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The Agency Costs of Teamwork

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THE AGENCY COSTS OF TEAMWORK

Jeremy McClanet†

Transactional lawyers working in corporate finance commonly assume that good teamwork results in better deals. While this may be true, teamwork can also magnify agency costs between issuing companies and the lawyers that serve them. This occurs for at least two reasons. First, teamwork, as it is frequently executed, can discourage dissent by team members even though well-handled disagreement is necessary for optimal outcomes. Second, since all members of the deal team ostensibly serve the issuing company, team cohesion can mask the subtle but significant ways in which the interests of the lawyers and the underwriters diverge from those of the issuers. Whether teamwork's benefits generally outweigh its costs in capital markets deals is a question with no obvious a priori answer.

This Article presents a theoretical and empirical analysis of agency costs in team dealmaking, using initial public offering ("IPO") transactions as a case study. The Article finds support for concluding that the tension between a lawyer's dual role as agent and team member carries little-noticed but significant costs that often offset some of the benefits that come from familiarity between parties in a deal. Drawing on interviews with practitioners and analyzing a unique dataset of 2,265 initial public offering deals, I investigate the potential negative impact of team dynamics in capital markets deals by looking at collaboration between lawyers on both sides of each deal and the investment banks that frequently take companies public. The analysis reveals that while familiarity between the lawyers and bankers in a deal may promote teamwork and lead to faster deal completion times, it is also associated with systematically negative consequences for the issuing companies, such as higher levels of underpricing and a greater likelihood of securities litigation. I analyze the implications of these findings for the law of fiduciary duty, the rules

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governing lawyers' ethics, and the norms by which securities deals are executed.

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INTRODUCTION

The lawyer is the archetypal agent.¹ But to stop at agency would tell only half the story. In many transactional situa-

¹ See, e.g., MODEL RULES OF PROF'L CONDUCT pmbll. (AM. BAR ASS'N 2013) (describing the lawyer's duties: "A lawyer, as a member of the legal profession, is a representative of clients"). Where the lawyer's duties conflict, the lawyer has an "obligation zealously to protect and pursue a client's legitimate interests, within

tions, such as when companies first issue securities into the capital markets,² the lawyer-as-agent becomes the lawyer-as-team-member, collaborating with all the parties involved in the deal: the investment bank underwriters, the issuing company's management, and the lawyers on the other side. The ostensible goal of this collaboration is to get the best deal for the issuing company, which is the ultimate client of the lawyers and bankers alike. In this context, teamwork overshadows the lawyer's traditional advocacy role as parties on all sides of the table pursue a common goal.³

Transactional lawyers understand the importance of teamwork and few would dispute that it facilitates deal making.⁴ More surprising perhaps is that even when it is well executed, teamwork can undermine the very deals its members work together to complete. This is so because teamwork can both exacerbate and conceal conflicts between the interests of agents (the lawyers and investment bankers) and their clients (the issuing companies).⁵ While teamwork may improve effi-

the bounds of the law" *Id.*; see also Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 550 (1994) (surveying the standards governing legal practice and concluding that "[t]raditional norms of professional conduct are insistently client-centered").

² For the sake of simplicity, I use the general terms "capital markets" and "capital markets deals" to refer to transactions that result in a company's issuance of debt or equity securities.

³ By "teamwork," I mean a group production process in which the work of all members of the group is essential to completing the goal. See Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 777-80 (1972) (defining team production as "production in which 1) several types of resources are used and 2) the product is not a sum of separable outputs of each cooperating resource . . . [and] 3) not all resources used in team production belong to one person").

⁴ For instance, it is common for law firms to promote their reputations for teamwork in recruiting and marketing materials. See, e.g., *Emerging Companies*, COOLEY LLP, <http://www.cooley.com/emergingcompanies> (last visited Apr. 6, 2016) [<http://perma.cc/X69E-ACM6>] ("Clients who partner with us get the advantage of extensive experience, true teamwork and an entrepreneurial culture"); *Mergers and Acquisitions*, SULLIVAN & CROMWELL LLP, <http://www.sullcrom.com/Mergers-Acquisitions-Practices> (last visited Apr. 6, 2016) [<http://perma.cc/LLX5-4YS6>] ("Teamwork is a hallmark of S&C. Lawyers from multiple disciplines and offices within the Firm work with each other and with the client, as well as with investment bankers, accountants, proxy solicitors and other advisers. This close collaboration with clients and colleagues gives the M&A team great versatility. The Group can execute any type of transaction, in any industry, economic climate or geographic region.").

⁵ See generally Sanford J. Grossman & Oliver D. Hart, *An Analysis of the Principal-Agent Problem*, 51 ECONOMETRICA 7, 10-18 (1983) (explaining the principal-agency problem and advancing an approach to it). For a review of the sources of agency costs both generally and among lawyers, see George M. Cohen, *When Law and Economics Met Professional Responsibility*, 67 FORDHAM L. REV. 273, 279

ciency and yield better results in a transaction, the group's pursuit of a common goal can blur the boundaries of a lawyer's agency role and create confusion as to whether the lawyers should pay deference to the issuer or the underwriter—a confusion that is intensified when the lawyers have an incentive to ingratiate themselves with the investment banks who are repeat players in the IPO market. At the same time, teamwork can make such conflicts difficult to deal with because parties either fail to recognize them or refrain from raising objections for fear of damaging the collaborative ethos. Over time, team members' desire for cohesion and aversion to disagreement may also lead to groupthink, thus making it more difficult for lawyers to perceive how their clients' interests diverge from the goals that the group is pursuing. In short, teamwork may paradoxically be both the key to a successful deal and a threat to the lawyer's effectiveness as an advocate.

This Article provides theory and evidence of the conflict between agency and teamwork in capital markets deals, which comprise a large proportion of the work done by transactional lawyers.⁶ The analysis builds on earlier research on familiarity between repeat players in IPOs, expanding it to the question of whether teamwork has any measurable benefits or drawbacks in the context of capital markets transactions, the collaborative character of which differs from the more adversarial litigation or M&A realms. To explore that question, I draw on interviews with practitioners as well as statistical analysis of a unique dataset collected from 2,265 initial public offerings of company stock ("IPOs") conducted between 1996 and 2010. The dataset catalogues information on the banks, law firms, and the individual lawyers involved in the deals, as well as stock performance data, company financial data, disclosure from each prospectus, and litigation statistics, among other items.

(1998) ("In all principal-agent relationships, there is a divergence of interests Because the agent does not reap the full reward from his efforts on the principal's behalf, and because the agent knows more than the principal about what the agent is doing (what economists refer to as 'asymmetric information'), the agent has the incentive and opportunity to act—whether alone or in concert with others—in numerous ways that harm the principal's interests."). See also ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 252 (2000) [hereinafter BEYOND WINNING] (discussing sources of agency costs in negotiations).

⁶ See, e.g., *Dealogic - ECM Statshot*, DEALOGIC <http://www.dealogic.com/media/market-insights/ecm-statshot/> (last visited Apr. 6, 2016) [<http://perma.cc/RDW6-PSMB>] (depicting a table of equity capital markets volume by world region).

As the analysis below demonstrates, evidence of significant agency costs between issuing companies and their legal counsel is especially pronounced just when the conditions for team cohesion are at their best. Although collaboration and teamwork cannot be directly observed *ex post* in the data, a reasonable proxy is the repeated interaction between the parties involved in the deal: the investment bank underwriters, the issuing company's management, and the lawyers for each side. I analyze the interactions between the law firms and underwriters at the organizational level and then, using names of counsel drawn from SEC filings, I analyze the repeated interactions at the level of individual lawyers. The analysis reveals two broad conclusions: (1) that repeated interaction between lawyers and the investment banks is linked to some benefits one would expect to find with better teamwork from repeated collaboration on the same kind of task; and (2) that repeated interaction is also linked to evidence of significant agency costs between the issuer, its counsel, and its underwriters.

And even though their role is rarely recognized, such agency costs contribute regularly to problems that make headlines in the financial press. An illustration is the decade-long litigation over the 1999 IPO of the online toy retailer eToys.⁷ A few years after going public, eToys sued its lead underwriter, Goldman Sachs, alleging that the investment bank had intentionally underpriced the deal by selling eToys' stock cheaply to Goldman's favored clients while leaving eToys with too little capital to survive.⁸

While many observers of the case focused on the role that the investment bankers played in eToys' poor outcome, few mentioned the part played by the lawyers charged with safeguarding eToys' interests. The lawyers may have played a larger role than many assumed. When eToys launched its IPO in May 1999, it was the second IPO deal in two years that Goldman Sachs had led with the equity capital markets team of its counsel, the law firm of Gunderson, Dettmer, Stough, Villeneuve, Franklin & Hachigian, LLP.⁹ By contrast, the firm representing eToys—the Venture Law Group (“VLG”)—had

⁷ See Tom Hals, *Goldman Sachs Finally Ends Litigation Over 1999 eToys IPO*, REUTERS (Sept. 19, 2013, 2:07 PM), <http://www.reuters.com/article/2013/09/19/us-goldmansachs-etoys-settlement-idUSBRE9810VL20130919> [<http://perma.cc/A9BW-F8FQ>].

⁸ See *EBC I, Inc. v. Goldman Sachs & Co.*, No. 601805/2002 (N.Y. Sup. Ct. 2003).

⁹ This information comes from the data collected by the author. See IPO Dataset (on file with author).

worked with Goldman on five IPOs in the preceding year, each time as Goldman's own counsel.¹⁰ In fact, at the time of the eToys IPO, VLG was simultaneously representing Goldman in connection with a different company's IPO. Meanwhile, both sets of counsel had faced each other in four other IPOs during the preceding year.¹¹

The familiarity amongst the lawyers and bankers in the eToys IPO was not unusual, and likely caused the deal to run more smoothly. At the same time, one could worry that the routinized processes and sense of affiliation from repeated interaction that make teamwork successful might have undermined VLG's ability to recognize and defend eToys' best interests. That worry would be especially high if the lawyers were also concerned (consciously or not) about maintaining the ability to collaborate with the underwriter or opposing law firm, whom they expect to meet in future deals.

Agency costs in the context of transactional teamwork have received little attention in the legal literature;¹² nor have they

¹⁰ See *id.*

¹¹ See *id.*

¹² Scholarship in the past several decades has advanced the idea that cooperation among lawyers would be beneficial to both clients and society as a whole, and research has focused on finding ways to foster it among legal professionals. See, e.g., Rachel Croson & Robert H. Mnookin, *Does Disputing Through Agents Enhance Cooperation? Experimental Evidence*, 26 J. LEGAL STUD. 331, 335–40 (1997) (examining experimentally the impact of lawyer reputational concerns in improving cooperation); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97–104 (1974); Gilson & Mnookin, *supra* note 1, at 550 (considering three levels of institutional reform proposals to help facilitate cooperation between lawyers and their clients); Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 248–49 (1993) (exploring improved collaboration in overcoming negotiation barriers). Galanter describes repeat litigants (engaged in multiple similar litigations over a certain time period) with systemic goals as distinguished from one-time litigants with more self-regarding goals. See generally Galanter, *supra* note 12. Galanter argues that repeat players have a structural advantage due to better "information, [the] ability to surmount cost barriers, and [the] skill to navigate restrictive procedural requirements." *Id.* at 119.

The type of cooperation that these studies deal with is distinct from teamwork, as it is described in this Article. Cooperation, as used in other research, refers to the lawyers on opposite sides of litigation revealing information and working to come to a swift resolution for their clients. See, e.g., Gilson & Mnookin, *supra* note 1, at 550 (referring to the relationship between lawyers as "critical"). Teamwork includes cooperation but goes beyond it, encompassing the working relationships between all parties, including the lawyers, clients, and other outside experts, largely subsuming adversarialism in pursuit of a common goal. One article that obliquely discusses teamwork is Manuel A. Utset, *Producing Information: Initial Public Offerings, Production Costs, and the Producing Lawyer*, 74 OR. L. REV. 275 (1995). The essay outlines a production theory of IPO transactions, comparing lawyers to a machine serving to reduce production costs. In

been widely addressed in the realm of financial economics.¹³ In this Article, I examine teamwork's potential agency problems by exploiting quasi-random variation in the identities of the lead underwriters and the counsel representing issuers. I start from the observation that lawyers and investment bankers who perform equity capital markets deals frequently come across the same players in a given industry, geographic region, and time period. While the pool of repeat players is relatively small, it is nonetheless large enough to accommodate a great deal of variation among the sets of lawyers and bankers on any particular transaction. Underwriting banks and issuing companies typically do not pick each other's lawyers in IPOs, and once industry, geography, time period, and the influence of venture capital are controlled for, the variation in the makeup of deal teams can be treated as though random with respect to the deal-related outcomes of interest.¹⁴ I use this method to compare transactions in which the parties have worked frequently together in a deal team in a short timespan (an important ingredient and determinant of teamwork¹⁵) and transactions in which parties are less familiar with each other.¹⁶ Specifically, I examine repeated interactions between: the underwriter's counsel and the underwriter; the issuer's counsel and the underwriter (the party on the other side of the table); the issuer's counsel and the underwriter when issuer's counsel has re-

doing so, the essay describes lawyers as part of a deal team, although it does not undertake an empirical study or make theoretical predictions. Another fascinating set of findings outside of the finance setting, but consistent with the research herein, can be found in Claudia M. Landeo & Kathryn E. Spier, *Incentive Contracts for Teams: Experimental Evidence*, 119 J. ECON. BEHAV. & ORG. 496, 496–511 (2015).

¹³ See generally 1 HANDBOOK OF CORPORATE FINANCE: EMPIRICAL CORPORATE FINANCE 270–81 (B. Espen Eckbo ed., 2007) [hereinafter HANDBOOK OF CORPORATE FINANCE] (reviewing the voluminous empirical finance literature on capital markets).

¹⁴ I note that in IPOs of companies that have venture capital backing, the venture capital investors may have an influence over the choice of law firms. However, the results of the analysis are the same for both VC-backed and non-VC-backed deals. The results similarly survive adding controls for the presence of VC backing, indicating that this factor in counsel selection is not important to the result. See *infra* Part III.B.

¹⁵ See Steve W.J. Kozlowski & Daniel R. Ilgen, *Enhancing the Effectiveness of Work Groups and Teams*, 77 PSYCHOL. SCI. PUB. INT. 77, 81 (2006). (“[R]epeated interactions among individuals that constitute processes tend to regularize, such that shared structures . . . crystallize and then serve to guide subsequent process interactions. Process begets structure, which in turn guides process.”).

¹⁶ I recognize that, at first blush, this description of the empirical approach raises obvious concerns about selection. I address selection using a number of strategies designed to rule it out. See *infra* Part III.B.2.

cently served as the underwriter's counsel in an IPO; and issuer's counsel and underwriter's counsel.

The results are striking for their contrasts. For example, an important pattern emerges with respect to the opening day price performance of an issuing company's stock revealing positive and negative implications. Opening day price performance, often referred to as the "bounce," is considered to be essential to a successful deal, and underwriters often underprice a deal by 15% of what they believe the fully distributed trading value will be to encourage a bounce.¹⁷ However, an excessively high bounce is detrimental to the issuing company, because it means the company sold the stock at too low a price (i.e., underpriced) and could have captured more of the value out of the deal.¹⁸ When the *underwriter's* counsel has represented an underwriter repeatedly within the past year, the first-day bounce of the security they create increases by 3–5% on average for each interaction, when controlling for other factors that might have an impact on first-day performance. This can be interpreted as a relatively modest indication of good deal performance because it indicates stronger demand in the issuance.

However, where the *issuer's* counsel and underwriter have been on the same deal team frequently in the past year (as was

¹⁷ Underwriters frequently attempt to attain a first-day bounce by intentionally underpricing the IPO stock, typically by 10–15% of the stock's expected equilibrium trading price. See Sean J. Griffith, *Spinning and Underpricing: A Legal and Economic Analysis of the Preferential Allocation of Shares in Initial Public Offerings*, 69 BROOK. L. REV. 583, 589, 650 (2004). The purpose of underpricing is reported to be ensuring strong demand and attracting publicity to the stock. See *id.* at 602–03. For example, sealed documents from the eToys litigation made public in early 2013 feature a Goldman Sachs pitchbook stating that an IPO should be priced at a "10–15% discount to the expected fully distributed trading level . . . [which is its] anticipated 'seasoned' trading value 1–3 months after the offering." Joe Nocera, *eToys vs. Goldman Sachs: The Documents*, N.Y. TIMES (Mar. 9, 2013), <http://www.nytimes.com/interactive/2013/03/10/opinion/sunday/nocera-goldman-sachs-etoys.html> [<http://perma.cc/F5CR-QDBC>] (publishing sealed documents from EBC I, Inc., v. Goldman Sachs & Co., No. 601805/2002 (N.Y. Sup. Ct. 2003)).

¹⁸ See Griffith, *supra* note 17, at 600. Underpricing benefits underwriters by allowing them to offer extremely high returns to favored investors while losing out on very little by way of commissions. See *id.* at 593–94 ("[U]nderwriters may be able to increase profits above their base compensation by engaging in underpricing. This may seem contradictory since, as noted above, underwriter compensation is a percentage of aggregate offering proceeds, which are maximized by raising, not lowering, the offering price. However, underpricing creates an additional profit opportunity for underwriters by enabling the practice of spinning."); see also Tim Loughran & Jay Ritter, *Why Has IPO Underpricing Changed Over Time?*, 33 FIN. MGMT. 5, 8 (2004) (noting that levels of underpricing above several percent implies that underwriters are not acting in the interests of issuers).

the situation in the eToys IPO) the price increase is much higher: the bounce increases by 9% on average for each past interaction, controlling for other factors. When the issuer's counsel has represented the underwriter in an IPO in the past year, the bounce is 12–16% higher than average, again holding other factors constant.¹⁹ Although a moderate level of price jump is to be expected in an IPO, the higher average first-day jump when the issuer's counsel has worked repeatedly with the underwriter is troubling, because it suggests a relationship between the issuer losing money in the deal and the issuer's counsel having a more familiar relationship with the underwriter. The underwriter, for its part, is less troubled by money left on the table. In the eToys case, for example, documents were produced in court that demonstrated how the money left on the table was captured by the underwriter's clients, which in turn generated future business and favorable relationships, all at the issuer's expense.²⁰ In addition to money left on the table, a troubling pattern emerges when litigation outcomes are analyzed: when the issuer's counsel has represented the underwriter in the preceding year, the associated probability that

¹⁹ See Appendix Table 1. Note that the results described in this paragraph are for repeated interactions among firms. When repeated interactions between individual lawyers are analyzed, the results remain significant and become larger in magnitude for all four varieties of interaction studied. This indicates that the observed effect is driven by the interactions between the individuals involved.

²⁰ By way of illustration, one commentator on the eToys IPO observed that:

eToys opened at \$78 per share, which meant that Goldman's clients were sitting on a profit of \$475 million the minute that the stock started trading on the open market. In most cases, the clients cashed out—which was smart, because eToys didn't stay at those levels for long. But if Goldman got back 40% of those profits in trading commissions, then it made \$190 million in commissions [from clients], compared to that \$11.5 million in fees [from doing the IPO].

If Goldman had raised the IPO price to \$37 per share, then yes its fee income would have gone up by \$10 million, to \$21.5 million. But—assuming the stock would still have opened at \$78—its clients' opening-tick profits would have come down to \$336 million, and Goldman's 40% share of that would also have come down, to \$135 million. Total income to Goldman? \$156.5 million, rather than \$201.5 million. If the IPO price were higher, Goldman's total take would have gone *down* by about \$45 million

If you look at the chart of what happened to the eToys share price in the first few months after the IPO, the price fluctuated around \$40 a share—which means that by Goldman's own standards, it really ought to have priced the IPO much closer to \$37 than to \$20.

the issuing company will be subject to a securities class action lawsuit nearly doubles.²¹

These results, along with those described in more detail in this Article, provide evidence that while teamwork enhances a deal, the familiarity and collaboration that go hand-in-hand with teamwork have the potential to enhance the costs of agents' misaligned incentives. Put simply, frequent interaction is a core component of teamwork, and groups who work together form better teams.²² However, teamwork in a context where adversarial interests exist²³ may pose dangers with respect to the lawyer's fundamental duties as an agent.

The rest of this Article is organized as follows. Part I provides an overview of the IPO process and the role of the issuer, the investment banks, and the lawyers for each side. Part II explains the empirical strategy and develops the hypotheses to be tested. Part III discusses the quantitative results, their interpretation, and competing possible interpretations. Part IV provides a discussion of the legal and practical implications of the results.

I

BACKGROUND: COLLABORATION IN THE IPO PROCESS

This section provides an overview of the process by which IPO deals typically occur. Generally speaking, the team doing an IPO works to complete a common set of tasks: gathering information about the issuing company, creating an offering document, marketing the issuing company to investors, liaising with the Securities Exchange Commission, and stock exchanges to ensure that regulatory requirements are met.²⁴ Although all the members of the deal team take part in all of these tasks, they also take on specialized roles that are impor-

²¹ See Appendix Table 4. All specifications include controls for industries, years, and other confounds. The majority of the results are significant at the 5%, 1%, or 0.1% level using robust standard errors, with a few results significant at the 10% level using robust standard errors.

²² See J. Richard Hackman, *Why Teams Don't Work*, in 4 SOCIAL PSYCHOLOGICAL APPLICATIONS TO SOCIAL ISSUES: THEORY AND RESEARCH ON SMALL GROUPS, 245, 249–50 (R. Scott Tindale et al. eds., 2002).

²³ See *EBC I, Inc. v. Goldman Sachs & Co.*, No. 601805/2002 (N.Y. Sup. Ct. 2003) (describing the interests of the underwriter and issuer in a firm commitment underwriting as “adversarial” in nature and rejecting the assertion that the underwriter had a fiduciary duty to the issuer with respect to the IPO price negotiation).

²⁴ See generally Carl W. Schneider, Joseph M. Manko & Robert S. Kant, *Going Public: Practice, Procedure, and Consequences*, 27 VILL. L. REV. 1 (1981) (describing the tasks performed by bankers, lawyers, and issuing company management when doing an IPO).

tant to understand for analyzing the team dynamic and the emergence of agency costs.

A. The Role of Issuers and Underwriters

An IPO begins when a privately held company decides to issue publicly traded equity.²⁵ A company's decision to "go public" frequently turns on the need to raise capital in order to fund its operations and grow.²⁶ The issuing company selects an investment bank to act as the managing underwriter to shepherd the transaction to completion.²⁷ The investment banks that do IPOs often complete dozens of such transactions a year, and thus have process expertise in documenting the deals, liaising with the SEC, coordinating the various parties, and working out the financial aspects of the offering.²⁸ In addition, they take the lead in marketing the deal to the initial investors, most of whom are institutional investors such as mutual funds, pension funds, and hedge funds with whom the underwriter has relationships.²⁹

Issuers choose underwriters using one of two general methods: the issuer can auction the position to the most competitive bidder among a group of banks in a process known as competitive underwriting, or the issuer can choose an underwriter based on informal negotiations in what is known as negotiated underwriting.³⁰ Competitive underwriting seldom occurs in the U.S. market except in certain circumstances for which it is legally mandated.³¹ For negotiated underwritings,

²⁵ See Griffith, *supra* note 17, at 585 ("An initial public offering of equity, or 'IPO,' is a company's first sale of shares into the public market.")

²⁶ There are other reasons a company might go public in addition to the need for capital. For example, a company may need to create a liquid market for its stock to use it as a type of employee compensation.

²⁷ Occasionally two managing underwriters will be appointed, often referred to as joint lead managers or joint bookrunners. See Royce de R. Barondes et al., *Underwriters' Counsel as Gatekeeper or Turnstile: An Empirical Analysis of Law Firm Prestige and Performance in IPOs*, 2 CAP. MKTS. L.J. 164, 166 (2007) (describing the process of selecting the underwriter). This happens when the IPO is expected to be particularly large. There are 826 observations involving joint managers in the dataset, comprising 30.3% of the deals. As explained below, these observations were weighted to avoid a double-counting effect.

²⁸ See *id.*

²⁹ See *id.* at 168.

³⁰ JOHN C. BURCH, JR. & BRUCE S. FOERSTER, CAPITAL MARKETS HANDBOOK 272 (6th ed. 2016) [hereinafter CAPITAL MARKETS HANDBOOK].

³¹ For instance, underwriters for municipal securities are usually chosen by auction. The reason for issuers' overwhelming preference for negotiated underwriting has puzzled commentators. See Yoram Barzel, Michel A. Habib & D. Bruce Johnsen, *IPO Syndicates, Private Foreknowledge, and the Economics of Excess Search* 7 (2000) (unpublished manuscript) (on file with author).

the issuer chooses the lead manager from a number of eligible banks after a series of meetings, colloquially known as “beauty contests” or “bake sales,” where each underwriter will showcase their experience and provide an early estimate of the price at which it will market the issuer’s stock.³² Negotiated underwritings in the U.S. market overwhelmingly involve so-called firm commitment contracts—contracts that require the underwriter first to purchase all of the issuer’s shares itself,³³ then resell the shares to investors in the market.³⁴ The effect of this is that the underwriter is liable for any shares that cannot be sold in the market.³⁵ As compensation, the underwriter takes a percentage of the total proceeds of the deal. In U.S. deals completed in recent years, most IPOs have had a gross spread of 7% of the total amount raised.³⁶

For most deals, underwriters form syndicates with a number of other banks to help distribute the shares and spread the sales effort, costs, and risk.³⁷ A common syndicate includes ten to twenty banks, although syndicates of over one hundred banks are not unheard of.³⁸ Regardless of the syndicate size, the first underwriter chosen by the issuer becomes the “lead” or “managing” underwriter and retains control of almost every aspect of the IPO process.³⁹ The other syndicate members are

³² See Barondes et al., *supra* note 27, at 166 (describing the process of selecting the underwriter). The choice of lead underwriter may also be influenced by preexisting relationships with an underwriting firm. See CAPITAL MARKETS HANDBOOK, *supra* note 30, at 272.

³³ See Griffith, *supra* note 17, at 590. Two other types of contracts sometimes found in U.S. underwritings are best efforts contracts and standby contracts. See *In re Nat’l Ass’n of Secs. Dealers, Inc.*, Exchange Act Release No. 17,371, 21 SEC Docket 930 (Dec. 12, 1980). Since these contracts are rarely used, this Article does not focus on them.

³⁴ See *In re Nat’l Ass’n of Secs. Dealers, Inc.* at *3 (describing firm commitment underwriting).

³⁵ In practice, this is rarely a problem, and most IPOs are oversubscribed. See Griffith, *supra* note 17, at 590.

³⁶ See *id.* at 592; see also Hsuan-Chi Chen & Jay R. Ritter, *The Seven Percent Solution*, 55 J. FIN. 1105, 1107–12 (2000) (describing the 7% underwriting discount that persists in most IPOs, particularly those in the \$30–120 million range, and arguing that its persistence is a result of implicit collusion, or strategic pricing, amongst underwriters).

³⁷ See Yoram Barzel, Michel A. Habib & D. Bruce Johnsen, *Prevention Is Better Than Cure: The Role of IPO Syndicates in Precluding Information Acquisition*, 79 J. BUS. 2911, 2911–23 (2006). A number of theories have been advanced to explain the use of underwriting syndicates. One theory suggests that it is done to remove the threat of speculation and opportunism by other banks. See *id.*

³⁸ See Barzel, Habib & Johnsen, *supra* note 31, at 2929 (describing the trend toward larger syndicates).

³⁹ It is not unusual for large IPOs to have multiple lead underwriters as well. In this case, one of the lead underwriters typically maintains control of the transaction, selects counsel, and manages the deal. This underwriter is known as the

relatively passive apart from their role helping to place their allocation of shares.⁴⁰

Once selected, the lead underwriter appoints counsel to advise it and the rest of the syndicate.⁴¹ Due diligence commences shortly thereafter and the issuer, the bankers, and both sets of counsel begin drafting the offering prospectus—the document that serves as the primary marketing document for the IPO.⁴² This preliminary prospectus (referred to as the red herring) is filed with the SEC on Form S-1.⁴³ Although the price of the stock is not set when the preliminary prospectus is filed, SEC regulations require that it contain a bona fide price estimate, usually given as a range.⁴⁴

When the prospectus is filed and while the SEC review is taking place, the lead underwriter and issuer management commence a marketing effort, the “road show,” during which they will meet with investors in different cities and build a book of indicative orders for the stock based on the information in the preliminary prospectus.⁴⁵ The investors to whom the IPO is marketed are typically large institutional investors. Upon completion of the roadshow, the lead underwriter and the issuing company’s management agree on a final price for the stock, largely influenced by the level of investor demand revealed on

“lead left” underwriter due to the fact that its name appears on the leftmost side of the prospectus cover. See Telephone Interview with Attorney (D) (name withheld by request) (July 23, 2013) (on file with author) [hereinafter Interview with D]. For this study, I analyzed the data using the lead left as the underwriter, and using a method to de-weight observations with multiple underwriters.

⁴⁰ See Shane A. Corwin & Paul Schultz, *The Role of IPO Underwriting Syndicates: Pricing, Information Production, and Underwriter Competition*, 60 J. FIN. 443, 446 (2005) (“These [non-managing syndicate members] do less work than co-managers, but are also relatively cheap to include.”).

⁴¹ See CAPITAL MARKETS HANDBOOK, *supra* note 30, at 232.

⁴² See Barondes et al., *supra* note 27, at 166–67 (describing the preliminary stages of the IPO process).

⁴³ See *id.*; see also JOHN C. COFFEE, JR. & HILLARY A. SALE, SECURITIES REGULATION: CASES AND MATERIALS 100–01, 115 (11th ed. 2012) (describing the process of drafting the “red herring,” or preliminary prospectus). The preliminary prospectus can be filed on other forms as well: companies under a certain size can file on Form SB-1, and certain types of companies can file on Form S-3. 17 C.F.R. §§ 228.501, 229.501 (2016). These are collectively called “S-1” in this Article for ease of reference.

⁴⁴ 17 C.F.R. §§ 228.501, 229.501. See also Barondes et al., *supra* note 27, at 166–67.

⁴⁵ Investors cannot yet make binding orders, but can indicate how much stock they would purchase, and they typically abide by their indications. See Securities Act of 1933 § 5(a), 15 U.S.C. § 77(e) (2012); see also COFFEE & SALE, *supra* note 43, at 115 (“Sales are . . . still barred . . . and the underwriter also cannot accept customers’ oral offers to buy. But the underwriters can ‘build their book,’ collecting non-binding indications of interest from customers, which they hope to convert into sales once the registration statement is declared effective.”).

the roadshow, as well as market conditions.⁴⁶ Setting the final price is technically a negotiation; however, issuers tend to rely heavily on their underwriters' advice in this process.⁴⁷ When the final price is agreed upon and the prospectus is approved, final pricing information will be filed and a final prospectus and registration statement will be deemed effective by the SEC.⁴⁸ Once the registration statement becomes effective, the shares are sold to investors at the final price, thus entering the market.⁴⁹

B. Issuer's Counsel and Underwriter's Counsel

When a company decides to issue stock to the public, its management retains counsel to assist in the process if the company does not already have legal counsel. The issuer's counsel will be part of the transaction from the very beginning.⁵⁰ In many cases, it will assist the issuer after the deal is concluded in its ongoing reporting obligations under the Securities Exchange Act of 1934.⁵¹ Underwriter's counsel is in turn retained once the underwriter is selected and the syndicate is formed.⁵² Although underwriter's counsel represents the entire syndicate, the lawyers take their instructions almost exclusively from the lead underwriter.⁵³

The issuing company's choice of counsel is important, because the issuer's counsel typically takes a leading role in coordinating the parties to the deal, conducting the due diligence, drafting the prospectus, and resolving legal uncertainties in connection with the issuance.⁵⁴ Perhaps most importantly, the issuer's lawyers serve as guide and advisor to the issuing com-

⁴⁶ See Barondes et al., *supra* note 27, at 168 ("In a customary IPO, there is not a definitive agreement on the price at which the underwriters will resell the stock to the public until after the preliminary marketing process is complete . . . SEC rules, however, require that a preliminary prospectus for an IPO circulated prior to the pricing include a bona fide estimate of the price, frequently stated as a range, at which the stock will be sold. This price estimate may change in subsequent preliminary prospectuses, as the managing underwriter acquires information during the marketing process." (footnote omitted)).

⁴⁷ *See id.*

⁴⁸ See 17 C.F.R. §§ 240.424(b), 230.430A (2016); *see also* COFFEE & SALE, *supra* note 43, at 129.

⁴⁹ See COFFEE & SALE, *supra* note 43, at 129.

⁵⁰ *See id.*

⁵¹ See Securities Exchange Act of 1934, 15 U.S.C. § 78a (2012); *see also* CAPITAL MARKETS HANDBOOK, *supra* note 30, at 274.

⁵² See Interview with D, *supra* note 39.

⁵³ *See id.*

⁵⁴ See Schneider et al., *supra* note 24, at 17–19 (discussing the role played by the issuing company's counsel when beginning an IPO).

pany's management and other personnel involved in the deal, most of whom will be unfamiliar with the world of capital markets.⁵⁵ Both through advice and by example, the issuer's lawyers counsel the issuer's management on how to deal with the underwriters on issues related to due diligence, prospectus and marketing disclosure, and the market norms for IPOs in a given industry.⁵⁶

The lawyers for both sides also play an important role in conducting due diligence and drafting the prospectus.⁵⁷ The prospectus is usually drafted with participation of the lawyers, bankers, and issuing company's management, typically beginning with a precedent and going through numerous iterations of drafting, commenting, and revising until the preliminary version to be filed with the SEC is complete.⁵⁸ The counsel for the company going public typically takes primary responsibility for drafting most parts of the prospectus and has a great deal of influence over the draft.⁵⁹ However, the underwriter's counsel has a great deal of impact as well.⁶⁰ SEC rules set out the information to be disclosed⁶¹ and also require the inclusion of

⁵⁵ See *id.*; see also Telephone Interview with Attorney (W) (name withheld by request) (Feb. 2, 2014) (on file with author) [hereinafter Interview with W].

⁵⁶ See Schneider et al., *supra* note 24, at 17–19 (“Management cannot properly take a passive role and rely entirely upon counsel to identify the information to be assembled, verify the information, and prepare the registration statement properly. Clients may have, quite appropriately, a different expectation of the lawyer’s role relating to those parts of the prospectus which deal with primarily ‘legal’ matters such as descriptions of litigation, legal proceedings, tax consequences of various transactions, interpretation of contracts, and descriptions of governmental requirements.”).

⁵⁷ See *id.* at 17.

⁵⁸ See Barondes et al., *supra* note 27, at 167 (“This drafting is an iterative process, as knowledge gained in due diligence informs what needs to be said about the issuer.”)

⁵⁹ See Schneider et al., *supra* note 24, at 14–15 (“The ‘quarterback’ in preparing the registration statement is normally the attorney for the company. Company counsel is principally responsible for preparing the non-financial parts of the registration statement.” (footnote omitted)).

⁶⁰ See *id.* at 16 (“Close cooperation is required among counsel for the company, the underwriters’ counsel, the accountants, and the printer.”).

⁶¹ See Regulation S-K, Items 10–915, 17 C.F.R. §§ 229.10–.915 (2016). Required disclosure includes: (1) information about the company’s business, see Regulation S-K, Items 101–03, 17 C.F.R. §§ 229.101–.103; (2) the management’s discussion and analysis of the financial condition of the company, including future projections if desired, see Regulation S-K, Item 303, 17 C.F.R. §§ 229.303; (3) financial statements and an auditor’s opinion covering them, see Regulation S-X, 17 C.F.R. § 210; (4) a description of material contracts, see Regulation S-K, Items 101-915, 17 C.F.R. §§ 229.101-.915; (5) information about legal and regulatory problems facing the company, see Regulation S-K, Item 103, 17 C.F.R. §§ 229.103; (6) information about the officers and directors of the company and their compensation, see Regulation S-K, Items 403-05, 17 C.F.R. §§ 229.403-05;

any information needed to make the disclosure in the prospectus “not misleading.”⁶² The SEC reviews the preliminary prospectus for conformity with its regulations, although it does not typically pass judgment on the accuracy of the information it contains.⁶³

Counsel will also usually be very involved in the negotiation of the underwriting agreement, which is the agreement that governs the legal relationship between the underwriter and the issuer.⁶⁴ The underwriting agreement contains the terms upon which the underwriter will purchase the shares at an agreed-upon discount and distribute them to investors and to other members of the underwriting syndicate, as well as setting out the advising and marketing services that the underwriter agrees to provide.⁶⁵

C. Agency and Teamwork in IPOs

The relationships between the parties described in the preceding section differ from the relationships in other legal contexts. Unlike the litigation or M&A contexts in which agents represent interests that are clearly adverse to one another, in the IPO context *all* the parties ultimately serve as agents of the issuer. The issuer hires the underwriter, and the underwriter’s counsel works to help the underwriter serve as the issuer’s agent. The parties whose paths frequently cross understand that their job is to reach a common goal, and they see their role as ultimately serving the issuing company.⁶⁶ This is important for two reasons. First, it gives rise to the expectation that all parties will function cooperatively, thus elevating the importance of teamwork.

Second, because all parties purportedly work as agents of the issuer, but in fact have divergent interests, the principal-

and certain industry specific information, *see* Securities Exchange Act of 1934 Industry Guides, 17 C.F.R. §§ 229.801-02.

⁶² *See* 17 C.F.R. § 230.408(a) (2016).

⁶³ *See* Schneider et al., *supra* note 24, at 19–22 (discussing the SEC comment and review process); *see also* William W. Barker, *SEC Registration of Public Offerings Under the Securities Act of 1933*, 52 BUS. LAW. 65 (1996) (describing the SEC staff’s role in the registration and disclosure process).

⁶⁴ *See* Schneider et al., *supra* note 24, at 16–17.

⁶⁵ *See* Griffith, *supra* note 17, at 592.

⁶⁶ *See* Schneider et al., *supra* note 24, at 19–22 (discussing the importance of the deal team having a common understanding of their goal for the deal to be successful); Interview with W, *supra* note 55.

agent problem⁶⁷ is especially sharp but for the parties in the deal to perceive. The possibility of a principal-agency problem (or the agency costs problem) arises whenever agents are hired to perform “imperfectly observable discretionary actions that affect the welfare of the principal.”⁶⁸ Because the principal does not have the skill to perform the task itself or to monitor the performance of the agent, the agent may take actions for its own benefit at the expense of the issuer.⁶⁹ To be sure, agency costs arise whether or not parties collaborate or perform tasks in a group. However, conditions like familiarity and cohesion that make groups work well together can also undermine an agent’s incentives to serve a principal in both overt and subtle ways. For instance, in the IPO context, lawyers for the issuer may think they are serving their client by showing solicitude to their counterparts and helping a deal to go smoothly, when in reality it would be more in their client’s interests if the lawyers pushed harder to secure better terms for the issuer. More subtly, but no less importantly, members of the issuing company’s management frequently have no experience in capital markets and look to their lawyers to guide them through the unfamiliar terrain, explain what is “normal” or “market standard,” and demonstrate how to interact with other parties to the deal.⁷⁰ If the issuer’s lawyers are deferential to their colleagues in the banks or side with the banks whenever the issuer’s management raises an objection to something that everyone else takes for granted as part of the typical deal, the lawyers might inadvertently downplay the extent to which the incentives of the banks and issuers diverge, at least on certain issues. When everyone on the deal team believes they are working toward the same goal—which is nominally to serve the issuer—it may be difficult to recognize the ways in which the team is not serving the issuer well. The team-like structure of an IPO makes it more difficult for the issuer and its counsel to perceive where its interests diverge from those of the underwriter, who appears to be serving the issuer’s interests as part of the team.

Moreover, teamwork can diminish counsel’s ability and incentive to monitor the underwriter on behalf of the issuer. Counsel’s ability to monitor can be compromised if counsel foresees working for the underwriter again in the future and if

⁶⁷ See Robert H. Sitkoff, *An Economic Theory of Fiduciary Law*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 197, 198–200 (Andrew S. Gold & Paul B. Miller eds., 2014).

⁶⁸ See *id.* at 198.

⁶⁹ *Id.* at 198–99.

⁷⁰ See Schneider et al., *supra* note 24, at 17–19.

the consequences of failing to monitor seem small because the underwriter's goals are purportedly in line with the issuer's.⁷¹ The better the team dynamic among the repeat players in a deal, the more likely it is that those same players will have less incentive to monitor. The key question is whether or not the benefits of teamwork trump any possible agency costs that come with it.

II

HYPOTHESES AND EMPIRICAL ANALYSIS

Drawing from the literature on social psychology as well as empirical finance, I explore here hypotheses about the outcomes of IPOs that can be used to assess the impact of collaboration on lawyers' agency. By design, detailed accounts of the meetings and telephone calls involved in a deal are usually not kept or made available to the public. Therefore, the analysis of collaboration and team dynamics is necessarily indirect. Nonetheless, the indirect evidence provides insights into some of the dynamics at work in a deal.

Methodologically, the research described below occurred using the following steps. First, I spoke with practitioners from investment banks and law firms that represent issuers and underwriters to find out what impact they thought teamwork has, both positive and negative.⁷² I then looked at the literature on collaboration and teamwork to fit the practitioners' insights into a theoretical framework and formulate general hypotheses. I also looked at the empirical corporate finance literature to determine what sort of quantitative analysis has been done, what sort of data can be analyzed that could provide insight into the general hypotheses, and what kind of results could be expected to support or refute the hypotheses.⁷³ Finally, after gathering and analyzing the data, I again interviewed practitioners to help further illuminate the results.

The methodology employed for this research undoubtedly has limitations. First, there is a relatively narrow set of IPO outcomes that can be measured quantitatively, and they may only tell part of the story with regard to collaboration or repeated interaction. Second, despite robust efforts to eliminate

⁷¹ See Interview with W, *supra* note 55.

⁷² As previously noted, this Article builds on earlier work on familiarity among underwriters and their lawyers. This methodology arose in part from that research.

⁷³ This component of the work builds upon research previously published by the author, finding an effect from repeated interaction in dealmaking.

errors in the interpretation of the results, such errors may exist. Third, interviews with practitioners may be subject to cognitive bias or selective memory, despite efforts to ask questions openly and in a way that would not lead interviewees to any particular answers.

Nonetheless, even given the inherent limitations of the research method, the results and the analysis below are compelling. The many various quantitative tests, when considered together, reveal a consistent story that fits well with the practitioner accounts and the theoretical literature. In addition, the statistical results are robust, and withstand numerous tests for bias, as well as tests to assess whether alternative interpretations would be more appropriate. The hypotheses tested, the results, and the various checks are further described below.

A. Hypotheses on Team Dynamics and IPO Deal Outcomes

The empirical and psychological research on teams suggests that team members' familiarity from working together repeatedly is a critical component of teamwork.⁷⁴ A group's repeated performance of a collective task is commonly assumed to have positive benefits for the group's ability to repeat that task successfully. However, the literature on teamwork provides a mixed picture on the impact of group repetition on performance, highlighting upsides as well as potential problems.⁷⁵

1. *Positive Effects of Repeated Interaction*

To the extent that it is helpful, repeated activity among members of a team or group improves team dynamics by helping to build relationships amongst those working together recurrently.⁷⁶ The literature describes members' repeated interactions in pursuit of common goals to be essential inputs to, and hallmarks of, a successful team, as measured by factors such as the speed and efficiency with which a group com-

⁷⁴ See Hackman, *supra* note 22, at 250 (citing NTSB statistics that 73% of commercial aviation accidents in its database occurred on a crew's first day flying together, and 44% of those accidents happened on the crew's very first flight; and highlighting findings that airline crews and teams of doctors who have worked together in the past perform significantly better, even when fatigued, than do rested crews who have not worked together before).

⁷⁵ *Id.* at 245-56.

⁷⁶ See Kozlowski & Ilgen, *supra* note 15, at 81; see also Interview with D, *supra* note 39; Interview with W, *supra* note 55.

pletes a task and the quality of the output.⁷⁷ These benefits accrue for several reasons. Most relevantly, groups benefit from repeating complex tasks together because such activity facilitates a shared understanding of the goals of those tasks, what roles each group member will take on, and how people in each role will leverage their particular skill or expertise.⁷⁸ The literature explains that repeated interaction allows some processes to become routinized, so that each member of the team can leverage his or her expertise more effectively on tasks that cannot be routinized.⁷⁹

Repeated interactions also help to create common norms of communication and behavior, including a common language for discussing the activity, and a common set of mental models for performing a task.⁸⁰ Perhaps most importantly, familiarity establishes trust among the team's members that does not exist in the same sense that it does for non-group members. The benefits of repeated interaction accrue most strongly when group membership remains consistent from task to task: experimental studies suggest that when team members have worked together repeatedly, replacing one team member with a new person results in a loss of some of these gains from repeated interaction as the new member adjusts to an unfamiliar group dynamic.⁸¹

⁷⁷ See Kozlowski & Ilgen, *supra* note 15, at 77 (reviewing and providing a meta-analysis of fifty years of psychological research on teams). According to this literature, teams become cohesive as "task cycles . . . 'entrain' the team to task dynamics by making specific, iterative, and repeated demands on team processes [that] . . . compile and improve as team members accrue experiences and learn how to work together better." *Id.* at 81 (citations omitted). A theme in the literature is that teams function as a unit better the more their members interact: "[I]t is also the case that the repeated interactions among individuals that constitute processes tend to regularize, such that shared structures . . . crystallize and then serve to guide subsequent process interactions. Process begets structure, which in turn guides process." *Id.*; see also Hackman, *supra* note 22, at 246–55 (providing examples of benefit from repeated interaction, while cautioning that more is needed).

⁷⁸ See Kozlowski & Ilgen, *supra* note 15, at 81; see also Schneider et al., *supra* note 24, at 17–19 (discussing the need for deal team members to have a common understanding of the tasks to be accomplished).

⁷⁹ See Kozlowski & Ilgen, *supra* note 15, at 106 ("As dyadic interactions become routinized, the focal level of development shifts to the team. A process of network development yields a flexible network of role interdependencies that enables continuous improvement and adaptability.").

⁸⁰ See *id.*

⁸¹ See *id.* at 86. In one interesting experiment, teams were assembled to create origami birds. Teams gained efficiency from repeating the task together multiple times, but they lost efficiency when members of the existing team were replaced with new members. See *id.*

2. *Negative Effects from Repeated Interaction*

Repeated interaction and teamwork may also have drawbacks in a number of ways. First, even very good team dynamics can lead to groupthink—the tendency for members of a group to converge on a set of ideas even when they are incorrect.⁸² This can compromise the ability of team members to make independent judgments, which is particularly problematic for lawyers, whose task is to protect their clients' interests within the group. For example, lawyers, who are not accustomed to judging the market impact of different types of disclosure, may give undue deference to the wishes of the underwriters who often take the lead in deciding on matters such as precedent documents, pricing, and the types of information about the issuer to disseminate.⁸³ Second, some literature suggests that teams that work together frequently may sabotage themselves by becoming overly risk averse. When a group performs a task several times successfully, for each additional iteration of the task, group members will worry more about disrupting the group dynamic and take fewer risks even where they might be warranted, for fear of breaking what is seen as a successful streak.⁸⁴

In addition, familiarity may bring other drawbacks that, while not directly related to team dynamics, are made more pernicious and harder to detect in the context of teamwork. The team atmosphere among repeat players in the IPO world may undermine the ability of the issuer's counsel to provide the

⁸² For a discussion of theory and research on groupthink, see generally Marlene E. Turner & Anthony R. Pratkanis, *Twenty-Five Years of Groupthink Theory and Research: Lessons from the Evaluation of a Theory*, 73 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 105, 105–15 (1998) (examining the historical development of the groupthink model and the recent responses to the body of empirical evidence amassed by it); see also IRVING L. JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES 7–9 (2d ed., rev. 1983) (articulating first the theory that groups converge on common ideas that are not always correct); Chip Heath & Rich Gonzalez, *Interaction with Others Increases Decision Confidence But Not Decision Quality: Evidence Against Information Collection Views of Interactive Decision Making*, 61 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 305, 322–24 (1995).

⁸³ A similar effect has been described as a symptom of “groupthink.” See CASS R. SUNSTEIN & REID HASTIE, WISER: GETTING BEYOND GROUPTHINK TO MAKE GROUPS SMARTER 15 (2015) (“[G]roups fall into herds, as group members follow the statements and actions of those who speak or act first, even if those statements and actions lead the group in unfortunate . . . directions.”).

⁸⁴ See Lindred L. Greer, Heather M. Caruso & Karen A. Jehn, *The Bigger They Are, the Harder They Fall: Linking Team Power, Team Conflict, and Performance*, 116 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 116, 124 (2011) (showing the higher levels of well-processed conflict in teams fully explains better team performance as compared to less successful teams).

best representation by removing the incentive to take an adversarial posture even when one is warranted.⁸⁵ The effect of this would be largely unintentional, indirect, and difficult to detect. But if the lawyers for the issuer have a high degree of trust and a sense of affiliation with the bankers on the deal, that may make it difficult for the lawyers to think about the issuer's interests objectively. They may instead take for granted that the bank's point of view is more persuasive and aligned with industry norms. The fact that the managers of issuing companies are often relatively new to capital markets deals compounds the problem, since they rely on their counsel to acclimate them to the norms of the market.⁸⁶

The relational considerations of lawyers and clients across the table may become more serious where the prospect of future work hovers in the background. While it is reasonable to assume that few lawyers would intentionally prejudice a client, and indeed none report doing so, it is easy to imagine subtle impact of the desire to please the party across the table. Members of issuer's management are in turn unable to adequately evaluate the services they are being given and take cues from their advisors about what to do.⁸⁷

B. Quantitative Measures of Performance

If there are benefits to be gained or costs associated with familiarity, one would expect to see better outcomes associated with repeated interaction; if the costs described in the literature are present, we would expect to see them reflected in at least some of the outcomes associated with high numbers of repeated interaction, when other factors are held constant. Of course, selection is a concern with any such analysis, and several strategies are used to rule out this possibility.

In order to assess these relational effects, I examine outcomes that are frequently discussed in the empirical financial literature on IPOs, applying similar methodology and in some cases expanding on the methodology in that literature. The outcome variables described in this section are those for which data are available and which might plausibly offer insight. For each outcome variable, I examine repeated interaction among the following actors in typical IPO deals: (1) underwriter's coun-

⁸⁵ See *infra* Part IV.

⁸⁶ See Interview with Attorney (K) (name withheld by request) (Sept. 16, 2013) (on file with author) [hereinafter Interview with K].

⁸⁷ See Schneider et al., *supra* note 24, at 8–9 (discussing the issuer's reliance upon its advisors to guide it through the unfamiliar IPO process).

sel's prior IPO deals with the lead underwriter(s); (2) issuer's counsel's prior deals across the table from the lead underwriter(s); (3) issuer's counsel's prior IPO deals acting for the lead underwriter as its counsel; and (4) issuer's counsel's prior deals with the underwriter's counsel. These interactions were chosen because they are most likely to reveal something about the effect of repeated group interaction among lawyers, and between lawyers and the underwriter. Some of the hypotheses and results discussed below build upon earlier work done by the author with respect to the benefits of familiarity between underwriters and their own counsel. Small portions of those results are repeated here because they help to interpret the results reported below by comparison.

1. *Accurate Pricing of the Deal*

A key task that must be accomplished in any IPO is pricing the deal, and the accuracy of the price can be an important indicator of the deal's success.⁸⁸ The stock offering price is the result of negotiations between the issuer (who would like the price to be higher, all else equal) and the underwriter (who has an incentive to underprice more strongly, all else equal). This is a challenging task because there is not yet a trading market for the issuing company's shares to use as a benchmark, and only the issuer and underwriter possess much information about the issuer and its business prospects. Certainly, a change in price accuracy associated with repeated interactions would indicate an impact, although separating positive from negative is more complicated, as discussed below.

a. *Underpricing*

The first component of pricing I examine is the amount of the first-day price increase, or "underpricing." I examine whether repeated interactions are associated with greater or lesser degrees of underpricing (or pricing accuracy), and the extent to which underpricing changes depending on which types of actors are repeatedly collaborating. The most basic null hypothesis is that when issuer's counsel interact repeatedly with other group members, issuers leave a consistent amount of money on the table. If the amount of money left on the table changes with repeated interaction, it would support a conclusion that familiarity has drawbacks or benefits. This

⁸⁸ See *id.* at 9–10.

hypothesis is tested with respect to repeated interaction between various lawyer and banker pairings.

Numerous studies of IPO performance have looked at first-day returns as a measure of how accurately priced (or underpriced) an offering is.⁸⁹ However, short-term price performance is a complicated measure of deal success. Good first-day performance (reflected in a large price increase in the market once the stock starts trading) is a sign of a good deal, especially if it is sustained over time, because it reflects large demand for the stock, which in turn relates to the deal team's marketing efforts and the disclosure the deal team creates and disseminates. However, an overly large first-day return signals a poor outcome for the issuing company, because the large return represents money that the issuing company is giving up, or "leaving on the table," as it is frequently described.⁹⁰

Performance for the first day of trading is typically measured in the IPO literature by taking the difference between the closing price on the first day of trading and the final offering price.⁹¹ A large first-day price increase for a given stock can be considered a positive result for the deal because it indicates strong investor interest; however, any first-day price increase also represents money that the issuing company could have captured, and therefore at a large enough magnitude, the initial increase is a negative outcome for the issuer.⁹²

Therefore, while the first-day price increase represents revenue that the issuer could have had from the offering, one cannot conclude that all underpricing is bad. Bankers routinely attempt to underprice an IPO by approximately 15% because of the positive optics of a short-term rise in stock price and the resulting momentum, and the need to generate publicity for the issue and demand from institutional investors.⁹³ Managers of issuing companies similarly agree that some level

⁸⁹ See HANDBOOK OF CORPORATE FINANCE, *supra* note 13, at 263–75 (reviewing empirical studies of IPOs).

⁹⁰ See Tim Loughran & Jay R. Ritter, *Why Don't Issuers Get Upset About Leaving Money on the Table in IPOs?*, 15 REV. FIN. STUD. 413, 413 (2002) (using the term "money left on the table" to describe the aggregate proceeds foregone in underpricing).

⁹¹ See Jay R. Ritter, *The Long-Run Performance of Initial Public Offerings*, 46 J. FIN. 3, 3 (1991).

⁹² See Loughran & Ritter, *supra* note 90, at 414; see also Griffith, *supra* note 17, at 600–30 (discussing the ways in which underpricing creates greater harm than good for issuers).

⁹³ See Nocera, *supra* note 17, at 27 (Goldman Sachs Pitch Book describing a "discount," usually 15% necessary to ensure adequate post-offering appetite for stock); Telephone Interview with Attorney (S) (name withheld by request) (July 23, 2013) (on file with author) [hereinafter Interview with S]; see also Griffith, *supra*

of underpricing is beneficial to a degree, which may explain why they tolerate a degree of it.⁹⁴ Thus, up to a certain point, the incentives of the issuer and the underwriter are aligned with respect to underpricing.

The incentives of the issuer and the underwriter diverge with respect to excessively high levels of underpricing, however. Excessive levels of underpricing above the standard 15% arguably go beyond what is needed to ensure a successful deal and are thus thought to represent an unnecessary but significant loss to the issuer.⁹⁵ On the other hand, with respect to the underwriter, high levels of underpricing create substantial benefits that frequently outweigh any losses they suffer from forgone commissions.⁹⁶ This is because the underwriter only loses out on 7% (the typical underwriting commission) of the underpriced amount, but at the same time gains substantial benefits by allocating the underpriced stock to favored investors, who return the favor through future business and trading commissions.⁹⁷ Indeed, the underwriter has an incentive to underprice far beyond what may be required to ensure a successful deal.⁹⁸

Consequently, drawing the line between a “good” first-day price jump and a “bad” one is inherently difficult and depends on whose perspective one takes. As just explained, underwriters typically claim to intentionally underprice by 15% to ensure

note 17, at 599–612 (describing the potential benefits of underpricing to issuers, including positive signaling effects and rewarding investor disclosure of demand).

⁹⁴ See Griffith, *supra* note 17, at 605–06 n.71 (citing Patricia A. Ryan & Irv DeGraw, *A Brief Comparison of the Oct 2000-June 2002 IPO CFO Results to the 1996-1998 IPO CFO Results* (working paper) (reporting that 70% of CFOs responding to a poll conducted in 2002 agreed or strongly agreed with the statement that “high first day returns are necessary to gain interest in the IPO”); see also Loughran & Ritter, *supra* note 90, at 416 (explaining that it makes it easier to find buyers for IPOs and that, by underpricing, investors will engage in rent-seeking behavior in order to improve their priority for receiving shares in coveted IPOs).

⁹⁵ See Griffith, *supra* note 17, at 591–99.

⁹⁶ See *id.* at 590–99 (discussing benefits to underwriters from underpricing).

⁹⁷ See *id.* at 593–94 (“[U]nderwriters may be able to increase profits above their base compensation by engaging in underpricing. This may seem contradictory since, as noted above, underwriter compensation is a percentage of aggregate offering proceeds, which are maximized by raising, not lowering, the offering price. However, underpricing creates an additional profit opportunity for underwriters by enabling the practice of spinning.”); Loughran & Ritter, *supra* note 18, at 8 (describing underpricing as a form of value transfer to the underwriter); Jay Ritter & Ivo Welch, *A Review of IPO Activity, Pricing, and Allocations*, 57 J. FIN. 1795, 1815 (2002). Compensation in the form of repeat business was a key issue in the eToys litigation. See Nocera, *supra* note 17, at 1–8 (Goldman Sachs internal documents reflecting compensation “owed” to the bank from investors receiving underpriced IPO allocations).

⁹⁸ See Griffith, *supra* note 17, at 591–99.

adequate demand and publicity in the market.⁹⁹ Given the inexactitude of the pricing process, this is roughly consistent with the median level of underpricing in the dataset (11%). One way to separate the “correct” level of underpricing from levels which are overly large would be to impose an arbitrary boundary of 15%. Such an arbitrary cutoff is bound to sweep in deals for which underpricing was justifiably higher than the norm. Nonetheless, once levels of underpricing become very high, it is difficult to make the case that they were justified.

Another, perhaps more revealing, approach with respect to group interaction is to examine the relative levels of underpricing associated with repeated interactions of different actors in the deal, or more precisely, to compare the change in levels of underpricing that occur when different types of actors interact repeatedly versus when they are relatively unfamiliar with each other. Both approaches are explored below.

b. Sustained Price Performance

In addition to first-day price performance and price correction, I also measure stock performance relative to the S&P 500 Index over the first thirty days, sixty days, and ninety days of the stock’s public trading. The purpose of measuring this is twofold. First, if the short-term returns on the newly issued stock remain over longer time periods, it supports an inference that the market has effectively absorbed the deal team’s information product and that such information has turned out to be accurate over the first few months.¹⁰⁰ On the other hand, if the large first-day increase dissipates over time, this is an indicator of poor information availability at the time of the offering, either because the information created by the deal team was poorly absorbed by the market or turned out to be inaccurate, due to insufficient due diligence or inadequate disclosure.¹⁰¹ Second, if a stock issuance has a very high level of underpricing, and the high price levels are sustained over time, it implies that the underpricing is not merely an anomaly in the market but is either intentional or a result of errors in the pricing process. One interpretation of the underpricing phenomenon could also

⁹⁹ See Loughran & Ritter, *supra* note 18, at 8 (“The resulting average level of underpricing should then be no more than several percent. Thus, given the use of bookbuilding, the joint hypothesis that issuers desire to maximize their proceeds and that underwriters act in the best interests of issuers can be rejected whenever average underpricing exceeds several percent.”).

¹⁰⁰ See Schneider et al., *supra* note 24, at 12–13 (discussing the role of disclosure in the market’s reaction to securities prices).

¹⁰¹ See *id.*

be that it represents a reasonable, if conservative, approach to pricing by the investment banks, who must bear the risk of selling all of the stock in a firm commitment underwriting. They may worry that setting the price too high could result in an incomplete uptake of stock by investors.¹⁰² However, if a stock rises by an excessive amount on the first day, and its performance remains strong over the first several months of trading, it further indicates that a conservative approach was unwarranted, suggesting either an egregious error on the part of the bank or self-interested pricing behavior on the part of a bank trying to capture value out of the deal from the issuer.

Overall, positive effects from teamwork should reveal sustained good performance over the long term. Good long-term performance may also reveal overly high levels of underpricing, however, and would therefore be an indication of a transfer of wealth from the issuer to the underwriter and investors. Indications of what the thirty-, sixty- and ninety-day market performance results imply can be further assessed by looking at other factors such as the incidence of securities litigation against the issuer within a short period of time following the IPO.

c. *Price Revision*

In order to help separate the negative implications of underpricing from the positive implications of an early price increase, I examine whether repeated interaction has any effect on the propensity for the issuer and underwriter to agree to a correct upward price revision—that is, an upward revision from the initial offer range in the preliminary prospectus that also corresponds to a price increase in the market.

Upward price revision indicates two things: the first is greater-than-expected demand for the issuer's stock, which in turn can be interpreted as a result of a good marketing effort that generates high pre-market demand, good disclosure that gives investors confidence in the issue, and information discovery that aids in the correction of early pricing errors.¹⁰³ The second is that the issuing company has been able to capture at least some of the value of the increase in demand, because a higher offering price will mean more proceeds for its coffers. Therefore, if repeated interaction has an effect on the propen-

¹⁰² See Loughran & Ritter, *supra* note 90, at 416.

¹⁰³ See Kathleen Weiss Hanley, *The Underpricing of Initial Public Offerings and the Partial Adjustment Phenomenon*, 34 J. FIN. ECON. 231, 232 (1993) (describing how greater-than-anticipated demand results in upward price adjustment).

sity to adjust price upward, it indicates a well-performing deal in which the issuer has been able to capture more value from the deal—an overall positive result.

By contrast, if a deal performs extremely well in the market but there is no upward revision in the final price, it indicates either that the parties have made an error in their projections about the market performance of the stock or that the parties willfully decided to deprive the issuer of proceeds it could have had.¹⁰⁴ The latter scenario is consistent with a situation in which the underwriter is capturing value for its clients at the expense of the issuer.

2. *Securities Class Action Litigation*

The filing of securities litigation soon after the IPO is a poor deal outcome in the sense that it indicates that stock prices for IPO companies have fallen¹⁰⁵ and some plausible defect in the disclosure is present that is related to the price drop.¹⁰⁶ Although the filing of litigation can be precipitated by numerous factors outside the control of the members of a deal team, an increased occurrence of litigation when controlling for other factors¹⁰⁷ implicates the lawyers' performance in the deal, since uncovering information through due diligence and limit-

¹⁰⁴ Cf. Janet Cooper Alexander, *The Lawsuit Avoidance Theory of Why Initial Public Offerings Are Underpriced*, 41 UCLA L. REV. 17, 66 (1993) (discussing a theory of underpricing as an artifact of error, combined with abundance of caution).

¹⁰⁵ A fall in the price of the issuer's stock is the basis for the damages sought in most lawsuits. See *id.* at 35 (“[T]here is no legal basis for suing because a security was priced too high—either in the sense that the open-market price was lower than the offering price, or that the offering price was higher than the ‘intrinsic’ value.”).

¹⁰⁶ See Securities Act of 1933 § 11, 15 U.S.C. § 77k(a) (2012) (requiring a misstatement or omission in the registration statement as a prerequisite to legal action); Securities Act of 1933 § 12 (requiring a misstatement or omission in a prospectus or oral communication as a prerequisite to legal action); Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2014); 17 C.F.R. § 240.10b-5 (2016) (providing for liability for any material misstatement or omission or scheme to defraud).

Class actions were filed within one year with respect to 119 of the issuers in the dataset, after discounting multiple separate class actions filed with respect to the same issuer. This number constitutes 4.4% of the dataset.

¹⁰⁷ Primary factors identified in the literature bearing a relationship to litigation include the size of the deal (as the log of gross proceeds), the total assets of the company after the IPO, the market capitalization of the issuer after the IPO, and the market share of the underwriter, reflecting the intuition that companies with “deep pockets” draw more litigation. See Michelle Lowry & Susan Shu, *Litigation Risk and IPO Underpricing*, 65 J. FIN. ECON. 309, 315–19 (2002). These factors are used as controls in the regression analysis discussed below.

ing liability through accurate disclosure is one of the lawyers' key tasks.¹⁰⁸

A few caveats are in order with respect to litigation as an indicator. First, securities litigation can occur based on periodic disclosure or other statements made by the issuer and may have nothing to do with the IPO.¹⁰⁹ When securities lawsuits allege causes of action under sections 11 and 12(a)(2) of the Securities Act, they necessarily relate to disclosure that was produced as part of the offering. Nonetheless, class actions often also allege liability under Rule 10b-5, as there are often procedural hurdles to bringing an action under sections 11 and 12.¹¹⁰

In addition, it is entirely possible that such lawsuits have limited or no merit. Spurious litigation was a central concern voiced by Congress when it passed the Private Securities Litigation Reform Act of 1995.¹¹¹ The possibility that meritless lawsuits are included in the data cannot be ruled out, and thus some of the data may not be indicative of a poor deal outcome. Nonetheless, it is reasonable to assume that lawsuits filed do, on average, have at least arguable merit and basis in the disclosure. As a robustness measure, I limit the dataset to class actions filed within the first year after the IPO, even though the statute of limitations for actions under sections 11 and 12 is the shorter of one year after the discovery of the facts giving rise to a claim of material misstatement or omission,¹¹² or three years, and the shorter of two years after the discovery of facts giving rise to a claim of material misstatement or omission, or five years for actions under Rule 10b-5.¹¹³ Although using all of the class actions would provide even stronger results, limiting them helps to ensure that lawsuits in the dataset are more likely to be meritorious and related to the initial offering.¹¹⁴

¹⁰⁸ See Schneider et al., *supra* note 24, at 4–5.

¹⁰⁹ See Marilyn F. Johnson et al., *Do the Merits Matter More? The Impact of the Private Securities Litigation Reform Act*, 23 J.L. ECON. & ORG. 627, 627–30 (2007) (documenting the prevalence of lawsuits based on earning statements, particularly where they have been revised).

¹¹⁰ See, e.g., 15 U.S.C §§ 77k(a) (standing requirement); § 77(l)(2) (requirement for purchase pursuant to a prospectus); § 77(m) (statute of limitations for §§ 11 and 12).

¹¹¹ See Joshua D. Fulop, *Agency Costs and the Strike Suit: Reducing Frivolous Litigation Through Empowerment of Shareholders*, 7 J. BUS. & SEC. L. 213, 213–14 (2007) (describing the strike suit problem).

¹¹² 15 U.S.C. § 77(m) (2012).

¹¹³ 28 U.S.C. § 1658(b) (2012).

¹¹⁴ See *id.*

The second caveat regarding litigation is that the filing of a lawsuit, even if meritorious, is not necessarily an indicator of defects in the performance of the lawyers. Many factors outside of the control of legal counsel might contribute. Nonetheless, part of the lawyers' duty is to insulate the company from litigation, especially spurious litigation through disclosure.¹¹⁵ Thus, when controlling for factors that typically attract litigation, one might hypothesize that there would be less litigation associated with lawyer repeated interaction, if it is the case that familiarity is beneficial. Nonetheless, if repeated interactions are associated with more class actions after holding other factors relevant to litigation constant, it provides another piece of evidence pointing to negative effects of group work.

3. *Prospectus Disclosure*

As a key marketing document, regulatory filing, and point of focus for telling the issuer's story to the market, the disclosure can have a significant impact on transaction outcomes. In a sense, the disclosure is a proxy for the performance of the various deal participants, and in particular the lawyers in the deal, since lawyers are the chief drafters of the document and conduct much of the due diligence investigation that forms the basis of the disclosure.¹¹⁶

It is difficult to measure the quality of disclosure in the aggregate. However, other studies have used measures of positive disclosure and negative disclosure to glean information about the information content of prospectuses.¹¹⁷ These measures typically involve looking at the ratios of portions of the prospectus considered negative, primarily the risk factors, to all other portions of the prospectus.¹¹⁸ Although this is a very rough measure, it provides a basic idea of the informational completeness of the prospectus, as well as the deal team's perception of the risks of the company.

¹¹⁵ See Telephone Interview with Attorney (F) (name withheld by request) (Oct. 20, 2013) (on file with author) [hereinafter Interview with F].

¹¹⁶ See Schneider et al., *supra* note 24, at 16 n.10.

¹¹⁷ See, e.g., Kathleen Weiss Hanley & Gerard Hoberg, *The Information Content of IPO Prospectuses*, 23 R. FIN. STUD. 2821, 2830–40 (2010); James C. Spindler, *IPO Underpricing, Disclosure, and Litigation Risk* 9 (U.S.C. Ctr. L. Econ. & Org., Research Paper No. 09-9, 2013), <http://papers.ssrn.com/abstract=1396818> [<https://perma.cc/PHH4-L44V>]; see also Tom Arnold et al., *The Effects of Ambiguous Information on Initial and Subsequent IPO Returns*, 39 FIN. MGMT 1497, 1497–1519 (2010) (reviewing past studies and claiming that ambiguity in prospectuses promotes underpricing).

¹¹⁸ See Spindler, *supra* note 117, at 9–10 (employing an approach looking at ratios of positive to negative disclosure).

The proportion of negative disclosure in a document, all else equal, is also an indirect way to examine the lawyers' ability and willingness to carry out an issuer's wishes. The disclosure is chiefly drafted by the lawyers and the underwriter acting in concert—and sometimes in tension—with personnel from the issuing company. Capital markets lawyers report that issuing companies' management often push to provide copious positive disclosure about their companies, while the underwriters and lawyers try to limit and temper the disclosure by including more negative information, ostensibly for the purpose of warding off liability. The parties' conflicting goals regarding disclosure manifest most palpably in the risk factor section of the prospectus, the drafting of which is driven by the underwriters and counsel.¹¹⁹ Risk factors relating to a company and its business are required to be disclosed by the Securities Act and the SEC's regulations. Moreover, risk disclosure is thought to protect issuers from lawsuits by providing adequate warnings and meaningful cautionary language with respect to the other disclosure in the prospectus, especially projections for future company performance and forward-looking statements.¹²⁰ However, the extent to which risk factors are prophylactic is unclear, and it is possible that they merely shift the basis for litigation to other elements of the disclosure.¹²¹ This conclusion is supported by at least some work in financial economics that has found evidence that greater risk factor disclosure may actually encourage litigation by obfuscating material risks related to the issuer.¹²²

In addition, negative disclosure in the risk factors can lower the price that investors are willing to pay for the stock. Risk disclosure thus might be protective, but overlawyering, overreliance on precedent or boilerplate, or grandstanding with respect to risk factors can be very costly for the issuer. Thus, risk disclosure is a somewhat rough and ambiguous measure of the team performance of lawyers in repeated interactions. High levels of risk disclosure indicate counsel who were able to prevail over issuers' preferences to present a positive picture of the company. That might be good if it reduces litigation risk,

¹¹⁹ See *id.*; see also Hanley & Hoberg, *supra* note 117, at 2830 (using text analysis to identify influences on disclosure).

¹²⁰ See Spindler, *supra* note 117, at 10.

¹²¹ Cf. Johnson et al., *supra* note 109, at 627 (noting a shift in the basis of liability claims to earnings statements).

¹²² See Hanley & Hoberg, *supra* note 117, at 2830 (discussing evidence that disclosure is a factor contributing to uncertainty).

but very high levels of risk disclosure might cost issuers more than they are worth through lost proceeds.

4. *Length of Time to Offering*

The length of time between the issuer's filing of Form S-1 with the SEC provides an indication of the efficiency with which a deal group is working. The filing of the S-1 allows the IPO marketing effort to commence and typically occurs between one and three months before the ultimate offering date but may be much longer.¹²³ Although many factors can cause a deal to be delayed outside the control of the parties at the table, such as market conditions,¹²⁴ comments from the SEC,¹²⁵ or problems within the issuing company, it is reasonable to hypothesize that good team dynamics might have a systematic effect on the efficiency with which the deal is closed.¹²⁶ Therefore, a systematic increase in deal length might indicate reduced teamwork, while a systematic decrease in deal length would indicate positive benefits of improved teamwork.¹²⁷

III

DATA AND ANALYSIS

The following discussion explains the empirical findings of this study and their implications for the hypotheses developed above. The section sets out the sources of data and methodology, and describes the results from regression analyses for the interactions between underwriter's counsel's and the lead underwriter(s) with the issuer's counsel and underwriter's coun-

¹²³ GIBSON, DUNN & CRUTCHER LLP, IPO GUIDEBOOK 8 (2015).

¹²⁴ Schneider et al., *supra* note 24, at 24–25 (“[I]f market conditions have worsened materially after the letter of intent stage, the issue must either come to the market at a price below that originally contemplated, or it must be postponed until conditions improve.”).

¹²⁵ *Id.* at 27 (“There is a wide variation in the time required for the SEC to process a registration statement. Relevant factors include the level of the Commission's backlog of filings and the time of the year. There is normally a considerable rush of filings at the end of each calendar quarter, and particularly at the end of March for filings with financial statements as of December 31. The SEC's current policy calls for the issuance of an initial letter of comments within thirty days of the filing of a registration statement, but the delay is often longer and at times has exceeded one hundred days.”).

¹²⁶ This conclusion comports with practitioner descriptions of the essential characteristics of a smooth deal. *See, e.g., id.* at 16–17 (“Close cooperation is required among counsel for the company, the underwriters' counsel, the accountants, and the printer. Unless each knows exactly what the others expect, additional delay, expense, and irritation are predictable.”).

¹²⁷ This analysis expands on previous work done by the author. *See* Jeremy R. McClane, *The Sum of Its Parts: The Lawyer-Client Relationship in Initial Public Offerings*, 84 FORDHAM L. REV., 131, 170 (2015).

sel. I analyze each type of repeated interaction with respect to the performance variables, noting the implications for the various hypotheses regarding the benefits or drawbacks of close relational dynamics and teamwork.

The data on IPOs used in this Article were drawn from interviews with lawyers and investment bankers in several large firms based in New York, London, Washington, D.C., and Palo Alto, CA. The quantitative data was gathered from a number of publicly available sources. The basis for the list of IPOs is the Kenney-Patton database of *de novo*¹²⁸ IPOs in the United States from June 1996 through December 2010.¹²⁹ The deals from that dataset were cross-checked with the Thomson One dealsheet record to confirm the date, ticker, and issuer name.¹³⁰ From Thomson One, I added the names of the banks involved in the underwriting syndicate for each deal, including the names of the lead underwriters, bookrunners or joint bookrunners, the lead underwriters' counsel and issuers' counsel, data about the involvement of venture capitalists, as well as the age of the issuing company. From the same source I also obtained the initial price range filed with the SEC, as well as the final price agreed by the issuer and underwriters, from which I determined whether the final price was revised up or down from the initial range. Twenty-two records were dropped either because information could not be found on the issue in the Thomson One database or because the Center for Research in Security Prices ("CRSP") database did not contain information on the initial or final price. This resulted in a dataset consisting of 2,265 IPOs spanning fifteen years.

I then gathered each company's registration document (the Form S-1, or its equivalent) and prospectus from the SEC's EDGAR database.¹³¹ From these documents, I gathered the names of the attorneys for both issuers and underwriters, as

¹²⁸ The database excludes offerings of capital trusts, securitizations, IPOs of preferred stock, and spin-offs.

¹²⁹ For more information on the database, see Martin Kenney & Donald Patton, *Guide to the Firm Database of Emerging Growth Initial Public Offerings (IPOs) from 1990 Through 2010*, U.C. DAVIS (Sept. 2013), http://hed.ucdavis.edu/faculty/webpages/kenney/misc/Firm_IPO_Database_Guide.pdf [<https://perma.cc/TNU5-DLMK>].

¹³⁰ Thomson ONE, *Trusted Investment Research Tools*, THOMSON REUTERS, http://financial.thomsonreuters.com/en/products/tools-applications/trading-investment-tools/thomson-one-investment-research-tools.html?gclid=CjwKEAiAx4anBRDz6JLYjMDxoQYSJAA4loRmqel_bXT8gpjPqFxFxMyt6A9VmdVOXXoM_u9oMbvA_3EhoCJdvw_wcB (last visited Apr. 9, 2016) [perma.cc/32H7-K3V5] [hereinafter Thomson One Database].

¹³¹ EDGAR: *Company Filings*, SEC, <http://www.sec.gov/edgar/searchedgar/companysearch.html> (last visited Apr. 9, 2016) [perma.cc/7QXZ-464P].

well as data on the geographic location of the law firms and the underwriters. From the prospectuses I gathered word counts for each document and for each individual section of the document. The word counts ignore information contained in tables and charts, which is consistent with methodology used in other research on IPOs. The rationale is that pure word counts, while constituting a very rough estimate of the types of disclosure included, are objective and do not suffer from the potential bias associated with hand-coded disclosure elements.¹³²

I used information from the CRSP database to obtain data on each stock's performance over time.¹³³ Data on class action litigation was taken from the Stanford Law School Securities Class Action Clearinghouse.¹³⁴ From Compustat, I then gathered data on company assets, book value per share, leverage, and fees paid to counsel.

The identities of each IPO's lead underwriters were taken from this data set. An investment bank is considered a lead underwriter if it is either the sole bookrunner or a joint bookrunner.¹³⁵ Where investment banks merge with other banks, I treat each merging bank as though it has disappeared and the newly merged bank as if it is a new bank. I use this method to maintain a conservative approach to tracking repeat transactions between investment banks and law firms. Where there is more than one bookrunner, observations are de-weighted accordingly.

The identity of counsel for the lead underwriters and issuing companies are similarly taken from this data.¹³⁶ As with

¹³² See Spindler, *supra* note 117, at 910 (noting that this method "has the advantage of being objective, as it does not rely upon subjective evaluations of particular disclosures (such as coding a line of disclosure as 'good' or 'bad') and does not require subjective index weighting").

Word counts for this study were taken for a total of 2,258 prospectuses. A small number (7) of prospectuses were excluded due to transcription errors in the database.

¹³³ CRSP US Stock Databases, CTR. RES. SEC. PRICES <http://www.crsp.com/products/research-products/crsp-us-stock-databases> (last visited Apr. 9, 2016) [<https://perma.cc/M2HL-2MM4>].

¹³⁴ Stanford Law School, *Securities Class Action Clearinghouse: A Collaboration with Cornerstone Research*, STANFORD, <http://securities.stanford.edu> (last visited Apr. 9, 2016) [<https://perma.cc/FZE5-9MG3>].

¹³⁵ This methodology is similar to that used in prior work. See, e.g., Loughran & Ritter, *supra* note 18, at 13 (describing the relationship between lead underwriter and bookrunner designations in empirical work). The most frequent lead underwriters are Goldman Sachs (217), Merrill Lynch (154), Morgan Stanley (137), Lehman Brothers (131), and JP Morgan (122).

¹³⁶ The most frequent managers' counsel are Wilson Sonsini Goodrich & Rosati (176), Latham & Watkins (160), Davis Polk & Wardwell (151), Cravath, Swaine & Moore (111), and Skadden, Arps, Slate, Meagher & Flom (106).

investment banks, law firm mergers are treated as the disappearance of each old firm and the appearance of a new firm. In the rare cases of multiple firms representing a party, the firms are treated as a single unit for that transaction.

Combinations of underwriters, their counsel, and issuer's counsel are grouped together, and then the offer date is used to construct variables representing how often a certain underwriter-counsel and counsel-counsel pair have worked together in the previous one year, two years, and three years for each new issue. Further, names of individual counsel collected from the Form S-1 documents filed with the SEC¹³⁷ are then matched based on whether the same individuals were present on a deal in which the same law firms were involved, and a variable is created to represent the number of repeat deals in which at least one individual attorney from a given firm appears in successive deals.

A. Empirical Results

1. *Regression Analysis on Performance Metrics*

For each type of repeated interaction observed in the data (underwriters with their own counsel, underwriters' encounters with the issuer's counsel on opposite sides of a deal, the underwriters' encounters with issuer's counsel when issuer's counsel has recently been the underwriter's counsel, and frequent encounters between the two sets of counsel), I analyze price performance, probability of correct price revision, incidence of litigation, and length of time to complete a transaction. Some of the results with respect to the interactions between investment banks and their own counsel have been reported in my previous research. I repeat them briefly here for the sake of comparison because they are helpful for understanding the implications of the new findings.

With regard to price performance of the IPO stock, the time to deal completion, and the proportion of various types of disclosure, I employ ordinary least squares ("OLS") regression analysis¹³⁸ to estimate the relationship between repeated interactions and the outcomes of interest. For price performance, the outcomes measured are the first-day bounce—the stock

¹³⁷ My thanks go to Robert Bartlett III for this suggestion.

¹³⁸ See Appendix Table 1 for the formal model and variables used in OLS regressions. OLS is a statistical method that attempts to determine the relationship between a set of explanatory variables and an outcome variable of interest, by finding a function that approximately fits a set of data. See JEFFREY M. WOOLDRIDGE, *ECONOMETRIC ANALYSIS OF CROSS SECTION AND PANEL DATA* 53 (2d ed. 2010).

price increase during the first day of trading (See Appendix Table 1), as well as the price change after thirty, sixty, and ninety days of trading, all relative to the performance of the S&P Index to account for the effect of overall market movements (See Appendix Table 2). For the time to deal completion, the outcome measured is the number of days from the filing of the S-1 until the offering date. With respect to disclosure, the relevant outcomes are the proportion of each prospectus occupied by risk factors, business descriptions, and management's discussion and analysis.

With respect to the probability of price correction (See Appendix Table 3) as well as class action litigation (See Appendix Table 4), I employ probit models.¹³⁹ For upward price revision, the model estimates the change in probability that the pricing negotiation will result in higher price than that set out in the initial filing range, when the market performance is good enough that it would justify a higher price and when parties have worked together repeatedly. With respect to litigation, the model estimates the change in probability that a securities class action lawsuit will be filed in the first six months, and the first year after the IPO offer date when parties have worked together repeatedly.

The models each incorporate a number of other independent variables, in line with prior empirical literature on IPOs.¹⁴⁰ These include fixed effects¹⁴¹ for IPO year and the issuing company's industry (as determined according to the

¹³⁹ See Appendix Table 2 for the formal probit model and variables used. A probit model is a statistical model in which the outcome variable can take on only one of two values; it is useful for estimating the probability of an event occurring, versus the probability of the event not occurring. See WOOLDRIDGE, *supra* note 138, at 471, 561.

¹⁴⁰ See, e.g., Hanley & Hoberg, *supra* note 117, at 2830–33; see also HANDBOOK OF CORPORATE FINANCE, *supra* note 13, at 276–79 (summarizing empirical evidence from prior studies on the determinants of underpricing of IPOs).

¹⁴¹ See WOOLDRIDGE, *supra* note 138, at 300. Fixed effects provide a method of controlling for variation within certain categories of variable by removing the mean of the observations for the dependent variable of interest. For example, in an OLS regression using first-day price jump (i.e., underpricing) as the dependent variable, fixed effects for (inter alia) each year are used. This allows for variation in overall underpricing from year to year by removing the mean underpricing for each year and controlling for the variation in underpricing that is specific to that particular year. For example, if 1999 was a year that saw a particularly large amount of underpricing, the fixed effect would remove the year-specific average of the underpricing and leave only the variation attributable to other factors. The same is done for each IPO quarter, each lead underwriter, each industry, and the interaction of each industry and year.

Standard Industry Classification, or “SIC,” code¹⁴² as well as other classifications used in the literature) to control for market conditions that changed over time and in various industries. I also use fixed effects for each investment bank in order to allow for variation in outcome variables associated with each lead underwriter, as well as the interaction between the year, industry, and underwriter variables. In addition, for all specifications I control for the IPO size measured in terms of the natural log of the gross proceeds of the offering, a variable frequently used as a proxy for deal quality, as well as the size of the issuing company.¹⁴³

I perform each analysis using a number of alternative specifications to test the robustness of the model. Appendix Tables 7 and 8 report the results of these robustness checks for analysis of the first-day price increase and the probability of litigation under the alternative specifications.

a. *Pricing Accuracy and Market Performance*

This section will describe the results for each set of repeated interactions with respect to first-day performance, and performance relative to the rest of the market at thirty, sixty, and ninety days post-offering.

For each set of parties studied (the underwriter(s) and underwriter’s counsel, the underwriter(s) and issuer’s counsel, underwriter’s counsel and issuer’s counsel) there is a significant first-day price jump for deals in which the parties have worked together repeatedly—the stock’s price in the market increases significantly over the initial offering price in the prospectus.¹⁴⁴ Regression analysis reveals a pattern in which each successive IPO deal that two of the parties have done in the past year is associated with an incrementally larger increase in the first-day price jump.

The graphs below illustrate the patterns with respect to first-day price increase found in the raw data. Figure 1 shows the percentage change in opening day price jump for an IPO

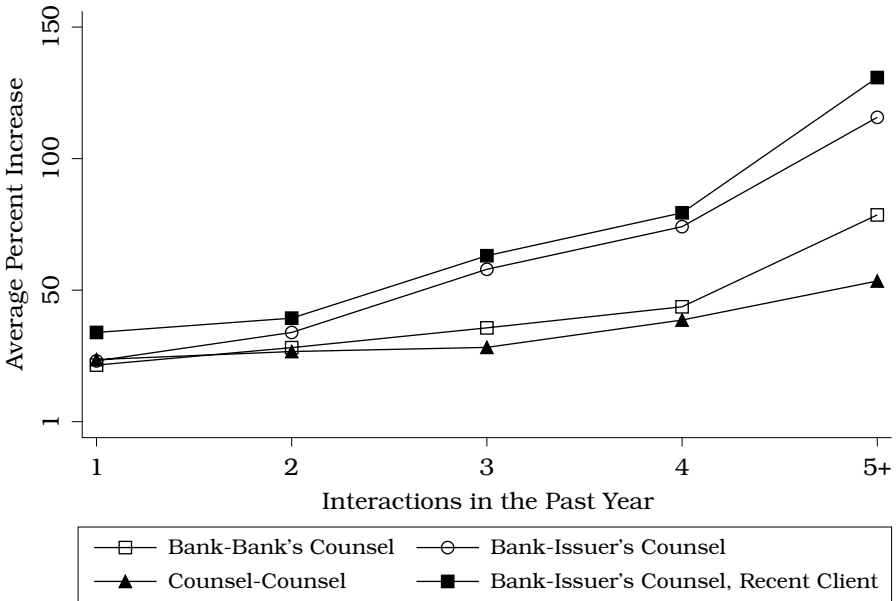
¹⁴² SIC codes are used to categorize the industry of issuing companies and are assigned for each securities issuer. See Barker, *supra* note 63, at 68.

¹⁴³ In line with the financial economic literature on IPOs, the regressions described in this Article use the natural log of the gross proceeds of each IPO in order to mitigate skewness in the distribution of dollar amounts. See HANDBOOK OF CORPORATE FINANCE, *supra* note 13, at 276–79. In the alternative specifications in Appendix Tables 7 and 8, I also use the size of the company (measured by total assets) and the book value per share as alternative ways to control for deal quality. These yield the same results.

¹⁴⁴ See Appendix Table 1.

stock in which the various parties to the deal have worked together between one and five-plus times within the previous year. The relationship evident between repeated interactions and the opening day jump continues to hold in regression analyses that control for many factors that may also influence the opening day price jump, which are detailed below.

FIGURE 1. REPEATED LAWYER INTERACTIONS AND OPENING DAY PRICE INCREASE



i. *Underwriter and Underwriter's Counsel*

The IPO stock's opening day price performance (or "bounce") and its relation to the number of times the underwriter and its counsel have worked together across different time periods is the first performance measure analyzed. Panel A of Appendix Table 1 shows the results, demonstrating a strong and significant effect from increased bank-counsel interactions, even after year, industry, and bank fixed effects as well as other controls are used. Each additional IPO that the underwriter and its counsel have done together in the past year is associated with a 3.1% to 5.1% higher opening day price jump. For deals in the past two years, each additional deal is associated with an average 1.9% to 3.6% additional price jump; for deals in the past three years, the increase is 1.5% to

2.9%.¹⁴⁵ When only deals in which specific lawyers can be identified appear repeatedly, the results remain significant, and the marginal increase becomes 11.2% to 14.0% for deals in the past year and 7.7% to 9.7% for deals in the preceding three years. The fact that the magnitude increases when interactions between individual lawyers are analyzed may be a result of the fact that the confidence intervals are large for these estimates. Nonetheless, they are still statistically significant, further indicating that the interpersonal interactions are driving the results.

The next performance measure to be examined is the percentage price change of the issued stock over the first thirty, sixty, and ninety trading days, relative to the percentage change in the S&P Index over the same set of days. The controls in all cases are dummy variables¹⁴⁶ for the IPO year, the SIC category, and the interaction of those two sets.¹⁴⁷ These controls are consistent with the financial economic literature on IPOs.¹⁴⁸ Clustered robust standard errors are used for each regression.¹⁴⁹

For the thirty-, sixty-, and ninety-day price performance, the upward trend in first-day price increase remains evident.¹⁵⁰ The effect of each additional interaction on the relative change in a stock's price with respect to the S&P Index after thirty trading days is 4.4% when the interactions are within the past year. This number drops to 2.8% when the interaction is in the past three years. Fewer recent interactions between a bank and law firm are associated with lower price performance over the thirty-, sixty-, and ninety-day periods. The effect remains strong for the first ninety days of trading, for which each deal in the past year is associated with a 7.4% increase, declin-

¹⁴⁵ See Appendix Table 1, Panel A1. The two specifications look at the number of prior deals between the underwriter and its counsel within the past year, two years, and three years preceding any IPO. Specifications are shown with and without fixed effects for each underwriter.

¹⁴⁶ See Appendix Table 1, Panel A2.

¹⁴⁷ When fixed effects for each bank are introduced, the result remains, but the significance diminishes.

¹⁴⁸ See, e.g., Spindler, *supra* note 117, at 18 (detailing the use of dummy variables to control for certain offering and issuer characteristics).

¹⁴⁹ In addition, to eliminate the possibility of clustering with respect to industry, bank, and year, each regression uses clustered robust standard errors. See A. Colin Cameron, Jonah B. Gelbach & Douglas L. Miller, *Robust Inference with Multi-way Clustering* 2-4 (U.C. Davis Dep't of Econ., Working Paper No. 09-9, 2009), <http://www.econstor.eu/bitstream/10419/58397/1/609322079.pdf> [<http://perma.cc/EMK5-HKNX>]. My thanks to an anonymous reviewer for this suggestion.

¹⁵⁰ See Appendix Table 2, Panel A1.

ing to a 4.1% increase in relative price for deals completed together within the preceding three years. These results remain when deals are analyzed for which individual lawyers can be identified.

ii. *Underwriter's Counsel and Issuer's Counsel*

The second set of interactions I analyze is that between the two sets of counsel to each deal, again in relation to the issued stock's first-day price jump. The results once again demonstrate a significant effect, albeit smaller than the one observed for the underwriter and its counsel alone.¹⁵¹ Each additional IPO that the two sets of lawyers have done together in the past year is associated with a 2.3% to 3.3% higher opening day price jump. For deals in the past two years, each additional deal is associated with an average 1.4–2.1% additional price jump; for deals in the past three years, the increase is 1.1–1.6%. When the set of deals is narrowed to those for which individual lawyers can be identified working together repeatedly, the marginal increase is much higher: 69.0–69.2% for each repeat deal in the past one year, and 47.5–51.7% on average repeat deals in the past three years. The effect is sustained for the first thirty, sixty, and ninety days of trading.¹⁵² Once again, the larger estimates when individual lawyers are analyzed must be viewed in light of the fact that the confidence intervals are large, and there are fewer repeated interactions among lawyers whose identities can be confirmed from the S-1. The large number is therefore not necessarily indicative of the typical increase one would associate with each repeated interaction. Nonetheless, the estimates are still statistically significant, further indicating that the interpersonal interactions among counsel contribute to the results.

iii. *Underwriter and Issuer's Counsel*

For each IPO, I also look at whether the issuer's counsel has been issuer's counsel in past transactions involving the same underwriter. For instance, in a given deal, if WilmerHale is the issuer's counsel and Morgan Stanley is the underwriting bank, I look at the number of prior IPOs in the past year, two years, and three years in which WilmerHale represented an issuer and Morgan Stanley led the deal.

¹⁵¹ See Appendix Table 1, Panel C1, C2.

¹⁵² See Appendix Table 2, Panel C1, C2.

For these parties, the relationship between opening day price jump and recent deals together has a relatively large magnitude compared to the other sets of interactions discussed so far. Each additional IPO in the past year is associated with a 6.7–8.2% higher opening day price jump. For deals in the past two years, each additional deal is associated with an average 4.8–6.6% additional price jump; for deals in the past three years, the increase is 3.7–5.6%.¹⁵³ When individual lawyers are matched in repeated deals, the associated marginal price increase is much larger: from 24.4–31.9% for repeated interactions in the past year, and 12.8–19.0% for repeated interactions in the preceding three years.

A similar result is observed for the percentage price change over the first thirty, sixty, and ninety trading days, relative to the percentage change in the S&P Index over the same set of days.¹⁵⁴ The controls in all cases are dummies for the IPO year, the SIC category, and the interaction of those two sets. The average marginal price increase at thirty days is 12.2% for each additional interaction across the table within the past year, declining to 7.3% for interactions within the past three years. The ninety-day marginal price increase relative to the S&P Index is 14.5% for additional interactions in the preceding year, dropping to 9.1% for interactions within the past three years.¹⁵⁵

iv. *Underwriter and Issuer's Counsel "Conflict" Deals*

To assess across-the-table interactions more thoroughly, I look at a subset of the transactions in which the issuer's counsel has not only encountered the underwriter previously but has served as the same underwriter's counsel recently. I define "recent" to be within the past year. For instance, in the example from the preceding section, if WilmerHale is issuer's counsel and Morgan Stanley is the underwriting bank, I look at whether or not WilmerHale has acted as Morgan Stanley's counsel in an IPO within the preceding year. For ease of reference, I call these "conflict" deals because of the potential for a conflict of interest.¹⁵⁶ As before, I control for the standard factors that would influence IPO performance, as well geo-

¹⁵³ See Appendix Table 1, Panel B1, B2.

¹⁵⁴ See Appendix Table 2, Panel B1, B2.

¹⁵⁵ All results are significant at the 1% level. See Appendix Table 2, Panel B1.

¹⁵⁶ I note that use of the term "conflict deals" may make the analysis seem deterministic. I use the term for word economy in this Article, but I did not originally approach the analysis using that frame.

graphic location of the issuer's counsel and the underwriters. As in all other specifications, I look at firm level interactions, as well as interactions involving the same individual lawyers.

Conflict deals bear a strong relationship to large opening day price jump both at the firm level and at the level of individual lawyers. Each conflict deal is associated with a 12.2–14.4% increase in first-day price jump. When isolating only the deals for which the same individual lawyers encounter each other repeatedly, the opening day price jump above what might be considered the “standard” 20% is between 16.1% and 21.5% higher on average. This effect is consistent over the first thirty, sixty, and ninety days that the stock trades.¹⁵⁷

v. *Analysis of Price Performance Results*

The contrasts in the results between different sets of actors are instructive. From the regression analysis above, it appears that frequency of interaction bears a strong positive relationship to stock performance. For each additional interaction in the sets of parties discussed above, the marginal effect on price performance is positive and statistically significant. The magnitude of the effect is markedly greater when an issuer's counsel is in a potential “conflict” situation, with each additional interaction resulting in a multiple of the 15–20% level of underpricing reported to be the norm. This raises the possibility of agency costs, even while indicating that repeated interaction leads to better deals.

A notable trend in the results is that the value of each additional interaction decreases as the time horizon increases. This indicates that repeated interactions that occurred longer ago have a lower impact on the deal, all else equal. That result is consistent with what one would expect if repeated interaction affects deal outcomes through familiarity, norming, and teamwork: if the chances to interact are fewer and further between, the team dynamic will be less strong.

b. *Price Correction*

As previously discussed, underpricing complicates the results with respect to price performance. Therefore, it is important to tease apart price performance that indicates a successful deal from price performance that indicates excessive loss of value for the issuer. Analyzing price correction

¹⁵⁷ See Appendix Table 1, Panels D1, D2.

provides a useful way to see whether or not interactions among the parties also have any mitigating effects on underpricing.

Recall that price correction is the process by which the offering price is changed from the initial offering estimate (set out in their preliminary prospectus) to the final price (which the initial investors pay).¹⁵⁸ To test whether or not there is price correction, I first construct a measure of “strong performers,” which are stocks whose price after 30 trading days is at least 20% and 30% higher than the upper range of their *filing* price range (controlling for the performance of the S&P Index during the same thirty days).¹⁵⁹

I look at the probability of upward price revisions for these issues separately for IPOs where the bank and counsel, bank and issuer’s counsel, and the two sets of counsel are frequent collaborators, and where that is not the case. For this analysis, “frequent collaborators” are bank-counsel or counsel-counsel pairs that have worked together at least three times prior to the current IPO in the past two years. If repeated interactions result in greater error rates, or collusion to excessively underprice, one would expect the probability of upward price revision to be lower when the bank and counsel are frequent collaborators.

i. *Underwriter and Underwriter’s Counsel*

When the underwriter and its counsel have collaborated frequently in the recent past, a deal is 8.7–9.3% more likely to see correct upward price revision.¹⁶⁰ This suggests both lower error rates for deal pricing generally and more independence on the part of underwriter’s counsel when there are more frequent interactions. This finding also further supports a conclusion that relational dynamics between the underwriter and its counsel improve the deal. When the results are narrowed to only those deals for which specific lawyers can be identified as working repeatedly with underwriters, the results remain significant, although the magnitude goes down to 4.3–4.5% more likely to revise up. This confirms that the effect exists in relation to individuals instead of firms or other factors. The lower magnitude might be explained by the fact that the effect is weaker for individuals, or it could be a measurement error due to the fact that only a few of the lawyers who would be doing

¹⁵⁸ See *supra* Part II.B.1.a.

¹⁵⁹ See Appendix Table 3.

¹⁶⁰ See Appendix Table 3, Panel A1.

deals can actually be identified, making the sample of individuals necessarily underinclusive.

ii. *Underwriter's Counsel and Issuer's Counsel*

I again examine the probability of correct upward price revision, this time with respect to the two sets of counsel.¹⁶¹ There is a weakly significant (at the 10% level) relationship between repeated interactions and the probability of upward price revision when the first-day bounce is 20% or more. No other significant results are seen.¹⁶²

iii. *Underwriter and Issuer's Counsel*

With respect to frequent interactions between the issuer's counsel and the underwriter, the analysis reveals no significant relationship to the probability of upward price revision for strong performers.¹⁶³ Thus there is no evidence that the issuer's counsel is more likely to impact the correction of the underpricing problem when it has encountered the same underwriter across the table frequently.

I again examine the probability of correct upward price revision for deals in which potential conflict exists to determine if issuer's counsel undertakes a countervailing corrective response in such circumstances.¹⁶⁴ Again the analysis reports no significant relationship, which is consistent with—albeit not determinative of—an agency problem.

c. *Securities Litigation*

Another potential indicator of the quality of deal outcomes is the incidence of securities litigation ensuing from the IPO. Securities litigation can occur for both meritorious and spurious reasons, and does not necessarily implicate the quality of the lawyers' representation or their relationship with their clients.¹⁶⁵ Nonetheless, a systematic pattern of either increased or decreased litigation provides a proxy for the quality of the due diligence and disclosure.

¹⁶¹ See Appendix Table 3, Panels C1, C2.

¹⁶² *Id.*

¹⁶³ See Appendix Table 3, Panels B1, B2.

¹⁶⁴ See Appendix Table 3, Panels D1, D2.

¹⁶⁵ See *supra* note 147.

FIGURE 2. REPEATED COUNSEL INTERACTIONS AND INCIDENCE OF SECURITIES LITIGATION WITHIN ONE YEAR

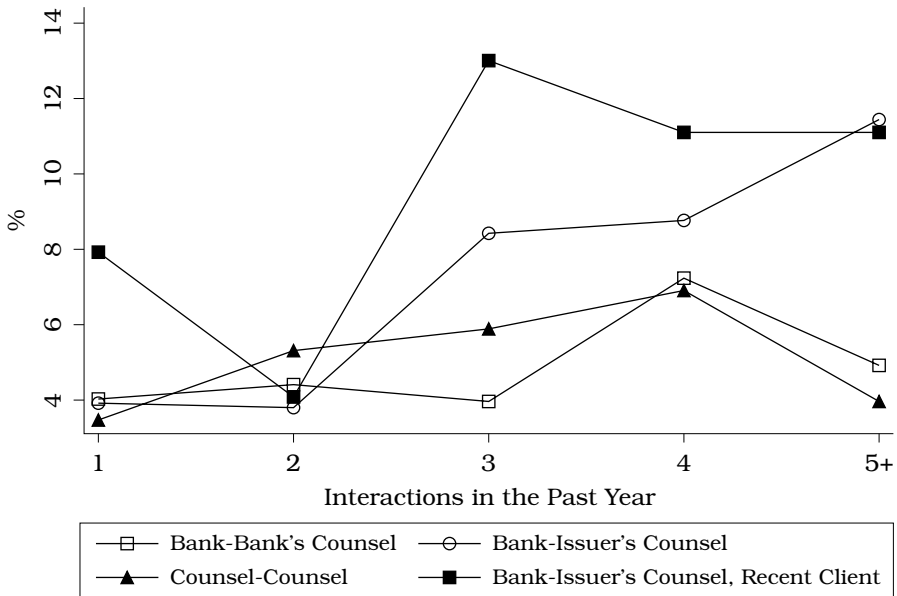


Figure 2 above illustrates the striking trend with respect to repeated interaction and securities litigation. The graph shows an association between a markedly higher incidence of securities class actions and the frequency of recent collaboration between issuer's counsel and the underwriter. This graph is merely descriptive of the raw data; below, I report the results of regression analyses including factors that may affect litigation.¹⁶⁶ As previously mentioned, in order to examine whether repeated interaction has any impact on litigation, I use a probit model to estimate the relationship between repeated interaction and the probability that a company will have a lawsuit filed within six months, and within one year of an IPO.¹⁶⁷

¹⁶⁶ As I discuss in more detail below, a body of literature has also connected litigation to underpricing, explaining underpricing as a possible insurance and deterrent to litigation. See, e.g., Randolph P. Beatty & Ivo Welch, *Issuer Expenses and Legal Liability in Initial Public Offerings*, 39 J.L. & ECON. 545 (1996) (examining the viability of the litigation theory); Lowry & Shu, *supra* note 107, at 326–33 (finding evidence to support the litigation hypothesis); see also Spindler, *supra* note 117, at 31–35 (exploring legal and empirical dimensions of the litigation hypothesis). But see Alexander, *supra* note 104, at 54–61 (providing a detailed critique of the litigation hypothesis). As I will explain further below, statistical analysis in this paper points to underpricing being a factor encouraging litigation, as opposed to preventing it.

¹⁶⁷ I limit the analysis to one year for two reasons. The first is that IPO-related class actions are typically filed within the first year after the offering. See Lowry & Shu, *supra* note 107, at 315 (discussing statistics on lawsuits filed). The second

i. *Underwriter and Underwriter's Counsel*

The regressions reveal no significant relationship between litigation and frequent interaction between the underwriter and its counsel within the preceding year.¹⁶⁸ The lack of significant result remains for deals within the past two and three years, as well as for deals for which individual lawyer identities can be confirmed. The absence of a significant result is not the same as a precise result showing no correlation. Nonetheless, the lack of relationship is noteworthy when compared to the results below that demonstrate a strong relationship between the probability of litigation and other types of repeated interactions.

ii. *Issuer's Counsel and Underwriter's Counsel*

When both sets of law firms have worked together more frequently, the analysis shows a slightly (0.3%) lower probability of litigation for the first six months, but no significant result is apparent for longer periods.¹⁶⁹ The six-month results might suggest a further positive benefit from lawyers' frequent interactions. Since a primary task of the lawyers is to limit liability, one would hope to see better working relationships result in more effectively preventing litigation, notwithstanding the fact that litigation can be caused by numerous factors outside of lawyers' control.

iii. *Issuer's Counsel Interactions with the Underwriter*

With respect to such deals where the potential for conflict of interest is high, the results of the analysis are particularly striking: when the issuer's counsel has represented the underwriter within the preceding year, there is a 2.9–3.5% increase in the probability of a securities class action lawsuit within one year of the IPO.¹⁷⁰ Given that the baseline probability of having

reason is to remain conservative in my empirical approach. Other studies of securities litigation also have used a one-year window to assess whether or not litigation is IPO related. *See, e.g.*, Stephen J. Choi, *Do the Merits Matter Less After the Private Securities Litigation Reform Act?*, 23 J.L. ECON. & ORG. 598, 607 (2007) ("Although plaintiffs' attorneys may file suit up to 3 years after the IPO, I focus on the first-year performance to screen out the impact of factors unrelated to the IPO on aftermarket performance."). The results in this Article, however, would remain the same even if a three-year window were used.

¹⁶⁸ *See* Appendix Table 4, Panels A1, A2.

¹⁶⁹ *See* Appendix Table 4, Panels C1, C2.

¹⁷⁰ *See* Appendix Table 4, Panel D1. The probability of securities class action litigation within three years increases by 5.8% for each underwriter representa-

a securities class action filed for all deals in the dataset is 4.4%, the results of the analysis represent a significant increase. When the dataset is narrowed to only deals for which individual lawyers can be identified, the results become stronger. The probability of a class action within six months becomes significant and increases 2.0–2.7%; the probability of a suit within one year increases by 4.4–4.7%. The finding further suggests a negative outcome for the issuer when the issuer's counsel has recently represented the underwriter. This raises the possibility of agency problems between the issuer's counsel, the underwriter, and the issuer.

d. *Disclosure*

Analysis of the prospectus disclosure provides some insight into one part of the deal for which the lawyers are very directly responsible, as previously discussed. The content and impact of different types of disclosure vary, but empirical work on disclosure agrees that the risk factors have a significant effect on how a deal is received by investors.¹⁷¹ I therefore analyze the share of the prospectus for each deal devoted to risk factors.¹⁷²

i. *Underwriter and Underwriter's Counsel*

The level of risk factor disclosure provides some evidence that frequent collaboration between the underwriter and its counsel yields better team functioning. Each additional deal that the two parties complete together in the preceding year is associated with a 30.9% increase in the proportion of the prospectus occupied by risk factors. For repeated deals in the past two years, the marginal increase is 20.0%, and for three years, it is 15.0%.¹⁷³

Although the quantity of disclosure is a rough measure of how informative disclosure is, it yields some tentative conclusions when viewed in light of the other results. Specifically, a

tion within the past year. The results remain after removing the IPOs from the so-called bubble period, from 1999 to 2000, which were especially prone to litigation.

¹⁷¹ See, e.g., Hanley & Hohberg, *supra* note 117, at 2821–22 (discussing the relationship between the degree of disclosure and investors' perception of the accuracy of the prospectus).

¹⁷² In addition, I analyzed the overall length of prospectuses and the proportion of each devoted to the management's discussion and analysis section ("MD&A") which is also reported to be important in the marketing effort. See Interview with W, *supra* note 55. Neither prospectus length nor MD&A proportion bore a significant relationship to repeated interaction, and so those results are not reported.

¹⁷³ See Appendix Table 10. Each estimate is significant at the 0.1% level

tentative inference can be drawn that the increase in risk factors is a beneficial outcome for the underwriter, especially if it is not associated with any great litigation risk or risk due to underlying factors specific to the issuing company. The increased risk factor disclosure might put downward pressure on the initial filing range or the final price, because it adds to investor uncertainty about the issuing company. This would, on balance, benefit the underwriter who stands to lose less and gain more from underpricing.

ii. *Issuer's Counsel and Underwriter's Counsel*

Repeated interactions between the two sets of counsel are associated with a trend of marginally increasing risk factor disclosure, similar to that seen with respect to the underwriter and its counsel alone. The degree by which risk factor disclosure increases remains relatively constant regardless of whether prior repeated interactions took place in the past one year (19.0%), two years (17.3%), or three years (15.1%).¹⁷⁴ It is not clear from this analysis alone whether the pattern reveals an outcome that is more favorable to the issuer or the underwriter. However, given the relatively modest levels of underpricing and negative probability of litigation associated with the two sets of counsel's interactions, the increase in negative disclosure does not seem particularly troublesome for the issuer, and may actually indicate a good working dynamic between the two sets of counsel.

iii. *Issuer's Counsel Interactions with the Underwriter*

With respect to issuer's counsel that have repeatedly faced the same underwriter across the table, repeated interactions are associated with much more risk factor disclosure. Each additional deal together within the preceding one year is associated with a 43.7% increase in the proportion of the prospectus occupied by risk factors. For repeated deals in the past two years, the marginal increase is 34.2%, and for three years, it is 32.1%.¹⁷⁵ An analysis of disclosure when issuer's counsel has recently represented the underwriter shows a striking increase in the proportion of risk factor disclosure: an increase of 128.1% when issuer's counsel has represented the underwriter

¹⁷⁴ See Appendix Table 11. Each estimate is significant at the 0.1% level.

¹⁷⁵ See Appendix Table 12. Each estimate is significant at the 0.1% level.

within the past year.¹⁷⁶ This further supports the conclusion that, regardless of the precise reasons, the result is bad for the issuer.

There are a few plausible interpretations of these results. One interpretation is that the issuer's counsel is trying to protect the issuer from litigation risk, and therefore allowing or even insisting on high levels of risk disclosure. However, the result could also be a sign of high levels of deference to the underwriter without regard to any detrimental impact on the issuer. As previously explained, issuers tend to resist risk factor disclosure, and one job of the issuer's counsel is to convince the issuer to accept language that is necessary, and to negotiate with the underwriter and its counsel to exclude risk factors that are not necessary. Whichever interpretation is correct, however, these results, taken together with the results from the preceding sections, point to worse outcomes for issuers when repeated interactions increase. Given the negative effect that risk factors have on underpricing, and given the apparent lack of protection these risk factors are affording the issuers against litigation, the increase in negative disclosure seems to be a negative outcome for the issuing company. And although a large amount of risk disclosure may indicate a fundamentally risky company, underlying company risk alone would not explain why repeated interactions among lawyers and bankers result in incremental increases in risk disclosure over successive unrelated deals. Nonetheless, this conclusion is at best tentative and must be taken with caution, given the inherent ambiguity of the risk disclosure as a measure of deal performance.

e. Time to Completion as a Measure of Efficiency

One way to assess efficiency is by measuring the speed at which familiar parties complete deals. To do this, I analyze the length of time it takes to complete a deal from the date that the Form S-1 (or its equivalent) is filed with the SEC to the offer date, when the issuer officially goes public. This time period represents only a portion of the time it takes to complete an entire deal, because much of the work is done before the S-1 is filed. Nonetheless, it serves as a proxy for speed and efficiency. Because the timing of the deal may depend on market conditions in a relatively narrow stretch of time leading up to the offering, I use a fixed effect for each quarter of the IPO year, in

¹⁷⁶ See Appendix Table 13. Results for share of the prospectus devoted to MD&A were not significant and not reported.

addition to the fixed effect for the entire year. The data reveals that the number of lead underwriters or joint bookrunners in the deal has a significant impact on how long the deal takes to complete (each additional manager increases the deal length by approximately six days), and therefore the number of lead underwriters is added to the group of controls. I limit the analysis to deals that are completed within one year, due to the presence of a number of lengthy deals in the dataset occurring mainly during the time of the financial crisis in 2008. Removing all deals that take longer than one year lowers the chances of skewing the results or overstating the true effect of repeated interactions.

i. *Underwriter and Underwriter's Counsel*

For each repeated interaction between the underwriter and its counsel within the past year, the time between the filing of the S-1 and the completion of the deal goes down by almost two days. This means that the deals get completed, on average, at least two days faster. When only deals for which specific individual lawyers can be identified are analyzed, deals are completed between three and five days faster for each prior deal in the past year. The results are necessarily incomplete, because I do not observe the timeframe of the deal from the time before the S-1 is filed, and therefore I can only analyze some of the variation in time and efficiency.¹⁷⁷ Nonetheless, the systematic reduction in the length of time to completion of the S-1 provides evidence of a significant increase in efficiency related to repeated interaction and familiarity with the individuals involved. This effect fades slightly in both magnitude and significance for repeated interactions within two and three years. In general, however, the trend supports what theory would expect: that better teamwork produces faster results.

ii. *Issuer's Counsel and Underwriter's Counsel*

No significant reduction in time to completion is evident from the data when law firms encounter each other repeatedly. This is surprising, given that one would expect familiarity to facilitate a more efficient process. However, the length of time a

¹⁷⁷ For instance, it is possible that repeated interactions slow the deal down between the time the deal commences and the filing of the S-1; or it is possible that repeated interactions speed the deal up by more than two days. While the analysis reported here does not definitively reveal which is the case, the pattern observed in the regression models supports what lawyers and bankers report in interviews: that repeated interactions lead to faster deals.

deal takes may be affected by many factors outside the lawyers' control. The timing of the deal is usually managed by the underwriters, and so perhaps it should not be surprising that familiarity between counsel alone would not affect it. The lack of a significant result with respect to firm interactions may be due to noise in the data, or it could be the case that individuals do not interact as frequently even when the same firms encounter each other repeatedly.

iii. *Issuer's Counsel Interactions with the Underwriter*

The analysis reveals no significant relationship with regard to issuer's counsel's prior representations and the length of time to market at the firm level.¹⁷⁸ When individual lawyers are analyzed, there is a notable reduction in time to completion. This effect exists, however, only for deals that drag on longer than one year between the S-1 filing and the offering date—an extremely long time period for an IPO. When deals that take less than one year are examined, the effect disappears. It is not clear why this would be the case—it could be increased efficiency, or could be something specific about the nature of deals that take an unusually long time. It is therefore difficult to draw conclusions from this result.

2. *Causation Analysis*

It would be dangerous to conclude from naïve regressions alone that a causal relationship exists between repeated interactions and the various outcome variables analyzed. It could be the case, for instance, that some other underlying factor is driving the results as well as the observed repeated interactions. Before proceeding to analyze the implications of the findings above, further analysis of identification and alternative interpretations of the results are warranted.

An inference of causation with respect to the results above would need to rely on the ability to treat the identities of the issuer's counsel and underwriters in each particular deal as quasi-random. This does not suggest that the dealmakers need be completely randomly chosen (which would, of course, be unrealistic). But the inference assumes that *repeated* observations of lawyers and underwriters working together (or across the table from one another) are not the result of the same factors that drive the outcomes being measured, and

¹⁷⁸ See Appendix Table 5, Panel D1.

thus the incidence of dealmakers encountering each other repeatedly are random with respect to the outcomes.

In this regard, one might be very worried about the possibility of selection driving the results. However, there are compelling reasons to rule out selection here. The first is that the underwriter does not choose the issuer's counsel or vice versa. Although there are reports of instances in which the issuer's counsel helps to select the underwriter, the practice is not widespread in IPOs. In many cases, the issuer's IPO counsel is chosen at around the same time or after the underwriter is chosen. If the issuer's counsel does help choose the underwriter, it is from a short list already determined by the issuer's management, and so counsel has a limited role in influencing the decision.

It is important to note that, although the underwriter does not choose the issuer's counsel, there are instances in which the issuer's management asks the underwriter for suggestions. In such instances, by all accounts, the underwriters provide a list for the issuer's management to choose from. Such cases reportedly happen in a minority of deals. And while creating a short list may give the underwriter some influence over the selection of counsel, the underwriter still does not ultimately control the identity of the issuer's counsel.

There may, of course, be other parties or factors at work determining both the identity of the issuer's counsel and the IPO outcomes analyzed above that could be problematic for treating the variation in the identity of the deal team as plausibly random. In addition to the lead underwriter, venture capital investors are another set of actors who are reportedly influential in the selection of counsel in some IPOs. Venture capitalists typically invest in new companies, and sometimes provide advice to company management on matters including the selection of counsel. To control for the possibility that venture capital involvement might be driving the results, I create a dummy variable to distinguish IPOs in which venture capitalists are involved and ones one where they are not. If venture capitalists are a source of selection, the results should disappear when this variable is introduced, but the results remain. I also control the age of each IPO firm, using the natural log of company ages, to account for the fact that many venture-backed firms are relatively younger companies.

Law firm experience and reputation are also possible to confound for several reasons. It could be the case that firm experience would give rise to the same types of results seen

above, and that one would expect to see with good team dynamics. It could also be the case that firm reputation drives the results through a signaling mechanism, conveying quality or lack thereof to the market or to potential litigants. Reputation, experience, and prior relationships with clients may also cut against the premise of quasi-random assignment. Interviews suggest that issuers' and underwriters' choice of law firm is often based on either a previous relationship or recent experience doing IPOs in a given industry.¹⁷⁹

With respect to law firm recent experience and reputation, I employ several strategies to rule these out as confounding factors. In order to rule out the possibility that law firm quality or experience is driving the results, I construct variables to represent the number of deals each firm has done in the previous one year, two years, and three years in each industry, and overall. When these variables are added to the model, they do not change the results at all. As a further test of robustness, I perform the same test but use law firm market share in the previous year as a measure of experience and reputation. This variable similarly does not change the results. In addition, I add fixed effects for certain law firms that appear most frequently in the dataset, and the results remain.¹⁸⁰ I perform similar checks with respect to underwriters, using variables to account for underwriter experience and market share. Again, the results remain.

Trends related to the issuing company's industry, its size, and the time period in which the IPO took place might all factor into the same issuer's counsel and underwriter encountering each other in multiple deals in a given time period.¹⁸¹ At the same time, these factors could influence the outcomes being studied here without regard to the effect of repeated interaction. I employ a number of strategies to rule out the impact of these factors as drivers of the results. The most basic strategies for doing this, as already described, are the use of fixed effects for year and industry, and the interaction of the two.¹⁸²

¹⁷⁹ See Interview with W, *supra* note 55.

¹⁸⁰ In particular, Wilson Sonsini Goodrich & Rosati appears a disproportional high number of times on the dataset. Adding a fixed effect for Wilson Sonsini does not change the results. See Appendix Tables 7 and 8.

¹⁸¹ See Interview with W, *supra* note 55; see also Barondes et al., *supra* note 27, at 184–85.

¹⁸² The interaction of the year and industry acts as a fixed effect for all deals in a particular industry in a given year. For example, if all technology IPOs in 1999 suffered from a very high level of underpricing, the interaction of the industry and year fixed effects will control for that trend.

In addition to the basic approach, in alternative specifications I use fixed effects for each lead underwriter and the quarter of the year in which an IPO occurs. Both of those variables interacted with the industry of the issuing company. In addition, I use controls for geographic location of the law firms, the fees charged by each law firm for each deal, the interaction of location and industry of the issuer, and the existence or absence of outside financing (from venture capital or other sources). I also include controls for the portion of the IPO proceeds that go to insiders, and the portion that go to company itself.

With respect to prior relationships between the banks and the law firms, I construct proxies for bank-lawyer relationships, and remove observations that result from these prior relationships. I do this in two ways. First, I remove observations for lawyers and banks that are anecdotally reported to have strong prior relationships. Second, I remove observations for bank-lawyer pairs with the most frequent interactions as determined by the data. In both cases, the results remain. Moreover, I account for anomalous time periods in the dataset. The years 1999 and 2000 have especially high numbers of IPOs (as well as repeated interactions) and are associated with very high levels of underpricing and litigation. I use fixed effects for these years to remove their average impact on the outcomes, and in alternative specifications I remove all deals done in each of these years from the data set completely.¹⁸³ In each case, the analysis yields results consistent with my preferred specification.

Other factors that might impact the issuer's choice of counsel as well as the outcome variables are the quality of the issuing company and the sophistication of the issuing company's management. Factors that serve as proxies for quality and sophistication are the age of the company (which impacts the amount of information available about the company), the value of the company in terms of total assets, the value of the company as determined by book value per share, and the size of the underwriting syndicate.¹⁸⁴ Including these factors in the model yields results consistent with those in the preferred specification.¹⁸⁵

Furthermore, the systematic incremental nature of the results makes it unlikely that underlying factors are driving the

¹⁸³ See Appendix Tables 7 and 8.

¹⁸⁴ Deal size, measured by the log of gross proceeds, is a standard control in all specifications. See HANDBOOK OF CORPORATE FINANCE, *supra* note 13, at 263–80.

¹⁸⁵ See Appendix Tables 7 and 8.

selection of counsel as well as the outcomes of interest once time period, market conditions, and industry are controlled for. In order for underlying factors to be driving the selection of counsel as well as the results, it would have to be true that the lawyers are being selected based on very accurate predictions of the future levels of, say, underpricing and litigation, and that such levels were being used to select counsel based on the precise number of times a bank had worked with them (or across the table from them) a specific number of times. For example, it would have to be true, on average, that Credit Suisse predicts 40% underpricing and so picks a law firm it has worked with exactly three times in the past year; but a 60% predicted level of underpricing would require it to pick a different law firm that it had worked with exactly four times in the past year. That scenario is not only extremely unlikely as a matter of intuition, it contradicts the accounts of bankers and lawyers describing how the selection of counsel works.

In sum, the results rely on very reasonable assumptions and are extremely robust to numerous tests, adding controls and cutting the data to remove observations that could be the result of selection. The remaining data is the result of plausibly random variation, and support an inference of causation.

B. Practitioner Experience and Team Dynamics

The practitioner accounts gathered for this Article provide valuable context for the quantitative results above. While the lawyers do not see a direct connection between what they do and the quantitative outcomes of the deals (and are generally surprised that there is any correlation), their experiences point to a similar pattern of contrasts between positive and potentially negative consequences of team interaction in IPOs.

Lawyers who work on IPOs report that they regularly come across familiar counsel and underwriters on different deals.¹⁸⁶ Their experiences illustrate how frequent interactions can foster better deal outcomes by building mutual understanding,

¹⁸⁶ This impression is confirmed by the quantitative data. Between 1996 and 2010, the same law firm and lead underwriter(s) worked across the table from one another multiple times in the same year on 450 occasions, out of 2,265 total deals. Between 1996 and 2010, there were 406 instances in which issuer's counsel had acted as underwriter's counsel for the same underwriter within the previous year. On 206 of those occasions, the issuer's counsel had also worked across the table from lead underwriter more than one time in the past year, out of a total of 2,265 deals. Between 1996 and 2010, 454 IPO deals featured law firms that had worked across the table from one another in an IPO deal at least three times within the preceding two years.

coordination, and trust.¹⁸⁷ Lawyers frequently report the experience of working on an IPO as one in which all members of the deal team feel that they are working toward a common goal, an important primary condition for effective team dynamics.¹⁸⁸

Lawyers report that when they are working with an institutional client they have worked with before, the process runs more smoothly.¹⁸⁹ The lawyers understand the organization and how it operates,¹⁹⁰ the key personnel concerned with various issues,¹⁹¹ communication norms,¹⁹² and both institutional and individual preferences with regard to the deal.¹⁹³ For example, one in-house lawyer taking his company public recounts that during negotiations, the underwriter's counsel with whom the underwriter had worked frequently regularly expressed confidence about what his client would or would not agree to, without any need to confer with anyone from the bank's team.¹⁹⁴ This sort of understanding leads in turn to better coordination, and better alignment of agents and principals in the performance of their tasks. The lawyer needs less time to gather information about the client's interests and can negotiate on the client's behalf more effectively.

In addition, assuming previous deals have gone well, more familiarity creates more trust in what the lawyers are doing.¹⁹⁵ This in turn frees the bank personnel to focus on marketing and other commercial aspects of the deal. In some instances, lawyers are reportedly so familiar with the client and the transactions they do that they become involved in business strategy, counseling their clients on decisions for which investment bankers typically do not seek a lawyer's advice.¹⁹⁶

The lawyers interviewed see less downside to teamwork, although they acknowledged the possibility of too much trust or deference to the underwriter. As one lawyer described, when drafting the prospectus as issuer's counsel, it is common to

187 See Interview with K, *supra* note 86.

188 See Hackman, *supra* note 22, at 249–50.

189 There was a consensus among lawyers' interviews that this was the case. See, e.g., Telephone Interview with Attorney (L) (name withheld by request) (Nov. 10, 2013) (on file with author) [hereinafter Interview with L].

190 Interview with D, *supra* note 39.

191 See *id.*

192 Interview with F, *supra* note 115.

193 *Id.* As one lawyer in a large capital markets practice described, "I know exactly who to e-mail or call if I need something, or who to prod if something needs to get done." Interview with K, *supra* note 86.

194 Interview with L, *supra* note 189.

195 Interview with D, *supra* note 39.

196 *Id.*

afford the underwriter great weight in driving much of the content of the disclosure, identifying the precedents to use, and often reigning in what issuers want to say about themselves.¹⁹⁷

Too much deference can undermine the issuer's interests, even if their desires are justified. For example, according to one anecdote, in the course of a drafting session, a negotiation commenced over the inclusion of a disclosure that issuer did not want to include.¹⁹⁸ Having no particular expertise, the issuer's management deferred to counsel.¹⁹⁹ The issuer's counsel argued for its exclusion because it was not material but might nonetheless provide an unnecessary roadmap to litigation.²⁰⁰ The underwriter and its counsel were insistent, and the issuer's lawyer conceded the point.²⁰¹ This example illustrates how issuer's counsel may be reluctant to disrupt the good working relationship of the group, even if it might be bad for the client's long-term interests.

One lawyer described a particularly unpleasant deal marked by poor teamwork. In that deal, the lawyers representing the issuer had not done many IPOs, and were in fact typically M&A lawyers, and took what was described as a more adversarial stance. The interviewee recounted how the lawyers refused to "reign in" the issuer's management on certain requests, turned everything into a laborious negotiation, and blamed the delays on the underwriter's counsel.²⁰² Despite the lack of teamwork, the issuer was able to get more of what it wanted than would typically be the case.

IV

DISCUSSION OF FINDINGS

The findings above indicate that teamwork is a double-edged sword. The frequency of principal-agent interactions plays a significant role in augmenting the quality of an IPO deal; however, there is also evidence that repeated interaction between lawyers and underwriting investment banks magnifies agency costs between the issuer and the underwriter, as well as the issuer and its own counsel.

¹⁹⁷ Interview with L, *supra* note 189.

¹⁹⁸ Telephone Interview with Attorney (C) (name withheld by request) (June 21, 2013) (on file with author) [hereinafter Interview with C].

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Interview with W, *supra* note 55.

Though the data support the general conclusion about the benefits and pitfalls of teamwork, they do not reveal the precise mechanism. The most plausible mechanism would be indirect. Legal counsel influence deals through their advice and their impact on disclosure, but they typically do not engage directly in negotiations related to pricing and other commercial aspects of the deal. On the positive side, this means that good group dynamics can increase the ability of every member of the group to perform tasks more effectively. For example, if counsel works well with the underwriters, they can focus less on regulatory matters and spend more time on marketing and other commercial aspects of the transaction. If the lawyers do a better job writing disclosure, it helps investors to understand the company, generating more interest and making it easier for the investment banks to sell the issuer's shares.

Nonetheless, the most plausible mechanism for the results above also implicates the tension between the lawyer's agency role and the group dynamic of the deals. The components of this mechanism range from the benign to the pernicious. On the more benign end of the spectrum, it could be the case that a better team dynamic entrenches a common idea about the nature of the team's goals in an IPO, such that it conceals the ways in which the parties' interests diverge. This can be described as the common knowledge effect: a feature of group dynamics in which information and ideas held by the most group members (the things that "everybody knows") have disproportionate influence on group judgments to the exclusion of new information.²⁰³ The entrenched goals and norms are developed through repeated interactions over time until alternatives seem outlandish.

Moreover, the perceived goals of the deal, as well as the group ideas about the optimal outcome of the deal, are driven by the underwriters—the repeat actors with the most at stake in shaping those goals.²⁰⁴ After numerous interactions, the goals of the transaction as expressed by the underwriting bank come to be taken for granted by the issuer's counsel and underwriter's counsel alike, and they in turn convince the issuers accordingly. In such situations, it is often difficult for a relatively new member of a group, such as the issuer's management, to express dissent. The issuer in an IPO may not see the

²⁰³ See Daniel Gigone & Reid Hastie, *The Common Knowledge Effect: Information Sharing and Group Judgment*, 65 J. PERSONALITY & SOC. PSYCHOL. 959, 959–74 (1993).

²⁰⁴ Cf. SUNSTEIN & HASTIE, *supra* note 83, at 15.

utility of fighting what the rest of the group sees as market norms, and counsel are unable to advise them otherwise.²⁰⁵ An even more pernicious possibility is that the issuer's counsel is overly solicitous of the underwriter's preferences and perspective on how the deal should run, in the hope of currying favor and future business.²⁰⁶ If the issuer's management is not experienced in capital markets work, they rely heavily on their lawyers both for advice and as examples of how to interact with underwriters, how to negotiate, and how much deference to afford to the underwriters' expertise. In many instances, outside funders such as venture capital groups may be involved in some of the deal negotiations. Although the data do not reveal any significant differences in the patterns when outside funders are present in a deal, it is possible they might also influence any negotiations with underwriters. Nonetheless, they are also subject to the common knowledge effect, and more importantly, their interests are also often not perfectly aligned with the long-term interests of the issuers. For example, outside funders are typically subject to lockup provisions, and therefore they usually cannot sell their stake until several months after the IPO.²⁰⁷ This means, however, that they stand to benefit from underpricing as well, but may have less of a long-term stake in the company once the lockup agreements expire.²⁰⁸ Nonetheless, the managers of a small venture-backed firm are unlikely to challenge their outside backers, especially if all the other parties in the deal are giving similar advice in lockstep.

Agency costs could arise in one or a combination of these scenarios in a deal team. Whichever of these possibilities explain the precise dynamics at work, the overall conclusion remains that agency costs arise in teamwork, and indeed agency

²⁰⁵ The social psychology literature notes that majorities tend to silence minority opinions, especially opinions from a party not previously part of the group, because minorities do not want to lose the favor of the majority. See Robert S. Baron et al., *Social Corroboration and Opinion Extremity*, 32 J. EXPERIMENTAL SOC. PSYCHOL. 537, 557–59 (1996). This may explain why the managers of issuing companies concede to underpricing so pliantly.

²⁰⁶ This is also analogous to regulatory capture, or what some scholars refer to as “deep capture.” See Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 202–06 (2003).

²⁰⁷ See Interview with W, *supra* note 55.

²⁰⁸ See Griffith, *supra* note 17, at 622. This was an issue in the *eToys* case as well. When the lockups expired several months after the IPO, venture capital investors dumped their stock in order to realize their profit. This resulted in the price of the stock dropping. See Laura Casares Field & Gordon Hanka, *The Expiration of IPO Share Lockups*, 56 J. FIN. 471, 474 (2001).

costs are exacerbated by the same kinds of group interaction that are thought to produce better teamwork. These agency costs arise along three dimensions: the relationship between the issuing company and the underwriters, the relationship between the issuing company and its counsel, and the relationship between the issuing company's management and the company itself as an entity.²⁰⁹ Below, I describe how the law surrounding each of these relationships is impacted.²¹⁰

A. "Arm's Length" Transactions and Team Dynamics

If teamwork enhances agency costs between the issuer and the underwriter, as well as the issuer and its counsel, then many capital markets transactions are less "arm's length" than courts have previously assumed. This is important because in recent years, courts have increasingly been asked to decide whether underwriters have any fiduciary duty to issuers when it comes to getting the best price for securities in the market.²¹¹

Fiduciary relationships exist to minimize agency costs while preserving the benefits of agency.²¹² They do so by imposing on an agent "a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation."²¹³ In arm's length dealings, by contrast, the law presumes that parties to a transaction are capable of looking after their own interests, and (absent outright fraud) are not entitled to rely on the trustworthiness of their counterparts.

²⁰⁹ A number of the lawyers interviewed noted that the issuing company is the ultimate client. *See, e.g.*, Interview with W, *supra* note 55.

²¹⁰ I note that the law's treatment of each of these relationships could be explored in great depth. However, in order to maintain the focus of this paper, I will describe them in relatively broad terms and save deeper analysis for future work.

²¹¹ *See, e.g.*, *Xpedior Creditor Tr. v. Credit Suisse First Bos. (USA) Inc.*, 399 F. Supp. 2d 375, 382 (S.D.N.Y. 2005); *Breakaway Solutions, Inc. v. Morgan Stanley & Co.*, No. Civ.A. 19522-NC, 2005 WL 3488497, at *2 (Del. Ch. Dec. 8, 2005) ("To the extent that underwriters function, among other things, as expert advisors to their clients on market conditions, a fiduciary duty may exist."); *Jorling v. Anthem, Inc.*, 836 F. Supp. 2d 821, 834–35 (S.D. Ind. 2011) (finding no fiduciary duty between an underwriter and issuer with respect to advice on size and price of an IPO); *EBC I, Inc. v. Goldman Sachs & Co.*, 936 N.Y.S.2d 92, 96–97 (N.Y. App. Div. 2011) (finding that no fiduciary duty arose between an underwriter and issuer); *HF Mgmt. Servs. LLC v. Pistone*, 818 N.Y.S.2d 40, 42 (N.Y. App. Div. 2006) ("New York . . . does not recognize the existence of a fiduciary obligation that is based solely on the relationship between an underwriter and issuer."). For an analysis of investment bank fiduciary duties, primarily in the context of merger and acquisition transactions, see generally Andrew Tuch, *Investment Banks as Fiduciaries: Implications for Conflicts of Interest*, 29 MELBOURNE U. L. REV. 478, 478–517 (2005).

²¹² *See* SITKOFF, *supra* note 67, at 198–99.

²¹³ RESTATEMENT (SECOND) OF TORTS § 874 cmt. a (AM. LAW INST. 1979).

The existence of a fiduciary duty matters legally as well as practically, because parties will negotiate differently if they believe the other side has their best interests in mind than they will if they believe the other side to be adverse.

While courts recognize that underwriters have interests that are clearly adverse to the issuer's,²¹⁴ they also recognize that the underwriter acts in an advisory capacity to the issuer,²¹⁵ and therefore a fiduciary duty may arise—even when it is disclaimed by contract—if the course of dealing between the parties suggests a relationship of trust and reliance.²¹⁶ Despite the theoretical possibility, courts addressing the issue have typically declined to find that a fiduciary duty exists between underwriters and issuers with respect to pricing an IPO.²¹⁷

In determining whether such a relationship exists between issuers and underwriters,²¹⁸ courts have assumed that: (1) issuers are sophisticated parties²¹⁹ who are (2) advised by experienced counsel,²²⁰ and (3) should be able to recognize when a

²¹⁴ See, e.g., *HF Mgmt. Servs.*, 818 N.Y.S.2d at 43 (“In fact, not only is a fiduciary aspect absent from the majority of underwriting relationships, such relationships are better characterized as adversarial since the statutorily-imposed duty of underwriters is to investors.”).

²¹⁵ See, e.g., *Xpedior Creditor Trust*, 399 F. Supp. 2d at 382 (“[A]n advisor and underwriter to [the issuer] had a fiduciary duty ‘to refrain from doing any act injurious to [the issuer], or which would deprive [the issuer] of any profit or advantage.’”); see also *EBC I, Inc., v. Goldman, Sachs & Co.*, 832 N.E.2d 26, 32 (N.Y. 2005) (“We stress . . . that the fiduciary duty we recognize is limited to the underwriter’s role as advisor.”).

²¹⁶ See RESTATEMENT (SECOND) OF TORTS § 874 cmt. b (“[L]iability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation.”); see also *EBC I, Inc.*, 832 N.E.2d at 31 (finding that an issuer’s reliance on the advice and expertise of its underwriter could create a relationship of “higher trust” and result in the underwriter having a fiduciary obligation to the issuer); *Greene v. Greene*, 47 N.Y.2d 447 (N.Y. 1979).

²¹⁷ See, e.g., *EBC I, Inc. v. Goldman Sachs & Co.*, 936 N.Y.S.2d 92, 96–97 (N.Y. App. Div. 2011); *HF Mgmt. Servs.*, 818 N.Y.S.2d at 43.

²¹⁸ See, e.g., *EBC I, Inc.*, 832 N.E.2d at 31–32 (finding that a fiduciary relationship can arise). The precise legal issue with which courts grapple in these cases is whether or not the plaintiffs present issues of fact sufficient to survive summary judgment regarding the establishment of a fiduciary duty; the determination turns upon whether the circumstances of an underwriting relationship between sophisticated parties with experienced counsel can, in any circumstances, create such a relationship. See, e.g., *id.* For the sake of clarity, I do not discuss in detail the legal posture of these cases, which is unnecessary to the basic point.

²¹⁹ See, e.g., *id.* at 35–36 (Read, J., dissenting in part) (arguing that no set of facts can establish a fiduciary relationship when the issuer is a “sophisticated, well-counseled business entity”).

²²⁰ See *id.* at 36 (noting that the offering price was “negotiated by sophisticated, represented parties”); *HF Mgmt. Servs.*, 818 N.Y.S.2d at 43 (“Both parties were separately counseled. In fact, the underwriting agreement specifically iden-

deal is adversarial and when it is not.²²¹ Each of these assumptions appears less compelling in light of the data on IPOs for the reasons that follow.

1. *Issuer Sophistication*

Courts that declare issuers to be sophisticated commercial entities are certainly correct, but they overlook the fact that people can be sophisticated with respect to one area of commercial life but nonetheless be susceptible to the influence of advisors in the right context. Managers of companies going public often have little experience in capital markets transactions, and although they may be sophisticated with respect to business, they rely heavily on the underwriter, legal counsel, and outside funders if there are any, to inform them of the norms and “market” practices, and guide them through the process.²²² While this can happen outside of group or team dealmaking, a group dynamic in which everyone appears to be working toward the issuer’s interests can make it more difficult for a company’s management to realize that their interests may be adverse from those of underwriters. And, in any event, even sophisticated parties can succumb to groupthink or be persuaded by the dictates of purported “market standards.”²²³ When dealing with a cohesive team of advisors, all of whom the

tified EBG as the ‘special regulatory counsel for the underwriters’ and acknowledged that another law firm was serving as outside counsel for WellCare.”).

²²¹ See, e.g., *EBC I, Inc.*, 832 N.E.2d at 36 (comparing the issuer and the underwriter to a buyer and seller, and noting that “the [arm’s length] nature of the contractual relationship between an issuer and an underwriter is long-established and well-understood”); *HF Mgmt. Servs.*, 818 N.Y.S.2d at 43 (noting the “long-established and well-understood” nature of the relationship between underwriter and issuer (quoting *EBC I, Inc.*, 832 N.E.2d at 36)).

²²² See Interview with W, *supra* note 55; see also Schneider et al., *supra* note 24, at 2 (discussing the importance of counsel and investment banks in advising the issuer). Issuers are also sometimes advised by venture capital firms that back them and who can provide greater levels of sophistication. However, the venture capitalists who back issuing companies vary in terms of the degree of involvement they take. Often, they invest in numerous companies and do not get heavily involved in the IPO itself. See Interview with W, *supra* note 55. The venture capital investors also have interests that are aligned in many ways with the underwriters, because they are usually subject to lock-up agreements limiting their ability to sell shares for several months after the offering, meaning that they will personally benefit from any underpricing when they exit the company. See Jan Jindra & Dima Leshchinskii, *Venture Capital Valuation, Partial Adjustment, and Underpricing: Behavioral Bias or Information Production?*, 50 FIN. REV. 173, 186–87 (2015).

²²³ See JANIS, *supra* note 82, at 7–9 (2d ed. 1982) (describing the theory that groups converge on common ideas that are not always correct); see also Heath & Gonzales, *supra* note 82, at 305–26 (discussing evidence of poor decision making based on group dynamics).

issuer presumes to be working in its interests, the lack of issuer sophistication is an even greater liability because managers will be less likely to oppose the group majority's views without reliable advice to back them up.²²⁴

2. *Advice of Counsel*

Both the theory and evidence discussed in preceding sections suggest that issuers cannot always rely on their counsel to advocate forcefully for them or even recognize that such an adversarial posture is appropriate when dealmaking takes on a team-like dynamic. The pattern seen in the quantitative results gives ample reason to doubt that the presence of sophisticated counsel warrants the assumptions that issuers are always apprised of the extent to which its interests diverge from those of the underwriter supposedly in its service. Given the nature of a team-like IPO deal process, this could happen for a number of reasons. The issuer's counsel can succumb to groupthink as easily as any party, especially if the particular lawyers involved have worked with certain members of the group repeatedly in the past.²²⁵ The issuer's lawyers may not notice that the issuer's and underwriter's interests are adverse; or even if the lawyers do notice, they may be reluctant to take actions that might disrupt the smooth group dynamic. More subtly, counsel may establish patterns of deference to underwriters in order to aid the team dynamic that also have the effect of minimizing dissent. In any scenario, a well-working group dynamic among the issuer's advisors can backfire on the issuer and undermines the assumption that "counseled" parties can be characterized as dealing at arm's length.

3. *Recognizing Adverse Interests*

The adversarial nature of the parties' interest in an IPO is less clear than courts assume, given the team-like framework and presumption of a common goal. The terms of the underwriters' compensation structure—a percentage of the proceeds of the offering—contribute to the impression that incentives are aligned, because at a surface level, it appears that the underwriter would want to maximize proceeds as well.²²⁶ However, parties familiar with institutional details of IPOs might recog-

²²⁴ See Baron et al., *supra* note 205, at 63.

²²⁵ Cf. SUNSTEIN & HASTIE, *supra* note 83, at 15.

²²⁶ The *eToys* case raised this point. See *EBC I. Inc.*, 832 N.E.2d 26 at 32 ("Thus *eToys* allegedly believed its interests and those of Goldman Sachs were aligned: the higher the price, the higher Goldman Sachs' 7% profit.").

nize how incentives diverge, but as just discussed, groupthink, lack of awareness, and lack of incentive make it difficult for issuer's counsel to advise the issuers properly on these matters. And if issuer's counsel cannot or will not effectively distinguish the adversarial from nonadversarial elements of an IPO, then the less-experienced issuer has little hope of doing so in most cases.

4. *A Fiduciary Duty for the Underwriter?*

Courts that have wrestled with the fiduciary duty question may reconsider their views in light of the pattern described above. The *eToys* case provides an illustration. Before the *eToys* case eventually settled in 2013, a divided appellate division panel ruled that Goldman owed no fiduciary duty to *eToys* in the underwriting process, and therefore had no obligation to help it capture all of the value from the deal that it could have.²²⁷ The majority reasoned that, despite the advisory role an investment bank takes with respect to a company going public, *eToys* and Goldman were operating at arm's length per the terms of the underwriting agreement between the two parties.²²⁸

The majority noted in passing that *eToys*' counsel had been contemporaneously representing Goldman on another deal when the *eToys* IPO began, but dismissed the possibility that the prior representation would lead to any conflict, noting that *eToys*' firm (the Venture Law Group, or VLG) had properly disclosed the fact and obtained the parties' consent.²²⁹ While there is no question that the VLG properly waived any potential conflict,²³⁰ the results above indicate that even with proper waivers, VLG was less likely than other law firms to be in the best position to help *eToys* reach independent judgments and ask the right questions about the advice it was getting from its underwriter. In a deal framework that resembles a team dynamic where reliance and trust arise naturally, the issuer was less likely to perceive where its interests diverged from the goal that the group was pursuing. And the nature of VLG's past interactions with Goldman made it highly unlikely that the firm would be able to assist *eToys* in getting the best deal. In all

²²⁷ See *EBC I, Inc. v. Goldman Sachs & Co.*, 936 N.Y.S.2d 92, 100–01 (N.Y. App. Div. 2011).

²²⁸ See *id.* at 94–95.

²²⁹ See *id.*

²³⁰ The firm had disclosed and obtained consent from the parties to engage in the representation, per the rules of professional responsibility. See *id.*

likelihood, the prevailing social dynamic left the issuer open to exploitation, even as it assumed that other members of the deal team were looking out for its interests.

While the results above shed light on how much a “well-counseled” issuer can be expected to adequately protect its interests in an IPO, they do not make clear what the solution to problems should be. The SEC has recognized that conflicts of interest exist in issuer-underwriter relationships, particularly where underwriters are engaged in spinning. Spinning is a practice that underwriters employed to curry favor with the managers of issuing companies whose IPOs were severely underpriced, by allowing them to invest in other “hot” or underpriced IPOs. If an underwriter underpriced an IPO and the CEO or other officers of the company became upset, the underwriter would allocate shares of the next underpriced deal, ensuring that the shares would increase in value and make company officers an instant profit. The SEC, via FINRA, banned the practice in 2011 after a string of complaints.²³¹ Nonetheless, the conflict of interest at the heart of the spinning problem still exists, raising questions about the duties that underwriters owe to issuers in IPOs.

The courts that have addressed this issue have been reluctant to impose any sort of duty, despite recognizing that one might exist.²³² Ultimately, whether such a duty makes sense and how it might work raises numerous questions, adequate discussion of which is beyond the scope of this Article. A categorical fiduciary duty (imposed on all underwriting relationships) would change the nature of underwriting dramatically and would contravene the issuer’s and underwriter’s ability to structure their contractual relationships. However, an ad-hoc finding of a fiduciary relationship in some cases, as has been suggested by some courts,²³³ would make it difficult for parties to predictably structure their relationships, and likely subject underwriters to increased contracting costs and litigation.²³⁴ These are problems with no simple solutions, and would benefit from further research.

²³¹ See FINRA, RULE 5131 (2011).

²³² See, e.g., *EBC I, Inc.*, 936 N.Y.S.2d at 100–01 (refusing to find that the facts sufficiently established the existence of a fiduciary duty, despite the Court of Appeals’ insistence that one did).

²³³ See *id.*

²³⁴ See SITKOFF, *supra* note 67, at 200 (discussing the problems inherent in different types of fiduciary duty regimes).

B. Implications for Ethical Rules

When a lawyer's role as agent comes into tension with a lawyer's role as a team member, what implications are there for lawyers' ethical rules? Latent conflicts, some of which may not even enter counsel's awareness, can exist with regard to his or her individual clients (the issuing company's management) as well as the organizational client (the issuing company itself). The results previously discussed suggest reexamining the assumptions embodied in the rules about how conflicts are handled.

1. *Conflicts of Interest*

Every state has passed an analogue to the ABA Model Rules of Professional Conduct containing provisions governing conflicts of interest in representation. Rule 1.7 of the Model Rules, which principally governs such conflicts, states that a lawyer may represent a client if the lawyer has no concurrent conflict of interest.²³⁵ A concurrent conflict of interest is defined as one in which representing the interests of one client "will be directly adverse to another client" or "there is a significant risk that the representation of one [client] . . . will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."²³⁶ Such conflicts, if they exist, are imputed to the lawyer's entire firm.²³⁷ Of course, potential conflicts arise all the time among law firms in most major financial centers. These are typically waived, often prospectively and in a general manner, as part of a client's standard retainer agreement.²³⁸ The Rules allow for lawyers to obtain a client's informed consent to continue the representation despite a potential conflict, provided that the lawyer reasonably believes he or she will be

²³⁵ MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2013).

²³⁶ *Id.* r. 1.7(a). The Rule contains slight variations in some states. Most notably for this Article, New York's version provides that a conflict exists in a concurrent representation if a "reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." N.Y. RULES OF PROF'L CONDUCT r. 1.7(a) (N.Y. CTY. LAW. ASS'N ETHICS INST. 2011).

²³⁷ See MODEL RULES OF PROF'L CONDUCT r. 1.7, cmt. 1.

²³⁸ See Michael J. DiLernia, *Advance Waivers of Conflicts of Interest in Large Law Firm Practice*, 22 GEO. J. LEGAL ETHICS 97, 97 (2009) ("Advance waivers of conflicts of interest have become an essential business and ethics practice for large law firms in the United States.").

able to provide competent and diligent representation.²³⁹ In addition, to raise an ethical red flag, multiple adverse representations must provide more than the mere possibility of harm to one client—the harm must be foreseeable and likely.²⁴⁰ In short, in most jurisdictions, the rules governing conflicts of interest are fairly permissive as long as counsel obtains informed consent. However, in some states—like New York, where a large share of capital markets deals are conducted—lawyers are generally prohibited from placing themselves in a position in which they advance, or even appear to advance, interests of a party adverse to those of their client.²⁴¹

The agency tensions inherent in team-like deals challenge the ways in which Rule 1.7 has been interpreted to allow client consent for potential conflicts of interest. First, the idea that a lawyer can “reasonably believe” that adequate representation of an issuer is possible when the counsel is currently or has recently represented the same underwriter in the deal is highly suspect. A lawyer’s ability reasonably to assess his or her susceptibility to bias is inherently suspect. Like most human beings, lawyers can fall prey to overconfidence bias,²⁴² and

²³⁹ MODEL RULES OF PROF’L CONDUCT r. 1.7(b). The rule states that a lawyer may represent a client despite a concurrent conflict of interest if:

- “(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.”

See id.

²⁴⁰ MODEL RULES OF PROF’L CONDUCT r. 1.7, cmt. 8 (stating that “[t]he mere possibility of subsequent harm” will not establish a concurrent conflict of interest).

²⁴¹ *See* N.Y. CODE OF PROF’L RESPONSIBILITY, DR 5-105; *see also* *Greene v. Greene*, 47 N.Y.2d 447, 451 (N.Y. 1979) (“Thus, attorneys historically have been strictly forbidden from placing themselves in a position where they must advance, or even appear to advance, conflicting interests This prohibition was designed to safeguard against not only violation of the duty of loyalty owed the client, but also against abuse of the adversary system and resulting harm to the public at large.” (citations omitted)).

²⁴² MODEL RULES OF PROF’L CONDUCT r. 1.7(b). A large literature has documented overconfidence bias—or a belief in abilities beyond what one realistically possesses—in business and finance. *See* ROBERT J. SHILLER, *IRRATIONAL EXUBERANCE* 142 (2000) (“[S]ome basic tendency toward overconfidence appears to be a robust human character trait”); *see also* Donald C. Langevoort, *The Epistemology of Corporate-Securities Lawyering: Beliefs, Biases and Organizational Behavior*, 63 BROOK. L. REV. 629, 650 (1997) (“Probably far more lawyers pride themselves on independence and good judgment than consistently exhibit it.”).

overestimate their ability to represent a party faithfully while representing an adverse client.²⁴³ Research on lawyer recusals supports the intuition that it is exceedingly rare for lawyers to inform clients that they are unable to waive a conflict.²⁴⁴

In addition, lawyers serve as their own gatekeepers when assessing potential conflicts.²⁴⁵ The inquiry into whether the conflict might result in harm to a client rests entirely with the “conflicted” attorney, and so will inevitably be subject to any biases or blind spots the attorney may have. Based on the interviews and other accounts by lawyers who do capital markets work, it is difficult for an issuer’s counsel to perceive the danger of prior interactions with underwriters that are apparent from the quantitative data; moreover, even New York’s stricter conflict of interest rules would permit representation despite the pattern in outcomes, because they are not obvious enough to preclude a “reasonable belief” that that diligent representation can be given. Greater awareness of the trends inherent in successive representation could make some difference if it changes accepted beliefs about what types of conflicts can be reasonably waived. But it is not clear that this would be the case. And in a team-like deal, whether groupthink, overlawying, or unconscious bias is at work, it would be hard for lawyers to reliably recognize the danger and screen.

Second, the rationale for allowing clients to give “informed consent” to concurrent representation—respect for client autonomy²⁴⁶—makes far less sense if simple disclosure of a potential conflict does not, and cannot, convey all the potential ways in which loyalty can be undermined. The information upon which “informed consent” rests is the fact of concurrent

²⁴³ In interviews, most lawyers readily acknowledged that issuer’s counsel frequently pandered to underwriters with whom they had worked; however, all were firm that they had never fallen into the same trap.

²⁴⁴ See Leonard E. Gross, *Are Differences Among the Attorney Conflict of Interest Rules Consistent with Principles of Behavioral Economics?*, 19 GEO. J. LEGAL ETHICS 111, 149 (2006). Professor Gross’s study surveyed graduates of Southern Illinois University Law School and found that 68% of respondents claimed to inform their clients that conflicts were nonwaivable less than 10% of the time; another 15% of respondents stated that they informed their clients that the conflicts were nonwaivable only 25% of the time. See *id.* at 149; see also Bryan K. Church & Xi (Jason) Kuang, *Conflicts of Interest, Disclosure, and (Costly) Sanctions: Experimental Evidence*, 38 J. LEGAL STUD. 505, 526–27 (2009).

²⁴⁵ MODEL RULES OF PROF’L CONDUCT r. 1.7, cmt. 1.

²⁴⁶ The rationale for allowing informed consent typically rests on concerns for client autonomy. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. g(iv) (AM. LAW INST. 2000) (“Concern for client autonomy generally warrants respecting a client’s informed consent.”).

representation, but analysis of the data raises doubts that such information conveys everything that would be relevant for consent. For the previously discussed reasons, the team-like dynamic of an IPO deal makes it seem as though prior or even concurrent representation would not present a problem, and may even be a benefit, because everyone has the same goals. However, as discussed in the preceding sections, conflicts may exist that are not obvious, and that in hindsight would appear to be subject to truly informed consent.

2. *Organizational Representation*

This Article has thus far treated issuing companies as though they are singular clients. However, as in any organization, the picture is more complex. The ultimate client is the organization itself, but the organization acts through its officers and directors, any of whom may have interests that diverge from what is ultimately best for the company. The group nature of capital markets deals further complicates this already muddy distinction, and may compromise counsel's ability to serve their organizational clients.

The Model Rules make clear that when lawyers represent an organization, their duty runs to the organization itself.²⁴⁷ This implies that good legal advice would include what is best for the company, even if the company management cannot see what that would be. The ability to give such advice, however, is undermined for all the reasons already stated. For instance, an issue like underpricing may not have a large impact on the issuer's management as individuals, because they will frequently be prohibited from selling their shares until months after the IPO and so will not be adversely affected.²⁴⁸ They themselves may have also been "spun," or sold shares in future hot IPOs lead by the underwriter to soothe any lingering bad feelings from an underpriced deal.²⁴⁹ However, underpricing is still a long-term problem for a newly public company because it has less cash to operate. Acquiescing to underpricing can thus be understood as an agency problem on multiple levels, meaning that counsel cannot adequately represent the organizational client without advising management about where their own interests may diverge from those of the company.

A fulsome analysis of this potential problem is beyond the scope and space limitations of this Article, but it is an issue

247 See MODEL RULES OF PROF'L CONDUCT r. 1.13.

248 See Griffith, *supra* note 17, at 609, 636-43.

249 See *id.*

that requires further exploration. At a very general level, the ethics rules should require disclosure of recent representations, as well as the associated unintended consequences. A solution might also entail barring acting as issuer's counsel following multiple deals with the same underwriter in a certain period of time, akin to the rules mandating the rotation of auditing partners that came into force in the wake of the corporate accounting scandals in the late 90s and early 2000s.²⁵⁰ Finally, the rules should require counsel to explain to the client not only the fact of a prior representation but also the ways in which the parties' incentives diverge and the possible impact that could have on the deal. In any event, an explicit recognition of the problem is an important step in prompting the bar to vigilance.

C. Managing Agency and Teamwork

In addition to the legal and ethical considerations discussed above, it is worth considering practical solutions to address problems inherent in teamwork. The first is that lawyers should take a larger role in setting the norms of a deal team, including a norm that provides space for dissent without disrupting the team dynamic.²⁵¹ The second, ironically, is that lawyers should revise their view of their own role on a deal team as more adversarial, or at least critical of the supposed market standards that prevail. The third is that lawyers should prime more critical approaches by locating more information.²⁵² I discuss each of these in more detail here.

One means of managing the tension between agency and teamwork is to develop a different understanding of the lawyer's role in the group process of bringing an IPO to market. Social science research indicates that in a group setting individuals will silence themselves if they think that dissent from the prevailing norm will lead to punishment or loss of reputation, both of which are dangers for lawyers working with familiar underwriters.²⁵³ However, the research also reveals that the most effective teams require more than just familiarity, trust, and routinization; they also require a set of norms and practices for raising problems and resolving disputes, while

²⁵⁰ See Securities Exchange Act of 1934 § 10A(j), 15 U.S.C. § 78a (2012).

²⁵¹ See Hackman, *supra* note 22, at 246–55.

²⁵² See Turner & Pratkanis, *supra* note 82, at 105–08.

²⁵³ See SUNSTEIN & HASTIE, *supra* note 83, at 107.

maintaining the trust and safety that familiarity affords.²⁵⁴ Indeed, the research shows that teams in which group members raise conflicts, dissent, or play devil's advocate perform better than teams in which conflict is downplayed.²⁵⁵ However, there is a catch: the conflicts must be raised in a way that maintains the collaborative ethos of the group, a task that requires good communication skills and emotional intelligence.²⁵⁶ As both advisors and process experts, lawyers are particularly well positioned to suggest group norms that include and even reward dissenting views, in the interest of improving the deal. Making the expectation clear at the outset of the deal that the lawyers will actively pursue dissenting viewpoints, while still working with the team, would lessen the perceived cost of breaking from the group's consensus.²⁵⁷

Of course, to do so, issuer's counsel would need to reframe its role in the transaction as one consisting of more advocacy. However, this need not be difficult. Dissent is an advocacy-type function that lawyers are ordinarily well trained to perform, and reframing counsel's role would not be a major departure from what lawyers routinely do. In order to advocate effectively, a lawyer would need a more complex understanding of his or her role in the interests of the various parties in the deal, and the ways in which an issuer might be especially vulnerable. This would mean developing a more nuanced understanding of when critical moments occur in the deal, as well as what kind of advice to give.

Many of the most critical negotiations in an IPO are thought to occur at the very end of the deal, when the issuer and lead underwriter agree on an offering price just before the stock goes public. But the negotiations preceding pricing have an impact on a number of factors that are influential in almost any negotiation: the information available to the parties, the nature of relationships between the parties (including patterns of deference), and the alternatives available to the parties. For example, as previously discussed, certain types of disclosure

²⁵⁴ See Greer et al., *supra* note 84, at 116; see also Hackman, *supra* note 22, at 250, 261.

²⁵⁵ See Greer et al., *supra* note 84, at 116; see also Garry Emmons, *Encouraging Dissent in Decision-Making*, HARV. BUS. SCH. (Oct. 1, 2007), <http://hbswk.hbs.edu/item/encouraging-dissent-in-decision-making> [<http://perma.cc/KV94-2PW5>].

²⁵⁶ See Greer et al., *supra* note 84, at 116; see also Emmons, *supra* note 255.

²⁵⁷ For example, in one large consulting firm where team tasks are emphasized, team members are charged with a "duty to dissent" to help avoid groupthink.

have a negative effect on initial offer price.²⁵⁸ Moreover, the preliminary prospectus provides a basis for comparison between the issuer and other companies that have gone public, which in turn provides an anchor for setting the initial offer range and the final price.²⁵⁹ Instead of taking cues from the underwriter, a more proactive issuer's counsel could help to establish a better bargaining position for the issuer from the very beginning of the deal.

Providing effective advice would also involve developing more information about market norms and performance, independently of what is provided by underwriters and other parties typically involved in such deals. For example, gathering a broader range of precedent documents or data about market performance for issuing companies from the outset of a deal could help to counter groupthink and the psychological weight of anchoring. If the lawyers have worked frequently with a particular underwriter, it might be necessary to avoid using precedent documents from previous deals with the underwriter, or even change personnel from deal to deal. While this might diminish some efficiency gains, it would likely better serve issuers in the long run. Whether issuers take such advice or not, greater access to alternative views would help issuers make better decisions regarding their deals, and lawyers are uniquely placed to help provide this information. Again, these proposals require more in-depth analysis, but they provide a starting point for further thinking on the issue.

CONCLUSION

Working in teams—both on your own side of a deal and with those nominally on the other side—is part of the reality of transactional legal practice. Familiarity and good teamwork are beneficial, perhaps even essential, but they also carry more costs for lawyers and their clients than many assume. The goal of this Article is to reveal those costs, explain the theory and the evidence for their existence, and discuss how both law and

²⁵⁸ See Khaled Abdou & Mehmet F. Dicle, *Do Risk Factors Matter in the IPO Valuation?*, 15 J. FIN. REG. & COMPLIANCE 63, 66–67 (2007).

²⁵⁹ The anchoring effect is a cognitive bias, described as the formation of a belief about the value of something, based on a specified initial value, regardless of whether that initial value is salient or entirely irrelevant. See JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 14 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982) (“In many situations, people make estimates by starting from an initial value that is adjusted to yield the final answer [D]ifferent starting points yield different estimates, which are biased toward the initial values. We call this phenomenon anchoring.”).

deal practice should take them into account. In doing so, this Article does not suggest that teamwork is a bad thing or that it should be dispensed with. It merely suggests that familiarity, trust, and the hallmarks of teamwork have especially complicated implications for deal lawyers. There are benefits, but also costs that must be taken into account. The point is that companies make this cost-benefit analysis without awareness of the cost of close relationships among the repeat players. The Article is an effort to bring those to light so that companies can become aware of them, as can courts and practitioners.

The secondary goal of this Article is to dispel the myth in legal practice, as has been done in other spheres, that good relationships alone are enough for effective collaboration, and that effective teamwork is something that arises through repetition. While those things are important elements to a good working dynamic, it is essential for lawyers, even more than for those in other professions, to develop the ability to recognize conflict, dissent, and object, but do so in a way that preserves the positive ethos of the working group. This is not something that develops automatically, but it is a skill to which lawyers are well suited, and indeed they should employ if they wish to balance the tension between agency and teamwork. Though teamwork is a popular topic, discussions of how to leverage it properly and avoid its pitfalls are virtually absent from discussions of good lawyering. Nonetheless, if lawyers are to continue to be effective transaction cost engineers in capital markets, these conversations are important, and the skills that come with them are essential, particularly at a time when the value of legal education is in question and large corporate clients complain that lawyers lack the ability to add value.

APPENDIX

APPENDIX FIGURE 1. VARIABLES ANALYZED AND STANDARD CONTROLS USED FOR OLS AND PROBIT MODELS.

Outcome variables tested (dependent variables)	Main independent variables: Types of lawyer interactions tested (IPOs together within the preceding 1 year, 2 years, and 3 years)	Additional control variables
• First trading day price change	• Lead underwriter and underwriter's counsel	• Offering size (as the log of gross proceeds)
• Price change relative to the S&P Index at 30 days, 60 days, 90 days, and 1 year post offering	• Lead underwriter and the issuer's counsel (prior interactions across the table)	• IPO year and quarter fixed effects (a dummy variable for each year and quarter year in the sample)
• Probability of correct upward price revision	• Lead underwriter and the issuer's counsel as underwriter's counsel	• IPO industry fixed effects (a dummy variable for each industry in the sample, using the SEC's 3-digit SIC codes; Fama French industry classification codes used in alternative specifications)
• Probability of securities class action litigation at 6 months and 1 year post offering	• Lead underwriter and the issuer's counsel (potential "conflict" deals: prior interactions on the same side of the table)	• Underwriting bank fixed effects (a dummy variable for each lead underwriting bank, de-weighted in the case of multiple lead underwriters)
• Prospectus size (as the log of prospectus size)	• Issuer's counsel and underwriter's counsel (prior interactions across the table)	• Age of the issuer (as the log of the issuer's age)
• Proportion of prospectus devoted to risk factors		• Lead underwriter quality (according to number of IPOs performed – robustness checks done using samples of the seven most experienced banks and the fourteen most experienced banks)
• Proportion of prospectus devoted to MD&A		• Lead underwriter quality (by IPO market share for the preceding calendar year)
• Length of time from the filing of Form S-1 to the offer date		• Law firm experience/quality (as the number of IPO deals completed by each law firm in the preceding 1-year, 2-year and 3-year periods)
• Volatility relative to the S&P Index at 30 days, 60 days, 90 days, and 1 year post offering		• Law firm experience/quality (by IPO market share for the preceding calendar year)
		• Geographic location of law firms (by ZIP code and city)
		• Participation by venture capital investors (a dummy variable indicating the involvement of venture capital investors prior to the IPO).

APPENDIX FIGURE 2. SUMMARY STATISTICS.

	N*	Mean	Median	Min	Max	Standard Deviation
Total IPO deals	2,265					
Lead underwriters	268	1.40	1.00	1.00	7.00	0.82
Underwriter-underwriter's counsel, multiple deals in the past:						
1 year Firm level	955	3.3	3.00	2.00	13.00	1.95
Lawyer level	412	2.60	2.00	2.00	9.00	1.14
2 years Firm level	1,135	3.89	3.00	2.00	16.00	2.63
3 years Firm level	1,231	4.24	3.00	2.00	19.00	3.07
Lawyer level	580	2.91	2.00	2.00	13.00	1.57
Underwriter-Issuer's Counsel multiple deals in the past:						
1 year Firm level	450	3.04	2.00	2.00	13.00	1.87
Lawyer level	99	2.10	2.00	2.00	3.00	0.30
2 years Firm level	564	3.29	2.00	2.00	16.00	2.33
3 years Firm level	632	3.39	2.00	2.00	18.00	2.48
Lawyer level	161	2.17	2.00	2.00	5.00	0.45
Underwriter Counsel-Issuer Counsel multiple deals in the past:						
1 year Firm level	493	4.53	3.00	2.00	18.00	3.41
Lawyer level	20	2.00	2.00	2.00	2.00	0.00
2 years Firm level	582	5.51	3.00	2.00	27.00	4.90
3 years Firm level	639	6.18	4.00	2.00	31.00	6.17
Lawyer level	30	2.00	2.00	2.00	2.00	0.00
Underwriter-Issuer's Counsel multiple "conflict" deals in the past 1 year:						
Firm level	406	2.31	2.00	1.00	13.00	2.15
Lawyer level	111	2.47	2.00	1.00	11.00	2.16
IPO first day price increase (percent)	2,265	0.28	0.11	-0.75	6.97	0.59
Company ages (years)	2,265	12.80	7.00	>1.00	157.00	18.21
Time to completion (days)	2,265	115.18	88.00	1.00	1016.00	93.83

* A number of deals involve more than one lead underwriter, which creates more observations than deals. Observations are de-weighted accordingly to account for this.

APPENDIX TABLE 1. OPENING DAY PERFORMANCE AND REPEATED INTERACTIONS.

Dependent Variable: Opening Day Price Jump %						
	(1)	(2)	(3)	(4)	(5)	(6)
Panel A1: Lead Underwriter & Underwriters' Counsel – firm level						
Deals together in past year	0.051*** (0.010)	0.031* (0.012)				
Deals together in past 2 years			0.036*** (0.007)	0.019* (0.008)		
Deals together in past 3 years					0.029*** (0.006)	0.015* (0.007)
Log Gross Proceeds	0.067*** (0.012)	0.074*** (0.017)	0.092*** (0.013)	0.078*** (0.018)	0.093*** (0.014)	0.078*** (0.018)
Adj. R²	0.210	0.268	0.197	0.266	0.195	0.261
Number of Observations	2,725	2,725	2,725	2,725	2,725	2,725
Panel A2: Lead Underwriter & Underwriters' Counsel – lawyer level						
Deals together in past year	0.140*** (0.033)	0.112*** (0.034)				
Deals together in past 3 years			0.097** (0.026)	0.077** (0.021)		
Log Gross Proceeds	0.092*** (0.013)	0.073*** (0.016)	0.093*** (0.013)	0.076*** (0.016)		
Adj. R²	0.212	0.275	0.211	0.274		
Number of Observations	2,725	2,725	2,725	2,725		
Panel B1: Lead Underwriter & Issuer's Counsel						
Deals together in past year	0.082*** (0.022)	0.067** (0.024)				
Deals together in past 2 years			0.066*** (0.016)	0.048** (0.017)		
Deals together in past 3 years					0.056*** (0.014)	0.037* (0.015)
Log Gross Proceeds	0.095*** (0.014)	0.081*** (0.018)	0.082*** (0.014)	0.073*** (0.020)	0.096*** (0.016)	0.081*** (0.018)
Adj. R²	0.210	0.273	0.210	0.269	0.201	0.266
Number of Observations	2,725	2,725	2,725	2,725	2,725	2,725
Panel B2: Lead Underwriter & Issuer's Counsel – lawyer level						
Deals together in past year	0.319*** (0.095)	0.244* (0.095)				
Deals together in past 3 years			0.190** (0.062)	0.128* (0.063)		
Log Gross Proceeds	0.101*** (0.014)	0.078*** (0.017)	0.080*** (0.013)	0.068*** (0.019)		
Adj. R²	0.195	0.266	0.194	0.262		
Number of Observations	2,725	2,725	2,725	2,725		

APPENDIX TABLE 1 (CONT'D). OPENING DAY PERFORMANCE AND REPEATED INTERACTIONS.

	Dependent Variable: Opening Day Price Jump %					
	(1)	(2)	(3)	(4)	(5)	(6)
Panel C1: Underwriters' Counsel & Issuer's Counsel						
Deals together in past year	0.033*** (0.010)	0.023* (0.010)				
Deals together in past 2 years			0.021*** (0.006)	0.014* (0.006)		
Deals together in past 3 years					0.016*** (0.005)	0.011* (0.005)
Log Gross Proceeds	0.086*** (0.015)	0.087** (0.023)	0.087*** (0.015)	0.088*** (0.023)	0.088*** (0.015)	0.088*** (0.023)
Adj. R²	0.189	0.252	0.187	0.251	0.188	0.251
Number of Observations	2,265	2,265	2,265	2,265	2,265	2,265
Panel C2: Underwriters' Counsel & Issuer's Counsel – lawyer level						
Deals together in past year	0.690* (0.325)	0.692* (0.348)				
Deals together in past 3 years			0.517** (0.223)	0.475* (0.240)		
Log Gross Proceeds	0.101*** (0.014)	0.075*** (0.017)	0.101*** (0.014)	0.075*** (0.017)		
Adj. R²	0.200	0.274	0.194	0.268		
Number of Observations	2,725	2,725	2,725	2,725		
Panel D1: Lead Underwriter & Issuer's Counsel – Past representation (firm level)						
Past representation in the preceding year	0.144*** (0.037)	0.122** (0.039)				
Log Gross Proceeds	0.096*** (0.014)	0.075*** (0.017)				
Adj. R²	0.194	0.266				
Number of Observations	2,725	2,725				
Panel D2: Lead Underwriter & Issuer's Counsel – Past representation (lawyer level)						
Deals together in past year	0.215** (0.087)	0.161+ (0.094)				
Log Gross Proceeds	0.101*** (0.014)	0.076*** (0.017)				
Adj. R²	0.191	0.263				
Number of Observations	2,725	2,725				
IPO Year Dummies	X	X	X	X	X	X
Industry* Year Dummies	X	X	X	X	X	X
Bank Dummies		X		X		X

Robust standard errors are in parentheses. Estimates marked with +, *, **, and *** are statistically significant at the 10%, 5%, 1%, and 0.1% level respectively. The number of observations is greater than the number of IPOs due to IPOs with joint bookrunners; each bank is treated as being a manager in such cases, and the weight of each such observation is reduced.

APPENDIX TABLE 2. 30-, 60- & 90-DAY PRICE PERFORMANCE

Dependent Variable: Percentage Price Change Relative to S&P Index

	30-Day			60-Day			90-Day		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Panel A1: Underwriters' Counsel & Managing Underwriter									
Deals together in past year	0.044*** (0.013)			0.068*** (0.019)			0.074*** (0.024)		
Deals together in past 2 years		0.033*** (0.009)			0.043*** (0.012)			0.049*** (0.015)	
Deals together in past 3 years			0.028*** (0.007)			0.034*** (0.012)			0.041*** (0.013)
Adj. R ²	0.094	0.092	0.091	0.135	0.136	0.131	0.138	0.137	0.136
Number of Observations	2,725	2,725	2,725	2,721	2,721	2,721	2,720	2,720	2,720
Panel A2: Underwriters' Counsel & Managing Underwriter – lawyer level									
Deals together in past year	0.110*** (0.037)			0.136*** (0.044)			0.141*** (0.058)		
Deals together in past 3 years			0.092*** (0.026)			0.089*** (0.027)			0.105*** (0.044)
Adj. R ²	0.097	0.099	0.099	0.126	0.126	0.125	0.133	0.134	0.134
Number of Observations	2,725	2,725	2,725	2,721	2,721	2,721	2,720	2,720	2,720
Panel B1: Issuer's Counsel & Managing Underwriter – firm level									
Deals together in past year	0.122*** (0.025)			0.163*** (0.038)			0.145*** (0.043)		
Deals together in past 2 years		0.087*** (0.019)			0.114*** (0.029)			0.108** (0.035)	
Deals together in past 3 years			0.073*** (0.017)			0.095*** (0.026)			0.091** (0.032)
Adj. R ²	0.102	0.100	0.091	0.135	0.133	0.132	0.133	0.132	0.131
Number of Observations	2,725	2,725	2,725	2,721	2,721	2,721	2,720	2,720	2,720

APPENDIX TABLE 2 (CONT'D). 30-, 60- & 90-DAY PRICE PERFORMANCE
 Dependent Variable: Percentage Price Change Relative to S&P Index

	30-Day			60-Day			90-Day		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Panel B2: Issuer's Counsel & Managing Underwriter - lawyer level									
Deals together in past year	0.382** (0.123)			0.711** (0.233)			0.761** (0.260)		
Deals together in past 3 years			0.222** (0.082)			0.387** (0.140)			0.405** (0.150)
Adj. R²	0.100	0.118	0.100	0.143	0.123	0.140	0.141	0.130	0.140
Number of Observations	2,725	2,725	2,725	2,721	2,721	2,721	2,720	2,720	2,720
Panel C1: Issuer's Counsel & Underwriters' Counsel - firm level									
Deals together in past year	0.022* (0.009)			0.038* (0.016)			0.041* (0.017)		
Deals together in past 2 years		0.016* (0.007)			0.030* (0.012)			0.039** (0.013)	
Deals together in past 3 years			0.013* (0.006)			0.025* (0.010)			0.034** (0.011)
Adj. R²	0.112	0.118	0.118	0.124	0.123	0.124	0.130	0.130	0.130
Number of Observations	2,725	2,725	2,725	2,721	2,721	2,721	2,720	2,720	2,720
Panel C2: Issuer's Counsel & Underwriter's counsel - lawyer level									
Deals together in past year	0.594** (0.227)			0.708* (0.281)			0.807 (0.643)		
Deals together in past 3 years			0.352* (0.167)			0.442* (0.203)			0.434 (0.438)
Adj. R²	0.100	0.100	0.100	0.130	0.130	0.130	0.130	0.130	0.130
Number of Observations	2,725	2,725	2,725	2,721	2,721	2,721	2,720	2,720	2,720

APPENDIX TABLE 2 (CONT'D). 30-, 60- & 90-DAY PRICE PERFORMANCE.

		30-Day			60-Day			90-Day		
		(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Dependent Variable: Percentage Price Change Relative to S&P Index										
Panel D1: Lead Underwriter & Issuer's Counsel - Potential conflict - firm level										
Collaboration in the preceding year		0.200*** (0.051)			0.200*** (0.068)			0.263*** (0.091)		
Adj. R²		0.092			0.131			0.131		
Number of Observations		2,725			2,721			2,720		
Panel D2: Lead Underwriter & Issuer's Counsel - Potential conflict - lawyer level										
Deals together in past year		0.214* (0.097)			0.210 (0.139)			0.266 (0.194)		
Deals together in past 3 years				0.151* (0.077)			0.174 (0.111)			0.207 (0.145)
Adj. R²		0.090		0.100	0.130		0.129	0.129		0.128
Number of Observations		2,725		2,725	2,721		2,721	2,720		2,720
Industry Dummies		X	X	X	X	X	X	X	X	X
IPO Year Dummies		X	X	X	X	X	X	X	X	X
Industry*Year Dummies		X	X	X	X	X	X	X	X	X

Robust standard errors are in parentheses. Estimates marked with +, *, **, and *** are statistically significant at the 10%, 5%, 1%, and 0.1% level respectively. The number of observations is greater than the number of IPOs due to IPOs with joint bookrunners; each bank is treated as being a manager in such cases, and the weight of each such observation is reduced.

APPENDIX TABLE 3. PROBIT ANALYSIS OF UPWARD REVISION FOR STRONG PERFORMERS.

Dependent Variable: Upward Revision				
	(1)	(2)	(3)	(4)
	20% Bounce		30% Bounce	
Panel A1: Lead Underwriter & Underwriters' Counsel – Firm level				
Log Gross Proceeds	0.582*** (0.078)	0.597*** (0.084)	0.486*** (0.910)	0.485*** (0.100)
Marginal Effect (frequent collaboration)	0.093** (0.037)	0.087** (0.037)	0.099* (0.044)	0.101* (0.044)
Number of Observations	964	906	698	625
Panel A2: Lead Underwriter & Underwriters' Counsel – lawyer level				
Log Gross Proceeds	0.604*** (0.083)	0.597*** (0.084)	0.547*** (0.103)	0.577*** (0.108)
Marginal effect (collaboration)	0.045* (0.037)	0.043* (0.018)	0.047* (0.043)	0.046* (0.020)
Number of Observations	964	906	659	612
Panel B1: Lead Underwriter & Issuer's Counsel – Firm level				
Log Gross Proceeds	0.594*** (0.079)	0.610*** (0.084)	0.501*** (0.092)	0.501*** (0.100)
Marginal effect (frequent)	0.008 (0.049)	0.005 (0.049)	-0.030 (0.524)	-0.274 (0.057)
Number of Observations	964	906	698	625
Panel B2: Lead Underwriter & Issuer's Counsel – lawyer level				
Log Gross Proceeds	0.620*** (0.083)	0.597*** (0.084)	0.547*** (0.103)	0.577*** (0.108)
Marginal effect (collaboration)	0.008 (0.055)	0.024 (0.056)	0.010 (0.060)	0.019 (0.060)
Number of Observations	964	906	659	612
Panel C1: Lead Underwriters' Counsel & Issuer's Counsel – firm level				
Log Gross Proceeds	0.591*** (0.079)	0.608*** (0.085)	0.498*** (0.092)	0.499*** (0.100)
Marginal effect (frequent)	0.042 (0.033)	0.047 (0.034)	0.021 (0.038)	0.034 (0.041)
Number of Observations	964	906	698	625
Panel C2: Underwriters' Counsel & Issuer's Counsel – lawyer level				
Log Gross Proceeds	0.619*** (0.083)	0.643*** (0.088)	0.547*** (0.103)	0.596*** (0.109)
Marginal effect (collaboration)	0.059 (0.149)	0.066 (0.145)	0.024 (0.154)	0.042 (0.152)
Number of Observations	964	906	659	612
Panel D1: Conflict Deals – Firm level				
Frequent Collaborator	0.100 (0.109)	0.080 (0.112)	-0.047 (0.122)	-0.026 (0.127)
Log Gross Proceeds	0.591*** (0.079)	0.607*** (0.084)	0.500*** (0.0922)	0.500*** (0.100)
Marginal effect (frequent)	0.035 (0.038)	0.027 (0.038)	-0.016 (0.042)	-0.009 (0.045)
Number of Observations	964	906	698	625

APPENDIX TABLE 3 (CONT'D). PROBIT ANALYSIS OF UPWARD REVISION FOR STRONG PERFORMERS.

Dependent Variable: Upward Revision				
	(1)	(2)	(3)	(4)
	20% Bounce		30% Bounce	
Panel D2: Conflict Deals – lawyer level				
Log Gross Proceeds	0.617*** (0.083)	0.644*** (0.089)	0.568*** (0.105)	0.601*** (0.110)
Marginal effect (collaboration)	0.025 (0.060)	0.009 (0.060)	-0.0002 (0.065)	-0.012 (0.066)
Number of Observations	964	906	659	612
Industry Dummies	X	X	X	X
IPO Year Dummies	X	X	X	X
Industry*Year Dummies		X		X

Robust standard errors are in parentheses. Estimates marked with +, *, **, and *** are statistically significant at the 10%, 5%, 1%, and 0.1% level respectively. The number of observations is greater than the number of IPOs due to IPOs with joint bookrunners; each bank is treated as being a manager in such cases, and the weight of each such observation is reduced.

APPENDIX TABLE 4. PROBIT ANALYSIS OF PROBABILITY OF CLASS ACTION LITIGATION.

Dependent Variable: Securities Class Action Litigation Filed				
	Within 6 months of offer date		Within 1 year of offer date	
	(1)	(2)	(3)	(4)
Panel A1: Lead Underwriter & Underwriters' Counsel – firm level				
Log Gross Proceeds	0.237*** (0.057)	0.291*** (0.081)	0.254*** (0.469)	0.300*** (0.030)
Marginal Effect (of freq. collaboration)	-0.0007 (0.002)	0.0013 (0.0022)	0.0002 (0.0023)	0.0003 (0.0029)
Number of Observations	2,639	1,645	2,705	2,138
Panel A2: Lead Underwriter & Underwriters' Counsel – lawyer level				
Log Gross Proceeds	0.225*** (0.057)	0.269*** (0.080)	0.307*** (0.049)	0.343*** (0.060)
Marginal Effect (of freq. collaboration)	0.003 (0.003)	0.006 (0.004)	-0.0002 (0.005)	0.0015 (0.005)
Number of Observations	2,639	1,645	2,705	2,138
Panel B1: Lead Underwriter & Issuer's Counsel – firm level				
Deals Together in the preceding 1 year	0.620 (0.065)	0.075 (0.050)	0.107*** (0.032)	0.108*** (0.032)
Log Gross Proceeds	0.235*** (0.057)	0.291*** (0.082)	0.251*** (0.048)	0.290*** (0.058)
Marginal Effect (of freq. collaboration)	0.003 (0.003)	0.005 (0.003)	0.009*** (0.003)	0.010*** (0.001)
Number of Observations	2,639	1,645	2,705	2,138
Panel B2: Lead Underwriter & Issuer's Counsel – lawyer level				
Log Gross Proceeds	0.225*** (0.057)	0.269*** (0.080)	0.305*** (0.049)	0.343*** (0.060)
Marginal Effect (of collaboration)	0.003 (0.003)	0.005 (0.004)	0.025 (0.005)	0.027 (0.017)
Number of Observations	2,639	1,645	2,705	2,138
Panel C1: Lead Underwriters' Counsel & Issuer's Counsel – firm level				
Deals Together in the preceding year	-0.120* (0.061)	-0.113* (0.057)	0.002 (0.024)	0.005 (0.024)
Log Gross Proceeds	0.262*** (0.073)	0.294*** (0.094)	0.288*** (0.057)	0.304*** (0.067)
Marginal Effect (of collaboration)	-0.005 (0.002)	-0.006* (0.003)	0.0001 (0.002)	0.0005 (0.002)
Number of Observations	2,201	1,404	2,253	1,850
Panel C2: Underwriters' Counsel & Issuer's Counsel – lawyer level				
Log Gross Proceeds	0.011*** (0.003)	0.010*** (0.004)	0.024*** (0.005)	0.027*** (0.007)
Marginal Effect (of freq. collaboration)	-0.012 (0.014)	-0.003* (0.001)	0.001 (0.009)	0.001 (0.010)
Number of Observations	2,203	2,203	2,256	1,852

APPENDIX TABLE 4 (CONT'D). PROBIT ANALYSIS OF PROBABILITY OF CLASS ACTION LITIGATION.

Dependent Variable: Securities Class Action Litigation Filed				
	Within 6 months of offer date		Within 1 year of offer date	
	(1)	(2)	(3)	(4)
Panel D1: Conflict Deals – firm level				
Frequent Collaborator	0.111 (0.156)	0.084 (0.179)	0.335*** (0.109)	0.363*** (0.119)
Log Gross Proceeds	0.231*** (0.059)	0.289*** (0.082)	0.238*** (0.049)	0.278*** (0.060)
Marginal Effect (of frequent collaboration)	0.005 (0.007)	0.005 (0.011)	0.029*** (0.010)	0.035*** (0.013)
Number of Observations	2,639	1,645	2,705	2,138
Panel D2: Conflict Deals – lawyer level				
Log Gross Proceeds	0.231*** (0.059)	0.270*** (0.082)	0.393*** (0.050)	0.0271*** (0.006)
Marginal Effect (frequent collaboration)	0.020* (0.059)	0.027*** (0.014)	0.047*** (0.015)	0.044*** (0.019)
Number of Observations	2,639	1,645	2,705	1,847
Industry Dummies	X	X	X	X
IPO Year Dummies	X	X	X	X
Industry*Year Dummies		X		X

Robust standard errors are in parentheses. Estimates marked with *, **, and *** are statistically significant at the 5%, 1%, and 0.1% level respectively. The number of observations is greater than the number of IPOs due to IPOs with joint bookrunners; each bank is treated as being a manager in such cases, and the weight of each such observation is reduced.

APPENDIX TABLE 5. TIME TO COMPLETION FROM S-1 FILING.

	Dependent Variable: Length of Time from S-1 Filing to Offer Date (in days)					
	(1)	(2)	(3)	(4)	(5)	(6)
Panel A1: Lead Underwriter & Underwriters' Counsel – firm level						
Deals together in the preceding 1 year	-2.523** (0.819)	-1.731** (0.546)				
Deals Together in the preceding 2 years			-1.815** (0.605)	-0.955* (0.441)		
Deals Together in the preceding 3 years					-1.559** (0.530)	-0.760 (0.393)
Log (Gross Proceeds)	-10.817*** (2.776)	-9.652*** (1.600)	-10.770*** (2.798)	-9.776*** (1.601)	-10.725*** (2.785)	-9.83*** (1.599)
Adj. R²	0.188	0.145	0.188	0.144	0.188	0.144
Number of Observations	2,723	2,651	2,721	2,651	2,721	2,651
Panel A2: Lead Underwriter & Underwriters' Counsel – lawyer level						
Deals Together in the preceding 1 year	-4.737*** (1.450)	-2.951** (1.125)				
Deals Together in the preceding 2 year						
Deals Together in the preceding 3 year					-3.962*** (1.012)	-2.174** (0.779)
Log (Gross Proceeds)	-11.190*** (2.778)	-9.447*** (1.596)			-11.061*** (2.788)	-9.922*** (1.598)
Adj. R²	0.187	0.144			0.188	0.145
Number of Observations	2,723	2,651			2,723	2,651
Panel B1: Lead Underwriter & Issuer's Counsel						
Deals Together in the preceding 1 year	-1.980 (1.170)	-0.718 (0.820)				
Deals Together in the preceding 2 year			0.238 (1.100)	-0.150 (0.709)		
Deals Together in the preceding 3 year					1.320 (1.570)	-0.127 (0.652)
Log (Gross Proceeds)	-11.536*** (2.780)	-10.213*** (1.594)	-11.724*** (2.792)	-10.279*** (1.594)	-11.915*** (2.813)	-10.280*** (1.596)
Adj. R²	0.187	0.143	0.187	0.143	0.187	0.143
Number of Observations	2,721	2,651	2,721	2,651	2,721	2,651
Panel B2: Lead Underwriter & Issuer's Counsel – lawyer level						
Deals together in the preceding 1 year	-9.816** (4.278)	-4.470 (3.702)				
Deals Together in the preceding 3 year					-4.095 (4.401)	-0.002 (3.019)
Log (Gross Proceeds)	-11.544*** (2.777)	-10.238*** (1.598)			-11.600*** (2.779)	-10.282*** (1.598)
Adj. R²	0.188	0.143			0.187	0.143
Number of Observations	2,723	2,651			2,723	2,651

APPENDIX TABLE 5 (CONT'D). TIME TO COMPLETION FROM S-1 FILING

	Dependent Variable: Length of Time from S-1 Filing to Offer Date (in Days)					
	(1)	(2)	(3)	(4)	(5)	(6)
Panel C1: Underwriters' Counsel & Issuer's Counsel						
Deals Together in the preceding 1 year	-0.548 (0.571)	-0.011 (0.500)				
Deals Together in the preceding 2 year			-0.435 (0.422)	-0.051 (0.387)		
Deals Together in the preceding 3 year					-0.469 (0.339)	-0.118 (0.307)
Log (Gross Proceeds)	-12.448*** (2.929)	-10.610*** (1.687)	-12.454*** (2.928)	-10.604 (1.688)	-12.446 (2.927)	-10.592 (1.686)
Adj. R²	0.163	0.140	0.163	0.139	0.163	0.140
Number of Observations	2,262	2,209	2,262	2,209	2,262	2,209
Panel C2: Underwriter Counsel & Issuer's Counsel – lawyer level						
Deals Together in the preceding 1 year	-8.713 (7.492)	-5.433 (6.683)				
Deals Together in the preceding 3 year					-7.771 (9.019)	-1.866 (8.222)
Log (Gross Proceeds)	-11.646*** (2.778)	-10.278 (1.600)			-11.641*** (2.778)	-10.293*** (1.600)
Adj. R²	0.187	0.143			0.187	0.143
Number of Observations	2,723	2,651			2,723	2,651
Panel D1: Conflict deals						
Frequent Collaborator	-1.639 (4.625)	-2.873 (2.745)				
Log (Gross Proceeds)	-11.684*** (2.580)	-10.157*** (1.598)				
Adj. R²	0.186	0.144				
Number of Observations	2,723	2,651				
Panel D2: Conflict deals – lawyer level						
Deals Together in the preceding 1 year	6.00 (10.870)	-3.793 (4.358)				
Deals Together in the preceding 3 year					4.535 (8.409)	-3.223 (4.101)
Log (Gross Proceeds)	-12.336*** (2.593)	-10.210*** (1.606)			-12.318*** (2.588)	-10.209*** (1.609)
Adj. R²	0.186	0.143			0.186	0.143
Number of Observations	2,723	2,651			2,723	2,651
Industry Dummies	X	X	X	X	X	X
IPO Quarter Dummies	X	X	X	X	X	X
Industry Dummies*	X	X	X	X	X	X
IPO QuarterDummies						
All deals	X		X		X	
Deal length < 365 days		X		X		X

Robust standard errors are in parentheses. Estimates marked with *, **, and *** are statistically significant at the 5%, 1%, and 0.1% level respectively. The number of observations is greater than the number of IPOs due to IPOs with joint bookrunners; each bank is treated as being a manager in such cases, and the weight of each such observation is reduced.

APPENDIX TABLE 7. ALTERNATIVE SPECIFICATIONS - OPENING DAY PRICE INCREASE OUTCOME VARIABLE.

Dependent Variable: Opening Day Price Jump %				
	(1)	(2)	(3)	(4)
	Underwriter- Underwriter's counsel: Deals in the last 1 year	Underwriter- Issuer's counsel: Deals in the last 1 year	Underwriter's counsel and Issuer's counsel: Deals in the last 1 year	Issuer's counsel recently represented Underwriter in IPOs: Deals in the last 1 year
(1) Preferred Estimate – with standard controls (Standard errors)	0.049*** (0.011)	0.089*** (0.023)	0.021** (0.007)	0.156*** (0.037)
<i>Calibrating for quality of lead underwriter – measured by number of deals</i>				
(2) Limiting Sample to biggest lead underwriters: more than 40 IPO deals	0.029* (0.013)	0.077*** (0.025)	0.029** (0.012)	0.165*** (0.048)
(3) Limiting Sample to biggest lead underwriters: more than 80 IPO deals	0.041* (0.018)	0.075*** (0.028)	0.031 (0.017)	0.230*** (0.06)
<i>Calibrating for quality of lead underwriter – measured dollar market-share</i>				
(4) Controlling for lead underwriter dollar market share for IPOs in preceding year	0.044*** (0.011)	0.084*** (0.024)	0.033*** (0.010)	0.160*** (0.042)
<i>Calibrating for law firm experience – measured by number of deals done</i>				
(5) Controlling for number of IPOs done by law firm in the past 1 year	0.048*** (0.011)	0.085*** (0.023)	0.027** (0.011)	0.150*** (0.038)
(6) Controlling for number of IPOs done in the past 2 years	0.049*** (0.011)	0.087*** (0.023)	0.029*** (0.010)	0.151*** (0.039)
(7) Controlling for number of IPOs done in the past 3 years	0.049*** (0.012)	0.087*** (0.023)	0.029*** (0.010)	0.151*** (0.038)
(8) Excluding Wilson Sonsini (outlier firm in number of deals; n = 384)	0.049*** (0.011)	0.082*** (0.030)	0.035*** (0.012)	0.100*** (0.038)
<i>Calibrating for lead underwriters' use of "favorite" law firms</i>				
(9) Removing lead underwriters' most frequently used law firm in the dataset	0.072*** (0.019)	0.095*** (0.028)	0.031*** (0.011)	0.173*** (0.044)
(10) Removing anecdotally reported "favorite" law firm-bank relationships	0.053*** (0.012)	0.090*** (0.026)	0.033*** (0.009)	0.146** (0.040)
<i>Calibrating for availability of information about the issuer / issuer risk</i>				
(11) Controlling for the age of the issuer in number of years since founding	0.049*** (0.011)	0.088*** (0.023)	0.031*** (0.009)	0.160*** (0.039)
(12) Controlling for the age of the issuer in the log of the number of years since founding	0.048*** (0.011)	0.086*** (0.023)	0.030*** (0.009)	0.157*** (0.039)
(13) Controlling for the presence of venture capital investors prior to IPO	0.047*** (0.011)	0.086*** (0.023)	0.030*** (0.009)	0.151*** (0.038)
<i>Altering year control categories</i>				
(14) IPO quarter instead of year	0.048*** (0.011)	0.086*** (0.023)	0.031*** (0.010)	0.167*** (0.040)
(15) Removing the year 1999	0.039*** (0.011)	0.048*** (0.014)	0.022*** (0.008)	0.110*** (0.030)
(16) Removing the year 2000	0.037*** (0.011)	0.129*** (0.039)	0.033*** (0.013)	0.110*** (0.038)

APPENDIX TABLE 8. ALTERNATIVE SPECIFICATIONS FOR CLASS ACTION OUTCOME VARIABLE.

		Dependent Variable: Probability of class action litigation within 1 year			
		(1)	(2)	(3)	(4)
		Underwriter-Underwriter's counsel: Deals in the last 1 year	Underwriter-Issuer's counsel: Deals in the last 1 year	Underwriter's counsel and Issuer's counsel: Deals in the last 1 year	Issuer's counsel recently represented Underwriter in IPOs: Deals in the last 1 year
(1)	Preferred Estimate – with standard controls (Standard errors)	0.0003 (0.0029)	0.010*** (0.001)	0.0005 (0.002)	0.035*** (0.013)
<i>Calibrating for quality of lead underwriter – measured by number of deals</i>					
(2)	Limiting Sample to biggest lead underwriters: more than 40 IPO deals	0.002 (0.004)	0.014*** (0.005)	0.001 (0.003)	0.046*** (0.017)
(3)	Limiting Sample to biggest lead underwriters: more than 80 IPO deals	0.005 (0.005)	0.016*** (0.005)	0.007 (0.004)	0.047*** (0.023)
<i>Calibrating for quality of lead underwriter – measured dollar marketshare</i>					
(4)	Controlling for lead underwriter dollar market share for IPOs in preceding year	0.001 (0.003)	0.013*** (0.004)	0.0002 (0.003)	0.040*** (0.015)
<i>Calibrating for law firm experience – measured by number of deals done</i>					
(5)	Controlling for number of IPOs done by law firm in the past 1 year	-0.001 (0.003)	0.010*** (0.002)	-0.0006 (0.002)	0.034** (0.014)
(6)	Controlling for number of IPOs done in the past 2 years	-0.002 (0.003)	0.010*** (0.003)	-0.001 (0.002)	0.034*** (0.012)
(7)	Controlling for number of IPOs done in the past 3 years	-0.002 (0.003)	0.010*** (0.002)	-0.001 (0.002)	0.034*** (0.015)
(8)	Fixed effect for Wilson Sonsini (outlier firm in number of deals; n = 384)	-0.0001 (0.003)	0.011** (0.004)	-0.0004 (0.002)	0.033*** (0.012)
<i>Calibrating for lead underwriters' use of "favorite" law firms</i>					
(9)	Removing lead underwriters' most frequently used law firm in the dataset	0.005 (0.005)	0.011** (0.004)	0.001 (0.003)	0.044*** (0.015)
(10)	Removing anecdotally reported "favorite" law firm-bank relationships	-0.001 (0.003)	0.010** (0.006)	0.001 (0.002)	0.040*** (0.015)
<i>Calibrating for availability of information about the issuer / issuer risk</i>					
(11)	Controlling for the age of the issuer in number of years since founding	0.001 (0.003)	0.010*** (0.002)	0.0002 (0.002)	0.036*** (0.012)
(12)	Controlling for the age of the issuer in the log of the number of years since founding	0.001 (0.003)	0.010*** (0.003)	0.0002 (0.002)	0.036*** (0.014)
(13)	Controlling for the presence of venture capital investors prior to IPO	0.0005 (0.003)	0.010*** (0.004)	0.0006 (0.002)	0.036*** (0.009)
<i>Altering year controls</i>					
(14)	IPO quarter instead of year	-0.002 (0.005)	0.017*** (0.005)	0.004 (0.003)	0.068*** (0.014)
(15)	Removing the year 1999	0.001 (0.004)	0.015*** (0.005)	0.003 (0.003)	0.046*** (0.013)
(16)	Removing the year 2000	0.0003 (0.003)	0.006 (0.005)	-0.004 (0.004)	0.026** (0.012)

APPENDIX TABLE 9. LIMITING TO IPOs MANAGED BY LARGEST BANKS – UNDERWRITER & UNDERWRITER’S COUNSEL.

	Dependent Variable: Opening Day Price Jump %					
	(1)	(2)	(3)	(4)	(5)	(6)
Deals together in past year	0.029* (0.013)	0.041* (0.018)				
Deals together in past 2 years			0.019* (0.008)	0.026* (0.011)		
Deals together in past 3 years					0.013* (0.0064)	0.019* (0.008)
Log (Gross Proceeds)	0.049* (0.019)	0.056** (0.0212)	0.0487* (0.0192)	0.055** (0.0210)	0.0485* (0.0191)	0.056** (0.0211)
Industry Dummies	X	X	X	X	X	X
IPO Year Dummies	X	X	X	X	X	X
Industry* Year Dummies	X	X	X	X	X	X
Bank Dummies	X	X	X	X	X	X
Manager>=40	X		X		X	
Manager>=80		X		X		X
Adj. R²	0.328	0.325	0.328	0.322	0.326	0.321
Number of Observations	1,534	940	1,534	940	1,534	940

Robust standard errors are in parentheses. Estimates marked with *, **, and *** are statistically significant at the 5%, 1%, and 0.1% level respectively. The number of observations is greater than the number of IPOs due to IPOs with joint bookrunners; each bank is treated as being a manager in such cases.

APPENDIX TABLE 10. NEGATIVE DISCLOSURE – UNDERWRITER & UNDERWRITER’S COUNSEL

	(1)	(2)	(3)
Deals together in past year	0.309*** (0.057)		
Deals together in past 2 years		0.200*** (0.040)	
Deals together in past 3 years			0.150*** (0.035)
Industry Dummies	X	X	X
IPO Year Dummies	X	X	X
Industry* Year Dummies	X	X	X
Adj. R²	0.166	0.166	0.164
Number of Observations	2,247	2,247	2,247

APPENDIX TABLE 11. NEGATIVE DISCLOSURE – UNDERWRITER’S COUNSEL & ISSUER’S COUNSEL

	Dependent Variable: Proportion of Prospectus Devoted to Risk Factors		
	(1)	(2)	(3)
Deals together in past 1 year	0.190*** (0.043)		
Deals together in past 2 years		0.173*** (0.031)	
Deals together in past 3 years			0.151*** (0.024)
Industry Dummies	X	X	X
IPO Year Dummies	X	X	X
Industry* Year Dummies	X	X	X
Adj. R²	0.163	0.168	0.171
Number of Observations	2,247	2,247	2,247

Robust standard errors are in parentheses. Estimates marked with *, **, and *** are statistically significant at the 5%, 1%, and 0.1% level respectively. The number of observations is greater than the number of IPOs due to IPOs with joint bookrunners; each bank is treated as being a manager in such cases.

APPENDIX TABLE 12. NEGATIVE DISCLOSURE – UNDERWRITER & ISSUER’S COUNSEL

	Dependent Variable: Proportion of Prospectus Devoted to Risk Factors		
	(1)	(2)	(3)
Deals together in past 1 year	0.437*** (0.077)		
Deals together in past 2 years		0.342*** (0.062)	
Deals together in past 3 years			0.321*** (0.054)
Industry Dummies	X	X	X
IPO Year Dummies	X	X	X
Industry* Year Dummies	X	X	X
Adj. R²	0.165	0.166	0.167
Number of Observations	2,247	2,247	2,247

Robust standard errors are in parentheses. Estimates marked with *, **, and *** are statistically significant at the 5%, 1%, and 0.1% level respectively. The number of observations is greater than the number of IPOs due to IPOs with joint bookrunners; each bank is treated as being a manager in such cases.

APPENDIX TABLE 13. NEGATIVE DISCLOSURE – ISSUER’S COUNSEL
WITH RECENT EXPERIENCE AS UNDERWRITER’S COUNSEL

Dependent Variable: Proportion of Prospectus Devoted to Risk Factors	
Deals together in past 1 year	1.281*** (0.242)
Industry Dummies	X
IPO Year Dummies	X
Industry* Year Dummies	X
Adj. R²	0.165
Number of Observations	2,247

Robust standard errors are in parentheses. Estimates marked with *, **, and *** are statistically significant at the 5%, 1%, and 0.1% level respectively. The number of observations is greater than the number of IPOs due to IPOs with joint bookrunners; each bank is treated as being a manager in such cases.