A REQUIEM FOR THE RETAIL INVESTOR?

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INTRODUCTION

THE American retail investor is dying. In 1950, retail investors owned over 90% of the stock of U.S. corporations.[1] Today, retail investors own less than 30%[2] and represent a very small percentage of U.S. trading volume. Data on the overall level of retail trading in U.S. equity markets are not available. But recent New York Stock Exchange ("NYSE") data reveal that trades by individual investors represent, on average, less than 2% of NYSE trading volume for NYSE-listed firms.[3] There is no question that U.S. securities markets are now dominated by institutional investors.

In his article, "The SEC, Retail Investors, and the Institutionalization of the Securities Markets,"[4] Professor Donald Langevoort offers a compelling, original account of the challenges facing the Securities and Exchange Commission as it turns seventy-five years old in the face of securities markets characterized by increasing institutionalization. Professor Langevoort's article offers several interesting insights and serves as an important commentary on the appropriate regulatory model for a marketplace strikingly different from the one existing at the time of the SEC's founding. Despite the enormous contribution of the work, however, I find some of Professor Langevoort's assertions regarding the SEC's focus and

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[1] John C. Bogle, Editorial, Individual Stockholder, R.I.P., Wall St. J., Oct. 3, 2005, at A16.

[2] Donald C. Langevoort, The SEC, Retail Investors, and the Institutionalization of the Securities Markets, 95 Va. L. Rev. 1025, 1026 n.4 (2009). As Professor Langevoort notes, however, though retail investors' proportion of ownership has declined, the absolute dollar amount of direct retail investment has increased over time. Id.

[3] Alicia Davis Evans, Do Individual Investors Affect Share Price Accuracy? Some Preliminary Evidence, 38 (Univ. of Mich. L. Sch. John M. Olin Ctr. for Law and Econ., Working Paper No. 07-018, 2009), available at http://www.law.umich.edu/centersandprograms/olin/abstracts/Pages/07-018.aspx.

[4] Langevoort, supra note 2.

capabilities, and his assumptions regarding the contours of an institutionalized marketplace, unconvincing. In this commentary, I address three concerns. First, Professor Langevoort is skeptical that the SEC, with a history of what he terms retail-driven regulation, is equipped to regulate a highly institutionalized marketplace.[5] I question the claim that regulation of the markets for issuer securities is, in any meaningful sense, retail investor driven and argue that there is no reason to think that the SEC is incapable of regulating a marketplace with limited direct individual investor participation. Second, Professor Langevoort conducts a thought experiment regarding the likely emergence of an institutions-only trading market that could substitute for public capital markets and be regulated as antifraud-only.[6] He argues that this is unlikely to ever occur in the current political climate, but nonetheless holds up such a market as clearly preferable to the status quo.[7] I agree that the emergence of such a market is unlikely, but I am skeptical of his idealized notion of an institutions-only marketplace. Finally, Professor Langevoort, in addressing mutual recognition proposals,[8] argues that foreign issuers seeking to sell securities in the United States should be subject only to the laws of their home countries, as long as those laws are "reasonably responsive to institutional investor interests."[9] This would be in lieu of subjecting such issuers to the purportedly retail-driven regulation that is the hallmark of U.S. securities markets. I question exactly what it means for the laws in a foreign issuer's home country to be "responsive to institutional investor interests" and argue that this proposed standard for substantial comparability is insufficiently definite to guide policy decisions in this area.[10]

[5] Id. at 1026.

[6] See id. at 1057; see also infra Part II for a discussion of the concept of an antifraud-only regulatory stance.

[7] Langevoort, supra note 2, at 1066–68.

[8] See infra Part III for a discussion of mutual recognition.

[9] Langevoort, supra note 2 at 1079.

[10] See Part III for a discussion of substantial comparability.

I. IS U.S. SECURITIES REGULATION RETAIL INVESTOR DRIVEN? IF SO, DOES IT MATTER?

Professor Langevoort asserts that U.S. securities regulation is retail investor driven because of the rhetorical stress on protecting the interests of individual investors that often accompanies SEC rulemaking and enforcement activity.[11] And, given the SEC's historical focus on retail investor needs, Professor Langevoort questions the agency's ability to oversee an institutionalized marketplace.[12] Yet, as an initial matter, it is far from clear that U.S. securities regulation is driven by concern for the interests of retail investors. Certainly, the SEC's mandate focuses its attention on retail investor protection with respect to the regulation of securities market professionals who interact directly with individual investors; securities regulation here serves an important function in limiting abuse. Professor Langevoort contends, however, that even the regulation of the markets for issuer securities is retail investor driven.[13] Though it is correct that many regulatory policies had, as a goal, at least in part, the protection of individual investors, many things drive agency activity, so it is difficult to know with any certainty precisely which considerations have played a predominant role in shaping regulatory policy. Even if it is true that current policy has been shaped by concern for the needs of individual investors, it is unclear why the SEC's historical focus on retail investor interests is particularly relevant to the question of the SEC's ability to regulate today's institutionalized marketplace. Professor Langevoort suggests that many regulations in this area were designed to protect individuals and thus are *unnecessary* in markets dominated by institutional investors. He is, therefore, concerned about the SEC's ability to adjust its regulatory stance. In my view, however, because sophisticated institutional investors generally benefit from current regulatory policies as much as, if not more than, individual investors, this concern seems misplaced. It is not at all clear that a significant regulatory overhaul is in order simply because institutional investors now dominate securities markets.

[11] Langevoort, supra note 2, at 1025.
[12] Id. at 1025–26.
[13] Langevoort, supra note 2, at 1026–27 & n.7.

Consider first the case of federal securities law disclosure requirements. Though Congress' initial intent in enacting the Securities Act of 1933[14] and the Securities Exchange Act of 1934,[15] which established the mandatory disclosure framework, was to protect investors,[16] who at that time were almost exclusively individuals, it does not necessarily follow that current regulation in this area primarily benefits retail investors. Indeed, the results of empirical studies on the use of federally mandated disclosure suggest that current mandates are not excessive and are as valuable to institutional investors as they are to retail investors. The American Institute of Certified Public Accountants ("AICPA") convened focus groups with professional investors/advisors—such as analysts, brokers, and portfolio strategists who focus on fundamental investing—and investor trade groups to determine the efficacy of financial information reporting.[17] The AICPA study found that, in the view of the investors who participated, the business reporting system in the United States generally works well and provides users with essential information that heavily influences their decisions.[18] Survey data are sometimes unreliable and one should approach the results with caution. It should be noted, however, that these study participants expressed no desire for wholesale changes to the current reporting system and did not generally view mandated disclosures as irrelevant.

In another study, the Financial Accounting Standards Board ("FASB") collected information on "voluntary disclosures."[19] It

[14] 15 U.S.C. §§ 77a–77bbbb (2006).

[15] 15 U.S.C §§ 78a–78nn (2006).

[16] See Sec. & Exch. Comm'n, The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation, http://sec.gov/about/whatwedo.shtml (last visited Mar. 1, 2009) ("Congress—during the peak year of the Depression—passed the Securities Act of 1933. This law, together with the Securities Exchange Act of 1934, which created the SEC, was designed to restore investor confidence in our capital markets by providing investors and the markets with more reliable information and clear rules of honest dealing.").

[17] The Special Comm. on Fin. Reporting, Am. Inst. Certified Pub. Acct., Improving Business Reporting—A Customer Focus: Meeting the Information Needs of Investors and Creditors (1994), available at http://www.aicpa.org/Professional+Resources/Accounting+and+Auditing/Accounting+Standards/ibr.

[18] Id.

[19] Business Reporting Research Project, Fin. Acct. Standards Bd., Improving Business Reporting: Insights into Enhancing Voluntary Disclosures 1 (2001), available at http://www.fasb.org/brrp/BRRP2.PDF. The working group considered disclosures not

found that a number of leading publicly-traded companies voluntarily provide investors with an extensive amount of information that is not required under the securities laws. Companies provide these additional disclosures because a failure to do so could put them at a competitive disadvantage if others in their industries provide similar information to investors. Indeed, FASB predicted that voluntary disclosures would increase in the future because of the fast-paced nature of change in the business community.[20]

Institutional investors that engage in fundamental analysis need information to make informed investment decisions. Of course, some current mandatory disclosure items may not assist institutional investors in making effective investment decisions,[21] which would make it appropriate for the SEC to reevaluate elements of the disclosure regime. I offer no opinion on that issue in this Article. What is clear, however, is that the current disclosure regime, broadly speaking, has been embraced by sophisticated market participants. Thus, there is no reason to believe that what some perceive to be excessive disclosure requirements are responsive only to individual investor needs.

There are at least two settings in which to test the proposition that the benefits from the current mandatory disclosure regime accrue primarily to individual investors. The first is the Rule 144A private placement market in the United States, which is open only to large institutional investors. According to Professor Langevoort, U.S. market regulation critics view the success of the 144A market

specifically required under GAAP or SEC rules as "voluntary," even though such disclosures could be made, for example, to give a more complete picture of a company's business as required by SEC rules. Id. at v.

[20] Id. at v–vi.

[21] Such things undoubtedly exist. Examples of potential areas for reform can be found in the results from another study conducted by FASB in which it asked a small group of study participants, which included accountants and securities industry professionals, what required disclosures under Regulation S-K (which contains requirements for non-financial statement portions of SEC disclosure documents) they would limit or eliminate. Business Reporting Research Project, Fin. Acct. Standards Bd., GAAP-SEC Disclosure Requirements (2001), available at http://www.fasb.org/brrp/brrp3p1.pdf. Their suggested changes were modest and included things such as eliminating disclosure of quarterly stock prices, since real-time stock price quotes are easily accessible, and limiting disclosures on real property to specialized industries such as oil and gas where information on properties is more relevant. Id. at 36–38.

as evidence of "regulatory inefficiency" in traditional markets.[22] This view, however, is odd. A study by Howell Jackson and Eric Pan, for example, reveals that institutional investors in Rule 144A transactions request and receive disclosures similar to those available in registered offerings.[23] This suggests that, consistent with the survey evidence described above, sophisticated investors find current mandated disclosures useful.

The second setting for testing the benefits to institutional investors of detailed disclosure requirements is any heavily institutionalized foreign market, such as those that exist in Europe, without what Professor Langevoort terms the U.S. market's legacy of retail investor protection. Though Professor Langevoort holds Europe out as a largely institutionalized marketplace with light touch regulation,[24] he acknowledges that the substantive requirements for is-

[22] Langevoort, supra note 2, at 1060.

[23] See Howell E. Jackson & Eric J. Pan, Regulatory Competition in International Securities Markets: Evidence from Europe—Part II, 3 Va. L. & Bus. Rev. 207, 255–57 (2008) ("Although European issuers escaped many of the disclosure obligations under U.S. securities law through Rule 144A transactions, they continued to voluntarily follow US-style disclosure practices, even to the point of paying for lawyers to prepare due diligence letters. One conclusion that can be drawn from such evidence is that many European issuers did not mind, or at least recognized the value of, preparing full and detailed disclosure documents and subjecting themselves to due diligence review. Therefore the decision not to conduct a U.S. public offering had less to do with the tough U.S. disclosure requirements, and more to do with non-legal concerns such as timing, placement success and recognition by the U.S. investment community."). Professor Langevoort points to this study and notes that institutional investors in such deals demand extensive protections, including mandatory disclosures and fraud-related representations. Langevoort, supra note 2, at 1065 n.113 (citing Howell E. Jackson & Eric J. Pan, Regulatory Competition in International Securities Markets: Evidence from Europe—Part II, 3 Va. L. & Bus. Rev. 207, 251–54 (2008)).

[24] It should be noted that, though European—and in particular U.K.—regulation is often referred to as "light touch," this is not universally agreed to be the case. Indeed, Callum McCarthy, former chairman of the United Kingdom's Financial Services Authority ("FSA") states the following:

> [It is a] myth . . . that the FSA is a "light touch" regulator, with the implication that the attractiveness of the UK's regulatory regime is that it permits practices prohibited elsewhere. In its most extreme form—or its mistranslated form—"light touch" is transcribed into "soft touch".
>
> But in very many respects, the FSA is not "light touch". In some important areas of financial services, for example, we regulate activities which are unregulated in most other countries: hedge fund managers, for example, are subject to a regulatory regime in the UK which has no legal equivalent in the US . . . . In other areas, we have deliberately chosen a level of regulation which is more

suer regulation are similar to, and sometimes exceed, the requirements of those in the United States.[25] Therefore, it is not at all clear that the presence of retail investors drives substantive market regulation, despite rhetoric to that effect.

One can point to other examples of securities regulations outside the disclosure context that ostensibly were implemented specifically with the interests of retail investors in mind. Regulation FD (fair disclosure) ("Reg FD"),[26] which prohibits selective disclosure by issuers, is one such example. Though Reg FD was designed to level the playing field for individual investors, the SEC, when introducing the regulation, offered a rationale that demonstrates that Reg FD can protect institutional investors as much as retail investors.[27] Before Reg FD, many issuers were using information as a commodity to be traded with the investment community, including the research analysts issuing buy and sell recommendations on stocks, to curry favor and ensure positive reports. Those institutions that failed to cooperate could be frozen out of the stream of selectively disclosed information. Reg FD has made it possible for all institutions and individuals to have access to relevant investment information at the same time. This benefits not only retail investors, but also non-favored institutions.

> demanding than that adopted in some other countries. Nor should the FSA's enforcement practices be regarded as light, still less soft, touch. . . .
>
> . . . [W]e have the flexibility to sanction firms for breach of principles, even when no specific rule may have been broken. . . .
>
> For all these reasons—scope of regulation, ability to impose substantial fines, ability to take action against breach of principle, even when no specific rule has been broken—I think it misleading to characterise the FSA as "light touch."

Callum McCarthy, Chairman, Fin. Servs. Auth., Financial Regulation: Myth and Reality, Speech to British American Business London Insight Series and Financial Services Forum (Feb. 13, 2007) (transcript available at http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2007/0213_cm.shtml).

[25] Langevoort, supra note 2, at 1074 ("On disclosure, Europe is reasonably thorough in how it addresses ongoing issuer disclosure and the potential for market abuse. In terms of formal regulatory demands, there are numerous ways in which its mandates for issuers actually exceeds what we have in the United States." (footnote omitted)).

[26] Regulation FD, 17 C.F.R. § 243 (2008).

[27] See Selective Disclosure and Insider Trading, Securities Act Release 7881, 65 Fed. Reg. 51,716 (2000) *reprinted in* [2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,319, at 83,677–78 (Aug. 24, 2000).

Another common allegation is that the "Plain English" initiative[28]—which requires issuer disclosure documents to be written in clear, simple language—is another costly initiative imposed on companies primarily to protect unsophisticated investors.[29] To be sure, the SEC had the "ordinary" investor in mind when putting forth this initiative. There is at least anecdotal evidence, however, that sophisticated investors also appreciate "Plain English." Investor Warren Buffett, a billionaire and one of the most sophisticated investors in the world, has said, "For more than forty years, I've studied the documents that public companies file. Too often, I've been unable to decipher just what is being said . . . ."[30] Most investors, even sophisticated investors, are not lawyers. Putting disclosures into easy-to-understand language can reduce transaction costs and facilitate the dissemination of clear information into the market.

In summary, one may quibble with the rules imposed under the current securities laws, but there are sophisticated investors who find many of these rules beneficial. Those who believe certain rules should be changed may have valid arguments. It is not clear, however, that the level of retail investor participation in securities markets has much bearing on whether these regulatory policies make sense.

Professor Langevoort also suggests that enforcement activity, including most prominently ex post shareholder litigation for regulatory violations, is a way in which securities regulation is designed to be responsive to retail investor needs. Indeed, Professor Langevoort indicates that, though some European regulations are more stringent than those in the United States, Europe is less enforcement-oriented.[31] He then suggests that this is the case, at least in part, because of less need for securities litigation in the Euro-

[28] Presentation of Information in Prospectuses, 17 C.F.R. § 230.421 (2008).

[29] For background, see generally Kenneth B. Firtel, Note, Plain English: A Reappraisal of the Intended Audience of Disclosure Under the Securities Act of 1933, 72 S. Cal. L. Rev. 851 1999 (discussing estimated costs involved with the Plain English initiative in its early years).

[30] Warren E. Buffett, Preface *to* Off. Inv. Educ. & Assistance, Sec. & Exch. Comm'n, A Plain English Handbook: How To Create Clear SEC Disclosure Documents at 1 (1998).

[31] Langevoort, supra note 2, at 1074. But see McCarthy, supra note 24, for the view that U.K. enforcement is not "light touch."

pean marketplace because of the dominance of European institutional investors that can put pressure on corporate management.[32] His argument, thus, seems to be that the U.S. focus on litigation and ex post deterrence efforts is a product of our markets' retail legacy. It is not at all clear, however, that low enforcement intensity would (or should) ever exist in the United States, even with little or no direct individual investor market participation, so it also may be unfair to characterize enforcement as primarily benefiting retail investors.

Professor Langevoort argues that institutional investors do not need heavy SEC enforcement and securities litigation to vindicate their interests or to deter fraud or other inappropriate behavior. Instead, institutional investors can use their market power to persuade corporations to act appropriately. Retail investors lack this power and therefore, Professor Langevoort implies, need access to other deterrence mechanisms, including government enforcement and private rights of action. This position, however, strikes me as untenable. Though one can argue that a firm's stockholders can influence the likelihood of a firm engaging in fraud or other acts of disloyalty, the critical question, in my view, is not the proportion of retail investors versus institutional investors. The more important question relates to how many "investors" a firm has (that is, those who have a long-term view and the ability and willingness to challenge management) versus "traders" (that is, those who move in and out of stocks quickly in hopes of making short-term profits).[33] Though retail investors are unlikely to be "investors" as I define it here (chiefly because they generally lack the ability to challenge corporate managers in a meaningful way), one should not take it as a given that institutions are necessarily "investors" either. In fact, many institutional investors have a short-term outlook and make no more effort to affect managerial behavior than their less powerful retail investor counterparts. Of course, one could argue that if institutional investors have the power to affect the incidence of fraud, but fail to do so, that does not mean that it is appropriate

[32] Langevoort, supra note 2, at 1074.

[33] Carolyn Brancato and Michael Price stress that institutions are not a monolithic group and should not be treated as one, and make a distinction between "investors" and "traders." Carolyn Brancato et al., The Institutional Investor's Goals for Corporate Law In The Twenty-First Century, 25 Del. J. Corp. L. 35, 45–47 (2000).

for them to look to the SEC or the courts to step in and come to their assistance if they suffer losses. I offer no opinion on that in this Article. As a society, however, we have an interest in deterring fraud and corporate misbehavior, wholly apart from concerns about direct investor losses, because fraud harms market integrity, undermines investor confidence, and affects the allocation of capital in society. Therefore, enforcement still has an important role to play in the regulation of securities markets, and it is not clear that that role varies with the level of direct retail participation in the marketplace.

Admittedly, the need for a class action mechanism to vindicate securities fraud claims sprang from an acknowledgement of the collective action problem facing small, dispersed shareholders. It is not clear, however, that the mechanism as currently operated benefits primarily individual investors. Today, the U.S. marketplace is largely institutional, yet we still observe—relative to other countries—a high incidence of litigation. One could partially attribute this fact to the zealousness of plaintiffs' attorneys in this area. That said, the Private Securities Litigation Reform Act ("PSLRA")[34]—as a means of ensuring that litigation has at least some investor direction—mandates the appointment of a lead plaintiff. The lead plaintiff usually is an institutional investor because an institution is likely to have the highest stake in the litigation. Moreover, some institutions opt out of class actions and pursue individual actions (admittedly at the behest of plaintiffs' attorneys) and these separate opt-out suits increase the incidence of litigation even more.[35] Thus, it is hard to say with any confidence that we would observe a substantial reduction in the rate of U.S. securities litigation if there were no participation by retail investors in securities markets.

Even if securities regulation, as currently implemented, were biased in favor of retail investor interests, it still is unclear why this fact would lead one to be skeptical of the SEC's ability to adapt to an increasingly institutional marketplace. The SEC is made up of

[34] Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.).

[35] See Kevin M. LaCroix, Opt-Outs: A Worrisome Trend in Securities Class Action Litigation, InSights (Oakbridge Ins. Servs., Bloomfield, Conn.), Apr. 2007, at 4–5, available at http://www.oakbridgeins.com/newsletters/April_Opt-OutsAWorrisomeTrendinSecuritiesClassActionLitigation.pdf.

skilled professionals who have been able to adapt to market conditions over the years.[36] There is no reason to think they could not respond appropriately to this change. Moreover, Professor Langevoort argues that diversified institutions require less protection than the average undiversified retail investor. If that is the case, were Congress and the SEC to adopt a more hands-off approach to securities regulation in this context, the SEC's job would be easier, not more difficult.

II. WOULD AN INSTITUTIONS-ONLY MARKET BE MORE EFFICIENT?

Professor Langevoort engages in a thought experiment in which he imagines an institutions-only trading market that could rival public capital markets.[37] For firms trading on this market, there would be no mandatory disclosure, no Sarbanes-Oxley-type federally instituted corporate governance requirements, and "low-intensity SEC enforcement."[38] Professor Langevoort asserts that we are not that far, either as a legal or economic matter, from his imagined world of a trading market closed to retail investors. In essence, this hypothetical world would be a version of the Rule 144A market with more widespread corporate and stockholder participation.[39]

[36] As of the time of this writing, the SEC is facing a number of challenges related to questions about its role in the market failures that contributed to the economic crisis in the United States. These questions, however, are not directly related to concerns about the relative proportions of retail and institutional investors in the marketplace, the subject of this article.

[37] Langevoort, supra note 2, at 1057–70.

[38] Id. at 1057. Though Professor Langevoort does not say so explicitly, I assume that state corporate law remains in place, even in this hypothetical world.

[39] Id. at 1060. Thus far, U.S. firm participation in the rule 144A market has been limited. The only U.S. firms that have used the 144A marketplace for substantial equity issuances are a private equity firm and a hedge fund. See William K. Sjostrom, Jr., The Birth of Rule 144A Equity Offerings, 56 UCLA L. Rev. 409, 410–12 (2008) (describing the 2007 equity offerings of Oaktree Capital Management, LLC, a hedge fund, and Apollo Global Management, LLC, a private equity firm). U.S. firm "equity" issuances in the Rule 144A market have increased in recent years, but the overwhelming majority of the "equity" capital raised actually takes the form of debt convertible into equity securities. See Steven M. Davidoff, Paradigm Shift: Federal Securities Regulation in the New Millennium, 2 Brook. J. Corp. Fin. & Com. L. 339, 343 (2008) (reporting that 87.4% (figure calculated by author) of "equity" issuances by domestic firms in the Rule 144A market in 2007 actually took the form of convertible debt).

Professor Langevoort argues, and I agree, that it is politically infeasible, particularly in this current time of financial crisis, to either deregulate public markets or allow a substitute private market with limited regulation to flourish.[40] Before reaching this conclusion, however, Professor Langevoort asserts that such a state of affairs would be preferable to the status quo, since an institutions-only market would be more efficient than one that includes retail investors and would lead to better corporate governance. He is essentially arguing that this nirvana-like state of full institutionalization and associated substantial deregulation could be our reality, if not for unfortunate political realities. In my view, this sentiment, shared by many, reflects an idealized notion of an institutions-only market.

There is reason to believe that this idealization is unfounded. First, there is evidence that the presence of retail investors *enhances* market efficiency. This suggests that eliminating the participation of individual investors could have far-reaching implications for market functioning. Second, as discussed briefly above, though institutional investors have the capacity to serve as effective corporate monitors, many fail to do so. Thus, one could argue that the institutionalization of securities markets has done little, if anything, to improve corporate governance in the United States.

A. Market Functioning

Public markets perform a vital economic role, since accurate share prices lead to the efficient allocation of capital. Individuals make a number of contributions to market functioning. First, liquidity, one element of a well-functioning market, is enhanced by the presence of individual investors. Deep and continuous markets are important so that investors can be assured of finding trading partners when they have a desire to buy or sell a particular stock. Therefore, sufficient liquidity is a necessary condition for market efficiency. The presence of even modestly active traders such as individual investors enhances market functioning.[41]

[40] Id. at 1065–67. I also question whether such a market would be attractive to market participants.

[41] Indeed, there is evidence that individual traders perform unique market functions. See, e.g., Ron Kaniel et al., Individual Investor Trading and Stock Returns, 63 J. Fin.

Second, retail investor market participation, though declining relative to that of institutions, is growing on an absolute basis. Thus, individuals represent an important source of capital for U.S. corporations. In 2006, approximately $5.5 trillion of U.S. equity investment dollars came from individual investors, up from $616 billion in 1965.[42] Individual investor participation is particularly important for small capitalization companies. Almost all large institutional investors are confined to making investments in large cap corporations. Either their own charters or government regulations limit their ability to buy stock in small companies because of minimum size and maximum ownership requirements. Moreover, most small cap stocks have thin floats, so any attempt to buy a significant number of shares in a small cap company could move the price of that stock higher instantly, making such investment no longer attractive. Because institutions own only a small percentage of the stock of small cap corporations, retail investors are important for the survival of many of these firms.[43]

Capital from retail investors also provides a stable ownership base for public corporations, as evidence shows that most individual stockholders trade relatively infrequently. For example, according to a study performed by the Investment Company Institute and the Securities Industry Association, 60% of surveyed individual investors made no trades at all during 2004.[44] Of the remaining 40% that did trade, 57% made five or fewer trades during the year and 79% made twelve or fewer trades.[45] These figures stand in sharp contrast to the much higher trading rates of institutional investors, with annual turnover rates approaching or exceeding 100%.[46] Many

273 (2008) (describing the means by which retail investors provide liquidity for institutional investors).

[42] Langevoort, supra note 2, at 1026 n.4.

[43] Paul A. Gompers & Andrew Metrick, Institutional Investors and Equity Prices 17–18 (Nat'l Bureau of Econ. Research, Working Paper No. 6723, 1998), available at http://www.nber.org/papers/w6723.

[44] Inv. Co. Inst. & Sec. Indus. Ass'n, Appendices: Additional Figures for Equity Ownership in America, 2005, at 16 (2005), available at http://www.ici.org/pdf/rpt_05_equity_owners_append.pdf. These figures overstate direct market retail trading activity because the study includes purchases and sales of shares in a mutual fund in its definition of "trade." Id. at 15 n.3.

[45] Id. at 17.

[46] The average annual turnover rate for domestic equity mutual funds appearing in the Morningstar mutual fund database as of July 19, 2007 is 81%. The most active

corporations, therefore, actively seek retail investment. Issuers often invite investment banks affiliated with retail brokerage houses into securities offerings to gain access to retail investors, and there are conferences organized by investor relations professionals aimed at helping companies retain their retail investor bases and attract additional retail investors. The virtues of direct retail investor participation in the market are generally not lost on corporate managers who value a stable and relatively loyal shareholder base.[47]

Notwithstanding the benefits of direct retail participation in equity markets I outline above, Professor Langevoort argues that eliminating retail investors from securities markets would lead to "efficiency conditions [that are] much better."[48] His assertion is consistent with the somewhat common view that individual investors are "noise traders"[49] that distort share prices and harm market functioning.[50] Despite this negative view of retail investors, evi-

traders (as represented by the top decile) have an average turnover rate of 263%. Alicia Davis Evans, Are Investors' Gains and Losses from Securities Fraud Equal Over Time? Some Preliminary Evidence, 34 tbl. 1 (Univ. of Mich. L. Sch. John M. Olin Ctr. for Law & Econ., Working Paper No. 09-002, 2009) available at http://www.law.umich.edu/centersandprograms/olin/abstracts/Pages/09-002.aspx. See also Bogle, supra note 1 (reporting that the average annual turnover rate for mutual funds during the 1990–2005 period was 91%).

[47] Professor Langevoort suggests that corporate managers may like retail investors because of "greater opportunity for entrenchment and manipulation of noise traders." Langevoort, supra note 2, at 1066 n.114. Of course, corporations may seek these investors because they are more complacent, but their participation does produce benefits, even if some managers, though certainly not all, might seek them out for exploitation purposes.

[48] Langevoort, supra note 2, at 1064.

[49] Noise traders are investors that do not trade on fundamental company information, but rather on rumors, fads, and other types of information deemed to be unreliable.

[50] See, e.g., Alok Kumar & Charles M.C. Lee, Retail Investor Sentiment and Return Comovements, 61 J. Fin. 2451, 2484–85 (2006) (finding the existence of concerted action on the part of individual investors and that the resulting "retail sentiment" does not appear to stem from a consideration of company fundamentals); Soeren Hvidkjaer, Small Trades and the Cross-Section of Stock Returns 20 (Robert H. Smith School Research Paper No. RHS 06-018, 2006), available at http://ssrn.com/abstract=869983 (finding that there is a systematic component to retail trading and that this trading can cause or protract periods of stock price under- or overvaluation); Brad M. Barber, et al., Do Noise Traders Move Markets? 22–23 (Dec. 2005) (unpublished manuscript, available at http://www.haas.berkeley.edu/finance/Noise.pdf) (find-

dence from international markets suggests that retail investors may not be noise traders. For example, one researcher found no evidence that individual investors were the source of noise trader risk on the Australian equity market.[51] Another study involving the Korean Stock Exchange found that retail investors appear to have an informational advantage over institutional investors and are better able to predict corporate events.[52] In prior work, I provide additional evidence that contributes to the debate on whether individual investors are, as a group, noise traders.[53] In that study, I found that increased trading by individual investors on the New York Stock Exchange is correlated with an increase in share price accuracy as measured by R^2. Under one, albeit highly controversial, interpretation of R^2, lower R^2s imply more accurate stock prices.[54] The results from this study provide evidence that: (i) as the proportion of trading by individual investors increases, the R^2 of firms decreases; and (ii) there likely is a causal relationship between retail investor trading and R^2. This, thus, serves as evidence that it is at least possible that, contrary to the conventional wisdom, trading by individual investors enhances market efficiency by bringing relevant private information to the market that is valuable in helping set market prices.[55]

Even if retail investors are noise traders, they still provide market benefits, as they (i) contribute, as mentioned above, to market liquidity,[56] and (ii) provide incentives[57] for informed traders to trade

ing that retail trades are correlated and that these trades move prices away from fundamental values).

[51] Andrew Jackson, The Aggregate Behaviour of Individual Investors 24–25 (July 29, 2003) (unpublished manuscript, available at http://ssrn.com/abstract=536942).

[52] Hyuk Choe et al., Do Domestic Investors Have More Valuable Information About Individual Stocks than Foreign Investors? 21–22 (Nat'l Bureau of Econ. Research, Working Paper No. 8073, 2001), available at http://www.nber.org/papers/w8073.

[53] Davis Evans, supra note 3.

[54] See id. for further discussion of the R^2 controversy.

[55] Id. at 14.

[56] As Fischer Black notes, if all traders had access to, and acted on, the same fundamental information, other than for liquidity reasons, there would be no reason to trade. Fischer Black, Noise, 41 J. Fin. 529, 530–31 (1986). Thus, noise traders are particularly important for liquidity.

[57] Gregory La Blanc & Jeffrey J. Rachlinski, In Praise of Investor Irrationality *in* The Law and Economics of Irrational Behavior, 542, 544 (Francesco Parisi & Vernon L. Smith eds., 2005). Unfortunately, for noise traders, they provide these incentives to

and consequently bring prices in line with fundamental values.[58] Thus, it is far from clear that the absence of retail investors would improve market efficiency.

Rather than idealizing institutionalization, scholars and regulators instead should question its effect on market efficiency. Not only is there evidence that retail investors improve market efficiency, but there is also reason to believe that institutional trading may harm it. Securities regulation seeks to set the rules of the game to provide a mechanism for the provision of capital for private innovation and to assist allocative efficiency (that is, allocating capital to its highest and best uses). To achieve this goal, regulators strive to increase investor confidence, reduce information asymmetries through mandatory disclosure regulations,[59] and combat fraud (through public and private enforcement means) to prevent the misallocation of capital. Otherwise, we leave it largely to the market to decide which corporations deserve capital. Traditionally, investors made money when the value of their investments went up because of improved corporate performance or prospects. This, in turn, generated investor confidence and also served our allocative efficiency goals because the firms that were profitable and efficient continued to have high stock prices and access to capital.

Today's institutionalized marketplace has changed this basic model. For sure, there are long-term buy and hold institutional investors that focus on company fundamentals. However, the marketplace has a large number of investors that make money from things that are only indirectly related to corporate performance. For example, mutual funds earn fees just for holding assets. Though the flow of funds is tied to investment returns (which should be related to portfolio company performance), such a tie is

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informed traders by suffering losses when trading against them. Id. at 566. I am not suggesting that this is a fair result for noise traders or one to which regulators should aspire.

[58] Black, supra note 56, at 531–32. Conversely, informed traders may be less willing to participate in markets with substantial noise trading, given the limits of arbitrage. J. Bradford De Long et al., Noise Trader Risk in Financial Markets, 98 J. Pol. Econ. 703, 703 (1990) ("The unpredictability of noise traders' beliefs creates a risk in the price of the asset that deters rational arbitrageurs from aggressively betting against them.").

[59] Joel Seligman, The Transformation of Wall Street 620 (3d ed. Aspen Publishers 2003).

not reliable. Marketing is important to mutual fund inflows, and there is often no way for retail investors to tell the difference between skill and luck.[60] Moreover, many institutions, particularly hedge funds, engage in derivative transactions where the financial payoffs can be detached from fundamental corporate values. Furthermore, liquidity-induced trades by institutional investors are increasing in importance relative to trading driven by information, and this has implications for allocative efficiency. Some of the activities of institutions make markets more efficient, but others take markets farther away from the efficiency ideal.

Richard Bookstaber, hedge fund manager and former risk manager for Salomon Brothers and Morgan Stanley, argues that liquidity, not information, is the primary driver of day-to-day market price movements in equity and bond markets.[61] Bookstaber provides examples of various types of trades that are not prompted by fundamental information, but rather by the traders' need for liquidity.[62] These trades affect market prices, even when the participants know they are not driven by any information related to fundamental value.[63] If Bookstaber is correct, and liquidity-driven trading is rivaling or even usurping information-based trading,[64] then the institutionalization of markets can do more to hurt allocative efficiency than any perceived risk of noise trading by retail investors.

Professor Langevoort acknowledges that there may be what he terms "suboptimal investment behavior," even in his imagined private institutions-only marketplace.[65] Yet he asserts that the "smart money" can neutralize any harm from these traders through arbitrage.[66] There are, however, well-known limits on the ability of ar-

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[60] See generally Langevoort, supra note 2, at 1051.

[61] Richard Bookstaber, A Demon of our Own Design: Markets, Hedge Funds, and the Perils of Financial Innovation 182 (2007).

[62] Id. at 182–84.

[63] Id. at 183.

[64] The idea of a market being primarily liquidity-driven is not implausible. For example, researchers have found that the trading of Hong Kong-listed securities on the London Stock Exchange is liquidity rather than information-driven. See Sumit Agarwal et al., Where Does Price Discovery Occur for Stocks Traded in Multiple Markets? Evidence from Hong Kong and London, 26 J. Int'l Money & Fin. 46, 62 (2007).

[65] Langevoort, supra note 2, at 1050.

[66] Id at 1064.

bitrageurs to bring prices back to fundamental values.[67] Thus, it is far from clear that an institutions-only market would be as efficient as many envision.

B. Corporate Governance

Professor Langevoort also asserts that corporate governance would be improved in an institution-only marketplace. He states, "Assuming a reasonably efficient, institution-driven private market, the likelihood that the market could price the chosen forms of disclosure and governance *reasonably* well makes it likely that investors on average would be better off than under detailed mandatory rules where there is no means of escape."[68] His conclusion is not free from doubt, however.

Under traditional finance theory, a firm's stock price should equal the present value of expected future cash flows. In an efficient market, stock prices will reflect fully all publicly available information relevant to a firm's expected future cash flows.[69] Therefore, in an efficient market, if the market were supplied with information on disclosure and governance practices, the stock price would reflect the perceived benefits and risks to investors. However, for this to be the case, we must believe that markets are effi-

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[67] See Mark Mitchell et al., Limited Arbitrage in Equity Markets, 57 J. Fin. 551, 551–52 (2002). Mitchell et al. describe the ways in which imperfect information and market frictions can limit arbitrage. First, uncertainty about the magnitude of an apparent mispricing and the somewhat high costs to gather more information to learn about it may make would-be arbitrageurs hesitant to attempt to exploit the opportunity. Second, specialized arbitrageurs with undiversified portfolios bear unsystematic risks for which they demand compensation and are possibly less likely to invest in arbitrage opportunities than a diversified arbitrageur might. Also, specialized arbitrageurs may be unwilling to bear the risk of loss that accompanies the potentially long, winding process to which prices eventually converge to fundamental values. If, prior to convergence, prices diverge even farther from fundamental value, an arbitrageur who lacks access to capital when this divergence occurs may have to unwind her position prematurely and incur a loss. Id.

[68] Langevoort, supra note 2, at 1065. Note that Professor Langevoort appears to have a more measured view on market efficiency elsewhere in the article. See id. at 1074–75 ("Market efficiency is not a persuasive enough argument to lead to the conclusion that a mixed institutional-retail marketplace will consistently govern price issuers' governance and disclosure well enough such that no further regulatory intervention is warranted . . . .").

[69] See Eugene F. Fama, Efficient Capital Markets: A Review of Theory and Empirical Work, 25 J. Fin. 383, 383 (1970).

cient. Market efficiency is a highly contested area of finance, and there is a great deal of evidence calling the central tenets of market efficiency into question. I will not relay the evidence from the debate here; others have done so at some length.[70] What seems clear, however, is that standardized corporate governance requirements, which allow for comparisons across firms, rather than ad hoc individually negotiated ones, would be far easier for the market to assess and price. Thus, it is unclear that the market's supposed pricing ability would provide sufficient incentive for issuers to adopt optimal disclosure and governance practices and make investors better off as a whole.

Professor Langevoort goes on to argue that "almost certainly, corporate governance would be improved in an institution-only market because of shareholders' greater practical ability to coordinate to exercise their law-given powers . . . ."[71] I am skeptical of this claim. Institutions currently are a dominant force ostensibly well-equipped to monitor the firms in which they invest, yet most have failed to engage in this activity in a meaningful way. And in his article Professor Langevoort gives no indication as to how the absence of retail investor market participation would provide incentives for institutions to do that which they have failed to do for decades.

Many commentators have raised questions about institutions' ability to monitor corporations and whether incentives exist for them to do so.[72] For example, John Bogle, founder of the Vanguard mutual and index fund group, believes that institutions have the ability to monitor, but have a long history of passivity that makes them partially responsible for some of the corporate governance lapses in the recent past.[73] He argues that though one might think a small group of professional managers replacing a diffuse group of

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[70] See e.g., Alicia Davis Evans, The Investor Compensation Fund, 33 J. Corp. L. 223, 271–72 (2007), for a brief description of questions surrounding market efficiency and the ability of the market to price corporate governance variables.

[71] Langevoort, supra note 2, at 1065.

[72] See, e.g., Bernard S. Black & John C. Coffee, Jr., Hail Britannia?: Institutional Investor Behavior under Limited Regulation, 92 Mich. L. Rev. 1997, 2055–77 (1994) (questioning the effectiveness of institutional corporate governance in the U.K.); Jill E. Fisch, Relationship Investing: Will It Happen? Will It Work?, 55 Ohio St. L.J. 1009, 1011 (1994).

[73] Bogle, supra note 1.

millions of individuals would lead to the professional managers aggressively asserting their rights and demanding better corporate governance, that is not the case. What we observe instead, despite a few notable exceptions (for example, TIAA-CREF, unions, selected state and local pension funds), are institutions that have failed to take an active role in corporate affairs.[74]

Bogle argues that the reason for this passivity is that there are agency costs inherent in what he terms our "agency society."[75] There are too many masters to pay, Bogle asserts.[76] For example, Bogle points out that mutual fund managers receive compensation from separate corporations that seek to maximize their own return on capital, which can be in conflict with the mutual fund's mandate to maximize the fund's investment returns for the benefit of the fund's individual shareholders.[77] According to Bogle, advisory fees, sales loads, and commissions paid to brokers on portfolio transactions in return for their sales support consumed approximately 45% of the real returns earned on managed portfolios over the last 20 years.[78]

Finally, Bogle points out that, unlike institutions in the 1950s and 1960s, today's institutional investors engage in short-term speculation rather than traditional long-term investing that depends on intrinsic corporate values.[79] Bogle notes that from 1950–1965, average annual turnover for equity mutual funds was 17% per year.[80] That figure rose to 91% for the period from 1990–2005.[81] Bogle argues that investors with long-term ownership could not afford to take effective corporate governance for granted, but today's institutions, with their short investment horizons, have little reason to care.[82] Thus, it is not clear that an institutions-only marketplace would necessarily lead to better corporate governance.

Moreover, were there to be no federally mandated corporate governance practices, outside of state corporate law, the only con-

[74] Id.
[75] Id.
[76] Id.
[77] Id.
[78] Id.
[79] Id.
[80] Id.
[81] Id.
[82] Id.

straints on corporate behavior would come from negotiated deals between investors and issuers. Professor Langevoort views this as a strength of his imagined world because we would no longer have "one-size-fits-all" disclosure and governance standards.[83] Customization of desired protections has an intuitive appeal, but, as commentators in the mandatory disclosure debate have argued and as Professor Langevoort notes, there are efficiency gains that accrue from having a single standard setter and enforcer.[84] Thus, some private entity tasked with providing uniformity and order likely would step into the void. What is unclear is whether having a new private body set standards would be more efficient than leaving the task to the SEC, which has been doing this for seventy-five years.

C. The Overestimation of the Value of Diversification and the Diversification Paradox

Professor Langevoort argues that an institutions-only market can be less regulated because institutions do not need the protection of the securities laws as currently conceived. He argues that institutions have the power to force managers to comply with their corporate governance demands. He asserts, however, that even if there is some slippage and investor losses ensue, institutions, as diversified investors, will not suffer substantial harm. Thus, diversified investors may be victimized by corporate issuers, but their losses are "absorbed with less pain."[85]

For decades, securities regulation scholars have held up diversification as the ultimate protection against corporate governance failings. For example, a familiar assertion with respect to investor losses from securities fraud is that, for any diversified investor that is an active trader, fraud-related gains and losses[86] are equal over the long term.[87] Therefore, compensating these investors for securi-

[83] Langevoort, supra note 2, at 1075.
[84] Id. at 1060.
[85] Id. at 1064.
[86] A shareholder who buys stock with a price artificially inflated by fraud suffers a loss, and a shareholder who sells stock at an artificially inflated price because of fraud enjoys a gain.
[87] See, e.g., Janet Cooper Alexander, Rethinking Damages in Securities Class Actions, 48 Stan. L. Rev. 1487, 1502 (1996); Frank H. Easterbrook & Daniel R. Fischel, Optimal Damages in Securities Cases, 52 U. Chi. L. Rev. 611, 641 (1985); Donald C.

ties fraud losses is inefficient. In prior work, I find that, though investors are break even from fraud on average, there is a great deal of variance in outcomes.[88] Thus, a large number of investors of all types, and not just a few outliers, suffer extreme net losses or enjoy extreme net gains from fraud. And, indeed, contrary to the conventional wisdom among securities regulation scholars but consistent with probability theory, active traders, such as mutual funds, are less likely to be break-even from fraud than investors that trade less frequently.[89] Thus, institutional investors cannot rely on diversification or an active trading strategy to make them neutral with respect to fraud-related gains and losses.

Of course, proper diversification can protect investors from business risks generally, including securities fraud risk. The diversification of institutions is a double-edged sword in this context, however, and Professor Langevoort's thought experiment reveals the paradox. On the one hand, if institutions are fully diversified such that losses do not matter, they have no incentive to engage in any corporate governance monitoring of the type envisioned in this idealized institutions-only marketplace. Moreover, fully diversified investors also have no incentive to invest in private information to aid overall allocative efficiency.[90] On the other hand, if institutions are not diversified, while perhaps better in one sense for securities markets as these investors have an incentive to engage in monitoring and private information investment, these inadequately diversified institutions subject the individual investors, whose interests they are supposed to serve, to greater harm. One cannot know the optimal average level of institutional diversification in this context, but it is, of course, somewhere between complete diversification and no diversification. That line, however, is difficult to draw. De-

Langevoort, Capping Damages for Open-Market Securities Fraud, 38 Ariz. L. Rev. 639, 646 (1996).

[88] Davis Evans, supra note 46, at 28.

[89] Id.

[90] Along a similar vein, Black and Coffee discuss the possibility of fund managers with relatively small stakes in firms becoming "indifferent to whether a portfolio company does well." They state, however, that interviews with British investment managers reveal that other factors, including fiduciary duties and cultural norms, would serve as a check on this attitude—or at least its open expression. Black & Coffee, supra note 72, at 2064. Nonetheless, direct economic incentives for monitoring are virtually nonexistent in the case of full diversification.

spite rhetoric to the contrary, we do not want all institutions to act as if they are risk neutral. For a deregulated securities market of the sort envisioned by Professor Langevoort to function properly, investors must feel some "pain" when they suffer losses.

III. DEFINING "SUFFICIENTLY COMPARABLE" IN ISSUER MUTUAL RECOGNITION

Finally, Professor Langevoort considers the contours of mutual recognition as it extends to foreign issuers trading on U.S. securities markets. Under current law, if a non-U.S. corporation wants to list its securities on a U.S. exchange and/or raise capital in a public offering in the United States, subject to certain exceptions, it must register with the SEC. Doing so subjects the foreign issuer to U.S. regulatory requirements. Current evidence, Professor Langevoort notes, suggests that foreign issuers are hesitant to register with the SEC and subject itself to U.S. regulation, including in particular the provisions of the Sarbanes-Oxley Act, which many consider to be burdensome. Under a "mutual recognition" regime, certain foreign issuers would be permitted to list their shares on U.S. exchanges and sell shares to U.S. investors without being subject to the full panoply of U.S. securities laws and regulations. These issuers would be subject only to the laws of their home country. The question with which Professor Langevoort wrestles in his article is which foreign issuers should have this privilege. Some commentators argue that foreign issuers with home country securities laws that are "sufficiently comparable" to U.S. securities law should be afforded this privilege. Professor Langevoort agrees and argues that "sufficiently comparable" should mean laws that are "reasonably responsive to institutional investor interests."[91] Professor Langevoort asserts that the only relevant consideration with respect to foreign issuer regulation is investor protection. Since the United States has a largely institutionalized marketplace, he argues, as long as the laws of the issuer's home jurisdiction are designed to address the interests of these institutions, the issuer should be free of all U.S. regulation, save liability for actual fraud.

I am skeptical that such a standard would provide the clarity regulators need when deciding whether to extend mutual recogni-

[91] Langevoort, supra note 2, at 1079.

tion to issuers from a particular country. What exactly does "reasonably responsive to institutional investor interests" mean? Which institutional investors matter? In the United States, the interests and investment strategies of hedge funds are often quite different from those of pension funds which are also different from those of mutual funds or insurance companies. Institutional investors are not a monolithic group. As mentioned above, some institutions are in-and-out, short-term traders, while others take a more long-term view toward investment. The type of disclosures these different investors want and the types of corporate governance processes that would be relevant to these investors are different.

Even if all institutions were long-term, information traders, what would make a particular country's disclosure or governance regime "reasonably responsive to institutional investor interests"? These kinds of investors are interested in primarily two things: (1) information on the issuer's business operations in a form that will allow them to make investment decisions and (2) comfort that the company's representations are trustworthy (that is, that the investor is not likely to fall victim to fraud). As discussed previously in Part I, institutions generally want the types of disclosures required under U.S. law currently. Also, as discussed in Part II above, institutions, as a group, have not been aggressive in pressuring management to conform to best practices in corporate governance. Thus, there is still a meaningful role for regulation to play in limiting the potential for abuse. So, given these factors, I would argue, any country with securities regulations similar to what we have in the United States would have laws that are "reasonably responsive to institutional investor interests." But how would regulators determine what, short of U.S.-style disclosure and governance requirements, would be responsive to the interests of institutional investors? Line drawing in this area would be difficult, particularly given that U.S. regulators would have to consider not only the substantive regulations in place, but also the general culture of compliance and investor/corporate relations in a variety of diverse countries when making such determinations. Of course, if one believes that mandatory disclosure and governance requirements are unnecessary in an institutionalized marketplace, then line drawing might be simple: any country, including those with no legal mandates regarding disclosure or corporate governance, would qualify for mutual recogni-

tion. This position, however, is untenable. As I argue above, there are reasons why legal mandates make sense, even in an institutionalized environment. But perhaps even more important, it is hard to imagine such a strong deregulatory policy achieving political traction.

CONCLUSION

The direct influence of retail investors on securities markets, as measured by proportionate stock ownership and trading, has declined significantly since the SEC's founding, and in his insightful article, Professor Langevoort discusses the institutionalization of securities markets and the appropriate SEC response. I find Professor Langevoort's analysis of institutionalization helpful, but I disagree with his characterization of securities regulation as retail investor driven to the extent that such characterization suggests that current policies are appropriate only in a marketplace dominated by retail interests, given the benefits from regulation that accrue to large institutional investors. I also disagree with Professor Langevoort's skepticism regarding the SEC's ability to adapt to a "new" marketplace reality. In my view, the SEC is well-equipped to handle an institutionalized marketplace because this market is not actually "new." The SEC has provided oversight to the evolving marketplace for decades, and if the SEC were to adopt Professor Langevoort's views on the appropriateness of deregulating securities markets, the SEC's task would be easier than it is now, not more difficult. I also am skeptical of the idealized notion of an institutionalized market that Professor Langevoort advances in his article. There is no reason to believe that a market without retail investors would be better than the status quo, and, indeed, there is reason to fear that such a market would be worse. Though I take issue with some of Professor Langevoort's assumptions and find his proposed standard for substantial comparability in the mutual recognition context too indefinite, there is no question that his article poses several interesting questions and offers keen insights that should serve as important guideposts for the SEC going forward.