THE ONCE AND FUTURE IRRELEVANCY OF SECTION 12(G)

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Among more fundamental reforms, the JOBS Act of 2012 amended Section 12(g) of the Securities Exchange Act and sought to increase the number of shareholders (from 500 to 2000) that a firm must have before it must make public disclosures. Argument on the floor of Congress focused on the undue burden the provision placed on companies. This Article examines data that invalidates those anecdotal concerns.

Indeed, the data reveal important insights: First, my hand-collected dataset shows that, contrary to public concerns about Section 12(g)’s onerous burdens, it only affects a few firms—(less than three percent of those going public). Second, my research relates to questions of the relative merits of Congress and the SEC with respect to fact-finding and the risk of capture. Finally, the Article answers the critical question the JOBS Act obscured: when, if ever, should we force private firms public?

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I. INTRODUCTION

Section 12(g) of the Securities Exchange Act (“Exchange Act”) forces a certain class of private firms—until recently, those that had over 500 shareholders of record—into the limelight of public disclosure, effectively forcing them to go public unwillingly (the “500-shareholder rule”).1 Conventional wisdom has it that the old 500-shareholder threshold triggered the initial public offerings (“IPO’s”) of Apple, Google, and Facebook.2 Congress responded to the plight of such reluctant public firms in the 2012 Jumpstart Our Business Startups (“JOBS”) Act by raising the threshold to 2000 shareholders and providing that many employee shareholders not be counted.3

This Article looks past the largely anecdotal debate on the floors of Congress by examining data on the number of shareholders firms have when they actually do go public. With respect to the shareholder threshold itself, I find that Section 12(g) probably forced very few firms public: between 2000 and the JOBS Act’s passage, only 2.94% of firms (35 out of 1192) went public with over 400 shareholders.4 To be precise, only 2.94% of companies may have been forced public by the rule. Keeping in mind that firms with more shareholders have more voices clamoring for liquidity, it is uncertain that even these firms went public because of Section 12(g), merely that they may have. Thus, examples like Google and Facebook may be salient, but they are outliers.


2. See infra notes 49–50 and accompanying text.


4. See infra Part IV.B.
The case study of Section 12(g) reform presented by this Article offers several basic lessons—the first one dealing with the relative virtues of administrative and legislative action. These events raise crucial policy questions about where to draw the line between public and private firms. A logical choice, and one in keeping with the original intent behind the 1964 amendments that introduced Section 12(g), might have imposed disclosure on firms that, though private, are actively traded. Indeed, Professor John Coffee made this suggestion, echoed by widely-respected securities scholar Professor Jay Ritter. Such a line would protect the hiring and capital-raising interests of one firm that lobbied for increasing the threshold—Wawa—and other traditional widely-held companies, but it would not have worked with the model of SecondMarket, another would-be reformer which provided a venue for the active trading of private company shares. SecondMarket’s engagement with reforming Section 12(g) may explain why the public float suggestion went nowhere.

Part I of this Article outlines the legislative history and original purpose of Section 12(g), stressing that the legislation was the product of a meaningful and data-informed debate, and that its goal was to capture firms already being publicly traded over the counter. It then documents how subsequent rulemaking rendered the original purpose obsolete, and how Section 12(g) thus evolved to become a trap for unlucky widely-held private firms like Facebook. Part II describes the debate on the congressional floor, where argument by anecdote prevailed. Part III provides some data that cast doubt on the existence of a problem at all. Finally, Part IV offers lessons from the data.

II. THE HISTORY AND FUNCTION OF SECTION 12(G)

U.S. securities law drags some companies into the public markets against their will. Or it used to. Up until April 5, 2012, Section 12(g) of the Exchange Act required that firms with assets of over $10 million, and a class of securities held by over 499 shareholders of record, register their securities under the Exchange Act. Although not originally intended to ensnare companies not publicly traded, over time (and especially with
the rise of the practice of granting employees stock options), some private firms approached the 500-shareholder threshold and went public because, in effect, they had to: registration under the Exchange Act subjects private companies to the same periodic reporting that public companies undertake, so most conclude that they “might as well” go public so as to reap the benefits of an IPO.¹¹

Forcing public status on a company marks an “extraordinarily significant change in its legal obligations and freedom to maneuver.”¹² Registration under the 1934 Act means that companies must file quarterly reports, an annual report, and periodic updates on Form 8-K when certain material events occur.¹³ They must follow detailed regulations governing proxy solicitation.¹⁴ Officers and other insiders face more ready exposure of possible violations of insider trading and short swing profit rules.¹⁵ Being public increases the stress of running an organization. Mistakes are scrutinized not only by analysts, short sellers, and the market in general, but also by plaintiffs’ attorneys.¹⁶ The idea of forcing an unwilling company public is thus “ideologically charged.”¹⁷

A. The Origins of Section 12(g)

There are two key points to take away from the history of Section 12(g). First, it was originally the product of a significant and meaningful debate.¹⁸ The regulatory reformers had the benefit of several studies on their side, and those resisting regulation argued that specific thresholds would overburden both firms and the SEC.¹⁹ Second, the legislation’s original purpose was to impose disclosure on firms that were already trading over the counter (“OTC”)—and thus where, as a practical matter, a public market already existed.²⁰

¹¹ See Sjostrom, supra note 1, at 43–44 (arguing that Facebook probably would go public since it was nearing the 500 holders of record threshold that requires it to “file public company reports regardless” and that Google did go public because it reached the 500 holders of record threshold).
¹⁷ Langevoort & Thompson, supra note 12.
¹⁹ Id. at 166–68.
²⁰ See Allen Ferrell, Mandatory Disclosure and Stock Returns: Evidence from the Over-the-Counter Market, 36 J. LEGAL STUD. 213, 219–22 (2007); Richard M. Phillips & Morgan Shipman, An Analysis of the Securities Acts Amendments of 1964, 1964 DUKE L.J. 706, 706 (1964) (“The main feature of this portion is an extension of the registration, periodic reporting, proxy and insider trading provisions of sections 12, 13, 14, and 16 of the Exchange Act to larger over-the-counter companies. These provisions were formerly applicable only to listed companies.”).
The original 1964 amendments were the product of empirical investigation and debate on the merits. \(^{21}\) From 1955 onward, the operators of the national exchanges agitated for the government to impose comparable disclosure requirements on stocks traded over the counter. \(^{22}\) In 1955, the Senate Banking and Currency Committee conducted a study on the subject. \(^{23}\)

The SEC commissioned a second 120-page report in 1963 that, taking as a given the need for extending reporting requirements to the OTC market, focused on the appropriate contours of investor protection. \(^{24}\) If investor protection were the only goal driving the SEC, it could have applied the Exchange Act provisions to all OTC issuers, but it was also mindful of the burden these expanded requirements would have placed not only on the issuers but on the agency itself. \(^{25}\) Thus, where to draw the line became a key question. \(^{26}\)

The SEC Report recommended extending reporting requirements to issuers with over 300 shareholders of record. \(^{27}\) Industry representatives pushed back, with the Investment Bankers Association proposing a cutoff for filings of 1000 shareholders. \(^{28}\) In response, the SEC pointed out that this high threshold would “deprive investors in some 1,400 companies” of its proposed protections. \(^{29}\) It also noted that these companies were substantial in size, and that many of them made use of notoriously bad proxy practices. \(^{30}\)

The study looked at several possible reporting benchmarks aside from the number of shareholders, including “transfers of stock, concentration of holdings, and trading interest in interdealer markets.” \(^{31}\) The SEC felt that because “it [was] difficult to conceive of any direct test [of market activity] that could ever be meaningful and workable,” the number-of-shareholder litmus offered the most viable substitute, even though it provided only a “rough, indirect measure of activity.” \(^{32}\) It observed that the number of shareholders encompassed the “number of transfers”
criteria, as “comparison of numbers of record shareholders with numbers of record transfers revealed a general correspondence between the two.” As to the amount of a company’s assets, the study determined there was “no discernible shareholder-to-assets pattern,” which, in combination with the philosophy that the smallest companies were the ones for which reporting requirements were most needed, led it to initially be left out of the SEC’s recommendations. The final amendments reflected a compromise of 500 shareholders, with the additional qualification that the Act would apply only to companies with over $1 million worth of assets. Ultimately, the SEC concluded that the “[n]umber of shareholders has always been recognized, and obviously is, the most direct and simple criterion of public-investor interest.”

The origins of Section 12(g) make clear that Congress never intended for the provision to have the effect of forcing illiquid private companies into making public disclosures. The 1964 amendments dealt with a completely separate issue: bringing securities that were already trading over the counter within the purview of SEC reporting requirements, thus providing investor protection to OTC investors “comparable” to that of exchange investors. This intervention was needed because, at the time, an active secondary market existed over the counter. Indeed, the estimated dollar volume of OTC securities in 1963 had grown to sixty-one percent of the national security exchanges. Going further, Congress reasoned, would have been too burdensome, and it deemed 500 a good compromise number that encompassed most of the OTC market, since requiring universal reporting of OTC-traded securities would have been too burdensome on firms with the most thinly traded OTC stocks and also would have threatened to overwhelm the SEC’s regulatory staff.

33. Id. at 20; see Louis Loss and Joel Seligman, Fundamentals of Securities Regulation 1757 n.1.
34. SEC Report, supra note 28, at 26. Though an asset-based criterion was ultimately included in the bill, its inclusion was for pure cost-benefit reasons, for “defining a limit where burdens may be disproportionate to needs.” Id. at 18.
36. Memorandum of the Securities and Exchange Commission With Respect to Changes in H.R. 6789 Between Its Submission to the Industry Liaison Committee and Its Introduction to Congress, Pub. L. No. 88-467, 78 Stat. 565, 566-67 (1964), reprinted in 1 Securities Act Amendments of 1964 (1964) (“The $1 million asset test was evolved by the Commission, primarily in the belief that in the case of companies having less than $1 million of assets the expense to the issuer and the administrative burden upon the Commission would outweigh the benefits to stockholders which would result.”).
37. Id.
38. See Sjostrom, supra note 1, at 44–45 (highlighting that the 1964 amendments were targeted at issuers with sufficiently liquid shares).
This history indicates that robust debate and empirical research surrounded the enactment of Section 12(g) in 1964. Congress thought hard about the number of shareholders and the size of the asset test that would serve the public interest in investor protection without being too burdensome both for the agency and for the firms themselves. The SEC was deeply involved along the way, including by generating the critical initial proposal after conducting an in-depth study of the issue.

Another key takeaway from this history is that the 500 number was intended as a compromise in an effort to capture the appropriate category of companies already publicly traded over the counter. Primary supporters of the legislation were the national exchanges that were already subject to disclosure requirements, who viewed the OTC markets as competitors operating unfairly free of regulation. Indeed, the SEC later noted that “the registration requirement of Section 12(g) was aimed at issuers that had ‘sufficiently active trading markets and public interest and consequently were in need of mandatory disclosure to ensure the protection of investors.’”

Once technology drove down monitoring and compliance costs, this sort of rough compromise was no longer necessary. On January 4, 1999, the SEC promulgated rules requiring all domestic OTC Bulletin Board (“OTCBB”) firms to comply with the 1934 Act’s reporting requirements by June 2000. From that time forward, all firms save traded on the Pink Sheets were subject to reporting requirements. Today all other firms traded over the counter are now subject to reporting requirements of some kind. This development reflects the logical culmination of the original impetus behind the 1964 Act reforms: by 1999, technology had advanced to a point where the law could require almost all publicly traded firms to make periodic disclosures. This move rendered the original intent of the 500-shareholder threshold moot: now all actively traded firms had to make periodic disclosures.

43. See Guttentag, supra note 18, at 166 (discussing a 1938 NYSE suggested amendment requiring mandatory disclosure under the Exchange Act).


46. Bushee & Leuz, supra note 45, at 234–35. Or, if a bank or bank holding company, they must be current in their reports to the Federal Reserve. 12 U.S.C. § 1844(c) (2012).
whose shares were widely held but not traded over the counter, into the public realm.\textsuperscript{47}

At first, it seemed that Section 12(g) would subside into irrelevance after 1999. Yet over time, as private companies stayed private longer, and employee stock option plans and multiple rounds of investment increased the number of many private firms' shareholders, even some companies that never traded over the counter bumped up against the 500-shareholder threshold.\textsuperscript{48} The result was that firms that Congress never intended to capture with the 1964 amendments were nevertheless swept into its net. Indeed, following the SEC's 1999 rulemaking, these became the only companies where Section 12(g) continued to bite.

\textbf{B. Salient Section 12(g) Victims}

The most salient recent examples of private companies being “forced” to go public are Facebook and Google.\textsuperscript{49} Like Apple before them,\textsuperscript{50} each was a huge private company that seemed content to stay private. Section 12(g), however, left these firms no option because at the time it required companies with more than 500 shareholders to register and become reporting companies.\textsuperscript{51} Because these firms were compelled to make periodic disclosures under the Exchange Act already, each decided to register under the 1933 Securities Act and complete an IPO. This Section will provide a brief summary of the effect of Section 12(g) on each.

In 2004, Google was a successful private company.\textsuperscript{52} Profitable nearly from day one, it was able to finance its operations, growth, and acquisitions without recourse to the public markets.\textsuperscript{53} But, because of “an obscure provision of securities law,” as the \textit{New York Times} termed Section 12(g),\textsuperscript{54} Google would have been forced to make filings under the

\begin{footnotes}
\textsuperscript{47} See Bushee & Leuz, supra note 45, at 235 (“By eliminating the possibility to trade on the OTCBB without filing, the eligibility rule essentially forces these firms to choose their next-best alternative.”); Sjostrom, supra note 1, at 43 (“Today, the practical effect of this rule is to force certain types of firms into the public markets earlier than is desirable.”).
\textsuperscript{48} Sjostrom, supra note 1, at 45.
\textsuperscript{51} See supra notes 46–49.
\textsuperscript{54} Markoff, supra note 52.
\end{footnotes}
Exchange Act because it stood on the brink of surpassing the 500-shareholder limit.\(^{55}\) Thus, it made sense to file for an IPO,\(^{56}\) which wound up netting $2.7 billion, giving it the third highest market capitalization in the Internet sector at the time.\(^{57}\) Without the impetus of Section 12(g), this tech behemoth may have remained private for longer, perhaps much longer. Indeed, shortly after the Google IPO, the SEC issued a rule stating that it would no longer count optionholders in its shareholder census, but only consider employees as shareholders once their stock actually vested and was purchased.\(^{58}\) No longer would companies be forced to go public simply because they issued too many options, so long as those options remained unexercised.

Following issuance of the SEC's new options rule, Section 12(g) affected only private companies that (1) issued a significant number of options, and (2) operated long enough for those options to vest and for the underlying shares to be bought by employees.\(^{59}\) In theory, these would not be many firms. Take, as an example, the prototypical technology startup, which relies heavily on options. The ideal for most startups is to grow the company towards one of two liquidity events: an IPO or an acquisition.\(^{60}\) If the IPO window is open or acquisitions are common, then Section 12(g) does not pose much of a problem. But when paths to liquidity are less easy, or if a company does not desire such an exit, it becomes increasingly possible that a firm might get caught in the 500-shareholder rule’s net.\(^{61}\)

Facebook is the most salient example of this type of company. As with Google, revenue from advertising sales had funded Facebook’s operations for many years.\(^{62}\) But Facebook had “too many shareholders”: it had been private for eight years, and as employee optionholders became stockholders, it was bumping up against the 500-shareholder threshold.\(^{63}\)

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55. *See id.* (noting that speculation about Google’s plan to go public was because the company had widely distributed stock options to employees, presumably putting it near the 500 mark). Indeed, it had already passed the 500 shareholder mark by December 31, 2003. See William K. Sjostrom, *Questioning the 500 Equity Holders Trigger*, 1 HARV. BUS. L. REV. 43, 44 (2011), available at http://www.hblr.org/2011/03/questioning-the-500-equity-holders-trigger/.

56. *Gaither, supra note 53.*


59. *Id.* at 69563.

60. *See Thomas A. Smith, The Zynga Clawback: Shoring up the Central Pillar of Innovation*, 53 SANTA CLARA L. REV. 577, 602–03 (2013) (stating that an IPO or acquisition of a successful startup is the “much hoped for liquidity event” that allows founders to actually realize the gains of their success).

61. *See id.* at 624–25 (discussing how private companies who issued options to employees may be forced to make disclosures under Section 12(g) when these options are exercised).


Facebook’s IPO did not fare as well as Google’s, but for our purposes the crucial point is that Section 12(g) impelled the company to go public before it would otherwise have done so—at least according to popular accounts.64

Significantly, outside of the traditional slow-to-IPO firm, Section 12(g) directly threatened two firms offering a new type of trading platform. SecondMarket65 and SharesPost,66 both of which debuted in 2009,67 began providing a market for the secondary trading of private shares.68 Others, including myself, have already written extensively about this market;69 for the purposes of this Article, I need to highlight only a few crucial features of these firms.

First, these platforms provided a new venue in which interested parties could buy and sell shares of private companies in a way that was impossible before. Secondary markets in private equity predated SecondMarket and SharesPost, but they were largely ad hoc.70 Interested buyers found it difficult to identify willing sellers, and vice versa.71 Moreover, each buyer had to conduct her own research, without the benefit of information on prior sales or any semblance of a market price.72 SecondMarket and SharesPost made these transactions faster, cheaper, easier, and more visible.

Second, the market could be a robust one: pre-IPO auctions for Facebook moved as much as 100,000 shares in a day.73 After Facebook’s IPO, this market stalled, but it has shown new signs of life.74 On March 5,
2014, SharesPost and NASDAQ OMX launched a joint venture called the NASDAQ PrivateMarket, LLC. SecondMarket facilitated over forty transactions of more than $10 million in 2013, allowing employees and early investors to sell their shares.

Third, firms whose shares traded on the secondary market increasingly risked bumping up against the 500-shareholder threshold. Employees or ex-employees made up most of the seller population. Often they sold only a portion of their shares. An employee might, for example, sell half of her vested options in order to finance a new house but keep the rest in order to benefit from a hoped-for increase in share price in a later IPO. Founders and existing venture capitalists likewise used these secondary markets to obtain a modicum of liquidity, without fully exiting their investment. Thus, each sale—rather than substituting new shareholders for old—added to the growing shareholder-of-record tally. It was therefore vital to SecondMarket’s business model that the 500 number be lifted. And, as I detail in a separate article, SecondMarket spent $380,000 on lobbying for Section 12(g), while its employees made significant campaign contributions to supporters of reform.

Finally, these markets are not open to the general public. Buyers are required to be accredited investors—those with over $200,000 in income or $1 million in assets. Because these transactions took place not on a public exchange like the NYSE, but instead in a private market limited to accredited investors, they could transpire outside the reach of the SEC’s 1999 rule on OTC trading. No disclosure necessary.

78. See Rodrigues, supra note 67, at 3411 (discussing one advantage of SecondMarket was that it allowed employees to sell portions of their shares); Chernova, supra note 76 (“Now, many large startups are offering employees a chance to sell a portion of their stake, at the same time as continuing to hold onto the rest.”).
79. See Rodrigues, supra note 67, at 3405 (stating the approximately four percent of sellers are investors or founders—a percentage that was increasing over time).
80. See infra note 127.
81. Barry Silbert, Not All Markets Are Created Equal, TECHCRUNCH (Mar. 28, 2012), http://techcrunch.com/2012/03/28/secondmarket-sec/ (“Only ‘accredited’ investors are eligible to buy private company stock on SecondMarket, and we have established a process to ensure that only accredited investors buy stock.”).
83. 17 C.F.R. § 200.2(b) (1999).
III. DEBATE ON THE CONGRESSIONAL FLOOR

A small constellation of bills converged to create what would become the JOBS Act of 2012. Title V, the main shareholder-of-record provision, began as the Private Company Flexibility and Growth Act ("PCFG Act"), introduced in June 2011 by Representative David Schweikert of Arizona. It not only sought to raise the Section 12(g) threshold from 500 to 1000, but also to exclude from the definition of holders of record both accredited investors and employee compensation plans.

The storyline of the reform camp was clear: the 500-shareholder rule discouraged growth—and by extension, job creation—by impeding hiring and capital-raising. A group of Silicon Valley CEOs and investors presented a letter to Congress offering a classic statement of the argument: “The 500 Shareholder Rule is outdated, overly restrictive, and limits U.S. job creation and American global competitiveness.” The writers made two arguments about why Section 12(g)’s threshold should be increased. First, stock options are a valuable employee-motivational tool, and as companies take longer to go public, options vest and employees exercise them, creating more and more private-firm shareholders. “Thus, the 500 Shareholder Rule has created a disincentive for private companies to hire and/or provide equity-based compensation to new employees.”

Second, the letter reasoned that the rule constrained private companies’ financing decisions: given only 500 total “slots” for both employees and investors, firms were forced to “[limit] the pool of potential individual and institutional investors.” In essence, the letter argued, the 500-shareholder rule forces firms to choose between forgoing hiring (at least with the use of stock options) or forgoing funding. Contemporary commentary echoed this concern: one technology journalist called the 500-shareholder rule “one of the Valley’s biggest pain points,” arguing that entrepreneurs know best when it comes to the relative merits of public versus private: “[m]ost entrepreneurs believe private companies can move quicker and innovate faster, so forcing someone to go public because of an arbitrary rule that pre-dated modern practices like granting stock options seems absurd.”

87. Examining Investor Risks in Capital Raising: Hearing Before the Subcomm. on Sec., Ins., and Inv. of the Comm. on Banking, Hous., and Urban Affairs, 112th Cong. 92 (2011) (statement of Barry E. Silbert, Founder and Chief Executive Officer, SecondMarket, Inc.).
88. Id. at 93.
90. Id.
No data supported these conclusions; instead, argument by anecdote prevailed. One House representative referred to “a company in Newport, Vermont, that has been under a lot of regulatory pressure. They can’t go over that 500 threshold.” Montana Senator Tester cited a seventy-five year old “Montana-grown company” that “has always believed in rewarding its employees so they can have a stake in the success of the firm, which now operates in 16 States,” but faced the choice of “costly public registration or potentially eliminating existing employee shareholders.” Senator Toomey of Pennsylvania expressed the concern in these words:

There are many companies throughout Pennsylvania, across the country, that are successful. They are thriving, they are growing, but they have a number of shareholders that is bumping up against their limit. They are close to 500. They need to raise capital. They do not want to go public, and they have plenty of people who would like to invest in their successful business so they can grow. But they cannot do it because they are so close to the threshold.

At the same time that the PCFG bill was wending its way along, H.R. 1965—the precursor of Title VI of the JOBS Act—proposed raising the threshold for banks and bank-holding companies. Its proponents stressed the importance of the community bank: “Community banks are the life blood of our local economies. These are the banks we need to see lending to small businesses and homeowners, but they are hamstrung in their attempt to raise capital by outdated SEC registration requirements. This one is over half a century old.”

Reformers also emphasized that this proposal made good sense because banks are highly regulated, so that revamping disclosure requirements would not eliminate investor protections. Advocates for raising the threshold in the bank context emphasized over and over again that banking was a regulated industry:

Now, it might be asked is this prudent? And the answer to that question, of course, is that the banks and the bank holding companies are very heavily regulated by their prudential regulators. From the moment they are chartered, they are overseen by State and Federal entities that are designed to keep them from any sort of fraud from imprudent activities, and so this is an industry that is already heavily regulated, even for those companies who remain private.
Thus, two distinct arguments concurrently played out on the Hill. Advocates for raising the shareholder threshold for banks emphasized that it was already a highly regulated industry. Advocates for raising the shareholder threshold for regular firms stressed that the burdensome regulation stifled growth and hiring.

Contrary voices did signal caution, but they failed to understand the true impact of Section 12(g). SEC Commissioner Luis Aguilar urged that investor protection would suffer. A push from Senator Jack Reed to change the method for counting holders from record to beneficial holders failed. Remarkably, it was premised on a mistaken perception of the impact on Section 12(g). “Street name” is the practice of brokerages naming themselves as the record holders of the stock of individual investors, who remain the beneficial holders. Originally intended to streamline paperwork processing when stocks change hands multiple times in a month or even a week, the practice of holding in street name means that a single entity could count as one holder of record despite owning shares on behalf of hundreds or even thousands of beneficial owners, each of whom buy and sell the underlying shares. Holding in street name means that the shareholders of record measure drastically undercounts the number of beneficial—that is, actual—holders of stock.

Yet, Aguilar and his supporters elided a crucial point: hardly any private company shares are held in street name. There are some notable private exceptions to the one-beneficial-holder-to-one-shareholder-of-record rule, but these should be captured by the SEC’s anticircumvention rule, Rule 12g5-1(b)(3). In general, in the private company context, a shareholder of record means a beneficial holder.

Misbegotten as the argument about looking through to beneficial holders was, the pro-regulatory camp used it to gain concessions: most


103. The Rule states that “[i]f the issuer knows or has reason to know that the form of holding securities of record is used primarily to circumvent the provisions of Section 12(g) . . . of the Act, the beneficial owners of such securities shall be deemed to be the record owners thereof.” 17 C.F.R. § 240.12g5-1 (2012).

104. In contrast, in the context of publicly traded delisting or going dark, immobilization means that, as Rep. Capuano put it, “[b]roker-dealers can hold investments on behalf of thousands, an unlimited number of people.” 158 CONG. REC. H1280 (daily ed. Mar. 8, 2012). For public companies, then, using the shareholder-of-record measure drastically undercounts the number of beneficial holders. But this is a problem relating to delisting, a topic that was never on the table for the JOBS Act.
important, the specialized cap of 500 unaccredited investors was inserted in the legislation,\textsuperscript{105} and the Commission would study its anticircumvention powers.\textsuperscript{106} We will revisit this compromise again later in our story.

So much for the debate over Section 12(g) on the House and Senate floors. The policy arguments made in its favor were two-fold: the rule constrained capital formation and firm hiring. Anecdotes proved the point, and the parallel move to raise the shareholder threshold in the banking sector lent legitimacy to the move—even though the main rationale for raising the threshold in the banking context, that it was a highly regulated industry, did not apply to the rank-and-file firms of Title V. The bill was swept up in a larger bipartisan, pro-business spate of lawmaking.\textsuperscript{107}

Two distinctive and related features of Section 12(g) make it an unusually good candidate for a deeper study of how securities law—and perhaps law in general—gets made today. The first characteristic of this lawmaking process is that relevant data were available.\textsuperscript{108} Indeed, the SEC was conducting a study, as it emphasized repeatedly while Section 12(g) reforms were hammered out.\textsuperscript{109} Yet, its research was ultimately pushed to the side as irrelevant.\textsuperscript{110}

IV. The Data Behind the Debate

No studies undertook to demonstrate that the challenged 500-total-shareholder number was in fact problematic. Rather, the centerpiece of the case for change took the form of anecdotal evidence about companies from their home states.\textsuperscript{111} No one researched how extensive the

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  \item \textsuperscript{106} Id. at § 504, 126 Stat. at 326. In an October 15, 2012, report, the Commission concluded that it had adequate tools to bring a case for violations of 12(g). SEC Report on Rule 12g5-1 and (b)(3), \textit{supra} note 101, at 31.
  \item \textsuperscript{107} Id. at § 504, 126 Stat. at 326. In an October 15, 2012, report, the Commission concluded that it had adequate tools to bring a case for violations of 12(g). SEC Report on Rule 12g5-1 and (b)(3), \textit{supra} note 101, at 31.
  \item \textsuperscript{108} Guttentag, \textit{supra} note 18, at 173.
  \item \textsuperscript{109} See \textit{discussion infra} Part IV.
  \item \textsuperscript{110} See \textit{discussion infra} Part IV.
  \item \textsuperscript{111} See, e.g., 158 CONG. REC. H1279 (daily ed. Mar. 8, 2012) (statement of Rep. Welch) (“We’ve got a company in Newport, Vermont, that has been under a lot of regulatory pressure. They can’t go over that 500 threshold.”); 158 CONG. REC. S1886 (daily ed. Mar. 21, 2012) (statement of Sen. Tester) (“For example, changes to the SEC’s 500 shareholder rule would ensure companies, such as investment brokerage D.A. Davidson in Great Falls, can continue to provide their employees with stock in
problem actually was and whether reform of the 500-shareholder benchmark would remediate it. Moreover, agency specialists from the SEC’s Corporation Finance Division testified on several occasions that the agency was working on an empirical report.112 Division Director Meredith B. Cross also pointed out that the 1964 reforms had been based on an extensive SEC report.113 Yet the 2012 legislation proceeded without the benefit of any new data. Concentrating on the reach of Section 12(g), I have gathered here the sort of relevant data Congress did not consider. In particular, this original dataset focuses on how many firms in fact found themselves compelled to go public because of the much-criticized 500-shareholder rule.

A. Methodology

I seek to uncover the effect of Section 12(g) by looking at firms that have gone public and the number of shareholders they have when they do so. These data are available because Item 201(b) of Regulation S-K requires firms to disclose “the approximate number of holders of each class of common equity . . . as of the latest practicable date.”114 And Section 12(g) requires registration for issuers with “a class of equity security (other than an exempted security) held of record by . . . 500 [post-JOBS Act, 2,000] persons.”115 To my knowledge, no other scholar has examined these data before.

The hypothesis to be tested in considering these data is whether Section 12(g) motivates some firms to go public. It merits emphasis that this hypothesis is nearly impossible to test conclusively. There are many reasons why firms may choose to go public as their number of shareholders grows. To posit but a few, firms with more shareholders may (1) tend

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112. See generally Spurring Job Growth, supra note 109 (statement of Meredith Cross, Director, Sec. & Exch. Comm’n).

113. Legislative Proposals to Facilitate Small Business Capital Formation and Job Creation, supra note 109, at 69 (statement of Meredith Cross, Director, Sec. & Exch. Comm’n); Spurring Job Growth, supra note 109, at 10 (statement of Meredith Cross, Director, Sec. & Exch. Comm’n).

114. 17 C.F.R. § 229.201(b) (2013).

115. 15 U.S.C. § 78l (2012). Under section 12(g)(5) of the Exchange Act, “class” means “all securities of an issuer which are of substantially similar character and the holders of which enjoy substantially similar rights and privileges.” Id. This means that an issuer could have 499 preferred shareholders and 499 common shareholders and still avoid registration. Harold S. Blumenthal & Samuel Wolff, Exchange Act Section 12(g)–Class of Equity Securities, § 7.6 SEC. AND FED. CORP. L. (2d ed. 2015). There is little evidence, however, that many firms have attempted to maintain large numbers of both preferred and common shareholders.
to be larger, and larger firms may go public at a higher rate than smaller firms, (2) have more investors agitating for exit, (3) be older companies with investors who accordingly have lost patience with holding onto illiquid stock, or (4) make bargained-for disclosure more costly, so that economies of scale make committing to mandatory public disclosure more attractive. Even so, if very few firms go public with close to 500 shareholders, then we can say with some confidence that Section 12(g) is not causing firms to go public. If, on the other hand, many firms go public at close to 500 shareholders, their decision to go public might be because of Section 12(g). Pure causation can only be determined in the negative.116

I examined a sample of firms that went public between June 1, 2000, and May 16, 2013. A regulatory change dictated the start of the sample period. In 1999, the SEC approved the NASD’s OTC Bulletin Board Eligibility Rule, which limited OTCBB trading to firms that reported current financial information to the SEC, banking, or insurance regulators.117 These regulations phased in over the course of eighteen months, and the new rule applied to all companies as of June 2000.118 I assume in the months prior to June 2000 some set of firms that would otherwise prefer to remain private went public to comply with the new rule. My interest is in comparing the population of firms that go public voluntarily and those that go public because of the 500-shareholder rule, so I begin the sample as soon as the rule was fully implemented with respect to the OTCBB.

I searched the Compustat database119 for firms with an IPO date from June 1, 2000, to May 16, 2013, that list a number of common shareholders, a variable it denominates “cshr.”120 Compustat describes the “cshr” category as representing “the actual number of shareholders of common/ordinary capital as reported by the company.”121 Note that Section 12(g) requires registration when a firm reaches $10 million in assets and “a class of equity security . . . held of record by 500 persons” (now 2000 persons or 500 persons who are not accredited investors).122 I did not combine preferred and common holders when they were report-

116. To be sure, it is possible that firms with fewer than 400 shareholders might choose to go public because they anticipate nearing the 500 threshold at some future time.
118. See Bushee & Leuz, supra note 45, at 240 (“The eligibility rule became immediately effective for new OTCBB quotations, but provided a phase-in period for issuers with securities quoted as of January 4, 1999. Each issuer was assigned a phase-in date between July 1999 and June 2000 based on its ticker symbol as of January 4, 1999.”).
120. Id.
ed separately, because the statute refers to a “class of equity security.””\textsuperscript{123} I counted whichever class, preferred or common, had more holders.

Compustat’s data for the IPO year is systematically inaccurate with respect to the initial shareholder numbers. Take, for example, a firm that goes public in 1998 and reports in its S-1 (the document that it files in order to go public) that it has 200 shareholders of record. After trading for a year, its 1998 10-K reports that it has 600 common shareholders. Compustat generally reports that the firm had 600 shareholders in 1998. In other words, it reports the post-IPO number instead of the pre-IPO number. For this reason, to find accurate data about the pre-IPO shareholder population, it is necessary to look up each S-1 or prospectus and locate the shareholder number in that document. With the help of research assistants who individually reviewed each document filed closest to the IPO date, I gathered these data for the full 2002–2013 period. I had two research assistants hand-collect these data to check Compustat’s figures.\textsuperscript{124}

\textbf{B. Results}

In the process of collecting this information a few minor complications arose. In nine instances, I could not locate the firm, and twenty-one had filed no S-1 (because, for example, they went public via reverse merger). Twenty-three firms completed their IPO before the period began (for example, Compustat reported a blank-check company’s acquisition as an IPO). I eliminated 211 more transactions because they did not involve U.S. corporations, thus rendering Section 12(g) inapplicable, including firms such as partnerships and other noncorporate entities (seventy-nine), real estate trusts (eighty-nine), and foreign firms (seventy). Also eliminated were offerings involving thirty-four closed-end investment companies, nineteen firms that went public by way of an S-4 (for business combinations, spin-offs, and the like), and one firm that went public by way of S-1 in conjunction with a merger. Finally, I eliminated fifty firms as spin-offs, reasoning that spinoffs by definition are not driven by shareholder number.

The result was that 1249 firms remained, of which 1192 went public before the JOBS Act was passed. See Table I.

\textsuperscript{123} Id.

\textsuperscript{124} Post-IPO, Compustat sometimes reports the number of beneficial owners instead of holders of record, or combines the two figures. This problem is not relevant for this paper. See Part II: Data Definitions A–FO, supra note 121, at 156.
The lessons of the data are limited but clear. I choose 400 shareholders as a cutoff number that I hypothesize will capture most of the firms that went public because of Section 12(g). The law may of course have some in terrorem effect even below the 400 shareholder threshold, but I predict that this effect would be marginal. Despite the rhetoric of congressmen and SecondMarket, very few firms went public with 400–500 shareholders—only thirty-one firms, or 2.60% of the sample. In addition, if one focuses on firms with more than 450 shareholders, the percentage drops to 2.10%. Moreover, we cannot say conclusively that Section 12(g) caused even these firms to go public. As discussed above, there are other natural reasons why a company with many shareholders might choose to go public, without regard to the effect of the 500-shareholder rule.

The data face another limit: they cannot shed light on all of the impacts of Section 12(g). For example, as firms approach the limit they might curtail stock option grants, restrict capital raising, or engage in costly maneuvers such as reverse stock splits to avoid the bite of the 500-shareholder rule. For every firm that the 500-shareholder rule actually forced into public disclosure, then, there might be five, ten, or one hundred that in another way felt its effect. This limitation is intrinsic to the data: all they can and do show is that few firms were actually forced public—as opposed to adapting while remaining private—by the 500-shareholder rule.

I break out firms with a sole shareholder because I expected to see a large number of those. I then include them in the 1–50 category. The data show that the majority of firms reporting a number of shareholders of record (60.22%) go public with 100 or fewer shareholders of record. Only 7.15% of firms reporting a number of shareholders of record go public with over 300 shareholders. Contrary to my expectations, fewer firms with more shareholders seem to go public than those with fewer shareholders. See Tables II & III.
Finally, the data show that some firms might flout the law, either by disclosing that they had more than 499 shareholders of record at IPO or by failing to disclose a shareholder-of-record number at all. Notably, nineteen pre-JOBS firms went public with 500 or more shareholders of record and did not begin registering under the 1934 Act when the law required them to do so. Indeed, two of the most prominent companies thought to have been captured by the reach of Section 12(g) overshot the threshold by a significant margin. Facebook went public with 1305 Class
B Common shareholders of record (and 115 Class A), more than twice as many shareholders as the 1934 Act permitted. Google went public with 1242 Class B Common holders, and 845 Class A Common holders. The SEC appeared, at least in these two cases, to allow the firms considerable leeway in complying with the rule.

Out of the total sample of 1249 firms, 311 (24.90%) failed to disclose any number of shareholders of record, despite that figure being required by law. On one hand, this nondisclosure might not be surprising. Potential IPO investors likely care far more about a firm’s revenue and business prospects than the number of shareholders it has. Similarly, the SEC may not place much emphasis on the shareholder-of-record number in its pre-effective-date reviews of the issuer’s registration statements. It is likely far more concerned that the issuer is not being unduly optimistic in its assertions and that any numbers and projections it reports are accurate or at least substantiated. On the other hand, it may be that a large number of these nonreporting firms actually have significantly more than 500 shareholders and are attempting to avoid the embarrassment of an ongoing violation by omitting to disclose the number. There is no way to know.

To summarize, this is the story of Section 12(g): It started out to protect investors from firms trading over the counter without disclosures. Subsequent rulemaking rendered that function obsolete, so that its sole function became to force firms public. A concentrated lobby, led in spending by the one firm that, as a repeat player, was the most threatened by the provision, built an attack on the 500 number into a larger JOBS Act narrative about freeing firms from pernicious regulation. All participants ignored publicly available data, which (as this Part reveals) cast doubt on the existence of the problem as an empirical matter.

With the JOBS Act, the overall shareholder number has now increased to 2000 and excludes those who receive stock from employee compensation plans. Although it is true that the limit remains 500 for unaccredited investors, the data show that few firms approached that number pre-IPO. Including post-JOBS Act firms, thirty-six out of 1249 went public with over 400 shareholders, or 2.88% of the sample (3.46% of firms reporting a shareholder number at IPO). Even more importantly, the old number counted employee stockholders, while the post-JOBS Act shareholder-of-record count excludes them. Thus, the post-

128. See supra note 84 and accompanying text.
129. See supra note 114 and accompanying text.
130. See supra note 86 and accompanying text.
JOBS Act Section 12(g) will be unlikely to affect more than a handful of firms.

V. LESSONS

My research reveals that, despite the conventional wisdom accepted without question on the Hill, Section 12(g) likely affected very few firms. Despite the lack of evidence of a problem, Title V of the JOBS Act changed the shareholder threshold. This Part offers some lessons from the story of Title V’s passage.

A. Finding the Superior Fact-Finder

Common understandings, which are reflected in our law, suggest that Congress is a good fact-finder—at least in comparison to the judiciary. Historically, there has been a good deal of judicial deference to congressional fact-finding, as long as Congress presented sufficient facts.131

What about Congress’ fact-finding capabilities relative to administrative agencies? In 1964, when Congress first adopted Section 12(g), the SEC was deeply involved in the reform process—so much so that the SEC’s 1963 report formed the basis for the legislation.132 While it is true that the SEC initially proposed a cutoff of 300 shareholders, when the Investment Bankers Association proposed a cutoff of 1000 shareholders, the SEC was able to look to the data it had collected to argue that this threshold would deny protection to the shareholders of 1400 companies.133

In contrast, the SEC was continually playing catch-up in 2012. During the PCFG Act debate, the SEC repeatedly alluded to the fact that it was in the middle of conducting a study of shareholder numbers.134 As Part III reveals, the data available would have suggested that the 500-shareholder threshold affected relatively few firms’ decision about going public. Yet Congress did not wait for that study.

One reason why Congress failed to wait may be that it faced no penalty for acting with dispatch. In particular, congressional fact-finding—or the lack of it—has little impact on judicial review of legislation of this kind. In matters of economic regulation, the judiciary long has deferred to congressional judgments, including by hypothesizing plausible rationales for its actions, even when the legislative record sug-

132. See supra Part II.A.
133. See id.
134. See supra note 109 and accompanying text.
suggests that Congress was not careful or was misled by self-serving interest groups.135

Of particular importance, the unlikely prospect of judicial invalidation of legislation in the securities field contrasts sharply with the reality of close judicial scrutiny of SEC action. Take, for example, the rigorous cost-benefit analysis the D.C. Circuit applied in Business Roundtable v. SEC.136 In that case, the SEC promulgated and adopted rules on proxy access, requiring public companies to allow shareholders the ability to include their nominees on the proxy card that companies send out for annual shareholder elections.137 The court found the proxy access rule to be “arbitrary and capricious” under the APA.138 According to the court, the SEC “inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.”139

The Business Roundtable court upbraided the SEC repeatedly for failing to consider relevant factors, including underestimating the intensity of companies’ opposition to the shareholder-nominated candidates,140 not estimating the costs to companies of campaigning against these candidates,141 and neglecting costs to companies from the use of proxy access by special interests like union and government pension funds.142

Of particular interest, the court took the SEC to task for its selective use of data that concerned whether the proposed rule would actually improve board performance. It scolded that, although there were “numerous studies” that found the opposite result, the SEC “completely discounted” those studies—even though, by the court’s own account, the agency discounted the studies “because of questions raised by subsequent studies, limitations acknowledged by the studies’ authors, or [its] own concerns about the studies’ methodology or scope.”143

Notably, the court leveled these criticisms at the SEC even though it had, in fact, relied on two empirical studies, one of which (unlike the studies cited by the court) was published in a respected peer-reviewed journal.144 The SEC did acknowledge in footnotes cited by the court that

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136. 647 F.3d 1144, 1149–51 (D.C. Cir. 2011).
137. Id. at 1147.
138. Id. at 1148.
139. Id. at 1148–49.
140. Id. at 1149.
141. Id. at 1149–50.
142. Id. at 1152.
143. Id. at 1150–51.
144. Id. at 1151 (quoting Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668-01, 56,762–63 (Sept. 16, 2010) (to be codified at 17 C.F.R. pt. 200)).
145. See id. (noting the studies relied upon by the Commission).
there were limitations to one of its studies, and that some of its implications on the question at hand were “difficult to interpret.” Relying in part on these conclusions, the court dismissed the studies themselves as “relatively unpersuasive.”

The lessons of this story are clear, if unappetizing. Because of governing separation of powers principles, courts defer to congressional fact-finding to a fundamentally greater extent than they defer to agency action. Especially in the case of controversial matters like proxy access, judicial review can be rigorous—indeed, downright nitpicky. It follows that the most effective way for a private actor to seek bullet-proof change is to go straight to Congress.

Judicial deference to congressional fact-finding enables Congress to make law—particularly obscure securities law—by anecdote rather than by data. The SEC lacks this capacity. And the result—as illustrated by the reworking of Section 12(g) in 2012—is that self-interested parties may rush to the congressional forum, at least when the winds of broad reform are in the air, to secure targeted legal change that serves their distinctive interests.

B. Agency Capture v. Public Choice

Representatives and senators strive for reelection, “since legislators who fail to do so quickly become ex-legislators.” Public choice theory suggests that these legislators are disproportionately likely to favor special interest groups, because they are better informed, well-positioned to influence prospective voters, and inclined to make sizeable campaign contributions.

The story of Section 12(g) exemplifies the operation of these forces. The driver behind the legislation was really Title I, which aimed to make it easier for firms to go public. Raising the shareholder threshold was a footnote in a larger reform agenda. The official reports on the JOBS Act do not even mention shareholder-reporting thresholds. Even so, conditions for altering the 500-shareholder threshold were distinctly favorable in 2012. To be sure, the JOBS Act hit at a moment when bipartisan legislation was almost nonexistent. But the economy was bad, and there was a strong sense that doing “something” to help would be popular among voters. The catchily titled JOBS Act was hard to resist, although it had

146. Id.
147. Id.
149. Id.
150. Guttentag, supra note 18, at 173 n.118.
151. Id. at 174 n.119.
nothing to do with jobs, as more than one member of Congress ob-
served.\textsuperscript{154}

The story of the lobbying and campaign contributions behind
Section 12(g)—which I detail in a separate piece—shows how a surgically
targeted reform effort can influence legislation, especially if it acts under
the cover of a larger agenda. This reform effort cost little in terms of
monetary outlays. Total lobbying expenditures were less than $500,000
and campaign contributions were a fraction of that number.\textsuperscript{155}

Section 12(g) also suggests that the risks that special interests pose
may be different with this type of targeted, distributive (as opposed to
redistributive or distributive) legislation where there is a narrow class
of beneficiaries and uncertain public cost on the other side. Legislative
change may come relatively cheaply under these conditions because the
opportunities for counterinfluence are remote.

Still, the lack of data analysis in the Section 12(g) debates suggest
that the risk of agency capture might present the lesser of two evils, at
least when it comes to securities law. In particular, the slow pace of agen-
cy action on the front end greatly complicates efforts to score a quick win
by sliding pet provisions into a large legislative package \textit{sub rosa}. Public
notice and comment allows all interested parties, including the public, to
make their opinions known. Agencies must conduct a cost-benefit analy-
sis, and the very real prospect of judicial review helps ensure that they do
a credible job. Additionally, structural mechanisms such as restrictions
on executive branch oversight,\textsuperscript{156} as well as independent agency funding,
restrictions on hiring and subsequent employment to counter the “re-
volving door problem,” and relationships with other agencies, help insu-
late agencies from capture.\textsuperscript{157}

Two considerations militate against channeling legislative-type work
to agencies. The first is a concern for preserving democratic values. And,
to be sure, the responsibility for crafting our securities laws should not
belong entirely to the SEC. Indeed, the large questions the next section
will address—about when to force firms into public disclosure—strike me
as a subject ultimately for Congress, not the SEC. But when it comes to
technical, data-driven questions like tinkering with numerical thresholds,
the agency may well be the superior decision-maker, precisely because in

litical Corruption}, 124 Harv. L. Rev. 118, 132 (“But for pursuing direct interests, lobbying is a more
effective means of securing desired ends, and the amounts spent on lobbying rather than on campaign
activities (even in states that permit contributions) reflect corporate understanding that the work of
securing a compliant government is best carried out in the legislative rather than electoral arena.”).

\textsuperscript{155} See Rachel E. Barkow, \textit{Insulating Agencies: Avoiding Capture Through Institutional Design},
89 Tex. L. Rev. 15, 26 (2010) (“[T]he President’s ability to remove an agency head only for cause,
which has been the defining feature of an independent agency; freedom from oversight by the Presi-
dent’s Office of Information and Regulatory Affairs; and a multimember design that is the structural
setup of most agencies with heads removable only for cause.”).

\textsuperscript{156} Id. at 42–58.
such contexts the electoral accountability of Congress renders it susceptible to interest group exploitation.

C. The Unasked Question: Should We Ever Force Private Companies to Make Public Filings?

Cynics may find little interest in the saga of Section 12(g). So what, they might ask, that Congress failed to acknowledge the underlying questions, or at least to debate them robustly with the benefit of the data available at the time? This is more a “dog bites man,” rather than “man bites dog” story.

This line of thinking, however, misses one below-the-radar point of great importance. The point is that the reform effort surrounding Section 12(g) did not focus at all on the broader question of whether we should impose public disclosure requirements on unwilling private companies. This question is, however, a pressing one. Congress’ consideration of the JOBS Act, and of Section 12(g) in particular, presented the chance to consider this fundamental problem of securities law. This episode thus reflects a lost opportunity to discuss this vital subject. The first part of this Section will explain why the question is one of urgency, and the second will outline four different pathways policymakers might take as they seek to navigate in the future.

1. The Coming Proliferation of the Large Private Firm

Companies go public for all kinds of reasons: to raise money, to obtain liquidity for founders and investors, and to gain the prestige and reputational benefits of being a publicly traded company.158 Yet plenty of companies resist the siren song of public company status for many years, growing into multi-billion-dollar private-firm giants. Indeed, the four largest private companies in the United States—Cargill,159 Koch Industries,160 Mars, Inc.,161 and Bechtel Corporation162—are all multi-

billion dollar businesses that have remained in private hands since their founding. Such firms have always been a part of the American corporate landscape: they generally have stable share ownership concentrated in the hands of a few shareholders, who are often members of the same family.

Thus, going public and entering the world of mandatory federal disclosure obligation is by no means inevitable. Nor is it uncontroversial. The scope of our public disclosure regime has been the subject of heated debate for decades.163 Much, too, has been written about the costs and perils of being a public firm.164 In short, this literature shows that going public creates both direct and indirect costs for firms.165 Direct costs include legal and accounting fees incurred in connection with complying with Exchange Act requirements and SEC proxy regulation.166 Indirect costs include increased exposure to private and public lawsuits, with attendant increases in directors and officers insurance liability premiums, and legal fees and management distraction if a suit is filed.167 Being a public firm is hard.

Moreover, Title II of the JOBS Act relaxed the ban on general solicitation, making it easier for private firms to raise money.168 Before the Act took hold, to qualify for an exemption under Rule 506 of Regulation D, firms could not engage in general advertising when selling their shares.169 Shares had to be offered to, as well as ultimately purchased by,
accredited investors.170 The JOBS Act, however, directed the SEC to eliminate this limitation, as long as “all purchasers of the securities” turned out to be “accredited investors.”171 This change in SEC rules means private companies can now for the first time seek capital by advertising via radio, television, and the internet without fear of breaching the securities laws.172 The ability to reach a wider audience will presumably lead to quicker, easier and more successful fundraising efforts. As never before, then, we face the possibility of the proliferation of large firms that are privately held on the understanding that they could remain so indefinitely.

2. A Missed Opportunity for a Real Debate

Advocates for raising Section 12(g)’s threshold had a ringer argument that no one made: namely that the provision was never intended to force public disclosures on companies that were not being traded. Wawa, Twitter, and other firms approaching the threshold could argue that, based upon the concerns of Congress in 1964, the 500-shareholder rule should not have applied to them at all, since their shares were not being traded. SecondMarket, however, could not make this argument, since it by raison d’etre served as a trading platform. The end result was argument by anecdote, untethered to actual data coupled with facile claims that, after fifty years, the threshold needed to be “modernized.”

The rule established in 1964 captured firms with over 500 shareholders and total assets exceeding $1 million. The SEC gradually raised the asset threshold, first to $3 million (1982), then to $5 million (1986), then to $10 million (1996). Reformers argued that the shareholder threshold likewise should be increased.173 This “let’s modernize the threshold” argument made little sense, however, for a simple reason: clearly a dollar-value threshold in its nature cries out for modernization in the form of inflation adjustment, but 500 shareholders today are the same as 500 shareholders in 1964.

If 500 was too many shareholders to adequately police agency costs, or to coordinate information demands in 1964, then it might well be an appropriate threshold today as well. Indeed, given the vast effects of technology, 500 shareholders are undoubtedly a much more disparate

group today than fifty years ago. Or perhaps technology has made coordination and information dispersal easier, so that the number should in fact be raised. Considerations exist on both sides. Yet no one moved beyond superficial “modernize the number” rhetoric. Congressman Himes opined, “the securities laws that were initially established in 1933 and 1934 could evolve and adapt to be more germane to today’s markets.”174 Later Congressman Hoyer referred to registration requirements that had become “outdated.”175

3. Alternatives

So what should be done about securities law disclosure requirements today? The data show that few private firms now find themselves forced public. Recent legal reforms also suggest that there is a coming wave of large private firms. I conclude by beginning a conversation about what to do about this brave new world in which IPOs may be commonly eschewed, rather than aggressively pursued. I discuss four choices: (1) no longer impose public disclosure requirements on private firms at all; (2) condition Section 12(g) on the number of beneficial shareholders, rather than shareholders of record as we do now; (3) require that firms of a certain size go public; or (4) impose public disclosure requirements on firms that are widely traded, using a version of “public float” for privately held firms—the choice I endorse.

a. Eliminate Forced Public Disclosure

First, we could abandon the field entirely, allowing all firms to decide on their own whether and when they will go public or otherwise assume (commonly by contract) disclosure obligations to other shareholders and the general public. This approach has the attraction of history. The last time thorough examination of the matter came was in 1964, as the then newly-proposed Section 12(g) was considered.176 As Part I explained, this provision was intended to bring to heel the many companies trading over the counter without making the disclosures required of firms that traded on the national exchanges. Subsequent SEC action has made this original purpose obsolete, however, because rules independent of Section 12(g) now impose public disclosure requirements on those firms that trade over the counter.177 In short, because Section 12(g) has outlived its purpose, a serviceable reform might be to repeal its strictures altogether.

Militating against this deregulatory move is the existence of the once-robust, if now moribund, secondary trading market of SharesPost, SecondMarket, and others. As previously noted, there are signs of life in these private secondary markets. On March 5, 2014, SharesPost and NASDAQ OMX launched a joint venture called the NASDAQ PrivateMarket, LLC. And SecondMarket itself has increased both the level and volume of its sales in the past year.

Even if the private secondary markets disappear, there is also evidence that private companies are using private funds to obtain liquidity and increase beneficial, although not record, ownership. In January 2013, a Blackrock fund invested $80 million in Twitter. To be more specific, the capital went not to the company, but rather to liquidate employee shareholders. And that was not the first time Twitter, founded in 2006, helped its employees obtain liquidity; half of an $800 million investment in 2011 from DST Global went to employees and investors. Pinterest did something similar, selling $30 million of early investor shares to an angel fund.

In other words, SecondMarket may have taken the genie of private firm liquidity out of the bottle. While firms may have clamped down on the practice of using that trading platform, as firms’ exit horizons stretch beyond a decade or more, employees and early investors will invariably agitate for exit, particularly if general solicitation means that large private firms do become more viable and more common. As but one example, one new startup purports to allow the employees of other companies to sell the economic rights to their shares without selling the shares themselves. And such trading, although generally among accredited in-


180. See Chernova, supra note 76.


182. Id.

183. Id. (“The company allocated half of its $80 million investment from DST for buying shares back from employees and investors, people said at the time.”).


vestors and thus outside the reach of the SEC’s OTC trading rule, none-
theless raises serious questions about investor protection—at least if one
believes, as many scholars do—that accredited investor status does not
equate to sophistication.186

b. Look Through to Beneficial Holders

Second, we could continue to use shareholders as a metric, but look
through to beneficial holders. SEC Commissioner Luis Aguilar advocat-
ed this approach.187 Holders of record is, as other commentators have
pointed out, a flawed metric,188 falling short in two distinct areas. The first
problem is that it is easily gamed, as an episode late in Facebook’s life as
a private company illustrated. Pre-IPO Facebook made a widely public-
ized (and ultimately unsuccessful) effort to evade the reach of the 500-
shareholder rule while still raising capital from a variety of private inves-
tors.189 The scheme involved bundling the interests held by multiple par-
ties together into a single investment vehicle.190 Through the use of this
device, hundreds, if not thousands, of individuals could receive an own-
ership interest in Facebook while Section 12(g) remained inoperative,
because there would still not be 500 shareholders of record.191

The second problem with the shareholder record metric is that even
when a firm’s shares begin trading on an exchange, these shares are held
in street name. As Langevoort and Thompson make clear, the result is
dysfunctional; record ownership is untethered to real ownership, for all
intents and purposes.192 Indeed, some legislators specifically recognized
and discussed this problem while debating amendments to the JOBS
Act.193

186. See, e.g., Howard M. Friedman, On Being Rich, Accredited, and Undiversified: The Lacunae in
Contemporary Securities Regulation, 47 OKLA. L. REV. 291, 291 (1994); Warren, supra note 171, at
382; C. Edward Fletcher, III, Sophisticated Investors Under the Federal Securities Laws, 1988 DUKE
L.J. 1081, 1122–23 (1988); Langevoort & Thompson, supra note 12, at 362; Felicia Smith, Madoff

187. SEC, PUBLIC STATEMENT BY COMMISSIONER: INVESTOR PROTECTION IS NEEDED FOR TRUE
News/PublicStmt/Detail/PublicStmt/1365171490120#.VNEFm1XF9Aw.

188. See Sjostrom, supra note 1, at 45.

189. Langevoort & Thompson, supra note 12, at 338.

190. Id.

191. See id. at 338–39; Liz Rappaport, Aaron Luchetti & Geoffrey A. Fowler, Goldman Limits
001142405274870339604576087941200274036.

192. See Langevoort & Thompson, supra note 12, at 355 (referring to the “dysfunction” caused by
Section 12(g)’s “size test”).

(“Through our hearings on this matter, it is clear that many big firms are getting around this require-
ment by pooling shares in a street name, such as an investment company like JP Morgan.”); 158 CONG.
the fact that the reporting threshold only counts records holders, excluding the potentially unlimited
number of beneficial owners who hold their shares in ‘street name’ with banks and brokerage compa-
ies, and thus are not considered record holders.”).
One episode at the tail end of the JOBS Act’s passage suggests that looking through to beneficial holders might be politically difficult. Senator Jack Reed introduced an amendment seeking to look through to beneficial holders. Banks, like Goldman Sachs and JPMorgan Chase & Co., perceived a threat to their investment business, and they reacted vehemently, inserting themselves for the first time into the JOBS Act debate. Thus, powerful repeat players on Capitol Hill might well thwart any reform effort aimed at regulators keyed at the beneficial holder level.

c. Use a Simple Size Test

Third, we could abandon the shareholder metric entirely; instead, lawmakers could endorse a simple size-based test—asset-level, for example, or market capitalization. This approach, however, is a flawed one. It may be true that some portion of securities regulation attempts to create more accountability for “large, economically powerful business institutions that [are] only loosely coupled with orthodox (and arguably more measurable) notions of investor protection.” Indeed, Professors Langevoort and Thompson have explained and documented this point. But just because securities law to some extent focuses regulatory policy on larger firms does not mean that it should do so and certainly does not mean it should do so in pursuing the goals that underlie Section 12(g).

Identifying this accountability aspect of securities law, I argue that it would be wrong to subject companies who would rather remain private to the panoply of public company regulations merely because regulators deem them to be too large or too important to the economy.

The United States has always had large, private companies play a major role in its public life. In general, when we have regulated them, we have done so by way of generally applicable laws having to do with environmental laws, antitrust, labor and employment, duties, and the like. In short, we have regulated these businesses’ business practices. We have not forced them into the public disclosure regime, nor do I think we should do so merely because they are large or powerful. Langevoort and Thompson concede that we cannot and should not prohibit large private companies as such. But forcing these companies to go public to comply

196. See Langevoort & Thompson, supra note 12, at 340. They cite conflict mineral disclosures as an example of regulation reflecting political motives rather than strict investor protection. Id. at 367.
197. Id. at 379–83.
198. See supra notes 159–62 and accompanying text.
199. See Langevoort & Thompson, supra note 12 at 365.
d. Mandate Public Disclosure for Widely Traded Firms

Finally, we could impose disclosure only on firms whose shares are in fact traded. John Coffee proposed this solution in testimony before Congress, stating:

I think we should junk the idea of shareholders of record, which can be gamed, and turn instead to the concept of public float. Public float looks at the market value of the securities held by public shareholders, not employees, not affiliates, but that is the test that tells us the need for disclosure. And I think if you used a test like $500 million of public float, that would give you a much better test that could not be manipulated.200

Professor Jay Ritter, a well-respected expert on the capital markets, also endorsed this public-float approach.201

The idea of looking at the value of shares that are freely tradable and trading has great appeal. It circles back to the core idea that gave rise to the adoption of Section 12(g) in 1964. Moreover, developing a workable public-float standard would not be hard to do. Lawmakers could, for example, fix a numerical standard based on the value of a private firm’s shares no longer held by employees, affiliates, or original investors, providing that once that number is exceeded, Section 12(g)-like disclosure obligations apply. This approach would protect firms’ ability to raise capital and use options to hire employees. But if the firm or its investors began to make serious use of secondary trading options or otherwise obtain liquidity via investors outside the firm, then new duties would arise. This result makes sense because after a certain amount of secondary sales, coordination costs increase and agency costs become harder to police. Moreover, the risks of insider trading become exponentially greater as more trading occurs.

Perhaps, in the end, this “public float” solution will not provide the right answer to the question of whether the law should force a firm into the world of public disclosure. But certainly it is a question worth asking.

201. See supra note 6 and accompanying text.