

THE REVOLVING DOOR

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ABSTRACT

The revolving door between the government and the private sector has long been presumed to lead to the capture of regulators by industry interests. A growing body of empirical literature, however, either finds no conclusive evidence of a capture effect or finds evidence of an opposite effect that the revolving door indeed results in more aggressive, not less aggressive, regulatory actions. To account for these incongruous results, scholars have formulated and tested a new “human-capital” theory positing that revolving-door regulators have incentives to be more aggressive toward the regulated industry as a way of signaling their qualifications to prospective industry employers.

But even with the insights offered by the human-capital theory, the prevailing analyses of the revolving door are still incomplete. This Article theorizes on yet another incentive created by the revolving door that deserves being recognized as a structural force inherent in the regulatory process: the incentive for regulators to expand the market demand for services they would be providing when they exit the government. This “market-expansion” incentive may manifest itself differently in different regulatory settings. In the enforcement setting, it may result in more enforcement actions, broadened jurisdictional reach of the enforcement actions, and higher penalties in the enforcement actions. In the rulemaking setting, it 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.

This market-expansion theory represents a paradigmatic shift in conceptualizing the role of individual regulators in the regulatory process. Contrary to the prevailing analyses, which posit that revolving-door regulators take the industry’s needs as given and merely respond to those needs, the market-expansion theory suggests that revolving-door regulators may exert efforts to expand the industry’s needs. Recognizing this market-expansion incentive has important implications for a wide range of policy issues, including agency aggrandizement, overenforcement versus underenforcement, regulatory settlements, compliance monitors, private rights of action, and professional responsibility.

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INTRODUCTION

A familiar phenomenon in American government and law, the “revolving door”¹ between the government and the private sector has been swinging hard in recent years. Since the beginning of President Obama’s second term, several high-level government officials have walked through the proverbial door in both directions. Mary Jo White, a litigator who spent the last decade defending Wall Street banks and executives at the law firm Debevoise & Plimpton LLP, was confirmed as the new chairwoman of the Securities and Exchange Commission (SEC).² The departing chairwoman of the SEC, Mary Schapiro, became a consultant at the Promontory Financial Group, a high-powered consulting firm that draws nearly one-third of its senior executives from government agencies overseeing the financial industry.³ Jack Lew, the new Treasury Secretary, once worked as a senior executive at Citigroup.⁴ Former U.S. Trade Representative Ron Kirk stepped down to join the law firm Gibson Dunn & Crutcher.⁵ Former Treasury Secretary Tim Geithner became president of the private equity firm Warburg Pincus several months after stepping down from his government position.⁶ Going a bit further back in time, other top administration officials leaving the government for the private sector included Christine Varney, the antitrust chief at the Department of Justice, who stepped down to join the law firm Cravath, Swaine & Moore in 2011,⁷ and Peter Orszag, President Obama’s budget director, who joined Citigroup as a vice chairman in 2010.⁸

1 See *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1428–39 & n.60 (1981) (“The term ‘revolving door’ refers to the phenomenon of individuals who move between government and the private sector and who are often regulators one day, regulated the next, and regulators again the day after.”).

2 Sarah N. Lynch, *Senate Confirms Mary Jo White as SEC Chairman*, REUTERS (Apr. 8, 2013, 4:27 PM), <http://www.reuters.com/article/2013/04/08/us-usa-congress-sec-idUSBRE9370XR20130408>.

3 Ben Protess & Jessica Silver-Greenberg, *Former Regulators Find a Home with a Powerful Firm*, N.Y. TIMES, Apr. 9, 2013, <http://dealbook.nytimes.com/2013/04/09/for-former-regulators-a-home-on-wall-street/?hpw> (reporting Mary Schapiro’s exit from the SEC to the Promontory Financial Group).

4 Jeffrey Sparshott, *Lew Wins Confirmation to Become Treasury Secretary*, WALL ST. J., Feb. 27, 2013, <http://online.wsj.com/article/SB10001424127887323293704578330542638408164.html>.

5 Catherine Ho, *Obama’s Top Trade Negotiator Jumps to Gibson Dunn*, WASH. POST, Apr. 1, 2013, http://www.washingtonpost.com/business/capitalbusiness/obamas-top-trade-negotiator-jumps-to-gibson-dunn/2013/04/01/3ca77360-97c2-11e2-b68f-dc5c4b47e519_story.html.

6 Devin Banerjee & Ian Katz, *Tim Geithner to Join Leveraged Buyout Firm Warburg Pincus*, BLOOMBERG (Nov. 17, 2013, 11:28 AM), <http://www.bloomberg.com/news/2013-11-17/tim-geithner-to-join-leveraged-buyout-firm-warburg-pincus.html>.

7 Thomas Catan & Gina Chon, *Antitrust Chief to Step Down*, WALL ST. J., July 7, 2011, <http://online.wsj.com/article/SB10001424052702303544604576430171298566868.html>.

8 Eric Dash, *Ex-White House Budget Director Joins Citigroup*, N.Y. TIMES, Dec. 9, 2010, <http://dealbook.nytimes.com/2010/12/09/ex-white-house-budget-director-joins-citi-group/>.

Not only has the revolving door frequently made news headlines, but it has had a deep impact on the law. Indeed, the revolving door has been such a fixation in the law that special features or structures have been created to mitigate its effects in many areas, such as administrative law, criminal procedure, and professional responsibility.⁹

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.¹⁰ The revolving door has long been considered an important mechanism of regulatory capture: in 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.¹¹

9 See David Zaring, *Against Being Against the Revolving Door*, 2013 U. ILL. L. REV. 507, 509–10 (describing responses to the revolving door by administrative law, criminal procedure, and professional responsibility rules).

10 See, e.g., Daniel P. Carpenter, *Protection Without Capture: Product Approval by a Politically Responsive, Learning Regulator*, 98 AM. POL. SCI. R. 613, 613 (2004) (arguing that favorable policy arrangements for well-organized and wealthy interests do not necessarily infer capture of the political process); David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 674–80 (2013) (discussing the impact of regulatory capture on agencies' abilities to serve as litigation gatekeepers); Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 CALIF. L. REV. 327, 348–50 (2013) (discussing how concerns about regulatory capture have undermined the independent agency model); Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, 106 Q.J. ECON. 1089, 1089 (1991) (developing an agency-theoretic approach to interest-group politics and regulatory capture); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1337 (2013) (discussing the role of regulatory capture in providing a normative foundation for regulatory review of administrative actions); Saule T. Omarova, *Bankers, Bureaucrats, and Guardians: Toward Tripartism in Financial Services Regulation*, 37 J. CORP. L. 621, 629–32 (2012) (arguing that the 2008 financial crisis is attributable in large part to regulatory capture); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1565–70 (1992) (discussing agency capture by private interest groups); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684–87 (1975) (describing how administrative agencies are captured by the interests they are charged to regulate).

11 See, e.g., J. RONALD FOX, *ARMING AMERICA: HOW THE U.S. BUYS WEAPONS* 461 (1974) (“[T]he availability of jobs in industry can have a subtle, but debilitating, effect on the officer’s performance during his tour of duty If he takes too strong a hand . . . he might be damaging his opportunity for a second career following retirement.”); KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* 342 (1986) (“[O]fficials take care of clients so that the clients will take care of them.”); Per J. Agrell & Axel Gautier, *Rethinking Regulatory Capture*, in *RECENT ADVANCES IN THE ANALYSIS OF COMPETITION POLICY AND REGULATION* 286, 292 (Joseph E. Harrington Jr. & Yannis Katsoulacos eds., 2012) (“The perspective of posterior employment in the regulated industry may discipline the regulators and lead to pro-industry regulations.”); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 23 (2010) (citing the revolving door as a cause of regulatory capture); Zachary J. Gubler, *Public Choice Theory and the Private Securities Market*, 91 N.C. L. REV. 745, 774 (2013) (“In

Under the influence of the capture narrative, the risk of capture has become the dominant concern about the revolving door. The potentially debilitating role of the revolving door was highlighted by Mary Schapiro during her Senate confirmation hearing, in which she stated that a conflict might be created by SEC regulators “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.”¹² The revolving door has also been blamed for a series of high-profile regulatory failures ranging from the SEC’s failures to prevent the Ponzi schemes of Bernard Madoff and R. Allen Stanford to federal regulators’ failures to prevent the BP oil spill in the Gulf of Mexico.¹³

A closer examination of the empirical evidence on the capture effect of the revolving door, however, reveals that the capture narrative has been built largely on presumptions. A growing body of empirical literature either finds no conclusive evidence that the revolving door leads to capture, or finds exactly the opposite evidence.¹⁴ For instance, a recent study finds that SEC lawyers are more, not less, aggressive in their enforcement efforts when they subsequently leave the SEC to join law firms specializing in defending clients charged by the SEC.¹⁵

To account for these incongruous empirical results, scholars have begun to formulate and test alternative theories of the revolving door. One such theory, which has been corroborated by empirical studies in recent years, focuses on incentives the revolving door creates for regulators to signal the type of human capital valued by industry employers.¹⁶ 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.

order to secure [industry] jobs, it helps [for SEC regulators] to placate industry players while still at the Agency”); George W. Hilton, *The Basic Behavior of Regulatory Commissions*, 62 AM. ECON. REV. 47, 48 (1972) (arguing that a regulator has incentives not to alienate members of the regulated industry because “employment in the regulated industry is one of the most obvious opportunities after a regulator’s term in office”).

12 *Nominations of: Mary Schapiro, Christina D. Romer, Austan D. Goolsbee, Cecilia E. Rouse, and Daniel K. Tarullo: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. 28 (2009) (statement of Mary Schapiro, Chairman-Designate, Sec. & Exch. Comm’n).

13 See Zaring, *supra* note 9, at 509.

14 For discussions of the empirical literature on the capture effects of the revolving door, see *infra* Section I.B.

15 See Ed deHaan et al., *Does the Revolving Door Affect the SEC’s Enforcement Outcomes?* 25–26 (Rock Cent. for Corp. Governance at Stanford Univ., Working Paper No. 187; Stanford Univ. Graduate Sch. of Bus., Research Paper No. 14-14), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2125560.

16 For discussions of the human-capital theory and its empirical evidence, see *infra* Part II.

But even with the insights offered by the more nuanced human-capital theory, the prevailing analyses of the performance incentives created by the revolving door are still incomplete. This Article argues that the current revolving-door literature is seriously lacking in not adequately recognizing what could be referred to as the “market-expansion” incentive created by the revolving door. Under this market-expansion theory, revolving-door regulators may have incentives to expand the market demand for services they would be providing when they exit the government. This market-expansion incentive may manifest itself differently in different regulatory settings. In the enforcement setting, it may result in more enforcement actions, broadened jurisdictional reach of the enforcement actions, and higher penalties in the enforcement actions. In the rulemaking setting, it 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.¹⁷

Recognizing revolving-door regulators’ market-expansion incentive has far-reaching implications. Most importantly, the market-expansion theory represents a paradigmatic shift in conceptualizing the role of individual regulators in the regulatory process. Although prescribing starkly different performance incentives, both the capture and human-capital theories posit that regulators take the industry’s needs as given and merely respond to those needs. Under the market-expansion theory, however, regulators exert efforts to expand the industry’s needs. In this sense, the market-expansion theory represents an entirely different way of approaching the power dynamics between regulators and the regulated industries.

Given how extensively the revolving door has become intertwined with the modern regulatory state, recognizing revolving-door regulators’ market-expansion incentive has the potential to change the conventional ways of thinking about a wide range of policy issues, including agency aggrandizement, overenforcement versus underenforcement, regulatory settlements, compliance monitors, private rights of action, and professional responsibility. This Article explores the policy implications of the market-expansion theory in those areas.¹⁸

This Article does not intend to argue that every regulator is subject to the market-expansion incentive, any more than the capture theories intend to argue that every regulator is subject to capture. Nor does this Article attempt to establish that the market-expansion incentive is the dominant incentive facing regulators in every regulatory setting. The goal of this Article is to propose the market-expansion incentive as a possibility that has so

17 For expositions of the market-expansion incentive of the revolving door, see *infra* Part III.

18 See *infra* Part III.

far been underrecognized and under-theorized. A future line of research will be necessary to empirically test the market-expansion theory and to identify the specific regulatory settings where the market-expansion incentive is more likely to be acted upon and turned into measurably different regulatory outcomes.

I. CAPTURE

This Article begins with an examination of the main narrative that has so far framed the public discourse on the revolving door: the “capture” narrative. As discussed below, various capture theories surmise that regulators tend to formulate public policies in favor of the industries they regulate. In the revolving-door context, however, this capture narrative has not been fully borne out by empirical evidence.

A. *Capture and the Revolving Door: Theories*

The traditional conceptualization of the regulatory process, aided by the custom of referring to regulators as public servants or civil servants, is to think of regulators as public-minded individuals who arrive at policy choices based on their perceptions of the public interest.¹⁹ Judge Henry Friendly, for instance, described an Interstate Commerce Commission that struggled in deducing what the public interest required it to do in its exercise of rate-making power amid ambiguous and shifting statutory guidance and abrupt industry changes brought about by technological advances.²⁰ Under this conceptualization, if regulators happen to favor the regulated industries in exercising their regulatory power, that would be because of their consciously held policy beliefs or their vision of the public interest.²¹

Capture theories offer a revisionist approach to the regulatory process. In sharp contrast to the public-interest theory, capture theories attribute regulatory favors for industries to the capture of regulators.²² These theories

19 Michael E. Levine & Jennifer Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 168–69 (1990) (discussing the tradition that describes governmental policymakers as public individuals); see also Abner J. Mikva, *Foreword to the Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167, 167 (1988) (questioning the characterization of public officials as wealth-maximizing egoists). For general discussions of the concept of the “public interest,” see GLENDON SCHUBERT, *THE PUBLIC INTEREST: A CRITIQUE OF THE THEORY OF A POLITICAL CONCEPT* 5–29 (1960), and VIRGINIA HELD, *THE PUBLIC INTEREST AND INDIVIDUAL INTERESTS* 1–15 (1970).

20 Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 1263, 1263 (1962).

21 See, e.g., Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7, 28–31 (2000) (arguing that ideology is an important motivator of regulators’ action); Steven Kelman, *Occupational Safety and Health Administration*, in *THE POLITICS OF REGULATION* 236, 250 (James Q. Wilson ed., 1980) (arguing that the pro-protection values of regulators at the Occupational Safety and Health Administration provides the best explanation for the agency’s action).

22 Levine & Forrence, *supra* note 19, at 169 & n.4.

view the regulatory process as being dominated by special interest groups that seek regulatory policies favoring their narrow interests.²³ Embedded in this view of the regulatory process is the view that regulators have narrow, self-interested goals such as job retention, self-gratification from the exercise of power, or post-government personal wealth.²⁴ Regulators could accomplish those goals, according to the capture theories, by granting regulatory favors to interest groups.²⁵ 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.²⁶

Consistent with the predictions of the capture theories in general and the public choice theory in particular, scholars have flagged the adverse impact of the revolving door on regulators' job performance. Richard Posner suggested that regulators who use government service as a steppingstone to private practice would have no incentives to vigorously advocate for the public interest if doing so could not be translated into a larger post-government private practice.²⁷ George Stigler went a step further, arguing that regulators who seek to maximize their utility in related post-government

23 See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965). According to Olson, small groups are better situated than large, diffused groups to overcome the collective action problems that impede group mobilization. See *id.* at 28, 35. Olson's work was expanded and refined by a number of scholars in different fields. See, e.g., GERALD MARWELL & PAMELA OLIVER, *THE CRITICAL MASS IN A MICRO-SOCIAL THEORY* (1993); ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990); George J. Stigler, *Free Riders and Collective Action: An Appendix to Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 359 (1974).

24 Levine & Forrence, *supra* note 19, at 169; see also George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 11 (1971) (arguing that the need for reelection makes it impossible for legislators to vote according to the public interest).

25 See Croley, *supra* note 21, at 10 ("Politicians, as policymakers and policybreakers, are well positioned to advance interest group goals.")

26 The pioneering work of the public choice school was done by George Stigler. See GEORGE J. STIGLER, *Supplemental Note on Economic Theories of Regulation*, in *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION* 137 (1975); Stigler, *supra* note 23; Stigler, *supra* note 24. George Stigler's theoretical framework was later formalized and refined by Sam Peltzman. See Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976). Stigler's approach can be traced to the earlier works of scholars including Anthony Downs, James Buchanan, Gordon Tullock, and Mancur Olson. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENSUS* (1962); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1985); OLSON, *supra* note 23; GORDON TULLOCK, *THE POLITICS OF BUREAUCRACY* (1965). For overviews of the public choice school, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 34-41 (1998); Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL. 203, 204-06 (2006).

27 Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 86 (1969). But see Croley, *supra* note 21, at 29 (arguing that over time, regulators who remain with an agency are those who believe in serving the public interest).

industry work “must avoid open conflicts with the regulated industry.”²⁸ This account of the revolving door has found acceptance in mainstream scholarships in law, political science, and economics concerning the regulatory process.²⁹

Contrary to the public choice theory, which treats regulatory decisions as outcomes of regulators’ rational choices, alternative theories in recent years attribute the capture of regulators to nonrational factors. Jeffrey Rachlinski and Cynthia Farina, for instance, constructed a model of governmental errors based on flaws in human judgment.³⁰ According to them, various characteristics of the structures and processes of government exacerbate the cognitive biases inherent in human decisionmaking and lead to improvident policy despite regulators’ good motives.³¹ Similarly, scholars have identified a set of behavioral biases that may partially explain the shortcomings or failures of the regulatory process at the SEC³² and at the Federal Reserve.³³ Other nonrational factors that have been suggested to account for the capture of regulators include “social capture,” whereby regulators’ worldviews are shaped by the composition of their social networks,³⁴ and “cultural capture,” whereby regulatory decisions could be outcomes of “shared but not explicitly stated understandings of the world.”³⁵

B. *Capture and the Revolving Door: Evidence*

As detailed above, the capture theories point to a possible adverse effect of the revolving door on regulators’ performance. The exact mechanisms of such effect may depend on whether the revolving door in question revolves from government to industry or from industry to government.³⁶ For regula-

28 STIGLER, *supra* note 26, at 165.

29 See *supra* note 11 and accompanying text.

30 See Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 553 (2002).

31 See *id.* at 554 (noting that cognitive psychology has shown that even people with good motives can make bad choices).

32 See Stephen J. Choi & A.C. Pritchard, *Behavioral Economics and the SEC*, 56 STAN. L. REV. 1, 20–42 (2003) (arguing that regulators at the SEC are vulnerable to a wide range of behavioral biases).

33 See Carol A. Needham, *Listening to Cassandra: The Difficulty of Recognizing Risks and Taking Action*, 78 FORDHAM L. REV. 2329, 2347–53 (2010) (arguing that cognitive biases potentially contributed to the Federal Reserve’s failures to examine nonbank mortgage originators during the housing bubble).

34 See Steven Davidoff Solomon, *The Government’s Elite and Regulatory Capture*, N.Y. TIMES, June 11, 2010, <http://dealbook.nytimes.com/2010/06/11/the-governments-elite-and-regulatory-capture/> (suggesting that regulatory capture could result from the interaction between regulators and the people they regulate).

35 See James Kwak, *Cultural Capture and the Financial Crisis*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 79 (Daniel Carpenter & David A. Moss eds., 2014) (arguing that cultural capture contributed to regulator failures in the two decades leading up to the 2007–09 financial crisis).

36 Dal Bó, *supra* note 26, at 214.

tors who have moved from industry to government, they are said to be friendlier to industry because they have been “socialized” in the industry environment.³⁷ 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.³⁸ These two mechanisms may work in conjunction with each other when regulators move back and forth between government and industry, compounding any possible capture effects.

The possible capture effects of the revolving door pose a major public policy concern because of the large number of regulators who enter or exit the revolving door at key regulatory agencies. One earlier study on the prevalence of the revolving door phenomenon was conducted by Ross Eckert, who examined the career paths of 174 regulators who had been appointed and confirmed to the International Criminal Court (ICC), the Civil Aeronautics Board (CAB), and the Federal Communications Commission (FCC) by December 31, 1977.³⁹ Eckert found that of those 174 regulators, 37 held related pre-government jobs in the private sector, and 72 took related post-government jobs in the private sector.⁴⁰ Eckert also found that many of those regulators made a round trip through the revolving door. Of the 37 regulators who held pre-government industry jobs, 50% of them returned to such positions upon leaving the government.⁴¹ More recently, the Project on Government Oversight, a nonprofit organization, issued a report detailing the revolving door problems at the SEC.⁴² The report identified 219 former SEC employees who filed nearly 800 post-government statements between 2006 and 2010 disclosing their representation of industry interests before the SEC within two years of leaving the SEC.⁴³ Those former SEC employees were retained to represent prestigious firms in the consulting, finance, and legal industries over a wide range of issues.⁴⁴

37 *Id.*; see also Agrell & Gautier, *supra* note 11, at 291 (“Regulators with an industry background may still look at issues with industry eyes and show sympathy for the view expressed by the regulated.”); Stavros Gadinis, *The SEC and the Financial Industry: Evidence from Enforcement Against Broker-Dealers*, 67 *BUS. LAW.* 679, 725–26 (2012) (“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.”). Note that this channel of influence of the revolving door on regulators’ performance is analogous to the concepts of “social capture” and “cultural capture” discussed above. See *supra* notes 34–35 and accompanying text.

38 Dal Bó, *supra* note 26, at 214.

39 Ross D. Eckert, *The Life Cycle of Regulatory Commissioners*, 24 *J.L. & ECON.* 113, 114 (1981).

40 *Id.* at 118.

41 *Id.* at 117–19.

42 See PROJECT ON GOV’T OVERSIGHT, *REVOLVING REGULATORS: SEC FACES ETHICS CHALLENGES WITH REVOLVING DOOR* (2011), available at <http://pogoarchives.org/m/fo/revolving-regulators-20110513.pdf>.

43 *Id.* at 7.

44 *Id.* at 12–17.

However, despite the clear theoretical predictions of the capture effects of the revolving door, the empirical literature on how the revolving door might affect regulators' performance is surprisingly thin and contains only limited support for the proposition. In 1979, William Gormley examined whether prior employment with the broadcasting industry affected the voting patterns of commissioners at the FCC.⁴⁵ He found that commissioners with industry backgrounds voted in favor of the industry more often than commissioners without industry backgrounds.⁴⁶ He also found, however, that the political party affiliation of the commissioners was a better indicator of their voting behavior than their prior industry employment.⁴⁷ As a result, Gormley could not isolate a capture effect that is attributable solely to the revolving door. Furthermore, Gormley's study only examines the impact of prior industry employment on regulators' performance, and sheds no light on how prospective industry employment would affect regulators' performance.

In 1981, Paul Quirk filled in the vacuum left by William Gormley by studying whether regulators had incentives to favor the regulated industry in order to enhance their future employment opportunities in the industry.⁴⁸ Using data from interviews he conducted with fifty high-level officials from four federal agencies, Quirk found that regulators did not feel that their level of support for industry would affect their chances for prospective industry employment.⁴⁹ Instead, at one of the agencies studied, the Federal Trade Commission (FTC), "the largest group of respondents perceived incentives in exactly the opposite direction, that is, favoring anti-industry behavior."⁵⁰

Jeffrey Cohen in 1986 revisited the revolving door issue at the FCC, examining the impact of both prior and prospective industry employment on FCC regulators' performance.⁵¹ As with Gormley, Cohen found evidence of a noticeable effect of what he referred to as the "entrance version" of the revolving door, that is, regulators moving from industry to government. According to Cohen's study, commissioners with prior industry employment were more supportive of the industry than those without prior industry employment.⁵² Cohen's findings regarding the "exit" version of the revolving door, that is, regulators moving from government to industry, were mixed. He found that commissioners who took industry employment after

45 William T. Gormley, Jr., *A Test of the Revolving Door Hypothesis at the FCC*, 23 AM. J. POL. SCI. 665, 666 (1979).

46 *Id.* at 674. Specifically, Gormley found that two FCC commissioners who were former broadcasters were more likely than commissioners who were not former broadcasters to vote in favor of the broadcasting industry in license renewals, program content enforcement, and broadcast-cable conflicts. *Id.*

47 *Id.* at 675-76.

48 See PAUL QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* (1981).

49 *Id.* at 164-65.

50 *Id.* at 148.

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

52 *Id.* at 693-94.

leaving office were on average less, not more, supportive of the industry.⁵³ He did find, however, that in their last year on the FCC, commissioners subsequently hired by the industry showed more support of the industry compared to previous years, and they also showed more support of the industry than commissioners not subsequently hired by the industry.⁵⁴ As with Gormley, however, Cohen found that the effects of the revolving door on regulators' performance became much more muted when controls for other commissioner characteristics and presidential and congressional influences were added to his model.⁵⁵

Yet another study that found inconclusive evidence of the capture effects of the revolving door is a 1992 study by Toni Makkai and John Braithwaite on the impact of the revolving door on self-described regulatory attitudes of Australian nursing home inspectors.⁵⁶ Their study showed no clear behavioral patterns as predicted by the capture theories: nursing home inspectors' prior industry experience had no or little effects on their identification with the industry, sympathies with the industry's problems, and toughness in compliance enforcement. Inspectors who expressed willingness to work in the industry upon leaving the government showed more identification and sympathies with the industry, but no less toughness in compliance enforcement.⁵⁷ Because of these mixed results, the authors concluded that the capture effects of the revolving door lack merit as an analytical concept and are determined by situational, not structural, factors.⁵⁸

More recently, Martin Grace and Richard Phillips studied whether state insurance regulators who were subsequently hired by the insurance industry favored the industry in regulating insurance prices.⁵⁹ They found that regulators who accepted jobs in the insurance industry upon leaving office allowed higher insurance prices while in office, compared to regulators who accepted jobs in other industries upon leaving office.⁶⁰ The net effect of the government-to-industry revolving door on insurance prices, however, was fairly small and only marginally statistically significant.⁶¹

In sum, although capture theorists have surmised that the revolving door is an important mechanism of capture, the empirical veracity of that mechanism has not been conclusively established. The effects of the revolving door on regulators' performance, if any, appear to vary from agency to agency, and do not lend support to a coherent behavioral pattern.

53 *Id.* at 694–95.

54 *Id.* at 695.

55 *Id.* at 697–704.

56 Toni Makkai & John Braithwaite, *In and Out of the Revolving Door: Making Sense of Regulatory Capture*, 12 J. PUB. POL'Y 61, 62–63 (1992).

57 *Id.* at 67–68.

58 *Id.* at 61.

59 Martin F. Grace & Richard D. Phillips, *Regulator Performance, Regulatory Environment and Outcomes: An Examination of Insurance Regulator Career Incentives on State Insurance Markets*, 32 J. BANKING & FIN. 116, 117 (2008).

60 *Id.* at 130.

61 *Id.*

II. HUMAN CAPITAL

As discussed above, empirical studies on the impact of the revolving door on regulators' performance have not shown a consistent capture effect. In particular, for the government-to-industry revolving door, two studies have even indicated an opposite effect: regulators who are subsequently hired by the industry are shown to be more aggressive, not less aggressive, toward the industry.⁶² To account for this anomalous result, scholars have formulated and tested an alternative theory of the revolving door—the “human-capital” theory.

A. *The Human-Capital Theory*

The authors of the earlier studies on the effects of the revolving door on regulators' performance offered some intuitive ideas about why the revolving door might incentivize regulators to be more aggressive toward the industry. Explaining his finding that FTC lawyers perceived that an anti-industry stance would enhance their career prospects in the private sector, Paul Quirk observed that demonstrating aggressiveness and effectiveness in enforcement will make regulators “attractive potential employee[s] of the private sector.”⁶³ Similarly, Jeffrey Cohen, who found that FCC commissioners who accepted jobs in the broadcasting industry after leaving office were on average less supportive of the industry, reasoned that “[i]t may make more sense to hire someone with the knowledge or skills that will help the industry, even if the person once opposed the industry, than to hire a friend who can add little to the business.”⁶⁴

In 1995, economist Yeon-Koo Che refined and formalized Quirk's and Cohen's conjecture and offered a more nuanced theory of the incentives created by the revolving door than are suggested by the capture theories.⁶⁵ According to Che, the traditional capture models of the revolving door focus on the *ex post* effects of the revolving door on regulators' performance, but ignores the *ex ante* incentives the revolving door creates for regulators to acquire regulatory human capital.⁶⁶ Che posits that regulators may choose to invest in two forms of human capital, technical expertise or influence contacts, depending on which one is sought by industry employers.⁶⁷ If industry employers hire regulators for their technical expertise, the presence of the revolving door will incentivize regulators to acquire regulatory human capital that will improve their monitoring of the industry.⁶⁸ If industry employers hire regulators for their influence contacts, the presence of the revolving

62 See QUIRK, *supra* note 48, at 163–64; Cohen, *supra* note 51, at 694–95.

63 QUIRK, *supra* note 48, at 172.

64 Cohen, *supra* note 51, at 695.

65 See Yeon-Koo Che, *Revolving Doors and the Optimal Tolerance for Agency Collusion*, 26 RAND J. ECON. 378, 379–80 (1995) (laying out the incentive approach).

66 *Id.*

67 *Id.* at 385.

68 For a formal proof of this proposition, see *id.* at 383–85.

door will divert regulators' attention away from the acquisition of regulatory human capital that is complementary to their regulatory performance.⁶⁹

When the regulatory human capital valued by industry employers is technical expertise, not influence contacts, Che further demonstrates that the presence of the revolving door might create a positive performance incentive for regulators. Che assumes that industry employers cannot directly observe regulators' qualifications but can indirectly obtain that knowledge through observing regulators' monitoring efforts.⁷⁰ Given that, regulators will try to signal their industry qualifications to prospective industry employers by choosing an appropriate level of monitoring efforts.⁷¹ Che proves that under the reasonable assumption that high-quality regulators face a lower marginal cost of monitoring than low-quality regulators, different types of type regulators will choose different levels of monitoring efforts, resulting in a separating equilibrium.⁷² In other words, when industry employers look for regulatory expertise in their agency hires, regulators will have incentives to be more aggressive towards the industry as a way of demonstrating that they possess the qualities sought by the employers.

The human-capital theory of the revolving door, therefore, predicts a performance incentive opposite of that suggested by the capture theories. When all of the conditions required for a human-capital effect are satisfied—that is, when industry employers seek regulatory expertise, when they cannot directly observe that expertise, and when it costs less for high-quality regulators to exert the same level of regulatory efforts than low-quality regulators—the presence of the revolving door may lead to more aggressive, not less aggressive, regulatory actions.

The strict conditions required under the human-capital theory, however, impose significant limitations on the applicability of the theory. The human-capital theory might be able to predict regulators' behavior in the enforcement setting, where regulators' technical expertise can be demonstrated through aggressive enforcement actions. But the theory offers little guidance in settings where industry employers do not value regulators' technical expertise or in settings where industry employers do value regulators' technical expertise but such expertise cannot be observed through aggressive regulatory actions.

B. *Human Capital and the Revolving Door: Evidence*

To varying degrees, empirical studies in recent years have corroborated the human-capital theory of the revolving door in the enforcement setting. Edward Glaeser, Daniel Kessler, and Anne Piehl in 2000 examined the

69 *See id.*

70 *Id.* at 385–86. Che shows that when industry employers have full information about regulators' qualifications, they can trivially separate different types of regulators by offering different wages and each category of regulators will choose a monitoring level commensurate with their innate abilities. *Id.* at 387.

71 *Id.* at 387.

72 For a formal proof of this conclusion, see *id.* at 386–88.

impact of the career concerns of federal prosecutors on the federalization of drug crimes.⁷³ They modeled the allocation of drug cases between the state and federal jurisdictions in a system in which federal prosecutors have relatively greater resources than their state counterparts.⁷⁴ Using survey data on state and federal inmates incarcerated for drug crimes, they found that federal prosecutors appear to prosecute criminals who are older, more successful in the legitimate sector, more likely to be married, more likely to be Army veterans, less likely to have a criminal record, and more likely to hire private defense attorneys.⁷⁵ The authors offered two possible explanations for their results: first, federal prosecutors might be maximizing social welfare by allocating more resources to cases that are important or are difficult to prosecute; and second, they might be seeking to try high-profile individuals “either to obtain political benefits, or to develop their legal skills and connections in the private sector by arguing against skilled private attorneys.”⁷⁶ The latter explanation is apparently consistent with the human-capital theory of the revolving door, although the authors did not refer to it by name. The authors were unable, however, to establish with certainty that the career concerns of federal prosecutors were the primary driving force of the federalization of drug crimes.⁷⁷

Richard Boylan in 2005 studied the effects of the job performances of high-level federal prosecutors who were employed at the rank of U.S. Attorney on their subsequent career outcomes.⁷⁸ Using a sample of 570 U.S. Attorneys who were in office from 1969 to 2000, Boylan demonstrated that longer prison sentences increase the likelihood that a U.S. Attorney becomes a federal judge, and increase the likelihood that the U.S. Attorney becomes either a federal judge or a partner in a large private practice.⁷⁹ Although Boylan did not frame his study as one on the revolving door, his results are indeed consistent with the human-capital theory of the revolving door, which

73 Edward L. Glaeser, Daniel P. Kessler & Anne Morrison Piehl, *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259, 261 (2000).

74 *Id.* at 286.

75 *Id.* at 288.

76 *Id.* at 261.

77 The authors found evidence supporting both explanations. On one hand, the authors found that consistent with the social-welfare view, federal prisoners were associated with longer prison sentences. On the other hand, the authors found that federal prisoners received longer prison sentences even when they were incarcerated only for drug possession. According to the authors, this is consistent with the career-returns view, as “it is hard to believe that high-human-capital people who are sentenced for possession are the most serious criminals.” *Id.* at 288.

78 Richard T. Boylan, *What Do Prosecutors Maximize? Evidence from the Careers of U.S. Attorneys*, 7 AM. L. & ECON. REV. 379, 379 (2005).

79 *Id.* at 396. However, other performance measures, including conviction rates and the number of indictments, were not found to affect the post-government careers of U.S. Attorneys. *Id.* at 379.

predicts that, everything else being equal, regulators who are more aggressive toward the industry have better post-government careers.

In a 2012 study, economists Ed deHaan, Simi Kedia, Kevin Koh, and Shivaram Rajgopal queried the consequences of the revolving door at the SEC.⁸⁰ They examined data on the career paths of 336 SEC lawyers involved in 284 SEC enforcement actions against fraudulent financing reporting over the period 1990 to 2007 and found that the intensity of the SEC lawyers' enforcement efforts is higher when the lawyers leave to join law firms that specialize in defending clients charged by the SEC.⁸¹ The authors explicitly attributed their findings to Yeon-Koo Che's human-capital theory⁸² and argued that their results show that the revolving door will promote more aggressive regulatory activities.⁸³

David Zaring in 2013 analyzed the performance incentives of the revolving door for a group of federal prosecutors.⁸⁴ Zaring followed the subsequent job histories of 152 prosecutors who were employed at the Criminal Division of the U.S. Attorney's Office in the Southern District of New York in 2001.⁸⁵ Zaring uncovered mixed effects of the revolving door: the number of annual criminal cases brought by the prosecutors reduces the probability of them entering the private sector, while the number of pleadings mentioned in Westlaw increases the probability of them entering the private sector.⁸⁶ Other performance-related measures, such as the length of prison terms given out by the prosecutors and the number of mentions in New York Law Journal, do not appear to affect the prosecutors' decisions to move to the private sector.⁸⁷ Instead, Zaring found that the best predictor of the choice to go through the revolving door is ethnicity.⁸⁸ Zaring argued that, at a minimum, his findings offer no support for the capture theories of the revolving door.⁸⁹ According to Zaring, what could have distracted regulators from pursuing their self-interest are the incentives of "reputation, effectiveness, and mission fulfillment."⁹⁰ Without explicitly referring to Che's

80 deHaan et al., *supra* note 15, at 2.

81 *Id.* at 25–26. The lawyers' enforcement efforts are proxied by the monetary value of the damages collected by the SEC, the likelihood of winning the case, the likelihood of criminal proceedings, and the likelihood of naming the CEO as a defendant. *Id.* at 2–3.

82 *See id.* at 2 (citing Che's study).

83 *Id.* at 37 ("[F]uture job prospects, on average, appear to make SEC lawyers increase their enforcement efforts in trying civil cases.").

84 Zaring, *supra* note 9, at 530–46.

85 *Id.* Zaring was able to identify these prosecutors because their names and temporary phone numbers were published in the *New York Law Journal* after the terrorist attacks on September 11, 2001 rendered their offices in downtown Manhattan uninhabitable. *Id.* at 531 n.128.

86 *Id.* at 545.

87 *Id.* at 544–45.

88 *Id.* at 545. Zaring reports that without controlling for ethnicity, gender appears to have an effect on the decision to go into private practice. But the effect of gender disappears after a control variable for ethnicity is added to the regression. *Id.*

89 *Id.* at 546. Note that Zaring uses the term "sell-out" instead of "capture." *See id.*

90 *Id.* at 549.

human-capital theory, Zaring considered his findings to be supportive of the theory, reasoning that “[t]he 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.”⁹¹

These studies corroborating the human-capital theory, however, do not necessarily discredit the capture theories as some of the studies claimed.⁹² After all, the human-capital theory concerns only the government-to-industry revolving door, while the capture theories encompass the revolving door in both directions, both government-to-industry and industry-to-government.⁹³ Even with respect to the government-to-industry revolving door alone, the human-capital theory and the capture theories could both be valid as they require different conditions. It is no coincidence that all studies supporting the human-capital theory are in the enforcement setting and involve technical skills.⁹⁴ The validity of the human-capital theory in that setting does not necessarily invalidate the capture theories in other settings, settings that may be more prone to capture.

That said, the human-capital theory does explain regulators’ behavior in ways that are overlooked by the capture theories. Together with the capture theories, the human-capital theory paints a more complete picture of the diverse incentives facing regulators in different regulatory settings.

III. AN ALTERNATIVE THEORY: MARKET EXPANSION

While the human-capital theory complements the capture theories in explaining the performance incentives the revolving door creates for regulators, it is not the only one that holds such promise. In this Part, this Article contends that both the capture theories and the human-capital theory fail to account for what could be referred to as the “market-expansion” incentive of the revolving door, that is, the incentive for regulators to expand the market demand for services they would be providing when they exit the government. Despite being evident in various regulatory settings, this market-expansion incentive has only received isolated, if any, attention from scholars and policymakers alike.

91 *Id.* at 520.

92 DeHaan, Kedia, Koh, and Rajgopal argued that their results “provide preliminary input to the discussion among the press, policy makers, and Congress about whether revolving doors are detrimental to the SEC’s regulatory efforts.” deHaan et al., *supra* note 15, at 37. Zaring asserted that the capture theories give a “parsimonious, even crabbed” reading of the motivations of law enforcement officials and deserve “some complication.” Zaring, *supra* note 9, at 549.

93 *See supra* Section I.A.

94 Recall that these are necessary conditions for the human-capital incentive of the revolving door. *See supra* Section II.A.

A. *Market Expansion: A General Theory*

A market-expansion theory of the revolving door points to a different performance incentive of the revolving door. It posits that in the enforcement setting, regulators who have their sights on the revolving door may have incentives to bring more enforcement actions, levy higher penalties, and work to expand the scope of matters subject to the agency's authority. In the rulemaking setting, the theory goes, regulators who contemplate moving to the private sector may focus their efforts not on whether the rules they are making are friendly or unfriendly to their prospective industry employers, but on whether the rules are broad enough and complex enough to require expertise in interpretation. In both settings, the underlying motives of the regulators are not based on capture or human capital, but based on their desires to increase the market demand for services they would be providing in the private sector after they exit the revolving door.

Some crude concepts of the market-expansion theory already exist in the current literature. In analyzing the impact of the revolving door on regulatory outcomes, Richard Posner suggests that regulators contemplating private practice upon leaving office would have no incentives to be aggressive towards the industry if doing so could not result in a larger private practice.⁹⁵ Larry Ribstein argues that in the criminal prosecution context, the existence of the revolving door increases prosecutors' incentives to bring more prosecutions, as "increasing the number of successful prosecutions can make the revolving door more lucrative."⁹⁶ Ribstein aptly analogizes this phenomenon to prosecutors "turn[ing] up the fire so they can sell extinguishers."⁹⁷ Mike Koehler voices concerns about Department of Justice (DOJ) officials charged with enforcing the Foreign Corrupt Practices Act (FCPA) exiting the DOJ to join law firms defending clients facing FCPA investigations.⁹⁸ These concerns notwithstanding, revolving-door regulators' potential market-expansion incentive has yet to be recognized as a structural force inherent in the regulatory process.

While the literature has not systematically examined the market-expansion incentive in the revolving-door context, it has long recognized regulators' financial interests in public law enforcement and regulation in general. William Niskanen argues that regardless of whether regulators are motivated by selfish considerations, they all care about "salary, perquisites of the office, public reputation, power, patronage, output of the bureau, ease of making

95 See *supra* note 27 and accompanying text.

96 Larry E. Ribstein, *Agents Prosecuting Agents*, 7 J.L. ECON. & POL'Y 617, 631 (2011). Ribstein could be referring to the human-capital incentive, however, as prosecutors could benefit from more aggressive prosecutions through building up their human capital. See *supra* Section II.A.

97 Ribstein, *supra* note 96, at 631.

98 See Mike Koehler, *DOJ FCPA Unit Chief Joins FCPA Inc.*, FCPA PROFESSOR (Jan. 28, 2014), http://www.fcprofessor.com/doj-fcpa-unit-chief-joins-fcpa-inc?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+thefcpaprofessor+%28FCPA+Professor%29.

changes, and ease of managing the bureau,” and all of those can be accomplished by having a bigger agency budget.⁹⁹ Nicholas Parrillo demonstrates that historically, in the eighteenth century and often far into the nineteenth and early twentieth centuries, the incomes of public officials in the United States consisted of fees or bounties for services they performed: judges charged fees for cases they heard, prosecutors won a bounty for each criminal they convicted, and tax investigators received a percentage of the tax evasions they discovered, to name just a few examples.¹⁰⁰ It was only later, when this bargaining-based system became incompatible with both liberal-democratic principles and the practical need to maintain public trust in government, that those fees and bounties were replaced with salaries.¹⁰¹ Margaret Lemos and Max Minzner contend that even today, regulatory agencies staffed with salaried officials have ample incentives to prioritize and maximize financial recoveries.¹⁰² According to Lemos and Minzner, these incentives stem from institutional arrangements that allow agencies to retain a portion of the financial awards they win, as well as agencies’ reputational interests in using the amounts of financial recoveries to signal the importance of their work to lawmakers and the public.¹⁰³ Lemos and Minzner further argue that these institutional incentives are internalized by individual regulators, who care about the agencies’ institutional goals because of “hard incentives, such as bonuses and termination, or soft pressures, like self-motivation and peer pressure.”¹⁰⁴ In an analysis resembling the human-capital theory of the revolving door, Lemos and Minzner acknowledge that “non-career” regulators, that is regulators who intend to leave for the private sector after a short period of time, have incentives to build their litigation skills as a way of appealing to their prospective employers.¹⁰⁵ But they argue that these skill-oriented incentives do not necessarily conflict with agencies’ institutional goal of maximizing financial recoveries.¹⁰⁶

99 WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 38–42 (1971). *But see* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 932 (2005) (“Even if most bureaucrats were primarily interested in lining their own pockets, the relationship between a larger agency budget and higher salaries or cushier working conditions is empirically tenuous.”).

100 NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940*, at 1 (2013).

101 *Id.* at 359.

102 *See* Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 856 (2014) (arguing that public enforcers often seek large monetary awards for self-interested reasons divorced from the public interest in deterrence).

103 *Id.* at 856–57.

104 *Id.* at 888.

105 *Id.* at 892. Indeed, Lemos and Minzner cite to the foundational work of the human-capital theory by Yeon-Koo Che to support their argument that industry employers are inclined to hire the regulators who are most valuable to them, not the regulators who gave them the most favors. *See id.* at 892 n.163.

106 *Id.* at 892.

The market-expansion theory of the revolving door extends this line of analysis to the revolving-door context. If financial incentives are inherent in the regulatory process and are part of the incentives facing individual regulators, they are likely to be taken into account by regulators who attempt to maximize their expected payoffs in the private sector.¹⁰⁷ The market-expansion theory surmises that regulators may act on such financial incentives in a different way than is commonly understood under the capture and human-capital theories—that is, not by appealing to prospective industry employers, but by engaging in market-expansion efforts.

The market-expansion incentive differs substantially from the human-capital incentive. Aside from being applicable to not only the enforcement setting but also the rulemaking setting, the market-expansion theory is predicated on a different action mechanism than the human-capital theory. The human-capital incentive presumes a fixed level of demand for regulators' post-government services; regulators have to compete against one another through more aggressive enforcement to demonstrate their qualifications for a post-government position in the private sector. The market-expansion incentive, by contrast, increases the aggregate demand for regulators' expertise and therefore expands the amount of opportunities available to all regulators. The human-capital incentive exists essentially because of the inability of industry employers to differentiate among regulators, and aggressive enforcement is the action taken by highly skilled regulators to overcome this informational hurdle. But under the market-expansion theory, even if employers could perfectly observe regulators' qualifications, regulators would still have incentives to engage in aggressive enforcement, because doing so would increase the aggregate demand for their post-government services. In other words, the human-capital incentive incentivizes regulators to vie for the same piece of a pie, while the market-expansion incentive incentivizes regulators to make the pie larger.¹⁰⁸

More fundamentally, compared to the capture and human-capital theories, the market-expansion theory represents a paradigmatic shift in the thinking surrounding the performance incentives of the revolving door. The human-capital theory, although predicting a performance incentive opposite of those suggested by the capture theories, shares a fundamental commonality with the capture theories in terms of the power dynamics they portray between regulators and industry employers. Both the capture and human-capital theories view industry employers as the dominant party that sets the terms of the relationship between regulators and industry employers. Under the capture theories, regulators must win the goodwill of industry employers

107 Indeed, the capture and human-capital incentives discussed above are two other ways for regulators to act on these financial incentives.

108 As an example of the intertwined relationship between the market-expansion incentive and the human-capital incentive, David Zaring did not distinguish the market-expansion incentive from the human-capital incentive when he considered the hiring of Mark Mendelsohn by the law firm Paul Weiss as an example of regulators benefiting from the revolving door by "working hard." See Zaring, *supra* note 9, at 520.

by being lenient towards them, whereas under the human-capital theory, regulators must win the attention and recognition of industry employers by being aggressive towards them. Under both sets of theories, regulators take the industry's needs as given and merely respond to those needs. Under the market-expansion theory, however, regulators exert efforts to expand the industry's needs. The market-expansion theory, therefore, paints the power dynamics between regulators and industry employers the opposite way.

This Article does not argue that the market-expansion incentive explains regulators' behavior in every regulatory setting. Rather, this Article attempts to prove the point that the market-expansion incentive merits recognition at least from a theoretical point of view, as there are reasons to believe that it is as plausible as, or even more plausible than, the capture and human-capital incentives. The capture incentives rely on an implicit contract: by being friendly towards a prospective industry employer, a regulator hopes that the employer will return the favor someday by hiring him or her when he or she is ready to exit the government.¹⁰⁹ But this implicit contract is time-inconsistent. By the time the regulator is ready to leave the government, all of the favors have been done and the employer would have no compelling reasons, other than goodwill, to return the favor.¹¹⁰ Of course, the regulator's expertise might be of value to the employer, but that would have been the case had the regulator not been friendly towards the employer. By contrast, if a regulator has structurally expanded the reach of a regulatory regime through aggressive enforcement or broad, complex rules, by the time the regulator is ready to leave the government, it would be in the best interest of a prospective industry employer to hire the regulator for its legal defense and compliance needs. That would be the case even if the personal relationships between the regulator and the employer had not been all that pleasant. From a regulator's point of view, expanding the reach of the regulatory regime on account of which he or she would be providing services to future clients is certainly more reliable than an implicit quid pro quo contract in securing a post-government position in the private sector.

Similarly, there are reasons to believe that the market-expansion incentive is at least as plausible as the human-capital incentive. If, as the human-capital theory asserts, regulators have incentives to be aggressive in carrying out their regulatory duties for purposes of signaling their human capital, they would also have incentives to be aggressive in carrying out their regulatory duties for purposes of expanding the market demand for their post-government services. To be sure, regulators face a classic collective action problem when engaging in market-expansion efforts, as the benefits of market expansion inure to all regulators while the costs of market expansion are shouldered by individual regulators alone.¹¹¹ This collective action problem,

109 This contract is likely to be implicit in most cases because it would be a violation of the law and the regulator's ethical duties if it were written out explicitly.

110 Lemos & Minzner, *supra* note 102, at 891-92.

111 This collective action problem is inherent in any group action. For formulations of the collective action problem, see OLSON, *supra* note 23, at 5-52.

however, is alleviated by the small size of the regulators' groups¹¹² and social norms that might exist in the regulatory community.¹¹³

Below, this Article discusses the market-expansion incentive in the enforcement setting and in the rulemaking setting respectively. For each setting, it details the different manifestations of the market-expansion incentive and examines what conditions are conducive to the market-expansion incentive.

B. *Market Expansion in Enforcement*

1. Manifestations of the Market-Expansion Incentive

In the enforcement setting, the market-expansion incentive may manifest itself in three simple ways. First, it may motivate regulators to bring a larger number of enforcement actions. The more enforcement actions regulators bring, the more market demand there will be for their services when they exit the government to defend against such enforcement actions.¹¹⁴ Second, the market-expansion incentive may prompt regulators to expand the jurisdiction of their agencies. The broader the scope of activities subject to regulators' enforcement authority, the more market demand there will be for their post-government services.¹¹⁵ Finally, the market-expansion incentive may lead to regulators imposing higher monetary or nonmonetary penalties in enforcement actions. Everything else being equal, higher penalties increase the stakes of the enforcement actions and lead to higher spending on legal defense, thereby increasing the market demand for regulators who would be providing such legal defense.

2. Conditions Conducive to the Market-Expansion Incentive

From a theoretical point of view, the market-expansion incentive is arguably an incentive facing every regulator who contemplates exiting the revolving door. Yet in any given case, the market-expansion incentive is likely one of the many factors impacting regulators' performance—the capture

112 Mancur Olson argues that small-sized groups are more effective and coherent in coordinating group actions. *See id.* at 53–57.

113 Elinor Ostrom argues that desires to conform to social norms help overcome the collective action problem. *See, e.g.,* Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSP. 137, 144 (2000) (“[S]ocial norms may lead individuals to behave differently in the same objective situation depending on how strongly they value conformance with (or deviance from) a norm.”).

114 The revolving-door-minded regulators' incentive to bring more enforcement actions differs from the incentives of regulators pursuing other goals. *See* Sanford C. Gordon & Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 AM. J. POL. SCI. 334, 335–36 (2002) (proposing a model in which elected prosecutors maximize conviction rates).

115 In an analogous setting, Larry Ribstein argues that prosecutors have incentives to create and expand theories of criminal liability so as to increase the private sector's demand for former prosecutors who can defend firms from these charges and counsel them on how to avoid criminal liability. *See* Ribstein, *supra* note 96, at 631.

and human-capital incentives being others, and competing financial incentives and regulators' senses of duty and professional ethics being other non-financial factors. So whether the market-expansion incentive will dominate other incentives and factors to produce measurable effects is an empirical question whose answer may vary on a case-by-case basis.

But one can identify certain conditions that are conducive to the market-expansion incentive, that is, conditions under which the market-expansion incentive is expected to be particularly strong. Such conditions include a relatively large degree of regulatory discretion, enforcement targets with ample financial resources, the possession of specialized skills and knowledge by regulators, and the lack of a private right of action.

First, regulators need regulatory discretion before they can adjust the level and manner of their enforcement efforts to benefit their post-government careers.¹¹⁶ This condition is likely present in most enforcement settings. As for prosecutors, given that the vast majority of criminal cases are not tried before a judge,¹¹⁷ there are essentially no effective checks on the manner in which prosecutors exercise their prosecutorial authority.¹¹⁸ Discretion is also a defining feature of enforcement by regulators in administrative agencies.¹¹⁹ Consequently, as a general matter, regulators who contemplate a post-government career in the private sector likely have the requisite discretion for the market-expansion incentive.¹²⁰

116 It is worth noting that regulatory discretion is a key condition conducive not only to the market-expansion incentive, but also to the capture and human-capital incentives. If regulators' actions were rigidly constrained by law or public policy, they would not be able to alter their enforcement actions to serve their personal objectives, be they currying favor with prospective industry employers or building or signaling human capital.

117 See Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1415 (2003) (stating that the rate of guilty pleas increased from 85.4% in 1991 to 96.6% in 2001).

118 See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 876–84 (2009) (discussing the broad power that federal prosecutors enjoy); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1024–28 (2006) (discussing the lack of oversight on prosecutorial discretion); Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 248 (2006) (arguing that prosecutors are the sole de facto adjudicator in criminal cases).

119 See David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 272 (2013) (“All agencies have significant enforcement discretion concerning the statutes that they administer.”); Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 466 (2012) (“Even when Congress delineates their substantive mandates more particularly, agencies retain significant enforcement discretion, effectively allowing them to shape the content of federal law.”); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 790–91 (2013) (discussing a memorandum issued by U.S. Immigration and Customs Enforcement director John Morton instructing subordinates on the exercise of prosecutorial discretion).

120 A caveat is that regulators' discretion might be limited in enforcement actions that are dictated by political imperatives.

Second, regulators' market-expansion incentive is expected to be stronger when the enforcement targets have the financial resources to pay for legal defense and compliance. Or put differently, the market-expansion incentive will lead regulators to focus their enforcement efforts on targets that have the financial resources to pay. This "deep pocket" effect has been well documented in private litigation¹²¹ and public enforcement.¹²² When regulators are responsive to financial incentives, as revolving-door regulators arguably are, the depth of the financial resources of the enforcement targets becomes an important factor in determining where to focus their enforcement efforts.

Third, regulators' market-expansion incentive would be stronger when they possess specialized skills. For regulators with skills that are valuable in a wide range of enforcement areas (e.g., general prosecutorial skills), the market demand for their skills would be plenty when they exit the government and their prospect in the private sector would not hinge as much on their own market-expansion efforts. When regulators possess specialized skills that are valuable only in a narrow set of enforcement settings, however, they would face stronger incentives to engage in market-expansion efforts to increase the exit opportunities available to them once they leave the government.

Finally, all else being equal, regulators' market-expansion incentive would be stronger when there are no private rights of action to create demand for regulators' post-government services. When only the government can enforce a statute, government enforcement becomes the only source of market demand for legal defense and compliance efforts. In such scenarios, regulators would find their exit opportunities limited if they do not bring enough enforcement actions. By contrast, regulators who enforce statutes that authorize private rights of action would find their expertise appealable not only to clients defending government enforcement actions, but also to clients defending private actions. A caveat, however, is that the importance of private actions for regulators' market-expansion incentive is tempered by the follow-on nature of such actions. In many areas where public enforcements and private actions coexist, a large percentage of private actions are filed as follow-on cases to government enforcement actions.¹²³

121 See, e.g., Frances Floriano Goins, *Defending Clients from Securities Fraud Claims*, in RECENT DEVELOPMENTS IN SECURITIES LAW *9 (2013 ed.), available at 2013 WL 5290488 ("In the wake of the recent financial meltdown and continuing economic difficulties, deep-pocket defendants, and particularly financial institutions, are named as defendants in nearly every securities fraud and Ponzi scheme case.").

122 See, e.g., Lemos & Minzner, *supra* note 102, at 884 ("[Federal agencies] frequently target their enforcement actions against large defendants with deep pockets.").

123 The best example of the follow-on nature of private actions can be found in antitrust law, where the broad channel of actions begins as public enforcement actions brought by the FTC or the DOJ, to be followed by private actions seeking monetary restitution or compensation. See Samuel Issacharoff, *Class Actions and State Authority*, 44 LOY. U. CHI. L.J. 369, 380 (2012). An earlier study found that between 1973 and 1983, nearly a quarter of all private antitrust actions were filed as follow-on cases. See Thomas E. Kauper

So even with private rights of action, regulators would still face the market-expansion incentive, as private actions themselves depend, at least partially, on government actions.

3. A Case Study: The Foreign Corrupt Practices Act

The market-expansion incentive in the enforcement setting can be illustrated using the enforcement of the FCPA as an example. Enacted in 1977 in response to U.S. corporations' overseas bribery scandals revealed during the Watergate era,¹²⁴ the FCPA prohibits U.S. companies, certain foreign issuers of securities, and any persons in U.S. territory from corruptly making payments to foreign officials for purposes of obtaining or retaining business.¹²⁵ The FCPA also requires certain issuers of securities to make and keep accurate books and records and to maintain an internal accounting control system to ensure compliance with the FCPA.¹²⁶ Two government agencies, DOJ and the SEC, are charged with enforcing the FCPA.¹²⁷ The FCPA does not provide for a private right of action,¹²⁸ although plaintiffs have been filing private actions against FCPA violations on other statutory grounds.¹²⁹

The FCPA has had an uneven pace of enforcement since its enactment. During the statute's first twenty-five years, FCPA enforcement actions totaled only a handful of cases per year, resulting in only modest penalties.¹³⁰ The

& Edward A. Snyder, *Private Antitrust Cases that Follow on Government Cases*, in PRIVATE ANTI-TRUST LITIGATION 329, 358 (Lawrence J. White ed., 1988). Plaintiffs also routinely file follow-on derivative lawsuits, security fraud actions, tort and contract claims, employment lawsuits, and private actions under the Racketeer Influenced and Corrupt Organizations Act. See Aryeh S. Portnoy & John L. Murino, *Private Actions Under the U.S. Foreign Corrupt Practices Act: An Imminent Front?*, INT'L LITIG. NEWS (Int'l Bar Ass'n Legal Practice Div., London, U.K.), Apr. 2009, at 32.

124 See Carolyn Lindsey, *More Than You Bargained For: Successor Liability Under the U.S. Foreign Corrupt Practices Act*, 35 OHIO N.U. L. REV. 959, 961 (2009) ("While investigating contributions to Richard Nixon's re-election campaign, Congress discovered that over 400 U.S. companies had paid bribes in excess of \$300 million through offshore slush funds in order to win contracts overseas." (footnote omitted)); see also Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 934-35 (2012) (detailing allegations or admissions of questionable payments by U.S. corporations to foreign government officials or foreign political parties in years leading up to the enactment of the FCPA).

125 See 15 U.S.C. §§ 78dd-1 to -3 (2012).

126 *Id.* § 78m.

127 See Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 923-24 (2010) (discussing the division of responsibilities between DOJ and SEC in FCPA enforcement).

128 See *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1027-30 (6th Cir. 1990) (holding that the FCPA does not create an implied private right of action).

129 See Portnoy & Murino, *supra* note 123, at 32 (discussing private actions against FCPA violations filed as securities fraud suits, shareholder derivative suits and suits under the Racketeering Influenced Corrupt Organizations Act).

130 Joseph W. Yockey, *Choosing Governance in the FCPA Reform Debate*, 38 J. CORP. L. 325, 330 (2013); see also Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 522 (2011).

FCPA was so rarely enforced in the early years that a bar journal stated that no sooner had the FCPA been signed into law than it “effectively became a dead letter.”¹³¹ Since the early 2000s, however, FCPA enforcement has picked up speed and intensity. During FCPA’s first twenty-eight years, DOJ and the SEC typically initiated just two or three cases a year.¹³² Since then, FCPA enforcement has spiked: the number of unique FCPA enforcement actions initiated by DOJ and the SEC was thirteen in 2007, ten in 2008, eleven in 2009, twenty in 2010, and sixteen in 2011.¹³³ In recent years, DOJ officials have stated on different occasions that FCPA enforcement actions are at an all-time high and will likely remain high.¹³⁴

Not only are FCPA enforcement actions increasing in number, but they are also expanding in scope. The FCPA requires a “business purpose” test; it applies only to payments intended to induce or influence a foreign official to use his or her position to assist in “obtaining or retaining business.”¹³⁵ The typical kinds of bribes that would satisfy this business purpose test are bribes paid in order to obtain or retain government contracts.¹³⁶ But in 2004, in *United States v. Kay*, the U.S. Court of Appeals for the Fifth Circuit affirmed the DOJ’s theory that the FCPA could potentially apply to bribes paid to foreign officials for purposes of lowering a defendant’s taxes and customs duties.¹³⁷ After examining the FCPA’s legislative history, the Fifth Circuit held that Congress intended for the FCPA to apply “broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business.”¹³⁸ Since *Kay*, FCPA enforcement actions have been brought against firms that made payments intended to generate general business advantages such as those involving foreign licenses, permits, and certifi-

131 John Gibeaut, *Rupert Murdoch, Embattled in the U.K., Grapples with U.S. Bribery Law*, 98 A.B.A. J. 52, 55 (2012).

132 Ethan S. Burger & Mary S. Holland, *Why the Private Sector Is Likely to Lead the Next Stage in the Global Fight Against Corruption*, 30 FORDHAM INT’L L.J. 45, 52 (2006).

133 See *FCPA Digest: Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act*, SHEARMAN & STERLING LLP 14 (Jan. 2012), http://www.shearman.com/~media/Files/NewsInsights/Publications/2012/01/Shearman—Sterlings-Recent-Trends-and-Patterns-i_/Files/View-January-2012-iRecent-Trends-and-Patterns-in_/FileAttachment/FCPADigestTrendsandPatternsJan2012.pdf.

134 See, e.g., Oliver J. Armas, *The U.S. Foreign Corrupt Practices Act—An Overview*, 22 INT’L L. PRACTICUM 31, 37 (2009) (discussing comments made by Mark Mendelsohn, then-deputy chief of the DOJ Fraud Section); *2010 Year-End FCPA Update*, GIBSON, DUNN & CRUTCHER LLP 1 (Jan. 3, 2011), <http://www.gibsondunn.com/publications/Documents/2010YearEndFCPAUpdate.pdf> (quoting Lanny A. Breuer, then-Assistant Attorney General, as stating that “FCPA enforcement is stronger than it’s ever been—and getting stronger”).

135 U.S. DEP’T OF JUSTICE & U.S. SEC. & EXCH. COMM’N, *A RESEARCH GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT* 12 (2012).

136 *Id.*

137 *United States v. Kay*, 359 F.3d 738, 739 (5th Cir. 2004).

138 *Id.* at 755.

cations.¹³⁹ Most recently, the DOJ has been investigating News Corp for potential FCPA violations in connection with the bribes its newspapers in London allegedly paid to British police officers for inside information.¹⁴⁰

More aggressive FCPA enforcement is reflected not only in the number and scope of enforcement actions, but also in the amount of monetary penalties levied. Until recent years, the amount of fines assessed in FCPA cases rarely exceeded one million dollars.¹⁴¹ In 2008, Siemens AG settled FCPA-related charges with DOJ for approximately \$800 million, setting a record for FCPA fines.¹⁴² A number of FCPA investigations in 2009 and 2010 also resulted in settlements of hundreds of millions of dollars each.¹⁴³

As the number of enforcement actions and the amount of penalties go up, so do the expenses incurred for complying with the FCPA. In December 2006, after evidence about its overseas bribes began to emerge, Siemens AG hired the law firm Debevoise & Plimpton LLP and the accounting firm Deloitte & Touche to conduct an internal investigation, which lasted for two years at a final cost of nearly \$1 billion.¹⁴⁴ A five-year internal FCPA investigation at Daimler AG cost at least \$500 million, compared to the \$185 million Daimler eventually paid in penalties.¹⁴⁵ It is estimated that a multinational company spends, on average, \$2 million on an internal FCPA investigation in one country, with most FCPA investigations spanning several countries.¹⁴⁶

The boom in FCPA enforcement has benefited former FCPA regulators who walked through the revolving door. Because of the elevated importance of FCPA compliance and defense, the expertise of those former regulators has become much more valuable to law firms and industries. For example, Mark Mendelsohn, Deputy Chief of the DOJ Criminal Division's Fraud Sec-

139 See Koehler, *supra* note 127, at 971–75 (discussing recent FCPA enforcement actions concerning foreign licenses, permits, applications, certifications, and customs and tax duties).

140 Michael Wolff, *Murdoch's News Corp Mulls FCPA Deal with US Justice Department*, THE GUARDIAN (Jun. 10, 2013), <http://www.theguardian.com/commentisfree/2013/jun/10/murdoch-news-corp-fcpa-deal-doj>.

141 Westbrook, *supra* note 130, at 495.

142 Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 791 & n.42 (2011). When including its settlement with German authorities, Siemens AG paid a total of \$1.6 billion in fines. *Id.*

143 These settlements are: Halliburton and its former subsidiary Kellogg, Brown & Root for \$579 million, Snamprogetti Netherlands B.V. for \$365 million, Panalpina World Transport (Holding) Ltd. for \$156 million, Technip S.A. for \$338 million, BAE Systems PLC for \$400 million, and Daimler AG for \$185 million. *See id.* at 791.

144 Nathan Vardi, *The Bribery Racket*, FORBES (June 7, 2010, 12:00 AM), <http://www.forbes.com/global/2010/0607/companies-payoffs-washington-extortion-mendelsohn-bribery-racket.html>.

145 *Id.*

146 Joe Palazzolo, *FCPA Inc.: The Business of Bribery—Corruption Probes Become Profit Center for Big Law Firms*, WALL ST. J., Oct. 2, 2012, <http://online.wsj.com/articles/SB10000872396390443862604578028462294611352>.

tion (the DOJ's FCPA unit) between 2005 and 2010¹⁴⁷ and the "architect" of DOJ's modern FCPA enforcement program,¹⁴⁸ joined the law firm Paul, Weiss upon leaving the DOJ reportedly for an annual salary of \$2.5 million.¹⁴⁹ As another example, Lanny A. Breuer, the Assistant Attorney General of the DOJ's Criminal Division who oversaw eight of the ten largest FCPA penalties in U.S. history,¹⁵⁰ returned to his law practice at the law firm Covington & Burling LLP in 2013 for an estimated salary of \$4 million in the first year.¹⁵¹

The fact that former FCPA regulators have benefitted from the boom in FCPA enforcement does not necessarily mean that they increased FCPA enforcement for personal gains. Although some commentators have suggested that such causal links might exist,¹⁵² no such conclusions could be drawn without concrete evidence. Indeed, there are many alternative reasons why FCPA enforcement was suddenly revived in the early 2000s. These reasons include the adoption of international antibribery conventions and key antibribery legislation in other jurisdictions in the late 1990s and early 2000s,¹⁵³ the enactment of the Sarbanes-Oxley Act of 2002,¹⁵⁴ the outbreak

147 *Mark F. Mendelsohn*, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, <http://www.paulweiss.com/professionals/partners-and-counsel/mark-f-mendelsohn.aspx> (last visited Dec. 26, 2014) ("As deputy chief of the Fraud Section from 2005 to 2010, Mark was responsible for overseeing all DOJ investigations and prosecutions under the FCPA . . .").

148 *Id.* ("Prior to joining Paul, Weiss, Mark served as the deputy chief of the Fraud Section of the Criminal Division of the United States Department of Justice (DOJ), and is internationally acknowledged and respected as the architect and key enforcement official of DOJ's modern Foreign Corrupt Practices Act (FCPA) enforcement program.")

149 Vardi, *supra* note 144.

150 See Press Release, Assistant Attorney General Lanny A. Breuer Announces Departure from Department of Justice, OFFICE OF PUB. AFFAIRS, DEP'T OF JUSTICE (Jan. 30, 2013), <http://www.justice.gov/opa/pr/2013/January/13-ag-128.html>.

151 Ben Protess, *Once More Through the Revolving Door for Justice's Breuer*, N.Y. TIMES, Mar. 28, 2013, <http://dealbook.nytimes.com/2013/03/28/once-more-through-the-revolving-door-for-justices-breuer/>.

152 See, e.g., Vardi, *supra* note 144 ("[A]s the feds cranked up enforcement of the 33-year-old Foreign Corrupt Practices Act (FCPA), a thriving and lucrative antibribery complex has emerged."); Yockey, *supra* note 142, at 793 ("The rise in FCPA enforcement has produced a cottage industry of FCPA experts, including lawyers, accountants, and consultants at prestigious firms, which DOJ and SEC personnel often join after leaving their federal jobs for considerably higher compensation." (footnote omitted)).

153 See Westbrook, *supra* note 130, at 510–15 (discussing international anticorruption developments since the late 1990s).

154 The Sarbanes-Oxley Act of 2002 imposed significant reporting and certification requirements on issuers of securities and likely contributed to increased information for FCPA investigations. See *id.* at 515–16; see also Yockey, *supra* note 142, at 793–94 (providing examples of the Sarbanes-Oxley Act's certification and reporting requirements and noting that "[t]hese developments prompted an increasing number of firms to voluntarily disclose potential FCPA violations").

of the United Nations Oil-for-Food Program scandals in 2005,¹⁵⁵ and the enactment of the Dodd-Frank Act in 2010.¹⁵⁶

Yet the point here is that FCPA regulators at least have *incentives* to increase FCPA enforcement if their goal is to maximize their exit opportunities. Since the FCPA does not authorize private actions, the only demand for FCPA regulators' post-government services would come from the enforcement actions brought by the regulators. FCPA regulators would also have incentives to increase enforcement, because there are not many alternative uses—or at least not many equally profitable uses—of their specialized knowledge and skills in bribery investigations.¹⁵⁷ It is completely rational, therefore, for a regulator contemplating a post-government career in the private sector to maximize enforcement to the extent permitted by his or her discretion.

C. *Market Expansion in Rulemaking*

1. Manifestations of the Market-Expansion Incentive

The market-expansion incentive may exist not only in the enforcement setting, but also in the rulemaking setting. Given that regulators enjoy wide discretion in rulemaking, they may have incentives to make rules in a manner that expands the market demand for their post-government services in interpreting the rules they made. As discussed in detail below, the market-expansion incentive may prompt rulemakers to engage in efforts to expand the jurisdiction of their agencies, to make flexible standards rather than bright-line rules, and to make complex as opposed to simple rules or standards.

First, to the extent that regulators are motivated by revolving-door considerations, they may have incentives to expand the jurisdictions of their agencies by expanding the scope of the subject matter covered by the rules they make. The logic of this incentive is straightforward: the more matters that come under the purview of an agency rule, the more market demand the regulators who are responsible for making the rule will create for their expertise in interpreting the rule.

155 In 2005, a United Nations-commissioned investigative body released a report naming 2253 companies as having made corrupt payments of more than \$1.8 billion to the Iraqi government. Those companies became ready-made candidates for FCPA enforcement actions. See Westbrook, *supra* note 130, at 516–17.

156 Under the whistleblower provisions of the Dodd-Frank Act, any qualified persons who provide original information about violations of securities laws, including the FCPA, will receive an award of between 10–30% of the monetary penalties imposed on a firm in excess of \$1 million. See Yockey, *supra* note 142, at 794.

157 Note, however, that the value of regulators' knowledge and expertise in a specific area is not completely exogenous. The more enforcement actions regulators bring in an enforcement area and the higher monetary penalties the enforcement actions carry, the more valuable regulators' knowledge and expertise will become in that area.

Second, revolving-door regulators may also have incentives to make flexible standards as opposed to bright-line rules.¹⁵⁸ Bright-line rules, like the one advocated by Oliver Wendell Holmes requiring a driver to “stop and look” at an unguarded railroad crossing,¹⁵⁹ prescribe specific rules of conduct on an ex ante basis and leave only factual issues for the future adjudicator.¹⁶⁰ By contrast, flexible standards, like the one advocated by Benjamin Cardozo requiring a driver to act with reasonable caution at an unguarded railroad crossing,¹⁶¹ are given content on an ex post basis and leave both the determination of what constitutes permissible conduct and factual issues for the future adjudicator.¹⁶² While much has been written about the relative merits of rules versus standards,¹⁶³ few inquiries have been made as to why rulemakers might prefer rules over standards or vice versa. The revolving door supplies a potential answer to this question. In the rulemaking setting, the revolving door may motivate a rulemaker to choose standards over rules, as standards may result in more market demand for the rulemaker’s rulemaking expertise than rules. The reasons for this preference are twofold. First, the process of adjudication is more costly if a standard governs, as the adjudication will require giving content to the standard.¹⁶⁴ Second, the lack of precision or specificity under a standard encourages costly efforts to avoid

158 Rules and standards can be described as different forms of legal directives that vary in the relative discretion they afford the decisionmaker. See Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57 (1992). For more on the distinction between rules and standards, see generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (using an economic analysis to determine whether legal commands should be implemented through rules or standards); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–713 (1976) (examining the opposing models of individualism, which favors rules, and altruism, which favors standards, on private law); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 783–92 (1989) (arguing for a more modern interpretation of the rule of law); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 592–93 (1988); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985) (examining the use of rules called crystals and standards known as mud in the property context).

159 *Balt. & Ohio R.R. v. Goodman*, 275 U.S. 66, 70 (1927).

160 Kaplow, *supra* note 158, at 559–60.

161 *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 103–06 (1934).

162 Kaplow, *supra* note 158, at 560.

163 See, e.g., Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983) (discussing the optimal precision of administrative rules); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974) (proposing an economic model of the optimal balance between specificity and generality in the formulation of legal rules and standards); Kaplow, *supra* note 158 (analyzing how rules and standards should be designed and when rules or standards are likely to be preferable); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (advocating clear, general principles of decision over personal discretion); Schlag, *supra* note 158 (discussing the rules versus standards dialectic in various areas of law and particularly in constitutional law).

164 Kaplow, *supra* note 158, at 570.

compliance.¹⁶⁵ Both the high enforcement costs and the high evasion and concealment costs associated with standards will create more market demand for the rulemaker's post-government services. Therefore, if a rulemaker wanted to maximize his or her exit opportunities, standards instead of rules would best serve his or her purposes.

Finally, the revolving door may also create incentives for regulators to make complex rules or standards as opposed to simple ones. The complexity of rules or standards is conceptually distinct from the choice between rules and standards: while the distinction between rules and standards is based on when the rules or standards are given content, the complexity of rules or standards describes the level of details of the rules or standards.¹⁶⁶ Although scholars have debated whether standards are inherently more complex than rules,¹⁶⁷ no discussions have been had about rulemakers' incentives to choose complex rules or standards over simple ones or vice versa. Again, the revolving door may be a potential factor. In the rulemaking setting, regulators who set their sights on the revolving door may have incentives to promulgate complex rules or standards over simple ones, as complex rules or standards encompass broader considerations¹⁶⁸ and therefore may generate more market demand for regulators' rulemaking expertise when they exit the government.

The market-expansion incentive in the rulemaking process poses fundamentally different public policy concerns than those suggested by conventional capture theories. Capture theories predict that revolving-door regulators will make rules friendly to industry interests at the expense of public interests.¹⁶⁹ According to the market-expansion theory, however, friendliness or unfriendliness to the industry is not the primary concern of regulators; regulators are more interested in promulgating rules that are complex enough to require their expertise in interpretation. When regulators make industry-friendly yet simple rules, industry employers may have few reasons to hire the regulators because the straightforwardness of the rules would not justify the additional costs.

165 See Diver, *supra* note 163, at 73 ("Increased precision may increase compliance and decrease evasion or concealment costs.").

166 Kaplow, *supra* note 158, at 588–90.

167 Some scholars assert that rules tend to be both over- and under-inclusive relative to standards. See, e.g., Diver, *supra* note 163, at 73; Ehrlich & Posner, *supra* note 163, at 268–70; Kennedy, *supra* note 158, at 1689–90; Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 646, 648–49 (1991). Kaplow argues that these commentators must be implicitly comparing a complex standard to a simple rule. Kaplow, *supra* note 158, at 589. According to Kaplow, "there is no universal tendency for standards as they are actually applied to be more complex than rules that would plausibly be promulgated." *Id.* at 596.

168 See Kaplow, *supra* note 158, at 594–96.

169 See *supra* Part II.

2. Conditions Conducive to the Market-Expansion Incentive

As in the enforcement setting, one condition conducive to the market-expansion incentive in the rulemaking setting is that regulators have sufficient discretion in making rules. This condition is likely to be met in most, if not all, rulemaking settings. To be sure, there are many procedural constraints on the rulemaking process. Certain enabling statutes, of which the best known is the Food, Drug, and Cosmetic Act of 1938, require “trial-type” hearings in agency rulemaking.¹⁷⁰ When the enabling statutes do not mandate formal rulemaking, the Federal Administrative Procedure Act (APA) requires agencies to at least provide an antecedent notice of rulemaking and an opportunity for interested parties to comment or otherwise participate.¹⁷¹ These constraints, however, do not limit regulators’ discretion in terms of the substance of the rules. Indeed, a central notion underlying the modern administrative state is that the comprehensive regulation required today is too intricate and detailed for direct legislative processes.¹⁷² Although the delegation of legislative power is required to be accompanied by “discernible standards,”¹⁷³ those standards only need to be “intelligent” enough to guide agencies’ exercise of that power,¹⁷⁴ leaving ample room for regulatory discretion.

Regulators also enjoy wide discretion in rulemaking because of the deference courts give to their interpretations of statutes. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council*,¹⁷⁵ the Supreme Court held that an agency’s interpretations of federal statutes should be accorded deference as long as they are reasonable and not contrary to the statutory text.¹⁷⁶ *Chevron* sets out a two-step inquiry for courts to follow when evaluating agency interpretations of federal statutes. In the first step of the inquiry, the court must determine “whether Congress has directly spoken to the precise question at issue.¹⁷⁷ If so, the court “must give effect to the unambiguously expressed intent of Congress.”¹⁷⁸ If the statute is silent or ambiguous, however, the court must proceed to the second step of the inquiry and must determine whether the agency interpretation at issue is “based on a permissible con-

170 BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* 192 (3d ed. 1991).

171 *Id.* at 199–200.

172 *Id.* at 44.

173 See *Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 675 (1976) (“[A] congressional delegation of power . . . must be accompanied by discernible standards, so that the delegatee’s action can be measured for its fidelity to the legislative will.”).

174 *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“Applying this ‘intelligible principle’ test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.” (citation omitted)).

175 467 U.S. 837 (1984).

176 Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL’Y 203, 204 (2004).

177 *Chevron*, 467 U.S. at 842.

178 *Id.* at 842–43.

struction of the statute.”¹⁷⁹ If so, the court is required to defer to the agency interpretation even if the court would have interpreted the statute differently on its own.¹⁸⁰

Courts even afford judicial deference to an agency’s interpretations of statutes concerning the scope of its own jurisdiction. In *City of Arlington v. Federal Communications Commission*, the Supreme Court held that when a court reviews an agency’s interpretations of a statute it administers, the question is always “whether the agency has stayed within the bounds of its statutory authority.”¹⁸¹ According to the Court, the distinction between jurisdictional and nonjurisdictional issues is an “empty distraction because every new application of a broad statutory term can be reframed as a questionable extension of the agency’s jurisdiction.”¹⁸² There is no principled basis, therefore, for “carving out an arbitrary subset of ‘jurisdictional’ questions from the *Chevron* framework.”¹⁸³ The Court concluded that agencies should receive *Chevron* deference as to their constructions of what might be considered jurisdictional issues.¹⁸⁴

In addition, courts also extend deference to agencies’ interpretations of their own regulations. In *Bowles v. Seminole Rock & Sand Co.*, the Supreme Court held that the ultimate criterion for judicial construction of an ambiguous regulation is “the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.”¹⁸⁵ Under this standard, courts must accept a plausible construction of a regulation even if it is not “the best or most natural one by grammatical or other standards.”¹⁸⁶

As in the enforcement setting, one other condition conducive to the market-expansion incentive in the rulemaking setting is the presence of rulemaking targets with financial resources to pay for regulators’ rulemaking expertise. All else being equal, the market-expansion incentive will be stronger when the rulemaking targets can afford to hire former rulemakers in their compliance efforts.¹⁸⁷

179 *Id.* at 843.

180 *Id.* at 844 (“[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” (footnote omitted)).

181 *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (emphasis omitted).

182 *Id.* at 1870.

183 *Id.* at 1865 (citation omitted).

184 *Id.* at 1874–75 (“[A] court need not pause to puzzle over whether the interpretive question presented is ‘jurisdictional.’ If ‘the agency’s answer is based on a permissible construction of the statute,’ that is the end of the matter.” (quoting *Chevron*, 467 U.S. at 843)).

185 *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

186 *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 702 (1991) (citation omitted).

187 For discussions of the “deep-pocket” effect in the enforcement setting, see *supra* subsection III.B.2.

IV. IMPLICATIONS

The market-expansion theory of the revolving door represents a paradigmatic shift in conceptualizing the role of individual regulators in the regulatory process. Like the capture and human-capital theories, the market-expansion theory recognizes that what impacts regulators' performance is not only agencies' institutional interests, but also individual regulators' personal interests. But in contrast to the capture and human-capital theories, the market-expansion theory offers a different perspective on the power dynamics between regulators and regulated industries. Under the market-expansion theory, revolving-door regulators do not passively respond to the needs of regulated industries as the capture and human-capital theories predict; they proactively create and maintain the needs through market-expansion efforts.¹⁸⁸

Recognizing regulators' market-expansion incentive has important implications for a wide range of policy issues—issues that either have not been examined from the revolving-door point of view, or have been examined from the revolving-door point of view but have not benefited from the insights offered by the market-expansion theory. Without attempting to offer an exhaustive list of such issues, this Article discusses below the implications of the market-expansion theory for agency aggrandizement, over-enforcement versus underenforcement, regulatory settlements, compliance monitors, private rights of action, and professional responsibility.

A. *Agency Aggrandizement*

Commentators have noted government agencies' tendencies to aggrandize their powers.¹⁸⁹ Agencies may seek self-aggrandizement by asserting a new power not authorized by the legislature, by expanding the scope of an existing power, or by claiming that their jurisdiction is triggered by the presence of a certain factual predicate.¹⁹⁰ Under the conventional analysis, the reasons for agency aggrandizement are institutional, ranging from agencies'

188 See *supra* Part III.

189 See, e.g., NISKANEN, *supra* note 99, at 36–42 (explaining that a bureaucrat's primary motivation is to maximize the budget of the bureau); Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1503–07 (discussing the aggrandizement of power by agencies). *But see* Levinson, *supra* note 99, at 920 (questioning the basis of the belief that government institutions seek empire-building).

190 Sales & Adler, *supra* note 189, at 1504–06.

financial interests,¹⁹¹ to their desires to avoid becoming obsolete,¹⁹² and to their need to attract new constituents.¹⁹³

Yet the behavior of government institutions depends at least in part on the personal interests of the government officials who comprise them.¹⁹⁴ Although conventional analysis recognizes the role of regulators' personal interests in determining agency behavior,¹⁹⁵ little attention has been paid to the role of regulators' revolving-door motivations in agency aggrandizement. The market-expansion theory of the revolving door points to such a possibility. Under the theory, regulators may have incentives to expand the jurisdictional reach of their agencies not only to further the institutional interests of the agencies, but also to further their personal interests in their post-government careers.

The recognition of the potential role of regulators' personal interests in agency aggrandizement complicates the analysis of the proper level of judicial deference that ought to be given to agencies' interpretations of statutes concerning the scope of their authority. Scholars have argued that courts should not accord *Chevron* deference to agencies' jurisdictional interpretations when those interpretations lead to agency aggrandizement and self-dealing.¹⁹⁶ Yet in *Arlington*, the Supreme Court brushed aside these concerns, holding that *Chevron* deference applies even when "concerns about agency self-aggrandizement are at their apogee."¹⁹⁷ The Supreme Court's primary worry appears to be that the elimination of *Chevron* deference to jurisdictional interpretations would eventually jeopardize *Chevron* deference itself, given what the Supreme Court considers the "false dichotomy" between "jurisdictional" and "non-jurisdictional" interpretations.¹⁹⁸ Eliminating *Chev-*

191 Eric M. Braun, Note, *Coring the Seedless Grape: A Reinterpretation of Chevron U.S.A. Inc. v. NRDC*, 87 COLUM. L. REV. 986, 1006–07 (1987) (arguing that agency aggrandizement is at issue where an agency has a substantial and obvious financial interest).

192 Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty*, 15 CARDOZO L. REV. 909, 926 (1994) (arguing that once an agency is formed, it will deny that it has become obsolete by seeking to expand its regulatory turf into other areas).

193 See Gubler, *supra* note 11, at 771 (arguing that under the public-choice account of the regulatory process, the SEC will try to expand its regulatory turf to attract new constituents and new beneficiaries of securities regulation).

194 Levinson, *supra* note 99, at 920.

195 See Lemos & Minzner, *supra* note 102, at 886–95 (examining whether regulators' personal interests conflict with agencies' financial interests).

196 See, e.g., Armstrong, *supra* note 176, at 244 (arguing that *Chevron* deference should not be given to agencies' jurisdictional interpretations "when [they] aggrandize power in the agenc[ies] or otherwise advance . . . agenc[ies'] self-interest[s]"); Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071, 2099 (1990) (arguing that *Chevron* deference to agencies' jurisdictional interpretations would allow agencies to be judges in their own cause).

197 *City of Arlington v. FCC*, 133 S. Ct. 1863, 1872 (2013).

198 *Id.*

ron deference, according to the Supreme Court, would raise separation of power concerns.¹⁹⁹

If the Supreme Court's analysis in *Arlington* is entirely predicated on the false distinction between "jurisdictional" and "non-jurisdictional" agency interpretations, that raises a question as to whether the elimination or modification of *Chevron* deference would be warranted in scenarios that raise significant public policy concerns counseling against *Chevron* deference and yet are more easily distinguishable from the typical *Chevron* scenarios than the "jurisdictional" versus "non-jurisdictional" distinction. Agency aggrandizement because of regulators' market-expansion incentive might be such a scenario. The line between "jurisdictional" and "non-jurisdictional" agency interpretations might be "specious" and "scary-sounding" as the Supreme Court asserts,²⁰⁰ but courts have had little conceptual and practical difficulties in identifying scenarios where agencies have their own financial interests at stake and in holding that *Chevron* deference does not apply.²⁰¹ Similarly, there should be few conceptual and practical difficulties in identifying scenarios where individual regulators have their own financial interests at stake, at least in scenarios where there has been a historical pattern of regulators exiting the revolving door and benefiting from their preferred interpretations of statutes.²⁰² Public policy concerns about the revolving door may weigh in favor of eliminating or modifying *Chevron* deference in such scenarios.²⁰³ In

199 *Id.* at 1873 ("The effect would be to transfer any number of interpretive decisions—archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests—from the agencies that administer the statutes to federal courts." (footnote omitted)).

200 *Id.*

201 *See, e.g.*, *S. Cal. Edison Co. v. United States*, 226 F.3d 1349, 1357 (Fed. Cir. 2000) ("When a party enters into a contract with the government, that party should reasonably expect to be on equal legal footing with the government should a dispute over the contract arise."); *Brown v. United States*, 195 F.3d 1334, 1340 (Fed. Cir. 1999) ("The interpretation of regulations which are incorporated into government contracts is a question of law which this court is free to resolve." (quoting *United States v. Boeing Co.*, 802 F.2d 1390, 1393 (Fed. Cir. 1986)); *Indep. Petroleum Ass'n of Am. v. Armstrong*, 91 F. Supp. 2d 117, 124 (D.D.C. 2000) ("[N]o deference is due an agency's interpretation of contracts in which it has a proprietary interest.").

202 The FCPA scenario would be an example of such scenarios. For discussions of the revolving door and the FCPA, see *supra* subsection III.B.3.

203 Scholars have proposed to modify *Chevron* deference in other contexts. *See, e.g.*, David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 234–36 (proposing a *Chevron* nondelegation doctrine under which *Chevron* deference applies only when the particular agency official Congress named in the relevant delegation personally assumed responsibility for the agency action); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 87 (1994) (proposing a modified *Chevron* deference that would require reviewing courts to scrutinize more carefully the reasonableness of agencies' statutory interpretations).

scenarios where there are no revolving-door concerns, however, *Chevron* deference would still be preserved under this approach.²⁰⁴

B. *Overenforcement Versus Underenforcement*

Contrary to the conventional revolving-door theories, the market-expansion theory and, to a lesser extent, the human-capital theory point to the possibility that regulators may engage in more aggressive enforcement to benefit their post-government careers. The competing incentives facing revolving-door regulators complicate the analysis of both the costs and the benefits of the revolving door in the enforcement setting.

In areas where enforcement is already at or exceeds a socially optimal level, regulators' tendency to overenforce represents a cost to society that has not been recognized under the conventional revolving-door theories. Under the influence of the capture theories, the costs of the revolving door have primarily been expressed in terms of its tendency to cause lax regulation.²⁰⁵ As a result, the revolving door's social costs associated with more aggressive enforcement tend to be overlooked. For example, deHaan, Koh, Kedia, and Rajgopal, upon finding that the revolving door led SEC lawyers to increase their enforcement efforts, argue that their results alleviate public concerns that the revolving door is detrimental to the SEC's regulatory efforts.²⁰⁶ David Zaring, upon finding that the revolving door does not appear to have motivated a group of elite federal prosecutors to be lenient towards defendants, and may have indeed motivated them to be more aggressive in their prosecution work, urged policymakers to "[l]earn[] to [l]ive with the [r]evolving [d]oor."²⁰⁷ These views are implicitly based on the assumption that the revolving door is socially undesirable only if it results in less aggressive enforcement.

Yet more aggressive enforcement may be detrimental to social welfare, too. Scholars have analyzed the optimal level of law enforcement in various settings.²⁰⁸ In particular, Gary Becker posited that the objective of public law

204 For example, the specific agency interpretation at issue in *Arlington*—the FCC's interpretation of the "reasonable amount of time" within which state or local governments are required to act after receiving a siting application for wireless facilities—does not appear to implicate FCC regulators' personal interests in terms of their post-government careers. Under the approach suggested here, *Chevron* deference would still apply.

205 See *supra* Section I.A.

206 See deHaan et al., *supra* note 15, at 26.

207 Zaring, *supra* note 9, at 546.

208 See, e.g., Lucian A. Bebchuk & Louis Kaplow, *Optimal Sanctions When Individuals Are Imperfectly Informed About the Probability of Apprehension*, 21 J. LEGAL STUD. 365 (1992); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Omri Ben-Shahar & Alon Harel, *The Economics of the Law of Criminal Attempts: A Victim-Centered Perspective*, 145 U. PA. L. REV. 299 (1996); Louis Kaplow, *A Note on the Optimal Use of Non-monetary Sanctions*, 42 J. PUB. ECON. 245 (1990); A. Mitchell Polinsky & Steven Shavell, *Enforcement Costs and the Optimal Magnitude and Probability of Fines*, 35 J.L. & ECON. 133 (1992); A. Mitchell Polinsky & Steven Shavell, *The Optimal Use of Fines and Fines and Imprisonment*, 24 J. PUB. ECON. 89 (1984); Steven Shavell, *The Optimal Use of Nonmonetary Sanctions*

enforcement is to maximize social welfare, defined as the sum of individuals' benefits minus the harms caused by their acts and enforcement costs.²⁰⁹ One fundamental insight of Becker's analytical framework is that there exists an optimal level of law enforcement, even though it might not be clear what that optimal level is.²¹⁰ According to this line of analysis, more aggressive enforcement does not necessarily enhance social welfare; it may indeed lead to overenforcement and therefore reduce social welfare if the enforcement's costs outweigh its benefits.²¹¹

As a result, a better appreciation of the complex incentives created by the revolving door calls for a more nuanced analysis of the social costs of the revolving door. When enforcement is already at or exceeds the socially optimal level—that is, when the social benefits of enforcement are already equal to or are outweighed by its costs—additional enforcement efforts stemming from regulators' market-expansion or human-capital incentives may lead to overenforcement and may be detrimental to social welfare.²¹² Therefore, the revolving door poses public policy concerns not only when it leads to underenforcement because of capture, but also when it leads to overenforcement because of the market-expansion and human-capital incentives.

The flip side of the above analysis is that regulators' market-expansion and human-capital incentives may produce under-recognized social benefits, too. Commentators have recognized many benefits of the revolving door: it enables the government to hire employees that it otherwise would not be

as a Deterrent, 77 AM. ECON. REV. 584 (1987); Louis L. Wilde, *Criminal Choice, Nonmonetary Sanctions, and Marginal Deterrence: A Normative Analysis*, 12 INT'L REV. L. & ECON. 333 (1992).

209 See Becker, *supra* note 208, at 172–80; Nuno Garoupa, *The Theory of Optimal Law Enforcement*, 11 J. ECON. SURV. 267, 268–69 (1997).

210 Under Becker's framework, the optimal level of fine that maximizes the social welfare is the maximal level of fine possible, as the fine is a costless transfer whereas enforcement is costly. Garoupa, *supra* note 209, at 268. The optimal level of law enforcement is determined accordingly. *Id.* Subsequent studies have attempted to investigate the circumstances under which the maximal fine may be nonoptimal. *Id.* But regardless of what the optimal level of fine is, there is always an optimal level of law enforcement that corresponds to that optimal level of fine.

211 A different formulation of the overenforcement thesis is that “[o]verenforcement occurs when the total sanction . . . suffered by the violator of a legal rule exceeds the amount optimal for deterrence.” Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743, 1743 (2005).

212 Commentators have recognized the possibility of overenforcement in other contexts. See, e.g., *id.* at 1771–77 (discussing the problem of overenforcement in corporate law context); Paul G. Mahoney, *Precaution Costs and the Law of Fraud in Impersonal Markets*, 78 VA. L. REV. 623, 653–55 (1992) (arguing that overenforcement of securities laws may lead to companies communicating more often through signals such as stock splits); Paul Weitzel, *The End of Shareholder Litigation? Allowing Shareholders to Customize Enforcement Through Arbitration Provisions in Charters and Bylaws*, 2013 BYU L. REV. 65, 72–79 (arguing that overenforcement in shareholder litigation can create more costs than benefits).

able to hire,²¹³ allows citizens to participate in the government,²¹⁴ and fosters close regulator-industry collaboration that may improve the regulatory process.²¹⁵ But one benefit of the revolving door that so far has escaped commentators' attention is its usefulness in compensating for the lack of enforcement in regulatory areas characterized by underenforcement. Government regulators have a tendency to underenforce certain statutory requirements for a number of reasons, including political pressure, lobbying by regulated entities, or the laziness or self-interest of the regulators themselves.²¹⁶ Such underenforcement is less than socially optimal if additional enforcement efforts would yield more benefits than their costs. In such cases, regulators' market-expansion and human-capital incentives may play a welcome remedying role in moving the enforcement level closer to the social optimum.²¹⁷

C. *Regulatory Settlements*

Revolving-door regulators' market-expansion incentive may also affect their tactics with respect to regulatory settlements. It has been observed that at least in some cases, government agencies have a tendency to prolong litigation.²¹⁸ An explanation offered to make sense of such tendency is that government lawyers see themselves as the guardians of the public treasury and are not willing to concede on even the smallest issues.²¹⁹

213 Scholars have studied the effects of revolving-door restrictions on the expertise of government employees. Marc Law and Cheryl Long examined how revolving-door regulations affected the characteristics of state public utility commissioners in the United States. Marc T. Law & Cheryl X. Long, *Revolving Door Laws and State Public Utility Commissioners*, 5 REG. & GOVERNANCE 405, 420 (2011). They found that commissioners from states with revolving-door regulations have less expertise, serve shorter terms, and are less likely to be subsequently employed by the private sector, compared with their counterparts from states without revolving-door laws. *Id.* at 405. In a setting analogous to the revolving door scenario, Marshall Geiger et al. studied how the market reacts to firms' hiring of accounting and finance officers from their external audit firms and found that the market values the revolving-door appointments more positively than other appointments. See Marshall A. Geiger et al., *The Hiring of Accounting and Finance Officers from Audit Firms: How Did the Market React?*, 13 REV. ACCT. STUD. 55, 55 (2008).

214 Zaring, *supra* note 9, at 546.

215 Dorit Rubinstein Reiss, *The Benefits of Capture*, 47 WAKE FOREST L. REV. 569, 595–605 (2012) (examining the potential benefits of a close regulator-industry relationship).

216 Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 110 (2005).

217 Note, however, that the market-expansion and human-capital incentives may not be strong enough to affect enforcement outcomes in every enforcement setting. When the enforcement targets do not have a "deep pocket," for example, the market-expansion incentive may not be relied upon to play a compensatory role.

218 An example is the twenty-eight-year-long patent infringement litigation between NASA and Hughes Aircraft. See Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105, 1117 (1995).

219 For example, in explaining why the patent infringement disputes between Hughes Aircraft and NASA took so long to resolve, a lawyer representing Hughes Aircraft in the

Yet such cases are rare compared to the more common pattern of government agencies avoiding prolonged litigation—or litigation altogether—through regulatory settlements. In antitrust, for example, the Antitrust Division of the DOJ has resolved nearly its entire civil enforcement docket from 2004 onward through consent decrees,²²⁰ resulting in what commentators call a “culture of consent.”²²¹ For another example, in recent years, the DOJ has increasingly used deferred-prosecution agreements (DPAs) and non-prosecution agreements (NPAs) to settle corporate crime investigations.²²² Under a DPA, the prosecutor files a criminal charge against a company, but agrees not to prosecute the claim so long as the defendant complies with the terms of a deferral agreement.²²³ Under an NPA, the prosecutor agrees not to file a charge in exchange for the defendant’s commitments to comply with a nonprosecution agreement.²²⁴

What are agencies trying to accomplish in these regulatory settlements? An earlier view, consistent with the “public interest” conceptualization of regulation in general, assumes that agencies further the public interest in regulatory settlements.²²⁵ Subsequent views take a more nuanced approach, recognizing that agencies may seek regulatory settlements to serve their bureaucratic interests, including broadening the agencies’ goals and responsibilities, benefiting particular interest groups, and accumulating power over the regulated industry.²²⁶

Absent from the public discourse on regulatory settlements, however, is the question of how regulatory settlements might be affected by the financial incentives of individual regulators, particular those who have revolving-door aspirations. A logical extension of the market-expansion theory set forth in

disputes stated that “[a]ttorneys for the government feel they have to protect the public treasury, so they never concede anything. Therefore, you have to litigate every issue.” See *id.* at 1117 (quoting Bruce Rubenstein, *\$114 Million Not Enough: Hughes Aircraft Appeals Latest Judgment in 28-Year-Long Saga*, CORP. LEGAL TIMES, Oct. 1994, at 1).

220 Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, para. 1 (Geo. Mason Law & Econ. Research Paper No. 13-18), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2225894.

221 *Id.* para. 4.

222 See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-110, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 13 (2009), available at <http://www.gao.gov/new.items/d10110.pdf> [hereinafter GAO REPORT ON DPAs AND NPAs] (noting the more frequent use of DPAs and NPAs by the DOJ in recent years); see also David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1307–08 (2013) (tracing the use of DPAs and NPAs by the DOJ).

223 Peter Spivack & Sujit Raman, *Regulating the “New Regulators”: Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 160 (2008).

224 *Id.*; see also Koehler, *supra* note 127, at 934.

225 See Michael J. Zimmer & Charles A. Sullivan, *Consent Decree Settlements by Administrative Agencies in Antitrust and Employment Discrimination: Optimizing Public and Private Interests*, 1976 DUKE L.J. 163, 170 (“Agency settlements of court proceedings are, like all administrative actions, supposed to further the public interest.”).

226 Ginsburg & Wright, *supra* note 220, para. 13.

this Article is that revolving-door regulators might favor the use of regulatory settlements to extract higher penalties from the defendants than they otherwise would be able to obtain in courts,²²⁷ so as to expand the market demand for the legal defense and compliance services they would be providing when they exit the government. Revolving-door regulators might also favor the use of regulatory settlements to avoid judicial scrutiny of their enforcement theories, given the lack of meaningful judicial oversight of regulatory settlements.²²⁸

One indication that the revolving-door factor might play a role in regulatory settlements is the use of NPAs and DPAs in FCPA enforcement, an area where there has been a pattern of regulators exiting the revolving door to lucrative private sector positions.²²⁹ The vast majority of FCPA enforcement actions brought in the last two decades were disposed of through NPAs, DPAs, pleas, and settlements.²³⁰ And the legal theories used in those actions were quite vulnerable.²³¹ Although this pattern in and of itself is not evidence that FCPA regulators sought regulatory settlements for purposes of furthering their post-government careers, it at least shows that revolving-door regulators would have incentives to resort to regulatory settlements if their goal was to expand the market demand for their post-government services.

That revolving-door regulators may use regulatory settlements to benefit their post-government careers has important policy implications. When the market-expansion incentive of revolving-door regulators is not socially desirable, one possible way to rein in the incentive might be to curtail the use of regulatory settlements, either through legislative action or through judicial oversight. The extent to which the practice of regulatory settlements should be modified to take account of the revolving-door factor is an important policy question that needs to be further examined.

D. Compliance Monitors

Closely related to the use of regulatory settlements is the use of compliance monitors, also known by other names such as independent consultants, independent compliance consultants, and corporate compliance

227 However, in any specific cases, whether an agency can indeed obtain concessions beyond the remedies it might obtain in courts depends on the defendant's comparison of the costs and benefits of litigation as opposed to the costs and benefits of a settlement. See *id.* para. 9.

228 A GAO survey of twelve U.S. district and magistrate judges who handled cases involving DPAs found that those judges "were generally not involved in the DPA process." GAO REPORT ON DPAs AND NPAs, *supra* note 222, at 25 (footnote omitted).

229 See *supra* subsection III.B.3 for discussions of the door phenomenon in FCPA enforcement.

230 See Koehler, *supra* note 127, at 932–46 (discussing the use of settlements by the DOJ and the SEC in FCPA enforcement).

231 See *id.* at 946–59 (discussing the vulnerability of the government's legal positions in FCPA enforcement actions).

monitors.²³² Since the early 1990s, the DOJ and other federal agencies have appointed monitors to ensure compliance with DPAs and NPAs in a wide range of cases, including securities fraud, tax fraud, and FCPA.²³³ For example, of the 152 DPAs and NPAs negotiated by the DOJ between 1993 and 2009, forty-eight required the appointment of a compliance monitor.²³⁴

Typically appointed for a term of one to three years,²³⁵ a compliance monitor enjoys wide powers, including overseeing the operations of the firm, making day-to-day decisions for the firm, and restructuring the firm's internal processes.²³⁶ They are expensive, too; their individual hourly rates can run as high as \$1,000, and they come with a "phalanx of lawyers and expert consultants all of whom charge market rates as well."²³⁷

While much scholarly attention has been devoted to the proper roles of compliance monitors,²³⁸ a less analyzed issue is who the monitors are and why they are appointed. Data indicates a clear pattern in the selection of compliance monitors: a large percentage of them are former regulators or prosecutors. A U.S. Government Accountability Office (GAO) study found that for all forty-eight DPAs or NPAs the DOJ entered into between 1993 and 2009 that required the appointment of monitors, companies hired a total of forty-two different individuals, twenty-three of whom had previous experience working for the DOJ.²³⁹ Another study of twenty-five compliance monitors found that at least seventeen were ex-federal prosecutors, and others included a former SEC Chairman and ex-SEC General Counsel.²⁴⁰ On a list of forty monitors submitted by the DOJ to the House Judiciary Com-

232 Veronica Root, *The Monitor-“Client” Relationship*, 100 VA. L. REV. 523, 524 n.1 (2014).

233 See Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1717–20 (2007). Brandon Garrett refers to these cases as “structural reform prosecution[s].” See Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 853 (2007).

234 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-260T, CORPORATE CRIME: PROSECUTORS ADHERED TO GUIDANCE IN SELECTING MONITORS FOR DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS, BUT DOJ COULD BETTER COMMUNICATE ITS ROLE IN RESOLVING CONFLICTS 3 (2009), available at <http://www.gao.gov/assets/130/123772.pdf> [hereinafter GAO REPORT ON MONITORS].

235 D. Daniel Sokol, *Policing the Firm*, 89 NOTRE DAME L. REV. 785, 826 (2013).

236 Khanna & Dickinson, *supra* note 233, at 1724.

237 Kathleen M. Boozang & Simone Handler-Hutchinson, “Monitoring” Corporate Corruption: DOJ's Use of Deferred Prosecution Agreements in Health Care, 35 AM. J.L. & MED. 89, 100–01 (2009).

238 See, e.g., Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 730–37 (2009) (proposing reform measures to improve corporate monitorships); Khanna & Dickinson, *supra* note 233, at 1727–42 (analyzing when it is desirable to appoint monitors and what powers and obligations they should have); Root, *supra* note 232 (arguing for the creation of a statutory privilege for the monitor-client relationship); Sokol, *supra* note 235 (advocating for the imposition of corporate monitors in criminal antitrust cases).

239 GAO REPORT ON MONITORS, *supra* note 234, at 5.

240 Ford & Hess, *supra* note 238, at 713.

mittee in May 2008, thirty were former government employees, including twenty-three former prosecutors.²⁴¹

In light of regulators' market-expansion incentive, the large percentage of compliance monitors who are former regulators raises revolving-door concerns. In theory, the government agency and the company involved work together to select the monitor.²⁴² But in effect, it is the government agency that chooses the monitor; in some cases, the agency provides an approved list of candidates from which to choose, and in others, the agency retains veto power over the appointment.²⁴³ Clearly, the appointment of former regulators as compliance monitors expands the market demand for the expertise of former regulators. To the extent that revolving-door regulators aim to expand the market demand for their post-government services, the use of regulatory settlements coupled with the appointment of former regulators as compliance monitors would be one certain way to achieve that goal. The revolving-door concern, therefore, is one additional factor counseling for increased scrutiny of the appointment of compliance monitors.

E. *Private Rights of Action*

The market-expansion incentive of revolving-door regulators may also change the standard analysis of private rights of action. Many statutory schemes authorize private citizens to file lawsuits to vindicate the public interest,²⁴⁴ giving rise to the widely used concept of "private attorney general."²⁴⁵ These private rights of action have long been thought to supplement public enforcement in enforcing statutory rights or obligations. The Supreme Court, for example, held in 1964 that a private right of action should be implied in favor of injured investors under federal securities laws because private enforcement was necessary to "make effective the congressional purpose."²⁴⁶ In particular, private rights of action are thought to play an important role in compensating for "agency slack," that is, the tendency of government regulators to underenforce certain statutory requirements.²⁴⁷ According to this view, private enforcement can be a substitute for agency prosecutions in areas where the agency is excessively lax, or can prod an agency into action.²⁴⁸

241 *Id.*

242 GAO REPORT ON DPAs AND NPAs, *supra* note 222, at 1.

243 Khanna & Dickinson, *supra* note 233, at 1722–23.

244 John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 215–16 (1983). Such private rights of action are authorized in, among others, antitrust law, and securities law. *Id.*

245 For discussions of the evolution of the private attorney general concept, see William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2133–37 (2004).

246 *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964).

247 *See, e.g.*, Stephenson, *supra* note 216, at 110.

248 *Id.*

Yet the market-expansion incentive of revolving-door regulators elucidated in this Article points to an unintended consequence of the creation of a private right of action. In areas where the revolving door is a common phenomenon and regulators are motivated by market-expansion considerations, the creation of a private right of action might result in a reduction in regulators' incentives to bring public enforcement actions. That is because everything else being equal, regulators will have maximum incentives to bring public enforcement actions when such actions are the only source of market demand for their post-government services. When market demand for their post-government services comes from not only public but also private enforcement actions, revolving-door regulators need not devote as much market-expansion effort on their part to maintain the sale level of market demand.²⁴⁹ This offsetting effect ought to be taken into account in policy deliberations over the creation of a private right of action, at least in areas where the revolving door is a common phenomenon.

F. *Professional Responsibility*

When revolving-door regulators are lawyers, their potential market-expansion incentive also raises thorny professional-responsibility issues. Under legal ethics rules, lawyers' professional responsibilities consist of duties of loyalty, zeal, and confidentiality to their clients, tempered by certain duties to the broader public such as duties not to mislead the court and not to unduly injure the interests of third parties.²⁵⁰ The professional responsibilities of government agency lawyers are complicated by the question of who their "client" is—their immediate agency employer or the broader public whose interests they supposedly represent.²⁵¹ But regardless of who the agency lawyer's client is, agency lawyers are not supposed to pursue personal interests or any interests other than those of their client.

The ethics issues that may arise when agency lawyers pursue personal interests in discharging their official duties have been recognized in the legal ethics literature.²⁵² But under the influence of capture theories, the kinds of ethics issues that have been recognized are those stemming from agency cap-

249 This effect also points to a potential way to empirically test whether the market-expansion incentive is the dominant incentive in a specific revolving-door setting. Researchers could compare the number of public enforcement actions and the penalties levied in such actions before and after the creation of a private right of action, controlling for other factors that might affect public enforcement. If there is a statistically significant decrease in the level and intensity of public enforcement actions after the creation of a private right of action, that might be an indication that the market-expansion incentive is the dominant incentive facing regulators in that regulatory setting.

250 Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 HARV. L. REV. 1170, 1171 (2002).

251 See *id.* at 1173 (describing the "agency loyalty" approach and the "public interest" approach to agency lawyering).

252 See, e.g., Macey & Miller, *supra* note 218, at 1117–18 (discussing ethics issues facing agency lawyers).

ture, that is, when agency lawyers “sell out” their agencies in order to curry favor with private-sector lawyers that they later hope to practice with.²⁵³ The market-expansion theory discussed in this Article suggests that revolving-door lawyers face a similar ethics issue when they engage in market-expansion efforts in discharging their official duties. This is particularly so when such market-expansion efforts are less than socially optimal and therefore conflict with the public interest.²⁵⁴

CONCLUDING REMARKS

What performance incentives does the revolving door create for regulators? For so long, the answer to this question has been presumed to be regulatory capture, and it is not until recently that scholars have shifted their attention to a possible human-capital effect of the revolving door. This Article breaks new ground by proposing a market-expansion theory of the revolving door that focuses on regulators’ incentive to expand the market demand for their post-government services. This Article argues that this market-expansion incentive, which so far has received only isolated attention from scholars and policymakers, deserves being recognized as a structural force inherent in the regulatory process.

While this Article focuses on the market-expansion incentive, it is important to emphasize that this Article does not intend to argue that the market-expansion incentive is the only possible incentive motivating revolving-door regulators. More likely than not, the market-expansion incentive coexists with other possible incentives in any specific regulatory settings, making the question of how the revolving door impacts regulatory performance a question that can be answered only through empirical studies. After all, policy responses to an issue as far-reaching as the revolving door ought not be based on presumptions alone. This Article can be, and the hope is that it will be, used as a steppingstone for such empirical studies.

253 *Id.*

254 For a social welfare analysis of the revolving door, see *supra* Section IV.B.