Reconsidering the Merger Process: Approval Patterns, Timeline, and Shareholders' Role

MATTEO GATTI*

Shareholder approval in mergers generally takes a long time, but is it necessary? This Article finds that in the context of mergers, the approval requirement is not nearly as valuable a procedure as we might expect. I analyze shareholder approval patterns (target side) in all domestic mergers with a Russell 3000 target company in the 2006–2015 period. By examining data on voting outcomes, I note shareholders rejected a very low number of mergers, which generally passed with significantly high approval percentages. Instead of concluding that voting is mere rubber-stamping by shareholders, voting positively affects mergers through the expectation that shareholders will turn down undesirable deals. The voting requirement signals a credible threat to corporate planners that such deals will be rejected; as a result, they are in fact rarely presented to shareholders in the first place (deal filtering effect of voting). The same dynamic contributes to higher premiums than we would have experienced if a threat of rejection were absent (premium effect of voting). However, the data also shows that voting comes with drawbacks, the most significant being the delay in deal completion, which can jeopardize a company's operations and put deal certainty at risk. If the beneficial role of shareholder voice in mergers stems from the pressure on corporate planners generated by the credible threat of rejection embedded in the vote, I suggest alternative ways to exert such pressure without incurring all the costs currently involved with voting. To that end, this Article sketches three possible policy solutions, ranging from impactful (vote-on-demand and randomized approval, both to be opted into by companies in lieu of the current voting regime) to more moderate (speeding up the timetable by revising the SEC review process of merger securities filings and state corporate laws).

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INTRODUCTION

Mergers do not close quickly. In almost half of mergers, the delay is essentially driven by the shareholder approval requirement. While the nuisance of a protracted closing period is generally acknowledged, we have yet to identify mechanisms for shortening it, in part because we take for granted the need to have shareholder approval procedures in place. This Article questions this assumption and finds that shareholder approval in the context of mergers is not nearly as valuable a procedure as expected. It proposes alternatives to the traditional approval requirements that would not only do away with unnecessary procedures, but also shorten the direction of the closing process.

Let us start with the approval requirement. Even though shareholder voting is rare in U.S. corporate law,[1] it is taken very seriously. An important takeover case from the late 1980s established "[t]he shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests."[2] In the 1990s, another famous M&A case warned that "[b]ecause of the overriding importance of voting rights, th[e Delaware Supreme] Court and the Court of Chancery have consistently acted to protect stockholders from unwarranted interference with such rights."[3]

Mergers and other similar fundamental changes such as charter amendments, form one of the two macro areas in which shareholder voting is considered crucial for the proper functioning of the corporation—the other one being director elections. Historically, the voting requirement in mergers derives from the principle of inviolability of contract: this explains why, since mergers alter the initial investment contract, unanimous approval was originally necessary to pass such transactions—today, a majority (in some states a supermajority) of shares suffices.[4] Currently, the most credited explanation for shareholder voting in mergers considers it a protection against potential director abuses in a typical final period situation.[5]

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1. *See generally* Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 VAND. L. REV. 129, 130 (2009) ("Voting plays a limited role in corporate decisionmaking, much more limited than in the public sphere. Shareholders have binding votes on only two things: the election of directors and ratifying fundamental corporate changes such as mergers.").

2. Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988); *see also* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 959 (Del. 1985) ("If the stockholders are displeased with the action of their elected representatives, the powers of corporate democracy are at their disposal to turn the board out.").

3. Paramount Commc'ns, Inc. v. QVC Network Inc., 637 A.2d 34, 42 (Del. 1994).

4. Over the years, corporate statutes have progressively lowered the threshold from supermajority to majority of the outstanding shares, which is what most states have adopted. *See infra* notes 31–33 and accompanying text.

5. When being acquired, directors and managers of the target company might resolve to trade-off a higher merger consideration for shareholders with some assurance that they (or some of them or some key members of management) will stay with some role with the combined company after

Courts and scholars stress the importance of shareholder voice in the context of merger transactions. For the Delaware Supreme Court, in mergers "the stockholders control their own destiny through informed voting," which is "the highest and best form of corporate democracy."[6] Recent pronouncements by the Delaware judiciary have reinforced this belief:[7] A new line of cases has established that under Delaware law the fully informed, uncoerced vote of a majority of the disinterested stockholders of a corporation approving a merger or analogous M&A transaction[8] restores the presumption of the business judgment rule in lieu of any other more stringent type of scrutiny.[9]

Because of the limited circumstances in which shareholders get to vote in corporate law, scholars consider voting rights in connection with a merger fundamental and somewhat sacrosanct.[10] Even scholars like Easterbrook and Fischel, who normally are supporters of ample contractual freedom and enabling statutes in corporate law, follow the mainstream view that shareholder approval in mergers is so crucial that it should be mandatory: "the durability and uniform acceptance of [such] rule creates a presumption of efficiency that has not been overcome by any contrary evidence."[11] In the opening line of an influential article of some ten years ago, Marcel Kahan and Ed Rock observed that "[n]ever has voting been more important in corporate law" and added that, at the

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the merger is completed. The vote operates as a protection against the peculiar conflicts faced by management in negotiated deals. *See infra* Part I.B.

6. Williams v. Geier, 671 A.2d 1368, 1381 (Del. 1996). This passage was notably quoted by the recent Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 313 n.28 (Del. 2015), which I describe *infra* in the text.

7. The line of cases started with the 2015 Delaware Supreme Court decision in *Corwin*, 125 A.3d at 304, which was followed by several decisions in 2016: Singh v. Attenborough, 137 A.3d 151 (Del. 2016); *In re* Volcano Corp. Stockholder Litig., 143 A.3d 727 (Del. Ch. June 30, 2016); Larkin v. Shah, C.A. No. 10918-VCS, 2016 WL 4485447 (Del. Ch. Aug. 25, 2016); *In re* Solera Holdings, Inc. Stockholder Litig., C.A. No. 10485-CB, 2017 WL 57839 (Del. Ch. Jan. 5, 2017). *See infra* Part I.C.

8. A transaction that is not otherwise subject to entire fairness.

9. *Corwin*, 125 A.3d at 308–11; *cf. infra* Part II.C.

10. *See* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 840, 846–47, 895–97 (2005) (arguing that shareholder prerogatives should actually be expanded, including the right to propose, and not simply veto director-proposed, mergers, as well as to accept third-party acquisition proposals without board obstructions); *see also* William J. Carney, *Fundamental Corporate Changes, Minority Shareholders, and Business Purposes*, 1980 AM. B. FOUND. RES. J. 69, 79–92 (1980) (describing the evolution of rules governing the approval of fundamental changes).

11. *See* Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 416 (1983) ("Perhaps all that can be said is that the common law rule requiring shareholders' approval of fundamental corporate changes has endured for the past century across all jurisdictions. It is unlikely that this pattern would be observed if the rule did not produce gains."). *But see id.* at 415 (discussing the dichotomy between the general power of directors to run the business of the corporation and shareholders' powers to veto fundamental changes such as mergers, whereby they concede that "[a]lthough this dichotomy is so well established in corporate law that it is never questioned or analyzed, the justifications for it are obscure.").

time they wrote the article, "there [were] more and more closely fought merger votes."[12]

This Article examines whether it is true that merger votes are often closely fought and, after an analysis of voting outcomes in domestic friendly deals during the 2006–2015 period,[13] determines that this is not the case. In fact, once submitted for approval, it is extremely rare (roughly 1% of the sample) that shareholders vote down these transactions.[14] Moreover, activist investors seldom campaign against pending mergers: The resolutions approving these deals constitute outliers in the overall activist climate of the last 10 or 15 years.[15] In general, most mergers are approved with high margins.[16] Counter-intuitively, the data presented in this Article reveal that the high approval percentages in mergers are not correlated with the size of premiums offered to shareholders.[17]

As a whole, shareholder votes look more like an exercise of rubber-stamping—albeit a costly one. In fact, shareholder voting in mergers normally takes a pretty long time: between two to three months when the process is relatively swift and more than five or six months when it is not.[18] The ensuing delay does not come cheap, especially in terms of opportunity costs. These costs can be quite troublesome for two sets of reasons. First, a prolonged time for closing can distract management from the ordinary course of business, delay effective integration, result in bad allocation of resources, and facilitate litigation.[19] Second, time can put deal certainty at risk, because, on the one hand, it stimulates the chances of buyer remorse and, on the other hand, it increases the value of the so-called seller's put.[20]

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12. Marcel Kahan & Edward Rock, *The Hanging Chads of Corporate Voting*, 96 GEO. L.J. 1227 (2008). In particular:

> The controversial merger between Compaq and HP squeaked through with the approval of 51.4% of the shares. The AXA/MONY merger was only approved after a change in the record date, and then only by a margin of 1.7 million shares (for a total of 53.8%) at a time when 6.2 million shares were out on loan. The Transkaryotic merger was approved by just 52% of the shares.

Id. at 1229.

13. As explained *infra* notes 64 and 65 and accompanying text, the surveyed data excludes parent/subsidiary mergers, as well as mergers in connection with divestitures of controlling interests.

14. *See infra* Part II.A.1.

15. *See infra* Part II.A.2.

16. *See infra* Part II.A.3.a.

17. *See infra* Part II.A.3.b.

18. *See infra* Part II.A.4.

19. *See infra* Part II.B.2.a.

20. The seller's put is the target's ability to pursue alternative offers while at the same time being able to, at a minimum, "always put itself to the [buyer] at the [deal] price." Vineet Bhagwat et al., *The Real Effects of Uncertainty on Merger Activity* 2 (Mar. 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2528844. *See infra* Part II.B.2.b.

In light of these findings, this Article questions if shareholder voting is somewhat overplayed in mergers. In particular, a provocative way to describe shareholders' role in mergers would be arguing that the costs borne by the 99% of approved deals in the sample subsidize the benefits of rejecting the 1% of deals that shareholders considered undesirable. Of course, that argument would be misguided: it is *because* of the voting requirement that only 1% of deals get rejected. In fact, without the credible threat of shareholder rejection, directors would propose more deals, including some that shareholders would have wanted to reject if they could have. Voting works as a safety valve in case of director error or bad faith: directors anticipate the threat of rejection and present deals they feel comfortable will get approved.[21] I call this the "deal filtering effect" of voting. Furthermore, voting has also a "premium effect," because it pressures directors to increase their bargaining leverage with the acquirer. Given that a sizeable premium is the best way to forestall rejection, directors credibly convey the threat of rejection to an acquirer who will ultimately have to come up with a better price. As a result, shareholders are presented with deals with more appealing premiums. I call this the "premium effect" of voting.

Still, this does not mean the current system is perfect. The opportunity costs in terms of delay in connection with shareholder voting can jeopardize a company's operations and endanger deal completion.[22] This Article challenges the view that, to attain the policy goal embedded in the credible threat of shareholder rejection, there is always a need to have a full-blown vote in each deal. It thus explores the idea to combine the deterrent element of the credible threat of rejection with a swifter process for the overwhelming majority of deals in which approval is not controversial. In particular, I assess three policy initiatives that could be used to shorten the voting process.[23] The first one aims to simplify the system by having a vote in mergers only if a given percentage of shareholders requests a vote as a reaction to the specific terms and conditions of the single deal (I call this feature "vote-on-demand").[24] The second route, which I call "randomized approval," is to require voting only for a fraction of merger transactions and exempt several others from the requirement. The deals that will ultimately be subject to shareholder approval would be selected on a random basis after the merger agreement is signed and announced. Hence, corporate planners would not know ex ante if their deal is going to be subject to shareholder

21. Sometimes directors overestimate shareholder support and propose subpar deals, which are the few ones passing with narrow approval margins (or failing altogether). *See* Timothy R. Burch et al., *Is Acquiring-Firm Shareholder Approval in Stock-for-Stock Mergers Perfunctory?*, 33 FIN. MGMT. 45, 46 (2004).

22. *See infra* Part II.B.2.b.

23. *See infra* Part III.B.1.

24. *See infra* Part III.B.1.a.

approval and would still have to act as loyal agents to shareholders under the assumption that approval *might* be necessary.[25] The third proposal is to shorten the SEC review process and other corporate formalities to get to a vote (and to completion) more quickly.[26]

A couple of disclaimers are in order. First, overall, the goal of this Article is not necessarily to advocate reform, but rather to deconstruct the current system to better understand it and, possibly, improve it. Second, I do not intend to make any claim that shareholder voting and other prerogatives in general should be limited. Simply, I am drawing attention to the fact that, in the specific field of mergers, voting essentially acts as a deterrent to bad deals[27] and as incentive to better premiums; but the way it is currently administered also carries some undesirable overreach. The question is thus whether the benefits of voting outweigh its costs to the point that it is not worth exploring solutions that are different from the current regime: Is voting so sacred that altering some aspects while leaving intact its credible threat function would impair shareholders' interests and alter the efficiency of the market for corporate control? I believe the answer is no. In sum, I have no intention to constrain, let alone get rid of, shareholder voice in mergers—I just suggest some ways for rationalizing it so that it can best serve its purpose without unwarranted ripple effects.[28]

This Article is structured as follows. Part I lays out the legal, structural, and functional bases underneath the shareholder approval requirement in mergers. In particular, it describes the most accredited theories supporting shareholder voice in mergers and introduces the recent *Corwin* line of cases awarding a standard-shifting effect to shareholder approval. In Part II, Subpart A, I provide statistics of merger approval patterns in the 2006–2015 period and of the actual number of days to approve a merger. In Part II.B.1, I discuss the plausible explanations for such patterns: the presence of premiums, the credible

25. *See infra* Part III.B.1.b.

26. *See infra* Part III.B.1.c.

27. I refer to a bad, subpar, or inefficient deal throughout the Article from the perspective of target shareholders only and not of target and acquirer shareholders combined, which is what a basic Kaldor-Hicks efficiency analysis would call for. Under the latter view, a redistributive acquisition at the expense of target shareholders would be efficient if the aggregate gains by the acquirer exceed the losses of the target shareholders. The reason behind looking at the welfare of target shareholders only is that, when analyzing from a positive law angle the shareholder approval requirement, there are no indications that corporate laws are protecting anything other than the best interests of the voting shareholders. Under merger rules, it is solely the target shareholders who always get a say on the ultimate outcome of the deal and therefore it makes good sense to use as proxy for the desirability of the acquisition the perspective of the group who gets to vote on it. *Cf.* Matteo Gatti, *It's My Stock and I'll Vote If I Want to: Conflicted Voting by Shareholders in (Hostile) M&A Deals*, 47 U. MEM. L. REV. 181, 183 n.207 (2016).

28. By the same token, this Article is agnostic, and its contents not impacted by whatever view one has, on Bebchuk's proposal of expanding shareholders' role in mergers by giving them the power to initiate mergers; *cf.* Bebchuk, *supra* note 10.

threat of shareholder rejection, the absence of a real choice for shareholders, and the possible inflation of approval rates because of arbitrage and/or shareholder conflicts. Part II.B.2 highlights the potential drawbacks of voting, especially in light of the substantial delay it imposes on the completion of a merger transaction. In Part III, after singling out the deal filtering effect and the premium effect as the ultimate rationales for shareholder approval in mergers (Part III.A), I explore three initiatives to simplify the voting process: vote-on-demand, randomized approval, and simplification of the approval timeline, including revisions to the SEC review process (Part III.B.1). In Part III, Subpart B.2, I evaluate possible objections to the proposed reforms and determine that none represents a valid reason for maintaining the status quo.

I. SHAREHOLDER VOTING IN MERGERS: FROM FUNDAMENTAL ELEMENT OF THE TRANSACTION STRUCTURE TO SHIELD FROM DIRECTOR LIABILITY

Shareholder approval in connection with M&A transactions is not an absolute requirement, at least in the form of voting. For instance, tender offers (especially friendly ones)[29] do not structurally call for shareholder voting and hence acquirers can obtain voting control without a prior shareholder meeting. Other structures such as mergers and sales of all or substantially all of the assets generally require formal shareholder approval from the target shareholders.

A. STRUCTURE

Shareholder voting has long been a necessary step in the approval process for merger transactions. This is true for both Delaware, and other jurisdictions across the United States.[30] From a historical and structural perspective, shareholder voting in mergers derives from the old rules channeling the principle of inviolability of contract: originally, such rules required a unanimous approval to alter the initial terms of the investment made by the shareholders.[31] During the 1800s, unanimity

29. In the mid-1980s, the evolution of the law governing tender offers and hostile deals in Delaware led to a system in which, if a bidder does not want to or cannot come to terms with the target board, the only way to override a target's resistance through various defensive devices (most notably, a poison pill), became launching a proxy fight in order to replace the incumbent board of directors with new directors nominated by the insurgent/bidder who would in turn repeal the defenses (hence, redeem the poison pill). *See* Gatti, *supra* note 27, at 194–98; *see also* Michal Barzuza, *The State of State Antitakeover Law,* 95 VA. L. REV. 1973, 2005 (2009); Paul H. Edelman & Randall S. Thomas, *Corporate Voting and the Takeover Debate*, 58 VAND. L. REV. 453, 459–61 (2005); Lucian Arye Bebchuk et al., *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 907–09 (2002).

30. *See* DEL. CODE ANN. tit. 8, § 251 (2016); Revised Model Business Corporation Act § 11.04 (2016); CAL. CORP. CODE § 1201 (2016).

31. Carney, *supra* note 10, at 79–92 (describing the evolution of rules governing fundamental changes and noting that the more liberal approach towards asset sales was progressively extended to

went out of favor because it promoted strategic hold-outs at the expense of consolidations that were considered necessary for technological innovation:[32] It first turned into supermajority and subsequently into majority of the shares outstanding.[33]

However, shareholder voting is not an absolute tenet.

First, it mostly covers shareholders of the target corporation and not those of the acquirer. Under Section 251(f) of the Delaware General Corporation Law ("DGCL"), a shareholder vote is not necessary if the certificate of incorporation of the surviving corporation is not changed and the number of shares does not increase more than 20%,[34] which essentially means that cash mergers and medium-to-small acquisitions via a merger never trigger a shareholder vote in the acquirer.[35]

Second, even for target companies, shareholder voting has eroded over time. On the one hand, since the late 1930s, states began passing short-form merger statutes, which permit to avoid a vote if the acquiring company already owns a high percentage of target stock (in Delaware the threshold is 90%).[36] On the other hand, more recently, in an effort to simplify then-current two-step merger structures,[37] Delaware reformed

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consolidations).

32. *Id.* at 79 (citing, in particular, technological change to develop the long-line railroad).

33. RONALD J. GILSON & BERNARD S. BLACK, THE LAW AND FINANCE OF CORPORATE ACQUISITIONS 642–44 (2d ed. 1995):

> Prior to the 1960s, the great majority of states required a two-thirds vote. This pattern was broken in 1962 when the Model Business Corporation Act reduced the required percentage approval to a majority. . . . Delaware reduc[ed] the vote requirement in its statute from two-thirds to a majority in 1967.

Id. at 642–43; *see also* Carney, *supra* note 10, at 95. The ease for approving mergers was counterbalanced with the added protection of appraisal rights. *Id.* at 70–71, 94; Robert B. Thompson, *Exit, Liquidity and Majority Rule: Appraisal's Role in Corporate Law*, 84 GEO. L.J. 1, 3–4 (1995).

34. Similarly, in the context of reverse triangular mergers, under the listing rules of the NYSE and the NASDAQ, *see* NYSE, INC., LISTED COMPANY MANUAL § 312.03(c) (2015); NASDAQ STOCK MARKET, INC., MARKETPLACE RULES, R. 4350(i) (2015), respectively, a shareholder vote at the acquirer is triggered if more than 20% of the outstanding shares are issued in connection with the merger. Note that in this case it is not the merger itself that is subject to approval, but rather the share issuance.

35. *See* Thompson & Edelman, *supra* note 1, at 141 (noting that, given the wide degree of freedom in structuring an M&A transaction, shareholder voting at the level of acquiring corporations is basically optional). For analysis, see Mario Becht et al., *Does Mandatory Shareholder Voting Prevent Bad Acquisitions?* 3 (ECGI Finance Working Paper No. 422, 2014), http://ssrn.com/abstract=2443792) (noting that shareholders of U.S. companies vote in limited circumstances and observing evidence supporting the proposition that value-reducing deals are more likely to be associated with acquisition structures designed to avoid shareholder approval); Afra Afsharipour, *A Shareholders' Put Option: Counteracting the Acquirer Overpayment Problem*, 96 MINN. L. REV. 1018, 1044-49 (2012) (detailing the various ways to structure transactions in order to bypass voting of the acquirer shareholders of Delaware corporations).

36. DEL. CODE ANN. tit. 8, § 253 (2016). This situation is typically seen in a two-step tender offer/short-form merger in Delaware; Section 253 allows for a majority owner with at least 90% ownership to perform a cash-out merger without shareholder approval.

37. For quite a while between the mid-1990s and 2006, statutory mergers happened to be a practitioner's favorite for negotiated public M&A transactions and shareholder voting was a necessary passage. Back in the 1990s, a circuit split emerged over the best price rule in tender offers (SEC Rule

its merger statute by introducing the so-called medium-form merger under Section 251(h) of the DGCL, which exempts from the voting requirement two-step mergers if, among other things, following a

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14d-10). 17 C.F.R. § 240.14d-10 (2017). The rule is promulgated by the SEC pursuant to the Securities Exchange Act of 1934, § 14(d), *amended by* the Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. § 78(a)(2012)). Some circuits interpreted it quite extensively so as to capture parachute payments to directors and officers. *See* Rusty A. Fleming, *A Case of "When" Rather than "What:" Tender Offers Under the Williams Act and the All Holders and Best Price Rules*, 27 S. ILL. U. L.J. 263, 286 (2003) (noting that if one takes such payments into account, the per-share price of an offer drastically increases and, as a result of the best price rule, so does the aggregate acquisition price). As a result, mergers were considered a safer structure to conduct an M&A transaction. David Offenberg & Christo A. Pirinsky, *How Do Acquirers Choose Between Mergers and Tender Offers?*, 116 J. FIN. ECON. 331, 348 (2015) (describing the effects of the best price rule and its effect on how a bidder plans an acquisition approach); *see also* Latham & Watkins LLP, *SEC Proposes Amendments to the Best Price Rule* (Jan. 18, 2006), https://www.lw.com/thoughtLeadership/m-and-a-deal-commentary-january-2006b. However, to solve the uncertainties surrounding the circuit split and revitalize tender offers, in 2006 the SEC promulgated amendments to Rule 14d-10, which clarified that such payments are outside the scope of the best price rule if certain conditions are present. SEC. & EXCH. COMM'N NOS. 3454684, AMENDMENTS TO THE TENDER OFFER BEST-PRICE RULES (2006). As a result, tender offers became popular once again, especially because of their speedier timetable that allows a buyer to obtain control much sooner and therefore to be less at risk of being outbid by a rival offer. *See* Offenberg & Pirinsky, *supra*, at 333 (reporting that a tender offer takes on average seventy-three days less to close than a merger and arguing that a tender offers is faster because of a less demanding regime under federal securities regulation, antitrust law, and financing requirements); *see also* John C. Coates IV, *Mergers, Acquisitions and Restructuring: Types, Regulation, and Patterns of Practice*, 36 (European Corporate Governance Institute ("ECGI"), Working Paper No. 260, 2014), http://ssrn.com/abstract_id=2463251 ("Because M&A law does not apply equally to all methods of pursuing a given transaction, opportunities arise for M&A to be structured to reduce the effect of or avoid some of these laws. . . . [I]n the US, we see the emergence of the tender offer as a mechanism for hostile takeovers in the 1980s, followed by its use in negotiated acquisitions (followed by squeeze-out mergers), to reduce the time needed to obtain control, while ensuring 100% ownership.").

However, while a standalone tender offer serves well the purpose of obtaining control faster, an acquirer would still need to go through a formal merger procedure to ensure all minority shareholders who hold out to the tender offer are pushed out of the corporation. Therefore, to quicken the lengthy procedure of mergers (disclosures, SEC review, calling and holding a shareholder meeting, tabulating the results, and so forth), buyers aimed at avoiding a vote altogether by obtaining a minimum of 90% of the stock of the target in order to effect a short-form merger under Section 253 of the DGCL. Given that 90% is a significant threshold to obtain, buyers engineered a way to get to 90% through so-called "top-up" options: "target companies issue enough new shares to get an acquirer to 90% and state law takes care of the rest." Liz Hoffman, *Top-Up Option, We Hardly Knew Ye*, LAW360 (Apr. 26, 2013, 5:39 PM), https://www.law360.com/articles/436259/top-up-option-we-hardly-knew-ye (describing the top-up option mechanics and mentioning that top-up options "spread quickly[: b]y 2004, one-third of tender offers included a top-up, according to MergerMetrics. By 2008, it was virtually 100 percent."). The top-up option was admittedly a complex procedure ("The top-up option is an engineered fix, and it works pretty well, but in an ideal world, we wouldn't need it," said Mark Morton of Potter Anderson & Corroon LLP, one of the Delaware lawyers who recommends changes to the corporate code each year to the state Legislature. "[Section] 251(h) tries to create that world.") *Id.* Because of such complexity, in 2013 the Delaware legislature relaxed the voting requirement in mergers by introducing, with Section 251(h), the so-called medium-form merger. H.B. 127, 147th Gen. Assemb., 79 Del. Laws, c. 72, § 6 (2013), *amending* 8 Del. C. 1953, § 251. Section 251(h) was subsequently amended on July 25, 2014, with changes that went into effect on August 1, 2014. *See also* Afra Afsharipour, *Deal Structure and Minority Shareholders*, *in* COMPARATIVE TAKEOVER REGULATION, GLOBAL AND ASIAN PERSPECTIVES 35, 46-48 (Umakanth Varottil et al. eds., 2018).

first-step tender offer, the acquirer has a number of shares at least equal to the "percentage of the shares of stock of [the target] corporation . . . that . . . , absent [Section 251(h) of the DGCL], would be required to adopt the agreement of merger by [the DGCL] . . . and by the certificate of incorporation of such . . . corporation."[38] So the old idea that an acquirer cannot force a shareholder out for cash without a vote is no longer true in today's legal landscape.

B. Function: Traditional Theories

From a functional perspective, scholars normally mention a few rationales justifying shareholder approval in connection with mergers.[39] According to a traditional view, a shareholder vote in mergers is necessary because mergers are a fundamental alteration of the original investment contract: In other words, these decisions are so important that directors should not decide alone.[40] This argument is no longer accepted as a plausible rationale. Scholars point out that there are several other decisions in the life of a corporation, so-called "bet-the-company" operational decisions, which are arguably as critical and fundamental as a merger, yet do not require a shareholder vote.[41]

Another recurring explanation is that shareholders decide on mergers because those transactions do not merely involve a pure business decision, but are essentially an investment decision, which should belong to those who will bear its effects, that is, the shareholders.[42] However, this theory does not satisfactorily explain why shareholders have voting rights in sell-side transactions only (buy-side transactions are investment decisions as well, which arguably carry

38. Del. Code Ann. tit. 8, § 251(h) (2016). This section is subject to limitations: for example, the procedure cannot be used for transactions involving and interested buyer under Section 203 of the DGCL.

39. Part I.B draws on William T. Allen & Reinier Kraakman, Commentaries and Cases on the Law of Business Organizations 466–68 (4th ed. 2016). *See generally* Afsharipour, *supra* note 37, at 46-48.

40. Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law 79 (1991) ("All statutes provide, however, that in situations of 'extraordinary' action—fundamental corporate changes—the issue must be submitted to shareholders," but also qualifying such a statement by adding that "[t]his rule . . . helps reduce agency costs."); *see also* Robert C. Clark, Corporate Law 414 (1986) ("The basic idea underlying the corporate law provisions on sales and mergers seems to be that sudden, deliberate (that is, manager-initiated), major or 'organic' corporate changes that affect shareholder interests ought to be approved or consented to by some majority of the shareholders.").

41. *See* Allen & Kraakman, *supra* note 39, at 467 (citing "Microsoft's decision to develop Microsoft Windows; or Boeing's decision to develop the 747 wide-body jet," and adding that "shareholders generally lack the ability and information to make them relative to the alternative decision maker, the board and top managers.").

42. *See* Melvin A. Eisenberg, The Structure of the Corporation 1416 (1976).

bigger risks for them)[43] and, more importantly, why shareholders cannot decide alone but still need directors to initiate the merger procedure.[44]

A third, more satisfying theory considers shareholder voting in mergers a protection against potential director abuses in a typical final period situation.[45] As Black and Kraakman point out, the "law supports bilateral decisionmaking by shareholders and the board on decisions that are fundamental to the corporation's identity and existence, especially decisions that place managers and directors in a final period problem, where agency costs are likely to be high."[46] In other words, the vote operates as a protection against the peculiar conflicts (because of potential side payments, career opportunities, and the like) faced by

43. For managerial abuses at buyers, see generally Richard Roll, *The Hubris Hypothesis of Corporate Takeovers*, 59 J. BUS. 197, 212 (1986) (arguing that bidders always overpay for targets); Bernard S. Black, *Bidder Overpayment in Takeovers*, 41 STAN. L. REV. 597, 599–600 (1989) (noting how bidders pay too much for target companies and that this phenomenon is something acquirer shareholders expect). For the policy proposal that all acquisitions, buy- and sell-side, irrespective of size and transactional form, should be subject to a shareholder vote, see John C. Coffee, Jr., *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance*, 84 COLUM. L. REV. 1145, 1269–72 (1984).

44. Thompson & Edelman, *supra* note 1, at 139 ("[i]f [the board] does not wish for a merger to happen, it is not obligated to put the matter before the shareholders, hardly an indication of shareholder primacy.").

45. *See* GILSON & BLACK, *supra* note 30, at 720–21:

> [I]n a situation where parties expect to have repeated transactions, the recognition that a party who cheats in one transaction will be penalized by the other party in subsequent transactions reduces the incentive to cheat. However, when a transaction is the last (or only) in a series—that is, the final period—the incentive to cheat reappears because, by definition, the penalty for doing so has disappeared. In the context of an acquisition nothing stops target management from selling out the shareholders in return for side payments from the acquiring company because target management, by definition, will no longer be subject to the constraints of the product, capital and control markets after the acquisition. Perhaps more importantly, if the remaining professional careers of target management are getting short, the size of the side payment may more than compensate them from any *ex post* penalty imposed by the market for managers. . . . [Target companies] are subject to final period problems and therefore cannot rely on management for protection, and require, instead, the barrier of a shareholders vote as a protection against management.

46. Bernard Black & Reinier Kraakman, *Delaware's Takeover Law: The Uncertain Search for Hidden Value*, 96 NW. U. L. REV. 521, 559 (2002); *see also* ALLEN & KRAAKMAN, *supra* note 39, at 468 (mentioning special agency problems when incumbents potentially face a final period); Thompson & Edelman, *supra* note 1, at 141 (noting that in mergers "voting by shareholders is best explained as error correction of managers rather than as an inherent shareholder right to participate").

management in negotiated deals.[47] I analyze this aspect more in depth throughout this Article.[48]

C. CONSEQUENCES: THE STANDARD OF REVIEW-SHIFTING EFFECT

A recent line of cases that emerged from the *Corwin* decision offers a new viewpoint for analyzing shareholder voting in mergers. Under *Corwin*, the Delaware Supreme Court upheld a Chancery Court decision establishing that "when a transaction not subject to the entire fairness standard is approved by a fully informed, uncoerced vote of the disinterested stockholders, the business judgment rule applies."[49] Among the crucial factors for the decision, Chief Justice Leo Strine mentioned that "[w]hen the real parties in interest—the disinterested equity owners—can easily protect themselves at the ballot box by simply voting no, the utility of a litigation-intrusive standard of review promises more costs to stockholders in the form of litigation rents and inhibitions on risk-taking than it promises in terms of benefits to them."[50] According to Chief Justice Strine, the effect of shareholder approval on judicial standard of review is not a novelty. In an extended footnote, Strine points out that "there is . . . precedent under Delaware law for the proposition that the approval of the disinterested stockholders in a fully informed,

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47. This point was first made clear in the seminal M&A article by Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 118 (1965):

> [T]he managers are in a position to claim almost the full market value of control, since they have it in their power to block the merger by voting against it. When we find incumbents recommending a control change, it is generally safe to assume that some side payment is occurring. . . . The most obvious kind of side payment to managers is a position within the new structure either paying a salary or making them privy to valuable market information. This arrangement, easily established with mergers, can look like normal business expediency, since the argument can always be made that the old management provides continuity and a link with the past experience of the corporation.

For more recent accounts of the many conflicts that may arise in friendly deals, see Coates, *supra* note *supra* note 37, at 11 (mentioning, among other things, that "[f]iduciaries may favor one bidder over another, not in return for an explicit quid pro quo (for example, in the form of a payment) but to curry good will in the hope of obtaining post-deal employment, or perhaps out of malice towards a bidder or gratitude for some past favor"); *see also* STEPHEN M. BAINBRIDGE, MERGERS AND ACQUISITIONS 58–59 (2012):

> Although the tension between shareholders and managers is perhaps most obvious in hostile takeovers, . . . similar conflicts of interest arise in negotiated acquisitions. To purchase the board's cooperation the bidder may offer side payments to management, such as an equity stake in the surviving entity, employment or non-competition contracts, substantial severance payments, continuation of existing fringe benefits or other compensation arrangements. Although it is undoubtedly rare for side payments to be so large as to materially affect the price the bidder would otherwise be able to pay target shareholders, side payments may affect management's decision making by causing them to agree to an acquisition price lower than that which could be obtained from hard bargaining or open bidding.

48. In particular, see *infra* Part II.B.1.b and Part III.A.

49. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 309 (Del. 2015).

50. *Id.* at 313.

uncoerced vote that was required to consummate a transaction has the effect of invoking the business judgment rule."[51]

Subsequent decisions, namely *Singh v. Attenborough*[52] and *In re Volcano*,[53] expanded the scope of judicial deference to shareholder voice. The former clarified that when the business judgment rule applies, the only instance in which directors might be liable for damages is under the waste doctrine,[54] while the latter extended the ruling of *Corwin* to two-step mergers under Section 251(h) of the DGCL.[55] This trend of expanding *Corwin* has continued with several pronouncements by the Court of Chancery.[56]

Corwin and its progeny put shareholder decisionmaking at the center stage, something that is not new in Delaware case law but in fact goes back to *Unocal*,[57] and well before then to cleansing statutes for conflicted transactions.[58] An informed, uncoerced, and unconflicted vote by the shareholders approving a merger shifts the standard of review to

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51. *Id.* at 309 n.19.

52. *See supra* note 7.

53. *See supra* note 7.

54. Singh v. Attenborough, 137 A.3d.151, 152 (Del. 2016).

55. In the *Volcano* decision, the Chancery Court held that the acceptance of a first-step tender offer by a majority fully informed, disinterested, uncoerced shareholders has the same cleansing effect of a fully informed, uncoerced vote by disinterested shareholders in connection with a merger. *In re* Volcano Corp. Stockholder Litig., 143 A.3d 727, 738–41 (Del. Ch. 2016).

56. In particular, in Larkin v. Shah, C.A. No. 10918-VCS, 2016 WL 4485447 (Del. Ch. Aug. 25, 2016), Vice-Chancellor Slight stated that, absent a controlling stockholder, the effect of disinterested stockholder approval of the merger is review under the business judgment rule (which the court labeled "irrebuttable"), "even if the transaction might otherwise have been subject to the entire fairness standard due to conflicts faced by individual directors." *Id.* at *1, *8. This decision on the applicability of *Corwin* was seemingly endorsed by the more recent *Solera* case (*In re* Solera Holdings, Inc. Stockholder Litig., C.A. No. 11524-CB, 2017 WL 57839 (Del. Ch. Jan. 5, 2017)), which also clarified several additional interpretative points and expanded *Corwin*'s breadth, including that plaintiffs have the burden of pleading that the vote was not fully informed and that there is quite a high standard for establishing the materiality of claims to challenge the merger disclosures.

57. In the case that started modern takeover law, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985), the Delaware Supreme Court granted target companies the power to defend, because, among other things, bidders could still use a proxy fight to challenge defenses. In the words of Delaware judges, "[i]f the stockholders are displeased with the action of their elected representatives, the powers of corporate democracy are at their disposal to turn the board out." *Id.* at 959. Scholars do agree that with this decision shareholder voice through a vote was put at the center stage. *See, e.g.*, Lucian Arye Bebchuk & Marcel Kahan, *A Framework for Analyzing Legal Policy Towards Proxy Contests*, 78 CALIF. L. REV. 1071, 1075 (1990); Joseph A. Grundfest, *Just Vote No: A Minimalist Strategy for Dealing with Barbarians Inside the Gates*, 45 STAN. L. REV. 857, 858 (1993).

58. *See, e.g.*, DEL. GEN. CORP. LAW § 144(a)(2) (providing for (i) a safe harbor from immediate voidability of an interested transaction and (ii) narrower judicial review on the directors' conduct if, among other things, the transaction is approved by the stockholders); c*f.* Marciano v. Nakash, 535 A.2d 400, 405 n.3 (Del. 1987) ("Approval by fully-informed . . . disinterested stockholders under section 144(a)(2), permits invocation of the business judgment rule and limits judicial review to issues of gift or waste with the burden of proof upon the party attacking the transaction."); c*f.* Thompson & Edelman, *supra* note 1, at 133 ("[I]n the corporate sphere, a vote may act as a way to cleanse behavior by an agent that would otherwise be suspect.").

the business judgment rule even in transactions that trigger *Revlon*: a vote having such characteristics has the effect of (de facto) ratifying the transaction for liability purposes. Following the closing of a merger, when the dispute simply revolves around directors' liability only, heightened standards of review that are typical of the takeover field, such as *Unocal* and *Revlon*, do not even apply. The rationale is that because shareholders have approved, why should there be a liability? The Delaware judiciary is essentially suggesting that shareholder voting does a much better job than litigation in protecting dispersed shareholders against director abuses in the M&A context because shareholders are better decision makers than a judge if certain conditions are present.[59] When shareholders make effective use of the franchise (that is, the vote is fully-informed, uncoerced, and comes from disinterested shareholders), litigation becomes unwarranted. All in all, *Corwin* and its progeny follow a recent trend in Delaware law that seeks to tame litigation abuses in connection with M&A transactions.[60]

I come back to further analyze this doctrine in Part III.[61]

II. How Relevant Is Shareholder Action in Mergers?

A. Voting Outcomes and Timing for Merger Approvals: An Analysis of Recent Deals

In this Part, I survey shareholder voting in connection with mergers, both in terms of patterns of voting outcomes and timing required to reach

59. A scholarly article by Vice-Chancellor Laster predating the *Corwin* case describes the doctrinal foundation behind this approach in the following terms:

> When a stockholder plaintiff claims that a corporate decision constituted a breach of fiduciary duty, a court applying Delaware law searches for an independent, disinterested, and sufficiently informed decision maker. If one exists, then the court defers to the decision that the qualified decision maker made. Only in the absence of a qualified decision maker will the court assume that role for itself.

J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443, 1443 (2014).

60. In 2014, 95% of publicly announced mergers were litigated (they were roughly half that size only a decade earlier). *See* Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 579 (2015). Given that merger litigation normally ends up in settlements that do not benefit shareholders, but rather enrich plaintiff attorneys significantly, the corporate litigation system in Delaware has become subject to criticism over the years. Starting in 2015, the Delaware judiciary responded, on the one hand, by clarifying that in the future it will not approve settlement without substantial benefits to shareholders (*In re* Trulia, 129. A.3d 884 (Del. 2015)) and, on the other hand, with *Corwin*, by making the bulk of post-closing litigation involving mergers subject to the more lenient business judgment rule; *cf.* Matthew D. Cain et al., *The Shifting Tides of Merger Litigation* 1, 3–4 (European Corporate Governance Institute ("ECGI") Law Working Paper No. 375, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2922121 (noting that the Delaware legislature has also taken steps to reduce abuses such as multi-forum litigation, by authorizing issuers to adopt forum-selection bylaws).

61. *See infra* Part III.B.2.a.iii.

a vote. The basic dataset, which originates from FactSet Sharkrepellent, reports on approval percentages for all mergers and asset deals that directors submitted for shareholder approval and the vote occurred (or was scheduled to occur)[62] in the period from January 1, 2006, to December 31, 2015. In such a dataset, the target is a domestic public entity whose stock at the time of the vote was part of the Russell 1000 or Russell 2000 indexes[63] ("FSSR Dataset"). Subparts 1 through 3 report on voting outcomes by analyzing the few instances of rejection (Part II.A.1), the few proxy campaigns to vote down a merger deal (Part II.A.2), the generally very high approval percentages (Part II.A.3.a), and lack of correlation between such percentages and the premiums paid to shareholders (Part II.A.3.b). Part II.A.4 surveys deals that were voted in 2014 and 2015 to determine how long it normally takes to get from deal announcement to shareholder approval.

1. *Extremely Low Number of Rejected Transactions*

From the original sample of 1067 deals contained in the FSSR Dataset, I do not take into account deals that fall under any of the following categories: (i) sales of assets, (ii) mergers between parents and subsidiaries, and (iii) mergers in connection with sales of control by one or more controlling stockholders. I make such exclusions because the focus of this Article is to report on mergers whose voting outcome is uncertain ex ante and in which shareholder voting could make a difference. The focus is thus on mergers in connection with acquisitions of companies whose control is contestable in the market (irrespective of whether any such merger triggers *Revlon* duties).[64] I am not interested

62. To be sure, the dataset is comprised of deals for which directors called a shareholder meeting, and does not include deals that, for one reason or another, were abandoned prior to calling the meeting.

63. Hence they belong to the Russell 3000 Index, which is comprised of both.

64. *Revlon* duties often, but not always, appear in connection with deals involving a contestable company. For starters, it is a Delaware law doctrine applicable to Delaware companies. As far as other states are concerned, some follow it, while others do not. *See* Barzuza, *supra* note 29, at 1982–85 (2009) (noting that although Delaware has, in the context of the sale of the company, or of its control, established enhanced fiduciary duties, some other states reject such duties and instead allow for other constituency statutes and more accommodating pill statutes). More importantly, not all deals targeting a Delaware contestable company are relevant for *Revlon* purposes: Its duties are triggered in limited circumstances, for example, if a company is put on sale (either in a stock or in an asset deal) or if a break-up is inevitable. Deals that are *not* subject to *Revlon* are stock deals involving a combination "of equals," which does not result in a change of control of the target company. *See* Paramount Comm'cns Inc. v. QVC Network Inc., 637 A.2d 34, 46–48 (1993) (finding *Revlon* would not apply when the target company gets acquired by a company of a relatively similar size that does not have a controlling stockholder who would otherwise end up controlling the combined company: If the control of the target combined with the other entity would continue to stay fluid in the market, stockholders of the target would not face a loss in their voting rights and therefore *Revlon* would not apply). The *Revlon* ruling establishes an enhanced standard of conduct for directors and officers of a Delaware company that compels them to maximize value for the benefit of shareholders in the sale of the company above the protection of interests of other stakeholders. Specifically, under *Revlon* the role of directors is

in mergers between parents and subsidiaries and mergers whereby one or more stockholders are divesting a controlling stake because the dynamics of voting are dramatically different. In the absence of a majority-of-the-minority condition, which is optional in parent-subsidiary mergers, obtaining shareholder approval is never problematic because the parent company has enough votes to make the merger pass.[65] Similarly, in mergers in connection with a divestiture of a controlling interest, the outcome of the vote is almost never uncertain because the exiting controlling stockholder is expected, and very often contractually bound, to support the transaction. Given that in these so-called "done deals" shareholder approval is either not an issue or is extremely likely, such mergers lack probative value.[66]

As a result, the sample I use for observations on rejected transactions is comprised of 907 mergers ("2006-2015 Sample"). Table I lists, for each year in the 2006–2015 period, (i) the number of mergers comprising the 2006–2015 Sample, (ii) the percentage of approved mergers, (iii) the number and percentage of failed mergers, (iv) the

transformed "from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company." Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

65. Even if the merger does have a majority-of-the-minority condition, because the pool of shares that are relevant for the approval is significantly smaller than in a normal merger, it would not be appropriate to consider the approval data comparable to all other mergers in which control is potentially contestable in the market. Under Delaware law, mergers between parents and subsidiaries trigger an enhanced level of scrutiny of the underlying transaction, which goes under the name of entire fairness and requires the defendant directors and controlling shareholder to show both "fair dealing" and "fair price." Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983). Under Delaware case law, the burden of proving that the transaction meets such criteria, which the entire fairness standard initially puts on the defendants because of the conflicted nature of the transaction, can be shifted back to the plaintiff if certain procedural safeguards are followed: Namely, the transaction is either negotiated by an independent committee with broad negotiating powers (inclusive of the power to appoint separate counsel and financial advisor, as well as to say no to the transaction) or is approved by a majority of the minority of shareholders of the subsidiary. *Compare* Kahn v. Lynch Commc'ns Sys., 638 A.2d 1110, 1117 (Del. 1994) (clarifying that an effective independent committee would only shift the burden of proof, which in the specific case did not happen because the independent committee faced a retributive threat by parent—to launch a tender offer at a lower price if the committee kept rejecting it terms—thus impairing its judgment and negotiating abilities) *with* Rosenblatt v. Getty Oil Co., 493 A.2d 929, 937 (Del. 1985) ("approval of a merger . . . by an informed vote of a majority of the minority shareholders, while not a legal prerequisite, shifts the burden of proving the unfairness of the merger entirely to the plaintiffs.").

66. In that spirit, I carve out from the sample all mergers that are accompanied by voting or supporting agreements covering 35% or more of the voting stock, unless such agreements contain outs for shareholders if directors change their recommendation, in which case the target remains potentially contestable pending shareholder approval. Although the cut-off is admittedly arbitrary, any commitment to vote shares in excess of 35% makes it extremely improbable that the merger is voted down, as corporate planners will only need an extra 15% of voting stock in support out of a remaining float of 65% (so they would need approximately need 2.3 out of every ten votes remaining). Because of this carve-out, mergers such as the acquisitions by Disney of Pixar and Marvel (each with a voting agreement covering 40% and approximately 37% of the voting stock, respectively) are not in the sample and disregarded from observation.

number and percentage of failed mergers as a result of an actual rejection through a vote, and (v) the number and percentage of failed mergers as a result of a shareholder opposition in general (rejected via vote or otherwise).

Shareholders approved an astonishing 98.68% of 907 mergers submitted to a vote in the 2006–2015 period.[67] Only twelve mergers (1.32%) failed to be approved: of these twelve, seven were abandoned prior to an actual vote, while only five (0.55%) were voted down by shareholders. Based on publicly available information, five out of the seven deals terminated prior to a shareholder vote were abandoned in anticipation of a likely rejection by shareholders, which brings the total number of mergers that were de facto rejected by shareholders in the observation period to ten (1.1%). In four years during the observation period—2009, 2013, 2014, and 2015—100% of the proposed mergers were approved. The years with the lowest passing rates were 2008 and 2010 with 95.89% and 95.12% respectively.

67. This is consistent with some prior studies. *See* Burch et al., *supra* note 21, 45–46 (looking at acquiring firm voting patterns). *But see* Offenberg & Pirinsky, *supra* note 37, at 338, who report that, from their 2007–2012 sample of 1033 domestic mergers with a public target, the completion rate was 78.9%, which contrasts with the passing rate reported here (98.68%). Similarly, reporting a 22% termination rate, see Bhagwat et al., *supra* note 20, at 6. There can be a few explanations for these discrepancies. The 2006–2015 sample that I use here reports only on mergers involving a Russell 3000 target company. This is why the total sample for the 2006–2015 period (907) under my sample is less numerous than Offenberg and Pirinsky's sample, which collects data from a much shorter time horizon (six years versus ten). The sample by Bhagwat et al. differs even more drastically as they count private targets and subsidiaries as well and such companies happen to dominate the sample: the total number of deals in their sample averages 692 per month, of which 638 are private or subsidiaries. Bhagwat et al., *supra* note 20, at 12. Also, my dataset is comprised only of deals for which directors actually submitted the merger to a vote, *see supra* note 62 and accompanying text. It is plausible that, for whatever reasons, certain mergers were abandoned shortly after announcement or failed to close after they obtained shareholder approval: In such cases, those mergers would not be captured in my sample. Finally, the sample I use here focuses on contestable companies only: As noted, from the original FSSR Sample, I carve out parent/subsidiary mergers, as well as mergers in connection with a divestiture of a controlling interest.

Table I
Announced and Failed Mergers Involving a Russell 3000 Domestic Target in the 2006–2015 Period

Year	**Number of Proposed Mergers**	**Percentage of Approved Mergers**	**Failed Mergers (Percentage)**	**Mergers Failed as a Result of a Reject Vote (%)**	**Mergers Failed as a Result of Shareholder Opposition (i.e., Vote or Otherwise) (%)**
2006	141	99.29%	1 (0.71%)	1 (0.71%)	1 (0.71%)
2007	183	98.91%	2 (1.09%)	2 (1.09%)	2 (1.09%)
2008	72	95.89%	3 (4.11%)[1]	0	2 (2.74%)[1]
2009	33	100%	0	0	0
2010	82	95.12%	4 (4.88%)[2]	2 (2.44%)	4 (4.88%)[2]
2011	83	98.8%	1 (1.2%)[3]	0	1 (1.2%)[4]
2012	69	98.55%	1 (1.45%)[4]	0	0
2013	91	100%	0	0	0
2014	64	100%	0	0	0
2015	86	100%	0	0	0
Total	**907**	**98.68%**	**12 (1.32%)**	**5 (0.55%)**	**10 (1.1%)**

(1) None of these planned mergers went to an actual vote, but were abandoned beforehand by the parties to the merger agreement: Bronco Drilling Corp. cancelled a special meeting of shareholders when it became apparent that there would not be enough shareholder support to move forward with the transaction; The Alpha Natural Resources / Cliff Natural Resources merger was terminated citing economic uncertainty in late 2008 (but it was rumored that buyer was also not likely to obtain shareholder approval); Constellation Energy terminated the merger agreement to be sold to a rival bidder (EDF).

(2) Of these four, two mergers (acquisitions of Dollar Thrifty Automotive Group and Dynegy) failed to obtain the required majority and two (acquisitions of CPI International and Javelin Pharmaceuticals) were abandoned before a shareholder vote took place, one (CPI International) out of mutual consent for loss of interest in the combination by the target (buyer apparently lost a large governmental contract) and the other (Javelin Pharmaceuticals) because of competitive bidding.

(3) The merger (acquisition of Transatlantic Holdings by Allied World) was abandoned before a shareholder vote took place because shareholders pressed to sell in a competitive auction.

(4) The merger (acquisition of Pep Boys-Manny, Moe & Jack) was abandoned before a shareholder vote took place because the buyer took issue with lower than expected earnings.

2. Extremely Low Number of Mergers Contested or Disputed by Shareholders

Not only are shareholder rejections (actual or anticipated) very limited (1.1% during the ten-year observation period), but it is also rare for merger approvals to escalate to contested or disputed votes. In terms of merger-related proxy contests, Georgeson reports, in its Annual Corporate Governance Review in the years 2006 through 2015,[68] very

68. *See* GEORGESON, INC., ANNUAL CORPORATE GOVERNANCE REVIEW 45 (2006); GEORGESON, INC., ANNUAL CORPORATE GOVERNANCE REVIEW 48–49 (2007); GEORGESON, INC., ANNUAL CORPORATE GOVERNANCE REVIEW 46–47 (2008); GEORGESON, INC., ANNUAL CORPORATE GOVERNANCE REVIEW 50 (2010); GEORGESON, INC., ANNUAL CORPORATE GOVERNANCE REVIEW 50 (2011); GEORGESON, INC.,

few cases of opposition to a merger. Shareholders contested only seventeen mergers, thirteen of which escalated to an actual proxy contest, and the remaining four were included because of some disputed elements in the process.[69] Table I.A in the Appendix lists all such cases.[70]

The very low number of contested merger votes (of seventeen in total, thirteen were formal contests) is quite at odds with the overall activist climate of the last ten to fifteen years.[71] In fact, for the same 2006–2015 period, the Georgeson Reports list an aggregate of 796 disputed votes, 397 of which escalated to an actual formal contest.[72] Of the thirteen mergers that experienced a formal proxy contest, management won seven (and so the underlying mergers were ultimately approved). Four campaigns were abandoned before a vote could actually take place and in such cases the merger was approved. Only in two cases (GFI and Chiquita Brands Int'l) did the dissident win. All in all, of the seventeen instances in which there was opposition to a merger, fourteen

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ANNUAL CORPORATE GOVERNANCE REVIEW 58–59 (2013); GEORGESON, INC., ANNUAL CORPORATE GOVERNANCE REVIEW 56–57 (2014); GEORGESON, INC., ANNUAL CORPORATE GOVERNANCE REVIEW 60, 63 (2015).

69. This finding is consistent with Yair Listokin, *Corporate Voting versus Market Price Setting*, 11 AM. LAW ECON. REV. 608, 616 (2009). In the years 2000 through 2006, Listokin collected only eight instances of proxy contests in connection with mergers, which he described as "a tiny fraction of total U.S. mergers and acquisition activity." His study collected a total of ninety-seven proxy contests in that same period. Similarly, in a study analyzing merger activity between 2005 and 2012, Fisch et al., *supra* note 60, at 581-82 found only fifteen instances of mergers obtaining a negative recommendation by Institutional Shareholder Services (ISS), the most prominent proxy advisory firm.

70. Note that, to compile its lists, Georgeson follows criteria that do not match those of the FSSR Dataset. Georgeson reports proxy fights in connection with mergers of corporations that are outside of the Russell 3000 Index; it also reports on mergers in which one of the parties is not a domestic entity: as a result, three mergers listed in Table I.A for being mentioned in the Georgeson Reports do not actually appear in the FSSR Dataset. As to the merger between Pamrapo Bancorp and BCB Bancorp, neither company was a Russell 3000 corporation. The mergers between Chiquita Brands Int'l and Eyffes, and between PartnerRe and Axis were not entirely domestic (Eyffes and PartnerRe are foreign private issuers).

71. This is consistent with prior studies. *See* Burch et al., *supra* note 21, at 46 (looking at acquirer firm voting patterns and arguing that "voting shareholders may view acquisition proposals less skeptically than they do other non-routine management proposals.").

72. The breakdown is as follows:

Year	Contested Solicitations	Other Publicized Disputes
2006	31	13
2007	46	22
2008	56	20
2009	57	20
2010	35	22
2011	20	22
2012	34	53
2013	37	51
2014	45	44
2015	36	132
Totals	397 (A)	399 (B)
Overall Total	796	

mergers passed, two (again: GFI and Chiquita Brands Int'l) failed and one (PartnerRe) was terminated.[73]

One takeaway is that shareholders know a bad deal when they see one: they do not need an activist to tell them to turn down a merger (and activists save their efforts for harder battles). After all, the merger price on the table is a pretty straightforward indicator that makes it somewhat easy to decide in which direction to vote, much easier than when shareholders have to vote on some "rules-of-the-game" resolutions (for example, having a staggered board or not, granting proxy access or not, which are some of the usual darlings of activists).[74]

3. Analyzing Approval Percentages

a. Mergers Pass with High Percentages of Shares Approving

As the ensuing analysis illustrates, not only were mergers almost always approved, they were also voted by significant majorities. I analyze a smaller sample here: from the 907 mergers in the 2006–2015 Sample, I disregard mergers in the 2006–2009 period because the FSSR Dataset does not contain sufficient information on approval percentages, which for those years are reported only for a limited number of deals. For a coherent dataset, I analyze approval percentages with respect to companies that have homogeneous approval requirements.[75] Because companies in the 2006–2015 Sample are mostly from Delaware, and Delaware's statutory approval requirement is a majority of the outstanding shares, I focus *primarily* on mergers in which the target is subject to such requirement.[76] Therefore, the main analysis of approval patterns is from the following sample: (i) mergers from the 2006–2015 sample that were approved in the 2010–2015 period, (ii) for which there is information on approval percentages in the FSSR Dataset, and (iii)

73. Note incidentally that, for one reason or another, none of these three mergers are included in the 2006–2015 sample—for instance, in the GFI merger, a voting agreement aggregated shares above the 35% cut-off (37.8%, to be precise) and therefore the deal was discarded from the sample. *See supra* note 66.

74. *See infra* notes 108, 241, and 243.

75. Corporate laws in the U.S. have different rules concerning quorums and majority required to approve a merger. In certain states, like Delaware and California, a merger must be approved by a majority of the outstanding shares carrying voting rights. *See* CAL. CORP. CODE § 1201 (2016); DEL. CODE ANN. tit. 8, § 251 (2016). Other states, like Texas and Ohio, adopted supermajority requirements (two-thirds of the outstanding shares carrying voting rights). *See* TEX. BUS. ORGS. CODE § 21.364 (2016); OHIO REV. CODE § 1701.78 (2016).

76. Companies falling into such a category are (i) Delaware companies subject to the statutory requirement (i.e., which have not opted into a supermajority requirement), (ii) companies in other jurisdictions with the same approval requirement of Delaware and that have not contracted out of it, and (iii) companies in jurisdictions having a different statutory requirement that have opted into the majority of the outstanding shares approval requirement. *See supra* note 75.

which required an approval by a majority of the outstanding shares ("Majority Approval Sample"). The Majority Approval Sample is comprised of 392 mergers. However, for comparison purposes, this Article also considers approval patterns for mergers with an approval requirement of two-thirds[77] of the outstanding shares (the "2/3 Approval Sample").[78] The 2/3 Approval Sample contains forty-two mergers.

Table II lists average approval percentages in relation to the aggregate numbers of shares outstanding, broken down in median, mean, standard deviation, 25th and 75th percentiles for both the Majority Approval Sample and the 2/3 Approval Sample.[79] Fig. I graphically shows median, 25th and 75th percentiles for the period for the Majority Approval Sample. In each of the observed years the median for the Majority Approval Sample is always above the 75% mark, and even mergers that rank lower in terms of approval numbers received quite high approval percentages. In each year of the observation period, the 25th percentile is above (and, but for 2011, well above) the 70% mark. Unsurprisingly, the approval numbers in the 2/3 Approval Sample are higher given the higher required majority.

77. Similar to *supra* note 76, companies falling into such a category are (i) companies subject to the statutory requirement (i.e., which have not opted into a lower majority or into a supermajority), and (ii) companies in jurisdictions having a different statutory requirement that have opted into the 2/3 approval requirement.

78. To be clear, the 2/3 Approval Sample is comprised of (i) mergers from the 2006–2015 sample that were approved in the 2010–2015 period, (ii) for which there is information on approval percentages in the FSSR Dataset, and (iii) which required an approval by two thirds of the outstanding shares.

79. Table II contains disaggregated data for each year in the 2010–2015 period, but only for the Majority Approval Sample, because the limited number of observed mergers in the 2/3 Sample (42) would not offer reliable information on a disaggregated basis.

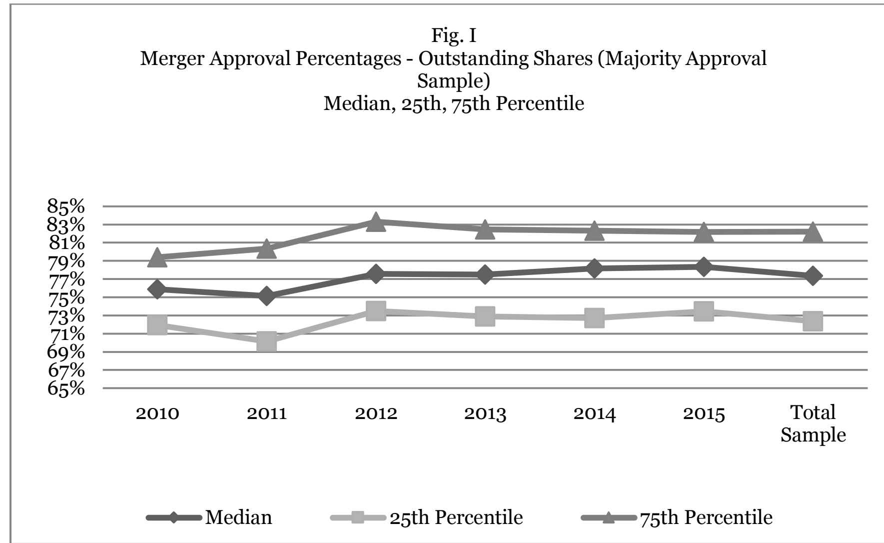


Table II
Average Approval Percentages—Outstanding Shares
(Majority Approval Sample and 2/3 Approval Sample;
2010-15 Period)

Year	No. Of Observed Mergers	Avg. Approval % Outst. Shares Median	Avg. Approval % Outst. Shares Mean	Standard Deviation	Approval % Outst. Shares 25th Pctile	Approval % Outst. Shares 75th Pctile
2010	56	75.87%	73.85%	10.67%	71.94%	79.40%
2011	72	75.14%	75%	8.91%	70.13%	80.33%
2012	59	77.58%	77.29%	8.47%	73.47%	83.3%
2013	73	77.51%	77%	7.81%	72.89%	82.44%
2014	56	78.16%	76.99%	7.49%	72.71%	82.32%
2015	76	78.22%	77.26%	6.77%	73.46%	82.17%
Total Majority Approval Sample	**392**	**77.17%**	**76.28%**	**8.41%**	**72.15%**	**81.68%**
2/3 Approval Sample	**42**	**80.3%**	**79.8%**	**5.61%**	**76.85%**	**84.06%**

Table III describes the lower tail of approval percentages in the Majority Approval Sample (per year and in the aggregate). The 5th percentile is roughly at the 62% level. Only 3.83% of mergers in the sample (15 out of 392 deals) have received less than 60% of shares approving. Of those, only two (or 0.5% of the sample) failed to be approved.

Table III
Lower Tail of Approval Percentages—Outstanding Shares
(Majority Approval Sample)

Year	**Total No. Of Mergers**	**Approval % Outst. Shares 25th Pctile**	**10th Pctile**	**5th Pctile**	**3rd Lowest**	**2nd Lowest**	**Min.**
2010	56	71.94%	65.23%	55.49%	51%	41.16%	26.45%
2011	72	70.13%	63.71%	58.81%	57%	52.18%	50.85%
2012	59	73.47%	63.61%	60.2%	60.2%	59.52%	59.43%
2013	73	72.89%	66.99%	64.09%	59.81%	58.14%	57.18%
2014	56	72.71%	66.68%	64.84%	64.78%	61.71%	53.12%
2015	76	73.46%	66.04%	65.06%	64.49%	62.34%	62.23%
Total Sample	**392**	**72.15%**	**65.53%**	**61.9%**	**50.85%**	**41.16%**	**26.45%**

Table II.A in the Appendix lists, for each year in the 2010–2015 period, average approval percentages in relation to the votes that were actually cast in favor of the merger (as opposed to votes against or abstain). Because in mergers voting against and not voting at all are equivalent, when shareholders vote they almost always vote *for* the merger: in the relevant period, the median of votes cast in favor (as opposed to against or abstain) was 98.9%, whereas the mean was 97.02%.[80]

Fig. II shows the portion of mergers in the Majority Approval Sample that were approved with 75% or more of the outstanding shares for each year in the 2010–2015 period. Almost two out of three mergers in the sample obtained votes equal to at least 75% of the outstanding shares.[81]

80. That is because the votes required for approving a merger are keyed to a percentage of the shares outstanding. Because voting involves certain costs, shareholders effectively vote against a merger by not voting at all. *See* Kahan & Rock, *supra* note 12, at 1250 ("[F]or matters requiring an affirmative vote by a majority of the shares *entitled to vote*—such as mergers or charter amendments—a failure to vote is equivalent to a 'no' vote."). A similar observation is contained in Burch et al., *supra* note 21, at 51. Note that some authors have described "yes" votes measured as a percentage of votes cast as the proxy that "best captures shareholder sentiment for a transaction." *See* Fisch et al., *supra* note 60, at 580 (noting that "it captures the sentiment of those shareholders who choose to be present at the meeting and cast a ballot or abstain[,]" while "[s]hareholder failure to vote at all can indicate a lack of support for a transaction, but it may also be caused by a variety of factors that are independent of the merits." Fisch et al., *supra* note 60, at 580). While I would agree that "yes" votes as a percentage of votes cast can somewhat *capture the sentiment of those who vote in favor of the transaction*, such a proxy *cannot capture the sentiment of those who do not back the transaction*, precisely for that variety of factors the authors mention. We simply cannot know what is behind the decision to not cast the vote, whether opposition to the transaction or simple disengagement. Note that not voting to express dissent is not only feasible, but also perfectly rational, because it involves less transaction costs. As a result, in this Article I rather use percentages of outstanding shares as metric for shareholder support.

81. The only year in which results were somewhat balanced in this 75% classification was 2011, whereby 54.3% of mergers were approved by at least 75% of the votes, while the remaining mergers below such a threshold were 45.7%.

Fig. II
Percentage of Mergers that Obtained 75% or More
of the Outstanding Shares
(Majority Approval Sample)

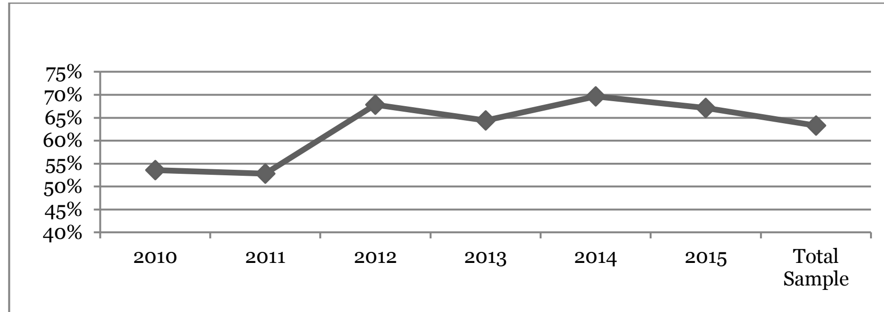


Fig. III shows the frequency distribution of voting outcomes for mergers in the Majority Approval Sample. I organize the voting outcomes in four classes with cut-offs at each incremental quarter in the (50%-) continuum of possible approving percentages (that is, in the 50%-plus-one-share-to-100% range): 62.5%, 75%, and 87.5%. The four classes therefore are (i) mergers that obtained approval by less than 62.5% of the outstanding shares, (ii) mergers that obtained a percentage of approval between 62.5% and less than 75% of the outstanding shares, (iii) mergers that obtained a percentage of approval between 75% and less than 87.5% of the outstanding shares, and (iv) mergers that obtained approval by at least 87.5% of the outstanding shares.

More than a half of the observed mergers (56.63% to be precise) obtained approvals within the 75–87.49% range. Roughly three out of ten mergers (31.63%) have been "safely" approved by a percentage between 62.5% and less than 75% of the outstanding shares. Interestingly, mergers in the two remaining and opposite classes are equally distributed: mergers obtaining 87.5% or more and mergers with less than 62.5% of the votes each represent 5.87% of the sample. Only 44 out of 392 mergers (11.22%) obtained less than 2/3 of the votes, which means that almost 9 out of 10 mergers would have passed under a 2/3-supermajority requirement.[82]

82. The shape of distributions tends to be very similar over the years; recently, approvals in the 75%–87.49% range have increased.

Fig. III
Frequency Distribution of Voting Outcomes
Majority Approval Sample
(% of Shares Outstanding)

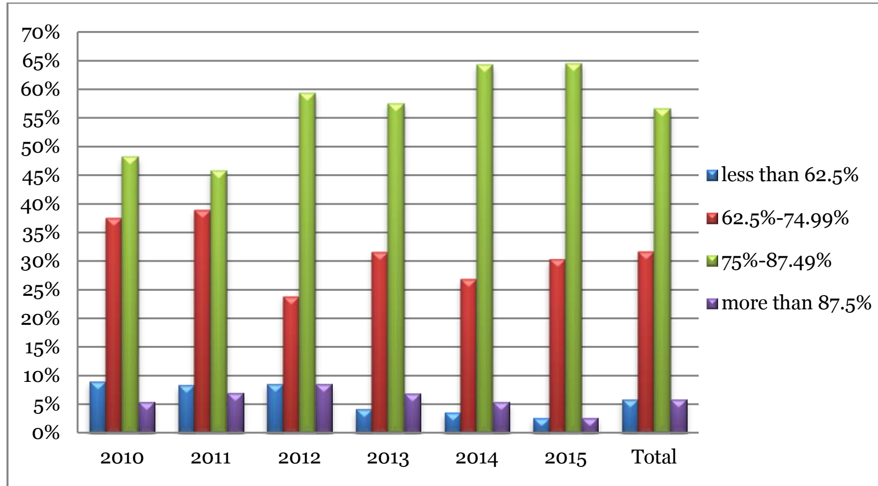


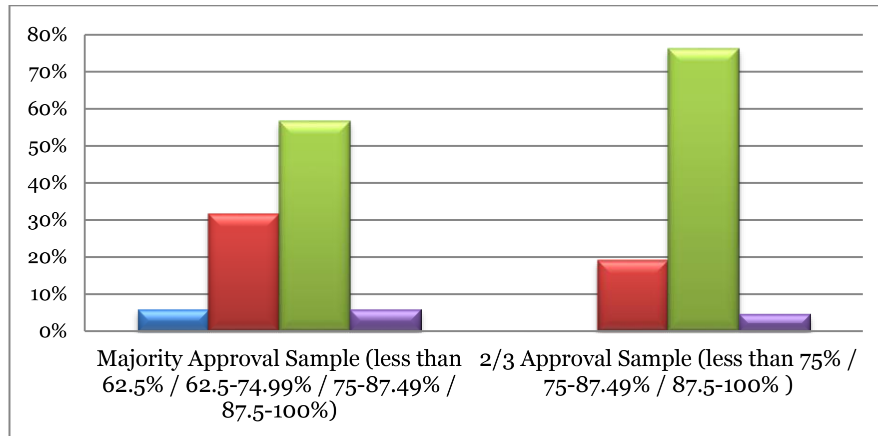
Fig. IV compares frequency distributions in the Majority Approval Sample and 2/3 Approval Sample. The frequency distribution for the Majority Approval Sample in the 2010–2015 period is on the left, while the three[83] columns to the right represent (i) mergers that were approved by (more than 2/3 but) less than 75% of the outstanding shares, (ii) mergers that obtained a percentage of approval between 75% and less than 87.5% of the outstanding shares, and (iii) mergers that obtained a percentage of approval of at least 87.5% of the outstanding shares.

The comparison reveals that the 2/3 Approval Sample contains significantly less mergers below the 75% threshold than the Majority Approval Sample (19% v. 37.5%). In other words, a higher majority requirement likely prompts management to steer away from potentially risky-to-approve mergers. The rather obvious corollary is that the portion of mergers approved in the 75%–87.49% range is significantly higher in the 2/3 Approval Sample (76.2% v. 56.6%).[84]

83. The 50%–62.49% column is missing because there were no mergers in the 2/3 Approval Sample that failed to obtain less than 2/3 of the votes.

84. For a discussion, see *infra* note 118 and accompanying text.

Fig. IV
Frequency Distribution of Voting Outcomes Comparing the Majority Approval Sample with the 2/3 Approval Sample



b. Approval Percentages Do Not Show Correlation with Neither Sizes of Premium Nor Insider Ownership Levels

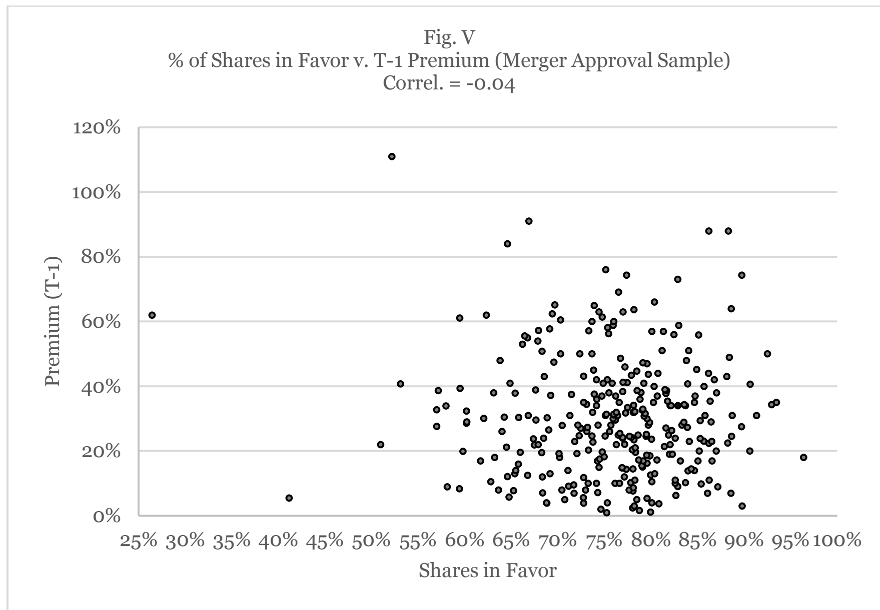
What drives the high levels of approval percentages? The most immediate answer is price: the higher the premium, the higher the percentage of shares approving the merger.[85] Another intuitive explanation would mention the importance of the "starting point" of the resolution. For example, if the company has high insider ownership (directors, management, and/or significant shareholders), one would expect a more substantial backing of the given transaction. In fact, neither premiums nor insider ownership levels correlate with approval percentages.

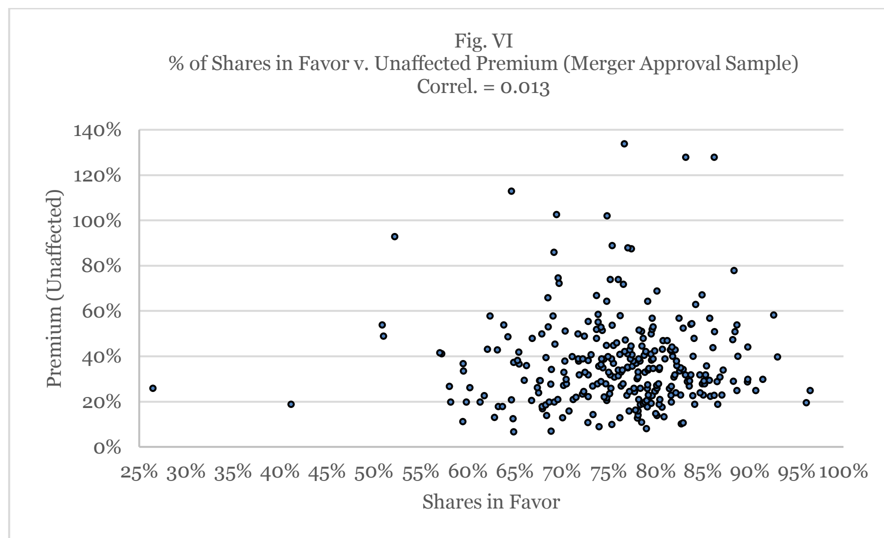
This analysis observes mergers from the Majority Approval Sample. All data on premiums, type of consideration, size of insider ownership and of voting agreements are hand-collected from the proxy statement or S-4, as applicable, relating to the underlying merger. As Table III.A in the Appendix explains, premiums do not have predictive power over the percentage of shareholders voting for the merger. Fig. V shows the point graphically: increasing approval percentages are not associated with higher premiums calculated against the price of the stock on the day prior

85. *Cf.* Fisch et al., *supra* note 60, at 584 (finding that mergers involving a higher premium generate a higher approval rate in terms of "yes" votes as a percentage of votes cast and as a percentage of "yes" and "no" votes, but not finding significant results in terms of "yes" votes as a percentage of outstanding shares, which is the main metric I adopt in this Article; *supra* note 80).

to the announcement of the transaction (t-1 premium). Fig. VI shows essentially the same results with premiums calculated on an unaffected basis.[86]

86. As noted, all information on premiums is gathered from the securities filing relating to the underlying merger. In such filings, issuers present information on the size of the premium offered to shareholders, without being bound by specific requirements as to against which day(s) prior to the announcement of the transaction the premium should be calculated (for example, one day, twenty days, thirty days, sixty days prior to announcement). In practice, issuers (with their financial advisors) generally calculate the premium against several benchmarks: in most circumstances (82% of the mergers in the Majority Approval Sample), issuers report on the premium calculated against the price of the stock on the day prior to the announcement of the transaction (what I call t-1 premium here). But because the price of the stock on the day prior to announcement can be impacted by rumors on the acquisition, companies generally also disclose additional premium calculations, which are aimed at providing investors with premium figures that are not affected by merger rumors. Given that companies are free to pick and choose any premium calculation they see fit (so long as it is true and correct), there are no uniform metrics that apply across the board: some disclosure documents report on premiums calculated against the price of the stock twenty days prior announcement, some others use thirty and/or sixty day prior to figures, and so forth (and some issuers use averages for any such window period). In calculating the unaffected premium, where available, I use the premium calculated against the price of the stock thirty days prior to announcement. However, if that figure is not available in a securities filing, I use the closest surrogate (whether it is twenty days or four weeks prior). I generally try to stay as close as possible to the announcement date. Now, while I reckon that one can object that for my comparisons I use unaffected premiums that are calculated with different criteria, I counter that selecting a one-size-fits-all criterion (for instance a specific cut-off date across the board) would not work: because in each merger the price of the stock can be impacted at different times and sometimes well before the selected cut-off date, one cannot purport to consider as unaffected a premium calculated in that manner. Rather, I use premium figures that are deemed unaffected by the issuers and are presented/advertised as such to shareholders (if multiple premium figures are presented I select the closest to the announcement day that appears unaffected). This way I compare unaffected premiums, which shareholders themselves are asked to base their voting decision on. Since all I am investigating here is whether premiums can predict shareholders' decisions, I believe that using information that shareholders understand is provided to them as unaffected premium absolves the effort well.





Tables IV.A–VIII.A in the Appendix show similar inconclusive results after making a series of adjustments and additional tests.

First, in Table IV.A in the Appendix, I eliminate mergers with a premium below 10% or above 60% from the sample. I also disregard a

t-1 premium if the difference between the percentage of the unaffected premium and the t-1 premium is 25% or higher. On the one hand, if a premium is below 10%, it is most likely because rumors on the upcoming merger have already been priced into the stock and therefore the variable is noisy. Similarly, a t-1 premium that is so distant from the unaffected premium has likely been eroded by merger rumors. On the other hand, premiums above 60% are almost double the average premium and I therefore treat them as outliers.[87] Second, as voting results might be impacted by insider ownership, since directors and managers are biased to vote in favor, and/or the presence of voting agreements (whereby shareholders are bound to vote in favor of the merger), in Table IV.A in the Appendix, premiums are also tested against approval percentages *net of shares* held by insiders or subject to voting agreements. In other words, I test approval percentages with respect to disinterested shareholders only. Even with these adjustments, premiums do not carry predictive value as to the outstanding shares approving the merger.

In the same vein, in Table V.A in the Appendix, I test approval percentages and premiums for mergers that are not subject to a voting agreement and, within that group, mergers in which the insider ownership at the target company is below 5%. Furthermore, in Table VI.A in the Appendix, I compare average premium sizes for the whole sample with averages premium sizes in circumstances in which insider ownership or the shares subject to a voting agreement were pivotal in reaching the required majority to approve the merger. In Table VI.A in the Appendix, I also compare average premium sizes for the whole sample with averages premium sizes of mergers that were supported by a voting agreement and mergers that did not have such support. In all such cases, I conclude that premiums do not significantly differ among such various classes.

A couple of additional tests confirm this conclusion. A comparison of medians and means of premiums for the thirty mergers that obtained the least (bottom thirty mergers) and the most (top thirty mergers) votes in favor do not show significant differences (Table VII.A in the Appendix). Also, Table VII.A in the Appendix shows that average premiums in the 2/3 Approval Sample, which is characterized by higher approval percentages,[88] are essentially similar to those in the Majority Approval Sample (note however that the number of observations is limited to twenty-nine for each of t-1 and unaffected premiums, so the test itself might lack probative value). The takeaway is that, while a more stringent approval requirement results in percentages that are actually

87. After such adjustments, Table IV.A in the Appendix also presents the data broken down by type of consideration (cash, stock, or combination thereof) and still obtains similar inconclusive results.

88. *See supra* Table II and Fig. IV.

higher than those in the Majority Approval Sample, the premiums associated with those deals are of similar magnitude and thus cannot be considered the factor determining the higher approval. If premiums are not the determining factor for higher approval percentages, something else must be going on. A plausible scenario is that since deals with a higher approval requirement are tougher to pass, the pondering by management before submitting a deal is much more elaborated (hence the overall lower number of deals in the 2/3 Approval Sample). However, given the number of observations is limited (twenty-nine), additional evidence is necessary to shed better light on this point. Note incidentally that also the 2/3 Approval Sample shows lack of correlation between premiums and voting outcomes.[89]

Table VIII.A in the Appendix provides cross-correlations between key variables. Interestingly, even tests on whether approval percentages correlate at all with the size of insider ownership (with or without a voting agreement) show similar, negative results. Aside, of course, the correlation between the two ways to calculate the premium (t-1 and unaffected), the only correlation of some significance is between the amount of inside ownership and the size of voting agreements, which does not come as a surprise.

However, it would be a mistake to interpret these tests as indicating that voting outcomes in mergers are not determined by merger premiums. The lack of correlation between voting outcomes and premiums should not be ascribed to shareholders' indifference to merger prices. As a preliminary note, such indifference would be at odds with the fact that mergers experienced a passing rate of almost 99% in the 2006–2015 period, which likely would not have happened absent premiums.[90] In other words, while the size of premiums does not correlate to the level of shares supporting the transactions, the presence of premiums in virtually all the observed mergers (other than mergers of equals) explains the 99% passing rate.

Moreover, other elements can explain the lack of correlation arising from the tests. First, while shareholders might care in general about the size of a premium, some of them might well be subject to collective action considerations convincing them to not bother voting if, for instance, they believe their vote will not matter, especially if they think the merger can already count on a solid consensus.[91] By the same token, because the required majority is tied to a percentage of the share capital and does not

89. -0.02 with respect to t-1 premiums and -0.18 with respect to unaffected premiums.

90. The mean and median premiums for mergers in the 2010–2015 period, as captured by the Majority Approval Sample, were respectively 31.1% and 28.6%, when calculated on a t-1 basis, and 41% and 34%, when calculated on an unaffected basis. *See infra* Part II.B.1.a.

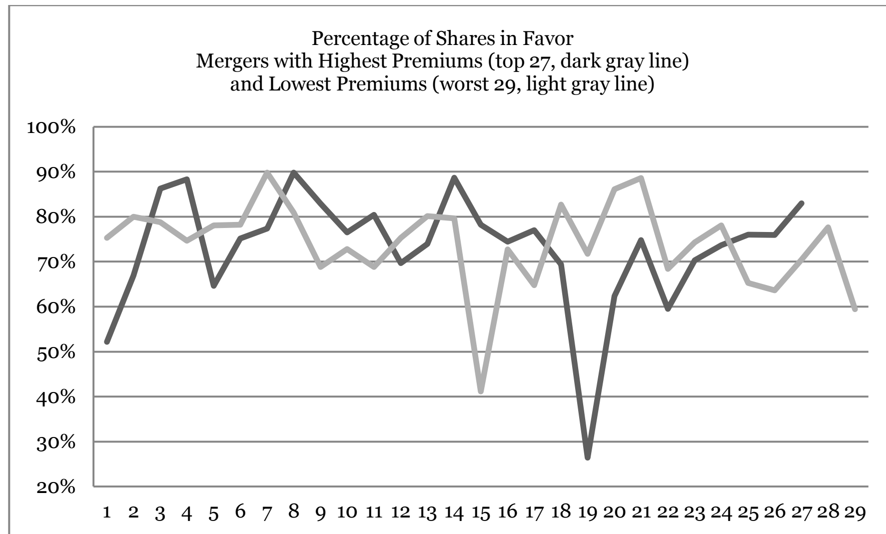
91. *See* Fisch et al., *supra* note 60, at 584 (considering non-votes noisy as a result of retail investors' lack of engagement); *see also* Fisch et al., *supra* note 60, at 580 n.121.

depend on a fraction of shares present or represented at the relevant resolution, directors might find out early that a sufficient number of shares has backed the transaction and decide to discontinue, or at least relax, the efforts of the campaign.[92] This may explain why mergers with high premiums do not necessarily attract higher votes.[93]

Second, the precise contours of voting outcomes might derive less from the strict merits of the transaction itself than from the ownership structure of the given company. Because many corporations award votes on a one-share, one-vote basis, the number of actual voting rights depends, one way or another, on stock ownership. Therefore, in many cases the uniqueness of the ownership structure of a given company will be the determining factor that drives the precise contours of a voting outcome. The final vote count might depend on factors such as how much institutional investors own vis-à-vis retail investors (the former tend to regularly cast their ballots while some of the latter might not), whether competitors of the acquiring corporation, or rival bidders, are shareholders of the target, and so forth. All these and many more specific features of the ownership structure of a company can lead to unique

92. In other words, management would not bother doing what it normally does when there is a risk to lose the vote; *cf.* Yair Listokin, *Management Always Wins the Close Ones*, 10 AM. L. & ECON. REV. 159, 162 (2008) ("With the polls about to close, management may apply intense campaigning effort to sway votes and/or adjust poll closing times in order to gain victory.").

93. As the chart below shows, there is very little difference in terms of percentage of shares voting in favor between mergers that carried the highest premiums (from left to right, in dark gray line are mergers with top twenty-seven premiums and associated percentages of shares in favor) with those that carried the lowest ones (from left to right, in light gray line are mergers with worst twenty-nine premiums and associated percentages).



outcomes that, to some extent, are disconnected from the underlying quality of the very deal.

Third, in a vacuum, the given size of a premium does not per se have absolute significance, for identical premiums might send a different signal to the market and have a different appeal to shareholders, depending on the type of company and its recent history. For instance, a 25% premium for a company in an expanding industry, or for a company whose stock is systematically undervalued, is not the same as a 25% premium for a company in a stagnant industry, or for a company whose stock is the darling of market analysts. The former premiums might be considered insufficient for the underlying potential of the target and gather a lukewarm response. Accounting for this and the other elements mentioned above is beyond the scope of this Article, but future research should investigate these and other possible explanations.

4. *Time Necessary for a Shareholder Vote*

Mergers affecting an SEC-registered issuer are corporate transactions that take a long time to close. One of the reasons for the significant lag is the necessity to hold a shareholder vote. A vote requires a whole host of activities, even for a simple transaction like a cash merger: preparing the preliminary proxy statement, selecting a proxy solicitor, filing the preliminary proxy statement with the SEC, taking into account the SEC's comments if the Commission intends to review the proxy statement,[94] fixing the record and meeting dates by the board of directors,[95] finalizing and printing the definitive proxy statement, filing the proxy statement with the SEC, mailing copies of it to shareholders,[96] preparing for the meeting, (scripts, agenda, rules of conduct, ballots, and so forth) and actually holding the meeting. The bulk of provisions that generate substantial delay to hold a meeting, namely the time to prepare, finalize, print, and mail the proxy statement (or other disclosure document, in a non-cash merger), come from federal securities regulation, not state corporate laws.[97]

94. *See* 17 C.F.R. § 240.14a-3 (2017) (regulating the form, content, and filing requirements for proxy statements). Any person soliciting must file preliminary copies of proxy statements with the SEC at least ten days before they are sent to shareholders, 17 C.F.R. § 240.14a-6 (2017).

95. *See* DEL. CODE ANN. tit. 8, § 211 (2016) (allows only the board of person authorized in the articles or bylaws to call a special meeting); DEL. CODE ANN. tit. 8, § 213 (2016) (noting the board of directors sets the record date, which cannot be more than 60 days nor less than ten days before the date of the meeting).

96. Definitive copies of proxy materials must be filed with the SEC no later than the date they are first sent to shareholders. Additionally, copies of these materials also must be filed with each national securities exchange on which the registrant has a class of securities listed and registered. 17 C.F.R. § 240.14a-6.

97. Generally, shareholder voting is "overwhelmingly a matter of federal law." *See* Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 612 (2003).

Part III.A.4. describes how long it normally takes to close deals and, in particular, to hold a shareholder vote. From the 2006–2015 Sample, I focus on mergers approved in 2014 and 2015. For each transaction, I calculate the time lags (i) between signing date and meeting date, and (ii) between meeting date and closing date.[98] Given that cash mergers have a leaner regime than mergers entailing a stock consideration (that is because of the securities law implications of offering securities in exchange),[99] the data I present also distinguishes between the two types of deals.[100]

As a starting point to appreciate timing in merger transactions, Table IX.A in the Appendix reveals that it takes quite a while to close mergers, that cash-only deals take much less time, and that there is generally a lot of variance in the observed lags. The average deal takes four to five months to close, with cash deals being generally quicker (slightly less than four months on average) than mergers with some stock consideration (five to six months on average).

It is hard to say with precision how much the shareholder vote alone contributes to prolonging the time to close. Voting clearly creates delay, as Table IV demonstrates. A shareholder vote occurs on average roughly four months after the signing day, with cash mergers being much quicker. However, the completion of a deal can be delayed by several factors other than the vote itself. Such factors can range from structural complexities[101] to antitrust[102] or other regulatory[103] issues.[104] Still, even assuming, when

98. While information on the meeting date is originally reported in the FSSR Dataset, I have gathered signing and closing dates from public filings.

99. The securities issued in exchange are a public offering for securities law purposes and require a prospectus compliance with the panoply of rules under the Securities Act of 1933; *cf.* John C. Coates IV, *The Powerful and Pervasive Effects of Ownership on M&A* 13 (Harvard Law Sch. Discussion Paper No. 669, 2010), https://ssrn.com/abstract=1884157 (mentioning the following provisions: "1933 Act § 5 (requiring registration statement to be filed with SEC prior to offers of stock to public); 1934 Act § 14 (framework for proxy and tender offer rules); SEC Rules 145 (stock mergers treated as stock offers under 1933 Act), 14a-3 and 14a-6 (proxy statements must be filed with SEC and furnished to shareholders prior to soliciting proxies or consents, including efforts to persuade shareholders to withhold proxies or consents from others.) *Id*.

100. This is consistent with previous studies that have calculated average duration of M&A deals and have distinguished between cash deals and deals involving securities. *See* John C. Coates & Guhan Subramanian, *A Buy-Side Model of M&A Lockups: Theory and Evidence,* 53 STAN. L. REV. 307, 391 (2000) (distinguishing cash deals from stock deals while analyzing the agency costs associated with lockups).

101. That would be the case if, for instance, other transactions, such as a refinancing, a spin-off, or other types reorganizations, need to happen.

102. For instance, the merging entities have one or more businesses that if combined can lead to anticompetitive conduct.

103. That is the case if the target and/or the acquirer are regulated entities, such as banks, broker dealers, utilities, and so forth.

104. *See generally* Coates & Subramanian, *supra* note 100, at 379–80:

> [S]everal sources of variation in deal delay exist: (1) SEC registration procedures if stock consideration is used, as is common for public bidders in rising stock markets, and at all times in industries, such as banking, where bidder equity capital is scarce or intentionally

any such complexities are present, that voting does not result in more time to close a given merger, it will still add an extra layer of procedural headache, which likely increases opportunity costs and loss of time for the corporate planners.[105]

With these disclaimers in mind, the data on timing for shareholders to approve a merger reveals a long process. Even deals that are voted in a relatively quick fashion take time: looking at the whole sample, at the 25th percentile a deal took 86 days to be approved (the 25th percentile is 73 days for cash deals and 107 days for deals with a stock component). Medians, means and 75th percentile figures confirm the time consuming nature of shareholder approval: in respect of the whole sample those are 108, 120, and 136 days, respectively. For cash deals, such figures are slightly lower 88, 95, and 108 days, respectively, while for deals with a stock component they are much higher: 131, 143, and 163 days, respectively.

Table IV
Time between Signing and Meeting Dates

Year	**No. Of Observed Mergers**	**Time Between Signing And Meeting Dates**			
		Median	Mean	25th Percentile	75th Percentile
All Deals					
2014	67	109	119 (55)	81	143
2015	86	106	120 (52)	86	131
Entire Period	153	108	120 (53)	86	136
All-Cash Mergers					
2014	33	86	92 (33)	67	115
2015	41	90	97 (41)	78	104
Entire Period	74	88	95 (37)	73	108
Mergers With Stock Consideration					
2014	34	136	145 (59)	102	161
2015	45	125	142 (52)	108	163
Entire Period	79	131	143 (55)	107	163

kept near a regulatory minimum; (2) special regulatory approvals, such as those required in the banking, utilities, or telecommunications industries; and (3) antitrust review, if the deal raises antitrust concerns or will require divestitures to be completed (as is increasingly common).

Coates & Subramanian, *supra* note 100, at 379–80. Of course, to speed up this lengthy process, sophisticated corporate planners run different closing activities on separate tracks with the help of various lawyers (corporate, securities, antitrust, and any industry-specific expert depending on the type of deal, such as banking, energy, aviation, telecommunications and so forth).

105. In other words, even though the voting requirement itself might not always be the sole reason for a delayed closing day, it would extract additional efforts and attention from the people involved.

As noted, a shareholder vote is not the only reason that mergers take time. But it is not easy (nor probably even feasible) to actually determine with some precision the (extra) time such a requirement normally adds to a merger timetable. A reasonably reliable proxy would be to identify deals that do not present particular structural, antitrust or regulatory complexities, whereby shareholder approval is the only obstacle to a rapid closing. To do that accurately, one would need to perform an in-depth qualitative analysis of each deal, possibly combined with interviews of corporate planners and their advisors. While this type of research is probably difficult to compile (if only because of the confidentiality duties legal advisors are subject to), it is certainly beyond the scope of my current work. Instead, I gather the lack of complexity of a given deal by implication. If a merger closes relatively shortly after a shareholder meeting, I assume the shareholder approval requirement was the actual piece of the transaction determining a delay in closing the transaction. In this spirit, Table V calculates the average time for a shareholder vote for only the subset of deals that closed within ten days after the shareholder meeting.

The data for these somewhat less complex mergers, in which the shareholder vote requirement is the main factor determining a lengthy transaction, show findings similar to what we have seen for all mergers:

(i) Even relatively faster deals take some time: the 25th percentile is 78 days for cash deals and 94 days for deals with a stock component; and

(ii) Median, mean and 75th percentile figures are 91, 93, and 105 days respectively, while for deals with a stock component they are much higher (106, 120, and 134 days, respectively).

Note again that these mergers represent a nontrivial segment of the entire universe of transactions: 41.2% of total deals, 39.2% of all cash mergers, and 43% of mergers with a stock component.[106]

106. As the medians and means are closer in Table V than in Table IV, it is plausible that the longer timetables of mergers in Table IV are driven by other factors, including the presence of a few outliers that cause delays *before* and *after* the meeting (such outlier being eliminated in Table V through the 10-day closing cut-off).

Table V
Time between Signing and Meeting Dates
(Mergers that Closed within 10 Days After Shareholder Vote)

Year	**No. Of Observed Mergers**	**No. Of Mergers Closed Within 10 Days Of Shs Meeting (Percentage Of Total Mergers)**	**Time Between Signing And Meeting Dates**			
			Median	Mean (Standard Deviation)	25th Percentile	75th Percentile
All Deals						
2014	67	27 (40.3%)	100	104 (30)	85	124
2015	87	36 (41.4%)	103	112 (44)	87.5	119
Entire Period	153	63 (41.2%)	101	108 (38)	84	123
All-Cash Mergers						
2014	33	15 (44.1%)	92	95 (33)	68	109
2015	41	15 (36.6%)	91	92 (14)	80	103.5
Entire Period	74	29 (39.2%)	91	93 (25)	78	105
Mergers With Stock Consideration						
2014	34	12 (35.3%)	99	108 (25)	89	131
2015	45	21 (46.7%)	113	127 (51)	101	134
Entire Period	79	34 (43%)	106	120 (44)	94	134

B. Assessing Shareholder Action in Mergers

This Part analyzes the data presented thus far. Part II.B.1 surveys plausible reasons for the extremely low number of rejections of mergers by shareholders, the few instances of narrow-margin deals, and the overwhelmingly high approval percentages. Part II.B.2 highlights the potential drawbacks of voting, especially in light of the substantial delay it imposes on the completion of a merger transaction.

1. *Explaining the Extremely Few Rejected and Narrow-Margin Deals, as Well as the High Approval Percentages*

This Subpart seeks to shed light on the approval and rejection data illustrated earlier by addressing the following explanations: (a) presence of premiums, (b) credible threat of shareholder rejection, (c) absence of a real choice for shareholders, and (d) inflation of approval rates because of arbitrage and/or shareholder conflicts.

a. *Mergers Are No-Brainers Because Shareholders Like Premiums*

Shareholders do like merger activity because deals bring premiums.[107] Per the Majority Approval Sample, in the 2010–2015 period premiums averaged approximately 28.6% (median) and 31.1% (mean), when calculated on a t-1 basis, and 34% (median) or 41% (mean), when calculated on an unaffected basis. The fact that the "approve" votes overwhelmingly dominate the "reject" ones should therefore not be surprising. The presence of a premium might well explain why mergers get more shareholder support than other instances of shareholder engagement in connection of corporate governance-related resolutions.[108]

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107. *See, e.g.*, Michael Bradley et al., *Synergistic Gains from Corporate Acquisitions and Their Division Between the Stockholders of Target and Acquiring Firms*, 21 J. FIN. ECON. 3, 16–18 (1988); *see also* B. Espen Eckbo, *Corporate Takeovers and Economic Efficiency* 28 (ECGI Finance Working Paper No. 391, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2340754; *see also* Audra Boone et al., *Shareholder Decision Rights in Acquisitions: Evidence from Tender Offers* 5–9 (Indiana Legal Studies Research Paper No. 331, 2016), https://ssrn.com/abstract=2629424 (acknowledging that the size of the premium is a significant factor motivating shareholder approval while discussing the effect of lower approval thresholds and the power of shareholders to holdout for higher premiums in these situations); David Becher et al., *Do Shareholders Listen? M&A Advisor Opinions and Shareholder Voting* 7–10 (Univ. of Md. Dep't of Fin. Research Paper, 2010), https://www.rhsmith.umd.edu/files/Documents/Departments/Finance/Session6BecherDoShareholdersListen.pdf (discussing the incentive for advisors to give a lower value to target companies such that the offered premium seems higher and thereby more likely to garner shareholder approval); *see also* Reinier Kraakman, *Taking Discounts Seriously: The Implications of "Discounted" Share Prices as an Acquisition Motive*, 88 COLUM. L. REV. 891, 894 (1988) ("Target shareholders earn large returns in the form of premia."); *see also* Coates, *supra* note 37, at 33 ("M&A transactions generally generate significant gains to target shareholders who sell.").

108. For instance, the following were the average voting results in 2014 in connection with corporate governance-related shareholder proposals, sorted by selected topics (the sample excludes topics such as executive compensation and social responsibility):

(i) allow for (or ease requirement to) act by written consent—twenty-seven proposals, average votes in favor: 38.1% (as percentage of votes cast) and 27% (as percentage of shares outstanding);

(ii) allow for (or ease requirement to) call special meetings—fourteen proposals, average votes in favor: 45% (as percentage of votes cast) and 31.5% (as percentage of shares outstanding);

(iii) change from plurality to majority voting—twenty-seven proposals, average votes in favor: 56.5% (as percentage of votes cast) and 43.6% (as percentage of shares outstanding);

(iv) declassify board—fifteen proposals, average votes in favor: 80.6% (as percentage of votes cast) and 63.7% (as percentage of shares outstanding);

(v) eliminate dual class structure—nine proposals, average votes in favor: 23.3% (as percentage of votes cast) and 19.4% (as percentage of shares outstanding);

(vi) eliminate supermajority vote requirements—twelve proposals, average votes in favor: 66.2% (as percentage of votes cast) and 50.6% (as percentage of shares outstanding);

(vii) allow proxy access—thirteen proposals, average votes in favor: 39.1% (as percentage of votes cast) and 32% (as percentage of shares outstanding);

(viii) separate CEO/chairman positions—sixty-two proposals, average votes in favor: 31% (as percentage of votes cast) and 24.5% (as percentage of shares outstanding);

cf. THE CONFERENCE BD., PROXY VOTING ANALYTICS (2010–2014) 61 (2014). Note that the majority generally required to pass any of the above resolutions (majority of the vote cast) is different than the one generally necessary to approve mergers (majority of the shares outstanding).

To be clear, it is likely that deals have premiums of a certain size *because of* the shareholder approval requirement—and I am referring to shareholder approval in a loose meaning here to cover both a vote (like in a merger), or a tender decision (like in a tender offer), for sizeable premiums are of course present also in tender offers, in which a shareholder resolution is not necessary. But mergers (as well as friendly tender offers) must first be approved by the board of directors of the target and therefore the size of premiums in the current legal environment is a combination of both (i) the negotiating powers of the board (which anticipates, and is influenced by, a subsequent shareholder decision), and (ii) the shareholder decision itself.[109]

Certainly, the mere presence of a premium does not automatically mean shareholders will approve the deal: size matters.[110] If, for instance, the consideration is cash, shareholders know that approving the merger will result in an endgame situation. If the merger passes, they will never have the opportunity to sell at a better premium because they will no longer hold any equity stake in the target post-closing. And that is why a small premium might not do it because a merger is the time, and probably the only time, to cash in a large premium—shareholders' expectations are geared toward that goal and (have to) rely on management to negotiate vigorously on their behalf.[111]

b. Self-Selection Bias in the Sample: Directors Seek Shareholder Approval Only with "Good" Deals

The pressures of agency costs affect the negotiating skills and efforts by directors. Deals are negotiated by a management team that in some cases anticipates, and in other wishes, to continue working with the new ownership post-closing. Corporate executives can then be tempted to trade off merger premiums with private benefits in the form of side payments or various career opportunities.[112]

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109. *See infra* Part II.B.2.

110. I reckon that, as noted *supra* Part III.A.3.b, premiums and voting outcomes in the Majority Approval Sample do not correlate. However, for the reasons stated in such Part, this does not mean shareholders are insensitive to premiums.

111. Enhanced fiduciary duties are often attached to situations in which shareholders of a target company face losing the prospect of selling their stock at a substantial premium, because soon the company would no longer be contestable and shareholders would experience a permanent "loss of voting rights" without being compensated with a premium. *See* Paramount Commc'ns v. QVC Network Inc., 637 A.2d 34, 42–43 (1993), which stated that the Paramount directors were obligated to seek the best value reasonably available for stockholders to compensate for the imminent loss of voting power following the change in control of Paramount ("[W]hen a majority of a corporation's voting shares are acquired by a single person or entity . . . , there is a significant diminution in the voting power of those who thereby become minority stockholders.").

112. *See supra* note 47 and accompanying text. *See* Coates, *supra* note 37, at 11 (noting that "[f]iduciaries may seek to sell their company 'too early' or 'too cheaply' to trigger 'golden parachutes' or vesting under option plans or retirement plans, or in return for benefits from the buyer."). *Compare*

But if potential conflicts suggest that in some instances management might not operate as an effective negotiator, the law gives shareholders the power to turn down a deal if they believe a small premium would not adequately reward their exit.[113] Directors perceive that poor deals run the risk of defeat, and such perception represents a "credible threat" that induces them to be more discriminating in the mergers they propose.[114] Directors do care about market scrutiny when a merger vote is pending, as they anticipate the risk that if they propose an unappealing deal, they might be turned down by shareholders—something that can have a big reputational impact not just on the company's business and operations, but also on their professional profiles.[115] Additionally, board members

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Julie Wulf, *Do CEOs in Mergers Trade Power for Premium? Evidence from "Mergers of Equals"*, 20 J.L. ECON. ORG. 60, 89–96 (2004) (documenting such trade-offs in mergers of equals), *with* Eckbo, *supra* note 107, at 14 ("The literature on deal initiation . . . establishes that takeover premiums are lower in seller-initiated than in bidder-initiated deals, and that deal initiation affects target CEO compensation.").

Compare how this trade-off presented itself in connection with the recently disputed merger between Signet and Zale (*In re* Zale Corp. Stockholders Litig., C.A. No. 9388-VCP, 2015 WL 585363, at *4 (Del. Ch. Oct. 1, 2015)):

> On January 16, 2014, [acquirer's CEO] Barnes informed [target's CEO] Killion that [the acquirer] Signet planned, post-merger, to keep [target] Zale as a separate division within Signet, and it wanted Killion to continue to lead that division from its headquarters in Texas. Killion also allegedly stood to earn nearly twice as much as the head of a division within Signet as he was earning as Zale's CEO.

113. JESSE H. CHOPER ET AL., CASES AND MATERIALS ON CORPORATIONS 937–38 (8th ed. 2013):

> Management acts as a gatekeeper in that no proposal for a . . . merger can be presented by shareholders unless the board of directors first approves it. Assuming loyal management, rational shareholders would choose for management to play this gatekeeper role; shareholders themselves would not be interested in considering any transaction that their experts had not already concluded was in the shareholders' interests. The further requirement that target shareholders also approve a transaction limits the potential that management may be disloyal in approving a proposed acquisition recommending it despite too low a price only because of post-transaction benefits promised by the acquiring company.

114. I borrow this expression and the underlying logic from Burch et al., *supra* note 21, at 52 (analyzing merger voting patterns at acquirers and arguing that merger votes do provide credible threats for management). They stated, "management might sometimes overestimate the level of shareholder support a proposed deal will gain . . . . If there is a realistic risk that merger votes can fail, then despite high approval rates *on average* we should observe votes that pass by relatively narrow margins." Burch et al., *supra* note 21, at 46.

115. Analyzing the parallel issue of shareholder voting in mergers at the acquiring firm, *see* Burch et al., *supra* note 21, at 46 ("[a] failed vote would presumably damage management's reputation, providing ammunition for any shareholders interested I replacing the management team."); Kai Li et al., *Shareholder Approval in Mergers & Acquisitions* 9 (European Corporate Governance Inst., 2016), http://www.ecgi.global/sites/default/files/Shareholder%20Approval%20in%20Mergers%20and%20Acquisitions.pdf ("[T]he threat of a failed vote is real and costly because a defeated merger proposal may flag shareholders' lack of confidence in management and could potentially result in management turnover."). For the argument that "[t]he vote on the merger can be viewed as a mid-term election of directors, a vote of confidence on a major decision," see Easterbrook & Fischel, *supra* note 11, at 416. For the argument that "managers have, on average, incentives to include proposals only if they believe they will pass[,]" see Jennifer E. Bethel & Stuart L. Gillan, *The Impact of the Institutional and*

know they are subject to potentially invasive judicial review for breaches of a whole host of enhanced fiduciary duties, and to the risk of having their business paralyzed in the interim period before closing.

Overall, the combined constraints, represented by the credible threat of rejection because of shareholder veto power and by the risk of litigation, create a screening mechanism whereby directors are induced to propose only deals that shareholders would not be expected to vote down and the judiciary would be reluctant to second-guess (especially today, in the aftermath of *Corwin*).[116] As a result, the high approval rates observed in Part II.A.3 and the few instances of barely approved mergers might well reflect a self-selection bias in the sample. Because most managers prefer to gain shareholder support, they propose deals they believe will be approved: Most of the time they are right, but in some few instances they overestimate the level of shareholder support and the vote is at risk of failing—hence the presence of a few deals that pass by narrow margins.[117] The data analyzed here support this hypothesis. Mergers subject to a more stringent approval requirement (2/3 v. 50%) register a higher portion of mergers approved in the 75%–87.49% range (76.2% in the 2/3 Approval Sample v. 56.6% in the Majority Approval Sample). This suggests that when a supermajority is required, directors may feel that deal approval is at risk and entertain more efforts to get the approval (and are possibly even more selective when submitting deals in the first place), which in turn results in higher percentages of votes in favor.[118] Also, a comparison with the much higher non-completion rates present in other studies (around 22% v. 1% circa)[119] confirms the point. Because the samples in those studies are based on all announced deals, while the one used here is based on deals for which directors actually did call a meeting, it is plausible that *some* deals present in those studies were so unappealing that directors resolved to not even bother calling a meeting and thus are not recognized in the sample.[120]

Regulatory Environment on Shareholder Voting, 31 FIN. MGMT. 29, 36 (2002).

116. *See supra* Part I.C.

117. For this line of reasoning, but in the context of acquirer firm shareholder vote, see Burch et al., *supra* note 21, at 46.

118. Interestingly though, as noted *supra* note 89 and accompanying text, while deals in the 2/3 Approval Sample are associated with higher approval percentages, they carry premiums that are essentially similar to those in the Majority Approval Sample. *See also* Table VII.A in the Appendix.

119. *See supra* note 67.

120. However, this cannot be the sole explanation. In fact, as explained *supra* in note 67, the samples are intrinsically different. Not only do I take into account only deals with Russell 3000 companies, but I also screen out noncontestable targets: from an original dataset of 1067 deals in the FSSR Sample, after reviewing all pertinent securities filings, I eliminated 160 deals to obtain the 907 deals in the 2006–2015 Sample. Furthermore, some deals that were not completed in the other studies might have plausibly been abandoned for reasons other than fear of lacking shareholder support: For instance, a rival bid arises, the buyer calls a MAC and the parties agree to terminate the deal, *see infra* Part II.B.2.b, regulatory approval becomes realistically unattainable, financing does not materialize, and so forth.

What future research should seek to establish is whether shareholders anticipate receiving proposals for good deals only, and thus cast votes and approve mergers without too much pondering.

c. Do Shareholders Really Have a Choice?

Shareholder voting can reflect no real choice after all. First, even when the merger consideration on the table is not irresistible, shareholders might still decide to approve the transaction, because they see no better alternative in the near future. Consider that, at the time of the vote, the target company has been in play for a decent amount of time, at the very least a good couple of months, but generally much more.[121] After a few months without improvements to the original deal, shareholders might have low expectations on the future value of the target and, rather than waiting for a better deal in an uncertain future, decide to take the merger consideration while still available. A deal today can be better than no deal at all.[122]

Second, the inherent pro-management advantages of proxy rules and machinery[123] might help companies accumulate more votes because of how easier their proxy campaign is—some authors even label the whole voting system as "rigged."[124]

121. *See* Coates, *supra* note 37, at 32 ("[A]cquisitions of US public targets (most of which are mergers that involve at least some non-cash consideration, and so require registration of securities with the SEC) typically take 60 to 90 days from announcement to complete . . ."). Others generally describe longer timeframes: *see, e.g.*, David J. Denis & Antonio J. Macias, *Material Adverse Change Clauses and Acquisition Dynamics*, J. FIN. & QUANTITATIVE ANALYSIS (forthcoming) (noting an average of four and a half months from announcement to closing in their sample). For an analysis of the average time to get to a shareholder vote with respect to mergers approved (or supposed to be approved) in the 2014–2015 period, see Table IX.A in the Appendix and *supra* Table IV and Table V and related discussion.

122. In other words, something akin to substantive coercion in tender offers could be at play: *Maybe* shareholders could get more, but they rarely do because they do not know when the opportunity will arise again and thus prefer to take what is on the table.

123. *See* Listokin, *supra* note 69, at 631 (noting that "narrow dissident victories raise market value, while narrow management wins reduce value" and explaining it with "management's advantages[, which] are able to 'move' the opinion of the median shareholder in favor of management."); *see also* Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 688–93 (2007) (citing discretion over the timing of a vote, contact information for shareholders, proxy expenses reimbursement, and conflicts by institutional shareholder who fear losing their business with a corporate client).

124. *See* Laurent Bach & Daniel Metzger, *Are Shareholder Votes Rigged?* 15 (Swedish House of Fin. Research Paper No. 17-3, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2880523 (presenting evidence estimating that 11% of closely contested proposals that were presented by insurgents and that were eventually rejected by shareholders would have passed if management had not been able to systematically affect the voting results); *see also* Listokin, *supra* note 92, at 160; Listokin, *supra* note 69, at 620 ("[M]anipulation of the vote share [held by management] is a possibility, as there are more close management victories than close dissident victories."); *see also* Richard W. Barrett, *Elephant in the Boardroom?: Counting the Vote in Corporate Elections*, 44 VAL. U. L. REV. 125, 128 (2009) (noting "the curious absence of accountability for accurately counting votes in corporate elections.").

d. Approval Percentages Are Inflated

We cannot know for sure whether all shareholders who vote in favor of a merger do so because they believe the merger consideration reflects the inherent value of the corporation and is superior to holding on to their shares. Merger arbitrage and shareholder conflicts are two mechanisms that can alter the sincerity of the voting process and inflate the votes in favor of the merger.

i. Merger Arbitrage

In general, shareholders' interests are not necessarily homogeneous. Among other factors, particular strategies and investment horizon might shape their goals differently. As noted, in the context of M&A transactions the heterogeneity of shareholders' interests is intensified by their opportunity to cash in a premium, irrespective of whether such a premium is a satisfying one.[125] This is because M&A transactions ignite opportunities to make short-term gains by taking the deal consideration, which in turn attracts merger arbitrageurs. After a deal is announced, such investors quickly proceed to buy stakes in the target company and become a significant player in a company's ownership. Most of the time, their strategy is to bet on the eventual closing of the deal so they can pocket the merger consideration: That way, they would profit from the difference between such consideration and the price they paid when they bought shares on the market right after the transaction was announced. That price difference is primarily based on their eagerness to assume the risk of deal completion.[126] If the deal closes, they gain. Otherwise, they lose their bet. Therefore, the only voting strategy that makes sense for these shareholders is approving the transaction.[127]

Merger arbitrageurs constitute significant chunks of the shareholder base once a transaction is announced, although the precise contours are not clear. Future research should shed light on their actual relevance in

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125. *See* Gatti, *supra* note 27, at 235–36.

126. Assuming a deal that the market is keen on, absent expectations of rival bids, right after announcement, the stock will trade very close to (but slightly below) the deal price (the spread to deal price reflects the risk that the deal will for some reason not close). Those shareholders who do not want to lose the opportunity to cash in will sell at merger arbitrageurs at slightly below the merger price, with the price spread being a sort of premium that selling investors are eager to pay to the arb for assuming the completion risk (the extent of such a spread is predicated to depend on several factors, including the probability of closing, hostile or friendly transaction, merger or tender offer, strategic or financial buyer, timing to close the deal, expectation on the trading price if the deal does not go through, probability of higher bids, dividends in the interim period, and so forth). *See generally* THOMAS KIRCHNER, MERGER ARBITRAGE: HOW TO PROFIT FROM GLOBAL EVENT-DRIVEN ARBITRAGE 18–27 (2d ed. 2016) (describing basic mechanics of merger arbitrage).

127. As the Delaware Chancery Court put it in Air Prods. & Chems., Inc. v. Airgas, Inc. 16 A.3d 48, 111 (Del. Ch. 2011), short-term arbitrageurs are "happy to tender their shares at [the offer] price regardless of the potential long-term value of the company."

the shareholder base of targets after deals are announced.[128] But certainly, several of the votes cast in connection with mergers come from a type of investor who almost always is biased to approve the transaction irrespective of its underlying merits.[129] This is a supplemental explanation for the high merger approval percentages.[130]

ii. Conflict of Interests

Both completion and percentage rates might be influenced by insider ownership supporting the transaction.[131] Barring extraordinary circumstances, directors and managers always vote to support the merger. They often do so because they have signed voting agreements with the acquiring firm to that effect.[132] On some occasions, the insiders' votes sway the ultimate outcome of the transaction. In the Majority Approval Sample, six of the 13 narrow-margin deals that were approved

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128. In the *Airgas* transaction, following the announcement of the takeover by Air Products, arbitrageurs and other event-driven investors started to purchase significant stakes in the target stock that ultimately allowed them to own approximately 46% of the company. *Id.* at 118; *see also* Mark J. Roe, *Corporate Short-Termism—In the Boardroom and in the Courtroom*, 68 BUS. LAW. 977, 990 (2013) (detailing then-Chancellor Chandler's analysis regarding the role of short-termism and deal arbitrageurs in *Airgas*).

129. One may object that if the deal were not good, then a merger arb would short the stock and vote against the merger. Of course that is a possibility. But it would be a pretty risky one because of the overall sentiment on mergers and the expectation that almost all of them, for one reason or the other, get approved; *cf.* Offenberg & Pirinsky, *supra* note 37, at 336 (reporting that only 15% of the deals in their sample experienced a negative spread). *But see* Wei Jiang et al., *Influencing Control: Jawboning in Risk Arbitrage* 3–5 (Columbia Bus. Sch. Research Paper No. 15-41, 2016), https://papers.ssrn.com/sol3/papers.cfm? abstract_id=2587925 (distinguishing between "activist arbitrageurs [who] stand ready to assume a higher deal failure risk [and] passive arbitrageurs who simply vote their shares in favor of the deal" and noting that activist arbitrage activities were spotted in 13% and 6.5% of the deals in 2013 and 2014, respectively).

130. On the flip side, shareholders who strongly oppose the deal might be better off selling (and/or short-selling) the stock rather than relying on their voice. This strategy is likely more pronounced in stock-for-stock deals, in which shareholders do not have an opportunity to cash in at the merger price, nor are generally provided with appraisal rights: *see* DEL. CODE ANN. tit. 8, § 262 (2016) (where shares of a company are publicly traded and the merger consideration is stock of the other merging corporation, there are no appraisal rights). Early exit strategies available on the stock market might explain why the pool of opponents ends up being less populated even for nonenticing deals. For a similar argument made in the context of acquiring-firm merger votes, see Burch et al., *supra* note 21, at 51–52:

> Even if many investors share negative views, they may prefer to sell rather than face uncertainty over whether shareholders (as a class) will vote to defeat the merger. Because selling investors do not vote—indeed they are replaced with buying investors who likely have more positive views—deals with negative announcement reactions can nonetheless pass with high approval rates.

131. For a similar observation in the broader context of voting outcomes on management proposals of various type (i.e., not just mergers), *Cf.* Bethel & Gillan, *supra* note 115, at 36 ("Managers . . . appear to have been likely to include proposals when they had sufficient holdings to influence voting results . . .").

132. Voting agreements are present in 43.4% of the deals in the Majority Approval Sample. On average, such agreements aggregate approximately 14% of the outstanding shares (precisely, the median is 13.67%, the mean is 14.74%, and the standard deviation is 10.37%).

by a vote of less than 60% of the outstanding shares, ultimately passed because of votes cast by insiders.[133] Delaware judges do not seem particularly keen to second-guess shareholder votes. Recently, in the context of the Zale merger litigation, the Chancery Court discussed, yet dismissed, whether a shareholder, who stood to earn an additional $3.2 million in prepayment fees on a loan they had previously made to the target Zale, was conflicted in casting its 23.3% stake in favor of the merger (such stake was worth approximately $225 million at the price of the merger consideration).[134]

133. The table below contains all narrow margin deals (that is, deals approved with a percentage of less than 60% of the outstanding shares) in the 2010–2015 period, with details on approving percentages, insider ownership levels, whether there was a voting agreement, and whether the vote by insiders was pivotal for approving the merger. Note that, for the reasons stated *infra* note 135 and accompanying text, the mere fact that the vote by insiders was pivotal, which happened in roughly half of the deals in the table below, is not per se sufficient to establish that the resolution was tainted by a conflict of interest.

Target Company Name	**Meeting Date**	**% of Shares Outstanding**	**Insider Ownership (*)**	**Voting Agreement? (%)**	**Insider Vote Pivotal?**
infoGROUP	6/29/10	57.23%	~34%	Yes (~34%)	Yes
Virtual Radiologic	7/12/10	56.99%	~36%	Yes (~33%)	Yes
Occam Networks	1/27/11	59.47%	~30%	Yes (~27%)	Yes
Conexant Systems	4/18/11	50.85%	~1.41%	No	Yes
Marshall & Ilsley	5/17/11	58.00%	~1.54%	No	No
drugstore.com	6/2/11	52.18%	< 2%	No	Almost (**)
Zoran	8/30/11	57.00%	~14%	Yes (1%)	Yes
Cogdell Spencer	3/9/12	59.43%	~6.6%	No	No
Medicis Pharmaceutical	12/7/12	59.52%	~3.8%	No	No
EnergySolutions	4/26/13	58.14%	~4.1%	No	No
H.J. Heinz	4/30/13	59.81%	~1.4%	No	No
Plains Exploration & Production	5/20/13	57.18%	~31.3%	Yes (~31.3%)	Yes
Zale	5/29/14	53.12%	~24.7%	Yes (~23.2)	Yes

(*) Includes ownership by directors, management, and significant shareholders.
(**) The resolution approving the merger would still have passed without the insider vote, but with an extremely tight margin.

134. The alleged conflict was based on the fact that the merger triggered the $3.2 million payment, which the Court ultimately did not consider material because it only amounted to less than 1.5% of the payment the shareholder was expecting from its consideration under the merger. *In re* Zale Corp. Stockholders Litig., No. CV 9388-VCP, 2015 WL 5853693, at *9 (Del. Ch. Oct. 1, 2015), *amended on reargument*, No. CV 9388-VCP, 2015 WL 655148 (Del. Ch. Oct. 29, 2015) (noting that under Delaware law "there are cases in which a plaintiff's allegations of a large stockholder's need for liquidity have been sufficient to defeat a motion to dismiss.").

It is beyond the scope of my current work to determine whether or not those insiders' votes were cast in the best interests of the corporation: to do that, one needs to establish whether rejecting the deal was a better course of action than approving it, by looking at what the expected value of the target as an independent entity was at the time of the vote.[135] Interestingly, one can argue that, if the purpose for having the shareholder approval requirement in the first place is to curb the intensified agency problems directors and managers might have in a final period,[136] then letting those same agents vote and be in a position to influence the fate of the deal contradicts such a purpose.

2. Delay as the Main Drawback of Shareholder Voting

Out-of-pocket transaction costs and delay in connection with the closing of the merger procedure are the often cited drawbacks of shareholder voting in mergers.[137] While I do not believe the cost of meetings should be a major concern, the long timeframes imposed by a shareholder vote should be considered.

Organizing a special meeting of stockholders is no doubt expensive, mainly in terms of paying proxy solicitor, accountants, and lawyers, as well as printing and mailing the disclosure materials.[138] While proxy solicitor expenses are normally in the $75,000–$200,000 range, generally depending on deal size,[139] and costs of accountants are around $1.5 million,[140] it is harder to quantify the exact extent of lawyers' fees

135. As I stated elsewhere, the complex aspect in policing shareholders' conflicts of interest in the M&A context is that their negative influence is circumstantial: the mere possibility of a conflict is not sufficient to taint the vote. "The pathology . . . is pursuing a personal interest and casting a pivotal vote against the interests of the other shareholders: to make such determination, there is no way other than looking at facts and circumstances arising from the actual [deal] on the table." *See* Gatti, *supra* note 27, at 188. In other words, if the deal is value maximizing, directors and managers supporting it will not be in conflict, but if it is not value maximizing, their votes in favor will in fact be conflicted.

136. This Article and mainstream legal and financial literature consider this to be the best explanation. *See supra* Part I.B and Part II.B.1.b and *infra* Part III.A.

137. *See* Ronald J. Gilson & Alan Schwartz, *Understanding MACs: Moral Hazard in Acquisitions*, 21 J. L. ECON. & ORG. 330, 333–34 (2005); *see also* Coates, *supra* note 37, at 30–34; Offenberg & Pirinsky, *supra* note 37, at 333; Bhagwat et al., *supra* note 20, at 1–2.

138. "Where public corporations are involved the process of obtaining shareholder approval [in mergers] is cumbersome and expensive. . . . [T]he cost of the shareholder approval process can easily run into seven figures." STEPHEN M. BAINBRIDGE, CORPORATE LAW 339 (2d ed. 2009) (citing costs of accountants, lawyers, and proxy soliciting firms).

139. Adam Kommel, *Proxy Fight Fees and Costs Now Collected by SharkRepellent: MacKenzie Partners and Carl Icahn Involved in Largest Fights*, SHARK REPELLENT (Feb. 20, 2013), https://www.sharkrepellent.net/request?an=dt.getPage&st=undefined&pg=/pub/rs_20130220.html.

140. Rebel A. Cole et al., *The Cost of Advice in Merger & Acquisition Transactions* 19–22 (Jan. 15, 2010), https://ssrn.com/abstract=1458465 (noting that the cost of advice increases with the size of the transaction); *cf.* Ari Dropkin, Note, *Skin in the Game: The Promise of Contingency-Based M&A Fees*, 103 GEO. L.J. 1061, 1063 (2015) (noting the different fee structures that professionals can use depending on the circumstances of the transaction).

attributable to the shareholder meeting only.[141] In any event, I do not believe these costs, alone, should justify doing away with voting. In the overall level of deal expenses associated with an acquisition, they do not increase the tab dramatically, especially considering that mergers are one-off transactions: the costs of a shareholder meeting alone are overshadowed by other deal expenses.[142]

On the other hand, calling and organizing a meeting to approve a merger is time consuming, as Part II.A.4 indicates. In particular, Tables IV and V show that it normally takes between two and a half to three and a half months to approve a cash merger (mergers with a stock component require at least an additional extra month). Below I analyze the main drawbacks of the current regime, including prolonged time lags between signing and closing that can distract corporations from running their businesses, delay integration, put deal certainty at risk, and facilitate litigation.

a. *A Long Time to Close Can Distract from Ordinary Course of Business, Delay Effective Integration, Result in Bad Allocation of Resources, and Facilitate Litigation*

An overly long interim period between signing and closing exacerbates managerial distraction, a cost typical of M&A transactions.[143] To degrees, managers must (or opportunistically may want to)[144] deviate from their regular duties in running the day-to-day business to focus on deal execution. Post-merger integration is a delicate task that normally requires enormous planning and employee attention.[145] Integration does

141. Corporate law firms generally handle the meeting together with a whole host of other activities, ranging from advising on how the merger talks should be set up to the drafting and negotiating of the merger agreement, as well as the preparation of all necessary securities, antitrust, and other regulatory filings. Without direct access to a dataset of lawyers' bills (with breakdowns of different activities), it is naïve to try to come up with some reliable figure for the portion of the fees attributable to the shareholder meeting alone.

142. *See, e.g.*, Cole et al., *supra* note 140, at 6–10 (finding that pretransaction costs relating to due diligence, tax planning, and planning complex deal terms represent significant costs such that can contribute to a decline in the acquiring firm's returns); *see also* Christel Karsten et al., *Lawyer Expertise and Contract Design—Evidence from M&A Negotiations* 6–11, 24 (Mar. 11, 2015), https://ssrn.com/abstract=2576866 (discussing data relating to merger costs and noting that significant costs associated with contract negotiations alone could near over $2 million.).

143. BAINBRIDGE, *supra* note 138, at 339 ("[S]enior corporate officers must expend considerable time and effort.").

144. This is the case if they feel the need to impress their future bosses in order to keep a job in the post-closing entity or to simply advance their career chances.

145. *Cf.* Gilson & Schwartz, *supra* note 137, at 337:

> [T]he target company may begin the process of integrating its product line with that of the acquirer by suspending or canceling the development or improvement of products; may freeze investment in capabilities that the acquirer already possesses; may shift its research and development to fit the anticipated postclosing strategic plan; and may discuss with its customers the buyer's capabilities in markets where the buyer has been a competitor.

not finish with the closing—quite the contrary, with the closing the integration becomes real. But when shareholder approval is still pending, and the process is lengthy, deal uncertainty makes managerial distraction an even larger issue. Some executives might feel extra pressure because of it, and the business might suffer for a prolonged time because of the lack of certainty as to whether there is going to be a deal or not.[146] The usual allocation of resources, both budgetary and staffing, is altered to accommodate the needs of deal execution. When the deal ultimately happens, it has faced delay in the integration process and uncertainty at the target level. In the meantime, the workforce, customers and suppliers of the target have questioned the prospects of their respective relationships with the company.[147] This issue affects not only target companies, but buyers as well. More time to get to closing also means higher fees to transaction advisors paid by the hour: lawyers primarily, but depending on the industry there may be several additional consultants involved. Additionally, delay gives the plaintiff's bar more time to initiate and maintain active litigation—a strategy that is very often abused in the M&A field. Finally, more time to close exposes to jawboning and other forms of activist shareholder interference.[148]

All in all, the longer it takes to close, the greater the destabilizing impact on the transaction process.[149]

b. *A Long Time to Close Endangers Deal Certainty, by Stimulating Buyer Remorse and Increasing the Value of the "Seller's Put"*

A significant delay to close enhances the costs associated with deal uncertainty.[150] In a protracted period between signing and closing, certain events can occur that might alter, at the eyes of one of the merger parties, the economics of the deal. A typical feature is buyer remorse, especially after a hard fought battle with other rival bidders, which often

146. "Anyone who has participated in a bidding war for a large public company knows how all-consuming the process can be for management." Coates & Subramanian, *supra* note 100, at 332 n.78.

147. *Cf.* Gilson & Schwartz, *supra* note 137, at 337:

> The announcement of a friendly transaction could lead employees to suspect layoffs or unwanted changes in the work environment. These expectations could cause more mobile, and likely more valuable, employees to become less focused on the target and more focused on their own futures, with the potential of an adverse selection cascade. . . . A target firm's customers and suppliers may reconsider their relations with the target in anticipation of the postclosing situation.

148. *See* Jiang et al., *supra* note 129, at 8–10; Boone et al., *supra* note 107, at 1.

149. *Cf.* Offenberg & Pirinsky, *supra* note 37, at 334 ("The cost of waiting reflects potential disruptions of the production process due to increased uncertainty surrounding the deal outcome.").

150. *See generally* Bhagwat et al., *supra* note 20, at 1–3 (estimating that, for deals that take 90 days or longer to close, "the target experiences an interim change in standalone value of more than 10% almost two-thirds of the time, and greater than 20% over one-half of the time[,]" and noting that "overall economic uncertainty will lead to decreases in deal activity.").

results in overpayment.[151] Buyer remorse is exacerbated when, in the aftermath of signing a deal, the economy, stock markets, or both experience a downturn.[152] Another important factor when it takes long to close is the increase in value of the so-called "seller's put:" The law generally restrains a buyer's ability to walk away from a deal,[153] but imposes on the target board the duty to sell at the highest price,[154] thus giving the target the option to pursue alternative offers while at the same time being able to, at a minimum, "always put itself to the [buyer] at the [deal] price."[155]

The legal and financial literature has stressed the prominence in merger agreements of risk allocation provisions, such as material adverse change ("MAC") clauses that give acquirers "the right to walk away from the acquisition, without penalty, if a material adverse event ("MAE") occurs between the announcement and the completion of the acquisition."[156] MAC definitions are normally open-ended and nonquantitative and contain carve outs to certain specific effects that will not be considered a MAC "even if they might have a severe impact on the target's business (for example, developments that affect the economy, markets or industry generally, changes in law or accounting policies,

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151. This was remarkably the case in one of Delaware's biggest MAC disputes, *In re* IBP, Inc. S'holders Litig., 789 A.2d 14 (Del. Ch. 2001). In then-Vice Chancellor Strine's words:

> To say that Tyson was eager to win the auction is to slight its ardent desire to possess IBP. . . . But the most important reason that Tyson slowed down the Merger process was different: it was having buyer's regret. Tyson wished it had paid less especially in view of its own compromised 2001 performance and IBP's slow 2001 results.

Id. at 21–22. On the phenomenon of bidder overpayment, see generally Black, *supra* note 43, at 599-601 (advancing an "overpayment hypothesis" to describe the reasons why overbidding occurs in takeover transactions and why target shareholders gain value from such transactions.); *see also* S. Michael Giliberto & Nikhil P. Varaiya, *The Winner's Curse and Bidder Competition in Acquisitions: Evidence from Failed Bank Auctions*, 44 J. FIN. 59 (1989).

152. Changing market conditions would, if not alter, at least test the original valuation analysis by the buyer, which would feel the pressure of capital markets if general market conditions show that the merger price is excessive.

153. On the difficulty for a buyer to walk away from a deal, *see infra* notes 160 and 161 and accompanying text.

154. This of course assumes that *Revlon* duties apply to the target in the specific deal. *See supra* note 64.

155. Bhagwat et al., *supra* note 20, at 2.

156. Denis & Macias, *supra* note 121, at 820; *see also* Gilson & Schwartz, *supra* note 137, at 331; Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 YALE LJ. 848, 865-70 (2010).

natural disasters)."[157] This way, buyers bear exogenous risk post signing.[158]

Parties to a merger contract attribute crucial importance to risk allocation post-signing. A testament to that is the fact that the number and length of MAC exceptions in M&A contracts expanded dramatically after the turn of the century.[159] Even if historically there have been few instances of buyers' walking away from a signed deal,[160] renegotiation attempts are not uncommon: Targets perceive buyer remorse as a real risk and buyers do the same with respect to the seller's put that targets have. Indeed, Denis and Macias report that approximately 9% of acquisitions in their sample experienced an MAE. According to their study, an MAE is "the underlying cause for more than 2/3 of the terminated acquisitions and 80% of the renegotiated acquisitions."[161] Bhagwat, Dam, and Harford recently expanded this field of research by looking at how the interim deal risk is affected by price volatility in markets and how that influences M&A activity generally. They found that targets with underlying higher volatility experience greater swings in value during the interim period, that this phenomenon is exacerbated in more concentrated industries, in larger targets, and *when the timeframe to close is longer*. Their conclusion is that "[interim period-fueled] price volatility affects merger activity."[162] In their view, "higher expected

157. Katherine Ashton et al., *MAC Clauses in the U.K. and U.S.: Much Ado About Nothing?*, 13 PRIV. EQUITY REP. (2013). The definition typically covers any material adverse effect on the "business, condition (financial or otherwise) or results of operations of the target company and its subsidiaries, taken as a whole." *Id. See also* Choi & Trantis, *supra* note 156, at 881-96 (discussing and endorsing vagueness as an effective screen against a promisee's incentive to sue, which also sanctions a breeching promisor).

158. Gilson & Schwartz, *supra* note 137, at 339 argue that "MAC drafters . . . resolve the ambiguity in the traditional MAC formulation by creating exceptions to the traditional MAC that would impose exogenous risk on the buyer." Denis & Macias, *supra* note 156, at 827 (observing that exclusions are normally customized for the particular acquisition and industry of the target).

159. According to Gilson & Schwartz, *supra* note 137, at 331, at the turn of the century, the negotiation of material adverse changes clauses has been contested and their length has exploded; *see also* John C. Coates IV, *M&A Contracts: Purposes, Types, Regulation, and Patterns of Practice* 21 (ECGI Law, Working Paper No. 292, 2015), http://ssrn.com/abstract_id=2593866 (mentioning findings by Gilson & Schwartz and Denis & Macias in the MAC literature).

160. In Delaware, parties seeking to invoke a MAC clause bear a heavy burden. *See, e.g.*, Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 715, 738–40 (Del. Ch. 2008) (finding that there were no grounds to invoke an MAC clause because such clauses are measured in "years rather than months" and thus a short-term drop in projected earnings during the gap period was insufficient to qualify); *In re* IBP, Inc. Shareholders Litig., 789 A.2d 14, 67–68 (Del. Ch. 2001) (concluding that even a broadly written MAC clause could not be invoked where there was a 64% drop in quarterly sales over the prior year because a buyer purchases a company as part of its long-term plan and therefore such drops must be measured over a "commercially reasonable period.").

161. Denis & Macias, *supra* note 156, at 820–21 (mentioning that "material adverse events ultimately lead to large changes in the price offered to target shareholders. On average, acquirers negotiate a 15% reduction in offer price when the target experiences a MAE.").

162. Bhagwat et al., *supra* note 20, at 35.

[W]e are investigating a situation where a bidder commits to the investment (thereby

uncertainty would make the marginal deal less appealing, thereby have an ex-ante chilling effect on the number of announced mergers."[163]

The problem with longer timeframes for completion is the greater likelihood that either party might experience a change of heart, which might trigger a cascade of events ranging from renegotiation to termination attempts. The MAC condition, on the acquirer front, and the fiduciary-outs required by *Revlon* duties, on the target one, give the parties such options.[164] Like with any other option, the longer the time to exercise it, the greater its value.[165] Therefore, current timeframes of shareholder meetings allow parties to be more opportunistic and tempted to exploit leverage for renegotiation and/or exit purposes. Such a dynamic, leads to greater volatility of the stock, is a threat to deal certainty, and carries a negative impact on the M&A market as a whole.

III. Shareholders' Role Reconsidered: Is Voting in Mergers Necessary in All Circumstances?

In Part III, I question the status quo that considers voting in mergers not only in corporate law, but also a fundamental right of shareholders.[166]

> providing the option), but has uncertainty over both the completion of the deal and the value of the firm being acquired. In our empirical setting, we are able to document that the elasticity of such investments to an increase in uncertainty is negative and economically meaningful (approximately -0.3). Bhagwat et al., *supra* note 20, at 7.

163. Bhagwat et al., *supra* note 20, at 10.

164. Steven Davidoff Solomon, *The MAC Is Back, but Does It Kill a Deal?*, NY TIMES: DEALBOOK (Aug. 23, 2011, 3:45 PM), https://dealbook.nytimes.com/2011/08/23/the-big-mac-is-back-but-does-it-kill-a-deal/?_r=0 ("A buyer can invoke a MAC clause to try to drive down the price of an acquisition by taking advantage of either changed market conditions or adverse events affecting the target company."); Denis & Macias, *supra* note 156, at 822:

> Between the initial announcement of the merger agreement and completion (or termination) of the merger (a period of 4.5 months, on average, in our sample), a variety of events can occur that potentially alter the wealth gains to each party from the acquisition. During this period, merger terms can be renegotiated and the merger is either completed or terminated.

165. *See* Bhagwat et al., *supra* note 20, at 6 (finding that "renegotiations and terminations are statistically only more likely when doing so favors the target, consistent with the seller's put view of the interim risk."). When attempting "to value the implied put option[,]" the authors "estimate the average put to be worth roughly 7% of deal value in a tender offer and 11% in mergers." Bhagwat et al., *supra* note 20, at 6 (noting that "the average month-to-month changes to the option value due to volatility changes average 1.8% of deal value, while at the 75th percentile of volatility this number jumps to 3.1% of deal value.").

166. *Cf.* Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 313 n.28 (Del. 2015) (quoting from Williams v. Geier, 671 A.2d 1368, 1381 (Del. 1996)): "[W]here a stockholder vote is statutorily required such as for a merger . . . , 'the stockholders control their own destiny through informed voting,'" which is "the highest and best form of corporate democracy." *Id.* Similar emphasis on the crucial role played by shareholder voting can be traced in seminal decisions in the parallel takeover field, such as Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 959 (Del. 1985) ("If the stockholders are displeased with the action of their elected representatives, the powers of corporate democracy are at their disposal to turn the board out.") and especially Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch.

Even contractual freedom enthusiasts like Easterbrook and Fischel support such a right: "the durability and uniform acceptance of the rule [mandating shareholder approval for mergers and other fundamental changes] creates a presumption of efficiency that has not been overcome by any contrary evidence."[167] The merger approval numbers analyzed in Part II provide an opportunity to reconsider and deconstruct the current system and examine if it is really necessary for shareholders to vote in all circumstances, given, on the one hand, the extremely low number of mergers that get rejected coupled with the very high percentages with which they get approved, and, on the other hand, the time necessary for shareholder approval.

After all, only a little more than 1% of the deals submitted to a vote do not get approved.[168] Provocatively, one may argue that the (out-of-pocket and opportunity) costs borne by the 99% of approved deals subsidize the benefits of rejecting the 1% of deals that shareholders considered undesirable. Eliminating the voting requirement would negatively impact only a tiny fraction of deals, while creating benefits in terms of deal speed and certainty for all the remaining deals, which almost comprise the entire universe of deals. Of course this logic would be fallacious. With all likelihood, it is *because* of the voting requirement that only 1% of deals get rejected, as the ensuing Part III.A illustrates.

A. The Benefits of Shareholder Voting in Mergers: Deal Filtering and Premium Effect as By-Products of the Credible Threat of Rejection

One of the benefits of shareholder voting in mergers is that, without the voting deterrent, there would be far more deals that shareholders would have wanted to reject if they only could.[169] Like all M&A deals,

1988) ("The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests."); *see also* Paramount Comm'cns Inc. v. QVC Network Inc., 637 A.2d 34, 42 (Del. 1994) ("Because of the overriding importance of voting rights, this Court and the Court of Chancery have consistently acted to protect stockholders from unwarranted interference with such rights.").

167. *See* Easterbrook & Fischel, *supra* note 115, at 416 ("Perhaps all that can be said is that the common law rule requiring shareholders' approval of fundamental corporate changes has endured for the past century across all jurisdictions. It is unlikely that this pattern would be observed if the rule did not produce gains."). But see also *id.* at 415 for a discussion on the dichotomy between the general power of directors to run the business of the corporation and shareholders' powers to veto fundamental changes such as mergers, whereby they concede that "[a]lthough this dichotomy is so well established in corporate law that it is never questioned or analyzed, the justifications for it are obscure").

168. *See supra* Part II.A.1.

169. Of course, there is no way to prove this with absolute certainty because we cannot observe (and compare) voting outcomes of mergers that directors never formally propose; Burch et al., *supra* note 21, at 46. Nor can we observe (and compare the desirability of) mergers for public and contestable companies that are not subject to the voting requirements, which is what ultimately allows empirical studies on the desirability of shareholder voting at the acquiring firm level. *See infra* note 183.

mergers are conflict-inducing situations in which shareholder approval works as a way to constrain how the agent operates.[170] The *credible threat*[171] of shareholder rejection operates as a safety valve in case of director malfeasance or ineptitude:[172] Directors anticipate the risk that a merger might get voted down and present deals they feel comfortable will be approved. However, sometimes they mistakenly feel *too* comfortable about a deal and overestimate shareholder support, which explains why some deals pass with narrow approval margins and some fail altogether.[173] Abandoning the voting requirement would generate, to borrow from the language of tort law, undesirable activity level effects for mergers. Without shareholders' policing potential bad deals, there would be more of them. I call this the "deal filtering effect" of voting.

While it is impossible to provide firm evidence supporting this hypothesis (for the simple fact that we do not get to see how shareholders would react to deals that are never presented to them), some data analyzed here supports this explanation. Mergers subject to the more stringent approval requirement of 2/3 of the shares proportionally experienced a higher level of mergers approved in the 75%–87.49% range (76.2% in the 2/3 Approval Sample v. 56.6% in the Majority Approval Sample), suggesting that when a supermajority is required, directors accomplish more in terms of approval numbers. This may be a result of the greater efforts spent to garner the votes when merger approval is perceived to be more at risk (and possibly because of stricter selection of the submitted deals). An additional indication that voting serves an important filtering effect can be found in comparing the rate of merger rejection in my sample (around 1%), which is based on deals that are formally submitted to shareholder vote, with the rates presented in other studies, which instead take into account a wider universe of deals, including some that have not formally been submitted to shareholder approval. Such latter rates average at around the 20% level.[174] True, there

170. To illustrate the point in simple terms, in the verge of being acquired, directors and managers might resolve to trade-off a higher merger consideration for shareholders with some assurance that they (or some of them or some key members of management) will stay with some role with the combined company after the merger is completed. *See supra* note 112 and accompanying text. In other words, directors face an endgame situation providing incentives to collude with the buyer against shareholders' interests. Note incidentally that voting is hardly the only way to ensure directors make decisions in the best interest of shareholders: A liability regime of enhanced fiduciary duties would often (but not always, as *Revlon* duties are not triggered in a merger-of-equals scenario. *See supra* note 64) bolster this pressure on directors. But see the recent *Corwin* line of cases, which has softened the pressure coming from a judicial second-guessing of the transaction when informed, uncoerced, and disinterested shareholders have approved it. S*ee supra* Part I.C.

171. *See supra* note 114.

172. Similarly, Thompson and Edelman consider voting in mergers as a mechanism of "error correction of managers." Thompson & Edelman, *supra* note 1, at 141. I prefer using "credible threat of rejection," as an expression that better describes the deterrent element of the vote.

173. Burch et al., *supra* note 21, at 46.

174. *See supra* notes 67, 119, 120, and accompanying text.

can be several explanations for why a deal never makes it to the shareholder approval stage (lack of financing, regulatory reasons, rival bids, a MAC); still, the perceived lack of shareholder support would certainly be a valid one.

To better capture the filtering effect of voting, future empirical research should focus on mergers abandoned prior to submitting them for approval and understand how many of them were dropped because the parties anticipated rejection by shareholders.

Rejecting bad deals is not the only beneficial aspect of shareholder approval; voting has an effect on premiums as well. Because shareholders' power to say no to mergers worries directors, it pressures them to increase their bargaining leverage vis-à-vis the acquirer. In the words of then-Vice-Chancellor Strine, "[a]lthough stockholders are not well positioned to use the voting process to get the last nickel out of a purchaser, they are well positioned to police bad deals in which the board did not at least obtain something in the amorphous 'range' of financial fairness."[175] As a result of their policing, shareholders get to approve deals with more appealing premiums.[176] Indeed, from a corporate planner perspective, a sizeable premium is the best way to forestall rejection; the threat of rejection itself is something directors and managers can credibly convey to an acquirer who will ultimately have to offer a better price to avoid such a risk. Without the voting requirement, both directors and acquirers would feel less pressured to present a premium that is satisfactory to shareholders—as a result, each approved deal would carry a smaller premium.[177] I call this the "premium effect" of voting.

175. *In re* Cox Comm'cns, Inc. S'holders Litig., 879 A.2d 604, 619 (Del. Ch. 2005).

176. For the reasons stated at the end of Part II.A.2.b, the fact that premiums and voting outcomes in the Majority Approval Sample do not correlate, as shown in such Section, does not mean shareholders are indifferent to premiums.

177. While it does not require a stretch to imagine that in all likelihood premiums would be lower without the threat of shareholders vetoing the deal, hypothesizing the premium could have been larger appears quite problematic. The only remotely plausible story for larger premiums in a world without shareholder approval is that with more deal certainty, a buyer would be inclined to pay more, but that would be inconsistent under two distinct aspects. First, empirical evidence shows that higher premiums are associated with the presence of more invasive deal protection mechanisms: that is, buyers are willing to pay more on the upward scenario of deal completion, if they get compensated with higher consolation prices in the downward scenario of non-completion that would trigger a lock-up option or a break-up fee. Coates & Subramanian, *supra* note 100, at 391. This means that buyers do not address the non-completion risk by offering less upfront: when they are averse to uncertainty they in fact offer more, in order to obtain better protection for the worst-case scenario of losing to a rival buyer. Another way to look at it is that the extra premium they pay works just like an insurance premium to obtain a higher payment if the risk materializes. But if uncertainty were eliminated, one can infer that an acquirer would be more confident to offer less: at a minimum, deal protection mechanisms would be unnecessary and their current influence on higher premiums would likely disappear. Second, hypothesizing larger premiums in a world without shareholder approval would miss the fact that the role played by shareholders represents only one of the three macro areas of deal uncertainty, the other two being regulatory approval and topping bids. Coates & Subramanian,

All in all, the true value of voting is the credible threat that shareholders will turn down unviable deals; such a threat motivates directors to present only deals that are considered "approval material." Voting in mergers should be seen as a quasi-dormant veto power that gets triggered when there is a need to reject a bad deal, but even when not triggered its looming threat brings the added virtue of keeping directors and managers honest when negotiating, because corporate planners cannot know ex ante the reaction from the public of shareholders—this dynamic has positive effects on the size of shareholder premiums.

B. Credible Threat of Rejection vs. Opportunity Costs of Voting: Experimenting a Departure from the Current Voting Regime

Even recognizing the beneficial effects of shareholder intervention in mergers, voting involves both out-of-pocket costs and opportunity costs in terms of delay. The latter in particular can be troublesome as it can jeopardize a company's operations and endanger deal completion.[178] Therefore, a question that deserves careful consideration is whether the credible threat of shareholder rejection needs to be necessarily dressed as a full-blown vote in each circumstance. Consider that departures from the voting prerogatives of shareholders are not unheard of, even in the context of mergers.[179] From a formal standpoint, voting as a procedure is not an absolute in those jurisdictions contemplating action by written consent by a majority of shareholders.[180] Substantively, the M&A market had already turned its back on voting when it envisaged two-step mergers with top-up options.[181] And Delaware's relatively recent legislative

supra note 100, at 310. The former, in particular, can be (and often is) the reason for further delay of closing beyond the date of shareholder approval, *see supra* Part II.A.4 and the discussion around Table IV, so getting rid of shareholder approval would at best take care only of a subset of deals: Those that are not complex and time consuming from a regulatory approval standpoint, which would have closed earlier if it was not for the voting requirement.

178. *See supra* Part II.B.2.

179. Shareholder prerogatives in mergers have progressively receded both in terms of the votes required for merger approval and the actual need for a vote. This process started in the late 1800s, when states abandoned the old unanimity requirement, and continued in the twentieth century, when supermajority turned into majority requirement. For more detail, *see supra* notes 31–33 and accompanying text. Also, states started to do away with the need of an actual vote with the introduction of short-form merger statutes. Delaware passed one in 1937 to cover wholly-owned subsidiaries and expanded the statute in 1957 to include parent/subsidiary mergers where the parent company owns at least 90% of the subsidiary. Glassman v. Unocal Exploration Corp., 777 A.2d 242, 244 (Del. 2001) (detailing a chronology of short-form mergers in Delaware).

180. Under Section 228(a) of the DGCL stockholder action may be taken by written consent in lieu of a meeting, unless prohibited or made it harder by the certificate of incorporation (for instance, by requiring unanimous consent). I reckon that such a strategy is admittedly a remote possibility in mergers where the target is a contestable company with dispersed ownership, which is the type of merger under discussion in this Article.

181. *See supra* note 37 and accompanying text.

history has all but blessed abandoning voting as a necessary step with the introduction of the medium-form merger under Section 251(h) of the DGCL.[182]

The remaining portion of this Article investigates whether the system can endure an extra step in corporate law experimentation by allowing companies to somehow relax the voting requirement. The working assumption is to keep intact what is truly crucial in the current system (the deterrent aspect of the vote), while reducing its main cost (delay). In other words, is it possible to maintain the credible threat of rejection by shareholders in place, but at the same time speed up the process to benefit the overwhelming majority of deals? Are there conceivable changes to the current voting process that can achieve both goals?

1. *Sketching Possible Reform Proposals*

Researchers should explore other alternatives. In Part III.B.1, I consider potential reform proposals and possible objections specific to each proposal. In Part III.B.2, I consider more general obstacles to reform, such as decreased protection for shareholders, futility of reform, and overall unfeasibility and resistance by interest groups. Overall, the purpose of this last part of the Article is not necessarily to push for a reform, but rather to deconstruct the current system, to better understand and possibly improve it. Before I address this task, I note that there has not been any significant debate on the issue of whether voting in mergers should be reconsidered from the target perspective. The M&A literature has focused on the protection of shareholders of the acquirer, by investigating whether providing them voice in every circumstance would make good policy[183]—currently, in Delaware their vote is limited

182. *See supra* notes 37, 38 and accompanying text and *infra* Part IV.B.2.b.i.

183. Empirical studies have focused on shareholder vote in mergers from an acquirer perspective for two main reasons. The first reason is that studies show that acquirer's shareholders generally experience negligible or negative returns in connection with M&A deals. *See generally* Klaus Gugler et al., *Market Optimism and Merger Waves*, 33 MANAGERIAL DECISION ECON. 159 (2012) (providing evidence that the long-term effects of takeovers for acquiring shareholders are negative on average). An explanation for this is that empire building-prone managers have a tendency to pursue bad acquisitions and/or overpay. *See* Roll, *supra* note 43, at 212; Black, *supra* note 34, at 599–600. This is why shareholder voting at the acquirer is suggested as a device to screen out detrimental deals. *See* Coffee, Jr., *supra* note 43, at 1269–72. Second, while a shareholder vote is generally required for the target, on the acquirer's front, shareholder voting is required only in limited circumstances (namely, if the certificate of incorporation of the surviving corporation is changed or the number of shares does not increase more than 20%. *See supra* note 34 and accompanying text) and therefore it is possible to empirically test the difference in shareholders' returns in acquisitions that require their vote and those that do not. Some authors argue shareholder voting has an impact only because it delays deals, not because it screens out potentially detrimental ones. Ehud Kamar, *Does Shareholder Voting on Acquisitions Matter?* 23–25, 31–32 (Mar. 2011), http://www7.tau.ac.il/blogs/law/wp-content/uploads/2011/11/March-2011.pdf (suggesting that shareholder voting should be reconsidered). Others believe that voting does have a positive allocative function in the market for

to specific transactions.[184] No similar debate exists around the desirability of voting at the target level, for the consensus considers it a quasi-sacrosanct shareholder right in the context of a fundamental transaction.[185]

a. Vote-on-Demand

The first working proposal, which was originally suggested by Ehud Kamar in the context of shareholder approval at acquirers,[186] is to simplify the system by having a merger vote only if a minimum percentage of shareholders (for example, any percentage in the 3%–10% range, as required by the organizational documents) so requests in reaction to the specific terms and conditions of the given deal. Since a rejection in the current regime is a rare exception, the need for an actual vote by shareholders would become an exception as well, which would be triggered if, in case the merger raises suspicion, one or more shareholders aggregating a non-*de minimis* stake ignite the voting process and the right to veto the merger. This way the credible threat system, and therefore the deal filtering and premium effects, would remain substantially intact. The advantages of this approach are twofold. First, it takes care of the problem of avoiding a vote when it is not warranted, which in turn results in less transaction costs and quicker deals. Second, it preserves the truly important function of voting, namely the deterrence posed by the credible threat of rejection.

The smoothest way to introduce this system would be through private ordering. Voting in mergers would continue to be the main regime; however, voting would no longer be mandatory, but rather the default provision in an enabling regime.[187] Corporations would be

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corporate control: in their studies, bad deals occur less recurrently when shareholder voting is required. *See* Becht et al., *supra* note 35, at 31–32 (focusing on acquisitions in the U.K. market and finding that so-called Class 1 transactions, which require shareholder approval, are associated with an aggregate gain to acquirer shareholders of $13.6 billion, whereas U.S. transactions of similar size, which are not subject to shareholder approval, are associated with an aggregate loss of $210 billion for acquirer shareholders; Class 2 U.K. transactions, also not subject to shareholder approval, are associated with an aggregate loss of $3 billion); Li et al., *supra* note 115, at 32 (finding that acquirers subject to the voting requirement generate an average 4.3% excess return upon announcement as compared to acquirers that do not need shareholder approval).

184. *See supra* note 35 and accompanying text.

185. *See supra* note 166 and accompanying text.

186. Kamar, *supra* note 183, at 4.

187. As Ian Ayres has pointed out, in the world of private ordering, selecting a default regime vs. an opposite one has significant implications over the choice the parties will ultimately make. *See* Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032 (2012). An "always voting" default with freedom to opt out by selecting the vote-on-demand regime would be superior than a vote-on-demand default with freedom to opt into an "always voting" regime. This view finds consensus in the literature. According to Bebchuk and Hamdani, the choice of default should be based on which selection can be reversed more easily by shareholders. Under their theory, an efficient opting out is more attainable and likely to occur when directors support it than when they oppose it,

allowed to opt out of voting by selecting the vote-on-demand system, which would basically work as a menu statute.[188] Note that, by its nature, vote-on-demand would essentially let shareholders opt back into voting on a deal-by-deal basis if they feel the particular merger deserves a vote. Thus, the consequences of contractual freedom on minority shareholders would be less severe than in other instances, in which opting out represents a once-and-for-all relinquishment of a right that could protect investors (think, for instance, of Section 102(b)(7) of the DGCL, which allows companies to opt out of and waive monetary liability for breach of the fiduciary duty of care by their directors).[189]

The minimum percentage to exercise the right is something that, in an ideal world, companies should be free to decide to best adapt to their underlying ownership structure. However, since conflicts might be at play,[190] state corporate law should establish a maximum threshold companies cannot depart from: that would ensure that the threshold is not so high that shareholders cannot really use the protection. While it is impossible to guess the perfect number, especially because companies

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hence they advocate the choice of a default that in the abstract is more favorable to shareholders than directors. *See* Lucian Arye Bebchuk & Assaf Hamdani, *Optimal Defaults for Corporate Law Evolution*, 96 NW. U. L. REV. 489, 502–03 (2002) (discussing asymmetries in the reversibility of default regimes). For a similar view, see Luca Enriques et al., *The Case for an Unbiased Takeover Law (with an Application to the European Union)*, 4 HARV. BUS. L. REV. 85, 113 (2014) ("Especially in the current U.S. environment of predominantly institutional ownership and high shareholder meeting turnout, managers could persuade shareholders to accept only efficient opt-outs."). For an empirical test of this theory, see Yair Listokin, *What Do Corporate Default Rules and Menus Do? An Empirical Examination*, 6 J. EMPIRICAL LEGAL STUD. 279, 292–95 (2009) (analyzing statutory defaults in the U.S. and finding that companies are unlikely to opt out of takeover-restrictive defaults in their organizational documents).

188. *See generally* Listokin, *supra* note 187, at 280 (describing menu statutes).

189. For the same reason that corporate laws in the U.S. permit eliminating monetary liability of directors and officers only with respect to violations of the duty of care, but not of the duty of loyalty, it would be misguided to leave it up to companies to decide to opt out of voting in mergers altogether. A pure opt out system would essentially allow companies to do away with the credible threat system. Because in companies that opt out shareholders would never be able to vote in mergers, not even on a deal-by-deal basis, directors and managers would never fear rejection and their loyalty in connection with M&A activity could be seriously questioned. In fact, abolishing the deterrent element embedded in the vote would give improper incentives to craft deals that advantage directors at the expense of shareholders. Assuming all companies opted out, we would soon face the potential for widespread excess in M&A activity with negative consequences for capital markets, since investors, in a typical market for lemons setting, would likely discount stocks systematically because of the risk of being exploited in subpar deals with side payments or favors to insiders; *cf.* George A. Akerlof, *The Market for "Lemons:" Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970).

190. For a discussion of how conflicts of interest might steer efficient contractual arrangements in M&A-related rules-of-the-game, see Luca Enriques & Matteo Gatti, *Creeping Acquisitions in Europe: Enabling Companies to Be Better Safe than Sorry*, 15 J. CORP. LEGAL STUD. 55, 96–100 (2015) (arguing that enhancing contractual freedom for European companies could counter their general weakness to creeping acquisitions, and that adequate procedures against conflicted voting should be in place to contain self-serving choices by target boards and their significant shareholders).

have different ownership structures, something in the 3%–10% range would seem sensible.[191]

I am not oblivious to the fact that such a regime would encounter criticism. First, some might claim that shareholders would still need to be informed on the deal in order to decide whether or not to exercise the vote. Second, others might claim that requiring a minimum percentage to trigger the vote would entail coordination costs for smaller investors.[192] Third, some might even object that institutional investors would likely take a prudent stance and always decide to trigger a vote. The first two objections concern the disruptiveness of the reform, and the third objection admonishes on its ineffectiveness.

With respect to the first objection, shareholders should still receive detailed information to make an informed decision (on whether or not to request a vote for the merger), but such an information statement will generally not be subject to review or comment by the SEC.[193] Shareholders should also be given sufficient time to decide. Perhaps this period should be fifteen to twenty days following receipt of such statement, similar to what is required today under Section 251(c) of the DGCL. If enough shareholders request a vote, the proxy materials will incorporate such prior disclosures and include additional ones tailored for the upcoming meeting and the actual vote. If no such request is made, the merger could be completed upon the expiration of the period to request a vote. Appraisal rights would obviously still survive, but their procedure would need to be harmonized with the new regime.[194]

The second objection exposes the risk that the right to trigger a vote would rarely be used, because of the nuisance to go through procedural hurdles, especially for smaller investors who would face nontrivial coordination costs. One way to address this concern is to give investors, along with the disclosure materials described above, some way to communicate back to the company their intention to hold the vote—this

191. Note incidentally that 3% was the cut-off ownership level chosen by the SEC when it implemented its short-lived proxy access rule (SEC Rule 14-a11), which was famously struck down on other grounds by the D.C. Circuit in Bus. Roundtable v. Sec. & Exch. Comm'n, 647 F.3d 1144, 1146 (D.C. Cir. 2011) (arguing that the basis of the rule were not adequately rational from a cost/benefit analysis standpoint). Because after such decision proxy access may still be adopted on an opt-in basis, it has been observed that companies that have used private ordering have overwhelmingly picked such 3% threshold. *See* ALLEN & KRAAKMAN, *supra* note 39, at 211.

192. In other words, this rule would redistribute from non-coordinated minority shareholders to the large or more coordinated ones—who might have to be bribed to avoid the vote.

193. Otherwise, if we maintained the disclosure process similar to what we have now, the regime would not be capable of reducing today's closing timeframes. However, it would certainly be prudent to keep the SEC informed on a pending deal and, in some specific and extraordinary circumstances, the SEC should still have powers to intervene and request supplemental information.

194. Note that appraisal rights are limited under the corporate laws of certain states. For instance, in Maryland, a corporate charter may eliminate appraisal rights. *Cf.* MD. CODE ANN., CORPS. & ASS'NS § 3-202(c) (2017).

could be done through some sort of preliminary ballot card to be returned in the mail or, better, via some digital and secure communication (this way, there would be less suspicion that the company is tampering with the results).

The third objection is that some large investors would probably be biased to trigger the vote, irrespective of the underlying merits, even when the merger is profitable and getting the consideration sooner rather than later would be the rational course of action. For instance, institutional investors may be inclined to act prudently and trigger the vote. Likewise, some hedge fund investors may want to extract advantages, as it has been happening with the recent phenomenon of jawboning in connection with activist arbitrage activities,[195] and decide to trigger a vote. True, especially at the outset, institutional investors might conservatively choose to require for a vote on a systematic basis. However, that would happen for pure risk aversion and cultural habit because of the old rules. In the absence of red flags on the specific deal, there would be no reason to trigger the vote. In fact, the vote would represent a waste of time and money for the corporation and, ultimately, for the fund's investors. Their decision would be based on their understanding of today's legal framework, where shareholder approval is an essential prerequisite of a long-form merger. Eventually, once the new rules have been tested for a while and shareholder approval is no longer a typical feature of noncontroversial mergers, institutional investors may have the opposite concern of avoiding useless votes for desirable deals. As far as merger arbitrage activists are concerned, the objection can be rebutted with the intuition that in the long run, they will focus only on mergers that raise some actual concern. Also, if there is confidence the merger will be approved by the shareholders, corporate planners will know how to not cave to whatever request or concession the activist seeks. Some soft greenmailing will always be present, but that is no reason to refrain from improving the system.

Finally, one might also object that the current M&A market is modeled by, and M&A contracts are synched to, the shareholder approval requirement. The newly proposed system would somewhat disrupt present-day M&A contracting and lawyers would need to reinvent the wheel to reflect the contingent nature of a shareholder vote. However, as I mention below,[196] this is hardly a reason to avoid pursuing a reform. Nobody doubts lawyers would quickly figure out how to craft merger agreements in a new legal landscape, because this is what they are paid to do all the time.

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195. *See generally* Jiang et al., *supra* note 129.

196. *See infra* Part III.B.2.b.ii when dealing with more general drawbacks of changing the current system.

b. *Randomized Approval*

To quicken the merger process while maintaining the element of deterrence embedded in the voting system, an admittedly bolder reform would be to keep voting only for a fraction of deals and exempt several other transactions from the approval requirement, which could then be completed on a faster track. This could be achieved by randomly selecting mergers that will ultimately be subject to shareholder approval—such selection, to occur after the merger agreement is signed and announced, should operate based upon a probability ratio of mergers ultimately subject to the vote (say anything in the 20%-40% range). The idea is that corporate planners would not know ex ante if their proposed merger would ultimately require shareholder approval, so they would continue to act as loyal agents to shareholders under the assumption that approval *might* be necessary. Just like the regular citizen does not know if her taxes will be audited by the IRS still complies with tax laws (also) because of the threat of potential enforcement, this system would maintain a certain level of pressure on management to act as loyal agents of their shareholders when negotiating a merger. There is a myriad of other examples of how the threat of enforcement works as a deterrent: from the risk of running into traffic cops when driving to how our luggage gets checked at customs when entering a country. And this proposal actually finds some corroboration in the current merger regime, which has a similar mechanism in the SEC's power to review only certain proxy/registration statements in connection with a merger vote:

> "the Division [of Corporate Finance] selectively reviews transactional filings—documents companies file when they engage in public offerings, business combination transactions, and proxy solicitations. To preserve the integrity of the selective review process, the Division does not publicly disclose the criteria it uses to identify companies and filings for review."[197]

In other words, the abstract principle of selecting certain transactions for a more thorough regime is not foreign to our legal and regulatory environment for mergers. Certainly, though, a randomized approval system would take it to a new level.

There are three predictable objections to this regime. First, the number of mergers in a given year is nothing compared to how many people file their taxes, drive cars or come back from a trip abroad. While the former can well tolerate a heavier filtering regime, the latter activities clearly cannot. The problem with this objection is that it proves too much. By using the same logic, one should then always justify a cumbersome regime whenever the overall number of transactions is limited, which is at odds with what a sophisticated M&A regime should be. A

197. Div. of Corp. Fin., *Filing Review Process*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/divisions/corpfin/cffilingreview.htm (last visited Mar. 3, 2018).

policymaker's focus should be on the merits of the particular screening regime, instead of simply calling for, or tolerating, heavy enforcement just because it is practically feasible.

Second, one might object that, because the risk of getting "caught" submitting a detrimental deal would be lower than under a straight shareholder approval regime, corporate planners might be tempted to propose subpar transactions that would not have otherwise been submitted under the existing system. For instance, they could low-ball shareholders and hope that the merger will not become subject to shareholder approval. A simple numerical example illustrates the issue.

Assume that the premium effect of the existing shareholder approval requirement amounts to a fraction of the merger consideration, say 10% (assume further that deal planners know shareholders' reservation price). In other words, without a credible threat of rejection, what would have been a $10 per share merger consideration under the existing rules would be $9 and the merger would still go through. Now, if the probability for the transaction to become subject to a vote is only, say 30% (and the parties know about this), risk-neutral buyer and risk-neutral target would agree on $9.30 instead of $10 per share. Or, more realistically, that same buyer could simply offer $9 per share; only if and when the transaction is selected for a vote would it renegotiate the deal and increase the price. A simple way to address this latter problem is to not allow price increases if the transaction is selected for a vote. But that would not take care of the other problem as risk neutral corporate planners would agree on a blended price based on the expected probability of having to submit to a shareholder vote (in the example, shareholders would only be offered $9.30 and not $10 per share).

I doubt that persons negotiating a merger can be realistically considered risk-neutral actors who simply price-in the approval risk. For starters, there is no real way they can diversify away the risk of becoming subject to merger approval other than through some price adjustment mechanism (automatic or otherwise), which, again, should not be permissible. Therefore, going from $10 to $9.30 counting on the 30% of being subject to approval would represent serious risk-taking on a transaction in which corporate planners have a lot to lose from a career and reputation standpoint.[198] Just like (almost) everyone complies with their taxes because of fear of being audited, corporate planners are quite aware of their own risks. Also, similar to the SEC process for selecting which transactional documents to review,[199] the system should be set up in a way that does not allow corporate planners to estimate with precision

198. *See supra* note 115.

199. "To preserve the integrity of the selective review process, the Division [of Corporate Finance] does not publicly disclose the criteria it uses to identify companies and filings for review." Div. of Corp. Fin., *supra* note 197, at 2.

the probability of subjecting the transaction to shareholder approval. This would weaken the very foundation behind offering a lower price.

A third, more granular issue this system would face is implementation. Who would select which mergers are subject to a shareholder vote? For example, a well-meaning agency would likely face significant pressure to have deals go on the fast track. If solely administered by bureaucrats, a suspicion of collusion and favoritism for certain companies would probably find its crowd of supporters—especially in today's conspiracy theory-prone society. But there are some manageable ways to help make these doubts disappear. The first thing that comes to mind is to have a reputable office, say the Court of Chancery in Delaware, in charge of administering a software not subject to human manipulation that makes the random selection.[200] This is merely an example. Of course, there can be many other ways to implement the regime without raising suspicion of special treatment for certain corporations or transactions.[201]

Note that this regime could also be adopted in conjunction with the vote-on-demand system I described in Part III.B.1.a: a milder introduction of the regime could provide that, if a given merger does not get picked for a vote by the random selection mechanism, shareholders representing a minimum percentage of shares of the target company can still demand that the transaction be subject to approval. And of course this regime should be conceived on an optional basis only. While leaving the current system as default (that is, requiring a shareholder vote at the target company), companies could determine if they want to adopt a vote-on-demand regime, a randomized approval regime, or a combination of the two.[202]

c. A Shorter Approval Timeline: Streamlining SEC Proxy Rules and Corporate Statutes.

While the two approaches suggested above have the advantage of eliminating, or at least reducing the overall incidence of, shareholder approval when unwarranted, while still maintaining its deterrent effect, they undoubtedly represent a stark break from the status quo. For whatever reason (I survey some likely objections in Part III.B.2 below), policymakers might not be ready to make any significant departure from the current voting regime. Therefore, a less ambitious reform to consider

200. A banal Google search of "Yes No Random Generator" shows how simple this software can be.

201. This proposal uses an approach essentially similar to the one Mexico has adopted to enforce its customs regulations. Mexican airports use a "red light—green light" system for customs. If the person entering the country has put "nothing to declare" on her customs form, she will need to simply push a button: If the light is green, she will exit without inspection; while if the light is red, she will be subject to inspection. Because the selection is random, there is no way for her to know ex ante which light (green or red) she will get and therefore the expectation is that she will comply.

202. *See supra* note 187 and accompanying text.

would maintain the shareholder approval requirement, but simplify and shorten the SEC review process, as well as corporate law formalities, to get to a vote (and completion) more quickly. For instance, under the current rules, it takes ten calendar days for the SEC to notify the target if it intends to review the filing of the preliminary proxy statement on Schedule 14A.[203] If the SEC intends to review it, the Commission normally takes up to thirty calendar days from the original filing to send its comments, at which point a back and forth of amended filings and further SEC comments take place until the SEC clears a definitive disclosure document that can be mailed to shareholders. This amendment process can take several weeks, sometimes months.[204] Finding some way to cut this phase to what is necessary can save several days, if not weeks, in the process. Similarly, state corporate laws can be reviewed to reduce the length of the process. For instance, Delaware law mandates a twenty-day minimum waiting period between the mailing of the proxy statement and the date of the meeting.[205] Such a timeframe could probably be reduced by five to seven days without major disruptions in light of the fact that preliminary proxy statements are made publicly available before the definitive is ready and the investor public does not realistically need all that time to ponder.

The main idea behind streamlining the SEC review process is that tender offers, which are themselves subject to SEC review and supervision, can be carried out in a much faster fashion, even as fast as thirty days, with no criticism to the effect they do not afford adequate information to shareholders. Why not consider a comparable timeframe for mergers?[206] True, mergers are bolder in their effects than tender

203. SEC Filing Requirements, 17 C.F.R. § 240.14a-6 (2017).

204. LATHAM & WATKINS LLP, GUIDE TO ACQUIRING A US PUBLIC COMPANY 5 (2015).

205. DEL. CODE ANN. tit. 8, § 251(c) (2017).

206. The formal dichotomy between mergers and tender offers is a leitmotif of the U.S. M&A practice, which has been shaped by the possibility for corporate planners to freely use each of the different structures to achieve their acquisition goals. In the past, Delaware judges protected the formal distinction and M&A players' ability to rely on the independent legal significance of each structure. *See* Leo E. Strine, Jr., *If Corporate Action Is Lawful, Presumably There Are Circumstances in Which It Is Equitable to Take That Action: The Implicit Corollary to the Rule of* Schnell v. Chris-Craft, 60 BUS. L. 877, 879 n.10 (2005) ("The courts have long respected th[e] ability to choose among the various methods for accomplishing a business transaction through judicial recognition of the doctrine of independent legal significance."). At the same time, judges have "admit[ted] being troubled by the imbalance in Delaware law[,]" which such distinction ends up creating. *In re* Pure Resources, Inc., S'holders Litig., 808 A.2d 421, 443 (Del. Ch. 2002). A case in point is the tortured evolution of freeze-out law, whereby Delaware courts for quite some time had used a formalistic approach that applied different standards of review to going private transactions depending on how a freeze-out is structured: before the *CNX* and *MFW* decisions introduced a unified standard (*see* Kahn v. M & F Worldwide Corp., 88 A.3d 635, 645–55 (Del. 2014) (explaining that the business judgment standard of review applies if the controlling stockholder subjects the merger to the necessary approval of: (i) a special committee of independent directors with separate financial and legal advisors, fully empowered to reject the transaction and negotiating a fair price with due care and (ii) a majority of the unaffiliated stockholders, fully informed and not coerced); *In re* CNX Gas Corp. S'holders Litig.,

offers in that a dissenting shareholder in a merger is bound by the approval by its fellow shareholders, whereas a shareholder who holds out in a tender offer keeps her shares. But these distinctions are more formalistic than anything. First, through the system of tender offers, shareholders might sometimes be called to make decisions on hostile deals, which is something that never occurs with mergers that are, by structure, negotiated transactions. In other words, a shareholder in a tender offer might sometimes be confused between two adversarial narratives, while a shareholder in a merger decides with a clearer informational framework (absent a proxy campaign to defeat a merger).[207] Second, with the introduction of the medium-form merger under Section 251(h) of the DGCL, tender offer disclosures have de facto *already* taken over the merger ones—so there is little substance for justifying resistance to a simplified and equivalent process.[208] This last observation begs the inevitable question: why bother changing merger rules when in fact corporate planners can bypass a vote via Section 251(h) of the DGCL? I address this objection below in Part III.B.2.b.i when dealing with more general problems of reforming the current system.

2. *Assessing Possible Criticism to a Reform and Fine Tuning*

This Part addresses some possible critiques to departing from the current voting requirements in mergers. In Part III.B.2.a, I dismiss objections based on some misconceived rationales behind shareholder approval in mergers, while in Part III.B.2.b, I tackle more general concerns including ineffectiveness the proposed reforms, alleged decrease in shareholder protections, as well as pushback by interest groups.

a. *Dismissal of Some Misconceived Justifications Behind the Shareholder Approval Requirement*

Aside from the advantage of representing a credible threat of rejection with important deal filtering and premium effects,[209]

4 A.3d 397, 400 (Del. Ch. 2010)); a negotiated merger between a controlling stockholder and its subsidiary was reviewed for entire fairness (Kahn v. Lynch Comm'cns Sys., Inc., 638 A.2d 1110 (Del. 1994).), while under *In re* Siliconix Inc. S'holders Litig., No. CIV. A. 18700, 2001 WL 716787 (Del. Ch. June 19, 2001), a parent/subsidiary unilateral tender offer followed by a short-form merger was reviewed under a less demanding standard than entire fairness.

207. On the very few instances of mergers facing activist campaigns to defeat them, *see supra* Part II.A.2.

208. If the parties to a cash merger pursue a two-step structure pursuant to Section 251(h) of the DGCL, the only disclosures shareholders of the target will receive will be pursuant to the Williams Act, and not under Schedule 14A under the Exchange Act. *See supra* note 37 and accompanying text; SEC Filing Requirements, 17 C.F.R. § 240.14a (2017). This means that the system does not deem such disclosures (and the timetable that goes with them) essential for shareholder protection.

209. This is the rationale for shareholder voting in mergers to which this Article subscribes. *See supra* Part III.A.

shareholder approval could also be said to foster further desirable policy goals, such as preserving the expression of shareholder choice, facilitating competing bids and auctions, and reducing litigation risk. The following Subparts address each of these claims.

i. *The "Sanctity" of Voting: Expressing Shareholder Choice in Mergers*

In *Corwin v. KKR Financial Holdings LLC*,[210] Chief Justice Strine stressed the importance of the shareholder franchise in mergers by quoting excerpts from *Williams v. Geier*:[211] "where a stockholder vote is statutorily required such as for a merger . . . , 'the stockholders control their own destiny through informed voting,'" which the *Williams* Court called "the highest and best form of corporate democracy."[212]

Entrusting shareholders with the power to decide is supported by the idea that a merger is a transaction with momentous consequences for them and voting is the best way to determine their preference,[213] especially because those who own more shares are deemed to have better incentives to make the right decision.[214]

However, a rationale for shareholder approval in mergers based on the sanctity of voting is aprioristic as it does not explain why voting is more important here than in other instances. By using this same simple logic, one should then expect a system that vests shareholders with decisional powers in other circumstances as well. In other words, to state that voting in mergers is beneficial because shareholders have a say on it does not explain why shareholders are supposed to be the best decisionmakers in mergers, as opposed to many other corporate actions in which they similarly bear the consequences of director decisions. The most obvious example is buy-side acquisitions, but there are many more—think derivative transactions, refinancing, launching a new line of business, expanding in markets abroad and so forth.

ii. *A Delayed Vote Facilitates Competing Bids and Auctions*

As previously noted,[215] shareholder approval in connection with a merger takes time, from a minimum of 8 weeks to more than 200

210. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 313 n.28 (Del. 2015).

211. Williams v. Geier, 671 A.2d 1368, 1381 (Del. 1996).

212. *Id.*

213. *Cf.* Zohar Goshen, *Voting and the Economics of Corporate Self-Dealing: Theory Meets Reality*, 91 CALIF. L. REV. 393, 399 (2003) (noting that "the voting mechanism is based on the assumption that the majority opinion expresses the 'group preference,' that is, the optimal choice for the group as a whole.").

214. They have better incentives because they can reap the benefits (or alternatively bear the bad consequences) of their choice. *See* Easterbrook & Fischel, *supra* note 11, at 408–09.

215. *See supra* Part II.A.4.

hundred days, with medians of approximately 90 and 130 days for cash and stock deals respectively.[216] In such a long period, other buyers can use the time to plan a rival bid, offer more, and eventually win.[217] The collateral effect of the longer merger timetable might benefit shareholders and improve the allocative efficiency of the market for corporate control, by creating a framework for companies to be sold to the highest buyer.[218] Consequently, a delayed vote would also have the advantage of satisfying *Revlon*.[219]

This rationale to support voting in mergers is not satisfying for two reasons. First, the M&A market has already managed to get around the voting requirement—something which the Delaware legislature has approved. Over the years, deal planners found ways to counter the voting completion risk by structuring two-tier acquisitions, whereby the acquirer obtains control through a faster-paced tender offer and subsequently completes the merger as a second step, once the risk of being topped by a rival bid has disappeared. As mentioned earlier,[220] a fairly complex system of top-up options was engineered to help bidders get to the 90% threshold and avoid a shareholder vote by passing a short-form merger pursuant to Section 253 of the DGCL. The Delaware legislature substantially endorsed this type of structure by making the second-step merger easier to approve. Section 251(h) of the DGCL dropped the shareholder voting requirement altogether so long as certain conditions are met (most importantly, the first-end tender offer obtains 50%, or the higher percentage required to approve a merger under the company's organizational documents, of the shares). All in all, the market has responded to the longer timetable of mergers with a different structure with which Delaware law has no issue.

216. For a discussion, *see supra* Part II.A.4.

217. It is well-established that longer timeframes for deals facilitate rival bids and auctions. *See* CLARK, *supra* note 40, at 553 (discussing the purpose of twenty business days, as the minimum period for tender offers pursuant to SEC Rule 14e-1 under the Williams Act).

218. A sale to the highest buyer is desirable because the person willing to spend the most on the target is considered the most efficient user of the asset from an efficiency standpoint. For the argument that auctions are beneficial for the market for corporate control, see Lucian A. Bebchuk, Comment, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028, 1052–55 (1982) (arguing that a delay to facilitate competing bids for a target is beneficial and would lead to more efficient transactions in the market for corporate control); Ronald Gilson, *Seeking Competitive Bids Versus Pure Passivity in Tender Offer Defense*, 35 STAN. L. REV. 51, 61–62 (1982). For a critique, see Frank H. Easterbrook & Daniel R. Fischel, *Auctions and Sunk Costs in Tender Offers*, 35 STAN. L. REV. 1, 17 (1982) (arguing that "shareholders are unlikely to gain from rules that promote auctions" and that "[p]rivate and social wealth is greatest when bidders choose their own time periods and disclosures, subject to a prohibition of fraud"); Alan Schwartz, *The Fairness of Tender Offer Prices in Utilitarian Theory*, 17 J. LEGAL STUD. 165, 169–84 (1988) (arguing that efficiency does not require that assets move immediately to the highest value user, as any transfer of an asset to a higher value user would be efficient).

219. *See supra* note 64.

220. *See supra* note 37 and accompanying text.

Second, any *Revlon* argument would be misplaced. On the one hand, a merger with a Delaware target is not per se sufficient to trigger *Revlon* (a sale or change of control being the actual prerequisite).[221] On the other hand, the duty to act as "auctioneers charged with getting the best price for the stockholders at a sale of the company"[222] embedded in such doctrine cannot rely on the timing requirements of merger transactions. Such requirements do not apply to change of control transactions that are not mergers (that is, tender offers), and, on top of that, they are not the product of merger laws per se, but rather derive from disclosure requirements stemming from SEC regulations.[223] And this is without even mentioning that some jurisdictions repudiate, or significantly reduce the impact of, the *Revlon* doctrine.[224]

iii. Shareholder Voting Reduces Litigation Risk After Corwin

Voting in mergers has a standard-shifting effect that can chill litigation efforts by the plaintiff's bar. Under *Corwin* and its progeny, a fully informed and uncoerced vote of disinterested stockholders subjects a merger transaction (other than one triggering entire fairness review) to the more lenient business judgment review, irrespective of whether *Revlon* is applicable in the abstract.[225] In the presence of such a vote, the litigation route becomes very difficult—the policy goal is in fact to chill strike suits challenging merger transactions.[226] Additionally, in light of the more recent *Volcano* decision, even two-step transactions that do not structurally require a vote (think a tender or exchange offer in connection with a Section 251(h) DGCL procedure[227]) have a similar standard of review-shifting effect when a majority of shareholders express their approval of the transaction by tendering their shares.[228] Therefore, in light of the *Corwin* decision and its progeny, a reduction of litigation in the M&A field would appear to be a rather important contribution of the voting system, which the proposed reforms might put at risk.

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221. *See supra* note 64.

222. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

223. *See supra* notes 94–99 and accompanying text.

224. *See* Barzuza, *supra* note 29, at 2009–15 (mentioning that six states, Indiana, Ohio, Pennsylvania, North Carolina, Maryland, and Virginia, have clarified that the enhanced duties under *Revlon* do not apply, or apply with major qualifications, to companies incorporated therein).

225. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 309 (Del. 2015).

226. As stated by Chief Justine Strine:

> When the real parties in interest—the disinterested equity owners—can easily protect themselves at the ballot box by simply voting no, the utility of a litigation-intrusive standard of review promises more costs to stockholders in the form of litigation rents and inhibitions on risk-taking than it promises in terms of benefits to them.

Id. at 313.

227. *See supra* note 37 and accompanying text.

228. *See supra* note 55 and accompanying text.

A couple of qualifications are in good order. First, under this line of cases, litigation is not chilled altogether; rather, it must refocus on specific pathologies of the merger process. In fact, *Corwin* is essentially telling plaintiff counsel the only reasonable path to a favorable judgment post-closing is to claim the vote was uninformed (by challenging the disclosures, or lack thereof, to shareholders), coerced, or swayed by a conflicting interest.[229]

Second, rather than a natural consequence stemming from the very nature of the vote, the standard of review-shifting effect is a specific policy choice that judges made to reduce litigation.[230] In the *Corwin* line of cases, courts attach a standard of review-shifting effect to a certain step in the overall merger transaction, which displays the consent of shareholders as a group. Consider that, to shift to business judgment review, judges clarified that the occurrence of an actual vote is not even necessary. As noted, the *Volcano* decision applied the *Corwin* doctrine to medium-form mergers under Section 251(h) of the DGCL, in which a formal vote does not take place.

Therefore, assuming a formal stockholder vote was no longer necessary in some mergers, a judge could still identify, in the context of a new, abridged merger procedure, some element that somehow displays the consent of shareholders. For example, the absence of a stockholders' request to hold a vote would indicate the transaction does not raise suspicion amongst stockholders and justify shifting to business judgment review to chill litigation.[231] But more importantly, it is the very law introducing a vote-on-demand system that should affirm a standard of review-shifting effect for when shareholders do not request an approval

229. Given the close to nil instances of rejection votes in connection with mergers, *see supra* Table I, the *Corwin* doctrine de facto kills suits seeking monetary damages post-closing. All there is left, really, are the exceptions to the doctrine: lack of disclosure, coercion, and conflict of interest. The policy question is whether this adequately protects investors. At a minimum, one might wonder whether a shareholder who voted against should maintain the right to sue and claim damages. Only time will tell if the abuse in the filing of strike suits has decreased in the aftermath of *Corwin* and its progeny. What is clear from the most recent pronouncements is that the Chancery Court has indicated eagerness to apply the Corwin doctrine quite broadly. *See supra* note 56.

230. In other words, the standard of review-shifting effect, cannot be regarded as if it were expressing some overarching principle with respect to shareholder voting. At best, it is an attempt to sanction the inconsistent behavior of approving a corporate action and then suing for taking such action (*venire contra factum proprium*, is how Roman law would put it). But of course, purporting to characterize *Corwin* as an example of a legal rule prohibiting inconsistent behavior would be a stretch. It would in fact assume that a majority vote could dispose of the minority's individual right to sue, which would be at odds not only with basic tenets of logic and justice, but also with established principles of Delaware law, which explains why judges have specifically spelled out certain conditions for the *Corwin* safe harbor to apply.

231. Similar to how judges created the safe harbor for mergers in *Corwin* to then extend it in *Volcano* to tender offers that are part of a medium-form merger, they could extend the safe harbor even further to a deemed consent mechanism like the one in the vote-on-demand system proposed here.

vote; that same law should also possibly clarify what conditions need to be satisfied to entertain such an effect (for example, that shareholders are informed, uncoerced in their decision to do away with the vote, as well as disinterested).

True, no deemed consent element could be traced with respect to the randomized approval system, which does in fact contemplate that several mergers (such as, those that are not selected for a vote) would pass without any shareholder involvement. For all such mergers, it would seem quite difficult to justify the standard-shifting advantages embedded in *Corwin*. Thus, in theory, all such mergers would still be subject to the perils of frivolous litigation, which all pre-*Corwin* mergers were subject to.

However, even if a randomized approval mechanism does not contribute to a standard of review-shifting effect, this should not be a reason for dismissing such a reform. Indeed, randomized voting would simply be an option companies could opt into if they so desired. To use it, companies would need to make choices at two different levels: when introducing it in the charter and, subsequently, when approving the specific merger. Each company should be free to decide on its own on the trade-off between completion speed and litigation risk. Based on the history of the *CNX* and *MFW* safe harbors, companies do not always choose litigation shields.[232] Therefore, even companies that are subject to the randomized approval regime could still decide not to avail themselves of the shorter process and submit the merger to a vote if they intend to take advantage of the *Corwin* doctrine. Again, directors would essentially have to choose between the costs of delay in completion versus the costs of strike suits. Both involve out-of-pocket and opportunity costs, except that the former are borne exclusively by shareholders, while the latter are somewhat shared by shareholders and directors (assuming standard indemnification provisions and D&O policies are in place).[233]

232. After *CNX* introduced what later became, with some adjustments, the *MFW* safe harbor, several deals purportedly did not use the safe harbor, but rather opted for the more burdensome entire fairness route, because of the completion risk embedded in the majority of the minority condition, which is a requirement for the safe harbor to apply. *See* Sunjeela Jain et al., *Examining Data Points in Minority Buy-Outs: A Practitioners' Report*, 36 DEL. J. CORP. L. 939, 950 (2011).

233. This trade-off would raise an interesting dilemma: What would be the implications of voluntarily subjecting a merger to a vote when not required under the law, which is something directors might want to do when approval is not expected to be an issue (that is, the vote on the merger is not a narrow one)? Such a decision would signal that, rather than subjecting the deal to a faster track, which would have been beneficial for shareholders, directors prefer to meet the requirements of the safe harbor, which is beneficial to them primarily. So one might then wonder, with some malice, why directors would pursue a safer route in an apparently noncontroversial merger if they have done nothing to be afraid of.

b. Other Objections to a Departure from the Current System

Aside from concerns citing the benefits of shareholder voting within the merger procedure, the proposal to modify the voting requirement as currently conceived might draw additional criticism. This Part addresses the following objections: (i) a reform to minimize the costs of voting would be trivial because the system already allows to skip a vote through the medium-form merger under Section 251(h) of the DGCL; (ii) easing up the voting requirement would be a setback in shareholder protections; and (iii) any reform would give rise to resistance from interest groups.

i. "But the Substitutes . . ." Is Reforming the Merger Process Even Necessary with Section 251(h) of the DGCL?

A practical objection might be that Section 251(h) of the DGCL already takes care of excessive delay in the merger procedure with no need to replicate the efforts for mergers more generally.[234] Complying with the medium-form merger procedure allows corporate planners to skip the vote and still achieve the main advantage of a merger, binding the dissenting shareholders. Shareholders can "voice" their approval for the merger via their tender decisions. If more than the required majority to approve a merger tender their shares, the second-step merger will take place without an actual vote. Why bother improving the current system if the goal being sought is already accomplished by an alternative acquisition technique?

There are four sets of reasons why Section 251(h) of the DGCL does not make attempting to reform the merger procedure moot. First, the fact that the goal of speed is already achieved via a tender offer is not a valid reason to stop improving long-form merger rules. Otherwise, by applying the same logic, one should not be bothered if mergers took, say, an average of a year to close: "Want a faster deal? Use a tender offer!" Rather, each acquisition technique deserves a stand-alone, dedicated analysis on how to pursue improvement. Leaving aside the bolder proposals (vote-on-demand and randomized approval), just consider the less ambitious one to shorten the timeline of shareholder approval. It would be bizarre if policymakers did not consider such policy simply

234. According to Afsharipour, *supra* note 37, at 48, "Section 251(h) transactions have become quite popular" (citing a report by Paul Hastings indicating that almost all two-step tender offers "have opted into the section 251(h) scheme."). Financial economists label "traditional mergers with voting" as "inefficiently structured" transactions. *See* Boone et al., *supra* note 107, at 3 ("By side-stepping the vote and delay created by a proxy filing, the tender offer . . . lessens exposure to market risk, material adverse events and other sources of volatility, and reduces managerial distraction and potential loss of key suppliers and customers"). This could increase the value of the target to bidders, leading bidders to offer a larger premium for the shares.

because medium-form mergers are available to corporate planners. Not only does that make little sense, but it also sets a dangerous precedent for condoning lack of experimentation whenever we have equipollent structures for getting to the same goal. It would be paradoxical if having freedom to choose between two structures becomes an excuse for limiting the appeal of one of the options.

Second, tender offers have drawbacks of their own. From a buyer's perspective, tender offers are not a viable route if acquisition financing is not yet in place upon the launch of the transaction. This essentially means that only fully-funded buyers can choose a medium-form merger structure.[235] From an investor perspective, even if Section 251(h) of the DGCL, by mandating that the price to be paid in the second-step merger be the same paid in the tender offer, seemingly cures the pressure to tender problem generally affecting tender offers,[236] in reality there are still avenues to pursue coercive and subpar acquisitions. Nothing under Section 251(h) of the DGCL prevents a buyer from closing a tender offer that fails to obtain less than the required majority. A buyer could in theory waive the minimum tender condition (normally set at the greater of 50% and the majority necessary to approve a merger at the single company) and purchase, say, only 40% of the stock in the tender offer. The buyer could then subsequently proceed to additional creeping

235. Offenberg & Pirinsky, *supra* note 37, at 333 (reporting that, in practice, tender offers are generally fully financed at the outset to meet the three-day requirement under SEC Rule 14e-1(c), in which bidders must pay a tendering shareholder within three days of the close of the tender offer and the antifraud requirement of SEC Rule 14e-8(c) that a bidder have a reasonable belief it can purchase the securities sought).

236. *See In re* Volcano Corp. Stockholder Litig., 143 A.3d 727, 743 (Del. Ch. 2016):

> Section 251(h) . . . alleviates the coercion that stockholders might otherwise be subject to in a tender offer because (1) the first-step tender offer must be for all of the target company's outstanding stock, (2) the second-step merger must 'be effected as soon as practicable following the consummation of the' first-step tender offer, (3) the consideration paid in the second-step merger must be of 'the same amount and kind' as that paid in the first-step tender offer, and (4) appraisal rights are available in all Section 251(h) mergers, subject to the conditions and requirements of Section 262 of the DGCL. Thus, Section 251(h) appears to eliminate the policy bases on which a first-step tender offer in a two-step merger may be distinguished from a statutorily required stockholder vote, at least as it relates to the cleansing effect rendered therefrom.

Note that the fact that the consideration to be paid in the second-step merger must be of the same amount and kind as paid in the first-step tender offer, makes the medium-form merger somewhat similar to Lucian Bebchuk's proposal that, to eliminate distorted choice in takeovers, tender offer regulation should at the very least give shareholders the chance to tender their shares in a second round, after the initial tender period expires. That way, those who do not tender in the first round in the hope that the tender offer failed would still have an opportunity to sell their shares and not become minority shareholders of the bidder. Lucian Arye Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 HARV. L. REV. 1693, 1797–98 (1985). The situation is of course not identical, because in medium-form mergers shareholders do not have any chance to decide in the context of the second-step merger, which essentially forces them to exchange their shares for the merger consideration.

purchases of stock in the target or perform a parent subsidiary merger. I understand that with these facts there would still need to be a vote before any merger takes place—but my point is that Section 251(h) of the DGCL is not a perfect solution against a bidder's lowball offer, which can become the prequel of a lowball going private transaction.

Third, relying exclusively on the advantages of a different acquisition structure in order to maintain mergers' appeal from a timetable perspective is dangerous. In fact, there is no way of knowing if tender offers will continue to be a market's favorite or will become unappealing again. That might well happen for whatever reason, market or regulatory—securities, tax, accounting, and so forth. If the history of the best price rule has any lessons,[237] it is that functionally equivalent acquisition techniques give corporate planners opportunities for structural arbitrage, with each single structure being potentially sensitive to market or regulatory changes.

Finally, if it is true the M&A market benefited from the speedier pace of the merger process under Section 251(h) of the DGCL,[238] I would argue there are even more reasons to extend a faster route to traditional mergers, not less. In other words, the success of Section 251(h) of the DGCL shows there is still unfinished business for policy makers. It would be interesting to see if other states decided to anticipate Delaware in easing up timing constraints under traditional mergers.[239]

ii. Reforming Voting in Mergers Would Be a Setback in Shareholder Protections

One argument might be that scaling back on voting would lessen shareholder protections. Reforming shareholder voting in mergers might upset those who take shareholder rights seriously.

However, a careful analysis of the suggested reform proposals demonstrates that shareholders prerogatives are safeguarded. True, the optics might give the appearance that voting rights in mergers are diminished. But in substance, the bulk of shareholder protections remain intact. In the vote-on-demand procedure, shareholders can still vote, they just need to activate the right; the randomized vote procedure gives shareholders ex ante a substantial likelihood that they will have a say to approve or reject the merger, which in turn should generate enough pressure on directors to propose viable deals in general; and finally,

237. *See supra* note 37.

238. Boone et al., *supra* note 107, at 6 ("Our results suggest that DGCL § 251(h) has had a net positive effect for target shareholders of Delaware firms, and facilitates improved deal structuring.").

239. Maryland, Texas, and Virginia already emulated Delaware in introducing their own versions of the medium-form merger. MD. CODE ANN., CORPS. & ASS'NS § 3-106.1 (2015); TEX. BUS. ORGS. CODE tit. 2, § 21.459(c) (2015); VA. CODE ANN. § 13.1-718.G (2015).

shortening the approval timeline does not take away shareholders' voting rights at all.

To be very clear, nowhere in this Article do I support shrinking merger-related disclosures. Under each of the proposals, shareholders would be receiving information in substance similar to what they currently receive under Forms 8-K, 14A, 425, and S-4. What would change is that in two out of three proposals shareholders might end up not casting their vote in certain mergers. Similarly, appraisal rights and their related timeline would not be altered. Of course, the architecture of merger agreements would have to change to adapt to a different statutory regime. Quite frankly, though, this should be the last of a policymaker's worries as no one can doubt skilled corporate lawyers would quickly adapt their contracts and ensure a smooth transition to the new regime.

Finally, altering the statutory regime in mergers in the ways I propose has no bearing in diminishing shareholder prerogatives in the other areas sensitive to the broader debate on their role in corporate governance. In other words, there are several distinct fields, from executive compensation[240] to proxy access,[241] from majority voting[242] to staggered boards[243] and shareholders' role in the adoption or repeal of takeover defenses,[244] in which the degree of shareholder empowerment is completely disjointed from whatever role the system assigns to shareholder approval in mergers. And in no way should any reconsideration of the merger procedure alter the politics of other corporate governance battles.

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240. *See generally* LUCIAN A. BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION, PART II: POWER AND PAY (2004).

241. *Compare* Lucian A. Bebchuk & Scott Hirst, *Private Ordering and the Proxy Access Debate*, 65 BUS. L. 329, 333–39 (2010) (arguing that proxy access should be the default rule and not a menu for companies to opt into), *with* Marcel Kahan & Edward Rock, *The Insignificance of Proxy Access*, 97 VA. L. REV. 1347, 1347–48 (2011) (arguing that proxy access would create more strategic disadvantages than cost savings for challengers).

242. For a critical view, see Marcel Kahan & Edward Rock, *Symbolic Corporate Governance Politics*, 94 B.U. L. REV. 1997, 2011–12 (2014) (arguing that a majority voting requirement to elect a board is less relevant than its proponents would admit: "[m]ajority withhold votes are rare events . . . If they happen, they usually result in change in policy even under a plurality standard; but, for companies with a plurality standard, they rarely result in a change in the board").

243. *Compare* Bebchuk et al., *supra* note 29, at 890, 944 (highlighting the powerful effect of combining poison pills with staggered boards and proposing that "[c]ourts should not allow managers to continue blocking a takeover bid after they lose one election conducted over an acquisition offer"), *with* Stephen M. Bainbridge, *Director Primacy in Corporate Takeovers: Preliminary Reflections*, 55 STAN. L. REV. 791 (2002) (arguing in favor of a director primacy-based standard for reviewing the tandem use of classified boards and poison pills).

244. *Compare* Jeffrey N. Gordon, *"Just Say Never?" Poison Pills, Deadhand Pills, and Shareholder-Adopted Bylaws: An Essay for Warren Buffett*, 19 CARDOZO L. REV. 511, 522–23 (1997) (arguing for the validity of bylaws amendments requiring poison pill rejection), *with* Lawrence A. Hamermesh, *Corporate Democracy and Stockholder-Adopted By-laws: Taking Back the Street?*, 73 TUL. L. REV. 409, 424 (1998) (arguing that poison pills bylaws amendments are inconsistent with the grant of directorial authority of Section 141(a) of the DGCL).

iii. Pushback from Interest Groups

Interest groups might organize and resist change, which is what they normally do if they perceive a reform might endanger their power and prerogatives.[245]

On the "demand side,"[246] proxy solicitors, accountants, corporate lawyers, and other constituencies currently charge fees in connection with shareholder approval in mergers.[247] Will they react to a change in the regime that reduces the centrality of such approval and might mean a reduction in revenue for these interest groups? That is quite possible, even though in reality the proposed changes would not have a significant effect on their bottom lines, at least as far as lawyers and accountants are concerned.[248] As mentioned, none of the proposals actually implies a scale-back on disclosures provided to shareholders—at most, a reform would entail a repackaging of the contents of current disclosures and a different timetable that goes with them. To be a bit cynical, lawyers might object to a shorter process because, all else being equal, fewer days to closing mean fewer days to bill their client.[249] None of these concerns should convince a sensible policymaker to desist from a reform effort.

The far bigger problem a reform may face is on the "supply side." One of the two crucial policymakers in the field, the SEC,[250] will most likely raise concerns, possibly out of any of the potential problems suggested in Part III.B.2.[251] The current merger process gives the SEC power and prerogatives. It would not be surprising if a departure from the current process generated resistance from the agency.[252] Note

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245. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965) (arguing that small and organized groups exercise political influence to maximize and preserve the groups' gains).

246. On the distinction between "demand side" and "supply side" interest group pressure, see Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, 106 Q. J. ECON. 1089, 1090 (1991).

247. As bankers are not paid by the hour and would benefit from faster-paced deals, I would not expect the investment banking industry to oppose.

248. If one considers proxy solicitors, they make the bulk of their business on routine matters: Mergers are one-off transactions that come only every once in a while. The impact of reform should not be so significant. *See* Asaf Eckstein, *Great Expectations: The Peril of an Expectations Gap in Proxy Advisory Firm Regulation*, 40 DEL. J. CORP. L. 77, 89–98 (2015) (describing the primary role of proxy advisors in corporate governance functions that are more common than extraordinary corporate transactions such as mergers).

249. In other words, the longer a process drags, the greater the opportunity to charge legal fees; this is just one of the consequences of billing by the hour. *See generally* Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 964–65 (2000) (noting that the higher the number of hours devoted to a matter, the higher the legal fees: the "hours required to resolve a legal matter are not fixed by abstract and immutable principles of justice.") *Id.* at 965.

250. The other, of course, would be the state legislature.

251. One obvious candidate is the setback in shareholder protection as mentioned in the immediately preceding Subpart. *See supra* Part III.B.2.b.ii.

252. "The SEC's major litigation efforts and regulatory initiatives have been designed to protect

incidentally that the SEC could de facto oppose a reform even after it is enacted by a state legislature. Consider that the long timetables in the current regime do not derive from state law requirements, but are a by-product of the Commission rulemaking and the way it administers its rules.[253] In other words, it is plausible the SEC would try to replicate a disclosure regime similar to what is existing and hence maintain the current level of delays even under more lenient "vote-on-demand" or randomized approval regimes under state law. In any event, if no merger reform is attainable because of a push-back by the SEC, it would actually validate the idea that the crucial factor behind the lengthy timetable of a merger is the SEC itself. Such a validation should help policymakers focus on what to do about it.

CONCLUSION

The analysis of data on voting outcomes in mergers, demonstrating a very low number of mergers that are filtered out by shareholders, could tempt someone to infer that—but for rare exceptions—voting is mere rubber-stamping by shareholders.[254] That, however, would miss the point that deals are presented to shareholders only after long negotiations take place between the two companies with each board of directors actually assuming that the merger will be subject to shareholder approval. In other words, voting does play a role, yet not through an actual resolution approving or rejecting. Rather, it is via the expectation that shareholders will turn down undesirable deals that voting positively affects mergers. The mere requirement of the vote implicates a credible threat that such deals might not be approved, which implies that value-decreasing deals will not be proposed to shareholders in the first place (deal filtering effect of voting). That same dynamic ensures that deals carry sizeable premiums, most likely higher than in the absence of a threat of rejection (premium effect of voting).

However, voting has its drawbacks, the most significant being the delay in deal completion, which can jeopardize the company operations and put deal certainty at risk.[255] If the beneficial role of shareholder voice in mergers does not really lie in the actual outcome of the vote, but rather stems from the pressure on management brought by the credible threat

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the Commission's regulatory turf, rather than to further important areas of public policy." Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty*, 15 CARDOZO L. REV. 909, 948 (1994). On a policymaker's preference for rules that would maintain such policymaker's clout "at the center of corporate law,"; *see also* Mark J. Roe, *Takeover Politics*, *in* THE DEAL DECADE: WHAT TAKEOVERS AND LEVERAGED BUYOUTS MEAN FOR CORPORATE GOVERNANCE 321, 345 (Margaret M. Blair ed., 1993) (discussing such predisposition in Delaware judges).

253. *See supra* notes 94–97 and accompanying text.

254. *See supra* Tables I–III and accompanying text.

255. *See supra* Part II.A.2.

of rejection embedded in the vote, I wonder whether policymakers could engineer alternative ways to exert such pressure without incurring the costs that voting carries with it. In other words, it is not my intention to eliminate or limit shareholders' right to vote in mergers, I simply challenge the way they currently do it. To that end, this Article suggests three possible policy solutions, ranging from impactful (vote-on-demand and randomized vote, both to be opted into by companies in lieu of the current voting regime) to more moderate (speeding up the approval process). Because none of the foreseeable objections to any such policy appears insurmountable, this Article recommends policymakers, companies, and their constituencies consider improving the merger procedure.

APPENDIX

Table I.A
Dissident Campaigns in Connection with Mergers at Target Corporations 2006-15 (Source: Georgeson)

Year	Company	Acquirer / Merger Partner	Dissident(s)	Outcome Of Campaign	Outcome Of Merger Vote	Approval % Outst. Shares	Approval % Votes Cast (Yes Vs. /No/Abs)
2006	Ubiquitel	Sprint Nextel	Deephaven Capital Management	Management Won	Pass	54.17%	86.15%
2007	Caremark Rx	Cvs	Express Scripts	Management Won	Pass	-[1]	-[1]
	Cbot Holdings	Cme	Ice (Rival Bidder)	Management Won	Pass	-[1]	-[1]
	Inter-Tel	Mitel Networks	Steven Mihaylo	Management Won	Pass	-[1]	-[1]
	The Topps Company	Torante & Madison Dearborn Capital	Crescendo Partners Ii	Management Won	Pass	-[1]	-[1]
	Reddy Ice Holdings	Gso Capital Partners	Shamrock Activist Value Fund	N/A[2]	Pass	70.07%	88.92%
2008	Northwest Airlines	Delta Airlines	International Associations Of Machinists	N/A[2]	Pass	75.45%	98.20%
2010	Pamrapo[3] Bancorp	Bcb Bancorp	William Campbell And James Dugan	Withdrawn	Pass	-[1]	-[1]
2011	Capital Gold Corporation	Gammon Gold	Timmins Gold (Rival Bidder)	Management Won	Pass	52.75%	63.27%

Table I.A (Con't)

Year	Company	Acquirer / Merger Partner	Dissident(s)	Outcome Of Campaign	Outcome Of Merger Vote	Approval % Outst. Shares	Approval % Votes Cast (Yes Vs. /No/Abs)
2011	Capital Gold Corporation	Gammon Gold	Timmins Gold (Rival Bidder)	Management Won	Pass	52.75%	63.27%
2013	Clearwire	Sprint	Crest Financial	Withdrawn	Pass	91.42%	95.86%
	Dell	Silver Lake Partners & Msd Capital	Southeastern Asset Management And Carl Icahn	Withdrawn	Pass	57.64%	69.76%
	Energy Solutions	Energy Capital Partners	Carlson Capital	N/A[2]	Pass	58.14%	77.35%
2014	Zale Corp.	Signet	Tig Advisors	Management Won	Pass	53.12%	62.17%
	Chiquita Brands Int'l[4]	Fyffes	Cavendish Acquisition Corp (Rival Bidder, Ultimate Winner)	Dissident Won	Fail	-[1]	-[1]
2015	Gfi	Cme Group	Bgc Partners (Rival Bidder)	Dissident Won	Fail	49.22%	57.76%
	Towers Watson	Willis Group	Driehaus Capital Management	N/A[2]	Pass	62.23%	72.19%
	Partnerre[5]	Axis	Exor (Rival Bidder, Ultimate Winner)	Withdrawn	Terminated	N/A	N/A

([1]) Information not reported on the FSSR Database.
([2]) There was no formal proxy campaign, but disputes arose.
([3]) Merger outside of the FSSR Database (target is not a Russell 3000 corporation).
([4]) Merger outside of the FSSR Database.
([5]) Merger outside of the FSSR Database (target is a reporting foreign private issuer).

Table II.A
Approval Percentages and Premiums
(Majority Approval Sample)

Year	**Avg Appr % Votes Cast (Yes Vs. No/Abstain) Median**	**Avg Appr % Votes Cast (Yes Vs. No/Abstain) Mean (Standard Deviation)**
2010	98.92%	95.31% (11.74%)
2011	99.41%	97.36% (5.15%)
2012	99.25%	97.64% (4.26%)
2013	98.83%	97.91% (3.34%)
2014	98.5%	95.88% (7.12%)
2015	98.46%	95.85% (3.43%)
Entire Period	**98.9%**	**97.02% (6.29%)**

Table III.A

In Regression A, I compare the percentage of outstanding shares approving the merger (dependent variable) to the merger premium (independent variable) calculated against the price of the stock on the day prior to the announcement of the transaction (t-1 premium), as publicly disclosed in the proxy statement or S-4 by the target or the acquirer, as the case may be. The observed mergers are those included in the Majority Approval Sample. In Regression B, I do the same exercise, but instead of comparing percentage of outstanding shares approving the merger against t-1 premiums, I compare such percentages against unaffected premiums. Again, I retrieve unaffected premiums from securities filings.[256] In Regression A, the test shows a minimal regression coefficient (-.019), combined with a large standard error (.026) and low R-squared (adjusted) (-.0015). Similarly, in Regression B, the test shows a minimal regression coefficient (.006) combined with a large standard error (.027) and a low R-squared (adjusted) (-.003). Both regressions indicate lack of predictive value on the premium variable. "SS" means sum of squares. "DF" means degrees of freedom. "MS" means Mean Squares (SS/DF).

Regression A: Shares in Favor and T-1 Premiums

<table>
<tr><th>Source</th><th>SS</th><th>DF</th><th>MS</th><th>Number of Observations</th><th colspan="2">314</th></tr>
<tr><td colspan="4"></td><td>F (1, 312)</td><td colspan="2">0.53</td></tr>
<tr><td>Model</td><td>.003951089</td><td>1</td><td>.003951089</td><td>Prob > F</td><td colspan="2">0.4657</td></tr>
<tr><td>Residual</td><td>2.31110483</td><td>312</td><td>.007407387</td><td>R-squared</td><td colspan="2">0.0017</td></tr>
<tr><td colspan="4"></td><td>Adj. R-squared</td><td colspan="2">-0.0015</td></tr>
<tr><td>Total</td><td>2.31505592</td><td>313</td><td>.007396345</td><td>Root MSE</td><td colspan="2">.08607</td></tr>
<tr><td colspan="7"></td></tr>
<tr><td>Approval Percentage</td><td>Coef.</td><td>Std. Err.</td><td>T</td><td>P>|T|</td><td colspan="2">[95% Conf. Interval]</td></tr>
<tr><td>T-1 Premium</td><td>-.0191364</td><td>.026202</td><td>-0.73</td><td>0.466</td><td>-.0706915</td><td>.0324186</td></tr>
<tr><td>Constant</td><td>.7642477</td><td>.0092717</td><td>82.43</td><td>0.000</td><td>.7460047</td><td>.7824907</td></tr>
</table>

256. If the securities filing relating to a merger in the Majority Approval Sample does not include reliable information on either the shares in favor or the relevant premium (whether t-1 or unaffected), I disregard from the observation the relationship between the shares in favor and the premium (t-1 or unaffected, depending on what premium is missing) for such merger. For a discussion on premium calculations, see *supra* note 86.

Regression B: Shares in Favor and Unaffected Premiums

Source	**SS**	**DF**	**MS**	**Number of Observations**	**289**	
				F (1, 312)	0.05	
Model	.000363326	1	.000363326	Prob > F	0.8243	
Residual	2.11112089	287	.007355822	R-squared	0.0002	
				Adj. R-squared	-0.0033	
Total	2.11148421	288	.007331542	Root MSE	.08577	
Approval Percentage	**Coef.**	**Std. Err.**	**T**	**P>|T|**	**[95% Conf. Interval]**	
Unaffected Premium	.0056601	.0254678	0.22	0.824	-.0444673	.0557875
Constant	.7575103	.0106857	70.89	0.000	.736478	.7785426

Table IV.A
Coefficient Estimates with Adjustments for Premiums and Ownership

The first part of this Table IV.A reports coefficient estimates and, in parentheses, R-squared (adjusted) values from estimating an ordinary least squares model in which the independent variable is the merger premium and the dependent variable is the percentage of outstanding shares approving the merger, calculated as follows: "Shares in Favor" is the percentage of outstanding shares approving the merger; "Shares in Favor w/o Insiders" is the percentage of outstanding shares approving the merger excluding shares held by directors and managers; and "Shares in Favor w/o Voting Agreement" is the percentage of outstanding shares approving the merger excluding shares subject to a voting agreement whereby the parties agreed to vote their shares in favor of the merger. Premiums are presented on t-1 and unaffected bases.[257] Column (1) represents the full available dataset of mergers with premiums calculated on a t-1 basis. Column (2) represents the dataset of Column (1), but excludes transactions in which the premium is below 10% (noise adjustment) or above 60% (outlier adjustment). Column (3) represents the dataset of Column (2), but excludes transactions in which the difference between the unaffected premium and the t-1 premium is 25% or more (to adjust for noise in the t-1 premium). Column (4) represents the full available dataset of mergers with premiums calculated on an unaffected basis. Column (5) represents the dataset of Column (4), but excludes transactions in which the premium is below 10% (noise adjustment) or above 60% (outlier adjustment). The second part of table breaks down Column (3) and Column (5) by type of consideration (cash, stock or combination thereof). N is the number of observations. Information about premiums, ownership by insiders, shares subject to voting agreements, and type of consideration was collected from the securities filing of the underlying merger.

257. *See supra* note 256.

	T-1 Premium (Entire Sample)	**10%<= T-1 Premium<= 60%**	**10%<= T-1 Premium<= 60% *And* Unaffected Premium – T-1 Premium <=25%**	**Unaffected Premium (Entire Sample)**	**10%<= Unaffected Premium <= 60%**
	(1)	**(2)**	**(3)**	**(4)**	**(5)**
Shares In Favor	-.02	0.03	0.09	0.03	0.1
(Adj. R-Squared)	(-.001)	(-.005)	(-.005)	(-.003)	(-.001)
Shares In Favor W/O Insiders	-.18	-.02	-0.02	-.09	0.04
(Adj. R-Squared)	(.012)	(-.005)	(-.008)	(-.000)	(-.004)
Shares W/O Voting Agreement	-.20	0.08	0.01	-.045	0.05
(Adj. R-Squared)	(.02)	(-0.004)	(-.008	(-0.003)	(-.002)
N	314	191	120	289	194

	10%<= T-1 Premium<= 60% *And* Unaffected Premium – T-1 Premium <=25%		**10%<= Unaffected Premium <= 60%**	
		N		**N**
Cash	0.09	78	0.064	128
(Adj. R-Squared)	(-.01)		-0.003	
Stock	0	11	-0.04	21
(Adj. R-Squared)	(-.12)		(-.04)	
Combination	-0.23	31	0.05	45
(Adj. R-Squared)	(.05)		(-.02)	

Table V.A
Coefficient Estimates Excluding Mergers with Voting Agreements and Insider Ownership > 5%

Table V.A reports coefficient estimates and, in parentheses, R-squared (adjusted) values from estimating an ordinary least squares model in which the independent variable is the merger premium and the dependent variable is the percentage of outstanding shares approving the merger, calculated as follows: "Without Voting Agreement" is the percentage of outstanding shares approving the merger, in deals where a voting agreement was not present; and "(1)+Insider Ownership<=5%" is the same dataset as "Without Voting Agreement" but also excludes transactions where insiders held more than 5% of the shares outstanding. Premiums are presented on t-1 and unaffected bases.[258] Column (1) represents the full available dataset of mergers with premiums calculated on a t-1 basis. Column (2) represents the full available dataset of mergers with premiums calculated on an unaffected basis. N is the number of observations. Information about premiums, ownership by insiders, and shares subject to voting agreements was collected from the securities filing of the underlying merger.

	T-1 Premium	**Unaffected Premium** T-1 Premium
	(1)	**(2)**
Without Voting Agreement	-.05	-.029
(Adj. R-Squared)	(.008)	(-.004)
(1)+Insider Ownership<=5%	-.017	.019
(Adj. R-Squared)	(.086)	(-.006)
N	247	182

258. *See supra* note 256.

Table VI.A
Average Premiums when Insider Ownership or Voting Agreement Are Pivotal, Average Premiums with / without Voting Agreement

In this Table VI.A, I compare average premium sizes for the whole sample with averages premium sizes for circumstances in which insider ownership or the shares subject to a voting agreement were pivotal in reaching the required majority to approve the merger. Premiums are presented on t-1 and unaffected bases.[259] Premiums do not significantly differ among the categories. "Insider Ownership Pivotal" represents the dataset of mergers in which the votes by directors and managers were pivotal in approving the transaction. "Voting Agreement Pivotal" represents the dataset of mergers in which the votes subject to a voting agreement were pivotal in approving the transaction. "Mergers With Voting Agreement" is the dataset of mergers in which there is a voting agreement whereby the parties agreed to vote their shares in favor of the merger. "Mergers Without Voting Agreement" is the dataset of mergers in which there is no such agreement. N is the number of observations. Information about premiums, ownership by insiders, and shares subject to voting agreements was collected from the securities filing of the underlying merger.

	T-1 Premium			**Unaffected Premium**		
	Mean	**Median**	**N**	**Mean**	**Median**	**N**
Insider Ownership Pivotal	36.0%	31.5%	25	38.8%	36.9%	23
Voting Agreement Pivotal	35.5%	33.4%	28	31.9%	32%	21
Mergers With Voting Agreement	31.9%	29.4%	140	47.4%(*)	34.6%	120
Mergers Without Voting Agreement	30.9%	26.0%	193	37.1%(*)	33.2%	185
Majority Approval Sample	31.1%	28.6%	333	41.0%	34.0%	305

(*) Given the apparent difference in values, a t-test was conducted on the means of unaffected premiums for Mergers With Voting Agreements and Mergers Without Voting Agreements. The t-value was computed as -1.2864, with 303 degrees of freedom. This results in a p-value of 0.199, which is too high to pass the 95% confidence interval test.

259. *See supra* note 256.

Table VII.A
Average Premiums in Top 30 Mergers, Bottom 30 Mergers, 2/3 Approval Sample, and Majority Approval Sample

This Table VII.A compares average premiums (means and medians) for each of the following categories: the 30 mergers that obtained the most votes in favor in terms of outstanding shares ("Top 30 Votes in Favor"), the 30 mergers that obtained the least votes in favor ("Bottom 30 Votes in Favor"), the 2/3 Approval Sample, and the Majority Approval Sample. Premiums are presented on t-1 and unaffected bases.[260] As the table shows, there is no significant difference between Top 30 Votes in Favor and Bottom 30 Votes in Favor. Similarly, no significant difference exists between average premiums in the 2/3 Approval Sample and the Majority Approval Sample (aside from medians of t-1 premiums, which differ mainly because some entries of t-1 premiums are noisy: after adjusting for such noise, the median is 25.3%). N is the number of observations. Information about premiums was collected from the securities filing of the underlying merger.

	T-1 Premium			Unaffected Premium		
	Mean	Median	N	Mean	Median	N
Top 30 Votes In Favor	33.8%	31.0%	24	36.3%	30.0%	21
Bottom 30 Votes In Favor	33.0%	30.1%	27	34.9%	30.3%	24
2/3 Approval Sample	25.5%	22.1%	29	33.5%	32.5%	29
Majority Approval Sample	31.1%	28.6%	333	41.0%	34.0%	305

260. *See supra* note 256.

Table VIII.A
Cross-Correlations

Table VIII.A represents cross-correlations between key variables in the dataset. "Shares in Favor" is the percentage of outstanding shares approving the merger. "Insider Ownership" is the percentage of shares held by directors and managers of the target company. "Voting Agreement" is the percentage of shares subject to a voting agreement whereby the parties agreed to vote their shares in favor of the merger. Premiums are presented on t-1 and unaffected bases.[261] Information about premiums, ownership by insiders, and shares subject to voting agreements was collected from the securities filing of the underlying merger.

	Shares In Favor	T-1 Premium	Unaffected Premium	Insider Ownership	Voting Agreement
Shares In Favor	1				
T-1 Premium	-0.033	1			
Unaffected Premium	0.092	0.633	1		
Insider Ownership	0.121	0.138	0.142	1	
Voting Agreement	0.059	0.286	0.092	0.640	1

261. *See supra* note 256.

Table IX.A
Time between Signing and Closing Dates

Year	No. Of Observed Mergers	Time Between Signing And Closing Dates			
		Median	Mean (Standard Deviation)	25th Percentile	75th Percentile
All Deals					
2014	67	136	172 (106)	98	217
2015	87	136	168 (93)	106.5	223.5
Entire Period	153	137	173 (99)	103	228
100% Cash Mergers					
2014	33	110	138 (94)	85	146
2015	41	121	160 (103)	104	184
Entire Period	74	114	150 (99)	89	172
Mergers With Stock Consideration					
2014	34	177	205 (108)	124	259
2015	45	169	188 (79)	110	255.5
Entire Period	79	177	197 (94)	112	262