IS "PUBLIC COMPANY" STILL A VIABLE REGULATORY CATEGORY?

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This Article suggests that the ubiquitous "public company" regulatory category, as currently constructed, has outlived its effectiveness in fulfilling core goals of the modern administrative state. An ever-expanding array of federal economic regulation hinges on public company status, but "public company" differs from most other regulatory categories in that it requires an affirmative opt-in by the subject entity. In practice, firms today become subject to public company regulation only if they need access to the public capital markets, which is much less of a business imperative than it once was due to the proliferation of private financing options. Paradoxically, then, public company regulation is both more important than ever and easier than ever to avoid.

This new state of affairs raises a foundational question of regulatory design: Can and should the applicability of an important part of federal law depend on self-elective public company status? The Article answers this question through an original analysis of the genesis, idiosyncrasies, persistence, and ultimate erosion of the public company regulatory category. It draws on a detailed review of the historical record and over 50 federal corporate governance proposals between 1903 and 2023. This includes a hand-collected sample of recent proposed bills tied to public company status—highlighting both the ongoing demand for new economic regulation and the prevailing inertia in conditioning regulation on public company status. The Article also applies an assessment framework adapted from the literature on regulatory review in administrative law and inquires into factors such as fidelity to statutory objectives, changes in relevant conditions, the regulatory treatment of similar cases, the rate of regulatory complexity, and the incidence of regulatory divergence.

Ultimately, there is serious cause for skepticism about the viability of the current model, both with respect to the traditional goals of public company regulation (investor protection, capital formation, and capital market efficiency) and with respect to newer economic governance goals (accountability, transparency, voice, and aggregate efficiency). The Article responds to these findings by outlining several alternative regulatory approaches. Among other takeaways, shifting the frame away from the entrenched public company category suggests that in certain important aspects of economic governance, regulation should cover significant firms irrespective of their financing choices and, potentially, non-profit entities engaging in significant economic activity.

Short of wholesale reform, this Article has one immediate message for legislators and policy advocates: when designing new bills that touch on any aspect of economic governance, think carefully before conditioning those bills' applicability on public company status.

* Associate Professor, Emory University School of Law. This Article is part of a larger research project on public company regulation and the public-private divide in securities law, which has benefited from discussions with a number of scholars. I am grateful to all the colleagues, too many to list individually, who engaged with this and prior pieces. I also wish to acknowledge the outsized influence of Don Langevoort and Bob Thompson's work on securities regulation after the JOBS Act, which has provided ongoing inspiration for my own work in this area. I retain responsibility for any errors or omissions, and I welcome comments and reactions via email. The editors of the *Harvard Business Law Review* provided superb editorial assistance.

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Introduction

The concept of a public company, which dates back to the New Deal era and ranks among its key legacies, has long dominated popular thinking about business activity in the United States. The vast majority of the economy's most visible and powerful firms—from Alphabet, Amazon, Apple, and AT&T on down—are public companies. The ubiquity of the public company as an economic actor, however, often obscures several important facts.

First and foremost, "public company" is a regulatory category constructed by statute, which means that public company status gives rise to substantial legal and regulatory consequences. Just as significant as the fact that public companies are heavily regulated is its corollary: non-public (or private) companies are exempt from regulation, which creates a wedge between public and private companies. Finally, unlike most other regulatory categories, public company status entails a choice: A firm generally needs to take a series of affirmative steps in order to become a public company, usually in connection with participating in the public capital markets.

Since the turn of the 21st century, the integrity of the original regulatory scheme has been challenged by a number of developments, including ever-accelerating changes in the markets for public and private capital, two financial crises, and legislative agendas that have been, in turn, highly regulatory and highly deregulatory. Today, the corpus of public company regulation is more voluminous and serves a broader range of policy goals than in the past, but its reach and efficacy are increasingly undermined by the proliferation of private financing options. Paradoxically, public company regulation is both more important than ever and easier than ever to avoid. It thus seems necessary to inquire whether this venerable regime remains a viable way for the modern administrative state to fulfill its regulatory objectives. And, if the regime is no longer viable, what might replace it?

As a point of departure, this Article views the regulations that apply to public companies via the securities laws as a subset of *federal economic regulation* and employs a wider analytical lens. This move is consistent with recent work showing that contemporary securities regulation encompasses both mandates focused on classic goals (i.e., investor protection, capital formation, and capital market efficiency), as well as mandates that are in the service of newer and broader goals, such as transparency, accountability, voice, and overall economic efficiency.[1] In prior related work, I have drawn attention to the fact that there has been a breakdown of the traditional public-private divide that characterized federal securities law for most of its history.[2] In this Article, I show that existing and proposed legislation continues to focus on public companies, which suggests that the public company regulatory category remains an important conduit through which the federal government seeks to regulate business entities.[3] It is the substantive content of regulation that usually attracts the most attention, but the conduit for regula-

[1] *See* Donald C. Langevoort & Robert B. Thompson, *"Publicness" in Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L.J. 337, 373–74 (2013) (describing securities regulation as a "joint project of experimentation in investor protection coupled with a public-driven demand for more transparency, voice, and accountability").

[2] *See* George S. Georgiev, *The Breakdown of the Public-Private Divide in Securities Law: Causes, Consequences, and Reforms*, 18 N.Y.U. J. L. & BUS. 221, 230–33 (2021) [hereinafter Georgiev, *The Public-Private Divide*].

[3] *See infra* Part III.

tion is just as essential: an ineffective conduit would produce an ineffective regulatory process and undermine the state's ability to govern.

This Article contributes to the literature by examining broad questions of regulatory design through an original analysis of the genesis, idiosyncrasies, persistence, and ultimate erosion of the public company regulatory category. It draws on a detailed review of the historical record and over 50 federal corporate governance proposals between 1903 and 2023, including a hand-collected sample of recent proposed bills tied to public company status; it also applies a novel assessment framework adapted from the literature on regulatory review in administrative law. The Article builds on prior scholarship in securities law, including a series of illuminating articles on the 2012 JOBS Act, which have analyzed the legislation's various provisions,[4] distortions caused by them,[5] alternative regulatory approaches,[6] and the theoretical basis for the public-private divide in securities regulation.[7] One common denominator in this body of work is a concern with firms' ability to raise capital while maintaining investor protection. This Article takes a different approach and focuses on the effectiveness of the *broader regulatory apparatus of the state*, viewing public company regulation pursuant to the securities laws as an integrated element of that regulatory apparatus. Finally, the Article is in conversation with, but stands apart from, the literature on the "eclipse of the public corporation," which was famously predicted by economist Michael Jensen in 1989, but has not come to pass.[8] The present inquiry is not about the utility of the public company as a means of carrying out business activity, but, rather, about the utility of the public company category as a means of regulating business activity.

Part I begins with a discussion of the legal construction of the public company regulatory category and the goals of the regulatory regime. I sepa-

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[4] *See, e.g.*, Elizabeth Pollman, *Information Issues on Wall Street 2.0*, 161 U. Pa. L. Rev. 179 (2012); Michael D. Guttentag, *Patching a Hole in the JOBS Act: How and Why to Rewrite the Rules That Require Firms to Make Periodic Disclosures*, 88 Ind. L.J. 151 (2013); Usha R. Rodrigues, *The Once and Future Irrelevancy of Section 12(g)*, 2015 U. Ill. L. Rev. 1529 (2015); Darian M. Ibrahim, *Equity Crowdfunding: A Market for Lemons?*, 100 Minn. L. Rev. 561 (2015).

[5] *See, e.g.*, Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, 68 Hastings L.J. 445 (2017); Jennifer S. Fan, *Regulating Unicorns: Disclosure and the New Private Economy*, 57 B.C. L. Rev. 583 (2016); Renee M. Jones, *The Unicorn Governance Trap*, 166 U. Pa. L. Rev. Online 165 (2017).

[6] *See, e.g.*, Jeff Schwartz, *The Law and Economics of Scaled Equity Market Regulation*, 39 J. Corp. L. 347 (2014); Onnig H. Dombalagian, *Principles for Publicness*, 67 Fla. L. Rev. 649 (2016).

[7] *See, e.g.*, Langevoort & Thompson, *supra* note 1; Robert B. Thompson & Donald C. Langevoort, *Redrawing the Public-Private Boundaries in Entrepreneurial Capital Raising*, 98 Cornell L. Rev. 1573 (2013); Michael D. Guttentag, *Protection From What? Investor Protection and the JOBS Act*, 13 U.C. Davis Bus. L.J. 207 (2013).

[8] *See, e.g.*, Craig Doidge, *Eclipse of the Public Corporation or Eclipse of the Public Markets?*, Harv. L. Sch. F. on Corp. Governance (Feb. 21, 2018), https://bit.ly/3V8fJhR (reporting Jensen's famous dictum that "the publicly held corporation has outlived its usefulness in many sectors of the economy" and questioning whether there has been an eclipse of the public corporation or of the public markets).

rate these goals into two categories: so-called *traditional goals* (investor protection, capital formation, and capital market efficiency), and what can be described as *economic governance goals* (transparency, accountability, voice, and overall economic efficiency).[9] Importantly, there is no universal agreement about the meaning of the traditional goals or about how they should be operationalized; there is even less agreement on whether the economic governance goals belong in a regulatory scheme that, at least on its face, focuses on investors, issuers, and capital market participants. Irrespective of how we define the goals, however, the state cannot achieve them unless a business entity *affirmatively opts into the legal regime* by taking on public company status, which calls for an examination of the evolution of the "public company bargain"—the hypothetical costs and benefits of entering the public company sphere from the vantage point of private firms that today have many alternative financing options.[10] Relevant datapoints bear out the dramatic rise of private capital raising and the proliferation of large private firms (unicorns), while also showing that the public firm sector is comprised of fewer firms that are larger and more profitable.[11]

Part II focuses on the history, evolution, and significance of the public company regulatory category. I first describe the idiosyncratic structure of corporate governance regulation in the United States, which combines state-level regimes, interstate competition, and ever-growing preemption by the federal government, and which generally stands in contrast to the approaches adopted by other advanced market economies. As a result of historical contingencies, the public company category serves as an obvious and convenient conduit for federal regulation, but its convenience influences the types of attempted regulation (primarily disclosure-based regulation) and the regulation's coverage (including public companies and excluding private ones, irrespective of the latter's economic significance).[12]

Part II then identifies and discusses three distinct phases in the long arc of federal regulation of entity governance: before 1933, between 1933 and 2002, and since 2002. In discussing Phase 1, I highlight little-known historical detail about Congress' early experimentation with entity governance regulation at the federal level: There were no fewer than 28 congressional bills proposed between 1903 and 1930 that dealt with an array of entity governance matters. These bills used regulatory categories that did not depend on seeking access to the capital markets, but, instead, simply required that an entity be engaged in interstate commerce.[13] By contrast, virtually all bills during Phase 2 (including both proposed and adopted bills) made use of the public company regulatory category, which highlights its durability and sig-

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[9] *See infra* Part I.B.
[10] *See infra* Part I.C.
[11] *See infra* Part I.D.
[12] *See infra* Part II.A.
[13] *See infra* Part II.B.

nificance.[14] In Phase 3, which started in 2002, public company regulation underwent further changes: more extensive regulatory requirements coupled with greater ways to escape public company regulation by raising funding on the private markets.[15] During Phase 3, we also observed a prominent deviation from the "public company" template, which illustrates what an alternative regulatory regime might look like. The Accountable Capitalism Act, which was proposed in 2018, sought to impose certain federal corporate governance obligations on all firms qualifying as a "large entity," a new category completely untethered from public company status and from access to the public capital markets.[16]

Part III brings the inquiry into the use and significance of the regulatory category into the present by discussing the results of an original study I conducted, which examined relevant legislative activity during the 116th Congress (2019–21) and its aftermath. I identified 19 unique congressional bills that sought to regulate aspects of firms' governance by using public company status as the regulatory hook. These proposed bills highlight demand for economic regulation at the federal level that is unlikely to dissipate. The 19 bills contain both substantive mandates and disclosure mandates, and the bills were not one-offs: many had been introduced before in prior legislative sessions, many were reintroduced in the subsequent, 117th Congress, and many will likely remain on the legislative agenda well into the future.[17] The structure of these bills—conditioning regulation on public company status—is as consistent as the bills' subject matter is varied. In the aggregate, these bills point to the regulatory inertia associated with the design of new legislation. The existence of these bills highlights the continued importance of the regulatory category and underscores the salience of the present inquiry. The implications are stark: if the public company regulatory category is no longer viable, then these proposed bills would be unable to achieve their desired aims, even if they were to become law, and they may in fact create harmful regulatory distortions.

Part IV proceeds to answer the Article's titular question. Assessing the viability of the core feature of an entire regulatory scheme—in this case, federal securities law's extensive reliance on the public company category—is a complex task for which no prior template exists. The task is made all the

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[14] *See infra* Part II.C.

[15] *See infra* Part II.D.

[16] *See infra* Part II.E.

[17] In terms of substantive mandates, the bills include requirements that one-third of a public company's board of directors shall be elected by employees, that shareholders vote to authorize corporate political spending, or that public companies receiving federal aid related to Covid-19 make annual payments of equity to employees. The disclosure mandates are wide-ranging and cover matters such as diversity in corporate leadership, human capital management, the value of digital assets, corporate political spending, outsourcing practices, internal compensation trends, ESG metrics, cybersecurity risk and the existence of internal cybersecurity expertise, financial dealings with firearms manufacturers, measures taken to address human rights violations in the supply chain, and various other topics. *See infra* Part III.C.

more difficult by the idiosyncratic features of the type of economic regulation at issue here.[18] Drawing upon relevant administrative law scholarship on retrospective regulatory review and regulatory policy evaluation, I develop and apply a five-factor assessment framework, which inquires into (1) fidelity to statutory objectives, (2) changes in relevant conditions, (3) the regulatory treatment of similar cases, (4) the rate of regulatory complexity, and (5) the incidence of regulatory divergence.[19] The analysis suggests that there is substantial cause to be skeptical of the ongoing viability of the public company regulatory category, both with respect to the traditional goals of public company regulation and with respect to the newer economic governance goals.[20]

Looking ahead, Part V briefly explores alternative regulatory approaches, including a footprint-based approach, a counterparty approach, a market-specific approach, and an intermediary approach.[21] Many of the structural, historical, and political factors explaining the persistence of the public company regulatory category suggest that it may be difficult to put in place an alternative model. Nevertheless, it would be worthwhile to consider whether in certain important aspects of economic governance, regulation should cover significant firms irrespective of their financing choices and, potentially, non-profit entities engaging in significant economic activity. Short of wholesale reform, the Article has one immediate message for legislators and policy advocates: when designing new bills that focus on any aspect of economic governance, including the types of bills discussed in Part III, think carefully before conditioning those bills' applicability on public company status.

Several prefatory points about the Article's scope and framing are in order. First, my focus is on the *overall design of federal economic legislation*, rather than on the merits of specific interventions or the normative desirability of specific regulatory goals. I discuss one key aspect of the proposed bills in my study sample (namely, their use of "public company" as a regulatory hook), and I make no attempt to assess their substantive merits. There is likely to be a range of opinions on these bills, but this does not impact the validity of the Article's analysis and conclusions. Relatedly, I take a pluralistic view of the goals of public company regulation for the sake of completeness. As noted in Part I.B, the economic governance goals are not as universally accepted as the traditional goals, but one need not agree with the full suite of goals to agree with the Article's analysis and conclusions. The focus of the Article is entity governance (which is used here synonymously with the narrower but better known term "corporate governance") and its regulation at the federal level through disclosure man-

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[18] *See infra* Part IV.
[19] *See infra* Part IV.A.
[20] *See infra* Parts IV.B–F.
[21] *See infra* Part V.

dates and substantive obligations or prohibitions related to the interactions among firm constituencies. Entity governance regulation is one component of federal economic regulation. Other, more specialized components of federal economic regulation—think labor law, antidiscrimination law, or tax law—use different regulatory categories and approaches, and those lie outside the scope of the Article.

It is also worth emphasizing that the public company regulatory category is constructed by law and that a bold enough change in law can shift the regulatory landscape considerably. Such an intervention is unlikely to be forthcoming in the near term, but still, the Article is about the public company regulatory category as it exists as of the time of writing. Finally, the Article's conclusion that the public company regulatory category has outlived its effectiveness—or, in other words, that the present regime is suboptimal—should not be taken to mean that this regime cannot endure for quite some time to come. Suboptimal and even ineffectual regulatory systems can persist for long periods of time. In federal securities law, the opportunities for reform are infrequent and limited in duration, and they generally follow major financial crises,[22] which makes it all the more important to work out solutions in advance.

I. "Public Company" as a Regulatory Category

How does existing law construct the public company regulatory category? What are the goals of public company regulation and how have they evolved since the 1930s? What is the cost-benefit calculus by which today's firms decide whether to take on public company status? How many firms are affected by public company regulation and how have markets and regulation changed over time? This Part discusses these broad matters insofar as they illuminate the applicable legal framework and the motivations of the various actors within it, which lays the foundation for the historical and analytical inquiries in the remainder of the Article.

A. *The Legal Construction of the Regulatory Category*

When used in popular and academic discourse, the term "public company" has two related meanings: the first refers to the public company as a model for engaging in economic activity, and the second refers to the public company as a legal and regulatory subject. In the first sense, "public company" is used to denote a firm with certain general characteristics: publicly traded stock, dispersed shareholders, a sizeable balance sheet and employee

[22] *See, e.g.*, Steven A. Bank & Brian R. Cheffins, *Corporate Law's Critical Junctures*, 77 Bus. Law. 1, 1 (2022) (positing that "a combination of a lengthy period of depressed share prices and a perception that business wrongdoing was integrally related to the slump are required to create the window of opportunity for significant and enduring [federal securities/corporate law] reform").

base, and a style of corporate governance that complies with specific regulatory obligations and with more malleable "best practices." In this context, scholars have focused on the role of the public company as a vehicle for conducting economic activity. For example, during the 1980s, Michael Jensen famously spoke of the "eclipse of the public corporation" due to the rise of private equity.[23] More recently, scholars have analyzed the evolution of public company governance and the role of public companies in the economy and society.[24]

The term "public company" also has a more technical meaning, which is the focus of this Article: a public company is a firm that has opted into public company status in connection with (i) raising new capital on the public markets, or (ii) listing existing shares on the public markets, both of which require compliance with an extensive legal framework.[25] In this more narrow sense, "public company" is a regulatory category constructed by law, including federal legislation, SEC rules, regulations, and enforcement practices, rules promulgated by stock exchanges, and judicial decisions. The applicable framework is complex and multi-layered, and, importantly, it sits atop the substructures established by state entity laws.[26]

Though the securities laws make reference to "public company,"[27] they do not define the term and there is a level of heterogeneity in the regulatory obligations that attach to different types of companies that are registered

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[23] *See* Michael C. Jensen, *Eclipse of the Public Corporation*, HARV. BUS. REV. (Sept. 1989), http://bit.ly/3I7Ymsz ("New organizations are emerging in [the public company's] place—organizations that are corporate in form but have no public shareholders and are not listed or traded on organized exchanges. . . . Takeovers, corporate breakups, divisional spin-offs, leveraged buyouts, and going-private transactions are the most visible manifestations of a massive organizational change in the economy.").

[24] *See, e.g.*, BRIAN R. CHEFFINS, THE PUBLIC COMPANY TRANSFORMED (2018) (describing the evolution of public company governance and the role of public companies in the economy since the 1950s); Andrew K. Jennings, *The Public's Companies*, 29 FORDHAM J. OF CORP. & FIN. L. (forthcoming 2023), http://bit.ly/3JR6JKk (discussing public understandings of public and private companies); Hillary A. Sale, *The Corporate Purpose of Social License*, 94 S. CAL. L. REV. 785 (2021) (discussing the nexus between a corporation's "publicness" and its social license to operate).

[25] For the sake of precision, it is worth noting that, in addition to opting in, a firm may also be pushed into public company status pursuant to Section 12(g) of the Exchange Act, which was adopted in 1964 to fill what was perceived at the time as a regulatory gap. Today, the registration triggers contained in Section 12(g) are practically meaningless and few, if any, firms are pushed into public company status. There are at least three reasons for this: (1) Congress amended Section 12(g) in 2012 to raise the numerical threshold of investors (proxied through the concept of "holders of record") that trigger registration; (2) at the same time, Congress exempted employee-investors from the "holders of record" count; and (3) changes in security holding methods now allow multiple beneficial owners to count as one "holder of record," which further undermines the concept. *See* Georgiev, *The Public-Private Divide*, *supra* note 2, at 245–46, 297–303.

[26] *See id*, at 248–55 (describing the public company regulatory framework).

[27] For example, the full title of the Sarbanes-Oxley Act of 2002 is the "Public Company Accounting Reform and Investor Protection Act." *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745. The Act also created the Public Company Accounting Oversight Board (PCAOB), which sets and oversees standards for preparing audit reports. *Id.*

with the SEC or that have issued SEC-registered securities.[28] We can, however, speak of a *paradigmatic "public company"*: a company that has equity securities listed on a national securities exchange pursuant to Section 12(b) of the Exchange Act and that, as a result, is required to comply with the full suite of periodic and current reporting requirements under Section 13 of the Exchange Act and the proxy rules under Section 14 of the Exchange Act.[29] These regulatory obligations, together with applicable stock exchange listing rules, serve to construct the public company regulatory regime.[30]

The majority of public companies, as well as the largest and most visible public companies, fit the mold of the paradigmatic public company. When legislators seek to regulate businesses by introducing the types of bills discussed in Part III, they are thinking about regulating the paradigmatic public companies. In addition, because the largest public companies fit this mold, an investor with a fully diversified and market-weighted portfolio would be exposed primarily to public companies that fit within this paradigm. Public companies that do not fit within the paradigm include certain younger and smaller public companies, which are not subject to the full suite of regulatory obligations.[31] With the passage of time and as they grow in size, however, many of these companies can be expected to become paradigmatic public companies.

Importantly, "public company" is not a static regulatory category. Congress and the SEC can vary not only the substantive content of regulation, but also the set of entities to which it applies by *exempting* firms with particular characteristics from all or parts of public company regulation as well as by *requiring* certain companies to become public companies. Congress has varied the "base" of public company regulation on several occasions, most notably in 1964 when it adopted Section 12(g) to the Exchange Act, which required companies to register with the SEC upon reaching a certain number of "holders of record," irrespective of their intent to access the public capital markets.[32] (This provision was relaxed considerably by the 2012 JOBS Act.[33]) In 2022, Senator Jack Reed and others introduced the Private Markets

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[28] *See, e.g.*, Georgiev, *The Public-Private Divide*, *supra* note 2, at 243–47.

[29] Securities Exchange Act of 1934, 15 U.S.C. §§ 78l(b), 78m, 78n.

[30] *See* Georgiev, *The Public-Private Divide*, *supra* note 2, at 243–255 (describing pathways to going public and the content of the public company regulatory regime).

[31] For example, "emerging growth companies" (EGCs) enjoy substantially reduced disclosure requirements, but EGC status is limited to five years. Many companies that qualify as "smaller reporting companies" (another category benefitting from exemptions) will eventually grow in size and become regular reporting companies. There are other categories that are more rare, including reporting companies under Section 15(d), which are not subject to Section 14, and companies that have raised capital under Regulation A and Regulation CF. Finally, foreign private issuers are subject to a subset of the disclosure and governance requirements applicable to domestic public companies. *See id*. This Article is about the regulation of the paradigmatic public company and these other categories fall outside its scope.

[32] For a historical discussion, see Allison Herren Lee, Comm'r, U.S. Sec. & Exch. Comm'n, Remarks at The SEC Speaks in 2021, Going Dark: The Growth of Private Markets and the Impact on Investors and the Economy (Oct. 12, 2021), https://bit.ly/41JB2Za.

[33] *Id.*; *see also supra* note 25.

Transparency and Accountability Act, which proposed that private companies should be required to register with the SEC, and become subject to public company regulation, if they either (i) reach a valuation of $700 million, or (ii) have at least 5,000 employees and $5 billion in revenues.[34] If it were to become law, this bill would automatically expand the base of public company regulation by hundreds of companies. By definition, the 651 U.S. private companies that currently enjoy "unicorn" status (denoting a valuation of $1 billion or more) would become subject to public company regulation.[35]

Even though "public company" is a federal category, certain state corporation statutes provide for differential treatment of public and non-public companies. For example, California corporation law allows public companies to opt out of the rule requiring cumulative voting in director elections; the rule is mandatory for non-public companies.[36] California's board diversity legislation, struck down in 2022, applied only to "publicly held" corporations headquartered in California.[37] These are but two examples of a growing trend. The importance of ensuring the integrity of the public company regulatory category, therefore, extends beyond federal law. If state legislatures are not aware of the deficiencies in the construction of the category under federal law, then those deficiencies may unwittingly undermine the fulfillment of important state law goals.

B. The Goals of Public Company Regulation

The goals of public company regulation from the point of view of the state fall in two broad categories: so-called traditional goals, most notably investor protection, and various broader goals, which are best described as economic governance goals. Whereas the traditional goals stem from the text of the underlying statutes, the broader goals are not mentioned in the statutes and, instead, can be deduced from legislation adopted since 2002 (discussed in Part II.D) and from bills proposed during the late 2010s (discussed in Part III).

1. Traditional Goals

The Securities and Exchange Commission, the agency in charge of public company regulation, describes its mission as "protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital

[34] Private Markets Transparency and Accountability Act, S. 4857, 117th Congress (2021–22) (introduced Sept. 15, 2022), https://bit.ly/41orHWQ. Among other innovations, the proposed bill defines "employee" to include "any independent contractor acting on behalf of an issuer," thus making it more difficult for firms to avoid being covered by the bill. *See id.*

[35] *See infra* note 59 and accompanying text (discussing unicorns).

[36] *See* CAL. CORP. CODE § 301.5(a).

[37] *See* CAL. CORP. CODE § 301.4(a).

formation."[38] The original statutes and the extensive lore of securities law make most frequent reference to "investor protection," though they do not define it.[39] Legislative history and regulatory practice suggest at least four distinct conceptions of investor protection: (1) protecting investors from fraud; (2) protecting investors from informational asymmetries; (3) protecting investors from tunneling of resources by firm insiders; and (4) protecting investors from making irrational or harmful investment decisions.[40] These conceptions are linked, but in certain circumstances they can point in different directions both with respect to the necessity of regulatory intervention and the scope, reach, and intensity of such regulation. Investor heterogeneity and the difficulty in assessing the effectiveness of disclosure regulation, which remains the main type of public company regulation, make this process all the more difficult.

Since 1996, the securities law statutes have included a triad of additional goals: "promot[ing] efficiency, competition, and capital formation."[41] Among these, the SEC, Congress, and the policy community have focused almost exclusively on capital formation, which is often presented as a foil to investor protection. Neither the legislative text nor the SEC's conduct over the years indicates whether the goal should be capital formation on the *public* markets or the *private* markets, and what is the *efficient level* of capital formation.[42]

It is neither necessary nor helpful for our purposes to settle on a specific meaning of investor protection, capital formation, and capital market efficiency. The relevant point is that there are two sets of goals of public company regulation—the traditional goals and the newer economic governance goals; the former are well accepted, even if only by dint of their frequent repetition, whereas the latter are more controversial.

2. Economic Governance Goals

The newer goals of public company regulation are unstated-yet-manifested and cover the realization of values such as transparency, accountabil-

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[38] *See What We Do*, U.S. Sec. & Exch. Comm'n, https://bit.ly/3x7yaIe.

[39] *See, e.g.*, Securities Act of 1933, 15 U.S.C. §77g (2012) (granting the SEC authority to require disclosure of information that is "necessary or appropriate in the public interest or for the protection of investors"); Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (2012) (requiring proxy solicitations to be conducted in accordance with "such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors").

[40] *See* Guttentag, *supra* note 7.

[41] *See* Securities Act of 1933, 15 U.S.C. § 77b(b); Securities Exchange Act of 1934, 15 U.S.C. § 78c(f). In 1999, the same provision was added to the Investment Company Act of 1940 and applies to rulemaking thereunder. Investment Company Act of 1940, 15 U.S.C. § 80a–2(c).

[42] Though capital raising was an implicit goal of securities law since its inception, the term "capital formation" was imported into mainstream securities regulation discourse as recently as the 1990s, without any elaboration. *See* Georgiev, *supra* note 2, at 256 n.128.

ity, voice, and aggregate economic efficiency. Increasingly, securities law spills over beyond investor protection, capital formation, and capital market efficiency. The substance of, and the policy goals behind, some of the specific public company disclosure rules, particularly rules stemming from Sarbanes-Oxley and Dodd-Frank, are difficult to square completely with existing notions of investor protection and capital formation, which suggests that Congress may have had in mind other goals, even if it did not clearly articulate them. Don Langevoort and Robert Thompson have observed that "the extent to which—purely as a descriptive matter—securities regulation is about social, political, and economic interests, in addition to investor protection and capital formation, has been seriously underestimated" and characterized securities regulation as a "joint project of experimentation in investor protection coupled with a public-driven demand for more transparency, voice, and accountability . . . as to systemically significant business enterprises."[43] In addition, there has long been a view that securities law should (and does) promote overall economic efficiency, sometimes referred to as "allocative efficiency."[44] Investor diversification and the rise of common ownership also suggest that a broader conception of efficiency may be warranted, and the recent focus on "portfolio primacy" theories of investing and regulation reflects this trend.[45]

As we will see in Part III, the majority of the proposed bills identified through my study of proposed "public company" legislation seek to accomplish economic governance goals, at least in part. Though the idea of using public company regulation in the service of broader economic governance goals continues to meet heavy resistance, it is a clearly manifested trend.

C. The Firm View: The Public Company Bargain

When we speak of regulatory goals, we are adopting the vantage point of the entity imposing regulation: the (administrative) state, as represented by the federal government. Unlike most other areas of law, however, the state cannot achieve its regulatory goals unless a firm *affirmatively opts into the legal regime* by taking on public company status.[46] For this reason, the going-public process can be characterized as a "bargain": a firm obtains a

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[43] Langevoort & Thompson, *supra* note 1, at 373–74.

[44] *See generally* Yoon-Ho Alex Lee, *The Efficiency Criterion for Securities Regulation: Investor Welfare or Total Surplus?*, 57 Ariz. L. Rev. 85 (2015) (discussing various conceptions of efficiency beyond narrow capital market efficiency).

[45] *See, e.g.*, Madison Condon, *Externalities and the Common Owner*, 95 Wash. L. Rev. 1 (2020); Jeffrey N. Gordon, *Systematic Stewardship*, 47 J. Corp. L. 627 (2022). For a critique, see Roberto Tallarita, *The Limits of Portfolio Primacy*, 76 Vand. L. Rev. (2023). Beyond securities law, other regulatory domains are also seeing similar moves to include broader economic governance goals. *See* Aneil Kovvali, *Stakeholderism Silo Busting*, 90 U. Chi. L. Rev. 203 (2023).

[46] As noted above, Section 12(g) of the Exchange Act has contained a mandatory registration provision since 1964, but the JOBS Act amendments to the Exchange Act have rendered it moot. *See supra* note 25.

benefit—access to public capital—in exchange for taking on the regulatory obligations associated with public company status.[47] As a general matter, the reach and effectiveness of the regulatory regime depend in large part on the attractiveness of this bargain from the vantage point of firms. The bargain's attractiveness, in turn, is a function of the net benefits of taking on and maintaining public company status (i.e., the total benefits minus the costs of the associated regulatory obligations), the exclusivity of those benefits, and other, more idiosyncratic factors.

The original public company bargain, which was established in the 1930s and persisted for the remainder of the 20th century, created strong incentives for going public, both because private markets were shallow and underdeveloped and because SEC rules placed stringent restrictions on firms' ability to access capital outside the regulated public markets.[48] As a result, virtually all firms with growth ambitions had to access the public markets sooner rather than later, which ensured the effectiveness of regulation.[49]

The 20th-century public company bargain has changed fundamentally since the early 2000s. First, the aggregate volume of the regulatory obligations applying to public companies has increased considerably since the passage of the Sarbanes-Oxley Act of 2002, the Dodd-Frank Act of 2010, and the completion of associated SEC rulemakings, which has contributed to a perception that the costs of being a public company have become higher.[50] Second, a series of mutually-reinforcing deregulatory developments—which can be described as a "deregulatory cascade"—have made it easier for *private* firms to access capital, which has made the public markets (and public company status) much less indispensable.[51] Ultimately, public capital and private capital have become functionally fungible, which has contributed to the breakdown of the traditional "public-private divide" in securities law.

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[47] SEC Chair Gary Gensler has adopted this framing and has referred to a "bargain" between investors and firms that is overseen by the SEC. *See, e.g.*, Gary Gensler, Chair, SEC, Remarks at Financial Stability Oversight Council Meeting (July 28, 2022), https://bit.ly/3ORceZH ("For the last 90 years, our capital markets have relied on a basic bargain. Investors get to decide which risks to take as long as companies provide full, fair, and truthful disclosures. . . . [T]he SEC oversees this bargain. . . . through a disclosure-based regime, not a merit-based one."). *See also* de Fontenay, *supra* note 5, at 449 (discussing a "regulatory bargain"); George S. Georgiev, *Too Big to Disclose: Firm Size and Materiality Blindspots in Securities Regulation*, 64 UCLA L. Rev. 602, 605 (2017) (describing the "implicit bargain" associated with being a public company: disclosure in exchange for capital market access).

[48] *See* Georgiev, *The Public-Private Divide*, *supra* note 2, at 258–77 (discussing the changing structure of capital markets over time due to regulatory and evolutionary developments).

[49] The relevant exceptions are a few large, mostly family-owned firms that never went public, including Cargill, Koch Industries, Albertsons, and Mars. Professional firms, such as Deloitte, PricewaterhouseCoopers, and Ernst & Young have also been private traditionally. *See id.*, at 281 n.209.

[50] *Id.*, at 258–64 (describing legislative reforms and commentators' reactions).

[51] *Id.*, at 264–75 (describing deregulatory developments, including the JOBS Act, the FAST Act, and related SEC rulemakings).

The lines separating public firms, public markets, and public investors, on the one hand, from private firms, private markets, and private capital, on the other, now appear quaint. This transformation of the regulatory regime for capital raising is illustrated by Figures A-1 and A-2 in Appendix A.[52]

One major consequence from these regulatory and market developments has been the disruption of the traditional public company bargain. Yet, as discussed above, the proper calibration of this bargain—the costs and benefits of being a public company—is crucial for ensuring the effectiveness of the regulatory framework.

D. Key Data and Trends

How many firms are covered by public company regulation and how have the public and private sides of the capital markets changed in recent decades? The picture is complicated but there are some clear trends that are worth noting since they are relevant to answering the Article's titular question.

The number of U.S.-listed companies (and its decline): The total number of domestic companies listed on the two major U.S. stock exchanges at the start of 2023 stood at 4,618, of which 1,824 were listed on the NYSE and 2,794 were listed on the Nasdaq.[53] The total number has fluctuated over time and stood at 7,322 at its peak in 1996.[54] Consistent with common practice, we can think of these domestic U.S.-listed companies as the paradigmatic public companies. The total set of companies in the SEC reporting universe is bigger.[55]

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[52] *See infra* Appendix A.

[53] *See* World Fed'n of Exchs., Market Statistics - April 2023, https://bit.ly/40pMBTY. These figures are based on data reported directly by the stock exchanges. There is no universally-accepted data source and some commentators have reported figures sourced from commercial databases, which are consistently lower; some of the differences may result from the exclusion of exchange-listed real estate investment trusts and other non-standard entities. For our purposes, such entities are appropriate for inclusion in the count since they have a stock exchange listing and are subject to the public company regulatory regime.

[54] Michael J. Mauboussin & Dan Callahan, Morgan Stanley, Public to Private Equity in the United States: A Long-Term Look 30 (2020), https://bit.ly/40naueY.

[55] The SEC estimates that in 2020, the number of domestic registrants was approximately 6,220, of which approximately 31% were large accelerated filers, 11% were accelerated filers, and 58% were non-accelerated filers. In addition, the SEC estimates that approximately 50% of domestic registrants were smaller reporting companies and 22% were emerging growth companies. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, Securities Act Release No. 11,042, Exchange Act Release No. 94,478, 87 Fed. Reg. 21,334 (proposed Apr. 11, 2022). The difference between the number of domestic listed companies (approximately 4,600) and the number of domestic registrants (approximately 6,200) is made up by companies that have registered with the SEC in connection with an issuance of securities at some point in the past, but whose securities currently do not trade on one of the two major exchanges due to "penny stock" status, unwillingness to pay the ongoing fees associated with a major exchange listing, inability to meet the listing requirements, or for other reasons. Such stocks trade on the OTC markets, alongside a number of non-registered companies.

Number of public companies vs. share of economic activity represented by public companies: Importantly, despite the *decrease* in the number of public companies over time, the economic significance of public companies has actually *increased*. Forthcoming research by Mark Roe and Charles Wang shows that the size of the U.S. public firm sector is bigger today by every measure other than the number of firms.[56] Comparing the relative contribution of the public firm sector to the overall U.S. economy over time, Roe & Wang report that the share of public firm profits has increased, the share of public firm revenues has increased, the share of public firm investment has increased, and the share of workers employed by public firms has also increased.[57] Roe & Wang conclude that there has been a "reconfiguration of the American public firm sector to one that is more profitable, more valuable, and with bigger but fewer firms," and explain these developments through changes in patterns of antitrust enforcement and changes in the efficient scope of the firm.[58]

Private companies and private markets: The rise of unicorns—private firms with an implied valuation of at least $1 billion—is another prominent trend. Whereas there were only 43 unicorn firms in the United States when the term was coined in 2013, at the end of 2022 their number stood at 651. Just in the three years between 2019 and 2022, that number tripled (from 212 to 651), as did the aggregate implied valuation of all U.S.-based unicorns, which at the end of 2022 stood at $2.1 trillion.[59] Relatedly, since the 2010s more capital has been raised in the private markets than in the public markets.[60] For example, though data availability is imperfect, the SEC estimates that in 2019, $1.2 trillion was raised in the public markets (which are accessible only to public companies), and $1.5 trillion was raised in the private markets pursuant to the Regulation D exemptions.[61] Both the rise of unicorns and the rise of private capital have been mutually reinforcing and the result of substantial deregulation.

E. Issuer Choice Redux

The developments described in this Part have important implications for longstanding securities law debates on the optimal regulatory architec-

[56] *See* Mark J. Roe & Charles C.Y. Wang, *Are Public Firms Disappearing? Corporate Law and Market Power Analyses* (working paper, Feb. 27, 2023), https://bit.ly/3KQR4cS.

[57] *Id.*

[58] *Id.*

[59] Unicorn data has been compiled by the author from the current and historical editions of the unicorn list maintained by CB Insights. *See* The Complete List of Unicorn Companies, CB Insights, https://bit.ly/41onCC2.

[60] *See* Jean Eaglesham & Coulter Jones, *The Fuel Powering Corporate America: $2.4 Trillion in Private Fundraising*, Wall. St. J. (Apr. 3, 2018), https://bit.ly/3mMqjOy (reporting data from Dealogic and an analysis of SEC filings).

[61] *See* U.S. Sec. & Exch. Comm'n, Report to Congress on Regulation A/Regulation D Performance 3 (Aug. 2020), https://bit.ly/3KNJGyV.

ture and the so-called "federalization" of corporate governance. In a nutshell, the present-day regulatory system can be described as one of "issuer choice": the issuers (i.e., firms) can choose whether to finance themselves in the public or the private markets and, consequently, whether to take on the obligations of public company regulation.[62] Private capital is bountiful and deregulated. Investors that were previously limited to the public markets now have access to the private markets as well, which in turn means that private firms have access to larger pools of capital. Moreover, this regulatory choice is available to already-public firms as well as private firms: In 2022, the SEC estimated that 89% of existing public companies could transition to private company status and, thus, rid themselves of the obligations of being a public company.[63]

These transitions are also notable for two conceptual reasons: First, the idea of "issuer choice" stems from a bold proposal made by Roberta Romano during the 1990s, which urged foundational changes to the regulatory architecture.[64] Romano's proposal gained extensive attention among academics, but it never entered the policy mainstream, in part because it was overshadowed by the dot-com bust and the accounting scandals of the early 2000s. Nonetheless, even though no legislator or policymaker set out to implement issuer choice and no broad debate about its costs and benefits took place, we now live in an "issuer choice" world.

Second, the provisions of Sarbanes-Oxley and Dodd-Frank have long been criticized as problematic "federal incursions" into matters heretofore reserved for state corporate law, which have brought about an undesirable "federalization" of corporate governance.[65] Setting aside the need for such federal interventions, the now-elective nature of public company regulation has reversed the federalization turn. At best, we can speak of *quasi*-federalization: it is true that there are now extensive corporate governance provisions at the federal level, but those apply only to the firms that choose to opt into the federal public company regulatory framework. Relabeling federalization as quasi-federalization lowers both the stakes and the expected effectiveness of existing and future federal corporate governance interventions.

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[62] For an extended discussion, see Georgiev, *The Public-Private Divide*, *supra* note 2, at 278–83. *See also* Elisabeth de Fontenay & Gabriel Rauterberg, *The New Public/Private Equilibrium and the Regulation of Public Companies*, 2021 COLUM. BUS. L. REV. 1199, 1205–06 (2022).

[63] 168 Cong. Rec. 4641 (2022) (reporting estimates from the SEC in connection with the proposed Private Markets Transparency and Accountability Act).

[64] *See* Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359 (1998).

[65] *See, e.g.*, Roberta Romano, *The Sarbanes–Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005); Stephen M. Bainbridge, *Dodd–Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1781 (2011).

II. The History and Significance of the Public Company Regulatory Category

The foregoing discussion of the legal construction of the regulatory category, the goals of public company regulation, and the costs and benefits of opting into public company status focused primarily on the regulatory scheme as it exists today and its 21st-century evolution. To fully appreciate the status quo, however, one also needs to understand the long and checkered history of corporate governance regulation at the federal level, which has been attempted since the start of the 20th century.

I begin the historical inquiry in this Part with an overview of the idiosyncratic structure of entity governance regulation in the United States, which combines state-level regulation, interstate competition, and ever-growing preemption by the federal government, and which generally stands in contrast to the approaches adopted by other advanced market economies. I then identify and discuss three distinct phases in the arc of federal regulation of entity governance: before 1933, between 1933 and 2002, and since 2002. The historical discussion in this Part highlights the enduring centrality of the public company regulatory category and provides the setup for Part III's original study of present-day regulatory demands.

A. *Institutional Overview and International Counterpoints*

According to one widespread view, the regulation of the internal governance arrangements of U.S. business entities is the *exclusive domain of state law*; indeed, this feature is so distinctive that it undergirds what Roberta Romano famously described as "the genius of American corporate law."[66] Giving exclusive control to the states means that the federal government does not have a framework to regulate the internal affairs of business entities in a universal way (by which I mean regulating both public and private companies), even when doing so might be the best way to promote well-accepted regulatory goals, including economic efficiency.[67] Federal laws of general applicability impose multiple regulatory obligations on busi-

[66] Roberta Romano, The Genius of American Corporate Law (1993). Under this view, the states are laboratories for experimentation and inter-state competition will result in a "race to the top" producing the most efficient corporate law. *See id.*; *see also* Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. Legal Stud. 251, 255–56 (1977).

[67] Despite the absence of a framework, there are isolated federal provisions that can be viewed through a governance lens. One such provision that predates the federal securities laws is Section 8 of the 1914 Clayton Act, which seeks to address interlocking directorates and prohibits any person from simultaneously serving as an officer or director of two competing companies. According to commentators, this provision has been "oft-overlooked and rarely enforced," though there are signs that it may be poised for a resurgence. *See What Companies Need to Know about the DOJ's Recent Targeting of Interlocking Directorates*, Ballard Spahr (Oct. 26, 2022), https://bit.ly/3igofvA.

ness entities in a variety of domains,[68] but they do not do that by regulating what is traditionally understood as the internal affairs of those entities. This problem has been solved by expanding securities law, which provides an imperfect substitute for across-the-board regulation by enabling federal oversight over an important *subset of business entities*—public companies. Consequently, public company regulation has been used, at times deliberately and at times only functionally, as a means of filling a general regulatory vacuum.

Though this view—corporate law as the exclusive domain of state law—is at best incomplete, it continues to exert a strong gravitational pull: Federal interventions are often portrayed as aberrations or "incursions" into state law territory.[69] Both the legitimacy and normative desirability of federal interventions are often called into question.[70] And any intervention usually needs to be justified with reference to the relatively narrow traditional goals discussed in Part I.B.1.[71] In short, the tension between state and federal regulation of business entities has been ever-present for more than a century. This Article need not take a position in the normative debates about the optimal balance between state and federal corporate law. To make the significance of the public company regulatory category apparent, we only need to accept that the category is an important conduit through which the federal government seeks to regulate business entities: an ineffective conduit will render the regulatory process itself ineffective, and, more broadly, undermine the state's ability to govern.

The public company regulatory category is also significant because it influences *the content* of economic regulation in indirect ways. In large part, public company regulation is about disclosure, which is a decidedly less intrusive tool than substantive regulation or outright prohibitions of business practices. This cuts both ways: Regulations that are less intrusive may be less effective, but they may also be less controversial and hence more likely to pass. Therefore, when Congress decides to meet a regulatory goal through a disclosure rule using the public company category, this determines both

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[68] *See* Adam C. Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 L. & CONTEMP. PROBS. 109 (2004).

[69] *See* Donald C. Langevoort, *Federalism in Corporate/Securities Law: Reflections on Delaware, California, and State Regulation of Insider Trading*, 40 U.S.F.L. REV. 879, 881 (2006) ("Some commentators employ a rhetorical trick by speaking of federal 'incursions' on state primacy in corporate internal affairs. Constitutionally, the federal government has the supreme authority on all matters of interstate commerce, which certainly includes the field of public company regulation.").

[70] *See, e.g.*, Romano, *supra* note 65, at 1523 (2005) (critiquing the Sarbanes-Oxley Act); *see also* James J. Park, *Reassessing the Distinction between Corporate and Securities Law*, 64 UCLA L. REV. 116 (2017) (summarizing critiques of federal securities law and proposing distinguishing principles for corporate law and securities law).

[71] *See, e.g.*, Steven A. Bank & George S. Georgiev, *Securities Disclosure As Soundbite: The Case of CEO Pay Ratios*, 60 B.C. L. Rev. 1123 (2019) (showing the evolution of the justifications for the pay ratio disclosure mandate during the rulemaking process).

the expected effectiveness of the proposed legislation (lower) and its chance of becoming law (higher).[72]

The existence of the public company regulatory category has additional, and more counterintuitive, implications. Even though the category is primarily about regulation, in practice it also serves to *constrain* the reach of government regulation, because entities that fall outside the category are left unregulated. Whenever there is demand for government regulation as a result of a crisis—such as the push for Congress to address the lack of business transparency and accountability in the wake of the WorldCom and Enron financial scandals in the early 2000s—the public company category effectively absorbs much of the public's interest in additional regulation. The extensive requirements contained in the Sarbanes-Oxley Act, which sought to address the problems of the early 2000s, apply only to public companies.[73]

The tension between regulatory demand and regulatory capacity in the United States is highlighted by the fact that other countries do not condition corporate regulation on public company status to the same extent. For example, the United Kingdom introduced a new regulatory regime in 2018 requiring large *private* companies to provide certain disclosures and comply with the substantive provisions of its new Corporate Governance Code.[74] Other parts of U.K. corporate law require all companies (both public and private) with more than 250 U.K.-based employees to provide a statement describing any employee empowerment initiatives pursued by the company and summarizing "how the directors have engaged with employees" and "how the directors have had regard to employee interests, and the effect of that regard, including on the principal decisions taken by the company during the financial year."[75] The same category of companies are also required to disclose the gender pay gap on an annual basis.[76] In the European Union, both the

[72] Consider, for example, the controversial "conflict minerals" disclosure rule in Dodd-Frank, which arguably aimed to stop the trade in conflict minerals originating from the Congo. *See* Dodd-Frank Act Pub. L. No., 111-203, § 1502, 124 Stat. 1376 (codified at 15 U.S.C. § 78m(p)) (imposing a disclosure mandate with respect to conflict minerals). Congress could have passed a law that prohibited all firms engaged in interstate commerce from trading in conflict minerals. This would have been more effective than a disclosure rule covering only the subset of those firms that are public companies. At the same time, however, it is likely that an outright prohibition would have been much more difficult to adopt because of business opposition and lobbying. The availability of the regulatory category likely ensured that at least some measure dealing with conflict minerals could be adopted.

[73] Sarbanes-Oxley's whistleblower protections, which apply to all companies regardless of public or private status, are the narrow exception that proves the general point about federal law's extensive reliance on the public company regulatory category. Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, § 806, 116 Stat. 745.

[74] *See Corporate Governance for Private Companies: Restoring Trust in Big Business*, LINKLATERS, http://bit.ly/3o36jFu.

[75] *See* The Companies (Miscellaneous Reporting) Regulations 2018, SI 2018/860 (UK); *see also* George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TUL. L. REV. 639, 658–59 (2021) and sources cited therein [hereinafter Georgiev, *Human Capital Management*].

[76] *See* Aleksandra Wisniewska et al., *Gender Pay Gap: How Women Are Short-Changed in the UK*, FIN. TIMES (Sept. 25, 2020), https://bit.ly/3xQDoIA.

existing Non-Financial Reporting Directive and the newly-adopted Corporate Sustainability Reporting Directive cover non-public companies.[77]

B. Phase 1: Before 1933

An inquiry into the now-distant origins of public company regulation further highlights the remarkable ability of the public company category to absorb demand for federal corporate governance regulation. There were no fewer than 28 Congressional bills that sought to regulate some aspect of firms' corporate governance at the federal level between 1903 and 1930, i.e., immediately prior to the creation of the public company category through the Securities Act of 1933 and the Exchange Act of 1934.[78] These early 20th century bills varied in content, but most proposed extensive federal regulation of corporate governance that applied to a much broader set of entities than the public company category Congress eventually constructed. Many of the proposed bills simply covered *any entity* (or any corporation) engaged in interstate commerce.[79] Some bills contained minimum thresholds based on sales, earnings, or other similar metrics, but those thresholds were set at fairly low levels and would have exempted only small entities.[80] In short, Congress seriously contemplated federal corporate governance regulation that applied across-the-board rather than regulation tied to access to capital markets. Table B-1 in Appendix B summarizes two relevant features of the 28 bills: the regulatory category they employed and the regulatory requirements and provisions contained in them.

While much can be said about the historical bills presented in Table B-1, there are two main takeaways for our purposes. First, none of the historical bills conditions regulation on a "public company"-style category. In other words, none relates to stock exchange access or public capital raising. The regulatory triggers are highly heterogeneous and, for the most part, much broader than today's public company regulatory category.

Second, the proposed interventions cover a wide variety of matters. Some of them mirror provisions that would subsequently find their way in the original securities laws (e.g., filing of annual reports), but many others focus on economic governance matters and are much bolder than anything seen in the policy mainstream since then. Examples of such bolder provi-

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[77] *See infra* Part IV.F.

[78] *See* Marc I. Steinberg, The Federalization of Corporate Governance 28–77 (2018). *See also infra* Appendix B.

[79] *Id.*

[80] *See, e.g.*, "A Bill to require all corporations engaged in commerce with the several States, with the Territories, and with foreign nations to secure a license from the General Government, and to impose a license fee for the same . . ." H.R. 10704, 59th Cong. § 2 (1906) (exempting entities whose sales for the preceding year were $1 million or less); "A bill to provide for the formation and regulation of corporations engaged in any form of interstate commerce . . ." H.R. 17932, 62d Cong. (1912) (exempting corporations whose aggregate capital stock and earnings did not exceed $5 million). *See* Steinberg, *supra* note 78.

sions include capitalization requirements or restrictions, inspection rights for shareholders, creditors, and customers, restrictions on dividends, fair value requirements for certain types of transactions, and so on.[81] In the aggregate, the 28 bills reflect much creative thinking about business regulation, as well as an openness to a variety of different interventions. For better or worse, once Congress established the public company category and public company regulation, interest in most of those bolder interventions vanished and they never reemerged.

C. Phase 2: Between 1933 and 2002

In contrast to the pre-1930s proposals, virtually *all* federal corporate governance legislation that was passed since the creation of the public company regulatory category has relied on that category and, therefore, applies *only* to public companies.[82] Congress could have created different, broader categories to extend its regulatory reach, but it did not. With very limited exceptions, it has also resisted attaching corporate governance-style provisions to laws with a broader applicability, such as tax and labor laws, which could have been one way to impose such rules on companies outside the public company regulatory category.[83] Moreover, with one rare exception from 1980, *all entity governance legislation that was proposed* (but not passed) during this period, has also relied on the public company category.[84] This exception is a 1980 bill introduced by Senator Howard Metzenbaum of Ohio, which, among other things, sought to create federal fiduciary duties

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[81] *See infra* Appendix B.

[82] To eliminate potential confusion, two clarifications to this statement are in order. First, there is the special case of the Foreign Corrupt Practices Act (FCPA), which uses both the public company category ("issuer of securities registered pursuant to Section 12 of [the Exchange Act] or an issuer required to file reports pursuant to Section 15(d) [of the Exchange Act]") and, for certain provisions, the much broader category "domestic concern." *See* Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1–3, 78m(a) (distinguishing the categories of domestic concern and issuer of public securities). I view the FCPA as anti-corruption legislation rather than entity governance regulation; if one were to take the opposite view, then the "domestic concern" provisions of the FCPA would be a deviation from Congress' exclusive reliance on the public company regulatory category since 1933. Second, the anti-fraud provisions of the Exchange Act of 1934 and SEC Rule 10b-5 apply across the board to prohibit any act or omission resulting in fraud or deceit in connection with the purchase or sale of any security, regardless of whether the issuer of the security is a public company. 17 C.F.R. 240.10b-5. Though federal corporate governance provisions are often enforced through Rule 10b-5 litigation, the rule itself is best conceived as a catch-all anti-fraud provision, not as a corporate governance rule.

[83] The now-replaced Section 162(m) of the IRS Code pertaining to the deductibility of incentive-based compensation can be viewed as a historical exception: a tax provision affecting public company governance. Specific tax and labor law provisions occasionally piggyback on federal corporate governance rules. *See, e.g.*, David M. Schizer, *Tax and Corporate Governance: The Influence of Tax on Managerial Agency Costs*, The Oxford Handbook of Corporate Law and Governance (Jeffrey N. Gordon & Wolf-Georg Ringe, Eds., 2018); Anita K. Krug, *The Other Securities Regulator: A Case Study in Regulatory Damage*, 92 Tul. L. Rev. 339 (2017).

[84] *See* Steinberg, *supra* note 78.

(loyalty and care) for corporate directors. The proposed bill did not reference public companies; instead, it would have applied to all domestic corporations engaged in or affecting interstate commerce that exceeded any one of three basic size thresholds.[85] Perhaps due to the bill's unorthodox design, academics and the then-Chairman of the SEC expressed skepticism during congressional hearings and the bill was never reported out of committee.[86]

Setting aside the Metzenbaum bill, the period between 1933 and 2002 reflected the progressive expansion of public company regulation. The SEC created new disclosure requirements covering executive compensation arrangements, certain environmental topics, management's discussion and analysis of results of operations, industry-specific disclosure items, and various other topics. For the most part, the new disclosure requirements were adopted by the SEC under its general rulemaking authority and not pursuant to a congressional mandate.[87]

Beyond disclosure, the SEC also adopted rules that impose higher standards of conduct upon public companies than what is required under state law. For example, in an effort to discourage self-dealing and the suboptimal use of corporate resources, an SEC rule requires disclosure of any transactions amounting to more than $120,000 between a public company and any of its executive officers or directors (and their affiliates).[88] Another SEC rule requires a public company that is undertaking a transaction whereby existing public shareholders are cashed-out to disclose whether it "reasonably believes that the [relevant] transaction is fair or unfair" to such shareholders, and the "material factors" upon which this belief is based.[89] Because disclosing that the transaction is "unfair" (or disclosing that it is "fair" without having an adequate basis) would subject the company to litigation, this rule in effect requires public companies to ensure the fairness of such transactions. The SEC has also engaged in extensive rulemaking in the context of acquisitions via a tender offer, in an effort to safeguard the economic rights of the shareholders of the acquisition target.[90]

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[85] The thresholds captured corporations that either (A) "had inventories, gross property, plant, and equipment which aggregated more than $100,000,000 and which comprised more than 10% of the total assets of the affected corporation, or (B) had $100,000,000 in total sales or revenues, or (C) had $1,000,000,000 in total assets." *Id.* at 79.

[86] *Id.*

[87] *See, e.g.*, Georgiev, *Human Capital Management*, *supra* note 75, at 716–17.

[88] Regulation S-K Item 404, 17 C.F.R. § 229.404 (2020). This amount was originally set at $60,000 in 1982 and was updated to $120,000 in 2006. *See* Executive Compensation and Related Person Disclosure, 71 Fed. Reg. 53,158, 53,159 (Sept. 8, 2006). The application of this rule to affiliates substantially expands its scope due to the broad definition of affiliate under federal law. *See id.*

[89] Regulation M-A Item 1014, 17 C.F.R. § 229.1014; *see* Rule 13e-3, 17 C.F.R. § 240.13e-3; Schedule 13E-3 Item 8, 17 C.F.R. § 240.13e-100.

[90] *See* SEC, Information for Certain Types of Transactions and Filers (2022), http://bit.ly/3YAWQoi; Steinberg, *supra* note 78, at 140–42. In so doing, the SEC has gone beyond what is strictly required by the relevant federal statute (the Williams Act of 1968). *Id.* at 141 n.150.

D. Phase 3: Since 2002

The reliance on the public company regulatory category has continued since 2002. This period has been characterized by two strong and countervailing trends. On the one hand, the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Act of 2010 imposed a series of additional regulations specifically tied to the public company regulatory category and increased the gulf between the regulatory treatment of public and non-public companies. On the other hand, the 2012 JOBS Act and related congressional actions and SEC rulemakings deregulated the capital raising framework, which, in effect, scaled back the reach of public company regulation. In the final reckoning, public company regulation was both deeper (there was more of it) and narrower (it applied to fewer firms across the economy).

The Sarbanes-Oxley Act has become synonymous with public company regulation and, among other things, created a new regulatory body to oversee public company accounting.[91] The impetus for Sarbanes-Oxley was provided by the financial scandals in the early 2000s, which involved accounting fraud at well-known firms such as Enron, WorldCom, Global Crossings, Tyco, Adelphia, and others.[92] Sarbanes-Oxley was the most ambitious federal law pertaining to public companies since the 1930s. Just eight years later, Congress passed the Dodd-Frank Act of 2010 in response to the 2008 global financial crisis. Both Sarbanes-Oxley and Dodd-Frank sought to improve financial disclosure transparency and restore investor confidence in the integrity of U.S. financial markets. Notably, Sarbanes-Oxley introduced a requirement whereby a public company must establish and maintain "disclosure controls and procedures" and "internal control over financial reporting,"[93] and its CEO and CFO must certify the company's financial statements.[94] Both acts focused on the boards of directors of public companies, in effect establishing a prescriptive public company governance model, which is described in a stylized fashion below. This model illustrates the extensive use of the public company regulatory category.

The defining features of the public company governance model pertain to board structure and composition. The underlying regulatory provisions seek to fulfill both investor protection goals and the broader economic goals of transparency, accountability, and voice. For example, the model promotes accountability by requiring that public company boards be comprised of a majority of independent directors and have three major committees: an audit

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[91] Sarbanes–Oxley Act of 2002 § 101, 15 U.S.C. § 7211 (2012); Public Company Accounting Oversight Board (PCAOB), https://bit.ly/3xzMxVe.

[92] *See generally* Jonathan R. Macey, *A Pox on Both Your Houses: Enron, Sarbanes-Oxley and the Debate Concerning the Relative Efficacy of Mandatory Versus Enabling Rules*, 81 Wash. U. L. Q. 329 (2003).

[93] Exchange Act Rule 13a-15, 17 C.F.R. § 240.13a-15; Exchange Act Rule 15d-15, 17 C.F.R. § 240.15d-15. The CEO and CFO certification requirements in respect of these matters are contained in Regulation S-K Items 307 & 308, 17 C.F.R. § 229.307–308.

[94] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 302, 116 Stat. 745.

committee (with at least one person who qualifies as a "financial expert"), a compensation committee, and a nominating committee.[95] Each of these committees has specified responsibilities stemming from federal law and stock exchange listing requirements.[96] Public companies are required to provide detailed information about the skills and qualifications of directors,[97] as well as information about individual board members' meeting attendance records.[98] The relevant rules also require information about the board's leadership structure, and, in particular, whether the CEO also serves as the chair of the board.[99] There is also a requirement to disclose whether or not the company has adopted a code of ethics.[100] Disclosure is a significant—but by far not the only—way to effectuate public company regulation. In the area of executive compensation, for example, both Sarbanes-Oxley and Dodd-Frank mandated clawback provisions in respect of erroneously-awarded incentive-based compensation.[101] The shareholder say-on-pay requirement introduced through Dodd-Frank added an important additional element of accountability and investor voice, even if the say-on-pay votes are advisory and non-binding.[102]

The goals of accountability and transparency, alongside investor protection, also underpin provisions requiring the disclosure of information that does not pertain strictly to governance or financial results. For example, the Dodd-Frank Act introduced specialized rules requiring public companies to disclose information about the pay received by their median worker and the ratio between median worker pay and CEO pay;[103] information on the use within their supply chains of "conflict minerals" originating in the Congo and adjoining countries;[104] information about payments made to a foreign

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[95] *See* Steven M. Bainbridge & M. Todd Henderson, Outsourcing the Board: How Board Service Providers Can Improve Corporate Governance 160–61, 165–66 (2018).

[96] The audit committee oversees internal and external financial reporting; the compensation committee determines executive compensation and prepares a compensation discussion and analysis (CD&A) report for inclusion in the company's proxy statement; the nominating committee is tasked with selecting new board members. *See* NYSE Listed Co. Manual, §§ 3.03A.07, 303A.05, 3.03A.04.

[97] *See* Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,343 (Dec. 23, 2009); Regulation S-K Item 401(e), 17 C.F.R. § 229.401(e).

[98] Regulation S-K Item 407(b), 17 C.F.R. § 229.407.

[99] *See* Dodd-Frank Act, Pub. L. No. 111-203, § 972, 124 Stat. 1376. In the case of CEO/Board Chair duality, the stock exchange rules require the appointment of an executive director and the holding of executive board sessions (without the CEO present). *See* NYSE Listed Co. Manual, § 303A.03 & Commentary, https://bit.ly/31wyggj; *see also* NASDAQ Reg., 5605(b)(2), https://bit.ly/3DpL8Sf.

[100] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 406, 116 Stat. 745. The stock exchange listing rules elevated this provision from a disclosure rule to a substantive mandate by requiring that listed public companies adopt a code of ethics meeting certain standards.

[101] *See* Steven A. Bank & George S. Georgiev, *Paying High for Low Performance*, 100 Minn. L. Rev. 14, 23–27 (2016).

[102] *See* Dodd-Frank Act, § 951 (setting out the say-on-pay mandate); Shareholder Approval of Executive Compensation, Dodd-Frank Act Release No. 33-9178 (Jan. 25, 2011), 76 Fed. Reg. 6010 (Feb. 2, 2011) (adopting an SEC rule establishing the say-on-pay regime).

[103] Dodd-Frank Act, Pub. L. No. 111-203, § 953, 124 Stat. 1376.

[104] *Id.* § 1502.

government or the U.S. federal government for the purpose of commercial development of oil, natural gas, or minerals (known as "resource extraction payments");[105] and information about mine health and safety (if applicable).[106] The Iran Threat Reduction and Syria Human Rights Act of 2012 asked public companies to disclose information on whether they have engaged in activities covered by the Iran Sanctions Act.[107] In addition to implementing congressional mandates, the SEC has acted to expand the public company regulatory regime through new disclosure requirements on human capital management (adopted in 2020),[108] cybersecurity (proposed in 2022),[109] and climate-related disclosure (proposed in 2022).[110]

As noted in Part I, the expansion of the range of regulations tied to public company status was accompanied by a deregulatory cascade which made access to public capital much less of a necessity. Despite the gradual erosion of the reach of the category, "public company" retained its monopoly as the trigger for new and proposed entity governance regulation, a position it has enjoyed since 1933. This is evidenced further by the proposed bills discussed in Part III.

E. The Contemporary Exception

The only contemporary exception to the use of the public company regulatory category as a hook for new governance regulation is the Accountable Capitalism Act, introduced by Senator Elizabeth Warren in 2018. The Act nicely illustrates an alternative approach to federal corporate governance regulation that eschews the public company concept. On a substantive level, the Act contains a number of bold corporate governance provisions, including a requirement to place workers on corporate boards and an affirmative obligation for directors and officers to consider non-shareholder interests in decisionmaking.[111] Based on established regulatory practice since the 1930s, it would have been natural to expect that the Act would apply only to public

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[105] Section 1504 of the Dodd-Frank Act added Section 13(q) to the Securities Exchange Act of 1934. The original rule promulgated by the SEC was invalidated by Congress in 2017 pursuant to the Congressional Review Act. The SEC adopted a revised version of the rule in December 2020. *See* Disclosure of Payments by Resource Extraction Issuers, Exchange Act Release No. 34-90679, Dec. 16, 2020, https://bit.ly/3lkxGvJ.

[106] Dodd-Frank Act, Pub. L. No. 111-203, § 1503, 124 Stat. 1376.

[107] *See* Iran Threat Reduction and Syria Human Rights Act (ITRA), Pub. L. No. 112-158, 126 Stat. 1214 (codified as 94 U.S.C. §§ 8701–8795). Section 219 of the ITRA added a new Section 13(r) to the Securities Exchange Act of 1934. *Id.*

[108] *See* Georgiev, *Human Capital Management*, *supra* note 75.

[109] *See* U.S. Sec. & Exch. Comm'n, SEC Proposes Rules on Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure by Public Companies (Mar. 9, 2022), https://bit.ly/40sVgFk.

[110] *See* George S. Georgiev, *The SEC's Climate Disclosure Rule: Critiquing the Critics*, 50 Rutgers L. Rec. 101 (2022); *see also* George S. Georgiev, *The Market-Essential Role of Corporate Climate Disclosure*, 56 U.C. Davis L. Rev. (2023).

[111] *See* Press Release, Office of Senator Elizabeth Warren, Warren Introduces Accountable Capitalism Act (Aug. 15, 2018), https://bit.ly/3Lfgmmg.

companies and that non-public companies would remain outside its scope. The Act does not follow this established practice; instead, it jettisons the public company category altogether.

The provisions of the Act apply to *any* "large entity"—a broad category that covers any domestic entity engaged in interstate commerce with more than $1 billion in annual gross receipts.[112] Any such large entities would be required to obtain a charter as a "United States corporation" from a newly-created Office of United States Corporations within the Department of Commerce.[113] The new obligations would pertain to the internal affairs (i.e., corporate governance) of large entities and would apply across the board and *irrespective of an entity's public company status*. The Act also proposes to extend the SEC's regulatory reach beyond public companies by tasking it with designing and overseeing a new system of director elections at all large entities and with enforcing some of the Act's other provisions.[114]

The Accountable Capitalism Act generated extensive attention when it was introduced as part of the 115th Congress in 2018, but, as of this writing, it has not inspired other legislative proposals that apply to both public and non-public companies. To the contrary, the 116th Congress saw 19 proposed bills dealing with corporate governance and they all hinged on public company status. Even though the substantive provisions of some of these bills overlapped with the Act's provisions, their regulatory trigger did not.

III. Regulatory Inertia: Proposed Regulation Tied to "Public Company" Status

As shown in Part II, virtually all efforts to regulate entity governance at the federal level since 1933 have made use of the public company regulatory category.[115] As this Part shows, reliance on the public company regulatory category continues today and, despite its age, the category shows no signs of becoming a historical artifact.

A. Overview and Key Takeaways

In order to assess the role of the public company regulatory category in current and future legislation, I examined legislative activity during the 116th Congress (2019-21) and I tracked certain bills into the subsequent 117th Congress (2021-23). I identified 19 unique congressional bills pro-

[112] Accountable Capitalism Act, S. 3348, 115th Cong. (2017–18), https://bit.ly/3li9vy2. Aggregation rules based on the IRS Code safeguard against evading regulation by splintering entities to fall beneath the $1 billion threshold. *Id.*

[113] *Id.*

[114] *See id.* at §§ 6 (board representation), 7 (executive compensation).

[115] Recall that between 1903 and 1930, there were 28 federal corporate law bills that were proposed and that those bills relied on a wide variety of regulatory categories. *See supra* Part II.B.

posed during the 116th Congress that sought to regulate aspects of firms' governance by using public company status as the regulatory hook. As discussed in more detail below, these proposed bills highlight substantial demand for economic regulation at the federal level that is unlikely to dissipate on its own.

The 19 proposed bills in the sample cover both substantive mandates and disclosure mandates. In terms of substantive mandates, the bills include requirements that one-third of a public company's board of directors shall be elected by employees, that shareholders vote to authorize corporate political spending, and that public companies receiving federal aid related to Covid-19 make annual payments of equity to employees.[116] The disclosure mandates are wide-ranging and cover matters such as diversity in corporate leadership, human capital management, the value of digital assets, corporate political spending, outsourcing practices, internal compensation trends, ESG metrics, cybersecurity risk and the existence of internal cybersecurity expertise, financial dealings with firearms manufacturers, measures taken to address human rights violations in the supply chain, and various other topics.[117] Some of the bills enjoyed bipartisan support. These bills were not one-offs; 12 were reintroduced in the 117th Congress and will likely continue to be reintroduced in the future. The structure of these bills—conditioning regulation on public company status—is as unimaginative as their subject matter is varied. In the aggregate, they point to the regulatory inertia associated with the design of new legislation.

The existence of these bills also highlights the continued importance of the regulatory category and underscores the salience of the Article's titular question. I make no attempt to assess the merits of the proposed bills, but it is worth noting that they have ardent supporters and ardent detractors alike. The implications of the choice to condition the bills' applicability on the public company category are clear: if the regulatory category is no longer viable, then these proposed bills cannot achieve their desired aims, which will frustrate the supporters, and may in fact create regulatory distortions, which is sure to frustrate the detractors even further. It would be a fair question to ask whether these bills are merely examples of so-called "messaging bills" that stand no chance of ever becoming law. However, our experience with Sarbanes-Oxley and Dodd-Frank, both of which ended up including provisions that might have been thought of as messaging bills, teaches us that we ought to take each of these proposed bills seriously. This Part proceeds by discussing the original study's design and its illustrative power. It then summarizes the 19 bills in substance and legislative posture.

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[116] *See infra* Table 1.
[117] *See infra* Part III.B.

B. The Study Design and Sample

The purpose of the study was to examine the contemporary use of "public company" as a regulatory trigger and illustrate the types of issues that Congress seeks to address through the public company regulatory category. I focused primarily on the two-year period during which the 116th Congress was in session (January 2019 to January 2021), and to a more limited extent, on the 117th Congress (January 2021 to January 2023). Of the 19 relevant bills introduced during the 116th Congress, six were passed by/reported out of the House Financial Services Committee and two were passed by the full House.[118] At least four bills enjoyed bipartisan support.[119] None of the 19 proposed bills became law.

The activity of the 116th Congress in this area was not unique. Several of the bills had been introduced in prior sessions of Congress,[120] and 12 were reintroduced in the 117th Congress.[121] While I used the two-year period of the 116th Congress to generate examples of bills that *conform* to the model of using "public company" as a regulatory trigger, my survey of proposed bills that *deviate* from the public company model covers the entire period from 1903 to the present (as discussed in Part II).[122]

Because each Congress is unique, it is reasonable to ask whether the particular political configuration and idiosyncrasies of the 116th Congress call into question the illustrative power of the study. As to political configuration, it likely influenced some of the specific results, but without undermining the validity of the overarching observations. During the 116th Congress, the House was controlled by the Democratic Party and the Senate was controlled by the Republican party.[123] Since a number of the bills were discussed at hearings of the House Financial Services Committee (and its Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets),[124] Democratic control of the House likely amplified the volume of activity because it allowed for more House committee hearings on various matters. But because at least four of the bills enjoyed bipartisan support,[125] this is not a phenomenon associated with a single political party.

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[118] *See id.*

[119] *See infra* Table 1.

[120] *See, e.g.*, Investor Choice Against Gun Proliferation Act, H.R.5106, 115th Cong. (2017–18), https://bit.ly/3YuoB1C.

[121] *See infra* Table 1.

[122] *See supra* Part II.B–D .

[123] *See 116th United States Congress*, BALLOTPEDIA, http://bit.ly/3DSxIBc.

[124] *See, e.g.*, *Promoting Economic Growth: A Review of Proposals to Strengthen the Rights and Protections for Workers: Hearing Before the S. Comm. on Fin. Servs., Investor Protection, Entrepreneurship, and Cap. Mkts.*, 116th Cong. (2019), https://bit.ly/3Yt3xbI (discussing Greater Accountability in Pay (GAP) Act of 2019, Outsourcing Accountability Act, and a bill pertaining to human capital management disclosure).

[125] These included bills pertaining to cybersecurity disclosure, disclosure of data asset valuations, corporate diversity, and supply chain audits. *See infra* Table 1.

The study period was also unique in that 10 out of the 24 months under analysis were during the Covid-19 pandemic. There is no evidence that this factor distorted the observations in a way that would exaggerate the present-day demand for new economic regulation keyed to the public company regulatory category. Only three out of the 19 bills were introduced after the start of the pandemic, and only two of those bills referred to the pandemic.[126]

C. The Proposed Bills

Table 1 below, which comprises five columns, summarizes the 19 "public company" bills introduced during the 116th Congress (2019–21). Table Column 2 ("Bill Title") contains the title of the bill and the bill number. Some of the bills were introduced in both the House and the Senate. When the House and Senate versions were substantially the same, I counted the bill only once and listed both the House and the Senate bill numbers. When two bills on the same general subject contained significant differences, as in the case of corporate political activities, for example, I counted and listed each bill separately.[127]

Table Column 3 ("Bill Requirements for Public Companies") contains my summary of each bill's requirements for public companies. It is worth noting that in most (but not all) cases, the original legislative text used different technical concepts to designate a public company, including "reporting company," "issuer," "company required to file reports under Section 13 of the Exchange Act," etc.

Table Column 4 ("Vote") shows whether the bill was reported out of committee and passed by the House. Bills that were only reported out of committee (but not taken up by the full House) are indicated with a single asterisk (*); bills that were reported out of committee and passed by the full House are indicated with a double asterisk (**). Since none of the bills received a Senate committee vote or a vote by the full Senate, no designations relating to Senate approval status are necessary.

Table Column 5 ("Other") shows certain other relevant information pertaining to each bill. Bills that enjoyed *bipartisan support* are indicated with a section sign (§). This means that either the House or the Senate (or both) versions of the bill had bipartisan co-sponsors.[128] Bills that were *rein-*

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[126] *See id.*

[127] Some of the bills were formally introduced and received a bill number, whereas others were presented in connection with a committee or subcommittee hearing and did not receive a number.

[128] Note that for bipartisan-supported bills that received a Committee or House vote in the 116th Congress (Column 4) or for bills that were reintroduced in the 117th Congress and passed (Column 5), the approval vote itself was not necessarily bipartisan. This is because Senate bills tend to have bipartisan co-sponsors, but not come up for a vote; House bills tend to come up for a vote, but those votes are often along party lines. In other words, the bipartisan support may have been in the Senate, whereas the vote on the same bill may have been in the House. The idea behind the "bipartisan support" designation is to convey bipartisan support

troduced in the 117th Congress (House) are indicated with an obelus (†). Bills that were *both reintroduced and passed* by the House during the 117th Congress are indicated with a double obelus (‡). Bills that were reintroduced in the 117th Congress (Senate) are indicated with a number sign (#). The Senate did not pass any relevant bills, so no designation relating to Senate approval status is necessary. For classification purposes, a bill from the 116th Congress is deemed to be reintroduced if its provisions are contained in substantially the same form in a legislative instrument in the 117th Congress, either as a standalone bill or as part of another bill containing multiple titles.

TABLE 1: PROPOSED BILLS IN THE 116TH CONGRESS (2019–21) USING THE PUBLIC COMPANY REGULATORY CATEGORY

	Bill Title	Bill Requirements for Public Companies	Vote	Other
1.	Corporate Political Disclosure Act of 2019 (H.R. 1053)	Requires public companies to annually disclose their prior-year political activity expenditures.		‡
2.	Shareholder Protection Act of 2019 (H.R. 4491/ S. 1630)	Requires public company shareholders to annually authorize any spending on political activities. Requires that the company's bylaws shall expressly provide for a vote of the board of directors on any expenditure for political activities in an amount that is more than $50,000 and that would result in the total amount spent by the company for a particular election to be more than $50,000.		‡
3.	Cybersecurity Disclosure Act of 2019 (H.R. 1731/ S. 592)	Requires public companies to provide a statement whether any member of their governing body has expertise or experience in cybersecurity; if no member has such expertise or experience, requires description of what other company cybersecurity aspects were taken into account by the persons responsible for identifying and evaluating nominees for the governing body.	*	# ‡ §

for *the principle of using the public company category* to regulate business entities in the ways specified by the relevant bill.

	Bill Title	Bill Requirements for Public Companies	Vote	Other
4.	Reward Work Act (S. 915)	Mandates that one-third of a public company's board of directors shall be elected by employees in order for such a company to be allowed to register securities on a national exchange.		†
5.	Investor Choice Against Gun Proliferation Act (H.R. 2364)	Requires public companies to disclose any substantial financial relationship with any manufacturer or dealer of firearms or ammunition.		
6.	Workforce Investment Disclosure Act of 2020 (H.R. 5930/ S. 3361)	Requires public companies to disclose detailed information, including specified metrics, about workforce demographics, workforce stability, workforce composition, skills and capabilities, culture and empowerment, health and safety, compensation and incentives, and recruiting.	*	‡
7.	Outsourcing Accountability Act of 2019 (H.R. 3624/ S. 1843)	Requires public companies to disclose the number of domestic and foreign employees disaggregated by U.S. state and territory and foreign country, as well as trends in such employee numbers over time.	**	
8.	The Disclosure of Tax Havens and Offshoring Act (H.R. 5933/S. 1609)	Requires certain public companies to provide country-by-country financial reports including tax information.		# ‡
9.	Designing Accounting Safeguards to Help Broaden Oversight and Regulations on Data (DASHBOARD) Act (S. 1951)	Requires public companies qualifying as "commercial data operators" to report the value of their user data and the value of any third-party contracts made for the collection of user data. Requires the SEC to promulgate accounting standards in respect of data valuation.		§
10.	Corporate Human Rights Risk Assessment, Prevention and Mitigation Act of 2019 ("CHRRA Act") (H.R._)	Requires a public company to identify any human rights risks and impacts that exist in its operations and value chain and that are known or should be known to it and rank the identified human rights risks and impacts based on their severity, taking into account the gravity and expected extent of any potential harm to human rights, as well as any anticipated challenges in remedying the potential harm.		

	Bill Title	Bill Requirements for Public Companies	Vote	Other
11.	Climate Risk Disclosure Act (H.R._/S. 2075)	Requires any public company to disclose information regarding climate change-related risks posed to it, including its strategies and actions to mitigate these risks. Among other things, public companies must report their direct and indirect greenhouse-gas emissions, disclose their fossil fuel-related assets, and establish standards regarding the social cost of carbon.		# ‡
12.	Tax Expense Disclosure Act (H.R._)	Requires public companies to disclose in quarterly and annual reports their total pre-tax profits, and total amounts paid in state, federal, and foreign taxes. Requires disclosure of various specific tax-related items for each subsidiary, as well as on a consolidated basis.		# ‡
13.	Greater Accountability in Pay Act of 2019 (H.R. 4242)	Requires public companies to disclose annual pay raise information for various categories of employees and relevant comparisons.	*	‡
14.	Improving Corporate Governance Through Diversity Act of 2019 (H.R. 5084); Diversity in Corporate Leadership Act of 2020 (S. 3367)	Requires public companies to disclose the racial, ethnic, and gender composition of their boards of directors and executive officers, as well as the status of any of those directors and officers as a veteran. Requires the disclosure of any plan to promote racial, ethnic, and gender diversity among these groups.	**	# ‡ §
15.	Business Supply Chain Transparency on Trafficking and Slavery Act of 2020 (H.R. 6279)	Requires public companies to disclose their efforts to prevent the use of forced labor, slavery, trafficked persons, and child labor in their supply chains.		
16.	ESG Disclosure Simplification Act of 2019 (H.R. 4329)	Requires public companies to annually disclose to shareholders a variety of ESG metrics and their connection to the firm's long-term business strategy.	*	‡
17.	Bill to Require Federal Pandemic Aid Recipients to Make Annual Payments of Equity to Employees (H.R. 6851)	Requires public companies receiving federal aid related to Covid-19 to make annual payments of equity to employees of the corporation while such aid is outstanding.		

	Bill Title	Bill Requirements for Public Companies	Vote	Other
18.	Bill to Amend the Coronavirus Economic Stabilization Act of 2020 (H.R._)	Requires public companies that receive coronavirus aid to adopt worker representation on their board of directors (†), and disclose information about their political spending, human capital management, ESG issues, federal aid, and country-by-country financial performance (‡).		† / ‡
19.	Slave-Free Business Certification Act of 2020 (S. 4241)	Requires any public company with annual worldwide gross receipts exceeding $500 million to conduct annual supply chain audits and disclose any use of forced labor in its direct supply chain.		# §

Legend:

*	Approved by House Committee (116th Congress)	†	Reintroduced in the House (117th Congress)
**	Approved by the full House (116th Congress)	‡	Reintroduced and approved by the House (117th Congress)
§	Bipartisan support	#	Reintroduced in the Senate (117th Congress)

IV. Is the Existing Model Still Viable?

After highlighting the legal construction, development, and historical significance of the public company category in Parts I and II, and the regulatory inertia driving the category's extensive use in contemporary legislative proposals in Part III, we now turn to this Article's titular question: Is "public company" still a viable regulatory category? As a first step in answering, I develop a five-criteria framework for assessing the ongoing viability of the regulatory category. I then consider how the present model performs under these criteria and ultimately find that there is substantial cause to be skeptical of the ongoing viability of the public company regulatory category.

Assessing the core feature of an entire regulatory scheme—in this case, federal securities law's extensive reliance on the public company category—is a complex task for which no commonly-accepted template exists. The task is made all the more difficult by certain other features of the type of economic regulation at issue here, which are worth noting. First, there is the amorphous nature of the statutory goals discussed in Part I.B (How do we define "investor protection"? What is the optimal level of capital formation? Should economic governance goals count as much as the traditional goals—or even at all?).[129] Second, even if we could agree on the policy goals and on desired outcomes consistent with those goals, it is near-impossible to establish causality between specific regulatory interventions and specific out-

[129] *See supra* Part I.B.

comes.[130] Third, there are epistemic and definitional problems (e.g., much financial fraud is unobservable, often for long periods of time, unless detected; corporate governance assessments suffer from hindsight and other biases; and industry, macroeconomic, and other factors may have a bigger effect on outcomes than any regulatory intervention, or in the very least, they may confound measurement).[131]

Finally, there are the idiosyncrasies of financial markets and systems that, as John Coates has argued, make financial regulation particularly ill-suited to cost-benefit analysis: finance permeates the entire economy;[132] it is social and political;[133] and it is characterized by non-stationary relationships and frequent structural changes.[134] And even if cost-benefit analysis of financial regulation did not suffer from such intractable problems, it still would be of limited utility here because our question is not about the particular choices of administrative agencies with respect to the design of *individual rules*, but, instead, about Congress' *consistent policy choice* to condition much of federal corporate governance regulation, which represents a substantial portion of all federal economic regulation, on public company status.

The primary ways I deal with these challenges include: elaborating on key analytical choices and the limitations inherent in the subject matter; identifying and then drawing upon relevant administrative law scholarship on retrospective regulatory review and regulatory policy evaluation; and per-

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[130] The difficulties in establishing causality are highlighted by a paper that examined 863 empirical studies published in major accounting, economics, finance, law, and management journals between 2001 and 2011. The paper found that "only a small minority of studies have convincing causal inference strategies" and that those largely depend on the availability of external shocks allowing for so-called natural experiments. *See* Vladimir A. Atanasov & Bernard S. Black, *Shock-Based Causal Inference in Corporate Finance and Accounting Research*, 5 CRITICAL FIN. REV. 207, 207 (2016). Because external shocks usually depend on random exogenous factors, there is much that we do not (and cannot) know in causal terms; this is not because the relationships in question are not important, but simply because no external shocks have occurred that would enable researchers to study those relationships. Even in the presence of external shocks, there are difficult measurement issues related to firm performance as a dependent variable. *See* Robert Bartlett & Frank Partnoy, *The Misuse of Tobin's Q*, 73 VAND. L. REV. 353, 358 (2020) (critiquing the reliability of Tobin's Q, the most commonly used proxy for firm value/performance in corporate governance research).

[131] *See generally* DONALD C. LANGEVOORT, SELLING HOPE, SELLING RISK: CORPORATIONS, WALL STREET, AND THE DILEMMAS OF INVESTOR PROTECTION 7–32, 160–68 (2016).

[132] *See* John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 999–1000 (2015) ("Any change in regulation with a material impact on finance will have a material impact on the economy, and large and complex effects on welfare . . . . The ripple effects of financial regulation are too large and complex, relative to its direct effects, to allow for reliable predictions of net effects.")

[133] According to Coates, "the main units of variation and change in finance are not things, or even individuals, but *groups* of people—groups with not only economic but also social and political relations . . . [which] can be contrasted with some non-financial domains, where objects of regulation are inanimate . . . and regulations are designed to achieve relatively simple ends." *Id.* at 1001.

[134] Coates explains that, unlike in other regulatory domains, where there are "underlying regularities that enable quantification," the structure of finance is "non-stationary" (i.e., more likely to change) because "finance is non-physical, such that technology shocks have larger and more unpredictable effects on optimal financial choices." *Id.* at 1002.

forming the assessment while keeping in mind both the traditional and the economic governance goals of public company regulation.

A. *Criteria for Analysis*

The longevity and consistency of the policy choice to rely on "public company" as a regulatory default is such a key feature of today's legal framework that it is easy to forget that it is still *a choice*. And, at core, asking whether this particular 90-year-old policy choice remains viable is not too dissimilar from asking whether any policy choice on a regulatory matter is still fit for purpose. The latter is a question that has been asked, in some form or another, with increasing frequency in modern administrative law. The policy and academic work done in seeking to answer that question provides a useful starting point for coming up with criteria for assessing the viability of the public company regulatory category.

One recent iteration of retrospective regulatory review dates back to the first Obama Administration. In 2011, the White House launched a "regulatory lookback" initiative through a series of executive orders, which required executive agencies (and, to the extent permitted by law, independent agencies) to submit a plan to the White House Office of Information and Regulatory Affairs (OIRA) for periodic review of significant agency regulations.[135] In particular, agencies were urged to "consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned."[136] Such retrospective regulatory review had been attempted by prior administrations,[137] and it is a considerably milder variation of legislative sunsets,[138] which had enjoyed some limited popularity in prior decades and which have been advocated with respect to new financial legislation.[139]

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[135] *See* Exec. Order No. 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 21, 2011) (applying to executive agencies); Exec. Order No. 13,579, Regulation and Independent Regulatory Agencies, 76 Fed. Reg. 41585 (July 11, 2011) (applying to independent agencies). *See also* Cary Coglianese, *Moving Forward with Regulatory Lookback*, 30 Yale J. on Reg. 57 (2013) (analyzing the Obama Administration's regulatory lookback initiative).

[136] Exec. Order No. 13,563, *supra* note 135.

[137] *See, e.g.*, Kate Sell, *Evaluating Regulations After the Fact*, Regul. Rev. (Feb. 18, 2015), http://bit.ly/3idKpP4 (noting that "every president dating back to Jimmy Carter has called for some type of evaluative process where agencies identify–and, where necessary, modify or eliminate–existing regulations that are no longer effective").

[138] Sunset provisions in federal and, more commonly, state legislation mandate that a statute expires on a specified date unless it is expressly reenacted by the legislator. *See, e.g.*, Jacob E. Gersen, *Temporary Legislation*, 74 U. Chi. L. Rev. 247 (2007); Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 Ga. L. Rev. 335 (2006).

[139] *See* Roberta Romano, *Regulating in the Dark and a Postscript Assessment of the Iron Law of Financial Regulation*, 43 Hofstra L. Rev. 25 (2014). In corporate law, a different type of "sunset mechanism" became the focus of much debate during the late 2010s: charter provi-

The 2011 executive order did not offer guidance on identifying suspect regulations, but the Administrative Conference of the United States (ACUS), an independent federal agency charged with improving procedures within agencies of the federal government, commissioned a comprehensive report from public policy scholar Joseph Aldy.[140] ACUS subsequently adopted a detailed recommendation "intended to provide a framework for cultivating a 'culture of retrospective review' within regulatory agencies."[141] The Aldy report and the ACUS recommendation are particularly useful because they contain a set of 11 criteria for selecting regulations that ought to be prioritized in retrospective analysis (the "Aldy/ACUS criteria").[142] The need for such guidance is acute given the large volume of regulations promulgated and administered by federal agencies as well as the inevitable time and resource limitations to which those agencies are subject.

For our purposes, there are useful parallels between the general problem giving rise to the Aldy/ACUS criteria (i.e., identifying factors that would render a prior regulatory choice suspect) and the task at hand, which entails an assessment of the continued viability of a historical legislative choice relating to the public company regulatory category. After setting aside certain of the Aldy/ACUS criteria that are not relevant,[143] I derive a set of five assessment criteria to guide the analysis in this Part. These criteria, phrased as questions, are set out in Table 2 below and focus on: (1) fidelity to statutory objectives, (2) changes in relevant conditions, (3) regulatory treatment

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sions providing for the expiration of dual-class structures (adopted either voluntarily in response to investor demands or potentially through stock exchange listing requirements). For an assessment of the various proposals and a critique, see Jill E. Fisch & Steven Davidoff Solomon, *The Problem of Sunsets*, 99 B.U. L. Rev. 1057 (2019).

[140] *See* Joseph E. Aldy, Learning from Experience: An Assessment of Retrospective Reviews of Agency Rules & the Evidence for Improving the Design & Implementation of Regulatory Policy (Nov. 17, 2014), http://bit.ly/3HHk05y. The Aldy report draws on original analysis, (limited) prior guidance from the Office of Management and Budget, selection criteria identified in the regulatory review reports submitted by administrative agencies, and guidance contained in executive orders dating back to the Carter administration. *See id.* The Aldy report also builds on earlier academic work in the area of retrospective regulatory review. *See, e.g.*, Neil R. Eisner & Judith S. Kaleta, *Federal Agency Reviews of Existing Regulations*, 48 Admin. L. Rev. 139 (1996); Jerry Ellig, Patrick A. McLaughlin & John F. Morall III, *Continuity, Change, and Priorities: The Quality and Use of Regulatory Analysis Across U.S. Administrations*, 7 Regul. & Governance 153 (2013).

[141] *See* Administrative Conference Recommendation 2014-5: Retrospective Review of Agency Rules 1, 1 (2014), http://bit.ly/3gFVs3r [hereinafter ACUS Recommendation].

[142] The Aldy/ACUS criteria were contained in the Aldy report and were adopted in the ACUS recommendation. While the ACUS recommendation acknowledges that "considerations will vary from agency to agency and program to program," it notes that the "factors can help identify strong candidates for retrospective review that could inform regulatory revision." *Id.* at 9.

[143] The Aldy/ACUS criteria contain several CBA-related items (e.g., variations in available CBAs, uncertainty as to CBA, temporal changes in CBA), which, for reasons having to do with the limitations of CBA discussed above are not useful in answering an aggregate question about a financial regulatory scheme.

of similar cases, (4) rate of regulatory complexity, and (5) incidence of regulatory divergence.[144]

The criteria for analysis are consistent with more general work on measuring regulatory performance commissioned by the OECD and performed by administrative law scholar Cary Coglianese in 2012.[145] Coglianese observed that while "governments around the world have established procedures to try to analyze the impacts of *new* regulatory proposals before they are adopted . . . they have paid remarkably little attention to analyzing regulations *after adoption* or to evaluating the impacts of the procedures and practices that govern the regulatory process itself."[146] The Coglianese study sought to respond to these shortcomings by offering a conceptual framework and methodological roadmap for assessing regulatory performance. Viewed through the prism of regulatory design, the Coglianese Study is a useful validity check for the assessment criteria set out above. As shown in the last column of Table 2, the chosen criteria cover each of the regulatory evaluation modalities identified by Coglianese.

What is regulatory evaluation? Coglianese defines it as a process that "answers the question of whether a treatment (i.e., a regulation or regulatory policy) works in terms of reducing a problem," and identifies three regulatory evaluation modalities: regulatory administration (which evaluates the activity or delivery of the treatment by regulators), behavioral compliance (which focuses on desired changes in behavior among covered entities), and, finally, outcome performance (which asks whether the regulatory treatment is successful and, possibly, cost-effective).[147] Regulatory administration and behavioral compliance can be useful proxies—and, sometimes, the only reliable mode of assessment—but they are nonetheless imperfect because the goal of a regulatory treatment is to reduce a problem in the real world. Unless the underlying problem itself relates to regulatory administration or the behavior of entities or individuals,[148] what truly matters is the outcome with respect to the identified problem. As a result, assessments based on outcome performance are, in theory, superior. But such assessments can also be challenging because they need to identify appropriate, reliable, and measurable

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[144] The summary captions (e.g., "fidelity to statutory objectives"; "changes in relevant conditions"; etc.) are formulated by this Article's author; the quoted language is drawn from the Aldy/ACUS criteria.

[145] Cary Coglianese, Measuring Regulatory Performance: Evaluating the Impact of Regulation and Regulatory Policy, OECD (2012), http://bit.ly/3gKznR3 [hereinafter Coglianese Study].

[146] *Id.* at 7 (emphasis added).

[147] *Id.* at 14–15.

[148] In cases such as these, evaluation modalities can overlap. If the express goal of a treatment is to improve administrative efficiency (as opposed to, say, reduce fraud), the indicia of success in terms of regulatory administration and outcome performance would likely look the same. Similarly, if the goal is to discourage related party transactions (again as opposed to, say, reduce fraud), the indicia of success in terms of behavioral compliance and outcome performance would likely look the same. Such overlaps are more likely in complex fields such as finance which are regulated through proxies.

indicators and deal with the issue of *attribution* (i.e., whether the regulatory treatment "caused" the change in outcome).[149] Depending on the circumstances, outcome performance evaluations can look to the treatment goals (both the broader policy goals and the more immediate goals of a particular intervention), benchmarks (e.g., historical, value- or values-derived, science-based, or other), inter-jurisdictional comparative assessments, and other factors.[150]

TABLE 2: CRITERIA FOR ANALYSIS OF THE VIABILITY OF THE "PUBLIC COMPANY" REGULATORY CATEGORY

	Criterion	**Relevant Questions**[151]	**Mode of Regulatory Evaluation**[152]
1.	Fidelity to Statutory Objectives	Does the existing model ensure attainment of the statutory objectives? Or, put differently, would an alternative model have a higher "likelihood of improving attainment of [the] statutory objective[s]"?	Outcome Performance (treatment goals; benchmarks)
2.	Changes in Relevant Conditions	Is the existing model called into question by "changes in underlying market or economic conditions, technological advances, evolving social norms, public risk tolerance, and/or standards . . . incorporated by reference"?	Behavioral Compliance; Outcome Performance (benchmarks)
3.	Regulatory Treatment of Similar Cases	Does the existing model result in "different treatment of similarly situated persons or entities (including both regulated parties and regulatory beneficiaries)"?	Outcome Performance (benchmarks); Regulatory Administration
4.	Rate of Regulatory Complexity	Does the existing model result in rules of high complexity ("as demonstrated by poor compliance rates, amount of guidance issued, remands from the courts, or other factors")?	Regulatory Administration; Behavioral Compliance
5.	Incidence of Regulatory Divergence	Is the existing model called into question by "differences between [the] U.S. regulatory approaches and those of key international trading partners"?	Outcome Performance (comparative); Regulatory Administration

[149] *See* COGLIANESE STUDY, *supra* note 145, at 15–16.
[150] *Id.* at 17–37.
[151] These questions draw on (and quote from) the Aldy/ACUS criteria. *See* ACUS RECOMMENDATION, *supra* note 141, at 9–10.
[152] These classifications draw on the Coglianese study. *See* COGLIANESE STUDY, *supra* note 145 and accompanying text.

Before proceeding with the assessment of the public company regulatory category, it is worth observing that the broad administrative law literature suggests that regulatory assessment is both an art and a science. There is plenty of "science"—i.e., the frameworks and conceptual work that have given rise to the assessment criteria set out in Table 2—but there also remains a large element of "art." The art takes the form of nuanced and difficult case-by-case judgments that are open to legitimate debate among experts. And, due to the political economy of financial regulation, those judgments are liable to contestation and distortion by interested political and industry actors, which makes consensus and reform all the more elusive.[153]

B. Fidelity to Statutory Objectives

The Traditional Goals of Public Company Regulation. Is "public company" still a viable regulatory category from the point of view of securities law's traditional goals—investor protection, capital formation, and capital market efficiency? Perhaps the most immediate question raised by the changes in public and private markets relates to the impact of these changes on investor protection. The core challenge is that unsophisticated and low-net worth investors are increasingly exposed to private firms, whereas much of securities regulation was built on the rationale that such investors would be limited to the regulated side of the markets that is populated by public firms. The classic story about the merits of public markets over private markets involves the advantages of public markets in ensuring efficient price discovery, liquidity, and informational quality.[154] Private markets' reduced capacity to value firms accurately is a significant concern because the price at which an investor buys or sells a security is the most important term in a securities transaction, making securities price accuracy an essential element of investor protection.[155] Evidence suggests that certain structural features of

[153] *See, e.g.*, John C. Coffee Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019 (2012); Coates, *supra* note 132; Donald C. Langevoort, *The Social Construction of Sarbanes-Oxley*, 105 MICH. L. REV. 1817 (2007). Even though political economy invariably influences the administrative law of securities regulation, it does not figure more prominently in the story here by design: much excellent work has already explored the political economy of securities/financial regulation, and the primary goal of this Article is to introduce and apply a historical and administrative law lens.

[154] *See, e.g.*, John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 747 (1984).

[155] *See, e.g.*, Merritt B. Fox et al., *Law, Share Price Accuracy, and Economic Performance: The New Evidence*, 102 MICH. L. REV. 331, 370–81 (2003); *see also* Allen Ferrell, *Measuring the Effects of Mandated Disclosure*, 1 BERKELEY BUS. L.J. 369, 372 (2004) (providing an assessment of the various empirical studies and noting that "[t]he concept of stock price accuracy is well accepted and commonly employed in the accounting and finance literature."); *see also* Marcel Kahan, *Securities Laws and the Social Costs of "Inaccurate" Stock Prices*, 41 DUKE L.J. 977, 982–87 (1992).

the private markets contribute to both valuation and governance bubbles.[156] Relatedly, the employees of fast-growing and higher-risk private firms increasingly receive part of their compensation in non-liquid and hard-to-value private company stock or stock options; as such, these employee-investors are exposed to non-diversifiable risk in both their employee capacity and their investor capacity, which is a significant problem.

There are also second-order effects that have indirect, though still adverse, impacts. The growth of private markets prevents or delays firms' entry into the public markets, which decreases the firm-specific information accessible to market participants, potentially impacting the accuracy of securities prices for *publicly* traded firms.[157] In other words, the investor protection harms stemming from private firms are not limited to those investing in private firms, but extend throughout the entire capital market ecosystem. Consequently, the reduced accessibility of information about private firms due to the expansion of private capital has notable repercussions for the efficiency of the capital markets and for the allocative efficiency of the economy as a whole. Again, this is due in large part to the fact that "public company" as a regulatory category does not capture all the firms that it arguably should.

The Economic Governance Goals of Public Company Regulation. Is "public company" still a viable regulatory category when taking into account the economic governance goals of public company regulation? As discussed in Part II, from the vantage point of federal lawmaking, securities law via disclosure mandates provides a relatively easy channel for adopting general economic regulation: the "public company" regulatory category is already in existence, as is the disclosure regime and the powerful regulator in charge of it, the SEC. Accordingly, Congress and the SEC have used the securities laws to regulate the corporate voting process, to prevent self-dealing, and to require disclosure on various financial and non-financial topics.[158] The proposed legislation discussed in Part III would use the public company category to impose a variety of additional disclosure obligations, including obligations pertaining to ESG topics.[159] These and other regulations certainly promote transparency, accountability, and shareholder/stakeholder voice within public companies. Problematically, however, the wide availability of private capital and the elective nature of public company regulation enable younger firms to avoid important disclosure and governance mandates by never going public (or by delaying going public), whereas already-public firms can avoid regulation by going private or by selling off "bad" assets to

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[156] *See* Jesse M. Fried & Jeffrey N. Gordon, *The Valuation and Governance Bubbles of Silicon Valley*, COLUM. L. SCH. BLUE SKY BLOG (Oct. 10, 2019), https://bit.ly/3rk1glU ("A market that makes it difficult and costly to express negative sentiments is prone to a bubble and thus an abrupt collapse when negative fundamentals finally become too pervasive to ignore.").

[157] *See* de Fontenay, *supra* note 5.

[158] *See supra* Part II.D.

[159] *See* Corporate Governance Improvement and Investor Protection Act, H.R. 1187, 117th Cong. (2021).

a private company. As long as the public company category is elective, the federal government cannot use it to effectively and predictably regulate business activities and practices it has deemed undesirable. (Of course, this is not to say that the state cannot use regulatory categories from other fields of regulation to achieve its goals; to do so, however, it would need to resist its inertia-driven reliance on the public company category.)

C. Changes in Relevant Conditions

The second assessment criterion in the five-criterion framework asks whether there have been changes in underlying market or economic conditions, technological advances, evolving social norms, public risk tolerance, and/or relevant standards. Consistent with a core feature of finance—rapid technological evolution—capital markets are constantly changing. The structural changes in markets, such as the rise of unicorn firms, the wider availability of private capital, and the increased time-to-IPO, among others, all signal the need for closer scrutiny of the existing model, which has been centered on the public company regulatory category and the now-eroded primacy of the public markets. Notably, policymakers have frequently urged an examination of the regulatory framework in response to technological change.[160]

D. Regulatory Treatment of Similar Cases

The third assessment criterion stems from a universal rule-of-law principle: similar cases should be treated similarly. When a regulatory framework leads to the dissimilar treatment of similar cases, its design should be scrutinized and improved.

In the case of public company regulation, we do observe the dissimilar regulatory treatment of otherwise identical public and private companies. The elective nature of the public company regulatory category and the widespread availability of private capital, both discussed in Part I, have contributed to a "public company regulatory paradox," which I identified in prior work.[161] It is possible today for two firms that are *identical* in virtually every respect—business model, size and scope of operations, enterprise value, access to capital, number of shareholders, number of employees, and so on—to have *widely different* regulatory obligations. The firm that is a public company ("Firm A") would need to provide public disclosure on a regular

[160] *See* Gary Gensler, Chair, SEC, *Remarks Before the Healthy Markets Association Conference* (Dec. 9, 2021), http://bit.ly/3DRZ4aJ ("Finance is constantly evolving in response to new technologies and new business models. Such innovation can bring greater access, competition, and growth to our capital markets and our economy. Our central question is this, though: When new vehicles and technologies come along, how do we continue to achieve our core public policy goals?").

[161] *See* Georgiev, *The Public-Private Divide*, *supra* note 2.

basis about its results of operations, financial condition, trends and risks affecting the business, executive compensation, corporate governance arrangements, and various other topics. Firm A would need to establish and maintain robust internal controls and procedures over financial reporting. Its board of directors would need to have specially designated committees with strict qualification requirements for those serving on them.[162] By contrast, the firm that is a private company ("Firm B") would have to do none of that. It could operate in secrecy, avoid public scrutiny, and eschew the internal governance structures required of public companies. Less regulation also translates into less liability for non-compliance.[163]

This dissimilar regulatory treatment may be less problematic if investing in private companies were limited to private investors and not available to public market investors. Unfortunately, as a result of the deregulation of the capital raising framework during the 2010s, an investor today can invest in *both* Firm A and Firm B—benefitting from investor protections in the first case but not in the second. What is more, both firms would likely be contained in the broadly diversified portfolios that have become a staple of standard 401(k) retirement plans and other popular investment vehicles. Accordingly, it would be difficult for an investor to avoid putting money in the unregulated firm, Firm B, even if avoiding private firms were an express goal for the investor.[164]

This type of dissimilar regulatory treatment represents a concern that members of the SEC have acknowledged. For example, in April 2022, SEC Commissioner Caroline Crenshaw expressly referenced the public company regulatory paradox.[165] SEC Chair Gary Gensler has also articulated a regulatory philosophy that requires like situations and entities to be treated alike.[166]

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[162] *Id.*, at 224–25.

[163] Both the public and private firm would be covered by the anti-fraud provisions of SEC Rule 10b-5, but the public firm would still be much more likely to face an enforcement action. *See, e.g.*, Verity Winship, *Private Company Fraud*, 54 U.C. Davis L. Rev. 663, 724–29 (2020) (presenting data on SEC enforcement actions against private companies, which remain rare).

[164] *See* Georgiev, *The Public-Private Divide*, *supra* note 2. Though this Article's concerns are broader than "unicorniphobia," Alex Platt's eponymous work provides a thoughtful and important normative critique. *See* Alexander I. Platt, *Unicorniphobia*, 13 Harv. Bus. L. Rev. (2023).

[165] *See* Caroline A. Crenshaw, Comm'r, SEC, Grading the Regulators and Homework for the Teachers: Remarks at Symposium on Private Firms: Reporting, Financing, and the Aggregate Economy at the University of Chicago Booth School of Business (Apr. 14, 2022), http://bit.ly/3EpNrXC ("I read an article recently that posed the paradox succinctly—you can have two firms that are virtually identical in every respect . . . [y]et, those two companies can have completely different regulatory and disclosure obligations to investors and stakeholders.").

[166] *See* Gensler, *supra* note 160 ("[A]n overarching principle I consider when thinking about public policy . . . has been around since at least antiquity. Aristotle captured it with his famous maxim: Treat like cases alike.").

E. Rate of Regulatory Complexity

As an assessment criterion, regulatory complexity focuses on regulatory administration and behavioral compliance rather than on the measurement of outcomes. Here, too, the existing regulatory model scores poorly, with simplicity in one area contributing to ever-increasing overall regulatory complexity.

As a point of departure, the public company regulatory category is fairly straightforward: the question of whether a company is a public company is not a difficult one. Even the sub-categories are defined with sufficient precision that a company's status is seldom, if ever, litigated or disputed. This apparent simplicity, however, has contributed to the overall complexity of securities law because it has motivated the proliferation of capital raising exemptions and safe harbors.[167] It is logical to expect that as the onus of compliance with public company regulation increases, firms would have an ever-stronger incentive to avoid the public company ecosystem, either by relying on existing private market exemptions or by lobbying for additional exemptions. This is precisely what has occurred in practice, as illustrated by Figures A-1 and A-2 in Appendix A. The complexity of the contemporary framework vis-à-vis the pre-2000s framework is evident simply by comparing the two figures. Even the SEC's November 2020 attempt to "harmonize" and "improve" the "patchwork" private offering framework led to the expansion of the underlying exemptions, which meant that more firms and classes of investors could gain access to exempt offerings.[168] We have also seen increased complexity within the public company category itself through the creation of sub-categories, such as EGCs; the increase in the number of "smaller reporting companies" resulting from changes to the definition; and the SEC's willingness to exempt these sub-categories from compliance with various aspects of the full regulatory framework.[169]

There is also a secondary channel through which the apparent simplicity of the public company regulatory category contributes to overall regulatory complexity. As discussed in Parts II and III, the accessibility of the public company regulatory category has made it an attractive mechanism for imposing new federal regulation, even if this regulation would be more effective—and less distortive—if applied to a different subset of firms. The 19 proposed bills from the 116th Congress discussed in Part III illustrate Congress' regulatory inertia when it comes to regulating business at the federal level.

To be sure, complexity is a relative concept. There is no guarantee that an alternative regulatory model will be characterized by lower levels of com-

[167] *See, e.g.*, Georgiev, *The Public-Private Divide*, *supra* note 2.

[168] *See* Press Release, SEC, SEC Harmonizes and Improves "Patchwork" Exempt Offering Framework (Nov. 2, 2020), http://bit.ly/3RH74Rw.

[169] *See supra* Part I.C.

plexity. In fact, to the extent we allow for a greater number of regulatory categories and reduce reliance on the public company category, as advocated in Part V, we may end up with a higher degree of complexity. But complexity is just one criterion for assessing the viability of the existing model, and, what is more, there are different kinds of complexity. Greater complexity coupled with coherence may well be preferable to lower, but still-high, complexity in a system that lacks coherence, distorts economic activity in counterproductive ways, and fails to promote its stated statutory goals.

F. Incidence of Regulatory Divergence

The final criterion for assessing the viability of the existing model, regulatory divergence, looks to international experience with similar types of regulation. Here, again, it is worth bearing in mind that financial regulation is different from most other types of regulation because it is influenced by social and political structures—and that those structures vary widely across jurisdictions.[170] Different jurisdictions' understandings of, and the relative weight attached to, traditional statutory goals and broader economic governance goals are also likely to be different.[171] Subject to these limitations, we do observe regulatory divergence, which provides an additional reason to question the existing U.S. model.[172]

As noted in Part II.A, other countries do not distinguish as sharply between public and non-public companies when it comes to disclosure requirements and corporate governance. In the United Kingdom, *all companies* file annual accounts containing basic financial information with a government registry, Companies House, which then publishes these accounts on a publicly accessible website. While already robust in comparison to the United States, these U.K. reporting requirements are likely to be enhanced even further in the near future.[173] In another example, certain of the disclosure and substantive provisions of the U.K. Corporate Governance Code apply to both listed (public) and non-listed (private) firms above a certain size. For example, all non-listed U.K. companies that have either (i) more than 2,000 employees, or (ii) turnover over £200 million and a balance sheet over £2 billion must report on their corporate governance arrangements, and all

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[170] *See generally* MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORPORATE IMPACT (2003).

[171] As a result, an interjurisdictional comparison of regulatory schemes to achieve an observable and measurable outcome such as, for example, reducing greenhouse gases would be much more apposite than an interjurisdictional comparison of regulatory schemes for investor protection—a more abstract goal.

[172] Under conditions of globalization, regulatory systems are generally more likely to converge than to diverge over time. *See, e.g.*, George S. Georgiev, *Bridging the Divide? The European Court of First Instance Judgment in* GE/Honeywell, 31 YALE J. INT'L L. 518 (2006) (discussing patterns of regulatory convergence among the EU and U.S. antitrust systems).

[173] *See* U.K. DEP'T OF BUS., ENERGY & INDUS. STRATEGY, CORPORATE TRANSPARENCY AND REGISTER REFORM WHITE PAPER (Feb. 2022), https://bit.ly/3H3T2re.

companies except certain smaller companies must report on how directors, when promoting the success of the company, took stakeholders into account.[174]

Moving from corporate governance to broader economic governance, U.K. legislation requiring reporting on "modern slavery" and an equivalent bill proposed in the United States provide a direct illustration of regulatory divergence. The U.K. legislation applies to any corporate entity, regardless of jurisdiction of incorporation, that conducts business in the United Kingdom, supplies goods or services, and has annual revenue of £36 million or more.[175] This is a very low threshold that captures any middle-sized business with operations in the United Kingdom, regardless of jurisdiction of incorporation and regardless of public company status. In the United States, the proposed Business Supply Chain Transparency on Trafficking and Slavery Act of 2020 would have required reporting only by public companies, much like the other bills in the sample of 19 proposed "public company" bills from the 116th Congress discussed in Part III.[176]

The United Kingdom is not unique in ignoring the distinction between public (listed) and non-public (non-listed) companies when it comes to entity governance regulation. In the European Union, the EU Audit and Accounting Directives apply to "public interest entities," a category that includes companies with securities listed on public markets and, irrespective of public/private company status, credit institutions, insurance firms, and certain other "entities designated by [EU] Member States as public-interest entities, for instance undertakings that are of significant public relevance because of the nature of their business, their size or the number of their employees."[177] Expanding on this already-expansive approach, the ambitious EU Corporate Sustainability Reporting Directive (CSRD), adopted in November 2022, requires a wide variety of businesses, both public and private and both EU-based and international, to repot detailed ESG information following a double-materiality approach.[178] According to estimates, the CSRD would apply to more than 50,000 companies within the European Union and

[174] *See Corporate Governance for Private Companies*, *supra* note 74.

[175] *See* U.K. Home Office, Guidance: Publish an Annual Modern Slavery Statement, Home Office (July 28, 2021), http://bit.ly/3JUf67N.

[176] *See* Business Supply Chain Transparency on Trafficking and Slavery Act of 2020, H.R. 6279, 116th Cong. (2020), https://bit.ly/40CVbAc.

[177] *See* Accountancy Europe, Definition of Public Interest Entities in Europe 1 (2017), https://bit.ly/443HtYJ.

[178] *See* Council Directive 2021/0104 (COD), of the European Parliament and of the Council Amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, 2022 O.J. (L 322) 1, https://bit.ly/41nVjnK.

to more than 10,000 companies outside the European Union.[179] This broad coverage is the direct result of the CSRD's capacious regulatory triggers.[180]

In explaining the rationale for its policy choice, the CSRD notes "concerns about the impacts and accountability of [non-listed] undertakings," and a desire that "all large undertakings should be subject to the same requirements to report sustainability information publicly."[181] The CSRD also highlights a concern that in the United States would correspond to the traditional, investor-protection rationale for public company regulation: "*financial market participants* also need information from those large undertakings whose securities are not admitted to trading on a regulated market in the [European] Union."[182] Put simply, the CSRD's regulatory philosophy is that investors and other financial market participants need certain information from all companies, not just from public companies.

V. Alternative Regulatory Approaches

This Article's main goal has been to highlight the extensive and inertia-driven reliance on the public company regulatory category and to assess the category's effectiveness in fulfilling core goals of the modern administrative state. Given that there is substantial reason to be skeptical of the category's ongoing viability, legislators and policymakers would be well advised to think carefully before using the public company regulatory category as the default option in the future. This conclusion naturally leads to the question of alternative approaches, which raises a number of complex issues and deserves its own full-length treatment. This Part offers some initial thoughts about alternative approaches, many of which draw on regulatory models referenced throughout the Article. The main takeaway is that the optimal regulatory approach would depend on the specific substance of the regulation in question as well as on the specific regulatory goals.

Economic Governance vs. Capital Raising: One of the reasons for the current state of affairs is that entity governance regulation in the United States has grown through securities law, which deals with capital raising—a very narrow and specific activity. Moreover, securities law is deliberately designed to contain two separate realms: a regulated one (inhabited by public firms and public investors interacting on public markets), and a very

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[179] *See* Dieter Holger, *At Least 10,000 Foreign Companies to be Hit by EU Sustainability Rules*, Wall St. J. (Apr. 5, 2023), https://bit.ly/3LutQuv (reporting estimates by the European Commission and financial data firm Refinitiv).

[180] The new EU rules would apply to "(1) companies that have listed securities, such as stocks or bonds, on a regulated market in the European Union; (2) companies that have annual EU revenue of more than €150 million, and an EU branch with net revenue of more than €40 million; and (3) companies with an EU subsidiary that is a large company, defined as meeting at least two of these three criteria: more than 250 EU-based employees, a balance sheet above €20 million or local revenue of more than €40 million." *Id.*

[181] Council Directive 2021/0104, *supra* note 178, at 18.

[182] *Id.* (emphasis added).

lightly regulated one (traditionally inhabited by private firms and private investors interacting on private markets). Given securities law's narrow focus, it is not surprising that many entity governance regulations are only tangentially related to capital raising and that those regulations may be warranted regardless of a firm's capital raising needs and preferences. Other countries have implemented such rules through laws applying to "companies" or "undertakings," without reference to capital market access.[183] A similar conduit for regulation that is untethered from capital raising may well be needed in the United States. The notion of a "large entity" contained in the proposed Accountable Capitalism Act offers one example.[184]

The Footprint-Based Approach: An entity's economic and societal footprint can serve as a useful regulatory hook, and such a hook could be more effective than the existing public company regulatory category. Potential proxies for an entity's footprint include number of employees, revenues, assets, and market capitalization. Such criteria could be used to redefine the public company regulatory category or to create a new regulatory category. The proposed Private Markets Transparency and Accountability Act does the former,[185] whereas the proposed Accountable Capitalism Act does the latter.[186] The EU CSRD offers a particularly vivid example by mandating corporate transparency for any entity, public or private, domestic or foreign, meeting certain fairly low footprint criteria.[187] Footprint-based approaches provide opportunities to regulate only entities whose economic and societal impact exceeds certain thresholds, to combine different criteria in order to minimize avoidance opportunities, and to scale regulation in proportion to an entity's footprint.

The Counterparty Approach: It may be possible to reach some of the entities that are currently excluded from the definition of public company through regulation that applies, indirectly, to counterparties. This is a somewhat controversial approach, but it deserves consideration in specific circumstances. In the United States, the conflict minerals disclosure requirement contained in the Sarbanes-Oxley Act provides one early example: it requires companies to report on the use in their supply chains of certain minerals that originate in the Democratic Republic of Congo and contribute to human rights abuses there.[188] Even though the requirement applies only to public companies, it also impacts those public companies' counterparties—a public company needs to know about its counterparties' practices in order to comply with the requirement, and it may well impose

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[183] *See supra* Part IV.F.

[184] *See supra* Part II.E. Recall that the Accountable Capitalism Act defined "large entity" to cover any domestic entity engaged in interstate commerce with more than $1 billion in annual gross receipts. *Id.*

[185] *See supra* notes 34–35 and accompanying text.

[186] *See supra* note 112 and accompanying text.

[187] *See supra* notes 179–180 and accompanying text.

[188] *See supra* note 72.

specific conditions on those counterparties. As other potential examples, requiring public companies to report their Scope 3 emissions as part of a corporate climate disclosure regime, or to report information on independent contractors as part of a human capital management disclosure regime would also expand the reach of what is ostensibly public company regulation, and, with it, the regulatory boundaries of the firm. The EU's draft supply chain due diligence directive offers an example of a comprehensive scheme that regulates firms and, indirectly, their counterparties.[189] Again, these are potential options for consideration, not recommendations.

The Market-Specific Approach: Because public company regulation works through the public capital markets, some of the challenges to its effectiveness have arisen from the emergence of private capital markets as an alternative source of financing. Scholars have noted that even regulation that is tangential to investors sometimes tends to be linked to investors for instrumental reasons and become part of capital market regulation.[190] Present-day economic activity takes place in various other markets, including labor markets, product markets, and data markets. The transition to an economy dominated by intangible assets reduces the relative importance of financial capital and capital markets vis-á-vis other assets and markets. Federal economic regulation, then, need not rely on capital market regulation via the public company regulatory category to such an extent. If worker welfare is the relevant regulatory goal, for example, this goal could be achieved by regulating the *labor market*, rather than by imposing a disclosure rule that requires public companies (but not private companies) to report on certain worker welfare metrics.[191]

The Intermediary Approach: A related regulatory approach focuses not on companies but on market intermediaries. For example, if a regulator wishes to reach the private companies whose securities are contained in a fund marketed by an asset manager, the regulator could impose reporting or other requirements on the asset manager. Such requirements could lead the asset manager to ensure compliance from the private companies in the fund so that it itself is in compliance. For example, the European Union's Sustainable Finance Disclosure Regulation requires intermediaries (the investment

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[189] *See* Eur. Comm'n, Press Release, Just and Sustainable Economy: Commission Lays Down Rules for Companies to Respect Human Rights and Environment in Global Value Chains (Feb. 23, 2022), https://bit.ly/3HbeEQo (describing the proposed Directive on Corporate Sustainability Due Diligence).

[190] *See, e.g.*, Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REG. 499 (2020) (criticizing the use of the investor-focused disclosure regime as a means of supplying important information to non-investor audiences).

[191] The Federal Trade Commission's proposed ban on non-competes in contracts is an example of such an approach. This proposed rule can be contrasted with a hypothetical SEC disclosure rule requiring disclosure of firms' use of non-competes. The FTC rule would apply to all employers, whereas the SEC rule would apply only to employers that are public companies. *See* Press Release, Federal Trade Commission, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023), https://bit.ly/40zdTHO.

funds and their managers) to collect and report sustainability information; similar ideas have been mooted in the United States in order to capture both public and private companies.[192]

What About Non-Profit Entities? Though they are not subject to any meaningful entity governance regulation at the federal level, non-profit entities mediate a significant share of economic activity in the United States. Such non-profit entities include major hospitals and healthcare organizations, educational institutions, foundations, and others. In the aggregate, they employ 12 million people and account for 5.6% of U.S. GDP.[193] If stakeholder-focused entity governance regulations covering matters such as employee voice, stakeholder-focused disclosure, supply chain due diligence, and others are warranted for for-profit entities, it is unclear why those regulations aren't warranted for non-profit entities as well. The same question can be asked for regulations dealing with board structure and composition and the amelioration of agency costs (to name just two examples), which are aimed at maximizing aggregate economic efficiency. To achieve this goal, the state should consider regulating all entities engaged in significant economic activity, regardless of their for-profit or non-profit status or their public company status. These examples suggest that if legislators revise the proposed bills discussed in Part III to cover private companies as well as public ones, then they should also consider, on a case-by-case basis, whether to also include non-profit entities in the bills' coverage.

Conclusion

This Article explored a question that has to do with regulatory design and administrative law as much as it does with securities law: Is public company regulation capable of fulfilling the goals assigned to it within the modern administrative state? Or, in other words, is the "public company" regulatory category still viable? The need to examine this question arises from the confluence of two prominent and countervailing trends: the historical and ever-growing reliance on the public company regulatory category, and the fact that the category has been rendered largely elective by recent regulatory and capital market developments. After developing and applying a five-factor assessment framework, the Article found that there is serious cause to be skeptical of the current model's effectiveness, both with respect to the traditional goals of public company regulation (investor protection, capital formation, and capital market efficiency), and with respect to newer economic governance goals such as accountability, transparency, voice, and overall economic efficiency.

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[192] *See, e,g.*, Lewis Davison et al., *ESG: EU Regulatory Change and Its Implications*, Harv. L. Sch. F. on Corp. Governance (Feb. 18, 2023), https://bit.ly/40UuNRv.

[193] *See* Peter Molk & D. Daniel Sokol, *The Challenges of Nonprofit Governance*, 62 B.C. L. Rev. 1497, 1498–99 (2022).

Will we see the eclipse of the public company regulatory category? The current regulatory system has been in place for nine decades and is a function of various structural, historical, and political factors. These factors explain the persistence of the public company regulatory category and they also suggest that it may be difficult to put in place an alternative model. Nevertheless, as this Article showed, there are new regulatory approaches that are worth exploring, including approaches that capture private firms as well as non-profits that engage in significant economic activity, approaches that focus on intermediaries, and approaches that regulate supply chains. Non-U.S. jurisdictions, which do not have a strong historical attachment to a "public company"-like regulatory category, offer potentially useful models.

Short of wholesale reform, this Article has one immediate message for legislators and policy advocates: when designing new bills that focus on any aspect of economic governance, including the range of bills that have appeared on recent legislative agendas, think carefully before conditioning those bills' applicability on public company status.

Appendix A: Changes in the Capital Raising Regulatory Regime

Figures A-1 and A-2 depict the functional changes in the applicable regulatory framework for capital raising before the 2000s and after the deregulatory cascade of the 2010s. A detailed description of the figures is available in prior related work.[194] The figures are reproduced here for ease of reference.

Figure A-1: Simplified Overview of the Capital Raising Regulatory Regime Before the 2000s

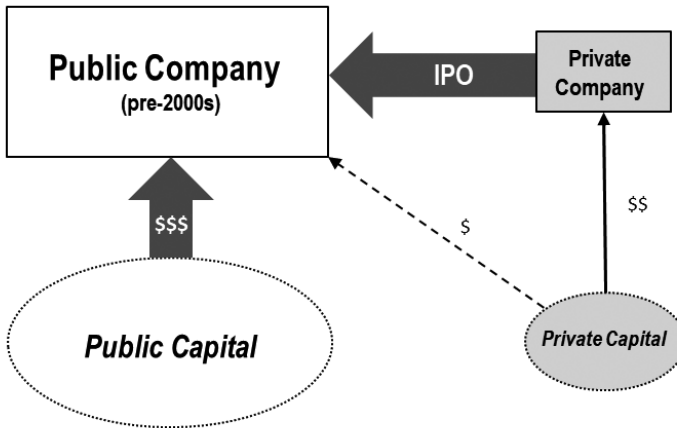
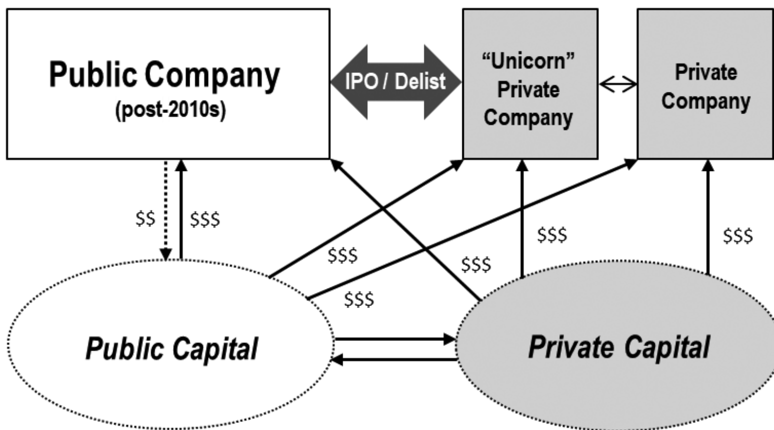


Figure A-2: Simplified Overview of the Capital Raising Regulatory Regime Post-2010s



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[194] *See* Georgiev, *The Public-Private Divide*, *supra* note 2, at 275–77.

Appendix B: Summary of Pre-New Deal Entity Governance Bills

Table B-1 summarizes 28 Congressional bills that sought to regulate some aspect of firms' corporate governance at the federal level between 1903 and 1930, i.e., immediately prior to the creation of the public company category through the Securities Act of 1933 and the Exchange Act of 1934.[195] These early 20th century bills varied widely in content, but most proposed extensive federal regulation of corporate governance that applied to a much broader set of entities than the public company category Congress eventually constructed.

Table B-1: Proposed Entity Governance Bills Between 1903 and 1930: Regulatory Categories and Content

	Proposed Bill	**Regulatory Category**	**Regulatory Requirements & Provisions**
1.	H.R. 66 (1903)	Corporations seeking to engage in interstate commerce	Federal charter; various substantive corporate governance rules
2.	H.R. 8883 (1904)	Corporations engaged in intrastate and interstate commerce	Restrictions on corporations' ability to engage in interstate commerce; Congressional approval requirement
3.	S. 6238 (1905)	Corporations seeking to engage in interstate commerce	Federal charter & registration; various related formalities; annual reports; "National Board of Corporations" with regulatory & investigatory powers
4.	H.R. 10704 (1906)	Corporations engaged in interstate commerce whose total sales for the preceding year exceeded $1 million	Federal charter/license & registration; various related formalities; annual reports; federal "Bureau of Corporations" with extensive regulatory & investigatory powers
5.	H.R. 473 (1905)	Corporations engaged in interstate commerce in food & fuel supplies	Federal licensing by Dept. of Commerce & Labor; certain capitalization requirements; annual reports

[195] Table B-1 draws on the descriptions of the proposed bills provided by Marc Steinberg. *See* Steinberg, *supra* note 78.

	Proposed Bill	**Regulatory Category**	**Regulatory Requirements & Provisions**
6.	S. 6287 (1906)	Corporations formed for the purpose of constructing, maintaining, or operating lines of railroad or navigation between states	Federal licensing by Interstate Commerce Commission (ICC); mandates for size & structure of board of directors; ICC approval for any capital raising, building new routes/lines, etc.; ICC oversight of shareholder meetings; establishment of employee pension fund; ICC mediation of firm-employee disputes
7.	S. 383 (1907)	Corporations engaged in interstate commerce	Federal charter and registration; various related formalities, annual reports; oversight by Dept. of Commerce & Labor by appointing accountants to investigate & submit reports
8.	S. 4874 (1908)	Corporations engaged in interstate commerce	Federal charter & registration; annual reports; approval requirements for further capital raisings; personal liability for directors & officers; capitalization requirements; inspection rights for shareholders, creditors & customers
9.	H.R. 19745 (1908)	Corporations engaged in interstate commerce (and subject to the Sherman Act)	Federal registration/licensing; optional advance review of business contracts for Sherman Act compliance private rights of action
10.	S. 6186 & H.R. 20142 (1910) (“Taft-Wickersham Bill”)	Corporations (of 5 or more U.S. citizens) engaged in interstate commerce	Voluntary federal incorporation as a “national corporation”; restrictions/prohibitions on mergers; mandates for size & structure of board of directors; capital raising formalities; restrictions on dividends; annual reports; oversight by Bureau of Corporations; 50-year life
11.	S. 1377 (1911)	Corporations engaged in interstate commerce	Corporation to be “organized under the law of a State or Territory in which its chief place of business . . . is located and its directors’ meetings regularly held”; prohibition on holding stock of other corporations or engaging anywhere in conduct that would be illegal under home state law; capitalization limitations

	Proposed Bill	Regulatory Category	Regulatory Requirements & Provisions
12.	H.R. 12809 (1911)	Corporations engaged in interstate commerce	Federal registration; annual certifications; prohibitions on corporations holding stock in other corporations and on directors & officers working for competitors; civil & criminal liability provisions for directors & officers
13.	H.R. 17932 (1912)	Corporations engaged in interstate commerce (excluding national banks, insurance companies, small corporations, and others)	Federal charter & registration with Dept. of Commerce & Labor; reporting of capital stock increases; prohibition on corporations holding stock in other corporations; annual reports (including independent auditor reports); civil & criminal liability provisions for directors & officers
14.	H.R. 18662 (1912)	Corporations engaged in interstate commerce (excluding banks)	Registration with a state-level, but federally-appointed, Deputy Commissioners of Corporations who are part of the Bureau of Corporations under the Dept. of Commerce & Labor; civil & criminal liability provisions for directors & officers; some ownership restrictions; creditors & shareholders can petition for a receiver in case of insolvency
15.	H.R. 26414 (1912)	Corporations engaged in interstate commerce	Federal registration; reporting & tracking of share purchases; size of board of directors; mandatory ownership stake for directors; shareholder inspection rights; Secretary of Commerce & Labor empowered to determine initial capital structure
16.	H.R. 26415 (1912)	Corporations engaged in interstate commerce in "manufacturing, mining, or other commercial or industrial business" above certain size	Federal charter & registration with bipartisan U.S. Corporation Commission; annual reports; limits on capital raising to "true value of physical assets and goodwill of business"; Commission approval required for any stock issuance & purchase of another corp.'s stock/debt; civil & criminal liability provisions for directors & officers; broad investigatory & adjudicatory powers to U.S. Corporation Commission
17.	H.R. 2488 (1913)	Corporations engaged in interstate commerce	Federal registration; civil & criminal liability provisions for directors & officers; prohibition on corporations holding stock in other corporations; other provisions mirroring related bills

	Proposed Bill	Regulatory Category	Regulatory Requirements & Provisions
18.	H.R. 1890 (1913)	Corporations engaged in interstate commerce (other than railroads) with annual gross receipts above $10 million	Federal charter & registration; provisions to be enforced by 7-member bipartisan Interstate Corporation Commission with broad investigatory & adjudicatory powers; civil & criminal liability provisions for directors & officers; prohibition on selling products at a price that is "unjust, unfair, or unreasonable"; requirement that all corporate practices and policies "shall be just, fair, and reasonable, and not contrary to public policy"
19.	S. 1617 (1913)	Corporations engaged in interstate commerce with capital above $5 million	Prohibition on directors & officers serving in the same capacity for a competitor corporation and, with certain exceptions, banking corporations; prohibition on corporations holding stock in other corporations; civil & criminal liability provisions for directors & officers; prohibitions on certain specified anticompetitive practices
20.	H.R. 11167 & H.R. 11168 (1913)	Corporations engaged in interstate commerce	Prohibition on corporations holding stock in, and directors & officers serving in, competitor corporations or common carriers; provision that a corporation could exercise "only such powers as are necessary or are incidental to its business"; tracing of stock transfers; books & records requirements; "actual value" requirement for transactions paid with stock; capital structure restrictions; civil & criminal liability for directors & officers
21.	S. 4647 (1914)	Corporations engaged in interstate commerce (other than railroads)	Federal licensing and registration; annual reports; Secretary of Dept. of Commerce has power to "inspect, supervise, and regulate" subject corporations; civil & criminal liability provisions for directors & officers; bookkeeping requirements; inspection rights; approval by Secretary for issuance or disposal of capital stock, bonds, and other instruments; prohibitions on corporations holding stock in other corporations; prohibitions on directors & officers serving in competitor corporations

	Proposed Bill	Regulatory Category	Regulatory Requirements & Provisions
22.	H.R. 315 (1917)	All corporations and associations (entities subject to Clayton Antitrust Act)	Amendment to Clayton Antitrust Act: corporate directors able to serve as directors of up to two competitor corporations upon consent of the FTC
23.	H.R. 4425 (1917)	All corporations and associations (entities subject to FTC Act)	Amendment to FTC Act: notice of sale of stock, bonds, or other securities required to be filed with FTC along with report containing various types of corporate information (akin to registration statement)
24.	H.R. 1186 (1919)	All corporations and associations (entities subject to FTC Act)	Federal licensing and registration with FTC; broad oversight and enforcement by FTC
25.	S. 2754 (1919)	Corporations engaged in interstate commerce (other than common carriers) with stock & assets ≥ $10 million	Federal licensing and registration with FTC; annual reports; FTC to ensure that no stock is issued except for cash or an equal value of property; prohibitions on corporations holding stock in competitor corporations (except with FTC approval); FTC to preapprove any increase in capital stock; oversight and enforcement by FTC
26.	S. 1612 (1921)	All corporations and associations (entities subject to Clayton Antitrust Act)	Federal licensing and registration with FTC; filing report with various types of corporate information (akin to registration statement) before issuing securities; civil & criminal liability provisions
27.	S. 2847 (1930)	Corporations engaged in interstate commerce	Federal licensing and registration with FTC; annual reports; approval by FTC of managing officers' salaries; cap on dividends to 5% of capital investment to be paid from net earnings; excess net earnings to be paid into guaranty fund held by federal government; civil & criminal liability provisions
28.	H.R. 12810 (1930)	Corporations engaged in interstate commerce (and their shareholders)	Prohibition on purchasing stock in corporations where such a purchase would exceed 49% "of the distribution of any line of goods, wares, merchandise, or other commodity, whether patented or unpatented, in interstate commerce. . . ."; annual reports to Secretary of Commerce setting forth corporation's amount of total distribution of any line of goods, wares, or other commodity