

# The Private Ordering Solution to Multiforum Shareholder Litigation

Law Working Paper N° 295/2015

June 2015

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We have benefitted from comments from participants in Boston University School of Law's Law and Economics Workshop. We would like to thank The Legal 500 Series for generously providing us access to their archived law firm ratings for use in our analysis.

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## Abstract

This paper empirically analyzes a private ordering solution to multiform shareholder litigation: exclusive forum provisions in corporate charters and bylaws. These provisions, whose use has become quite widespread, require that all corporate law-related disputes be brought in a single forum, typically a court in the statutory domicile. Using hand-collected data on the 746 U.S. public corporations that have adopted the provision, we examine what drives the growth in these provisions and whether, as some critics contend, their adoption reflects managerial opportunism. We separately analyze companies that adopt the provision at the IPO stage (which usually occurs through a charter amendment) and those that adopt “midstream” or after IPO stage (which usually occurs through a bylaw amendment).

We find that nearly all new Delaware corporations adopt the provision at the IPO stage, and further that the transition from zero to near-universal IPO adoption is driven by law firms. The characteristics of individual companies appear to play little or no role in adoption decisions. Instead, the pattern of adoption follows what can be described as a light switch model, in which law firms suddenly switch from never adopting to always adopting the provision in the IPOs they advise. This pattern contrasts with the decision to include takeover defenses in IPO charters, and suggests that lawyers have come to perceive that exclusive forum provisions are universally value-increasing.

For midstream adoptions, we compare corporate governance features of midstream bylaw adopters to a matched sample of non-adopters in order to test the hypothesis that midstream bylaw adoption reflects managerial opportunism. If the hypothesis were correct, then we would expect to find that midstream adopters exhibit poor corporate governance compared to nonadopters (using the metrics of good governance practices as identified by critics of the provisions). We find, however, that there are either no significant differences in governance or that it is actually adopters that have higher quality governance features. We also find no significant differences in governance and ownership structures between firms whose boards adopt the provisions as bylaws and those who obtain shareholder approval. The absence of significant differences across firms using disparate adoption procedures suggests that the method of adopting an exclusive forum provision – whether with or without shareholder approval - should not be a matter of import for investors.

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Keywords: exclusive forum clauses, multiform litigation, shareholder litigation

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## I. Introduction

Shareholder suits against Delaware corporations have been increasingly filed in multiple forums.<sup>1</sup> This trend would appear to be puzzling because it is at odds with the widely held view that the expertise of Delaware courts actually benefits shareholders.<sup>2</sup> The trend is less puzzling, however, if one appreciates that while this may be true on average, it may not be true for every individual shareholder. Further, it is shareholders' attorneys who decide in which forum to file a lawsuit, but, as has been long-recognized in the literature, attorneys' incentives may be misaligned with the interests of their clients.<sup>3</sup>

Commentators have proposed a number of responses to multiforum litigation, including judicial, legislative, and private ordering solutions.<sup>4</sup> This paper focuses on one private ordering

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<sup>1</sup> E.g., John Armour, et al., *Is Delaware Losing its Cases?* 9 *J. Emp. Leg. Stud.* 605 (2012) [hereinafter Armour, et al., *Losing*]; Jennifer J. Johnson, *Securities Actions in State Court*, 80 *U. Cin. L. Rev.* 349 (2012); Edward B. Micheletti & Jenness E. Parker, *Multi-jurisdictional Litigation: Who Caused This Problem and Can It Be Fixed?* 37 *Del. J. Corp. L.* 1 (2012).

<sup>2</sup> E.g., Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 *J. L., Econ. & Org.* (1985); Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 *Del. J. Corp. L.* 673, 682-683 (2005); E. Norman Veasey, *An Economic Rationale for Judicial Decisionmaking in Corporate Law*, 53 *Bus. Law.* 681, 683, 694 (1998).

<sup>3</sup> E.g., John C. Coffee, *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 58 *Law & Contemp. Prob.* 5 (1985). As Thompson and Thomas describe multijurisdictional corporate litigation, it is "fee distribution litigation," that is, the function of an out-of-state forum filing is to obtain for the attorney a share of a fee award, and not to contribute to the resolution of a dispute. Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and Its Application to Multijurisdictional Litigation*, 106 *Nw. Univ. L. Rev.* 1753, 1801 (2012). This dynamic is possible because a settlement in one forum can release the defendant from liability for all claims related to the dispute transaction asserted by any other shareholder in any other forum. See *Matshushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996); Minor Myers, *Fixing Multi-Forum Shareholder Litigation*, 2014 *Univ. Ill. L. Rev.* 467, 496-497.

<sup>4</sup> These solutions are discussed in section II, *infra*. Not all commentators consider this phenomenon problematic. For articles endorsing multijurisdictional litigation, see Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 *Vand.*

solution: exclusive forum provisions. An exclusive forum provision in a corporation's charter or bylaws is analogous to a forum selection clause in a contract. It requires that all corporate law-related disputes be brought in a single forum, most typically a court in the corporation's statutory domicile. The number of firms adopting this self-help solution has dramatically increased in recent years, following its endorsement by the Delaware Chancery Court and a number of other state courts.<sup>5</sup>

There has been limited investigation of which firms adopt exclusive forum provisions. But a better understanding of which firms adopt exclusive forum provisions would shed light on whether shareholders should be concerned about their own firms adopting (or not adopting) the provision. It would also shed light on whether this private ordering solution obviates the need for judicial or legislative intervention. Using hand-collected data on all 746 U.S. public corporations that have adopted the provision (as of August 2014),<sup>6</sup> we analyze the extent to which adoption is associated with a firm's internal governance structure versus its external influences (such as outside counsel).

Throughout the analysis, we draw a distinction between firms that have the provision at the time of their IPO ("IPO adopters") and those that have adopted a provision after their IPO ("midstream adopters"). The dynamics of adoption at these two stages differ considerably.

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L.Rev. 1053 (2013); Faith Stevelman, Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law, 34 Del. J. Corp. L. 57 (2009); and for articles viewing it as problematic, see John Armour, et al., Delaware's Balancing Act, 87 Ind. L. J. 1345 (2012); Benjamin D. Landry, Mutual Assent in the Corporate Contract: Forum Selection Bylaws, 18 Fordham J. Corp. & Fin. L. 1 (2013); Micheletti & Parker, *supra* note 1; Myers, *supra* note 3; Leo E. Strine, Jr., et al., Putting Stockholders First, Not the First-Filed Complaint, Harvard John M. Olin Fellow Disc. Paper No. 740 01/2013 (2013).

<sup>5</sup> The court decisions upholding exclusive forum provisions are discussed in section II, *infra*.

<sup>6</sup> The first exclusive forum bylaw was adopted by Oracle Corp. in 2006. The first exclusive forum charter provision, included in the certificate of a company upon going public

When adoption occurs before the IPO, any potential wealth effect can be impounded into the stock price before public investors purchase their shares. In contrast, when adoption occurs after the IPO, public shareholders have no such opportunity to price-in the potential wealth effect. If the value of the provision were negative, then midstream adoption could generate a loss for shareholders. Thus, unlike provisions in place at the IPO, post-IPO amendments to corporate documents (so-called “latecomer terms”)<sup>7</sup> could transfer wealth from shareholders to management (or vice versa). For this reason, we use different empirical strategies to analyze IPO and midstream adoption.

Our analysis of IPO adoption yields two principal results. First, from January 2010 to August 2014, the rate of IPO adoption has risen steadily from 0 to 80 percent. At this rate, we predict that by the end of 2015, virtually all Delaware corporations will adopt an exclusive forum provision before going public. Second, company-specific characteristics, such as industry or firm size, play little to no role in the adoption decision. Instead, we find that the most significant predictor of IPO adoption is having outside counsel that has previously advised an IPO adopter. That is, the data fit a model in which law firms abruptly switch from never adopting to always adopting the provision. Although we identify a similar adoption pattern for investment banks underwriting the issues, when their role is analyzed jointly with law firms, only the law firm light switch effect remains. These results are consistent with the characterization that law firms make a once-and-for-all decision to unconditionally advise their corporate clients to adopt an exclusive forum provision before going public.

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(“IPO firm”) was adopted by Netsuite Inc. in 2007.

<sup>7</sup> The phrase was coined by Frank Easterbrook and Daniel Fischel to emphasize the differential wealth effect of midstream charter changes from terms in place at the initiation of an investment. Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 *Colum. L. Rev.* 1416, 1442-43 (1989).

Our analysis of midstream adoption yields two related results. First, there are minimal to no differences in corporate governance between adopters and non-adopters. Further, when there is a significant difference, it is adopters that have “better” governance (at least according to what institutional investors and proxy advisors deem good governance). These findings are at odds with claims, made by those same investors and advisory services, that the provisions are adverse to shareholder interests; if they were adverse to shareholder interests, then well-governed firms would not adopt them. Second, we find no significant differences in governance characteristics between firms whose adoption was implemented by the board of directors versus those whose adoption was approved by shareholders. These findings should allay the concern that midstream adoption harms shareholders. Indeed, as midstream adopters are at least as likely as non-adopters to have mechanisms of good governance that are thought to reduce managerial opportunism, the more plausible characterization is that such provisions are, if anything, beneficial to shareholders.

The paper proceeds as follows. The next section summarizes the literature on multijurisdictional litigation and exclusive forum provisions. The third section describes the data set. The fourth section presents our methodology and results, separately for IPO and midstream adopters. The final section concludes.

## **II. Multijurisdictional Shareholder Litigation and the Exclusive Forum Solution**

The first part of this section provides an overview of the research documenting the sharp increase in multijurisdictional litigation over the past decade, why this is thought to be a problem, and proposed solutions. In the second part, we review the empirical research on exclusive forum provisions.

## A. Multijurisdictional Shareholder Litigation

Multijurisdictional litigation is a state court phenomenon. This is because there is no formal mechanism, as there is in the federal system, to consolidate lawsuits that involve the same transaction into one forum. The phenomenon is also a relatively recent one, at least in the corporate law context, as there has been a striking shift in shareholder lawsuit filings over the past decade. In 2000, most complaints brought against Delaware corporations were filed solely in Delaware, but by 2010 over half of the lawsuits against Delaware corporations were brought in multiple forums, and less than a third were filed solely in Delaware, with a similar proportion filed solely out-of-state.<sup>8</sup> Most of these lawsuits involve mergers and acquisitions (M&As).<sup>9</sup> At the same time as plaintiffs have been filing in more numerous venues, the proportion of M&As attracting litigation has also spiked dramatically.<sup>10</sup>

Commentators have advanced a number of explanations for the acceleration of multiforum litigation since 2002. Some have emphasized decisions of the Delaware chancery

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<sup>8</sup> E.g., Johnson, *supra* note 1, at 374 (for example, of Delaware corporation M&A cases filed in 2010, “8 percent were single, out-of-state filings; 23 percent were Delaware-only filings; and 58 percent were multiple filings... in Delaware and out of state”); Armour, et al., *Losing*, *supra* note 1, at 625, 627 (proportion of Delaware corporation LBO cases filed in Delaware dropped from over 70 percent in 2000 to less than half from 2006 onward).

<sup>9</sup> Johnson, *supra* note 1, at 371 (state securities class action filings 1997-2010); Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation*, 57 *Vand. L. Rev.* 133, 167-69 (2004) (sample of all Delaware cases filed over 1999-2000).

<sup>10</sup> Johnson, *supra* note 1, at 379; Armour, et al., *Losing*, *supra* note 1, at 621, (of 25 largest M&A transactions each year over 1994-2010, ratio of suits to deals rose from 1:1 in 2006 to 2:1 in 2009, with virtually all Delaware transactions attracting litigation by 2008, and multiple jurisdiction filings simultaneously increasing); Matthew D. Cain & Stephen Davidoff Solomon, *Takeover Litigation in 2014*, at 1-2 (manuscript 2015) (lawsuits brought in over 90 percent of corporate takeovers in 2014 compared to 39 percent in 2005, and 34 percent of 2014 deals experienced suits in multiple states compared to 8 percent in 2005). This trend appears to have slowed in 2014, when for the first time since 2009, the number of cases brought in one court exceeded the number brought in more than one forum. Cornerstone Research, *Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2014 M&A Litigation* 3 (2015).

court that sharply criticized and reduced requested attorneys' fees, along with its relaxation of the presumption granting lead counsel status to the lawyer who is "first-to-file."<sup>11</sup> Others have characterized the development as an aftereffect of changes in plaintiffs' law firm competition wrought by (1) the 1995 Private Securities Litigation Reform Act (PSLRA), which made securities lawsuits more costly for small law firms, and (2) the 1998 Securities Litigation Uniform Standards Act (SLUSA), which preempted private state securities, but not fiduciary, actions, along with (3) the breakup of the then leading plaintiffs' law firms, which are said to have served a coordinating function for law firms' fee sharing within one court filing.<sup>12</sup>

The explanation concerning changes in law firm competition would affect litigation against firms incorporated in any state and not simply Delaware, however. And not surprisingly, the trend of increased corporate litigation, particularly acquisitive transaction litigation, as well as the trend of increased filings in multiple jurisdictions, has been experienced by firms across the states, that is, by non-Delaware firms incorporated in states other than their headquarters state, as well as by Delaware corporations.<sup>13</sup> Accordingly, while the vast majority of firms

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<sup>11</sup> Id. at 643-645, 651; Johnson, *supra* note 1, at 384. Cain and Davidoff provide data suggesting that plaintiffs' attorneys filings are inversely correlated with dismissal rates and in some models, positively correlated with the size of fee awards, and that states would appear to be actively involved in the process, responding to declines (increases) in the number of suits filed by adjusting fee awards upward (downward). Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 *Iowa L. Rev.* (130-134) (forthcoming 2015).

<sup>12</sup> Johnson, *supra* note 1, at 350, 361; Boris Feldman, *Shareholder Litigation after the Fall of the Iron Curtain*, 45 *Rev. Sec. & Commod. Reg.* 7 (2012); Brian Cheffins, et al., *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar*, 2012 *Colum. Bus. L. Rev.* 427, 429-432 (2012).

<sup>13</sup> Armour, et al., *Losing*, *supra* note 1, at 614, 623-624, 635; Myers, *supra* note 3, at 470, 482, 485. Myers also notes that multijurisdictional litigation has affected firms incorporated in their headquarter state, through increases in parallel federal court filings. Id. at 487-488. Myers therefore contends that it is a mistake to characterize the multijurisdictional trend as unique to Delaware firms, and, given his data on option backdating cases, as unique to M&A litigation. Id. at 470, 479.

adopting exclusive forum clauses are Delaware corporations, a number of firms incorporated in other states have also adopted such provisions (7 percent of the firms in our sample, see table 1, panel *A*). The increased prevalence of such clauses has been attributed as a possible cause of a recent drop in the number of acquisitive transaction lawsuits filed in multiple courts and a corresponding rise in those brought solely in Delaware.<sup>14</sup>

Multiforum litigation is thought to be problematic for four key reasons. First, multiple suits entail duplicative litigation costs and waste judicial resources. These costs are ultimately borne by shareholders and the general public.<sup>15</sup> Second, plaintiffs (or more accurately, their attorneys) are said to seek out courts that will rule more favorably on a complaint, or award greater attorneys' fees than would the Delaware Chancery Court. This would be a particularly worrisome type of forum shopping because, given that the same substantive law is supposed to be applied, neither the outcome nor the fee award should, in theory, vary by forum.<sup>16</sup> Third, multiforum litigation is said potentially to generate a "reverse auction," in which defendants are believed to settle with the plaintiff who will accept the lowest payment.<sup>17</sup> This would be equally

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<sup>14</sup> Cornerstone Research, *supra* note 10, at 3.

<sup>15</sup> E.g., Johnson, *supra* note 1, at 381.

<sup>16</sup> E.g., Myers, *supra* note 3, at 495. There are also procedural differences across states, which will follow the law of the forum rather than the statutory domicile (in contrast to whose law governs the substantive legal issues), and which plaintiffs could seek to exploit to their advantage, such as, the extent of discovery permitted, the approach to the holding of hearings on, and granting of, preliminary injunctions, the criteria for selecting lead counsel, and were the case to be litigated, the trier being a jury rather than a chancery court judge. *Id.* at 494.

<sup>17</sup> E.g., Griffith & Lahav, *supra* note 4, at 1082-83; Johnson, *supra* note 1, at 382. Although Griffith and Lahav identify this negative potential of multiforum litigation, they contend that the phenomenon should be perceived as a benefit and not a problem, by creating a market for preclusion of claims, which improves litigation outcomes by performing a price discovery mechanism and relieving Delaware courts from having to hear every dispute, and contend that the appropriate solution to the problem of attorney opportunism in this context is to make the market function better, by enhanced judicial oversight of complaints and settlements and improved intercourt communication about multiple lawsuits, rather than eliminate it by centralizing claims in one court. *Id.* at 1057-58, 1102, 1115, 1125, 1138.

troubling forum shopping as it would distort or even eliminate the relationship between the merits of a suit and its settlement value. Finally, multiform litigation undermines a state's ability to control the development of its corporate law, for when a lawsuit is filed out of state, its law is determined by another state's court, potentially producing inconsistent rulings, thereby increasing legal uncertainty and operating costs for the state's domestic corporations.

Commentators critical of multiform litigation have advanced a number of solutions. These proposals have focused on three approaches to resolution: legislative, judicial, and private ordering. Advocates of the legislative approach have proposed that Congress federalize the forum by preempting state corporate litigation (paralleling SLUSA) or mandate that lawsuits be brought solely in the corporation's statutory domicile.<sup>18</sup> A related legislative approach would compel federal courts to stay shareholder lawsuits in favor of filings in the statutory domicile, along with permitting their removal from an out-of-state court to federal court so as to be routed back to the domicile state through a thereupon-imposed stay.<sup>19</sup>

Courts confronted with multijurisdiction lawsuits have attempted to fashion a solution that relies on voluntary coordination—acts of judicial “comity”—that identify which court is to take charge of the litigation and can be initiated by either the courts or the parties. When multijurisdictional litigation initially appeared on the scene, the Chancellor of the Delaware Chancery Court advanced such a comity approach, reaching out to other courts on his own accord, without litigant prompting, to negotiate which court would hear the case, an initiative

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<sup>18</sup> E.g., Johnson, *supra* note 1, at 385-386 (noting possible solution); Comm. on Sec. Litig., N.Y.C. Bar Ass'n, *Coordinating Related Securities Litigation: A Position Paper* (2008) (recommending as solution) [hereinafter NYC Bar Paper]; Thomas & Thompson, *supra* note 3, at 1809-1810 (noting possible solution and rejecting as undesirable, as well as unlikely to occur).

<sup>19</sup> Myers, *supra* note 3, at 472.

that would appear to have functioned effectively.<sup>20</sup> Defense counsel thereafter adopted the Chancellor's sua sponte action to request formally that the courts coordinate. These motions, referred to as Savitt motions after the attorney initiating them, are a more polite and respectful mechanism to obtain a single forum than a conventional motion to dismiss a suit in favor of a proceeding filed elsewhere, because the moving attorney does not express a preference among courts.

The clear-cut advantage of comity techniques over proposals for preemptive federal legislation is that they require no input beyond the judges and parties to a specific lawsuit. But these techniques have an inherent drawback as they cannot resolve multiform litigation if the judges cannot agree on who should hear a case.<sup>21</sup> Commentators have accordingly advocated alternative mechanisms to ensure coordination among state courts without resort to federal legislation, such as revising the criteria used for forum selection under current conflict of laws doctrine or drafting model legislation for states to adopt.<sup>22</sup> In contrast to the comity solution, such proposals have the disadvantage of requiring the affirmative decision of numerous actors

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<sup>20</sup> Id. at 1804; *In re Allion Healthcare Shareholders Litig.*, 2011 WL 1135016 at \*4 n. 12 (Del. Ch. Mar. 29, 2011) (Ch. Chandler) (noting personal preference for Savitt motions to deal with problems of multijurisdictional litigation and stating that judges' conferring on where the case should proceed "is a method that has worked for me in every instance when it was tried.")

<sup>21</sup> In one well-known instance, the New York and Delaware courts refused to cede jurisdiction. See *In re The Topps Co. Shareholders Litig.*, 924 A.2d 951 (Del. Ch. 2007) (denying defendants' motion to stay court's ruling on preliminary injunction motion to avoid having to litigate in two courts); *Matter of Topps Co Inc. Shareholder Litig.*, 200 NY Slip Op 52543(U), 19 Misc. 3d 1103(A) (N.Y. Sup. Ct. June 8, 2007) (denying defendant's motion to dismiss or stay the proceeding because, among other reasons, New York case was filed first), available at: <http://law.justia.com/cases/new-york/other-courts/2007/2007-52543.html>. The claims were ultimately resolved in the Delaware proceeding after the New York appellate court stayed the New York action. Myers, *supra* note 3, at 520.

<sup>22</sup> Strine, et al., *supra* note 4 (proposing prioritizing the statutory domicile over other factors, along with further revisions to the American Law Institute's Restatement of Conflicts of Law); Thomas & Thompson, *supra* note 3, at 1810-11 (suggesting that the American Bar Association committee that crafts the Model Business Corporation Act could draft a legislative

(e.g., approval at the multiple stages of the ALI’s restatement revision process, along with acceptance by state courts, or by a drafting committee(s) and fifty state legislatures), and thus entail a time-consuming process with an uncertain outcome.

The implementation difficulties in judicial and legislative approaches to resolving multiforum legislation lent force to commentators advocating the “self-help” private ordering solution of exclusive forum provisions that automatically coordinate across courts by identifying the forum *ex ante*. However, the key to the effectiveness of such a strategy is the provisions’ enforceability, a matter on which commentators differed when the approach was initially proposed by practitioners in the late 2000s.<sup>23</sup> Given such legal uncertainty, few firms adopted the provisions until the strategy was approvingly noted by Vice Chancellor Travis Laster, in dicta in a 2010 opinion, *In re Revlon Shareholders Litigation*, in which he remarked that corporations could adopt exclusive forum charter provisions to manage multijurisdictional litigation.<sup>24</sup>

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template for Model Act states that provides a coordinated solution).

<sup>23</sup> E.g., Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 *Bus. Law.* 325 (2013) (enforceable); Thomas & Thompson, *supra* note 3 (not enforceable). A “self-help” proposal advanced by members of a prominent plaintiffs’ law firm is for plaintiffs filing M&A lawsuits in Delaware to publish a nationwide notice, which would be open for ten days in which other shareholders and their attorneys would apply to compete for the position as lead plaintiff and counsel, reducing the incentive for attorneys to file in other courts, as they would have a chance at being named lead counsel without filing elsewhere. Mark Lebovitch, et al., *Improving Multi-Jurisdictional, Merger-Related Litigation* 6 (Feb. 14, 2011), available at: <http://www.blbglaw.com/news/publications/data/00132>. But as with the exclusive forum provision solution developed from the perspective of the corporate defendants, this proposal is a feasible solution only with judicial assistance, as it does not stop plaintiffs from filing in out-of-state courts; the proponents’ aspiration, is that other courts would be more likely to stay or dismiss a proceeding in favor of Delaware under such an open and transparent process of lead counsel selection. *Id.* at 8.

<sup>24</sup> *In re Revlon Inc. Shareholders Litig.*, 990 A. 2d 940, 960 (Del. Ch. 2010) [hereinafter cited as *Revlon*]. The trend of increasing adoptions of forum selection provisions after this decision and the *Chevron* decision of then Chancellor Strine, cited in note 26, *infra*, is discussed

Though *Revlon*'s dicta only referred to exclusive forum charter provisions, after the decision, numerous firms adopted exclusive forum bylaw provisions. Those adoptions came to a virtual standstill, however, when, following the refusal of a federal court in California (in *Galaviz v. Berg*) to enforce a bylaw (which had been adopted after the litigation had commenced and would thereby be applied retroactively), several shareholder lawsuits were filed that challenged management-adopted bylaws as invalid under Delaware law.<sup>25</sup> Although most of the sued corporations voluntarily repealed their bylaws, two chose to litigate. In a 2013 decision, *Boilermakers Local 154 Retirement Fund v. Chevron*, the Chancery Court upheld the validity of exclusive forum bylaw provisions, rejecting the plaintiffs' statutory and contractual contentions that, under Delaware law, management could not preempt shareholders' right to select a forum.<sup>26</sup>

Following the *Chevron* decision, corporate adoptions of exclusive forum bylaws rapidly accelerated, paralleling the widespread inclusion of such provisions in IPO charters (which had not been impacted by the bylaw litigation).<sup>27</sup> Of course, for exclusive forum provisions to be effective, state courts other than the Delaware Chancery Court must also respect their validity. In contrast to the earlier federal court decision, they have overwhelmingly done so: numerous state courts, including one in California, ruling on the issue after *Chevron* have dismissed suits

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in sections II.B and IV, *infra*.

<sup>25</sup> *Galaviz v. Berg*, 763 F. Supp. 2d 1170 (N.D. Cal. 2011) [hereinafter cited as *Galaviz*].

<sup>26</sup> *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del Ch. 2013) [hereinafter cited as *Chevron*]; see Claudia H. Allen, Trends in Exclusive Forum Bylaws, Conference Board Director Notes 2 (2014) [hereinafter Allen 2014], available at <http://ssrn.com/abstract=2411715> (ten of twelve companies repealed bylaws when sued). Apparently wishing to avoid a Supreme Court affirmation that might have been even broader than that of the Chancery Court, the decision was not appealed. Theodore N. Mirvis, et al., Surrender in the Forum Selection Bylaw Battle, *Wachtell, Lipton, Rosen & Katz* (Oct. 25, 2013). Then Chancellor Strine did include a caveat that even a valid bylaw could still be challenged as operating inequitably, indicating that the provisions could be subject to a case-by-case review of the reasonableness of their operation. *Chevron*, *supra*.

<sup>27</sup> See Allen 2014, *supra* note 26, and figure 2 and accompanying discussion in section

before them in accordance with the forum choice expressed in the defendant corporations' documents.<sup>28</sup> Accordingly, of the three potential routes for reducing the likelihood of multijurisdictional litigation—legislative, judicial and private ordering—the self-help solution has decisively emerged as the most promising, as it is by far the simplest to implement and has been effective in resolving multiforum litigation. The three routes are not, however, mutually exclusive. For instance, legislation permitting Virginia corporations to adopt a bylaw

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IV, *infra*.

<sup>28</sup> Glen T. Schleyer, et al., Exclusive Forum Bylaws Gain Momentum, Del. Corp. & Leg. Serv. Blog (July 8, 2014) (all state courts considering enforceability of exclusive forum bylaws have upheld them, including courts in California, New York, Illinois and Louisiana), available at <http://decals.delaware.gov/2014/07/08/exclusive-forum-bylaws-gain-momentum/> The Delaware Chancery Court has also upheld a Delaware corporation's bylaw that selected a court in another state (a federal district court in North Carolina) as its exclusive forum. *City of Providence v. First Citizens Bancshares, Inc.*, CA No. 9795-CB (Del. Ch. Sep. 8, 2014). The Delaware legislation is currently considering legislation proposed by the Delaware bar, however, that would overturn the decision and preclude Delaware corporations' adoption of an exclusive forum provision that did not select Delaware. Michael Greene, Proposal Would Nullify Fee-Shifting Bylaws in Delaware Stock Corporation Bylaws, Charters, BNA Corp. L. & Accountability Rep. (Mar. 9, 2015) [hereinafter Greene, Nullify]; Michael Greene, Fee-Shifting Bill Expected for Early June Vote Before Delaware House Committee, BNA Corp. L. & Accountability Rep. (May 13, 2015). Only one decision, by an Oregon state court, has refused to enforce an exclusive forum clause since *Chevron*; that court rejected a bylaw adopted at the same time as the corporation entered into a merger agreement that was the subject of the underlying lawsuit; however, the court suggested that had the provision been enacted prior to the merger, it would have been enforced. *Roberts v. TriQuint SemiConductors, Inc.*, No. 1402-02441 (Ore. Cir. Ct. Aug. 14, 2014). Whether such legislation will prompt state courts to look less favorably on Delaware exclusive forum clauses in retaliation for the express lack of comity remains to be seen. In one instance, the Delaware Chancery Court refused to grant a motion to enjoin litigation in Louisiana to enforce what it deemed to be a valid provision specifying the Delaware court as the exclusive forum, holding that the defendant corporation's pursuing an anti-suit injunction was the "most aggressive" path it could take, which created "potential issues of interforum comity" and expressed a preference that the forum selection clause "be considered in the first instance by ...the court where the breaching party [i.e., the shareholder plaintiff] filed, not through an anti-suit injunction in the contractually specified court." *Edgon Grp. Inc. v. Genoud*, C.A. No. 9055-VCL (Del. Ch., Nov. 5, 2013) (Trans.) The Louisiana court subsequently dismissed the case to be litigated in Delaware, as provided by the bylaw. *Genoud v. Edgen Group Inc.*, Case no. 625244 (19<sup>th</sup> Jud. D.Ct., Parish of East Baton Rouge 2014); Peter L. Welsh & Martin J. Crisp, Enforcing Exclusive Forum Selection Clauses in Corporate Organizational Documents, 28 Insights 1, 4 (CCH) (Mar. 2014).

designating Virginia or their headquarters state as an exclusive forum for shareholder litigation has recently been unanimously approved by the Virginia House of Delegates and forwarded to the state Senate.<sup>29</sup>

## **B. Exclusive Forum Provisions**

The literature examining firms' adoption of exclusive forum clauses initially focused almost exclusively on the type of provisions adopted, rather than on the characteristics of adopting firms. Claudia Allen has tracked the adoption of exclusive forum provisions since the Chancery Court suggested their use in *Revlon*.<sup>30</sup> Her initial examination identified 82 Delaware companies that adopted (or were in the process of adopting) an exclusive forum provision, with nearly all (93 percent) being adopted after *Revlon*.<sup>31</sup> In less than a year, Allen found that the number had more than doubled.<sup>32</sup> In her third tally after *Chevron*, there was a similarly dramatic surge, with over 100 bylaw adoptions alone in the four months following the decision.<sup>33</sup> These data underscore the tight interrelationship between a successful self-help approach and judicial

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<sup>29</sup> Yin Wilczek, Va. House of Delegates Passes Bill Authorizing Exclusive Forum Selection Bylaws, Bloomberg BNA Corp. Law & Accountability Rep. (Feb. 4, 2015). One firm in our sample is incorporated in Virginia, a 2013 midstream bylaw adopter, which designated as the exclusive forum, the U.S. district court for the eastern district of Virginia, or the state Circuit Court of Fairfax County, if the federal court lacked jurisdiction. Albemarle Corp, Form 10-Q, filed Oct. 18, 2013.

<sup>30</sup> Claudia H. Allen, Study of Delaware Forum Selection in Charters and Bylaws (2010-2011) (first published July 1, 2010, updated April 7, 2011) [hereinafter Allen 2011]; Claudia H. Allen, Study of Delaware Forum Selection in Charters and Bylaws (2010-2012) (first published July 1, 2010, updated April 7, 2011, updated June 2012) [hereinafter Allen 2012]; Allen 2014, supra note 26 (update of bylaw adopters after *Chevron* decision).

<sup>31</sup> Allen 2011, supra note 30, at i, iv (figures as of April 2011).

<sup>32</sup> Allen 2012, supra note 30, at 1 (195 firms by December 2011).

<sup>33</sup> Allen 2014, supra note 26, at 3 (103 adoptions from July through October 2013). In the same time frame in 2012, by contrast, only one company adopted an exclusive forum bylaw, a decline from prior years that Allen attributes to the shareholder lawsuit filings discussed in section II.A, supra. Id. at 2-3.

recognition.

Allen focuses her description of exclusive forum provisions on the procedure by which they are adopted.<sup>34</sup> Most of the clauses are included in companies' charters (51 percent) compared to their bylaws (44 percent).<sup>35</sup> The bulk of charter provisions are not accomplished by a separate public shareholder vote. Rather, they are included in the charter of firms engaging in an initial public offering (IPO), emerging from a bankruptcy, or reincorporating.<sup>36</sup> Accordingly, most corporations that are already publicly traded adopt the provisions as bylaws, eliminating the need for shareholder approval.<sup>37</sup> As discussed in section IV, bypassing a shareholder vote is still the norm for midstream adoptions.

The voting outcomes of five companies which put a forum selection clause to a

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<sup>34</sup> Allen's analysis focuses on the Delaware incorporations, but she does note that a few entities incorporated in other states have adopted exclusive forum provisions, as well as many unincorporated Delaware entities, such as public limited partnerships. Allen 2011, *supra* note 30, at iii, viii. Allen also analyzes variations in the substantive content of exclusive forum provisions, such as whether coverage is expressly limited to derivative suits, they provide for "deemed consent" (i.e., individuals acquiring shares are deemed to have notice and to have consented to exclusive forum), or they are mandatory or discretionary (i.e., the corporation may consent in writing to a suit's being brought in an alternative forum). *Id.* at iii, v-vi.

<sup>35</sup> *Id.* at ii, xi. The remaining firms in the data set adopted the forum selection provision either in both the charter and bylaw (2.4 percent), or in a statutory trust or trust agreement (2.4 percent). *Id.* at iv, xii. This pattern persists in Allen's extension of the study from April 2011 to December 2011. Allen 2012, *supra* note 30, at 1-2, 4 (from April 2011 through December 2011, the number of Delaware companies adopting, or in the process of adopting, forum selection provisions went from 82 to 195, with 56 percent of adoptions by charter amendment, and 53 percent of adoptions in IPOs).

<sup>36</sup> Allen 2011, *supra* note 30, at ii. The majority of exclusive forum provisions in Allen's study were adopted by IPO firms (50 percent of those adopted in 2011; 61 percent of those adopted in 2010). *Id.* at iv.

<sup>37</sup> *Id.* at ii. Only four public corporations put the provision up to a shareholder vote as a separate charter amendment. *Id.* at iv. Delaware requires approval of a majority of outstanding shares for charter amendments, Del. Gen. Corp. L. § 242. Bylaws can be adopted by either the shareholders or the board, if the charter grants the board such authority. Del. Gen. Corp. L. § 109. Of course, firms that do not have a provision in their charters that grants the board such authority cannot adopt that strategy. The increase in the number of firms adopting the provision by shareholder vote since 2011 is analyzed in sections III.B and IV.B, *infra*,

shareholder vote in 2011 provide insight into why the preferred midstream adoption approach is a bylaw amendment. As Allen reports, one proposal failed and two passed by narrow margins; adoption with considerable votes to spare occurred where insiders owned a substantial block.<sup>38</sup> A plausible factor explaining the outcomes is opposition to the clauses of the principal proxy advisory service firms, Institutional Investor Services (ISS), the market leader, and Glass Lewis & Company (Glass Lewis), as their recommendations are routinely followed by many institutional investors.<sup>39</sup> The proxy advisory services' recommendations are also typically in sync with the views on governance of the Council of Institutional Investors ("CII"), an influential corporate governance advocacy organization of pension and labor union funds, endowments and foundations. The CII advocates a set of corporate governance policies, which it lists on its website as "guidelines that [it] has found to be appropriate in most situations," and the list includes not restricting shareholder lawsuits to an exclusive forum.<sup>40</sup>

Allen reports that ISS took the position that it would recommend voting against an

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<sup>38</sup> Allen 2012, *supra* note 30, at 5 (percentage of outstanding shares cast for the five stand-alone proposals were 42 percent, 50.1 percent, 50.3 percent, and in the firms with what she considers sizeable insider ownership, 83.1 percent and 93.1 percent)., Allen does not provide the inside ownership percentages, but as she notes, those proposals' high level of support cannot be considered "representative" for predicting voting outcomes more generally. *Id.* We analyze firms putting the clauses up to votes in comparison to those adopting bylaws unilaterally in section IV.B, *infra*.

<sup>39</sup> Studies have estimated that between 10-20 percent of voting shares follow the leading proxy advisory service firm's recommendations. E.g., Cindy R. Alexander, et al., *Interim News and the Role of Proxy Voting Advice*, 23 *Rev. Fin. Stud.* 4419 (2010) (proxy advisor recommendation in favor of dissidents in contested elections increases probability of their success between 14-30 percent); Jie Cai, et al., *Electing Directors*, 64 *J. Fin.* 2389 (2004) (directors for whom proxy advisors recommend withholding votes receive 19 percent fewer votes); Stephen Choi, et al., *The Power of Proxy Advisors: Myth or Reality?*, 59 *Emory L. J.* 869 (2010) (proxy advisor recommendations to withhold votes for directors shift 6-10 percent of votes).

<sup>40</sup> Council of Institutional Investors, *Policies on Corporate Governance*, available at: [http://www.cii.org/corp\\_gov\\_policies](http://www.cii.org/corp_gov_policies) ("1.9. Judicial Forum: Companies should not attempt to restrict the venue for shareholder claims by adopting charter or bylaw provisions that seek to

exclusive forum proposal if the company did not have four “best practice” corporate governance features.<sup>41</sup> Glass Lewis went even further: it stated that not only would it recommend voting against all such proposals, but also, were a company to adopt a provision without shareholder approval, it would recommend voting against the election of the director who chaired the firm’s governance committee.<sup>42</sup> In keeping with the CII position, as Allen reports, both advisory services did not recommend voting in favor of any stand-alone forum clause proposal,<sup>43</sup> regardless of the companies’ compliance with ISS’s governance criteria, which are ostensibly more flexible than those of Glass Lewis. Allen concludes that the advisory services’ recommendations influenced the two adverse voting outcomes, a view, no doubt, shared among practitioners, which would factor into their counseling midstream adopters to proceed by bylaw amendment in order to avoid the risk of a voting failure.

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establish an exclusive forum.”).

<sup>41</sup> Allen 2012, *supra* note 30, at 5. The “good” governance features that ISS required were annual election and majority voting of directors, no poison pill unless approved by shareholders and a “meaningful” right of shareholders to call special meetings; the latter requirement was dropped when it refined its position in the Fall of 2011, and stated it would make recommendations on a case-by-case basis. *Id.* at 6.

<sup>42</sup> *Id.* For bundled votes, Glass Lewis provided more flexibility regarding its blanket negative recommendation for separate votes by stating that it would balance the benefit of the other provisions against the harm of the exclusive forum provision. *Id.* ISS did not issue any specific guidance regarding bundled votes, but it did recommend voting in favor of a forum selection provision that was bundled with a proposal to destagger the board. *Id.*

<sup>43</sup> *Id.* at 6. For the upcoming 2015 proxy season ISS has further adjusted its position to recommend shareholders withhold their vote from directors who adopt bylaws “materially adverse” to shareholders, while taking a case by case approach to bylaws “generally deemed not ‘materially adverse,’” which entails examining additional factors, such as the timing of adoption, and identifying exclusive forum provisions as falling into the category of “generally not materially adverse” bylaws. See Andrew R. Brownstein & Sebastian V. Niles, ISS Clarifies 2015 Voting Policies Regarding Proxy Access, Excluding Shareholder Proposals and “Unilaterally” Adopting Bylaw and Charter Amendments (Feb. 20, 2015). The shift may reflect a recognition by ISS that their clientele, institutional investors, do not view exclusive forum provisions unfavorably, see, e.g., Allen 2014, *supra* note 26, at 8 (noting some institutional investors, such as T. Rowe Price, that “originally opposed exclusive forum provisions have changed or softened their views”), a perception further supported by our analysis of midstream adopters in section IV,

Allen also reviews the form of the midstream bylaw adoptions. Pre-*Chevron*, the bulk of exclusive forum bylaws were adopted concurrently with other bylaw changes, often in conjunction with annual bylaw reviews, as opposed to being adopted on a “stand-alone basis.”<sup>44</sup> Immediately following *Chevron*, however, the approach changed. A majority of adoptions in the months following the opinion were stand-alone amendments.<sup>45</sup> Allen considers this change to evidence public companies’ increased “comfort” with adopting the bylaws, which would be due in no small part to their validation by the Chancery Court.<sup>46</sup> In a few instances, a stand-alone bylaw was adopted at the time the firm entered into a merger agreement. Allen observes that such instances suggest management’s “concern regarding strike suits being filed in jurisdictions outside of Delaware following the transaction announcement.”<sup>47</sup> Such event-driven bylaw adoptions have continued to occur in small numbers.<sup>48</sup>

Allen reports the location (headquarters state), size, and industry of exclusive forum clause adopters. Her findings suggest adoptions may not be related to litigation risk or experience. California is the state with the largest number of adopters.<sup>49</sup> But while high tech firms in that state are frequently subject to securities litigation, which is typically accompanied

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infra.

<sup>44</sup> Allen 2012, *supra* note 30, at 4 (at least 16 bylaws adopted on a stand-alone basis compared to at least 46 adopted with other bylaw amendments). The ratio of concurrent adoptions was even higher in January 2012, with only 8 percent being adopted as a sole amendment. Allen 2014, *supra* note 26, at 5.

<sup>45</sup> *Id.* at 5. We also find this to be true: before *Chevron* was decided, 27 percent (16 of 59) of bylaw adoptions were stand-alone, whereas after *Chevron* the ratio flips to 59 percent (136 of 232), excluding bylaws adopted in conjunction with merger agreements, which are stand-alone provisions.

<sup>46</sup> *Id.*

<sup>47</sup> Allen 2011, *supra* note 30, at iv.

<sup>48</sup> See section III B, *infra*.

<sup>49</sup> Its share of adopters declines somewhat over time, from 39 percent of adopters in 2011 to 26 percent of adopters in the four months following *Chevron*. Allen 2011, *supra* note 30, at vi; Allen 2012, *supra* note 30, at 2, 17; Allen 2014, *supra* note 26, at 6.

by state derivative suits (the subject of exclusive forum provisions),<sup>50</sup> the industry sector with the largest number of adopters is manufacturing (at 32 percent), which is not the sector of California firms prone to litigation.<sup>51</sup> Further, while size is known to be positively correlated with litigation, she identifies few S&P 500 firms among the earliest adopters or the later surging adopters following *Chevron*.<sup>52</sup>

Joseph Grundfest, an early advocate of exclusive forum provisions to manage multiforum litigation, has also examined their adoption.<sup>53</sup> He identified 133 firms with exclusive forum provisions as of June 2011. Similar to Allen's study, Grundfest reports that more firms have the provisions in charters than bylaws (56 and 41 percent respectively) and finds that adoption is associated with judicial recognition as the vast majority of adoptions followed *Revlon*.<sup>54</sup> Specifically, he computes the number of adoptions per year for three periods: (1) pre-*Revlon*, (2) between *Revlon* and *Chevron*, and (3) post-*Chevron*, and finds that the average adoption rate

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<sup>50</sup> See, e.g., Jessica Erickson, Corporate Governance in the Courtroom: An Empirical Analysis, 51 Wm. & Mary L. Rev. 1749, 1774, 1778 (2010) (state actions accompany federal actions); Irene Kim & Douglas J. Skinner, Measuring Securities Litigation Risk, 53 J. Acctng & Econ. 290 (2012) (industry sectors associated with securities litigation).

<sup>51</sup> Allen 2011, supra note 30 at 18.

<sup>52</sup> Allen 2012, supra note 30, at 1 (27 of S&P 500 firms with clause by December 2011); Allen 2014, supra note 30, at 3 (19 more S&P 500 firms had adopted a provision in four months after *Chevron*); Kim & Skinner, supra note 50 (securities litigation associated with firm size); Roberta Romano, The Shareholder Suit: Litigation Without Foundation, 7 J. L., Econ. & Org. 55 (1991) (larger firms experience more shareholder suits).

<sup>53</sup> Grundfest is associated with some of the earliest adoptions of the clauses, having been involved in three of five provisions adopted before *Revlon*. Joseph A. Grundfest, The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis, 37 Del. J. Corp. L. 333, 352 (2012).

<sup>54</sup> Only 16 of the 133 firms had adopted a provision before March 2010. Id. at 339. Throughout the article, Grundfest analyzes adoptions of both publicly traded unincorporated entities as well as corporations. He also examines the substantive content of the clauses regarding the mandatory or discretionary nature of the exclusive forum requirement, see note 34 supra, and their provenance in relation to the language of one or the other of the earliest adoptions. Grundfest, supra note 53, at 362-366.

statistically significantly increased in each period.<sup>55</sup> Grundfest also reports that IPO adoption in particular increased from essentially 0 to about 16 percent within the first few years after *Revlon*.<sup>56</sup> He concludes that the *Revlon* decision increased the rate of adoption, but that *Chevron*'s effect is unidentified because it cannot be separated from a secular trend.<sup>57</sup>

Grundfest investigates adopting firms' physical location and statutory domiciles. All 133 exclusive forum provisions in his sample specified a Delaware forum and 130 of them were adopted by Delaware corporations. He thus characterizes exclusive forum provisions as a "Delaware phenomenon."<sup>58</sup> He also maintains that firms located in California are particularly likely to adopt an exclusive forum provision, noting that 32 percent of Delaware adopters are located in California, but only 24 percent of Delaware corporations are located in California.<sup>59</sup> From this he concludes that there is "a general migration to Delaware . . . and a particular emigration from California as the forum for intra-corporate disputes." He further contends—in explanation of the phenomenon—that Delaware corporations headquartered in California are disproportionately sued and that the business community believes that California courts are of lower quality than Delaware courts.<sup>60</sup> Claudia Allen also hypothesizes a similar "California effect," but she does not specifically test it. In contrast, we show in section IV.A that, in all

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<sup>55</sup> Id. at 360.

<sup>56</sup> Id. at 361-362. As discussed in section IV, the rate of adoption by IPO firms has dramatically increased.

<sup>57</sup> Id. at 358-359.

<sup>58</sup> Id. at 367. As discussed in section III, we also find that the vast majority of adopters are Delaware firms, and there are only a few more non-Delaware firms in our data set. But while we exclude them from our analysis, we note that there are numerous mutual funds and unincorporated firms with exclusive forum provisions, and a large number of those entities are not Delaware firms.

<sup>59</sup> Id. at 368. A binomial test of whether the two distributions are identical rejects the hypothesis of equality at 4.1 percent. Id. at 407.

<sup>60</sup> Id. at 369 (citing data from Cain & Davidoff's study showing that 72 percent of shareholder suits against such firms were heard in California, and noting Chamber of Commerce

likelihood, there is no “California effect.”

Lastly, Grundfest examines inside ownership (calculated by combining management and outside blockholders’ shares) of the seven midstream adopters in his sample that put the exclusive forum provision up to a stand-alone shareholder vote.<sup>61</sup> Paralleling Allen’s observation on the initial round of such votes, he notes that inside ownership was lower in the two firms whose proposals were not approved than in those where the provisions were approved (under 15 percent compared to a range of 20 – 87 percent). He plausibly characterizes the data as suggesting that voting outcomes will be correlated with inside ownership. In contrast, we disaggregate insider and outside blockholder share ownership in section IV.B and find that insiders hold considerably less than the combined figures in Grundfest’s study would suggest. We further find that the average inside ownership of voting firms decreases over time, while the proportion of approved proposals increases, suggesting that there is an increase over time in shareholders’ familiarity with the provisions. However, these results should be interpreted with caution because the sample sizes are small.

The Allen and Grundfest examinations of forum selection clause adoptions are useful introductions to the phenomenon—in particular, identifying an accelerating trend of adoption and differential routes followed by new and established firms. But without more information on the characteristics of adopters compared with non-adopters, or among adopters using different methods (board-adopted versus shareholder-approved provisions), it is not possible to ascertain the significance of the phenomenon or whether the rapid pace of adoptions, particularly by midstream bylaws, should be an issue of any moment for shareholders. It matters whether these are, for instance, typical firms, firms uniquely prone to litigation, or firms led by entrenched

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court ratings rank Delaware as the best and California as 46<sup>th</sup> among the states).

executives.

A recent paper by Jared Wilson attempts to answer questions left unanswered by Allen and Grundfest, in particular the welfare effects of exclusive forum provisions, by analyzing more systematically which firms adopt the provisions and investigating stock price reactions to adoption of the provisions and the *Chevron* decision.<sup>62</sup> His approach is to examine whether exclusive forum provision adopters are more likely to experience shareholder litigation or acquisitions (events prone to litigation) than non-adopters, along with their governance characteristics, as a first pass for ascertaining whether forum clause adoption should be viewed as a means of managerial entrenchment or shareholder value-enhancement.

Wilson finds that there is no significant difference between the litigation experience (before and after adoption) of adopters and non-adopters, but that adopters have significantly higher litigation risk (although that finding is not robust to all model specifications). Litigation risk is identified by a model developed in the literature on securities class actions that is a function of firm size, volatility and industry. He also finds no significant difference across adopters and nonadopters in the probability of being taken over, but that adopters have a higher probability of acquiring another firm and are more likely actually to be acquired (ex ante and ex post variables are not included in the same regressions). Perhaps the most generous interpretation of these seemingly inconsistent results—the significance of the predicted and actual event variables differs—is that litigation-prone companies are more likely to adopt a provision, but boards only have accurate information concerning future acquisitions, not future litigation. If that were the case, then boards would respond only to predicted litigation risk and actual takeover risk (as Wilson finds).

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<sup>61</sup> Id. at 370.

The governance variables that are significantly associated with adoption in Wilson's study are those characterized as "poor" governance. Adopters have fewer independent directors and more "busy" directors (directors who sit on at least three boards). These data would appear to suggest that adopters are firms with entrenched managers, who would be unresponsive to shareholder welfare as they would not appear to have effective monitoring boards. Consistent with such an interpretation is the finding that adopters are more likely to make acquisitions, as such transactions have historically resulted in negative stock returns.<sup>63</sup> But adopters also have higher institutional ownership than nonadopters, investors who are often characterized as monitors. As governance characteristics may be substitutes, and not solely complements, the governance findings would seem to be inconclusive.

The event study data further suggest a more subtle interpretation of the data. Although Wilson finds that adoption is associated with a statistically insignificant negative abnormal return overall, the results differ for important subsamples. The abnormal return is significantly positive for adopters that have experienced litigation in the past or in the year of adoption. This suggests that investors with experience of multiforum litigation perceive its restriction to be value-enhancing. Similarly, the full sample stock price reaction to the *Chevron* decision is insignificantly negative. But there is a significant difference between the abnormal returns of firms with higher and lower litigation risk and higher and lower risk of making an acquisition. In both instances, the higher risk firms experience less negative returns. Wilson concludes that the data are most consistent with adoption of the clauses as being shareholder wealth-enhancing because they would appear to provide the greatest benefit to shareholders of firms most likely to

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<sup>62</sup> Jared I. Wilson, *The Value of Exclusive Forum Provisions* (manuscript 2014).

<sup>63</sup> E.g., Gregor Andrade et al., *New Evidence and Perspectives on Mergers*, 15 *J. Econ. Persps.* 103 (Spring 2001).

be subject to duplicative lawsuits.

Taken as whole, Wilson's study provides suggestive evidence that litigation-prone companies are more likely to adopt an exclusive forum clause. While his interpretation of the event study data as evincing that the clauses are wealth-enhancing is a possible interpretation, the evidence is thin as the abnormal returns are for the most part not significantly positive and the governance variables associated with adoption would appear to be more consistent with entrenched than monitored managers.

### **III. Data**

Our data consist of three samples: (1) companies that have adopted an exclusive forum clause, (2) initial public offerings, and (3) a control group of companies that have not adopted an exclusive forum clause. After explaining the construction of each data set, we discuss key summary statistics of each in turn.

#### **A. Sample and data collection**

The first sample is our population of interest: all U.S.-domiciled public corporations that have adopted an exclusive forum clause. These include both corporations that adopted before their IPO ("IPO adopters") and those adopting after their IPO ("midstream adopters"). We constructed the sample by searching the SEC EDGAR database for all instances in which the terms "exclusive" and "forum" appear in the same sentence in either a bylaw or a charter.<sup>64</sup> In practice, our search was over-inclusive, and so we read through each bylaw or charter to confirm that it contained an exclusive forum clause and that the issuer was a U.S. public corporation. It

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<sup>64</sup> Specifically, we searched for "exclusive /S forum" on the Bloomberg Law EDGAR search tool and limited the search to "Exhibit 3 (bylaws and charters). We also conducted a similar search of proxy statements in Lexis to identify provisions subjected to a vote. This search

is possible that our search did not recover every exclusive forum clause ever adopted. However, given our study of the phrasing of the clauses, we are confident that our sample contains virtually all—if not all—exclusive forum clauses adopted before August 2014 by U.S.-domiciled corporations that report to the SEC.

The second sample is a comparison group for IPO adopters. We collected data on all IPOs from January 2010 to August 2014. We commenced the data collection in 2010 because only one exclusive forum clause was included in an IPO charter before that year. We restricted the sample to IPOs by U.S.-domiciled corporations that report to the SEC (i.e., the same sample for which we hand-collected the exclusive forum provision data). Our data on the firms are of three types: (1) identification and financial variables such as firm name, firm size, and IPO proceeds, (2) the name of the law firm that advised the company during its IPO, and (3) corporate governance variables such as state of incorporation and whether the board was classified at the time of the IPO. The IPO-related data come from the SDC Platinum database maintained by Thomson Reuters. The governance data were obtained from the firms' SEC filings in the EDGAR database.

The third and final sample is a comparison group for midstream adopters. We used an algorithm to match each midstream non-event-driven bylaw adopter to a similar corporation that had not adopted an exclusive forum clause. The algorithm matched companies by year, firm size, industry, and domicile.<sup>65</sup> We then hand-collected corporate governance and ownership data for

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picked up a few additional firms which did not file an exhibit containing the provision.

<sup>65</sup> See the Appendix for details of the matching procedure. Size and industry are standard characteristics used in the literature to identify comparable companies, but a further rationale informs our use: both size and industry are key factors the literature identifies with litigation risk, see, e.g., Kim & Skinner, *supra* note 50, and it is desirable in our context to match on proxies for litigation risk, to reduce the possibility of bias in the comparison to the extent that litigation risk is a factor in the decision to adopt a clause. As discussed in section IV.B, we do not think it is a

each midstream adopter and its matched non-adopter from SEC filings in EDGAR. Crucially, we collected the governance characteristics at the time of adoption.

## **B. Summary statistics**

Table 1 presents summary statistics. The data are split into four panels, each representing a different unit of analysis: (A) all exclusive forum clauses, (B) IPOs between 2010 – 2014, (C) law firms advising IPOs, and (D) exclusive forum clauses adopted midstream.

Panel *A* considers all 746 exclusive forum clauses adopted by U.S.-domiciled public corporations. Of these, 93 percent specify Delaware as the exclusive forum. The 746 instances of adoption are split roughly 50/50 between IPO adopters and midstream adopters. Panel *A* also shows that exclusive forum clauses are a quite recent phenomenon: Over 70 percent of existing provisions were adopted in the last two years of the sample (the two years prior to August 2014). Only 4 percent were adopted before 2011.

Panel *B* presents data on all IPOs of U.S.-domiciled corporations between January 2010 and August 2014 in the SDC database. There are 679 IPOs in total; 45 percent had an exclusive forum clause in the charter, 76 percent were Delaware corporations, and 25 percent (the plurality) were headquartered in California.<sup>66</sup> Of the Delaware IPOs, 59 percent have a forum clause. Most IPOs generated more than \$50 million in proceeds and most were by corporations with over \$100 million in assets (68 and 58 percent, respectively).

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significant factor given the relatively low percentage of adopters in high litigation risk industry sectors.

<sup>66</sup> We identified a total of 351 IPO firms with exclusive forum clauses in our EDGAR search, as indicated in panel *A*. Thirty-two of those IPOs were corporate spinoffs, a transaction type not included in the SDC IPO database. An additional 13 of the IPO firms identified in our search were also not in the SDC database. Those 45 firms are excluded from the counts in panel *C* and our analysis of IPO forum selection clause adoptions in section IV.

In panel C, the unit of analysis is the law firm. The panel includes all law firms that have advised at least one of the 679 IPOs from January 2010 to August 2014 (i.e., the sample of IPOs in panel C). There are 183 unique law firms in total. The average number of IPOs per law firm is 3.7 (679 IPOs / 183 law firms), but the distribution is skewed. Of the 183 total law firms, about half have advised only one IPO since January 2010. One third of law firms have advised between two and four IPOs; 10 percent have advised between five and nine IPOs; and 8 percent (fifteen law firms) have advised more than ten IPOs.

The distribution of exclusive forum clauses per law firm is commensurately skewed. More than half of all law firms (61 percent) have never adopted an exclusive forum clause at the IPO; 16 percent have adopted it exactly once; 10 percent have adopted it two or three times; and 13 percent have adopted it four or more times. In addition, the first IPO after *Revlon* of 31 law firms (17 percent) contained a provision. Such firms can be characterized as legal “innovators.”

The table also presents summary data on law firm characteristics that would be relevant to a firm’s propensity to use an exclusive forum provision: sophistication and pre-*Revlon* experience with large M&A transactions (as larger deals are frequent targets of multiforum litigation).<sup>67</sup> We proxy for firms’ sophistication by the rankings in the Am Law 100 (gross

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<sup>67</sup> E.g., Robert Borowski, *Combatting Multiforum Shareholder Litigation: A Federal Acceptance of Forum Selection Bylaws*, 44 Sw L.R. 149, 150 (2014) (in 2012, 93 % of deals over \$100 million and 96% of deals over \$500 million were subject to shareholder litigation, over half of which were brought in multiple states). M&A experience is constructed by extracting from Thompson-Reuters’ SDC M&A data set all completed, unconditional M&As of U.S. publicly traded corporations whose deal value was at least \$100 million, with an announcement date from Jan.1, 2005 to the *Revlon* decision. Creditor acquisitions of a bankrupt firm, recapitalizations, spinoffs, repurchases and purchases of minority stakes were excluded. This identified 987 deals (deals where at least one legal advisor, on either the target or acquirer side, was reported). Experience is measured as the total number of transactions between 2005-2010 for which the law firm is reported as the lead advisor (for either the target or acquirer).

revenue) and the Legal 500 series (elite expertise).<sup>68</sup> Less than one-third of the firms (27%) were in the elite tiers of advisors to issuers of equity offerings and large M&A transactions and only slightly more (37%) are in the top 100 firms by revenue. In addition, close to half of the law firms had no experience with a large M&A transaction pre-*Revlon*.

Panel *D* presents summary statistics for midstream adoptions. The vast majority (over 80 percent) are adopted as bylaw amendments. Moreover, most of the midstream charter adoptions (over 60 percent) were not subject to shareholder approval. Only 12 percent of midstream adoptions were put to a shareholder vote, with half of these occurring as stand-alone votes and half as bundled votes (primarily as a vote on a reincorporation, in which the new domicile firm's charter—which is not subject to a separate vote—has an exclusive forum provision).<sup>69</sup> An additional 4 percent were approved by written consent, most of which were bundled with a

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<sup>68</sup> The American Lawyer ranks law firms each year by gross revenue. For each year of Am Law 100 rankings over 2010-2013, we grouped the IPO law firms by whether they ranked in the top 25, next 26-50, bottom half, or were not ranked. For the regressions, we assigned a firm to the group in which it appeared in three of the four years. Most law firms (115) were not ranked, and these firms worked on most of the IPOs that did not have forum clauses (85 percent). The remaining law firms were evenly divided across the ranked groups, and the higher the ranked group, the higher the percentage of firms had used such a clause at least once. The Legal 500 Series ranks law firms based on a series of performance metrics using client and peer rankings and analysis of private information from the law firms to identify a set of elite firms by area of specialty, which are divided into several tiers. For a description of the ranking methodology, see The Legal 500 Series, How Do You Rank Firms/Sets?, available at: <http://www.legal500.com/assets/pages/about-us/how-it-works.html#rank>. We searched four specialties: capital markets, equity offerings (advice to issuers); large and mega M&A transactions; M&A litigation; and securities shareholder litigation.

<sup>69</sup> Three firms put a board-adopted bylaw up to a shareholder vote (two a year later the other within six months); we exclude the board adoptions from the midstream bylaw count and include these adoptions only in the separate vote counts. Although the overwhelming number of firms seeking shareholder approval do so for charter amendments, five of the separate votes were on clauses located in bylaws. Three firms with exclusive forum charter provisions are included in panel A as midstream adoptions but are excluded from panel *D* and the analysis of midstream adoptions in part IV because they were identified as IPOs by SDC but the SEC filings indicated that the firms had already been publicly traded, albeit to a limited extent in over-the-counter markets.

reincorporation. As might be intuited, firms that adopt a provision by written consent have substantially higher inside ownership than firms that adopt the provision at a meeting (42 percent for firms using written consents compared to 18 percent for firms conducting separate votes and 21 percent for those with bundled votes), and that difference is approximately equal to the higher margin of approval received by provisions adopted by written consents compared to those voted on at meetings (78 percent approval by written consents compared to 65 and 67 percent, respectively, for separate and bundled votes).

As is true of IPO adopters, most midstream adopters are Delaware corporations selecting Delaware courts as the exclusive forum (88 percent). However, five midstream adopters selected a forum other than their statutory domicile, including two Delaware corporations and a Texas corporation selecting Delaware.<sup>70</sup> In contrast, all IPO adopters chose their statutory domicile. The number of adopters that are non-Delaware corporations is higher for midstream than IPO adopters, and much higher than that reported in the earlier Allen and Grundfest studies. The recent growth in the number of adopters choosing non-Delaware forums suggests that there are other explanations, besides a preference for the expertise of the Delaware Chancery Court, for why firms adopt these provisions, such as the convenience of being sued locally as well as the avoidance of duplicative litigation expense.

In contrast to IPO adopters, the bulk of midstream provisions (74 percent) were adopted after Delaware validated bylaw adoption in *Chevron*. Almost as many provisions were adopted

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<sup>70</sup> All of these adoptions were post-*Chevron*. One of the Delaware firms adopted the provision in conjunction with a merger, and the provision was upheld against a challenge by shareholders seeking to sue in Delaware, as mentioned in note 28, supra. The proposed statutory prescription of such provisions, see Greene, Nullify, supra note 28, seems quite unnecessary, given the small number of Delaware firms not designating the state as the exclusive forum (less than one half of 1 percent).. The Texas corporation had sought to reincorporate in Delaware three years earlier, with a charter including an exclusive forum provision, but the reincorporation

in the first five months of 2014 as were adopted in the six months following the decision in 2013 (compare figures 1 and 2). The post-*Chevron* surge is greater for midstream bylaw than midstream charter adoptions (80 percent compared to 43 percent). These data are at odds with Grundfest's contention that *Revlon* was the more significant decision for midstream adoptions—that contention is accurate only for provisions located in charters (whether by midstream charter amendment or in an IPO charter). As indicated in figure 2, midstream bylaw adoption approximately *tripled* immediately after *Chevron*. Both the level and the steepness of midstream bylaw adoptions post-*Chevron* are far greater than what Grundfest perceived to be a secular trend.

Lastly, event-driven bylaw adoptions are still relatively rare. Twenty midstream provisions (5 percent) were adopted by a corporation at the time it entered into a merger agreement in which it was being acquired. The small number might be explained by uncertainty over their validity, as courts have diverged on whether to uphold an exclusive forum bylaw adopted at the time of a specific transaction to litigation over the same transaction.<sup>71</sup> Uncertainty over event-driven bylaws' enforceability encourages firms to act prophylactically and adopt a provision *ex ante*, well before any transaction is on the horizon. Namely, ensuring the validity of an exclusive forum provision should the firm enter into an acquisition in the future plausibly explains the post-*Chevron* surge in bylaw adoptions, because most are adopted by firms not in high litigation risk industries, and they would therefore be most concerned about multiforum

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proposal was withdrawn without being put to a shareholder vote.

<sup>71</sup> Compare *City of Providence v. First Citizens Bancshares, Inc.*, CA No. 9795-CB (Del. Ch. Sep. 8, 2014) (enforcing exclusive forum provision adopted in conjunction with merger agreement) with *Roberts v. TriQuint SemiConductors, Inc.*, No. 1402-02441 (Ore. Cir. Ct. Aug. 14, 2014) (refusal to enforce exclusive forum provision adopted in conjunction with merger). Whether enforceability will continue to be uncertain is an open question as the Delaware court in *City of Providence* noted that to the extent the *Triquint* court was purporting to apply Delaware

litigation arising in an acquisition context.

## **IV. Results**

Because of the possible wealth transfer from shareholders to managers from latecomer terms, as earlier noted, we separate the analysis of exclusive forum provisions by the time of adoption. The first part of this section analyzes exclusive forum clauses that are adopted at the IPO; the following part examines those adopted midstream.

### **A. Adoption at the IPO**

The dynamics of exclusive forum clause adoption at the IPO and midstream stage differ not only with respect to the opportunity for wealth transfers but also in the adoption process. Virtually all Delaware firms now go public with exclusive forum provisions in their charters, with IPO law firms playing a critical role in their adoption.

#### **1. The transition toward universal adoption**

The dicta of *Revlon* sparked a revolution in IPO charters. This is evident on visual inspection of Figure 1. The figure graphs the probability that the charter includes an exclusive forum clause at the IPO. In December 2007, the NetSuite IPO was the first to include an exclusive forum clause in its charter. Thereafter, prior to *Revlon*, no other IPO included an exclusive forum clause.

*Revlon* was issued on March 15, 2010. Since the decision, exclusive forum clause adoption has grown at a constant linear rate of over 15 percentage points per year. The quadratic fit shown in Figure 1, though not statistically significant, suggests that if anything the growth is slightly accelerating. In any case, by 2013, exclusive forum clauses were being incorporated into

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law, it was “based on a misapprehension of Delaware law.” 99 A.3d at 242, n.52.

over half of all charters at the IPO. As of August 2014 (the end of the sample), the adoption rate is 80 percent. Extrapolating a year into the future, exclusive forum clauses could be universal among Delaware firms by the end of 2015.<sup>72</sup>

The effect of *Revlon* on adoption at the IPO has been remarkably constant since the day that *Revlon* was issued. In contrast, neither the 2013 *Chevron* case (on the validity of bylaw adoption) nor any other event seems to have affected this trend. (By contrast, midstream adoptions were dramatically effected by *Chevron*, as indicated in Figure 2.) The inapplicability of *Chevron* to the decision for IPO adoption (which is always through a charter provision) confirms our distinction – indeed, the entire literature’s distinction – between IPO and midstream adoption. This distinction is further validated by the fact that, whereas IPO adoption is now almost universal, midstream adopters are still a small minority (only a few hundred out of thousands of public companies).

Figure 1 also motivates a reappraisal of the empirical approach to studying exclusive forum clause adoption. The previous literature has focused on explaining the adoption decision for any given firm. The basic idea is that firms that are particularly at risk of multi-forum litigation should be more likely to adopt an exclusive forum clause. Such “litigation risk factors” could work both in favor and against the case for exclusive forum clauses: in favor if they are driven by lawyer opportunism or a perceived tendency of some foreign courts to assume jurisdiction even without an obvious efficiency or fairness rationale (e.g., the “California effect” discussed in the Allen and Grundfest studies); or against if, as some critics would argue, the

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<sup>72</sup> This prediction is based on the quadratic fit in figure 1. This comes from an OLS regression in which the dependent variable is an indicator for adopting an exclusive forum clause and the independent variables are years (since 2010) and years-squared. The sample for the regression is all U.S. corporate IPOs since 2010.

exclusive forum clause is just another mechanism to entrench management. The study by Jared Wilson essentially combines these two possibilities into a single “litigation risk” measure.<sup>73</sup>

An approach that focuses on individual firms’ decisions may continue to be sensible when considering midstream adoption, since this is the case in which a board acts unilaterally and perhaps in anticipation of a litigation-prone event such as a merger. But for IPO adoption, Figure 1 demonstrates that the game may soon be over; universal adoption is nigh.

Figure 1 thus motivates an approach that explains not just an individual firm’s decision, but the entire *transition* itself, the shift from 0 to (nearly) 100 percent adoption for IPOs. There are two possible explanations for this transition: (1) exclusive forum clauses are adopted seemingly at random; they are in most firms’ interest but whether or when a firm adopts one is not determined by any important characteristic of the firm itself, or (2) there is some kind of selection effect that drives a diffusion process; some types of firms are particularly likely to adopt it while others simply follow the trend.

## **2. Law firms as the drivers of the transition: A light switch hypothesis**

The question is: What is the vehicle of diffusion? The fact that the trend in Figure 1 is linear actually eliminates a large class of possibilities. Specifically, we can reject a standard diffusion model that is based on individual firms. A standard diffusion model would posit that the likelihood of adoption is an increasing function of the current state of prevalence: The individual likelihood of adoption is some fixed probability (whether high or low) multiplied by the current rate of adoption. In this case, adoption rates are accelerating (this is the first part of the so-called “S-curve”). The higher the current state of adoption, the larger the change in adoption rate for the next period. The observed trend, however, is not accelerating. The

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<sup>73</sup> Wilson, *supra* note 62.

quadratic fit is graphed in Figure 1 and the coefficient on the quadratic term is neither substantial nor statistically significant (0.005 with standard error 0.01). The best fit is thus linear. The first-pass analysis suggests that the rate of diffusion through IPOs is constant; a given company's decision to adopt does not depend multiplicatively on the current level of adoption.

If the vehicle of diffusion is neither randomness nor the companies themselves, another potential source could be legal counsel. Suggestive of such an hypothesis, two studies have provided evidence that law firms influence IPO charters.<sup>74</sup> Robert Daines finds that IPO firms are more likely to be incorporated in Delaware than their home state when advised by a national law firm as opposed to local legal counsel.<sup>75</sup> John Coates finds that firms going public in 1991-92 that were advised by New York law firms are more likely to have antitakeover defenses in their charters than IPOs counseled by Silicon Valley law firms, with the law firms' M&A experience strongly correlated with the presence of defenses. He further finds that by 1998-99, the difference had disappeared. He attributes the transition to law firm learning, as Silicon Valley corporations experienced hostile bids for the first time in the mid-1990s.<sup>76</sup> The disparate content across charters is interpreted as a function of law firm expertise and potential agency problems of lawyers' interests not being well aligned with those of issuers. We adapt these

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<sup>74</sup> John Coates, Explaining Variation in Takeover Defenses: Blame the Lawyers, 89 Cal. L. Rev. 1301 (2001); Robert Daines, The Incorporation Choices of IPO Firms, 77 N.Y.U. L. Rev. 6 (2002). In addition, one study provides data suggesting that law firms of higher expert quality, as measured by market share of IPOs, reduce IPO underpricing and underwriter compensation. Randolph P. Beatty & Ivo Welch, Issuer Expenses and Legal Liability in Initial Public Offerings, 39 J. L. & Econ. 545 (1996). A further study examines the impact on M&A transaction outcomes of top-tier law firms, as measured by M&A league tables which rank law firms by the size of their deals, and finds that top firms are associated with higher takeover premiums but lower or higher completion rates, depending on which side, target or bidder, they serve. C.N.V. Krishnan & Ronald W. Masulis, Law Firm Expertise and Merger and Acquisition Outcomes, 56 J. L. & Econ. 189 (2013).

<sup>75</sup> Daines, *supra* note 74, at 1595.

<sup>76</sup> Coates, *supra* note 74, at 1304, 1362-65, 1370-73, 1377, 1380.

insights on lawyers' key role in the crafting of IPO charters to explain what is a quite different pattern of exclusive forum provision adoptions, compared to the domicile and takeover defense decisions explored in those studies.

Specifically, a linear trend of exclusive forum provision adoptions could be explained by a model in which law firms are the vehicle of diffusion for this new legal technology. Imagine the stylized case in which there are  $N$  law firms and each law firm advises a fixed number of IPOs per year. Suppose further that, each year, one of these law firms (or any other constant number) suddenly decides that, from then on, all of the IPOs it advises will include an exclusive forum clause. Call this the "light switch" model of diffusion; the idea being that when a law firm suddenly switches from zero adoption to total adoption, the time series of adoption for that law firm resembles a light switch, e.g., "0, 0, 0, 1, 1, 1."

Figure 3 tests the light switch model in a simple event analysis framework. The event is the first time that the law firm advises an IPO adopter. Subsequent IPOs are all "post-event" for the law firm. If the light switch model were perfectly correct, all post-event IPOs would include an exclusive forum clause and the adoption rate would immediately jump from 0 to 1. The post-event sample includes 315 IPOs advised by 43 law firms.

The light switch model shows promise. Figure 3 separates two groups of law firms: (1) Wilson Sonsini and (2) everyone else (as explained later). First consider law firms other than Wilson Sonsini. The instantaneous light switch effect is about 60 percent for these law firms. That is, when these law firms adopt for the first time, the likelihood of adoption for their next IPO jumps to 60 percent. Within two years, their adoption rate climbs to 85 percent. Within 3.5 years, their adoption rate is – remarkably – 100 percent. Seven law firms (excluding Wilson Sonsini) have over 3.5 years' experience, and all of their last twenty-four IPOs have included an

exclusive forum clause.

Wilson Sonsini is a special case: Wilson Sonsini advised the first IPO to adopt an exclusive forum clause, NetSuite in 2007, well before *Revlon*. NetSuite's adoption seems to have been a kind of legal experiment.<sup>77</sup> After NetSuite, no other IPO adopted an exclusive forum clause until after *Revlon* (in 2010). Wilson Sonsini itself did not adopt one again until 2011. In the interim, Wilson Sonsini had advised another twelve IPOs. Wilson Sonsini's "event time" is thus somewhat out of sync with other law firms. Yet even if one syncs it back by dropping the NetSuite IPO, Wilson Sonsini remains an outlier (though the difference is less stark). While all of its peer law firms have quickly transitioned to 100 percent adoption, Wilson Sonsini's adoption rate has grown but at a much slower pace. It is currently at approximately 50 percent.

Table 2 tests the light switch model in a regression framework. The unit of observation is the IPO. Each column lists the results of an OLS regression in which the dependent variable is an indicator equal to 1 if the corporation has an exclusive forum clause at its IPO. The first specification includes only a constant (column 1). It estimates that 45 percent of all IPOs since 2010 have included an exclusive forum clause.

The second specification tests the light switch hypothesis (column 2). It omits the constant term and includes only one control: a variable that we refer to as the "light switch" indicator. The light switch indicator is equal to 1 if the IPO is advised by a law firm that (a) has previously adopted an exclusive forum clause or (b) is now adopting one for the first time. We call this the "light switch" variable because, for every law firm, it starts at 0 and then permanently switches to 1 the first time the law firm adopts an exclusive forum clause. The mean

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<sup>77</sup> See Grundfest, *supra* note 53.

of this variable is 0.57, as indicated in table 1, panel C, so “post-light switch” law firms advised 57 percent of all IPOs since 2010..

If the light switch indicator’s coefficient were exactly 1, then the light switch model perfectly explains the data and law firms make a once-and-for-all decision to adopt exclusive forum clauses for all of their IPOs. If adoption bears no relation to the advising law firm, the light switch indicator’s coefficient will be approximately 0.45 (the unconditional adoption rate from specification 1).<sup>78</sup> The estimated coefficient with the full sample is 0.79 (standard error 0.02). Thus, the model estimates that the average light switch effect is nearly 80 percent complete.

The next specification separately considers a few of the determinants of adoption that are discussed in the literature (column 3).<sup>79</sup> These include indicators for whether the company is incorporated in Delaware, whether the company headquarters are in California, small versus large firms, year fixed effects, and industry fixed effects. Not surprisingly, firms incorporated in Delaware as well as large IPOs (over \$50 million in proceeds) are more likely to include an exclusive forum clause (38 and 23 percentage points, respectively).

However, these effects significantly diminish in the full specification that combines the literature’s determinants with the light switch model (column 4). Both the large IPO and Delaware corporation coefficients plummet. The coefficient for large IPOs drops to 6 percentage points and remains (marginally) significant. The Delaware effect drops to 5 percentage points and is no longer significant.

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<sup>78</sup> They would be exactly equal (in expectation) if we excluded IPOs in which the law firm adopts for the first time. We do this as a robustness check and find that the main results do not change.

<sup>79</sup> See the literature review in section II.B.

Further, the California effect becomes *negative* 7 percent and significant. This is surprising given the discussions of previous studies, which suggest that, in an effort to avoid California courts, firms headquartered in California would be *more* likely to adopt an exclusive forum clause.<sup>80</sup> In subsequent specifications (described below) the California effect remains negative but not always statistically significant. Even if the true California effect were positive, it is unlikely to be large.<sup>81</sup>

The next specification (column 5) includes an additional indicator that the law firm has previously adopted an exclusive forum clause more than two years ago. This is the case for 26 percent of IPOs (see table 1, panel *B*). This coefficient would be positive if the light switch model were true but not instantaneous, the full transition instead occurring over a few years. Figure 3 has already shown this to be the case for seven of the eight law firms that have over 3.5 years of experience, for whom all of the last 24 IPOs have included an exclusive forum clause. In the full sample (column 5), this coefficient is not statistically significant and it does not explain any additional variance (the R-squared remains 0.80 with and without it). As one might expect, if we exclude Wilson Sonsini, both the light switch and the transition coefficients increase and are significant (column 6). The average effect is 76 percentage points; the additional effect after two years is 9 percentage points. Thus, with the full set of controls (and excluding Wilson Sonsini), law firms with over two years of experience adopt exclusive forum provisions 85 percent of the time.

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<sup>80</sup> See Allen 2011, *supra* note 30, at ii; Grundfest, *supra* note 53, at 368; and section II.B, at notes 49-51 & 59-60, discussing the studies' analyses of a California effect.

<sup>81</sup> The negative California effect also seems to be entirely driven by Wilson Sonsini. It disappears when one moves from the specification that includes Wilson Sonsini to the one that excludes it (i.e., from column 5 to 6).

The final two specifications compare IPOs for Delaware versus non-Delaware corporations (columns 7 and 8). The differences are stark. For Delaware corporations, the light switch coefficient is 76 percent and highly significant.<sup>82</sup> For non-Delaware IPOs, the light switch coefficient plummets to 31 percent and is not significant. This is not surprising since only 4 out of 167 IPOs by non-Delaware corporations have included an exclusive forum clause. Thus, both the light switch model and the exclusive forum clause are Delaware-specific phenomena.

To summarize, the *Revlon* dicta ushered in a transition period for the charters of new public companies. In five years, IPO adoption of exclusive forum provisions went from essentially zero pre-*Revlon* to about 80 percent by August 2014. At current growth rates, this could be 100 percent by the end of 2015. Our analysis further suggests that the transition is driven primarily by the corporate bar. Law firms that advise IPOs seem to follow approximately a “light switch” model in which the law firm makes a once-and-for-all decision to adopt an exclusive forum clause in its IPOs.

### **3. Robustness of the finding that law firms drive the transition**

At first glance, the results suggest that law firms are the primary drivers of the transition toward universal adoption of exclusive forum clauses. Indeed, the light switch indicator by itself explains twice as much variance as all of the other controls combined. Comparing the adjusted R-squared from columns 2 and 3 in table 2, the light switch model by itself explains about 80

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<sup>82</sup> The transition coefficient (having more than two years’ experience) is negative and statistically significant, but this is again completely due to Wilson Sonsini. When Wilson Sonsini is omitted, this coefficient becomes positive (0.08 with standard error 0.04) and the light switch coefficient also increases (0.75 with standard error 0.03). Note these results are not shown in table 2.

percent of the variance versus about 40 percent for all other controls. We can reject the hypothesis that the two models explain the data equally well. (The p-value is below 0.001.<sup>83</sup>)

However, there is a crucial caveat to this analysis: The company going public chooses its law firm. It is therefore possible that companies that want exclusive forum clauses are simply choosing law firms that have adopted them in the past. A more nuanced version of this concern would posit that a company does not necessarily choose a law firm based on its tendency to adopt exclusive forum clauses per se, but rather based on its tendency to insert charter provisions that, at least according to some critics, work in management's favor.

To address this selection concern, we conduct a placebo test to see if the presence of another popular charter provision—a staggered board—follows a similar trend of diffusion. To do this, we replicate the analysis for exclusive charter provisions in figures 1, 3 and table 2 for staggered boards. As indicated in table 1, panel *B*, at the time of their IPO, more firms have staggered boards than exclusive forum provisions (66 percent compared to 45 percent, respectively).<sup>84</sup>

In contrast to exclusive forum provisions, the adoption of a staggered board does not seem to follow any kind of diffusion process or light switch model. Figure 4 shows that the likelihood that a corporation has a staggered board (in either the charter or bylaws) at the time of the IPO was roughly constant over the same period (at 66 percent). This contrast is clear when one compares figure 4 with figure 1 (the adoption of exclusive forum clauses at the IPO).

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<sup>83</sup> We cannot perform a standard F-test to compare goodness-of-fit because the two specifications are non-nested. That is, neither model's set of independent variables is a subset of the other. Instead, we perform the likelihood ratio test suggested by Vuong (1989). See Quang H. Vuong, "Likelihood Ratio Tests for Model Selection and Non-Nested Hypotheses," 57 *Econometrica* 307 (1989).

<sup>84</sup> The presence of a staggered board at the time of the IPO is manually collected from firms' SEC filings in Edgar.

Further, the light switch coefficient for staggered board clauses is either small (less than one fourth the magnitude for exclusive forum clauses) or insignificant. Law firms do not explain nearly as much variance in staggered board clauses as they do for exclusive forum clauses.<sup>85</sup>

We present this placebo test in order to contrast two models of the dynamics of corporate governance. Exclusive forum clauses are seemingly adopted at the law firm level and then applied in every circumstance as a kind of “best practice” or “boilerplate.” Staggered boards, by contrast, appear to be adopted at the company level; that is, law firms would seem to be advising their clients to adopt them on a case-by-case basis. This is perhaps to be expected since the former are arguably in the interest of all parties, while the latter are generally considered as geared toward entrenching management.<sup>86</sup> To put the point another way, the light switch adoption of exclusive forum provisions but not of staggered boards is consistent with a characterization of forum clauses (or law firms’ perceptions of them) as universally enhancing shareholder wealth but takeover defenses as wealth-enhancing for only a subset of firms.<sup>87</sup>

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<sup>85</sup> The results are on file with the authors. In contrast to exclusive forum provisions, corporations have had staggered boards for centuries, and it is possible that when staggered board clauses were new, a light switch model would have fit the data better. But other data suggest that might not be the case. Studies of the prevalence of staggered boards in IPOs occurring after the increase in hostile takeovers of the 1980s indicate that the proportion has varied considerably, from 34-35 percent of IPOs in 1988-92 and 44 percent in 1994-97, to 66 percent in 1998 and 82 percent in 1999, Coates, *supra* note 74, at 1377. Such variability is not consistent with a light switch model.

<sup>86</sup> Most of the literature views takeover defenses, such as staggered boards, as management entrenchment devices. E.g., Robert Daines & Michael Klausner, *Do IPO Charters Maximize Firm Value? Antitakeover Protection in IPOs*, 17 *J. L., Econ. & Org.* 83, 83 (2001).

<sup>87</sup> For example, William Johnson and colleagues advance a “bonding hypothesis” of takeover defenses in IPO charters for which they provide empirical support: for firms with important long-term business relations with a large customer or supplier, defenses serve as commitment devices that their business strategies will not be altered and diminish (or expropriate) the value of those business partners’ investments in the relationship (quasi-rents). William C. Johnson, et al., *The Bonding Hypothesis of Takeover Defenses: Evidence from IPO Firms* (manuscript 2015). In addition, defenses might reduce managerial myopia for the set of firms that need to invest in long-term projects. See Jeremy C. Stein, *Takeover Threats and*

A second concern regarding the interpretation of law firms as drivers of exclusive forum provision adoptions is that the analysis may have omitted a key alternative source of innovation, the IPO firm's investment banker. This would be especially a problem if the selection of a law firm were highly correlated with the selection of an underwriter. That is, a large law firm could tend to work with the same underwriter or small group of underwriters on all of its deals. The concern, then, is that it is in fact the underwriters - not the law firms - that advise new corporations to include an exclusive forum provision in their charter.

To address this concern, we collected data on the underwriter for each of the IPOs in our sample. We then re-ran the regressions in table 2 (the light switch model) both for underwriters by themselves and jointly for underwriters and law firms.<sup>88</sup> As expected, when tested by themselves, underwriters have a large and significant light switch coefficient. Depending on the specification, it hovers around 0.65. However, when controls are added, the underwriter light switch coefficient drops significantly. When tested together with law firms, it drops further to at most 0.1 and sometimes closer to zero. By contrast, the law firm's light switch coefficient remains high across all specifications. This result is robust across the specifications in table 2. We therefore conclude that it is not likely that underwriters drive the transition rather than law firms.

#### **4. Explaining the timing of the transition**

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Managerial Myopia, 96 J. Pol. Econ. 61 (1988).

<sup>88</sup> The unreported regression results are available from the authors. SDC reported a financial advisor (i.e., underwriter) for 83 percent of the sample IPOs. Most IPOs have multiple financial advisors. We ran two sets of regressions, one using as the underwriter variable only the first entity listed for an IPO (which would be the first investment bank listed in the offering's tombstone), and another counting all of the IPOs for which a bank was listed. There are 51 (80) underwriters which are first-listed (listed in any position) in the sample, 10 (27) of which underwrote only one IPO and 20 (30) of which never underwrote an IPO with an exclusive forum provision. We can reject the hypothesis that legal and financial advisors are independently

The analysis above suggests that law firms are the primary drivers of the transition toward universal adoption of exclusive forum clauses. This finding in turn motivates a further question: What drives the *timing* of this transition? That is, what determines when a law firm makes its once-and-for-all decision to adopt exclusive forum clauses at all IPOs?

This section discusses the potential roles of three actors behind the timing of this transition: courts, lawyers, and companies. Of these three, we conclude that courts and lawyers are, in all likelihood, the most influential. However, we also conclude that it is difficult to predict when any given law firm will “flip the switch,” that is, when it will transition from never adopting to always adopting.

#### **a. Courts**

Perhaps the most straightforward hypothesis is that the timing of a law firm’s adoption is entirely driven by the *Revlon* decision. The simplest version of this hypothesis is that all law firms “flipped the switch” right after *Revlon*. From the previous section (and figure 1 specifically) we already know that this is not the case; the transition took several years.

However, consider a slightly refined version of this hypothesis. Suppose we separate law firms into two groups: (1) law firms that have never adopted an exclusive forum clause and (2) law firms that have adopted at least once. Suppose further that we find that all law firms of the latter group adopted an exclusive forum clause in their first post-*Revlon* IPO. This would be strong evidence that the timing of adoption is driven by the *Revlon* decision.

Figure 5 shows that, roughly speaking, *Revlon* could account for up to 44 percent of the timing decision. Figure 5 graphs how long it took for law firms to adopt an exclusive forum clause for the first time after *Revlon*. The sample is restricted to “group 2” law firms, law firms

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distributed with  $p$ -value  $\ll 0.0001$ .

that eventually adopted a provision at least once (71 of 183). The  $x$ -axis indicates the law firm's  $x$ -th post-*Revlon* IPO; the  $y$ -axis is the fraction of group 2 law firms that have ever adopted a provision after *Revlon*.<sup>89</sup> By definition, the fraction that have ever adopted a provision post-*Revlon* is equal to 0 at time zero (the first circle in figure 5) and equal to 1 when the last “surviving” law firm finally adopts a provision for the first time (the last circle).

The second circle of figure 5 shows that 44 percent of law firms (31 of 71) adopted an exclusive forum clause in their very first post-*Revlon* IPO. The next circle shows that 68 percent of law firms had adopted by their second post-*Revlon* IPO (48 of 71).<sup>90</sup> This figure eventually climbs to 100 percent by the 10<sup>th</sup> IPO. Thus, many law firms that eventually “flipped the switch” waited for several IPOs after *Revlon*. Since 44 percent of law firms that have ever adopted did so in their first post-*Revlon* IPO, a generous (and admittedly loose) interpretation of these data is that *Revlon* accounts for 44 percent of the timing of the transition.

## **b. Lawyers**

There are several possible reasons why law firms that eventually adopted exclusive forum clauses did not do so immediately after *Revlon*. One possibility is that the transition mechanism works through a diffusion process. For example, law firms could drive the process through word of mouth, which takes time. Similarly, it could be that a law firm will adopt a new legal technology only after observing that certain other law firms have successfully adopted it. Some law firms may be slower to learn about the latest legal technology, or they may be particularly difficult to convince, if, for instance, they have strong contrary priors concerning the efficacy of the technology. Put another way, some law firms may be more willing to try new legal strategies

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<sup>89</sup> Technically speaking, figure 5 is 1 minus the survival rate of law firms, where the event is the first time a law firm adopts an exclusive forum clause since *Revlon*.

<sup>90</sup> That is, 48 = 31 law firms that adopted in the first IPO + 17 that did not adopt in the

while others may simply follow the trend. All these hypotheses are ultimately based on law firms' willingness or ability to innovate.

One interpretation of figure 5 is that it graphs the “willingness to innovate” thresholds for law firms. According to figure 5, 44 percent of law firms adopted an exclusive forum clause in their first post-*Revlon* IPO. These 44 percent might be labeled “legal innovators” since they were willing to innovate immediately after the Delaware court’s endorsement. The law firms whose first-time adoption was their second post-*Revlon* IPO (about 24 percent)<sup>91</sup> might in turn be called “early adopters,” since they are willing to adopt but only after observing that others have successfully innovated. By this interpretation, law firms that wait for their third, fourth, or later post-*Revlon* IPO are successively less willing to innovate.<sup>92</sup>

We can also learn about the transition timing by comparing figure 5 with figure 1. Both graph essentially the same concept – the rate of diffusion of exclusive forum clauses – but from different perspectives. Figure 1 graphs the process where the unit of observation is the IPO, while figure 5 graphs the process where the unit of observation is the law firm. Neither fit the standard “S-curve” innovation diffusion process, in which diffusion is first accelerating and then decelerating. The IPO process (figure 1) is linear, so diffusion occurs at a constant rate. In contrast, the law firm process (figure 5), which we have described as a “light switch approach,”

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first but adopted in the second IPO.

<sup>91</sup> This is equal to 68 minus 44 percent; that is, the percent that had adopted at least once by the second IPO minus the percent that adopted at the first IPO.

<sup>92</sup> Two caveats are in order. First, we do not argue that figure 5 proves this interpretation. We only offer this as one way of interpreting it. Second, figure 5 only includes the 71 (out of 183) law firms that have ever adopted an exclusive forum clause. Thus, the numbers above only apply to the subpopulation of law firms that are eventually willing to innovate (at least within 5 years of *Revlon*). Roughly speaking, one would multiple these figures by 0.39 (71/183) to recover the percentages for the full sample of law firms that have advised post-*Revlon* IPOs. So for example, only  $0.39 * 44 = 17$  percent of the full sample are “legal innovators.”

is first discontinuous and then decelerating; the light switch effect essentially skips the first part of the S-curve and jumps straight to the second part. The fact that we do not observe an analogous light switch effect for IPOs (i.e., there is no discontinuous jump after *Revlon* in figure 1) is further evidence that the light switch model applies only to law firms and not to corporations generally.

Finally, we investigate whether law firms' characteristics predict the timing of the transition. One might think that a law firm's size, quality or past experience with IPOs or M&A activity (where recent years' high litigation rates could suggest the value of an exclusive forum clause), might predict whether it flips the switch early or late in the transition. To address this, we defined two measures of a law firm's willingness to innovate, whether its first post-*Revlon* IPO had an exclusive forum provision and its total number of post-*Revlon* IPOs till first adoption. We then ran regressions for each of these on the law firms' Am Law 100 and Legal 500 rankings,<sup>93</sup> along with their pre-*Revlon* IPO and M&A experience.<sup>94</sup> We also experimented with specifications that use the IPO (rather than the law firm) as the unit of observation. Table 3

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<sup>93</sup> The reported regression uses an indicator variable for whether the law firm was ranked in the Am Law 100. As a robustness check, we also regressed indicators for various gradations in the Am Law rank (e.g., whether the law firm ranked in the top 10, the top 25; ranks 25-50), and the results were substantially unchanged. Because of the small number of firms ranked in any of the specified Legal 500 series practice specialties, see note 68, *supra*, the Legal 500 variable is an indicator that equals 1 for any law firm ever ranked in any of the tiers in any of those specialty areas over 2009-2014.

<sup>94</sup> The IPO data set is as previously described, tallying the law firm's experience from January 1, 2005 until the *Revlon* decision on March 10, 2010, and the M&A data set is as described in note 67, *supra*. As a robustness check, we ran the regressions with three alternative methods of defining M&A experience: (1) only transactions for which firms advised targets, (2) only transactions for which they advised acquirers, and (3) all transactions for which firms are listed as an advisor, whether or not it was "lead advisor" status. (Our reported regressions did not count non-lead advisor roles as experience because of the possibility that subsequently listed legal advisors may be counsel for specialized issues, such as antitrust or regulatory concerns, or local counsel in cross-border transactions, and hence might not have been involved in any shareholder litigation.) There were no significant differences across the various formulations.

presents the results of regressions for law firms' innovation propensity measured as whether they adopted a provision in the first IPO after *Revlon*. As it indicates, the results are mixed, small, and only occasionally significant.<sup>95</sup> We found no robust association between any law firm characteristic and its willingness to innovate. The conclusion that we draw from this exercise is that the observable characteristics of law firms do not robustly predict the timing of the transition.

### **c. Companies**

An alternative hypothesis is that the first adoption decision is somehow driven by the characteristics of the current IPO firm or by the law firm's history of IPO firms. There are both practical and logical reasons for why this not a compelling hypothesis. First, the sample of first-time adoption is only a tenth of the total sample of IPOs (71 of 679). Even if we did find that the IPOs in which law firms adopt for the first time were, for example, of disproportionately large companies, the sample size is probably too small to conclude much from this. Second, we already found in the previous section that the explanatory power of all other controls related to the IPO was significantly less than the light switch model by itself. Third, it is not clear how one would formulate a hypothesis about how the history of a law firm's IPOs should affect the timing of its decision to adopt an exclusive forum clause. Any particular hypothesis would therefore seem arbitrarily selected.

### **B. Midstream adoptions**

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<sup>95</sup> The results are the same using the other proxies for innovation propensity. The Am Law, Legal 500 and M&A experience variables are occasionally significantly positive, but when controls for the IPO characteristic are included (e.g., size, Delaware domicile), they typically lose their significance. IPO experience, with a coefficient close to zero, is never significant. Because of the high variance in M&A experience, we also ran the regressions using a log transformation and other formulations, such as an indicator variable for experience above the median level; there was no significant differences across the formulations. The results of these

The potential for opportunism accompanying latecomer terms is significantly mitigated in the case of midstream adoption by charter amendment, which requires shareholder approval, but this mode of adoption is rare. Our analysis of midstream adoptions focuses on governance characteristics, in contrast to our analysis of IPO adoptions,<sup>96</sup> in order to obtain a better handle on whether the provisions are being opportunistically adopted at shareholders' expense. The rationale for this approach is that if proxy advisory service providers and institutional investors were accurate in their contention that exclusive forum clauses are harmful to shareholders, then we would expect that firms adopting such provisions unilaterally would not possess the same, or as many, good governance characteristics compared to non-adopters. For if they had such governance mechanisms, then that should have prevented, or lessened the likelihood of, the adoption of bylaws adverse to shareholder welfare. It would be straining credulity to contend that exclusive forum bylaws harm shareholders if firms adopting them are, in fact, more likely to follow the very policies deemed to be good governance by the advisory service providers and institutional investors than firms not adopting such provisions. That should also be true of a comparison between midstream bylaw adopters and adopters by shareholder vote.

## **1. Comparison of Midstream Bylaw Adopters and Non-Adopters**

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unreported regressions are on file with the authors.

<sup>96</sup> Outside counsel no doubt influence midstream adoptions by suggesting to public companies' general counsel that they should adopt the provisions. See, e.g., Richard A. Rosen & Stephen P. Lamb, Adopting and Enforcing Effective Forum Selection Provisions in Corporate Charters and Bylaws, 47 BNA Sec. Reg. & L. Rep. 285 (Feb. 9, 15) (discussing how to adopt the provisions in order to reduce risk of litigation over their enforcement). It is not possible to track the relation between outside law firms and the diffusion of clauses midstream because such information is not publicly available. But general counsel may also adopt these provisions independently of advice of outside counsel, given a firm's prior litigation experience or anticipation of transactions that might result in litigation, as suggested by the results in Wilson, *supra* note 62 (finding adopters are associated with higher litigation risk and with a higher probability of being acquired)..

We collected data on four “good governance” characteristics: (1) annual election of directors, (2) majority voting for directors, (3) the absence of a poison pill unless adopted by shareholder approval; and (4) an independent board chairman.<sup>97</sup> The first three characteristics were identified by ISS as informing its recommendations regarding shareholder voting on exclusive forum clauses when the provisions began to be more widely introduced.<sup>98</sup> These characteristics are also a focus of institutional investors’ attention: annual elections, an independent board chairman and majority voting for directors are at the top of the list of requirements for board good governance practices according to the CII.<sup>99</sup>

CII considers majority voting (as opposed to plurality voting) as key to board accountability because when votes “count” (i.e., when directors can fail to be reelected), directors are expected to be more effectively constrained by and hence more responsive to shareholders.<sup>100</sup> Annual director elections are perceived to serve a similar function. CII also emphasizes the importance of an independent board chairman for board accountability. An independent chairman is said to enhance the board’s ability to fulfill its “primary duty” of

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<sup>97</sup> We hand collected governance data from firms’ SEC filings in Edgar, using the proxy statement and annual reports filed in the year of the adoption of the exclusive forum provision.

<sup>98</sup> See Allen 2012, *supra* note 30, *supra*, at 5, and note 41, *supra*.

<sup>99</sup> See CII, Policies on Corporate Governance, available at: [http://www.cii.org/corp\\_gov\\_policies#intro](http://www.cii.org/corp_gov_policies#intro). CII also includes in its board governance policies, having two-thirds of the board be independent directors, but as stock exchange rules require a majority to be independent, there is limited potential variation in this variable across firms. We did collect board independence data as well as the variables listed in the text, and as expected, there was no significant difference across adopters and their matched non-adopters, with both groups having 80 percent independent directors, and we therefore do not discuss findings for this variable further in the text.

<sup>100</sup> E.g., CII, Majority Voting for Directors, at [http://www.cii.org/majority\\_voting\\_directors](http://www.cii.org/majority_voting_directors). Consistent with that perception, Yonca Ertimur and colleagues find that boards subject to majority voting are more responsive to shareholder proposals (increasing the rate of implementation) and to withheld votes in elections. Yonca Ertimur, et al., Does the Director Election System Matter? Evidence from Majority Voting, 20 Rev. Account. Stud. 1 (2015).

monitoring management. The logic is that an independent chairman would constrain the CEO's influence on the board and its agenda, thereby preventing insiders' conflicts of interest.<sup>101</sup> ISS and shareholders also oppose poison pills adopted without shareholder approval as well as staggered boards, for being managerial entrenchment devices that thwart hostile bids, with the combination considered particularly potent because, at least theoretically, the bidder would have to wait two years in order to elect a board majority and repeal the pill.<sup>102</sup>

We also collected data on ownership of insiders (directors and officers), financial institutions, and other blockholders, as governance characteristics, as well as adoption method, can be expected to vary with ownership composition.<sup>103</sup> In addition, financial blockholders can be characterized as a governance mechanism complementing majority voting, independent chairmen and annual elections. Such blockholders can serve a monitoring function because the cost-benefit calculation of a blockholder is favorable for obtaining information and engaging in oversight. We compare the governance and ownership features in firms whose boards have adopted exclusive forum bylaws to non-adopters in this section, and to firms whose exclusive forum provisions have been approved by shareholders in the next section.

The bylaw adopters used in our comparison tests consist solely of "clean" bylaw adoptions, which we define as exclusive forum bylaws that are adopted in the ordinary course of business, and not event-driven (that is, for example, not adopted in conjunction with a merger

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<sup>101</sup> E.g., CII, Independent Board Chair, [http://www.cii.org/independent\\_boardchair](http://www.cii.org/independent_boardchair).

<sup>102</sup> E.g., Lucian Bebchuk et al., The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy, 54 Stan. L. Rev. 887 (2002). In many if not most instances, however, when a bidder succeeds in electing a minority, a board will respond to the bid and not settle down into a multi-year contest.

<sup>103</sup> Ownership data were hand collected from the firms' proxy statements and annual reports filed with the SEC available on Edgar, in the year in which the bylaw was adopted.

agreement). As indicated in table 1, panel *D*, there are 291 such adoptions in total.<sup>104</sup> A higher proportion of the clean adoptions are by non-Delaware domiciled firms (13 percent) compared to the full set of midstream adoptions.<sup>105</sup> In addition, they are not especially subject to litigation: only 30 percent of clean adopters are in industry sectors conventionally identified as at high risk for securities litigation, the same percentage as in the full sample.<sup>106</sup> By contrast, a higher percentage of firms whose bylaws were adopted in conjunction with a merger are in the high-risk litigation sectors (45 percent).<sup>107</sup> In addition, slightly under half of clean midstream bylaws were adopted simultaneously with other bylaw changes (47 percent), suggesting that in such instances the provision might well have been added following a comprehensive “housekeeping” review of the company’s governance, although it is also possible that in instances of multiple amendments, consideration of a forum selection clause sparked the broader evaluation.

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<sup>104</sup> There are 36 exclusive forum bylaws that are not clean unilateral adoptions: 24 adopted in conjunction with a merger; three adopted simultaneous with emergence from a bankruptcy reorganization; and nine approved by shareholders (votes or written consents). As indicated in table 1, panel *D*, the remaining 65 midstream forum selection clauses are charter amendments.

<sup>105</sup> A much higher percentage of firms putting the provision up to a shareholder vote, both separate or bundled, are Delaware firms (98 percent), while that of firms using written consent (88 percent) is roughly the same as that of firms with board-adopted bylaws (87 percent).

<sup>106</sup> The literature on federal securities litigation has identified firms as high risk in four-digit SIC codes for the biotech, computer, electronics and retail sectors. Kim & Skinner, *supra* note 50, at 295 n. 18 & 297. We adopt these codes to identify high litigation risk sectors because, although state shareholder litigation most often involves acquisitions, derivative suits frequently accompany federal securities lawsuits. See Erickson, *supra* note 50, at 1774, 1778 (large number of state law derivative lawsuits are filed in federal courts, with more than 30% joined to federal securities claims, and many others, phrased as failure to supervise fiduciary claims, are “tagalong” cases to securities actions that attorneys could no longer bring because of federal preemption upon the passage the Private Securities Litigation Reform Act, Pub. L. 104-67, 109 Stat. 737 (1995) and Securities Litigation Uniform Standards Act, Pub. L. 105-353, 112 Stat. 3227 (1998).)

<sup>107</sup> The higher percentage could be related to mergers occurring in waves clustered by industry. See, e.g., Andrade, et al., *supra* note 63, at 104 (“[T]wo most consistent empirical features of merger activity over the last century [are that] mergers occur in waves; and within a wave, mergers strongly cluster by industry.”)

We use clean bylaw adopters, whether the bylaw was adopted solely or with other provisions, for our governance comparison tests because the decision to adopt a provision in these instances is not confounded by other events, such as a merger, that could be related to governance characteristics. However, we exclude bylaw adoptions of controlled companies (a stock exchange classification for firms with a 50 percent shareholder that permits exceptions from independent director requirements), dual-class stock companies, and of companies that subsequently put the bylaw to a shareholder vote. The rationale for the exclusions is that those companies either could have obtained (or actually did obtain) shareholder approval for the provision, so the mode of adoption—board rather than shareholder action—is of no practical consequence, and hence we would not learn anything useful about the efficacy of unilateral board adoption by comparing such adopters to non-adopters or to adopters by actual shareholder vote. In addition, the governance of firms with a controlling shareholder cannot be compared to that of firms without such a shareholder, because even the same mechanism on paper will operate differently in a control context. Their inclusion would therefore confound an analysis comparing the governance quality of adopters by unilateral board action and non-adopters. This results in a final sample of 249 bylaw adopters.

To construct a comparison group, we matched each of the 249 bylaw adopters to a non-adopter according to year, industry, firm size, and domicile.<sup>108</sup> Seven bylaw adopters could not be matched.<sup>109</sup> This left a main sample of 242 bylaw adopters and a matched sample of 242 non-adopters. The 242 adopters are representative of the full sample of 291 “clean” midstream bylaw adopters. The same proportion are non-Delaware domiciled firms (13 percent) and in high-risk

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<sup>108</sup> See the appendix for details on the matching procedure.

<sup>109</sup> Six adopting firms were not in the CRSP database and one firm could not be matched according to our procedure because there was no non-adopter that was “close.” See appendix.

litigation industries (30 percent). In addition, approximately the same proportion adopted multiple bylaw amendments with the exclusive forum clause (48 percent). Finally, the same percentage adopted the bylaw post-*Chevron* (80 percent). They can therefore reasonably be said to be a representative sample of the population of clean adopters.

Table 4 presents paired t-tests of differences in means of the governance and ownership variables between clean midstream bylaw adopters and their matched non-adopters. As shown in the table, two good governance variables, the presence of an independent chairman of the board and majority voting for directors, are significantly higher among adopting firms than non-adopters.<sup>110</sup> There are no significant differences in takeover defenses (staggered boards and poison pills) or any of the ownership variables. These findings are distinctively at odds with the view of ISS and CII that exclusive forum provisions reflect poor corporate governance. They also differ from those of Wilson's study, which suggested that adopters have lower quality governance.<sup>111</sup> The absence of indicia of managerial entrenchment along with the more frequent presence of features that institutional investors regard as good governance (independent chairmen and majority voting) among adopters than non-adopters, compared to non-adopters, is

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<sup>110</sup> We report the findings for a stricter definition of independent chairman than there simply being different individuals in the positions, to require that there be a non-executive chairman, that is, excluding from the classification of independent chair, firms that have separated the positions but whose chairman is an executive employed by the firm, as well as firms whose chairman is a former executive but counted as independent under stock exchange rules for having been retired for three years. The results are unaffected if we use any of the three possible definitions of independence, different individuals, only non-executive chairmen, and only non-executive chairmen who are also not former executives. We calculate the t-test significance levels both with and without using the Bonferroni method of adjustment for multiple comparison tests. See, e.g., Paul E. Green, *Analyzing Multivariate Data* 221-23 (1978). As these comparison tests are not interdependent, in contrast to those in Table 6 that compare subsets of adopters over the same variables, the Bonferroni adjustment is more appropriate in assessing the significance of the differences in means in the latter table than in this one.

<sup>111</sup> See text following note 62, *supra*.

consistent with the inference that boards adopting exclusive forum provisions are behaving as responsible fiduciaries of their shareholders.

As a robustness check, we rerun the paired t-tests separately for firms in high litigation risk sectors (70 firms) and those that are not (160 firms). There are no significant differences in mean in the governance variables for the smaller sized subsample of high risk litigation firms, and the direction is the same as in the full sample, that is, adopters have a higher proportion of independent chairmen and majority voting, albeit insignificantly so, than non-adopters.<sup>112</sup> These data provide further support for a characterization of exclusive forum bylaw adoptions as not adverse to shareholders because we do not find that non-adopters have better governance than adopters when we separately examine firms that might be more likely to have use of the clauses (those in high risk litigation sectors).

We also run a logit regression for the probability of adoption of an exclusive forum clause on the governance and ownership variables, the percentage of independent directors and an indicator variable for high litigation risk firms. We run the regressions using all observations and using only observations where both the adopter and nonadopter of a pair have no missing observations (resulting in 448 and 412 observations, respectively). As reported in Table 5, in both specifications, the presence of majority voting and an independent chairman are significantly positively related to the presence of the provision, as is the percentage owned by blockholders that are financial institutions. No other variables are significant. These findings bolster the conclusion from the paired comparison tests regarding the implausibility that

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<sup>112</sup> If the simple definition of independent chairman referring to firms in which different individuals hold the two positions is used, then the mean difference for the high risk litigation matched pairs of .1571 with a t-statistic of 1.953 is significant at 6 percent. The independent chairman variable remains significant for the larger subsample of firms in sectors not at high risk of litigation, but the majority voting variable is no longer significant (non-Bonferroni adjusted).

exclusive forum provisions harm shareholders, for they indicate that the managers of adopters are likely to be subject to more effective monitoring, and hence more effectively constrained from taking opportunistic action, than nonadopters.

## **2. Comparison of Midstream Adopters by Approval Process**

We next compare the governance and ownership characteristics of adopters according to the mechanism of adoption, by bylaw or by shareholder vote or written consent. The rationale for this approach is that were there significant governance differences across these subsamples of midstream adopters, then the difference in the mechanism of adoption (by board or shareholder approval) could matter quite importantly. In particular, were critics correct that midstream bylaw adoptions are instances of managerial opportunism that reduce shareholder-wealth, then we should expect to find that bylaw adopters are more poorly-governed than adopters that seek, and obtain, shareholder approval, for the managers who would engage in such action should be those not subject to effective board or shareholder monitoring.

The first three columns of Table 6 report differences in mean comparison tests between clean bylaw adopters and companies that adopted a provision by (1) a separate shareholder vote, (2) a bundled shareholder vote, and (3) written consents.<sup>113</sup> There are no significant differences in governance characteristics between companies with board-adopted exclusive forum provisions and those whose provisions were adopted by separate shareholder votes (column 1). In contrast, companies that adopted the provisions in bundled votes or by written consent are less likely to have majority voting than companies with clean bylaw adoptions (columns 2 and 3). These data suggest that criticism of midstream bylaw adoption is misplaced, as adopters that did not have shareholder consent are, if anything, more likely to exhibit good governance. However, it should

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<sup>113</sup> Because all but one of the written consents to an exclusive forum provision were

be noted that these are small samples, so the tests have low power. There are 291 clean bylaws, but only 25 separate shareholder votes, 23 bundled votes, and 17 written consents.<sup>114</sup>

Firms using written consent have significantly higher insider ownership, significantly lower ownership by financial institutions, and significantly fewer outside blockholders than bylaw adopters or those putting the proposals up to a shareholder vote. This is as expected because, to use the written consent route successfully, insiders need to have over 50 percent of shares (or close enough so that they can ally with an outside blockholder and meet the threshold). The more important finding regarding ownership composition is that there is no significant ownership difference between bylaw adopters and adopters by separate shareholder vote. Indeed, the difference is so small that it would not be sufficient to make a difference in outcome were the mode of adoption reversed across the firms.<sup>115</sup> Hence, a plausible explanation for why boards

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bundled with other items, it is combined with the bundled consents for the analysis.

<sup>114</sup> Logit regressions were also run for the probability of a firm adopting by a shareholder vote on the governance and ownership variables, percentage independent directors and a high litigation risk dummy. Whether firms adopting by written consents are included as firms adopting by a shareholder vote or excluded from the regression, the presence of majority voting is significant and negative, that is, bylaw adopters have higher quality governance (the presence of majority voting is a predictor of adoption by unilateral board action), which is at odds with a negative perception of that mode of adoption. In addition, when written consents are included in the analysis, blockholder ownership is positively related to adoption by shareholder approval; the effect becomes only marginally significant (at 7 percent), when those firms are excluded from the analysis. No other variables are significant in either regression.

<sup>115</sup> For example, the two firms whose separate vote proposals failed had far lower inside, block and financial institution ownership than the average of firms whose proposals were approved, as well as of all midstream adopters, and 4 or 5 percent more shares (the average ownership difference between vote approved and midstream bylaw adopters) would not have made a difference in those outcomes. Allstate Corp.'s proposal received 42 percent of outstanding shares and Cameron International Corp.'s received 40 percent. Calculated from Allstate Corp., Form 8-K, filed May 18, 2011 and Form Def.14A, filed Apr. 1, 2011; and Cameron International Corp., Form 8-K, filed May 15, 2012 and Form Def. 14A, filed Mar. 28, 2012. Both firms' governance characteristics were not qualitatively worse than those of the firms whose proposals were approved: they both had annual election and majority voting (compared to less than half of firms with approved provisions), but not independent chairmen (as also true of over half of firms with approved provisions). Moreover, like all but one of the firms with

continue to opt for unilateral adoption is not because of fear that shareholders would disapprove, but because it is simply cheaper. We would not, however, expect exclusive forum provisions to become as universal among publicly-traded companies as they are in IPOs without a shift in the position of influential investor organizations such as ISS and CII with respect to the clauses. Given that most shareholder litigation involves acquisitions and the probability of being acquired is quite low for most corporations, many independent directors may calculate the benefits of the provision as remote compared to the cost of taking action that might lead to a negative voting recommendation by the proxy advisory services, and the consequent reputational damage.

Taken as a whole, the findings are at odds with critics' view of exclusive forum bylaws and particularly the positions of the CII and proxy advisory services. In the view of those institutions, a responsible board of directors would not adopt an exclusive forum provision unilaterally but would only adopt such a provision, if at all, by putting it to a separate shareholder vote. Yet by their own standards, bylaw companies exhibit no worse, and in some instances exhibit higher, quality governance than those putting the provisions up to shareholder approval.<sup>116</sup> Because there is also no difference in inside ownership between bylaw adopters and separate vote adopters, one cannot assume that the bylaw mechanism was used solely to avoid a

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approved provisions, they did not have poison pills. In short, the two firms whose proposals were defeated met all of ISS's stated governance criteria, in contrast to most firms putting up the provisions to a separate vote, although ISS did not recommend voting in favor of those provisions or any other. Allen 2012, *supra* note 34, at 6. There would appear to have been other problems at Allstate which created shareholder discontent because the "say-on-pay" vote, in which shareholders are asked to approve the Chief Executive's compensation package on an advisory basis, received an extremely low level of support at 57 percent.

<sup>116</sup> Bundled voting firms fare no better than separate voting firms when their governance characteristics are compared to board adopters, but bundled voting is disfavored under the CII's corporate governance policies and presumably would therefore not be viewed as a better mechanism of adoption. See [http://www.cii.org/corp\\_gov\\_policies](http://www.cii.org/corp_gov_policies) ("Bundled Voting: Shareowners should be allowed to vote on unrelated issues separately. Individual voting issues (particularly those amending a company's charter), bylaws or anti-takeover provisions should not

losing shareholder vote. In sum, bylaw adopters are subject to no less monitoring by shareholders or directors than are shareholder vote adopters.

It might be alternatively contended that firms strategically adopt good governance features as a means of obtaining shareholder goodwill, which they then can exploit by taking other opportunistic actions such as adopting an exclusive forum clause without fear of shareholder retaliation. While we are skeptical of such a speculation, more importantly, it seems implausible that an opportunistic board would draw down its goodwill on an exclusive forum provision rather than for a far more consequential entrenching provision, such as a staggered board or plurality voting, which is the ostensible tradeoff in the data. Indeed, the costs of multijurisdictional litigation are not even directly borne by board members, as outside directors are rarely, if ever, personally liable for fiduciary breach.<sup>117</sup>

## **V. Conclusion**

In this paper, we have documented the rise of exclusive forum provisions—provisions that corporations adopt in their bylaws or charters in order to prevent multiforum shareholder litigation. In particular, we ask what drives the extraordinary growth in these provisions and whether (as some critics contend) their adoption reflects bad corporate governance or managerial opportunism. To answer these questions, we separately analyze companies that adopted such provisions at the IPO stage and those that adopted them midstream.

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be bundled.”)

<sup>117</sup> See, e.g., Bernard Black, Brian Cheffins & Michael Klausner, *Outside Director Liability*, 58 *Stan. L. Rev.* 1055 (2006) (finding only thirteen cases in past twenty-five years in which an outside director of a public company made an out-of-pocket payment, and noting most of these fact patterns would not result in personal payouts for companies with “state-of-the-art” directors’ and officers’ liability insurance policies, ) That is not to say that directors bear no cost, as litigation can be accompanied by considerable non-monetary costs, such as the personal stress from being a defendant or potential reputational damage. But the higher legal expense for having to litigate in multiple courts comes from the corporation’s coffers and hence the shareholders’

We draw two principal conclusions from the IPO data: (1) the rate of exclusive forum clause adoption at the IPO has increased steadily from 0 to 80 percent between 2010—2014 and will likely reach 100 percent by the end of 2015 and (2) the entire transition is primarily – if not entirely – driven by law firms; the characteristics of individual companies play little or no role even in individual adoption decisions, and the effect of investment bankers is swamped by that of the law firms. Moreover, the pattern of adoption follows what can be described as a light switch model, in which once a law firm includes a clause in an IPO, it does so for all subsequent IPOs. The near-universal adoption of these provisions across IPO firms, in comparison to staggered boards, further suggests that lawyers have come to perceive that, unlike takeover defenses, exclusive forum provisions universally increase firm value.

For the midstream adoptions, we find almost no significant differences in governance features across midstream bylaw adopters and non-adopters. Further, when there is a significant difference, it is the adopters that have higher quality governance (using the metrics of organizations that are critics of the provisions, ISS and CII). The findings are most consistent with the contention that boards that unilaterally adopt a bylaw provision are acting as responsible fiduciaries. We also find no significant differences in ownership and governance structures between firms whose boards adopt bylaws and those who obtain shareholder approval. The absence of significant differences across firms using disparate adoption procedures suggests that the method of adopting an exclusive forum provision should not be a matter of import for investors.

## **VI. Appendix: Matching procedure for midstream adopters**

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pockets.

We matched each midstream adopter to a non-adopting corporation according to year, industry, and firm size. Each midstream adopter was matched to the “closest” firm as of the end of the year prior to adoption, where “close” is determined according to differences in firm size and industry. We matched on size and industry in the prior year because a substantial number (35 percent) of midstream adoptions occurred in 2014 and that year’s data were not yet available. The tradeoff between firm size and industry follows a simple rule that is outlined below. A non-adopting company is matched to at most one midstream adopter.

The matching procedure is as follows:

1. Restrict the pool of potential matches to all U.S.-domiciled public corporations that have never adopted an exclusive forum clause and are neither controlled nor dual-class stock companies.
2. For each midstream adopter:
  - a. Restrict potential matches to firms that have the same statutory domicile (Delaware or non-Delaware). Further restrict to firms operating in the same year in which the midstream firm adopted the exclusive forum clause. For example, if the firm adopted the clause in 2012, then only firms operating in 2012 are potential matches and differences in firm size and industry (referenced below) are with respect to firm size and industry of the potential matches as of the end of 2011.
  - b. Rank all potential matches according to their absolute percentage difference in firm size.
  - c. Find the closest firm (in terms of firm size) that has the same 4-digit Standard Industrial Classification (SIC) code. If the difference in firm size is less than 50

percent, assign that firm as the match, skip the remaining steps, and proceed to the next midstream adopter to be matched. Otherwise, continue.

- d. Find the closest firm (in terms of firm size) that has the same 3-digit SIC code. If the difference in firm size is less than 50 percent, assign that firm as the match, skip the remaining step, and proceed to the next midstream adopter to be matched. Otherwise, continue.
- e. Find the closest firm (in terms of firm size) that has the same 2-digit SIC code. If the difference in firm size is less than 50 percent, assign that firm as the match, skip the remaining step, and proceed to the next midstream adopter to be matched. Otherwise, continue.
- f. Find the closest firm (in terms of firm size) that has the same 2-, 3-, or 4-digit SIC code. Assign that firm as the match and proceed to the next midstream adopter to be matched.

If step 2 matches the same non-adopter to more than one adopter, the non-adopter is assigned to the adopter for which it is ranked higher (according to firm size and industry). For example, suppose Non-Adopter A is matched to both Adopter Y and Adopter Z. If A was Y's third-closest match but Z's first-closest match, then A is assigned to Z. Y is then assigned to its next-closest match.

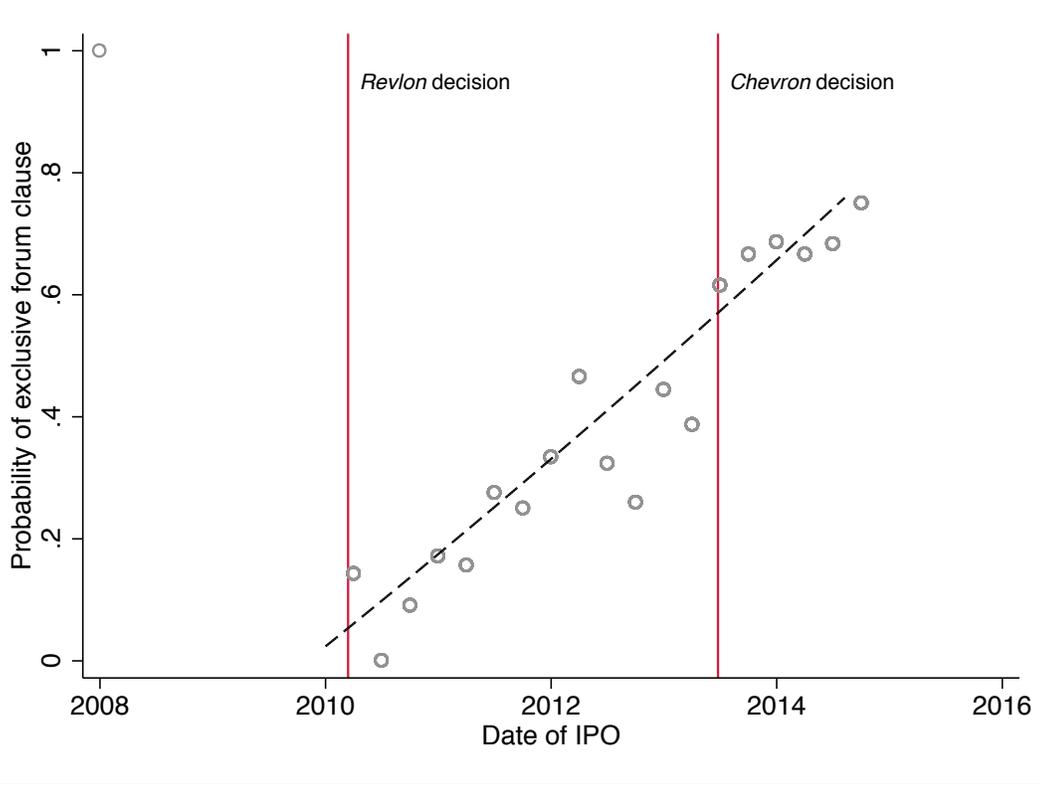


Figure 1: *Exclusive forum clauses at the IPO*. This figure graphs the probability that a corporate charter includes an exclusive forum clause at the IPO. In *Revlon*, the Delaware Chancery Court suggested in dicta that corporations could adopt “charter provisions selecting an exclusive forum for intra-entity disputes.”

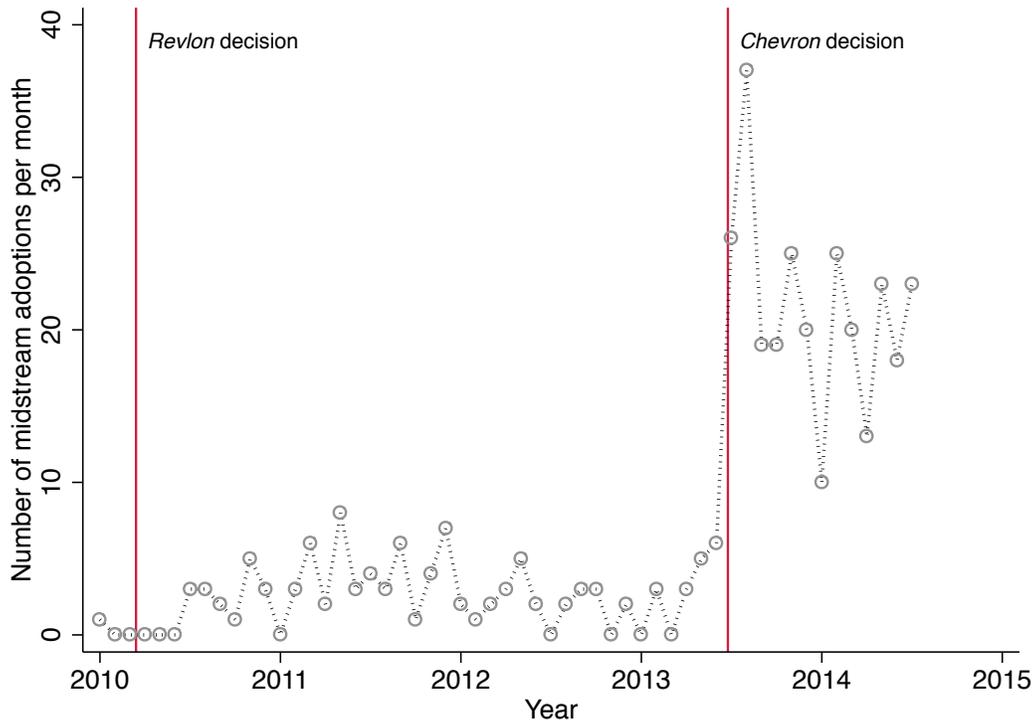


Figure 2: *Exclusive forum clauses (midstream adopters)*. For each month, this figure graphs the number of U.S. public corporations that adopted an exclusive forum clause. In *Chevron*, the Delaware Chancery Court held that such clauses, even if unilaterally adopted by a board via bylaw amendment, are facially valid under Delaware law.

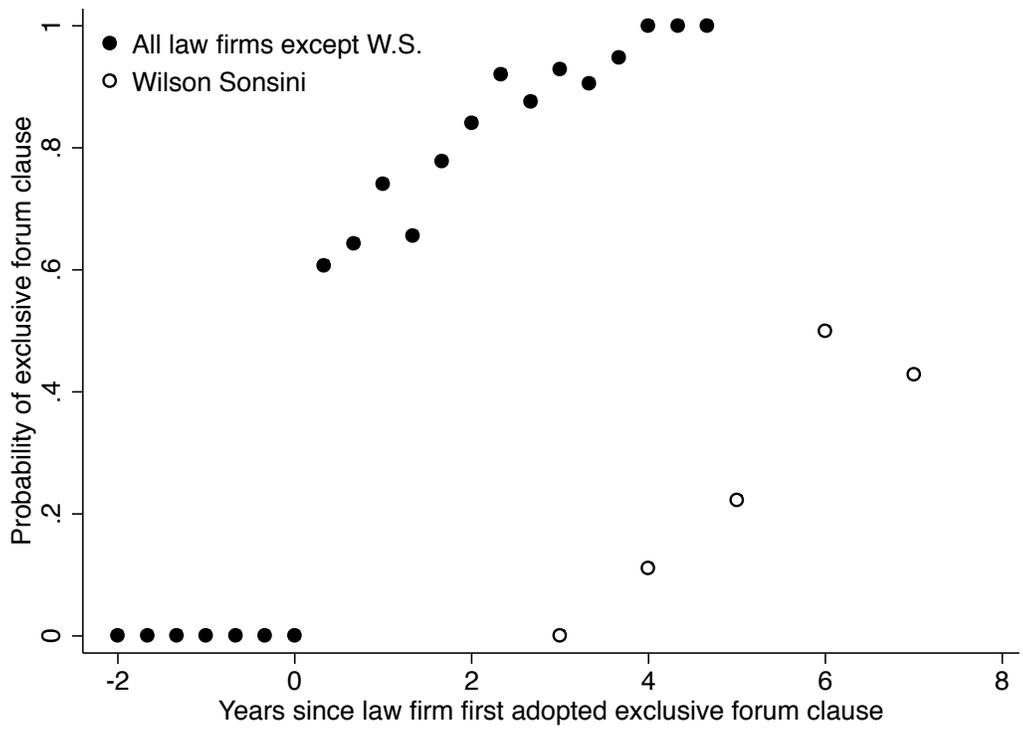


Figure 3: *The light switch model.* This figure graphs the likelihood that a law firm adopts an exclusive forum clause in the corporate charter at the IPO, before and after adopting it for the first time. The “light switch” hypothesis posits that law firms make a once-and-for-all decision to adopt exclusive forum clauses, inducing a discontinuous jump in adoption rates before and after first-time adoption. In the extreme case, the adoption rate would jump from 0 to 100 percent.

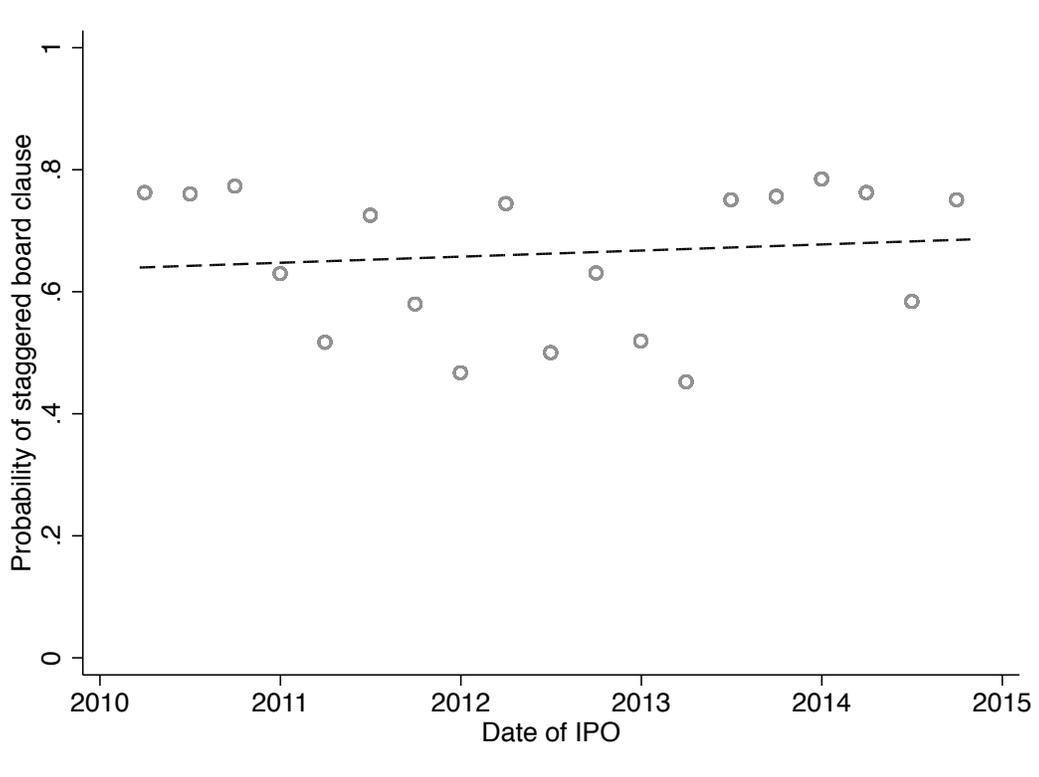


Figure 4: *Staggered board clauses at the IPO.* This figure graphs the probability that the corporate charter or bylaws include a staggered board clause at the IPO.

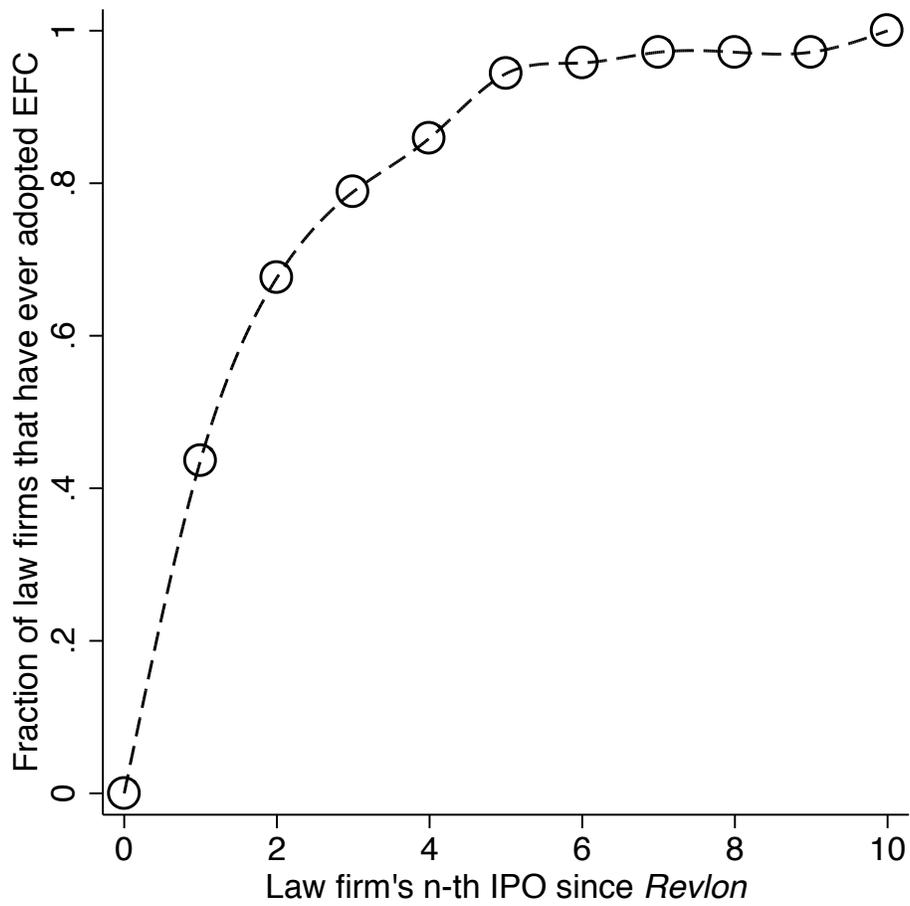


Figure 5: *Timing of the light switch model.* This figure graphs the fraction of law firms that have adopted an exclusive forum clause at least once since the *Revlon* decision. The sample is all law firms that have ever adopted an exclusive forum clause (71 law firms in total). The dashed line is the cubic spline fit.

Table 1: Summary Statistics

	<i>Fraction</i>	<i>Number</i>
<i>Panel A: Exclusive forum clauses (all)</i>		
Delaware forum	0.93	695
Stage of adoption		
Initial public offering	0.47	351
Midstream	0.53	395
Year of adoption		
2006	< 0.01	1
2007	< 0.01	1
2010	0.04	31
2011	0.12	87
2012	0.11	79
2013	0.38	283
2014 (Jan–Aug)	0.35	264
<i>Observations</i>	1.00	746
<i>Panel B: Initial Public Offerings (2010–2014)</i>		
Exclusive forum clause (EFC)	0.45	305
Delaware corporation	0.76	517
California headquarters	0.25	171
Proceeds > \$50m	0.68	460
Assets > \$100m	0.58	395
Advising law firm has adopted EFC $\geq 1$ time	0.57	386
Advising law firm has adopted EFC $\geq 2$ years ago	0.26	174
Classified board	0.66	450
Advised by top 100 law firm	0.64	435
<i>Observations</i>	1.00	679

(Continued)

Table 1: Summary Statistics – continued

	<i>Fraction</i>	<i>Number</i>
<i>Panel C: Law firms advising IPOs (2010–2014)</i>		
#IPOs law firm advised		
1	0.49	90
2–4	0.33	60
5–9	0.10	18
≥ 10	0.08	15
#EFCs law firm adopted at IPO		
0	0.61	112
1	0.16	30
2–3	0.10	18
≥ 4	0.13	23
#M&As law firm advised pre- <i>Reylon</i>		
0	0.49	89
1–5	0.24	44
6–19	0.14	26
≥ 20	0.13	24
Am Law Top 100	0.37	67
Legal 500	0.27	50
EFC in 1st post- <i>Reylon</i> IPO (“innovative” law firm)	0.17	31
<i>Observations</i>	1.00	183

*Panel D: Exclusive forum clauses (midstream only)*

Delaware forum	0.88	346
Post- <i>Chevron</i>	0.74	291
High litigation industry	0.31	121
Clean midstream bylaws	0.74	291
Charter	0.17	65
Separate shareholder votes	0.06	25
Bundled shareholder votes	0.06	23
Written consents	0.04	17
Merger (adopting corporation disappears)	0.05	20
Merger (adopting corporation survives)	0.01	5
Bankruptcy	0.02	8
Splitoff	0.01	3
<i>Observations</i>	1.00	392

*Notes:* Each panel reports summary statistics according to different units of observation.

*Sources:* Bloomberg, SDC, SEC EDGAR.

Table 2: Exclusive forum clause at IPO

<i>Dependent variable is an indicator for exclusive forum clause</i>								
	<i>All IPOs, 2010–2014</i>					<i>non-W.S.</i>	<i>Del.</i>	<i>non-Del.</i>
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Law firm has adopted $\geq 1$ time		0.79*		0.71*	0.73*	0.76*	0.76*	0.31
		(0.02)		(0.03)	(0.03)	(0.03)	(0.03)	(0.18)
Law firm has adopted $\geq 2$ years ago					-0.08	0.09*	-0.11*	0.19
					(0.04)	(0.04)	(0.04)	(0.31)
Delaware corporation			0.38*	0.05	0.05	0.03		
			(0.04)	(0.03)	(0.03)	(0.03)		
California headquarters			0.01	-0.07*	-0.06*	-0.01	-0.04	-0.08
			(0.04)	(0.03)	(0.03)	(0.03)	(0.03)	(0.06)
Proceeds > \$50m			0.23*	0.06*	0.07*	0.08*	0.08*	0.04
			(0.04)	(0.03)	(0.03)	(0.03)	(0.04)	(0.02)
Assets > \$100m			0.01	-0.00	-0.00	-0.01	-0.01	-0.02
			(0.03)	(0.03)	(0.03)	(0.02)	(0.03)	(0.03)
cons.		0.45*						
		(0.02)						
Year fixed effects			Yes	Yes	Yes	Yes	Yes	Yes
Industry fixed effects			Yes	Yes	Yes	Yes	Yes	Yes
Adj. $R^2$	0.45	0.79	0.40	0.80	0.80	0.86	0.82	0.37
Observations	679	679	678	678	678	638	517	161

*Notes:* Each column lists the coefficients from an OLS regression. The main sample is all IPOs since 2010 for corporations domiciled in the U.S. and subject to federal securities law. “Non-W.S.” restricts the sample to IPOs for which Wilson Sonsini was not the advising law firm. “Del.” restricts the sample to IPOs of Delaware corporations. “Law firm has adopted  $\geq 1$  time” is an indicator equal to 1 if the law firm advising the IPO has previously adopted an exclusive forum clause or if this is the first time. “Law firm has adopted  $\geq 2$  years ago” is an indicator equal to 1 if the law firm has previously adopted more than 2 years ago. The unit of observation is the IPO. Standard errors clustered by law firm are in parentheses. \* indicates statistically significantly different from zero at 95 percent confidence.

*Sources:* Bloomberg, SDC, SEC EDGAR.

Table 3: Law firms' willingness to innovate

<b>Dependent variable</b>	Indicator for adopted on first post-Revlon IPO										
<b>Unit of observation</b>	Law firm										
<b>Sample</b>	Law firm's first post-Revlon IPO										
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Law firm's											
Experience ( $\frac{\# \text{ Pre-Revlon IPOs}}{10}$ )	-0.05 (0.03)				-0.05 (0.03)				-0.06* (0.02)	-0.05* (0.02)	-0.05* (0.02)
Experience ( $\frac{\# \text{ Pre-Revlon M\&As}}{10}$ )		0.03 (0.02)				0.04* (0.02)			0.03 (0.02)	0.04 (0.02)	0.03 (0.02)
Legal 500 (Ever ranked)			0.12 (0.07)				0.19* (0.08)		-0.10 (0.10)	-0.08 (0.11)	-0.11 (0.10)
AmLaw (Top 100)				0.20* (0.06)				0.25* (0.07)	0.17* (0.09)	0.12 (0.10)	0.11 (0.09)
Delaware corporation									0.28* (0.06)		0.26* (0.06)
California headquarters									0.08 (0.09)		0.07 (0.09)
Proceeds > \$50m										0.22* (0.08)	0.15* (0.07)
Assets > \$100m										-0.06 (0.06)	0.01 (0.06)
cons.											
Year fixed effects					Yes	Yes	Yes	Yes	Yes	Yes	Yes
Industry fixed effects									Yes	Yes	Yes
Adj. $R^2$	0.01	0.02	0.02	0.06	0.03	0.06	0.06	0.10	0.23	0.16	0.24
Observations	183	183	183	183	183	183	183	183	182	183	182

Notes: Each column lists the coefficients from an OLS regression. \* indicates statistically significantly different from zero at 95 percent confidence.

Sources: Bloomberg, SDC, SEC EDGAR.

Table 4: Midstream governance differences: EFC adopters v. non-adopters (paired  $t$ -tests)

<i>Governance</i>	<i>EFC firms</i>	<i>non-EFC firms</i>	<i>Difference</i>	<i>Observations</i>
No staggered board	0.58 (0.03)	0.62 (0.03)	-0.04 (0.04)	242
No poison pill	0.83 (0.02)	0.86 (0.02)	-0.03 (0.03)	237
Independent chair	0.44 (0.03)	0.34 (0.03)	0.10* (0.04)	230
Majority voting	0.48 (0.03)	0.40 (0.03)	0.08* (0.04)	242
% Financial institution ownership	23.99 (1.00)	23.67 (0.99)	0.32 (1.29)	240
% D&O ownership	9.16 (0.72)	9.24 (0.71)	-0.09 (0.86)	240
% Blockholder ownership	25.97 (0.97)	27.01 (1.03)	-1.04 (1.30)	239
# Blockholders	3.16 (0.12)	3.29 (0.11)	-0.14 (0.15)	241

*Notes:* This table reports differences in governance characteristics between firms that have adopted an exclusive forum clause midstream (“EFC firms”) and firms that have not (“non-EFC firms”). The sample is all EFC firms (242 total) and a matched sample of 242 non-EFC firms. The “Difference” column lists the results of a paired  $t$ -test. Standard errors are in parentheses. \* indicates statistically significantly different from zero at 95 percent confidence.

*Sources:* Bloomberg, SEC EDGAR.

Table 5: Midstream governance differences:  
EFC adopters v. non-adopters (multivariate analysis)

<i>Governance</i>	<i>Sample</i>	
	All	Non-missing pairs
No staggered board	-0.14 (0.20)	-0.09 (0.21)
No poison pill	-0.18 (0.27)	-0.22 (0.27)
Independent chair	0.42* (0.20)	0.43* (0.20)
Majority voting	0.50* (0.21)	0.46* (0.22)
% Financial institution ownership	0.04* (0.02)	0.03* (0.02)
% D&O ownership	0.01 (0.01)	0.01 (0.01)
% Blockholder ownership	-0.01 (0.02)	-0.01 (0.02)
# Blockholders	-0.26* (0.13)	-0.25 (0.13)
cons.	0.08 (0.36)	0.10 (0.36)
Observations	463	446

*Notes:* The dependent variable an indicator equal to 1 if the firm has adopted an exclusive forum provision midstream by a bylaw amendment. The sample is all EFC firms (242 total) and a matched sample of 242 non-EFC firms. \* indicates statistically significantly different from zero at 95 percent confidence.

*Sources:* Bloomberg, SEC EDGAR.

Table 6: Midstream governance differences: By method of EFC adoption

<i>Governance</i>	<i>Difference between groups (avg. of first group – avg. of second group)</i>				
	Separate vote v. Bylaw	Bundled vote v. Bylaw	Written consent v. Bylaw	Separate vote v. Bundled	Any vote v. Written consent
No staggered board	-0.12 (0.10)	-0.07 (0.11)	0.19 (0.13)	-0.04 (0.15)	-0.29 (0.15)
No poison pill	0.08 (0.08)	0.10 (0.09)	0.16 (0.12)	-0.02 (0.08)	-0.07 (0.08)
Independent chair	-0.16 (0.11)	-0.14 (0.11)	-0.28 (0.19)	-0.02 (0.14)	0.13 (0.18)
Majority voting	-0.16 (0.10)	-0.28 <sup>†</sup> (0.12)	-0.36 <sup>†</sup> (0.14)	0.12 (0.13)	0.14 (0.13)
% Financial institution ownership	0.90 (3.42)	-3.37 (3.72)	-21.32* (5.16)	4.27 (5.30)	20.27* (5.68)
% D&O ownership	4.72 (3.97)	7.23 (4.27)	28.48* (5.99)	-2.51 (6.95)	-22.62 <sup>†</sup> (8.83)
% Blockholder ownership	7.69 (3.93)	2.68 (4.28)	20.63* (6.39)	5.01 (6.45)	-15.23 (9.29)
# Blockholders	0.43 (0.39)	0.25 (0.43)	-2.03* (0.59)	0.18 (0.70)	2.38* (0.76)
Litigation	-0.02 (0.10)	0.00 (0.10)	0.11 (0.12)	-0.02 (0.13)	-0.12 (0.13)
Fraction in first group	0.08	0.07	0.06	0.52	0.74
Observations (min–max)	303–316	301–314	287–308	43–48	51–65

*Notes:* Standard errors from an unpaired *t*-test are in parentheses. “Observations” gives the range of the total number of observations in the two groups. There is a range because of missing data. † indicates statistically significantly different from zero at 95 percent confidence *without* correcting for multiple hypothesis testing. \* indicates statistically significantly different from zero at 95 percent confidence after correcting for multiple hypothesis testing with Bonferroni-adjusted significance levels.

*Sources:* Bloomberg, SEC EDGAR.

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