Stephen Luparello	2014	Partner – Wilmer Cutler Pickering Hale & Dorr LLP; Vice Chair – FINRA
Brett Redfearn	2017	Global Head of Market Structure – J.P. Morgan; Global Head of Equity Market Structure Strategy – J.P. Morgan; Americas Head of Market Structure Strategy – J.P. Morgan

D. SEC DIVISION HEADS (CORPORATE REGULATION)

Director of Corporate Regulation[287]		
Name	**Appointed**	**Posts Before Appointment**
Robert McDowell	1952	*Insufficient Information Available*
	1955–1975	
Ray Garrett, Jr.	1956	Associate Director of Corporate Regulation – SEC; Partner – Gardner, Carton, Douglas, Roemer & Chilgren
Joseph C. Woodle	1957	Associate Director of Corporate Regulation – SEC; Lecturer – University of California, Berkeley, School of Law; Partner – Nields & Woodle
Alan F. Conwill	1961	General Counsel – SEC; Partner – Willkie Farr & Gallagher LLP
Solomon Freedman	1964	Associate Director of Corporate Regulation – SEC
Aaron Levy	1972	Associate Director of Corporate Regulation – SEC

287. This division existed from 1952 to 1972. *See Securities and Exchange Commission Division of Corporate Regulation, Division Directors*, SEC. & EXCH. COMM'N HIST. SOC'Y, http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1930/1936_1983_SEC_Div_CorpR_DD.pdf (last visited Feb. 24, 2019).

E. SEC DIVISION HEADS (INVESTMENT MANAGEMENT)

Investment Management[288]		
Name	**Appointed**	**Posts Before Appointment**
Allan Mostoff	1972	Special Counsel of Corporate Regulation – SEC
	1976–1996	
Anne Jones	1976	Associate Director of Investment Management – SEC
Sydney Mendelsohn	1978	Associate Director of Investment Management – SEC; Assistant Director of Investment Management – SEC
Joel Goldberg	1980	Associate Director of Investment Management – SEC
Kathryn McGrath	1983	Counsel – Gardner, Carton & Douglas LLP; Associate Director of Market Regulation – SEC
Marianne K. Smythe	1990	Associate Director of Investment Management – SEC; Executive Assistant to the Chair – SEC
Barry Barbash	1993	Partner – Willkie Farr & Gallagher; Staff Attorney of Investment Management – SEC; Staff Attorney, Office of the Solicitor – Department of Labor
	1997–2017	
Paul Roye	1998	Partner – Dechert LLP; Staff Attorney of Investment Management – SEC
Andrew Donohue	2006	Global General Counsel – Merrill Lynch Investment Managers; Executive Vice President and General Counsel – Oppenheimer-Funds Inc.
Eileen Rominger	2011	Partner and Chief Investment Officer – Goldman Sachs Asset Management; Managing Director and Member of the Executive Committee – Oppenheimer Capital
Norm Champ	2012	Deputy Director, Office of Compliance Inspections and Examinations – SEC
David Grim	2015	Deputy Director of Investment Management – SEC; Assistant Chief Counsel – SEC

288. This was a part of the Division of Corporate Regulation until 1972. *See Panelist Bios for 75th Anniversary of the 1940 Acts*, U.S. SEC. & EXCH. COMM'N (Sept. 28, 2015), https://www.sec.gov/spotlight/75/75th-anniversary-iac-ica-bios.shtml [https://perma.cc/PX63-WTKR]. This was called the Division of Investment Management Regulation until 1975. *See id.*

F. SEC DIVISION HEADS (ENFORCEMENT)

Director of Enforcement[289]		
Name	**Appointed**	**Posts Before Appointment**
	1955–1975	
Irving Pollack	1972	Director of Trading and Markets – SEC
Stanley Sporkin	1974	Deputy Director of Enforcement – SEC; Associate Director of Enforcement – SEC; Assistant Director of Enforcement – SEC
	1976–1996	
John Fedders	1981	Partner – Arnold & Porter LLP
Gary Lynch	1985	Associate Director of Enforcement – SEC
William R. McLucas	1989	Associate Director of Enforcement – SEC
	1997–2017	
Richard Walker	1998	General Counsel – SEC; Regional Director of the Northeast Regional Office – SEC
Stephen Cutler	2001	Deputy Director of Enforcement – SEC; Partner – Wilmer Cutler & Pickering & Dorr LLP
Linda Chatman Thomsen	2005	Deputy Director of Enforcement – SEC; Associate Director of Enforcement – SEC; Assistant Director of Enforcement – SEC
Robert Khuzami	2009	General Counsel of Americas – Deutsche Bank
Andrew Ceresney	2013	Partner / Co-Chair of White Collar & Regulatory Defense – Debevoise & Plimpton LLP
Stephanie Avakian	2017	Deputy Director of Enforcement – SEC; Partner – Wilmer Cutler Pickering Hale & Dorr LLP
Steven Peikin	2017	Partner – Sullivan & Cromwell LLP

289. Created in 1972. *See Division of Enforcement*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/page/enforcement-section-landing [https://perma.cc/5A2V-BFTB] (last visited Feb. 24, 2019).

G. SEC DIVISION HEADS (ECONOMIC AND RISK ANALYSIS)

Director of Economic & Risk Analysis/Chief Economist[290]		
Name	**Appointed**	**Posts Before Appointment**
Henry Hu	2009	Allan Shivers Chair in the Law of Banking and Finance – University of Texas Law School
Craig Lewis	2011	Economic Fellow – SEC; Madison S. Wigginton Professor of Finance, Owen Graduate School of Management – Vanderbilt University
Mark Flannery	2014	Professor – University of Florida; Member and Chair, Model Validation Council – Federal Reserve
Jeffrey H. Harris	2017	Professor and Gary D. Cohn Goldman Sachs Chair in Finance, Kogod School of Business – American University

290. This Division was founded in 2009. The Division is also called the Division of Risk, Strategy, and Financial Innovation. *See Economic and Risk Analysis: About the Division*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/dera [https://perma.cc/3FUW-XY6K] (last visited Jan. 10, 2019).

APPENDIX II: SEC CHAIRS OVER TIME

(Revolver Appointments in Italics; Prior Appointment as SEC Commissioner Indicated by +; Prior Appointment with SEC Staff Noted by Bold Face Type)

Historical Summary of SEC Chairs[291]

Chair	**Commissioner Term**		**Chair Term**		**Experience 18 Months Prior to Appointment**
Joseph P. Kennedy	7/2/34	9/23/35	7/2/34	9/23/35	Engaged in investment.[292]
James M. Landis+	7/2/34	9/15/37	9/23/35	9/15/37	Member of the Federal Trade Commission.[293]
William O. Douglas+	1/31/36	4/16/39	9/21/37	4/16/39	Faculty at Yale Law School.[294]
Jerome N. Frank+	12/27/37	4/30/41	5/18/39	4/9/41	In private practice with the firm of Greenbaum, Wolff and Ernst.[295]
Edward C. Eicher+	12/3/38	2/2/42	4/9/41	1/20/42	Congressman, United States House of Representatives, 1933–1938.[296]

291. A list of former Chairs of the Security and Exchange Commission can be found at *SEC Historical Summary of Chairmen and Commissioners*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/about/sechistoricalsummary.htm [https://perma.cc/N3PB-4CUV] (last modified May 4, 2017).

292. *Joseph P. Kennedy*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY & MUSEUM, https://www.jfklibrary.org/JFK/The-Kennedy-Family/Joseph-P-Kennedy.aspx [https://perma.cc/X7DA-AYYA] (last visited Oct. 8, 2018).

293. *Commissioners, Chairwomen and Chairmen of the Federal Trade Commission*, FED. TRADE COMM'N, https://www.ftc.gov/system/files/attachments/commissioners/commissioner_chart08312018.pdf (last modified May 2018).

294. *William O. Douglas Biography*, BIOGRAPHY, https://www.biography.com/people/william-o-douglas-9278209 [https://perma.cc/ XF5T-8YF9] (last visited Oct. 8, 2018).

295. *Guide to the Jerome New Frank Papers*, YALE UNIV. LIBRARY, http://drs.library.yale.edu/HLTransformer/HLTransServlet?stylename=yul.ead2002.xhtml.xsl&pid=mssa:ms.0222&clear-stylesheet-cache=yes [https://perma.cc/K96F-3GZK] (last visited Oct. 8, 2018).

296. *Biographical Directory of the United States Congress: Eicher, Edward Clayton, (1878–1944)*, BIOGUIDE.CONGRESS.GOV, http://bioguide.congress.gov/scripts/biodisplay.pl?index=E000094 [https://perma.cc/F569-YUBB] (last visited Oct 8, 2018).

Historical Summary of SEC Chairs[291]					
Chair	**Commissioner Term**		**Chair Term**		**Experience 18 Months Prior to Appointment**
Ganson Purcell+	6/17/41	6/30/46	1/20/42	6/30/46	Joined the SEC in 1934. (Need further information to confirm)[297]
James J. Caffrey+	5/2/45	12/31/47	7/23/46	12/31/47	Headed the regional office of the SEC in 1938. (Need further information to confirm)[298]
Edmond M. Hanrahan- +	7/22/46	11/3/49	5/18/48	11/3/49	Partner at the law firm of Sullivan, Donovan & Heenehan.[299]
Harry A. McDonald- +	3/26/47	2/25/52	11/4/49	2/25/52	Worked at investment brokerage.[300]

297. Letter from Joseph P. Kennedy, Chair, Sec. & Exch. Comm'n, to James P. Buchanan, Chair, Comm. on Appropriations, U.S. House of Representatives (Jan. 14, 1935), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1930/1935_01_14_JPK_to_Buchanan1_t.pdf.

298. *James J. Caffrey Heads Regional Office of SEC*, N.Y. TIMES (May 3, 1938), https://www.nytimes.com/1938/05/03/archives/james-j-caffrey-heads-regional-office-of-sec.html?smid=pl- [https://nyti.ms/2C9taaG].

299. *New Face for SEC*, TIME (July 8, 1946), http://content.time.com/time/magazine/article/0,9171,778761,00.html [https://perma.cc/68XS-SPRS].

300. *Harry McDonald Ex-U.S. Aide, Dies; Former Chairman of SEC Also Headed the RFC*, N.Y. TIMES (July 4, 1964), https://www.nytimes.com/1964/07/04/archives/harry-mdonald-exus-aide-dies-former-chairman-of-sec-also-headed-the.html?smid=pl-share&mtrref=undefined&gwh=55971994F7D43796FBC7FE039FB10050&gwt=pay [https://nyti.ms/2C9MHaW].

Historical Summary of SEC Chairs[291]

Chair	**Commissioner Term**		**Chair Term**		**Experience 18 Months Prior to Appointment**
Donald C. Cook+	11/1/49	6/17/53	2/26/52	6/17/53	Served at different government positions, including: Special Counsel to the House Committee on Naval Affairs, Executive Assistant to the United States Attorney General and Director of the Office of Alien Property in the Justice Department.[301]
Ralph H. Demmler	6/17/53	5/25/55	6/17/53	5/25/55	At the law firm Reed Smith Shaw & McClay.[302]
J. Sinclair Armstrong-+	7/16/53	6/27/57	5/25/55	6/27/57	Lawyer at the Chicago firm of Isham, Lincoln & Beale when named as commissioner.[303]
Edward N. Gadsby	8/20/57	8/4/61	8/20/57	3/26/61	Lawyer at Boston law firm of Sullivan & Worcester since 1956.[304]

301. William G. Blair, *Donald Cook, Ex-Chairman of S.E.C., Dies at 72*, N.Y. TIMES (Dec. 17, 1981), https://www.nytimes.com/1981/12/17/obituaries/donald-cook-ex-chairman-of-sec-dies-at-72.html [http://nyti.ms/2GKRnEn].

302. Kenneth N. Gilpin, *Ralph Demmler, 91, Chairman of the S.E.C. Under Eisenhower*, N.Y. TIMES (Dec. 29, 1995), https://www.nytimes.com/1995/12/29/us/ralph-demmler-91-chairman-of-the-sec-under-eisenhower.html?smid=pl-share&mtrref=undefined&gwh=F3B8DCFA4E62B332E9353606D49212DE&gwt=pay [https://nyti.ms/2A46EyD].

303. Douglas Martin, J. Sinclair Armstrong, *SEC Chief, Dies at 85*, N.Y. TIMES (Nov. 9, 2000), https://www.nytimes.com/2000/11/09/nyregion/j-sinclair-armstrong-sec-chief-dies-at-85.html?smid=pl-share [https://nyti.ms/2qFJ5HY].

304. *News Digest*, U.S. SEC. & EXCH. COMM'N (Aug. 20, 1957), https://www.sec.gov/news/digest/1957/dig082057.pdf.

Historical Summary of SEC Chairs[291]					
Chair	**Commissioner Term**		**Chair Term**		**Experience 18 Months Prior to Appointment**
William L. Cary	3/27/61	8/21/64	3/27/61	8/20/64	Professor of Law at Columbia University.[305]
Manuel F. Cohen+	10/11/61	2/22/69	8/20/64	2/22/69	Joined the SEC staff in 1942 as a junior attorney and stayed twenty-seven years.[306]
Hamer H. Budge+	7/8/64	1/2/71	2/22/69	1/2/71	Judge in the Third Judicial District of Idaho in Boise.[307]
William J. Casey	4/14/71	2/2/73	4/14/71	2/2/73	Partner at Hall, Casey, Dickler & Howley, a New York corporate law firm from 1957–1971.[308]
G. Bradford Cook	3/3/73	5/16/73	3/3/73	5/16/73	General Counsel of the SEC and the Associate Director of the Enforcement Division at the SEC.[309]
Ray Garrett, Jr.	8/6/73	10/28/75	8/6/73	10/28/75	Partner at Chicago law firm.[310]

305. David Margolick, *William Carey, Former S.E.C. Chairman, Dies at 72*, N.Y. TIMES (Feb. 9, 1983), https://www.nytimes.com/1983/02/09/obituaries/william-carey-former-sec-chairman-dies-at-72.html?smid=pl-share [https://nyti.ms/2CaHsbg].

306. Hobart Rowen, *Manuel F. Cohen, Former SEC Head, Dies*, WASH. POST. (June 18, 1977), https://www.washingtonpost.com/archive/local/1977/06/18/manuel-f-cohen-former-sec-head-dies/63a7bfa3-bcc6-4ab0-841d-a0f9c6b20cac/?utm_term=.e121ca47831f [https://perma.cc/Z6VM-G7GU].

307. Paul Lewis, *Hamer Harold Budge, 92; S.E.C. Chief and Lawmaker*, N.Y. TIMES (Aug. 4, 2003), https://www.nytimes.com/2003/08/04/business/hamer-harold-budge-92-sec-chief-and-lawmaker.html?smid=pl-share [https://nyti.ms/2A4hiWa].

308. Eric Pace, *William Casey, Ex-C.I.A. Head Is Dead at 74*, N.Y. TIMES (May 7, 1987), https://www.nytimes.com/1987/05/07/obituaries/william-casey-ex-cia-head-is-dead-at-74.html?smid=pl-share [https://nyti.ms/2EmUFex].

309. *Chicagoan is Named Top SEC Counsel*, N.Y. TIMES (Sept. 8, 1971), https://www.nytimes.com/1971/09/08/archives/chicagoan-is-named-top-sec-counsel.html?smid=pl-share/ [https://nyti.ms/2A4mUjc].

310. *In the Midst of Revolution: The SEC, 1973-1981*, U.S. SEC. & EXCH. COMM'N, http://www.sechistorical.org/museum/galleries/rev/rev02a.php [https://perma.cc/2YL8-J4V8] (last visited Oct. 8, 2018).

Historical Summary of SEC Chairs[291]					
Chair	**Commissioner Term**		**Chair Term**		**Experience 18 Months Prior to Appointment**
Roderick M. Hills	10/28/75	4/10/77	10/28/75	4/10/77	Top adviser in the White House.[311]
Harold M. Williams	4/18/77	3/1/81	4/18/77	3/1/81	Dean of the UCLA Anderson School of Management from 1970.[312]
John Shad	5/6/81	6/18/87	5/6/81	6/18/87	Chaired the Reagan-Bush Campaign's New York State Finance Committee during the 1980 election; worked in E. F. Hutton Group, Inc.[313]
David S. Ruder	8/7/87	9/30/89	8/7/87	9/30/89	Faculty of Northwestern University School of Law.[314]
Richard C. Breeden	10/11/89	5/7/93	10/11/89	5/7/93	Served in government positions, including as the Senior White House Economic Aide in 1989.[315]

311. Matt Schudel, *Roderick M. Hills, Ford White House Official Who Led SEC from 1975 to 1977, Dies at 83*, WASH. POST (Nov. 2, 2014), https://www.washingtonpost.com/local/obituaries/roderick-m-hills-ford-white-house-official-who-led-sec-from-1975-to-1977-dies-at-83/2014/11/01/7c39c1c2-61dd-11e4-8b9e-2ccdac31a031_story.html?noredirect=on&utm_term=.f5ab31945e92 [https://perma.cc/5X84-8BZX].

312. Mary Daily, *In Memoriam: Harold Williams, Former Dean of UCLA Anderson, Philanthropist and Arts Advocate*, UCLA NEWSROOM (Aug. 1, 2017), http://newsroom.ucla.edu/stories/in-memoriam-harold-williams-former-dean-of-ucla-anderson-philanthropist-and-arts-advocate [https://perma.cc/GA36-G2QP].

313. Leonard Sloane, *John S. R. Shad Dies at 71; S.E.C. Chairman in the 80's*, N.Y. TIMES (July 9, 1994), https://www.nytimes.com/1994/07/09/obituaries/john-s-r-shad-dies-at-71-sec-chairman-in-the-80-s.html?smid=pl-share&mtrref=undefined&gwh=2F41FD598DA6C89A1A93EB2481F25FAD&gwt=pay [https://nyti.ms/2D8I2bn].

314. Nathaniel C. Nash, *Novice Regulator: David S. Ruder; Seeking Tighter Control Over the Financial Markets*, N.Y. TIMES (Jan. 17, 1988), https://www.nytimes.com/1988/01/17/business/novice-regulator-david-s-ruder-seeking-tighter-control-over-financial-markets.html?smid=pl-share [https://nyti.ms/2A3MG77].

315. *Richard C. Breedent*, HARV. SHAREHOLDER RTS. PROJECT, http://www.srp.law.harvard.edu/breeden_bio.shtml [https://perma.cc/ZG3D-B2Q2] (last visited Oct. 8, 2018).

Historical Summary of SEC Chairs[291]					
Chair	**Commissioner Term**		**Chair Term**		**Experience 18 Months Prior to Appointment**
Arthur Levitt	7/27/93	2/9/01	7/27/93	2/9/01	Chair of the New York City Economic Development Corporation and the owner of the Roll Call newspaper.[316]
Harvey L. Pitt	8/3/01	2/17/03	8/3/01	2/17/03	In the private practice of law from 1978 to 2001; worked at the SEC from 1968–1978; the last three years of which Pitt was the Commission's General Counsel.[317]

316. *SEC Biography: Chairman Arthur Levitt*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/about/commissioner/levitt.htm[https://perma.cc/27VM-QQMJ] (last modified Jan. 23, 2009).

317. *SEC Biography: Chairman Harvey L. Pitt*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/about/commissioner/pitt.htm [https://perma.cc/HD77-U3GL] (last modified Jan. 23, 2009).

Historical Summary of SEC Chairs[291]					
Chair	**Commissioner Term**		**Chair Term**		**Experience 18 Months Prior to Appointment**
William H. Donaldson	2/18/03	6/30/05	2/18/03	6/30/05	Worked in business, government, and academia, holding various positions, including: Co-founder and Chief Executive Officer of the investment banking firm, Donaldson, Lufkin & Jenrette; Chair and Chief Executive Officer of the New York Stock Exchange; Chair, President, and Chief Executive Officer of Aetna; Chair and Chief Executive Officer of Donaldson Enterprises, Inc.; and Co-founder of the Yale University School of Management.[318]
Christopher Cox	8/03/05	1/20/09	8/03/05	1/20/09	Chair of the United States House Committee on Homeland Security from 2003–2005.[319]

318. *SEC Biography: Chairman William H. Donaldson*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/about/commissioner/donaldson.htm [https://perma.cc/E2D7-QGK6] (last modified Jan. 23, 2009).

319. *SEC Biography: Chairman Christopher Cox*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/about/commissioner/cox.htm [https://perma.cc/AQV9-FADH] (last modified Feb. 4, 2009).

Historical Summary of SEC Chairs[291]					
Chair	**Commissioner Term**		**Chair Term**		**Experience 18 Months Prior to Appointment**
Mary L. Schapiro	1/27/09	12/14/12	1/27/09	12/14/12	Chief Executive Officer of the Financial Industry Regulatory Authority (FINRA).[320]
Mary Jo White	04/10/13	1/20/17	04/10/13	1/20/17	Chair of the litigation department at Debevoise & Plimpton LLP.[321]
Jay Clayton	05/04/17		05/04/17		Partner at Sullivan & Cromwell LLP.[322]

320. *SEC Biography: Chairman Mary L. Schapiro*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/about/commissioner/schapiro.htm [https://perma.cc/7JBR-TKVA] (last modified Dec. 11, 2012).
321. *Biography: Chair Mary Jo White*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/biography/white-mary-jo [https://perma.cc/MDL2-P44T] (last visited Oct. 8, 2018).
322. *Biography: Chairman Jay Clayton*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/biography/jay-clayton [https://perma.cc/QEF7-742U] (last visited Oct. 8, 2018).

APPENDIX III: SEC CHAIRS AND THEIR GENERAL COUNSELS

(Revolvers in Italics)

SEC Chair	General Counsel
Joseph P. Kennedy 1934–1935	John J. Burns 1934–1936
James M. Landis 1935–1937	John J. Burns 1934–1936
	Allen A. Throop 1936–1938
William O. Douglas 1937–1939	Allen A. Throop 1936–1938
	Chester T. Lane 1938–1948
Jerome N. Frank 1939–1941	Chester T. Lane 1938–1948
Edward C. Eicher 1941–1942	Chester T. Lane 1938–1948
Ganson Purcell 1942–1946	Chester T. Lane 1938–1948
James J. Caffrey 1946–1947	Chester T. Lane 1938–1948
Edmond M. Hanrahan 1948–1949	Chester T. Lane 1938–1948
	Roger S. Foster 1948–1953
Harry A. McDonald 1950–1952	Roger S. Foster 1948–1953
Donald C. Cook 1952–1953	Roger S. Foster 1948–1953
Ralph H. Demmler 1953–1955	*William H. Timbers* 1953–1956
J. Sinclair Armstrong 1955–1957	Thomas G. Meeker 1956–1960

SEC Chair	**General Counsel**
Edward N. Gadsby 1957–1961	Thomas G. Meeker 1956–1960
	Peter A. Dammann 1961–1963
William L. Cary 1961–1964	*Peter A. Dammann* 1961–1963
	Philip A. Loomis, Jr. 1963–1971
Manuel F. Cohen 1964–1969	Philip A. Loomis, Jr. 1963–1971
Hamer H. Budge 1969–1971	Philip A. Loomis, Jr. 1963–1971
William J. Casey 1971–1973	*G. Bradford Cook* 1971–1973
G. Bradford Cook 1973–1973	*Lawrence Nerheim* 1973–1975
Ray Garrett, Jr. 1973–1975	*Lawrence Nerheim* 1973–1975
Roderick M. Hills 1975–1977	Harvey Pitt 1975–1978
Harold M. Williams 1977–1981	Harvey Pitt 1975–1978
	Ralph Ferrera 1978–1981
John Shad 1981–1987	*Edward F. Greene* 1981–1983
	Daniel L. Goelzer 1983–1990

SEC Chair	**General Counsel**
David S. Ruder 1987–1989	Daniel L. Goelzer 1983–1990
Richard C. Breeden 1989–1993	Daniel L. Goelzer 1983–1990
	James R. Doty 1990–1993
Arthur Levitt 1993–2001	*Simon Lorne* 1993–1996
	Richard Walker 1996–1998
	Harvey Goldschmid 1998–2000
	David M. Becker 2000–2002
Harvey L. Pitt 2001–2003	*David M. Becker* 2000–2002
	Giovanni Prezioso 2002–2006
William H. Donaldson 2003–2005	*Giovanni Prezioso* 2002–2006
Christopher Cox 2005–2009	*Giovanni Prezioso* 2002–2006
	Brian Cartwright 2006–2009
Mary L. Schapiro 2009–2012	*David M. Becker* 2009–2011
	Mark D. Cahn 2011–2013
Mary Jo White 2013–2017	Anne K. Small 2012–2017
Jay Clayton 2017–	*Robert Stebbins* *2017–*